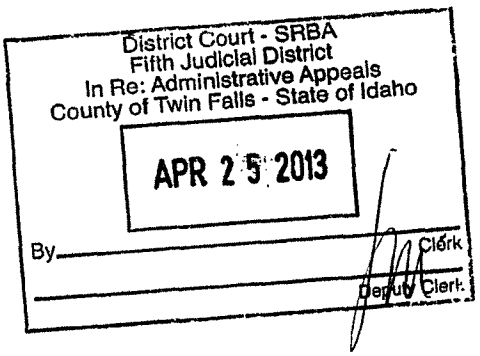

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A & B IRRIGATION DISTRICT Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents, and THE IDAHO GROUND WATER APPROPRIATORS, INC., and THE CITY OF POCATELLO, Respondents-Intervenors. IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	Case No. CV 2011-512 **MEMORANDUM DECISION ON PETITION FOR JUDICIAL REVIEW**

Appearances:

Travis L. Thompson, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District.

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Director of the Idaho Department of Water Resources.

Candice M. McHugh, Racine Olson Nye Budge & Bailey, Chartered, Boise, Idaho, on behalf of Respondent-Intervenor Idaho Ground Water Appropriators, Inc.

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, on behalf of Respondent-Intervenor City of Pocatello.

I.
STATEMENT OF THE CASE

A. Nature of the case.

This case originated when Petitioner A&B Irrigation District ("A&B") filed a *Petition* with the Minidoka County district court on June 27, 2011, seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The case was reassigned by the clerk of the Minidoka County district court to this Court on June 27, 2011.[1] The final order under review is the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* issued on April 27, 2011 by Director Gary Spackman in IDWR Docket No. CM-DC-2011-001 ("*Remand Order*"). In the *Remand Order*, the Director denied a delivery call made by A&B against certain junior ground water users on the grounds that A&B is not being materially injured. A&B asserts that the *Remand Order* is contrary to law and requests that this Court set aside and reverse the *Order*.

B. Course of proceedings and statement of facts.

This is A&B's second time seeking judicial review of the Director's denial of its 1994 *Petition for Delivery Call*. The background for this case was set forth by the Idaho Supreme

[1] The case was reassigned pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

Court in *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012), in part as follows:

> 2. *A & B's Senior Water Right 36–2080*
>
> A & B's delivery call is based on its senior water right, 36–2080. This water right was licensed by IDWR in 1965 and authorized the diversion of 1,100 cfs from 177 individual points of diversion in order to irrigate 62,604.3 acres. A & B also irrigates roughly 4,000 additional "enlargement acres" under this water right. Water right 36–2080 did not identify a specific place of use with each diversion point.
>
> In 2003, the Snake River Basin Adjudication (SRBA) partially decreed the water right in a decree that is substantially similar to the 1965 license. One difference between the partial decree and the license is that the decree states that A & B, pursuant to transfer, is authorized to divert water from 188 points of diversion. Of those 188 authorized points of diversion, 177 of A & B's wells are currently in active production. These individual wells comprise over 130 separate "well systems."
>
> 3. *A & B's 1994 Delivery Call and Subsequent Procedure*
>
> On July 26, 1994, A & B filed a petition for delivery call, which sought both an administration of junior-priority ground water rights from the ESPA and a designation of the ESPA as a ground water management area (GWMA). Among other things, the petition alleged that junior priority groundwater pumping from the ESPA had, since 1959, lowered the water table an average of twenty feet and up to forty feet in some areas, which resulted in a 126 cfs reduction of A & B's diversion rate. On May 1, 1995, A & B, IDWR, and others entered into an agreement that stayed the petition for delivery call until a Motion to Proceed was filed with the Director. That Motion to Proceed was filed electronically by A & B on March 16, 2007, and sought the same outcome as in the original delivery call. At a September 20, 2007 status conference the Director notified the parties that the stay was lifted from the 1994 delivery call and that retired Chief Justice Gerald Schroeder (Hearing Officer) was appointed to oversee a hearing "and issue a recommendation pursuant to IDAPA Rule 37.01.01.410, .413...." Those sections of the administrative code are IDWR's Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules).
>
> Shortly after the stay was lifted, the Director, in accordance with Rule 42, issued an Order Requesting Information that asked A & B to provide IDWR with information that the Director deemed relevant in making a determination of injury. On January 29, 2008, the Director issued a final order (January 2008 Final Order) finding that A & B was not materially injured and denying A & B's request to designate the ESPA as a GWMA. A & B then filed a petition for rehearing.

> A & B's petition was granted, and after some preliminary matters a hearing commenced on December 3, 2008. At the hearing, evidence and testimony was presented by IDWR, A & B, IGWA, and Pocatello. On March 27, 2009, the Hearing Officer issued an Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations (Recommendations).
> . . .
>
> The recommendations of the Hearing Officer were accepted by the Director in a Final Order Regarding the A & B Irrigation District Delivery Call (Final Order) issued on June 30, 2009.

A&B Irr. Dist. v. Idaho Dept. of Water Resources, 153 Idaho 500, 503–505, 284 P.3d 225, 228–230 (2012) (internal footnotes omitted).

i. A&B's first *Petition for Judicial Review.*

A&B's first sought judicial review before this Court in Minidoka County Case No. CV-2009-647. In that case, A&B contested the Director's *Final Order Regarding the A&B Delivery Call* issued on June 30, 2009, in which the Director denied A&B's 1994 delivery call on the grounds that A&B was not materially injured. One of the issues raised was whether the Director erred by requiring A&B to take reasonable steps to interconnect individual wells or systems within its project prior to seeking regulation of junior water right holders. In its *Memorandum Decision and Order*, this Court found:

> [T]hat the extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Case No. CV-2009-647, p. 39 (May 4, 2010).

Another issue raised was whether the Director erred in failing to apply the proper evidentiary standards and burdens of proof in applying his material injury analysis. On that issue, the Court found that the Director erred in failing to apply a clear and convincing evidence standard to the record when analyzing whether A&B's senior water right was being materially injured under the conjunctive management rules. *Id* at pp.33–38 & 49. As a result, this Court

remanded the case to the Director "for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record." *Id.* at 49.

A&B subsequently appealed the issue regarding interconnection to the Idaho Supreme Court, and the City of Pocatello and IGWA likewise appealed the issue on the proper evidentiary standard. Those issues were placed before the Idaho Supreme Court in Idaho Supreme Court Docket Numbers 38403-2011, 38421-2011 and 38422-2011.

ii. A&B's Second *Petition for Judicial Review.*

Meanwhile, on remand the Director issued his *Remand Order* again denying A&B's 1994 *Petition for Delivery Call.* In doing so, the Director concluded "by clear and convincing evidence that A&B Irrigation District is not materially injured." *Remand Order*, p.22. On June 27, 2011, A&B filed a *Petition for Judicial Review*, resulting in the commencement of the above-captioned matter, asserting that the *Remand Order* is contrary to law and requested that this Court reverse the same. A&B filed an *Amended Petition for Judicial Review* on August 25, 2011, followed by a *Second Amended Petition for Judicial Review* on October 30, 2012. In their response briefing, the Respondents ask this Court to dismiss the instant judicial review proceeding for reasons that will be discussed herein. A hearing on the *Second Amended Petition* was held before this Court on March 13, 2013.

iii. Idaho Supreme Court Decision.

After the Director issued his *Remand Order*, and after the above-captioned judicial review proceeding had been initiated by A&B, the Idaho Supreme Court issued its decision in *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012). Among other things, the Court held "that the Director did not act arbitrarily or violate Idaho law when he found that A&B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed . . . ." *Id.* at 517, 284 P.2d at 242.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on March 13, 2013. The parties did not request the opportunity to submit additional briefing and the Court does not

require any. Therefore, this matter is deemed fully submitted for decision on the next business day or March 14, 2013.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or

(e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. The petitioner must show that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

IV.

ISSUES

A&B presents the Court with the following issues on judicial review:

1. Whether the Director unconstitutionally applied the CM Rules to A&B's decreed senior water right for purposes of administration.

2. Whether the Director erred in applying the clear and convincing evidence standard in finding that A&B could not beneficially use the quantity of its decreed water right for irrigation purposes.

3. Whether the Director erred in using an undefined "crop maturity" standard, not the water right, for purposes of administration.

4. Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were "wasting" water.

5. Whether the Director erred in applying a concept of "full economic development" based upon a misreading of I.C. § 42-226 and statements in CM Rule 20.03, most of which the Idaho Supreme Court has declared void in *Clear Springs Foods, Inc. et al. v. Spackman et al.*, 150 Idaho 790 (2011).

6. Whether the Director violated the mandate rule and exceeded the Court's *Memorandum Decision* by reconsidering settled findings beyond the scope of the ordered remand.

7. Whether the Director erred in making findings that are not supported by clear and convincing evidence to conclude A&B's water right is not materially injured.

Petitioner A&B Irrigation District's Opening Brief, p.3.

The Respondents present the Court with the following issue on judicial review:

1. [Whether] A&B's appeal of the Final Order on Remand must be dismissed because A&B has failed to meet its legal duty to make reasonable efforts to maximize interconnection of its well system or show financial or physical impracticability.

IDWR Respondents' Brief, p.5.

V.

ANALYSIS

A. Request to dismiss A&B's *Petition for Judicial Review* based on the Idaho Supreme Court's decision in *A&B Irr. Dist. v. Idaho Dept. of Water Resources.*

In their response briefing, the Respondents ask this Court to dismiss the instant judicial review proceeding based on the Idaho Supreme Court's decision in *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012). Given that decision, it is the Respondents' position that A&B has a legal duty to show the Director it has made reasonable efforts to maximize the interconnection of its well system or show that interconnection is financially or physically impractical as a precondition to the filing of a delivery call relating to

water right no. 36-2080. Since A&B has failed to comply with this precondition, the Respondents ask this Court to dismiss this matter. A brief review of the Idaho Supreme Court's decision and the proceedings preceding it is required.

When the Director first denied A&B's 1994 delivery call in 2009, he held that A&B had certain interconnection obligations that must be met before it could seek curtailment or compensation from junior users:

> Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A & B's obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. *Consequently, there is an obligation of A & B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from junior users.*

Hearing Officer's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, p.19 (March 27, 2009) (emphasis added).[2] The Director based his decision in this regard upon the history of water right no. 36-2080 and the unique way in which the right was licensed and decreed. *Id.* Namely, that water from any of the authorized points of diversion under the right may be used on any or all of the 62,604.3 acres within the place of use, and that the full authorized rate of diversion can be diverted from any combination of the authorized points of diversion. *Id.*

A&B sought judicial review of the Director's interconnection holding before this Court in Minidoka County Case No. CV-2009-647. After considering the arguments of the parties this Court affirmed the Director, holding:

> [T]he extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A&B must make reasonable efforts to maximize interconnection of the system and placed the burden on A&B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Case No. CV-2009-647, p. 39 (May 4, 2010).

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[2] This recommendation of the Hearing Officer was accepted by the Director in his *Final Order Regarding the A&B Delivery Call* issued on June 30, 2009.

A&B appealed this Court's decision on the interconnection issue to the Idaho Supreme Court. On appeal it asked the Idaho Supreme Court to address the following issue: "Whether the Director unconstitutionally applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project *before a delivery call can be filed* even though water right 36-2080 was developed, licensed and decreed with 177 individual wells?" *A&B Opening Brief*, Idaho Supreme Court Docket No. 38403-2011 (July 1, 2011), 2011 WL 2835755 (Idaho) at *9 (emphasis added); *See also, A&B Irr. Dist.*, 153 Idaho at 505, 284 P.3d at 230. The Idaho Supreme Court squarely addressed the issue as framed by A&B and held that the Director did not err in requiring A&B to work to reasonably interconnect before a delivery call can be filed:

> Given the language in the CM Rules, we find that the Director did not act arbitrarily or violate Idaho law when he found that A & B must work to reasonably interconnect some individual wells or well systems before a delivery call can be filed, and we affirm the district court's finding in this regard.

A&B Irr. Dist., 153 Idaho at 500, 513, 284 P.3d at 238. The Court further held that "[t]hose reasonable steps are . . . a finding for the Director." *Id.* at 514, 284 P.3d at 239.

This Court agrees that based on the Idaho Supreme Court's holding A&B has a duty to "work to reasonably interconnect some individual wells or well systems before a delivery call can be filed." *Id.* The Court's language in this regard is plain and unambiguous, and imposes certain interconnection obligations on A&B as a precondition to filing a delivery call involving water right 36-2080. There has been no finding by the Director that A&B has taken the reasonable interconnection steps contemplated by the Idaho Supreme Court in its decision. Therefore, A&B is not entitled to the relief it seeks.

Under Idaho law, a case becomes moot, and therefore will not be considered by the court, when the issues presented are no longer live, the parties lack a legally cognizable interest in the outcome, or a judicial determination will have no practical effect upon the outcome. *Goodson v. Nez Perce County Bd. of County Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). A court may dismiss an appeal when it appears the case only involves a moot question. *Id.* For the reasons set forth above, the Court holds that this case and the issues presented are moot. A&B is not entitled to the relief it seeks, and the issues presented are no longer live, as it has not complied with the interconnection obligations placed upon it under *A&B Irr. Dist. v. Idaho Dept.*

of Water Resources, 153 Idaho 500, 284 P.3d 225 (2012). Therefore, the Court agrees with the Respondents that the case be dismissed.

A&B argues that even if its case is moot as a result of the Idaho Supreme Court's decision, the issues it raises should still be reviewed based on an exception to the mootness doctrine that the challenged conduct is likely to evade judicial review and thus is capable of repetition. This court disagrees that the exception cited by A&B can save its case. As an initial matter, the exception cited applies only to general legal issues, and does not apply to the issues raised on judicial review pertaining to specific findings unique to a particular proceeding. *See e.g., Idaho Dept. of Health and Welfare v. Doe*, 150 Idaho 103, 108, 244 P.3d 247, 252 (Ct. App. 2010) (stating "[t]o the extent that an exception to the mootness doctrine would apply . . . it would only be applicable as to the general legal issues raised that are potentially capable of evading review and thus capable of repetition and would not be applicable to the magistrate's specific findings unique to this particular incident"). Therefore, the exception cannot be applied to save the issues raised by A&B which simply challenge the Director's specific factual findings particular to this incident (i.e., issues 2, 6 and 7 identified above). Moreover, the mootness exception cited cannot save A&B's remaining issues except for arguably issue no. 5, which this Court will address. As explained below, those issues were either (1) waived when A&B failed to raise them in its first *Petition for Judicial Review* filed in Minidoka County Case No. CV-2009-647, or (2) previously addressed by this Court in Minidoka County Case No. CV-2009-647.

B. A&B waived issues by failing to previously raise them and is improperly re-raising issues previously addressed by this Court.

i. Issue failed to be raised in first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647.

In this judicial review proceeding, A&B now raises the following issue for the first time, identified above as issue no. 4: "Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were 'wasting' water." This is an issue that could have been raised in the first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647 but was not. Since A&B failed to raise this issue in the prior proceeding it is deemed waived for the limited scope of the purpose of this appeal. *See e.g., Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009)("The "law of the case"

doctrine . . . prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.")

ii. Issues previously addressed in first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647.

In this judicial review proceeding, A & B also raises the following issues, identified above as issues no. 1 and 3: (1) Whether the Director unconstitutionally applied the CM Rules to A&B's senior water right for purposes of administration?; and (2) Whether the Director erred in using an undefined 'crop maturity' standard, not the water right for purposes of administration? This proceeding arises out of the remand from the *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647 and is therefore restricted to those issues arising for the first time out of the limited purpose of the remand. Issues that were raised or could have been raised in the prior proceeding are outside the scope of the issues that can now properly be raised in this judicial review proceeding.

One of the issues previously raised by A&B and addressed by this Court in the Minidoka County Case No. CV-2009-647 was:

> Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in (i) reducing A & B's diversion rate per acre from 0.88 to 0.75 miners inches; (ii) creating a new 'failure of the project' standard for injury; and (iii) using a 'minimum amount needed' for crop maturity standard?

On this particular issue, this Court affirmed the Director's injury analysis in all but two respects. First, that the Director erred by failing to apply the correct evidentiary standard in conjunction with his finding "that the quantity decreed to A&B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury." The Court did not reject the evidence considered by the Director in the injury analysis nor did the Court reject the conclusion that pursuant to the application of the CM Rules it is possible for a senior water right holder to receive less than the decreed quantity and not suffer material injury, provided the Director's determination is supported by clear and convincing evidence. Ultimately, this Court held as follows:

> Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being

> put to beneficial use must be supported by clear and convincing evidence. Accordingly this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.

Memorandum Decision and Order on Petition for Judicial Review, Minidoka County Case No. CV-2009-647, p. 39 (May 4, 2010).

On appeal, the Idaho Supreme Court noted: "Among the Hearing Officer's pertinent findings . . . Crops may be grown to full maturity on less water than demanded by A & B in this delivery call." *A & B* at 504, 284 P.3d at 229. The Supreme Court acknowledged that: "The district court issued an order and accompanying memorandum on May 4, 2010. This order affirmed the Director's *Final Order* on all pertinent substantive issues, but found that the Director erred by applying an improper evidentiary standard when analyzing whether A&B was materially injured." *Id.* at 505, 284 P.3d at 230. The Supreme Court also acknowledged that the *Memorandum Decision and Order on Petition for Judicial Review* had several conclusions that were at issue in the appeal, including:

> The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

Id. at 506-07, 284 P.3d at 230-31, fn.5. Ultimately, the Idaho Supreme Court affirmed, holding:

> It is Idaho's long standing rule that proof of "no injury" by a junior appropriator in a water delivery call must be by clear and convincing evidence. Once a decree is presented to an administrative agency or court, all changes to that decree, permanent or temporary, must be supported by clear and convincing evidence.

Id. at 525, 284 P.3d at 250.

Second, with respect to the above-stated issue, this Court held that the Director erred by applying a "failure of the project" standard. The Court held that there was no *de minimis* exclusion for injury. However, the Court recognized that any such injury may be eliminated by A&B's duty to interconnect its delivery system; the fact that A & B was also irrigating enlargement acres and/or that wells located in areas of poor transmissivity may be subject to futile call. The "failure of the project" standard is not at issue in this proceeding.

Therefore, for the reasons just explained, the issues identified above as issues no. 1 and 3 were previously addressed by this Court in the first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647. A&B's attempt to re-raise these same issues in this judicial review proceeding is improper.

iii. Issue of general legal significance.

Finally, A&B asserts "the Director erred in applying the concept of 'full economic development' based on a misreading of I.C. § 42-226 and statements in CM Rule 20.03, most of which the Idaho Supreme Court has declared void in *Clear Springs Foods, Inc. et al. v. Spackman et al.*, 150 Idaho 790 (2011)." As an initial matter, the Court finds this issue to be an issue of general legal significance within the above-discussed exception to the mootness doctrine. However, in order to address this general legal principle the Court must refer to specific facts of the case for proper context.

In the *Final Order*, the Director concluded:

> 33. The Director concludes with reasonable certainty that, during peak season, A & B could divert additional water for irrigation purposes. CM Rule 42.01.e. Further, if more water is needed, A & B has additional wells that could be put into production. CM Rule 42.01.g. Requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to full economic development of the State's water resources. CM Rule 20.03; Idaho Code § 42-226.
>
> 34. The Director concludes with reasonable certainty that A & B has the capacity to pump more water if it in fact needs more water. For purposes of conjunctive administration, A & B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water. CM Rule 20.03; Idaho Code § 42-226.

Final Order, p.19.

A&B argues the Director's reliance on the "full economic development" provision of Idaho Code § 42-226 is misplaced. A&B asserts that based on the holding in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011), the provision strictly pertains to the protection of reasonable pumping levels, which are not at issue in this appeal. This Court disagrees that the full economic development provision applies strictly to the protection of reasonable pumping levels. The provision applies equally to the reasonableness of the means of

diversion. Furthermore, the Director's determination did not rely exclusively on Idaho Code § 42-226, which incorporates the full economic development provision, but also relied upon CM Rule 20.03, which incorporates both "optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution" as well as "full economic development as defined by Idaho law." *See* IDAPA 37.03.11.20.03.

Idaho Code § 42-226 provides in relevant part: "[W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." I.C. § 42-226. CM Rule 20.03 provides:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority of right being subject to the conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirely of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

IDAPA 37.03.11.20.03. In *Clear Springs Foods*, the Idaho Supreme Court addressed the application of the full economic development provision of Idaho Code 42-226. In that case, senior spring right holders filed a delivery call against junior ground water users. The ground water users asserted the full economic development provision of Idaho Code § 42-226 meant that that so long as the aquifer was not being over-drafted, priority of right as between surface and ground water users is not to be considered. The ground water users argued it would therefore be incumbent on the senior right holder to change the means of diversion in order to access the source of the water right.

The Supreme Court rejected the argument that full economic development precluded a delivery call so long as the aquifer was not being over-drafted, holding that the provision "only modifies the rights of ground water users with respect to being protected in their historical pumping levels." *Id.* at 808, 252 P.3d. at 89. However, the Idaho Supreme Court's analysis did not end at this conclusion. The Court then analyzed the ground water users' arguments regarding reasonable aquifer levels and full economic development as also contesting the reasonableness of the spring users' means of diversion.

In addressing the argument, the Court discussed that the concept of full economic development also applied to the reasonableness of the means of diversion:

> The Idaho Water Resource Board and the Idaho legislature have the power to formulate and implement a state water plan for 'optimum development of water resources in the public interest.' Idaho Const. Art. XV, § 7. There is no difference between securing the maximum use and benefit, and the least wasteful use, of this State's water resources in the public interest. Likewise, there is no material difference between 'full economic development' and the 'optimum development of water resources in the public interest.' . . . . Full economic development is the result of optimum development of water resources in the public interest. As we stated in *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), "It is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution." When discussing the Ground Water Act and particularly Idaho Code § 42-226, we stated 'The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources.' Id. at 512, 650 P.2d at 654.
>
> Over one hundred years ago, we held that a senior appropriator was not protected in an unreasonable means of appropriation. In *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907), the senior appropriator dammed a creek so that the water would back up, raising the water table to subirrigate his lands. The Court held that although he could divert water from the stream to fill his water right, he could not dam or impede the flow of the remaining water in order to cause a subirrigation of his meadow.
>
> . . .
>
> Conjunctive management rule 20.03 states, 'An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the reasonable use of water. . . .' That is consistent with our holding in *Van Camp*. The senior appropriator in *Van Camp* was entitled to his water right; he simply had to change his unreasonable means of diversion.

Id. at 808-09, 252 P.3d. at 89-90. In this same context, the Court also addressed the holding in *Schodde v. Twin Falls Land & Water, Co.*, 224 U.S. 107 (1912), where the senior water right holder diverted water using a system of water wheels. A dam constructed by a junior appropriator impeded the flow of the river and rendered the water wheels inoperable. The Idaho Supreme Court noted: "The issue in *Schodde* was whether the senior was protected in his means of diversion, not in the priority of water rights." *Id.* at 809, 252 P.3d. at 90.

Ultimately, the Supreme Court concluded that "there is no material difference" between the directives of "full economic development" as provided in I.C. § 42-226, and the "optimum development of the water resources in the public interest" as provided by Article XV, Section 7 of the Idaho Constitution. *Id.* at 808, 252 P.3d. at 89. Both directives are referred to in CM Rule 20.03, which was also relied upon by the Director. According, under either directive, a senior appropriator may not be protected in his means of diversion, while still being protected in his priority of right.

The Hearing Officer in Minidoka County Case No. CV-2009-647 also relied on this same reasoning in arriving at the conclusion in that protection of A&B's water right cannot be based on its poorest performing wells:

> A finding of material injury leading to curtailment or mitigation cannot rest upon what would amount to a bottleneck in the system, similar to Schodde's means of diversion. The right to water established in the partial decree remains, but that right is dependent upon A & B's ability to reach the water from those wells or to import it from other wells.

Opinion Constituting Findings of Fact and Conclusions of Law and Recommendations, p. 36.

Accordingly, for the foregoing reasons, the Director did not misapply I.C. § 42-226 in support of his conclusions that "requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to full economic development of the State's water resources" and "A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water."

C. Attorney fees.

The City of Pocatello and IGWA request an award of attorney's fees on judicial review pursuant to Idaho Code § 12-117(1). That section provides as follows:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117.

In this case, the Court does not find that A&B acted without a reasonable basis in law or fact at the time it filed its *Petition for Judicial Review*. At that time, the Idaho Supreme Court's decision in *A&B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500, 284 P.3d 225 (2012), had not been released. More importantly, the issue of whether A&B was required to work to reasonably interconnect some individual wells or well systems across its project before a delivery call could be filed, while pending before the Idaho Supreme Court, had not been resolved. Therefore, the Court does not find that A&B acted without a reasonable basis in law or fact when it originated this action by filing a *Petition* seeking judicial review of the Director's *Remand Order*. The Court concludes that neither the City of Pocatello nor IGWA is entitled to attorney fees on judicial review.

VI.
CONCLUSION

For the foregoing reasons, A&B's *Second Amended Petition for Judicial Review* is hereby dismissed in part with prejudice and to those matters not dismissed the *Remand Order* is affirmed consistent with this *Memorandum Decision*. The City of Pocatello's and IGWA's request for attorney's fees on judicial review is denied.

Dated Apr. 25, 2013

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION ON PETITION FOR JUDICIAL REVIEW was mailed on April 25, 2013, with sufficient first-class postage to the following:

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