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District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

FEB 15 2013

By _____ Clerk
Deputy Clerk

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 Director of the Idaho Department of Water Resources, Respondents, and THE IDAHO GROUND WATER APPROPRIATORS, INC., and THE CITY OF POCATELLO, Respondents-Intervenors.	**Case No. CV 2011-512**
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	

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director

Honorable Eric J. Wildman, Presiding

ATTORNEYS FOR RESPONDENTS
Garrick L. Baxter, ISB #6301
Chris M. Bromley, ISB #6530
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
Deputy Attorneys General for Gary Spackman, Director, and the Idaho Department of Water Resources

ATTORNEYS FOR PETITIONER
John K. Simpson
Travis Thompson
Paul L. Arrington
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Ste. 204
Twin Falls, ID 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
Attorneys for A&B Irrigation District

ATTORNEYS FOR RESPONDENT-INTERVENOR
A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
Telephone: (208) 234-6149
Facsimile: (208) 234-6297
and
Sarah A. Klahn
Mitra M. Pemberton
WHITE & JANKOWSKI LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
Telephone: (303) 595-9441
Facsimile: (303) 825-5632
Attorneys for the City of Pocatello

ATTORNEYS FOR RESPONDENT-INTERVENOR
Randy C. Budge
Candice M. McHugh
RACINE OLSON NYE BUDGE BAILEY
P.O. Box 1391
Pocatello, ID 83201
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
Attorneys for the Idaho Ground Water Appropriators, Inc.

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I. STATEMENT OF THE CASE

This is a proceeding for judicial review of the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* issued on April 27, 2011 ("Final Order on Remand") by the Director of the Department of Water Resources ("Director" or "Department"). The Final Order on Remand was issued because of this Court's remand in its *Memorandum Decision and Order on Petition for Judicial Review* (Fifth Jud. Dist., Case No. 2009-647, May 20, 2010)[1] ("Memorandum Decision") that the Director determine, by clear and convincing evidence, if the A & B Irrigation District ("A&B") is materially injured.

There are two questions before this Court. First, A&B has a legal duty to interconnect its well system "before a delivery call can be filed . . . ." *A & B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, ___, 284 P.3d 225, 241 (2012) (hereinafter "*A&B*"). A&B has not undertaken this requirement; thus, the Department poses, as its own issue on appeal, whether A&B's appeal of the Director's Final Order on Remand should be dismissed. Second, if the Court does not dismiss the present action, the core question is whether the Final Order on Remand is supported by substantial evidence.

II. ADDITIONAL ISSUE ON APPEAL

Pursuant to Idaho Appellate Rule 35(b)(4), the Department presents the following issue on appeal: Whether A&B's appeal of the Final Order on Remand should 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 before a delivery call can be filed?

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[1] The *Memorandum Decision* was signed on May 4, 2010; however, due to errors in service, the Court has treated "the date of entry of the *Memorandum Decision* . . . as May 20, 2010." *Order of Extension Re: Filing Date of Memorandum Decision* (Fifth Jud. Dist., Case No. 2009-647, May 19, 2010). The *Memorandum Decision* reviewed the Director's June 30, 2009 *Final Order Regarding the A&B Irrigation District Delivery Call*, R. at 3318 ("2009 Final Order).

III. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of the A&B delivery call has been thoroughly presented before this Court, *Memorandum Decision* at 5-8, and the Idaho Supreme Court, *A&B* at ___, 284 P.3d at 228-230. Therefore, this section will only address A&B's "Statement of Facts," starting on page 2 of its *Opening Brief.*

A&B incorrectly states that its water right authorizes only "177 separate points of diversion . . . ." *Opening Brief* at 2. It was conclusively established that A&B's water right authorizes it to divert ground water for irrigation purposes from 188 points of diversion; however, A&B only pumps from 177 of its wells. *A&B* at ___, 284 P.3d at 228; *Memorandum Decision* at 5. Moreover, while A&B has 130 separate well systems, *A&B* ___, 284 P.3d at 228, the Idaho Supreme Court stated A&B has a legal duty to take reasonable steps to interconnect "some individual wells or well systems <u>before</u> a delivery call can be filed." *A&B* ___, 284 P.3d at 241 (emphasis added). There is no evidence in the record to support any contention by A&B that it has met this legal duty.

A&B leaves out critical facts when it says, "during the peak of the irrigation season when water is needed most, the District goes on 'allotment' and each landowner receives a prorated rate of delivery per acre based on the original acres under water right 36-2080." *Opening Brief* at 3. A&B's calling water right, 36-2080, authorizes irrigation of 62,604.3 acres. *A&B* at ___, 284 P.3d at 228. It was conclusively established that A&B does not limit irrigation during allotment to the original 62,604.3 acres, but rather irrigates 66,686.2 acres with water right no. 36-2080. *A&B* at ___, 284 P.3d at 241; *Memorandum Decision* at 41-42 (discussing "Issues with Respect to Enlargement Claims"); R. at 3474. These additional 4,081.9 acres are junior and enlargement acres. *Memorandum Decision* at 41 ("prior to seeking regulation of pumpers junior

to September 9, 1948, it would be incumbent on A&B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis"); R. at 3474. *See also A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.* 141 Idaho 746, 118 P.3d 78 (2005) (analyzing A&B's place of use and enlargement acres). Conversion from gravity fed furrow irrigation to sprinkler irrigation has allowed A&B to irrigate lands that were not originally developed under water right no. 36-2080. R. at 3474.

IV. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). In conjunctive administration, the agency's finding of no material injury must be supported by clear and convincing evidence. *A&B* at ___, 284 P.3d at 249. "Clear and convincing evidence refers to a degree of proof greater than a mere preponderance." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996). "Clear and convincing evidence is generally understood to be [e]vidence indicating that the thing to be proved is highly probably or reasonably certain." *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) (internal citations omitted); *see also Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

"The determination of whether [clear and convincing] evidence has been presented is a question of fact to be determined" by the agency and "will be disturbed only if . . . clearly erroneous." *Snider v. Arnold*, 153 Idaho 641, 643, 289 P.3d 43, 45 (2012). On review, the

agency's "factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A&B* at ___, 284 P.3d at 231. The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1).

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. *A&B* at ___, 284 P.3d at 231. "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.* at ___, 284 P.3d at 236 (internal citations omitted). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. *Id.* at ___, 284 P.3d at 231.

V. SUMMARY OF THE ARGUMENT

In this case, the Director found A&B has: reduced its conveyance losses from 8 percent to 3 percent; converted its means of irrigation from gravity fed furrow irrigation to 97 percent sprinkler irrigation; pumps less water than it could otherwise divert from fewer points of diversion than are authorized, yet irrigates more acres than are authorized under water right no. 36-2080; that inherent hydrogeology, not junior-priority ground water pumping impacts its ability to pump water in the southwestern area of the project; and, with its present water supply, raises crops on its lands. Based on these facts, the Director found, by clear and convincing

evidence, that A&B is not materially injured since the present quantity of water available exceeds the quantity of water being put to beneficial use. Because A&B's present use does not require the full decreed quantity for irrigation of its lands, "the quantity called for in excess . . . would not be put to beneficial use or put differently would be wasted." *Memorandum Decision on Petitions for Rehearing* at 8 ("Memorandum Decision on Rehearing"). While A&B disagrees with the Director's finding of no material injury, the Director complied with this Court's remand by applying the clear and convincing evidentiary standard to the record. Because the Final Order on Remand is supported by substantial evidence in the record, it must be affirmed on review.

VI. DEPARTMENT'S ISSUE ON APPEAL

A. 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

In its Memorandum Decision, the Court held as a matter of law that, based on the history of water right no. 36-2080 and the way in which the right was decreed, it was proper for the Director to require A&B to "make reasonable efforts to maximize interconnection of the system and place[] the burden on A&B to demonstrate where interconnection is not physically or financially practical." *Memorandum Decision* at 39. A&B was required to comply with this requirement "prior to seeking regulation of junior pumpers." *Id.* (emphasis added).

On appeal before the Idaho Supreme Court, A&B raised the following issue on appeal: "[W]hether 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." *A&B* at ___, 284 P.3d at 230, 239 (emphasis added). After analyzing the issue before it, the Supreme Court held as follows: "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* at ___, 284 P.3d at 241 (emphasis added).

Therefore, as a matter of law, and as a precondition to its conjunctive management delivery call, A&B has a legal duty to show the Director it has made reasonable efforts to maximize interconnection of its well system or show that interconnection is financially or physically impractical before a delivery call can be filed. The requirement to interconnect is "law of the case" and must be complied with by A&B. *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) ("The law of the case doctrine provides that when the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.") (internal citation omitted). Because A&B has failed to meet its legal obligation to interconnect, the Department asks the Court to dismiss A&B's petition for judicial review.[2]

VII. RESPONSE TO ISSUES RAISED BY A&B

A&B levels many charges against the Final Order on Remand in an attempt to show it should be set aside.[3] Yet the core issue on review remains: does the Final Order on Remand comply with the Court's ordered remand that the Director "apply the [clear and convincing] evidentiary standard to the existing record," *Memorandum Decision* at 49, and is the Final Order

[2] A&B is authorized to seek judicial review of the Final Order on Remand. *A & B Irr. Dist. v. Idaho Dept. of Water Res.*, 2012 WL 4055353 * 4 (2012). However, A&B's petition for judicial review is subject to the underlying record, this Court's *Memorandum Decision* and *Memorandum Decision and Order on Petitions for Rehearing*, and the Idaho Supreme Court's decision in *A&B*.

[3] Given that A&B has not met its duty to interconnect, it is unclear how A&B can achieve the result it seeks. Nevertheless, the Department will respond to the Opening Brief.

on Remand supported by substantial evidence. Because the Final Order on Remand meets both requirements, the Department respectfully requests the Court affirm on review.

A. The Final Order On Remand Is Supported By Substantial Evidence In The Record

On judicial review in Case No. 2009-647, A&B asked the Court, among other things, "Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in" the Director's finding that A&B was not materially injured. *Memorandum Decision* at 8. In its written decision, the Court examined the record and found that the Director did not state which evidentiary standard he applied—preponderance or clear and convincing—to arrive at his finding of no material injury. *Id.* at 37. Holding that clear and convincing evidence must support the Director's finding of no material injury, and that the June 2009 Final Order's lack of an articulated evidentiary standard was in error, the Court remanded the case to the Director:

> 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 purpose of determining material injury. <u>The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record</u>. No further evidence is required.

Id. at 49 (emphasis added).

On remand, after examining the record, R. at 3471 ¶ 13, the Court's *Memorandum Decision* and *Memorandum Decision on Rehearing*, R. at 3489 ¶ 45, and case law regarding the clear and convincing standard, R. at 3480-81, the Final Order on Remand found, by clear and convincing evidence, that A&B is not materially injured:

> The clear and convincing evidence in the record supports the Director's conclusion that the 1,100 cfs (0.88 miner's inches per acre) decreed to A&B under 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. *Memorandum Decision* at 49. The clear and convincing evidence in the record supports the Director's conclusion that the

> quantity available to A&B is sufficient for purposes of irrigating crops. *Memorandum Decision on Rehearing* at 7. The Director concludes, by clear and convincing evidence, that A&B is not materially injured.

Id. at 3489 ¶ 45.

Substantial evidence in the record supports the Final Order on Remand.

1. A&B's Present Beneficial Use does not Require 1,100 cfs for the Irrigation of 62,604.3 acres

In its Opening Brief, A&B seeks to relitigate the question of whether the Department can examine efficiency in a conjunctive management delivery call, stating: "The issue is straightforward, possession of a decree is a prior adjudication that a senior can beneficially use the decreed quantity and the Director and IDWR must deliver that amount in administration." *Opening Brief* at 9 (emphasis added). This issue was already decided by the Idaho Supreme Court in *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.* and cannot be relitigated in this proceeding:

> CM Rule 42 lists factors "the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste. . . ." IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* American Falls argues the Director is not authorized to consider such factors before administering water rights; rather, the Director is "required to deliver the *full quantity* of decreed senior water rights according to their priority" rather than partake in this re-evaluation. (emphasis in original brief). American Falls asserts the Rules are defective in giving the Director, in essence, the authority to negotiate with the senior water right holder regarding the quantity of water he will enforce under a delivery call—a quantity that in some instances, has already been adjudicated.
>
> Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither

> address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication.

143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (2007) (emphasis added).

Based on its misunderstanding of the law, A&B goes on to argue: "Contrary to the agency's theory, a water user does not have two different entitlements to his decreed quantity depending on whether or not a delivery call is in place." *Opening Brief* at 16. This assertion directly opposes this Court's prior statement "that a difference can exist between the decreed quantity and the quantity put to beneficial use . . . ." *Memorandum Decision* at 36 (emphasis added). "It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season." *Memorandum Decision* at 30. "[T]here are indeed circumstances where the senior making the delivery call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity." *Memorandum Decision on Rehearing* at 7.

Consistent with *American Falls*, the *Memorandum Decision*, and the *Memorandum Decision on Rehearing*, the Final Order on Remand examined A&B's beneficial use, concluding that 1,100 cfs is not presently needed for the irrigation of 62,604.3 acres. R. at 3489 ¶ 45; *Memorandum Decision* at 31. Because the *Memorandum Decision* and *Memorandum Decision on Rehearing* are "law of the case," *Taylor* at 709, 201 P.3d at 1286, A&B's attempt to relitigate this issue must be rejected.

i. A&B's reduced conveyance losses and increased efficiencies

In the *Memorandum Decision*, the Court stated that improved conveyance and other efficiency measures could reduce the amount of water presently needed for beneficial use:

> Efficiencies, new technologies and improvements in the delivery systems that reduce conveyance loss can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of acres. The subsequent lining or piping of a ditch . . . can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.

Memorandum Decision at 30.

In this case, it was conclusively established that when water right no. 36-2080 was originally appropriated, water was conveyed through a system of mainly unlined ditches and laterals. R. at 3474 ¶ 23; *A&B* at ___, 284 P.3d at 228; *Memorandum Decision* at 6. "The original conveyance system included 109.71 miles of laterals and 333 miles of drains." R. at 3474 ¶ 23; *Memorandum Decision* at 6. "Currently, the system includes 51 miles of laterals, 138 miles of drains, and 27 miles of distribution piping." R. at 3474 ¶ 24; *Memorandum Decision* at 6. "Sixty-nine water injection wells have also been eliminated and the water applied to other purposes." *Id.* Over the years, conveyance loss has been reduced from 8 percent, to 5 percent, to 3 percent. R. at 3474 ¶ 23 ("From 1963 through 1982, average conveyance loss was estimated at 8 percent."); *A&B* at ___, 284 P.3d at 228 ("in the 1980s, A&B began converting its gravity flow system to sprinkler irrigation, which reduced conveyance losses [from eight] to five percent"); R. at 3088 (current conveyance loss is 3 percent).

ii. A&B's conversions from gravity to sprinkler irrigation

Similar to the Director's analysis of A&B's conveyance system, A&B's means of irrigation was also reviewed. According to the Court, "The subsequent . . . conversion from

gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed." *Memorandum Decision* at 30.

Here, it was conclusively established that the 62,604.3-acre place of use was originally irrigated by gravity fed furrow irrigation. *A&B* at ___, 284 P.3d at 228; *Memorandum Decision* at 6. Beginning in the early 1980s, A&B undertook a steady process of converting its project from gravity fed furrow irrigation to sprinkler irrigation. R. at 1115, Fig. 4 (graphic depiction of A&B's conversions from 1980-2007); *A&B* at ___, 284 P.3d at 228. By 1982, 25 percent of the place of use was irrigated by sprinkler; by 1987, 30 percent of the place of use was irrigated by sprinkler; by 1992, approximately 50 percent of the place of use was irrigated by sprinkler; and, by 2007, 96 percent of the place of use was irrigated by sprinkler. R. at 1115, Fig. 4; R. at 3474 ¶ 24. In its expert report, A&B estimated that gravity fed furrow irrigation was 60 percent efficient, whereas sprinkler irrigation was 80 percent efficient. Ex. 200 at Tbl. 4-7; *see also* R. at 1116 ¶ 47 (January 2008 Final Order listing application efficiencies). Conversion from gravity fed furrow irrigation to sprinkler irrigation "was expected to reduce the per acre water requirement by 19.6 percent." R. at 1115; R. at 3487 ¶ 36.

iii. Due to improved efficiencies and sprinkler irrigation, A&B diverts less water for its present beneficial use

Due to improved efficiencies and conversions from gravity fed furrow irrigation to sprinkler irrigation, A&B presently diverts less water for beneficial use than is authorized by its water right. R. at 3477 ¶ 45. The Director's finding is wholly consistent with the *Memorandum Decision*: "the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season." *Memorandum Decision* at 30.

In order to find that A&B's reduced diversions were attributable to its improved efficiencies and conversions to sprinkler irrigation, the Director reviewed A&B's pumping records. A&B separately tracks: (1) the amount of ground water available at the well for diversion; and (2) the amount of ground water actually pumped. R. at 3475 ¶¶ 31, 32. A&B's "Annual Report, Part 2" tracks the amount of water that could be diverted by A&B during the "high" and "low" flow periods of the irrigation season. R. at 3475 ¶¶ 31, 32. "The high flow measurements are usually taken early in the irrigation season; whereas the low flow measurements are usually taken during the peak irrigation season (i.e. June 15 to July 15). Tr. Vol. VI, pp. 1284-1289." R. at 3475 ¶ 32. A&B's Annual Report, Part 2 shows "maximum discharge or well capacity." *Id.* The amount of water actually pumped is tracked by A&B in its "WaterPumpedrevised.xls" spreadsheet. R. at 3475 ¶ 31. "The low flow reading in the WaterPumpedrevised.xls spreadsheet shows actual diversions during the peak season. Ex. 132 (A&B 1445, 1450)." R. at 3475 ¶ 32.

Using data from the WaterPumpedrevised.xls spreadsheet, Ex. 132 (A&B 145) (monthly diversions in acre-feet from 1960 to 2007), the Director first examined A&B's annual pumping. From 1963—when the place of use was irrigated by gravity fed furrow irrigation—to 1982—when 25 percent of the place of use was irrigated by sprinklers—A&B's average annual pumping was 201,736 acre-feet. R. at 1113 ¶ 37; R. at 3477 ¶ 42; Ex. 132 (A&B 1450). From 1994—when 50+ percent of the place of use was irrigated by sprinklers—to 2007 when 97 percent of the place of use was irrigated by sprinklers— A&B's average annual pumping was 180,095 acre-feet. R. at 1113 ¶ 38; R. at 3477 ¶ 42; Ex. 132 (A&B 1450). The Director found the 21,641 acre-feet reduction in annual pumping—a 10.7 percent decrease—was attributable to

A&B's improved efficiencies and conversions. R. at 3477 ¶ 42.[4] When compared with other nearby irrigation districts, the Director found A&B's 10.7 percent reduction in annual pumping was similar. R. at 3478 ¶ 46 ("Burley Irrigation District has had decreases in these same time periods of about 20 percent. Milner Irrigation District has had decreases more similar to A&B. . . . But I believe theirs was also around 8 percent."). *See also* R. at 1108 ¶ 14 ("total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre-feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities").

Over the same time period, the Director then looked at reductions in A&B's actual pumping during peak demand.[5] From 1963—when the place of use was irrigated by gravity fed furrow irrigation—to 1982—when 25 percent of the place of use was irrigated by sprinklers—A&B's pumping during peak demand averaged 55,486 acre-feet. R. at 1118 ¶ 57; R. at 3477 ¶ 43; Ex. 132 (A&B 1450) (monthly diversions in acre-feet from 1960 to 2007); Ex. 155 (peak pumping in acre-feet from 1960 to 2007, converted to miner's inches per acre). From 1994—when 50+ percent of the place of use was irrigated by sprinklers—to 2007 when 97 percent of the place of use was irrigated by sprinklers—A&B's peak demand averaged 50,262 acre-feet. *Id.* The Director found the 4,206 acre-feet reduction in pumping during peak demand—a 7.7

[4] Referring to a report authored by one of A&B's experts, the Final Order on Remand stated: "elimination of all drainage wells and pumping back surface runoff to existing irrigated lands allows reduction of pumped ground water, reduction in retention pond size, and increased project irrigation efficiency . . . the amount of water pumped from the aquifer can be reduced by 21,920 acre-feet per year." R. at 3477 ¶ 40 (emphasis added). *See also* R. at 1115 ¶ 46. The predicted 21,920 acre-feet reduction in pumping is remarkably similar to A&B's reduced diversions between the period 1963-1982 and 1994-2007: "The difference in mean annual diversion volume between the periods 1963-1982 and 1994-2007 is 21,641 acre-feet . . . ." R. at 3477 ¶ 40 (emphasis added).

[5] The peak demand "typically runs from June 15 to July 15, but in some years, it has run from July 15 to August 15." R. at 3475 ¶ 29.

percent decrease—was consistent with improved efficiencies and conversions: "Reductions in peak water use by A&B, over time, reasonably parallels its conversion from predominantly flood irrigation to predominantly sprinkler irrigation, and its improvements in irrigation efficiency." R. at 3477 ¶ 45.

Lastly, the Director compared the amount of water A&B actually pumped during peak demand with the amount of water that was available for diversion. R. at 3477 ¶¶ 43-44. Said another way, the Final Order on Remand examined how much water A&B could have diverted during peak demand but chose not to pump:

> Converted to a monthly volume, the 2006 peak season low flow well capacity of 970 cfs [taken from A&B's Annual Report, Part 2] is 59,643 acre-feet. As reported in the WaterPumpedrevised.xls spreadsheet, the 2006 low flow volume of water actually pumped during the peak season was 49,855.3 acre-feet. Ex. 132 (A&B 1450). Therefore, in 2006, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand period.

R. at 3477 ¶ 44 (emphasis added).

Based on the findings above, the Director concluded, by clear and convincing evidence, that A&B was not materially injured. R. at 3487 ¶ 34; R. at 3489 ¶ 45. The Director's findings that A&B's reduced annual and peak demand pumping is due to increased efficiencies and conversions, and that A&B chooses to pump less water during peak demand than is available, are supported by substantial evidence in the record and should be affirmed on review.

iv. Even pumping less water A&B irrigates 4,081.9 more acres than are authorized by water right no. 36-2080

According to the *Memorandum Decision*, "Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed." *Memorandum Decision* at 30. Here, the

Director found, because of sprinkler irrigation, A&B irrigates 4,081.9 acres more than are authorized by water right no. 36-2080. R. at 3474 ¶ 25.[6] Even during "allotment" or the "peak or the irrigation season when water is needed most," *Opening Brief* at 3, A&B farmers continue to irrigate junior and enlargement acres. R. at 3474 ¶ 25; Tr. Vol. III p. 605-06.

Because A&B does not limit irrigation under water right no. 36-2080 to its original acres, this Court held: "[P]rior to seeking regulation of pumpers junior to September 9, 1948, it would be incumbent on A&B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages, if any, to the 36-2080 right." *Memorandum Decision* at 41. Consistent with the *Memorandum Decision*, the Final Order on Remand reached the same conclusion. R. at 3490. Because A&B did not appeal the Court's ruling to the Idaho Supreme Court, the issue has been waived, *Pines Grazing Ass'n, Inc. v. Flying Joseph Ranch, LLC*, 151 Idaho 924, 930, 265 P.3d 1136, 1142 (2011) (court will not address issues not raised below), and is now "law of the case," *Taylor* at 709, 201 P.3d at 1286. Furthermore, because the record does not contain evidence that A&B has met the Court's holding, A&B's delivery call must be rejected.

v. Eleven unused points of diversion

A&B's water right lists 188 points of diversion. R. at 3093; *A&B* at ___, 284 P.3d at 228. Despite only pumping from 177 wells, A&B manages to irrigate 4,081.9 more acres than are authorized under water right no. 36-2080, yet claims it is materially injured. R. at 3472 ¶ 15; R. at 3093; *A&B* at ___, 284 P.3d at 241. Putting the eleven unused wells into production would

[6] According to A&B's expert report: "As the A&B Project water users converted from gravity to sprinkler irrigation, some of the lands not originally accessible by gravity irrigation became accessible and are now irrigated." Ex. 200, Vol. 4 at 4-24.

increase A&B's capacity to pump ground water. R. at 3472 ¶ 15; R. at 3489 ¶ 45. In its *Opening Brief*, A&B argues that because the 11 unused points of diversion have never been used, the Director erred in considering them in the Final Order on Remand. *Opening Brief* at 39. While A&B disagrees with the Director's consideration of its unused points of diversion, which are part of its water right, and would increase its capacity to divert ground water if put into production, the Director's finding is supported by substantial evidence and in accord with CM Rule 42.01.g.

vi. Inherent hydrogeology, not ground water pumping by others, causes water shortages in the southwestern area of the project and forced A&B to convert certain acres from ground water to surface water irrigation

In addition to examining A&B's improved efficiencies, conversions from gravity fed furrow irrigation to sprinkler irrigation, reduced annual pumping, reduced peak demand pumping, foregoing of peak demand pumping, enlarged place of use, and unused points of diversion, the Final Order on Remand also assessed A&B's allegation that, because of ground water pumping by others, certain wells no longer produce ground water. Consistent with inherent hydrogeology, the Final Order on Remand found as follows:

> With the exception of one well in Township 8 South, Range 25 East, which was replaced because of a crooked borehole, Tr. Vol. IX, p. 1759, every problem well identified by A&B is located in the geologic transition zone described above. Exhibit 215A. Wells located in Townships 9 and 10 South, Range 22 East have been documented as problematic since they were originally drilled by USBR. Exs. 152P, 152Q, 152II, 152TT, and 152BB. Wells that have been drilled, but not used by A&B, are also located in the geologic transition zone. The problems associated with these wells derive from the inherent hydrogeologic environment. *Recommended Order* at 34. "Basically, everything that you want a well to do, is more difficult in the southwest area." Tr. Vol. IX, pp. 1756-1757.

R. at 3473 ¶ 20 (internal footnotes citing to specific locations within Exhibit 215A have been removed).

The inherent hydrogeology, transmissivity, specific capacity, depth to water, and pumping in southwestern area of A&B is extensively documented in the record. Ex. 106; Ex. 121; Ex. 215A; R. at 1127-1131 ¶¶ 81-94; R. at 3089-3092; R. at 3472-73 ¶¶16-22. *See also A&B* at ___, 284 P.3d at 228 (describing inherent hydrogeology in the southwestern area of A&B); *A&B* at ___, 284 P.3d at 237 ("that initial drillings were often inadequate; and that A&B has problems with certain well systems in the southern portion of the project where sedimentary deposits and thick layers of basalt are present"). The Director's finding that A&B's difficulties in the southwest are attributable to inherent hydrogeology, not junior-priority ground water pumping, is supported by substantial evidence in the record and should be affirmed.

The Final Order on Remand also examined the factual reasons for A&B's conversion of 1,447 acres in the southwestern area of the project from ground water irrigation to surface water irrigation. "As early as 1960, the USBR discussed the need to import surface water to those lands because of poorly performing wells. *Recommended Order* at 15; Ex. 152QQ; Tr. Vol. IX, pp. 1765-1767. In a 1961 letter, the USBR stated, "The downward trend in pumping water levels is readily apparent and the absence of any tendency of ground water levels to stabilize is of considerable concern." Ex. 152BBB, Tr. Vol. IX, p. 1777. The project was not completed until 1963. *Memorandum Decision* at 5." R. at 3473 ¶ 21. By 1965, "roughly half of the project's wells had been redrilled." *A&B* at ___, 284 P.3d at 228. Thus, the Director found "the inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields and the need to convert 1,447 acres from ground water to surface water irrigation." R. at 3488 ¶ 41. The Director's finding is supported by substantial evidence in the record and should be affirmed on review.

vii. Review of crop records, farmer testimony, and METRIC ET data show that A&B is not water short

Lastly, the Final Order on Remand looked at whether, with the present water supply, A&B was accomplishing the beneficial purpose of irrigation; namely, raising crops. During the hearing, farmers testified about water use and the raising of crops. A&B farmers called by A&B "testified uniformly that they could put additional water to beneficial use." R. at 3478 ¶ 48. A&B argues the Director should have ended his investigation at this point: "it is the individual farmer, *not the Director*, who is best acquainted with the land and is in the best position to know how much water is needed." *Opening Brief* at 18 (emphasis in original). While farmer testimony is persuasive, it is the Director's duty to determine material injury in a conjunctive management delivery call. CM Rule 42. Moreover, if the Director had stopped his investigation with A&B's witnesses, he would have been forced to disregard other evidence. Indeed, an A&B farmer called by IGWA testified "that on lands immediately adjacent to the A&B project, he was able to raise crops to full maturity with less water from private wells." R. at 3478 at ¶ 52. On his A&B acres, the same farmer testified, "he 'replace[s] water with management.'" *Id.* at ¶ 53. While this farmer agreed that "farmers want more water not less," R. at 3478 ¶ 48, his testimony establishes more water is not needed to use "water efficiently and without waste . . . ." CM Rule 42.01.

Regarding crops, A&B and IGWA witnesses testified that, despite reduced pumping, "crop yields have generally increased over time. . . . This is consistent with evidence submitted at the hearing showing an increase in Minidoka County crop yields, over time. Ex. 357." R. at 3479 ¶ 55. *See also* R. at 1108 ("less water is generally needed in the present time to fully irrigate lands . . . with a certain crop mix . . . than was needed in the 1960s and 1970s for the same lands, crop mix, and climatic growing conditions."). Federal litigation involving "a

herbicide called 'Oust' . . . precluded inquiry into crop yields and the circumstances surrounding those yields for the period from 2001-2005 . . . ." R. at 3478 ¶ 51. *See Adams v. U.S.*, 658 F.3d 928 (9th Cir. 2011). Nevertheless, two A&B farmers who testified at hearing, "for whom data was prepared, had higher crop yields than the Minidoka County average." R. at 3479 ¶ 55.[7]

In order to objectively determine whether A&B's crops were affected by reduced pumping, the Department analyzed METRIC evapotranspiration ("ET")[8] data from 2006 "to compute and map consumptive water use on and around the A&B project." R. at 3479 ¶ 57. ET data from 2006 was analyzed "because it was the only year specific acres were alleged by A&B to be water short." R. at 3479 at ¶ 58. "The analysis compared the mean ET for acres within A&B that were specifically alleged by A&B as water short (Item-G lands), acres within A&B that were not alleged by A&B as water short, and adjacent acres outside the A&B project boundary that were not alleged as water short." R. at 3479 ¶ 57. "Further analysis normalized the ET data using NDVI (Normalized Difference Vegetation Index) to adjust for any differences caused by cropping patterns." R. at 3479-80 ¶ 58. Based on analysis of the ET data, the Final Order on Remand found that, "with its diverse crop mix, A&B was not water short." R. at 3480 ¶ 60. In analyzing all of the evidence, the Final Order on Remand found "that A&B's crop mix is grown to maturity on A&B lands with the current water supply." R. at 3488 ¶ 40.

As an issue on appeal, A&B argues that the Director's review of crop maturity is not proper under the CM Rules, asserting that the Director should simply defer to A&B's decreed

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[7] A&B's crop distribution records were examined in the record. R. at 3480 ¶ 60. In its expert report for the period 1995 to 2007, Ex. 200, Vol. 4 at Tbl. 4-3, A&B reported that "49 percent of its lands are planted with grains, 24 percent are planted with beets, 12 percent are planted with beans, 7 percent are planted with alfalfa, 1 percent is planted with corn and peas, and 1 percent is pasture." R. at 3480 ¶ 60. A&B reported "it is reasonable to assume that this crop mix represents the average current crop distribution for the study period." R. at Ex. 200, Vol. 4 at 4-2.

[8] "METRIC is an acronym for mapping evapotranspiration at high resolution with internalized calibration. It is a model developed by the University of Idaho to take Landsat data, and using a remote sensing and energy-balanced approach, convert that to evapotranspiration data." R. at 3479, fn. 7.

diversion rate when farmers testify that additional water will be put to beneficial use. *Opening Brief* at 3, 13.[9] Here, it is undisputed that A&B holds a decreed water right for 1,100 cfs for the beneficial purpose of irrigation. *A&B* at ___, 284 P.3d at 228. As stated in prior sections above—and setting aside the fact that A&B has enlarged its 62,604.3-acre place of use by 4,081.9 acres and no longer irrigates 1,447 acres with ground water—the Director examined the quantity element of A&B's water right; finding that, due to efficiencies and conversions, A&B pumps less water than it presently needs for beneficial use.

The Director then turned to the decreed purpose of use—irrigation—to determine if A&B, with its present water supply, could raise crops to maturity. "The lode star of utility of irrigation water is application to a beneficial use without waste, i.e., using no more than is necessary according to the standards and practices of good husbandry for the particular crop sought to be grown, soil and all other essential factors and conditions being taken into consideration, but it does not place any restriction on the kind of crops one may desire to raise." *In re Robinson*, 61 Idaho 462, 469, 103 P.2d 693, 696 (1940). Based on the record before him, which included testimony from farmers that raise crops on A&B lands, the Director found the beneficial purpose of irrigation could be accomplished with the present water supply. The Director's finding is supported by substantial evidence and should be affirmed on review.

A&B attempts to discredit the Director's analysis of crop maturity by comparing it with the Idaho Supreme Court's admonishment against review of a water user's business profitability.

[9] "Crop maturity" or the ability to raise crops was articulated by the hearing officer. R. at 3106-10. In the Recommended Order, the hearing officer found: "Crops may be grown to full maturity on less water than demanded by A&B in this delivery call." R. at 3107. A&B "is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity." R. at 3108. "It is unlikely rectification would be prompted at a level below the amount necessary for crop production." R. at 3110. The June 2009 Final Order accepted these recommendations. Until this appeal, the Department cannot find that A&B took issue with these accepted recommendations. R. at 3322. As such, A&B is precluded from challenging them now, *Flying Joseph* at 930, 265 P.3d at 1142 (court will not address issues not raised below), and they are "law of the case," *Taylor* at 709, 201 P.3d at 1286.

Opening Brief at 13 *citing Clear Springs v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). There is no parallel between *Clear Springs* and this case. In *Clear Springs*, the Director found material injury to senior-priority spring users who used water for the beneficial purpose of fish propagation. During the administrative hearing, the spring users obtained a protective order to prevent junior-priority ground water users from discovering their fish production records. On appeal, the junior-priority ground water users argued the Director's finding of material injury should be reversed because there was no evidence to show curtailment would allow the spring users to raise more fish at a profit. In affirming the Director's finding of material injury, the Supreme Court stated material injury does not

> require showing an impact on the profitability of the senior appropriator's business. Such a holding would conflict with Article XV, § 3 of the Idaho Constitution, which states that "[p]riority of appropriation shall give the better right as between those using the water." It would also require the Director or watermaster to examine the businesses of the senior and junior appropriators to determine which one could make the greater profit from the use of the water when there is a shortage. If business profitability was the basis for appropriation, decreed water rights would become meaningless.

Clear Springs at 811, 252 P.3d at 92.

Unlike the spring users in *Clear Springs*, A&B used cropping information to support its contention that its present water supply impacted its ability to raise crops. *See* Ex. 200, Vol. 4. The Director's analysis of A&B's crops was in direct response to the record before him and is devoid of any profitability analysis between A&B and junior-priority ground water users.[10] The Director's Final Order on Remand is supported by substantial evidence and should be affirmed on review.

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[10] It is also worth noting that the spring users were using all of the water available to them for the beneficial purpose of fish propagation. As stated in prior sections above, the record in this case shows that A&B chooses not to pump all of the water that is available for diversion. Moreover, unlike the record in this case, there was no evidence in *Clear Springs* that improved efficiencies allowed the spring users to accomplish the beneficial purpose of fish propagation with less than the quantity elements of their water rights, that the spring users had enlarged their raceways, or that inherent hydrogeology, not junior-priority ground water pumping, impacted the spring users' water supply.

B. The Director Acted Within The Scope Of The Court's Ordered Remand

In its *Opening Brief*, A&B argues the Director exceeded the scope of this Court's order on remand, and violated what it refers to as "the mandate rule." *Opening Brief* at 27. A&B's "mandate rule" is a legal theory gleaned from an 1895 United States Supreme Court decision, and various reported and unreported federal cases. *Opening Brief* at 28-29, 31, 34. There is no reported decision from any Idaho appellate court or Idaho federal court on the mandate rule. As such, the mandate rule has no application in Idaho. Whether the Director acted within the scope of this Court's ordered remand is a separate question.

In its *Memorandum Decision*, the Court remanded the case to the Director, stating as follows:

> 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 purpose of determining material injury. <u>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.</u>

Memorandum Decision at 49 (emphasis added).

In support of its argument that the Director violated the scope of the Court's remand, A&B points to findings of fact made in the Final Order on Remand concerning: (1) the per acre delivery standard; and (2) the reasonableness of A&B's diversions. Because A&B's arguments are counter to the record before the Director and the Court, the Final Order on Remand should be affirmed.

1. The per acre delivery standard

In its *Opening Brief*, A&B accuses the Director of backing off his prior finding that 0.75 miner's inches per acre is the delivery standard for this call. "Reviewing the <u>*same evidence*</u>, the Director reversed himself to conclude that A&B only needs 0.65 miner's inches for purposes of

administration." *Opening Brief* at 33 (emphasis in original). A&B's allegation that the Director now supports a 0.65 miner's inches per acre standard confuses the Director's findings by making an apples to oranges comparison of the amount of water A&B could have diverted (0.75 miner's inches) with the amount of water actually pumped (0.65 miner's inches).

As stated in the Final Order on Remand, R. at 3475 ¶ 33, the 0.75 miner's inches per acre standard[11] came from A&B's 2007 *Motion to Proceed*, in which A&B alleged it "is unable to divert an average of 0.75 of a miner's inch per acre which is the minimum amount necessary to irrigate lands within A&B during the peek (sic) periods when irrigation water is most needed." R. at 836. According to the *Motion to Proceed*, the water supply was 970 cfs. R. at 835; R. at 3475 ¶ 33. The 970 cfs supply was A&B's peak demand well capacity, taken from its 2006 Annual Report, Part 2. As stated above in section VII. A. 1. iii., the Annual Report, Part 2 tracks water available at the well for diversion. R. at 3475 ¶¶ 31, 32. Therefore, in 2006, A&B could have diverted 970 cfs and delivered 0.75 miner's inches per acre to the field.[12] *Id.*

Because of the parties' focus on miner's inches per acre, and in order to better compare data, the Department converted A&B's peak monthly pumping volumes from its WaterPumpedrevised.xls spreadsheet to miner's inches. Ex. 155; Ex. 155A; Tr. Vol. VI, pp. 1196-97. At the hearing, a Department witness presented this data without objection and

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[11] The 0.75 miner's inches per acre standard, which is water available at the well for diversion and adjusted for 3 percent conveyance loss, was accepted by the hearing officer in his Recommended Order, R. at 3088, by the Director in his June 2009 Final Order, R. at 3322, and was acknowledged by the Court, *Memorandum Decision* at 24 ("The 0.75 miner's inches per acre, among other things, was therefore used to arrive at the finding of material injury."). The Final Order on Remand does not change the prior conclusion, nor should it be inferred. R. at 3471 ¶ 13.

[12] 970 cfs is converted to miner's inches per acre as follows: 970 ÷ 62,604.3 x 50 = 0.77. The January 2008 Final Order found that 5 percent was the proper value for conveyance loss. R. at 1119 ¶ 64. However, the hearing officer's Recommended Order found that 3 percent was the "proper figure to use." R. at 3088. The June 2009 Final Order accepted this recommendation. R. at 3322. Adjusted for 3 percent conveyance loss, 0.77 miner's inches translates to 0.75 miner's inches per acre at the field. When 970 cfs "is applied to 66,686.2 acres, and adjusted for 3 percent conveyance loss, the on-farm delivery is 0.71 miner's inches per acre. The place of use for water right no. 36-2080 is 62,604.3 acres." R. at 3476 ¶ 35.

exhibits 155 and 155A were admitted into evidence. Tr. Vol. VI, pp. 1196-1203, 1288-89. According to the 2006 Annual Report, Part 2, A&B could have diverted 970 cfs (59,643 acre-feet), or 0.75 miner's inches per acre over its 62,604.3-acre place of use. R. at 3476 ¶ 35; R. at 3477 ¶ 44. However, in 2006, the WaterPumpedrevised.xls spreadsheet showed that A&B chose to pump only 49,855.3 acre-feet, Ex. 132 (A&B 1450), or 0.65 miner's inches per acre, Ex. 155. R. at 3476 ¶ 36; R. at 3477 ¶ 44. Therefore, the Final Order on Remand found, "in 2006, A&B had the ability or capacity on a project-wide basis to pump nearly 10,000 acre-feet of additional water during the peak demand period." R. at 3477 ¶ 44.

The Final Order on Remand's discussion of 0.65 miner's inches per acre was another way of showing that A&B chose to pump less water than it could otherwise divert. "The record establishes with reasonable certainty that A&B . . . does not utilize the capacity it has during the peak season when water is most needed." R at 3489 ¶ 45. For purposes of this delivery call, the per acre delivery standard is 0.75 miner's inches, which has always been water available at the well for diversion, adjusted for 3 percent conveyance loss. The 0.75 miner's inches per acre standard is consistent with the *Motion to Proceed*, the January 2008 Final Order, the Recommended Order, the June 2009 Final Order, the *Memorandum Decision*, and the Final Order on Remand. A&B's assertion that 0.65 miner's inches per acre is a new standard is without merit and should be disregarded.[13]

[13] A&B attempts to liken the Director's use of 0.65 miner's inches per acre with Pocatello's expert report, which concluded that A&B would not be materially injured if it had 0.65 miner's inches. Ex. 301 at 11; Ex. 301 at Apdx. A. In their expert reports, both A&B and Pocatello developed theoretically based analyses to support their respective peak monthly delivery requirements. Ex. 200, Vol. 4 at 4-1-8; Ex. 200, Vol. 4 at Tbl. 4-11 (A&B's 0.89 miner's inches per acre peak monthly demand); Ex. 200, Vol. 4 at 4-50 (A&B flowchart describing "method to compute Unit B irrigation diversion requirements"); Ex. 301 at Apdx. A (Pocatello's 0.65 miner's inches per acre peak monthly demand). As stated by the hearing officer, the manifest difference between A&B's and Pocatello's expert reports was Pocatello's use of "soil moisture." R. at 3109 ("An element in the extreme disagreement between the experts is the question of the use of developing soil moisture in the non-peak periods to buffer against the pumping shortages that might develop during the peak period."). Pocatello's "soil moisture" analysis was rejected by the hearing officer. R. at 3109-10. Despite A&B's argument that the Director used "theoretical average

2. A&B's means of diversion in the southwest are unreasonable

In its *Opening Brief*, A&B cites to prior findings of the hearing officer regarding A&B's "reasonable" means of diversion, stating "A&B uses efficient water conveyance systems to deliver water to the landowner." *Opening Brief* at 30.[14] A&B then leverages this finding to support its contention that the Final Order on Remand's analysis of wells located in the southwestern area of the project is inconsistent with the prior findings: "The Director analyzed the exact same evidence . . . but, this time, concluded that A&B's diversions are not reasonable because of the original siting and well design. The Director's about-face on an issue that was never appealed or ordered to be reconsidered violates" the *Memorandum Decision*. *Id.* at 31; *see also Opening Brief* at 43-45 (discussing original well drilling methods and well siting in the southwest).

There was no "about-face" by the Director on this issue. The Final Order on Remand recognized the record below, R. at 3471 ¶ 13, and does not contradict the hearing officer's prior finding that A&B's well drilling methods, or well design were reasonable. *See* R. at 3097 ("cable tool drilling was appropriate"); R. at 3111 ("the wells as developed by the Bureau of Reclamation <u>were reasonable under the conditions known at the time</u>") (emphasis added). A&B's argument relies on selective quotes about early development but ignores the rest of the

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diversion deliveries to re-adjudicate A&B's water right," *Opening Brief* at 9, the Final Order on Remand examined actual data to determine that A&B chooses to pump less water (0.65) than is available for diversion (0.75). R. at 3477 ¶ 44.

[14] The findings cited to by A&B involve the evolution of its conveyance system. The block quote on page 30 of A&B's *Opening Brief* was taken from the hearing officer's Recommended Order and selectively omits findings made regarding its conversion from gravity to sprinkler irrigation and elimination of drainage and injection wells. *Compare Opening Brief* at 30 *with* R. at 3098-99. This response brief previously discussed these findings, as did this Court, and the Idaho Supreme Court in *A&B*. The Department does not question the reasonableness of A&B's implemented irrigation efficiencies.

Final Order on Remand and the fact the hearing officer went beyond early development. While wells located in the southwest were reasonable at the time they were drilled, conditions rapidly changed. R. at 3092, 3102. In the Recommended Order, the hearing officer took great exception with A&B's demands for curtailment based on its wells in the southwest. R. at 3111-13. The hearing officer analogized A&B's means of diversion in the southwest with Schodde's point of diversion on the Snake River:

> The conditions in the southwest area create a situation which in significant ways is analogous to the problem addressed in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912), which weighed the public interest against the exercise of an established water right. Schodde's means of diversion were apparently reasonable when constructed, just as the wells as developed by the Bureau of Reclamation were reasonable under the conditions known at the time. Regardless, Schodde was not permitted to block the construction of the dam or apparently to obtain other mitigation. He retained the water right, but that right could not trump the public welfare in development of the dam. The public good was considered and outweighed the private right despite the fact that Schodde suffered injury. That injury was to his means of diversion, not to his underlying water right. This case creates a similar issue. A&B has a water right with points of diversion in the southwest region. That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.

R. at 3111 (emphasis added).

The substantial evidence in the record led the Director to find that "the inherent hydrogeologic environment in the southwestern area of the project—not depletions caused by junior-priority ground water users—is the primary cause of A&B's reduced pumping yields and the need to convert 1,447 acres from ground water to surface water irrigation. Wells placed in a poor hydrogeologic environment do not constitute a reasonable means of diversion. CM Rule 42.01.g." R. at 3488 ¶ 41. *See also A&B* at ___, 284 P.3d at 237 ("that initial drillings were often inadequate; and that A&B has problems with certain well systems in the southern portion

of the project where sedimentary deposits and thick layers of basalt are present"). The Final Order on Remand's finding on the issue of wells in the southwest is in accord with the underlying record and therefore does not exceed the scope of this Court's order on remand.

C. The Director Properly Applied Idaho Code § 42-226 and CM Rule 20.03

Based on the Idaho Supreme Court's decision in *Clear Springs*, A&B argues the "Director erred in his reference to Idaho Code § 42-226 and Rule 20.03 as justifying the no-injury finding on remand." *Opening Brief* at 21. Referring to *Clear Springs*, A&B asserts, "the Court clarified that the concept of 'full economic development' is limited to Idaho Code § 42-226 and only applies to a senior's reasonable pumping level." *Opening Brief* at 22. Thus, A&B contends four of the Director's conclusions of law, each of which cite Idaho Code § 42-226 and/or CM Rule 20.03, should be set aside. *Opening Brief* at 23-24. Because this is a ground water to ground water delivery call, A&B's argument is incorrect and should be rejected.

In *Clear Springs*, junior-priority ground water users argued the Director's finding of material injury should be reversed because he erred in failing to properly apply Idaho Code § 42-226. The Court disagreed, holding that Idaho Code § 42-226 did not apply: "By its terms, section <u>42-226 only applies to appropriators of ground water</u>. The Spring Users are not appropriators of ground water . . . [t]hey are appropriators of surface water flowing from springs." *Clear Springs* at 804, 252 P.3d at 85 (emphasis added). The Court went on to say: "Conjunctive Management Rule 20.03 also refers to 'full economic development as defined by Idaho law.' The words full economic development only appear in Idaho Code § 42-226 and the cases discussing that statute. *See American Falls* . . . ; *Parker v. Wallentine* . . . ; *Baker v. Ore-Ida* . . . ; and *State ex rel. Tappan v. Smith* . . . ." *Id.* at 807-08, 252 P.3d at 88-89. Furthermore, "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 public policy of reasonable use of water . . . .' That is consistent with our holding in *Van Camp*." *Id.* at 809, 252 P.3d at 90 (emphasis added). Therefore, the Court in *Clear Springs* held that Idaho Code § 42-226 applies only in ground water to ground water delivery calls, and that CM Rule 20.03 applies in both ground water to ground water and surface water to ground water delivery calls.

Since this is a conjunctive management delivery call, there is no question the CM Rules apply. CM Rule 1. *American Falls* at 862, 154 P.3d at 433 (CM Rules are facially constitutional). Since this delivery call involves junior- and senior-priority ground water users, there is no question that Idaho Code § 42-226 and CM Rule 20.03 apply. *Clear Springs* at 804, 807-08, 252 P.3d at 85, 88-89. Even A&B concedes there is no holding in *Clear Springs* declaring Idaho Code § 42-226 and CM Rule 20.03 unconstitutional or void in their entirety. *Opening Brief* at 22-23 (explaining which portions of Idaho Code § 42-226 and CM Rule 20.03 "survive[d]" *Clear Springs*). Therefore, based on *Clear Springs* and A&B's own admission, it is legally incorrect for A&B to argue that Conclusion of Law 14 from the Final Order on Remand—which states the Director must review Idaho Code § 42-226 and CM Rule 20.03 in a ground water to ground water delivery call—should be set aside.

A&B's argument that conclusions of law 33, 34, and 41 should be set aside is similarly mistaken. According to *Clear Springs*, "with respect to ground water pumping, the prior appropriation doctrine was modified so that it only protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources." *Clear Springs* at 802, 252 P.3d at 83. "A senior appropriator is not

absolutely protected in either his historic water level or his historic means of diversion." *Id.* (emphasis added).

Conclusions of law 33, 34, and 41 speak to findings of fact made by the Director concerning A&B's means of diversion. Conclusions of law 33 and 34 examined findings of fact made by the Director that A&B could divert more water with its current system than it chooses to pump. R. at 3487 ¶¶ 33, 34. In applying the law to the facts, the Director concluded A&B is not fully utilizing its means of diversion. Because A&B chooses to forego pumping, curtailment of junior-priority ground water rights would run counter to full economic development of the ESPA by allowing A&B to "block further use of the aquifer." *Clear Springs* at 803, 252 P.3d at 84. Conclusions of law 33 and 34 are in accord with *Clear Springs* and should be affirmed as written.

Conclusion of Law 41 examined findings of fact made by the Director regarding the inherent hydrogeology of the southwestern area of the project and the fact that wells located in that area produce less water than other areas of the project. R. at 3488 ¶ 41. In applying the law to the facts, the Director concluded A&B's means of diversion in the southwest are unreasonable. As aptly put by the hearing officer, "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." R. at 3113. Conclusion of Law 41 is in accord with *Clear Springs* and should be affirmed as written. *Clear Springs* at 809, 252 P.3d at 90 ("The issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights.").

Even if A&B is right that the Final Order on Remand incorrectly applied Idaho Code § 42-226 and CM Rule 20.03, the Court may correct the Department's errors of law. "This Court

will not substitute its judgment for that of the agency on questions of fact and it will uphold the agency's findings if supported by substantial and competent evidence. We are, however, free to correct errors of law in the agency's decision." *Mercy Medical Center v. Ada County, Bd. of County Commissioners of Ada County*, 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008) (internal citation omitted).

Conclusion of Law 14 references Idaho Code § 42-226 and CM Rule 20.03 without applying the law to any findings of fact. Therefore, if Conclusion of Law 14 is set aside, there will be no substantive impact to the Final Order on Remand. Conclusions of law 33, 34, and 41 do draw conclusions from prior findings of fact made by the Director regarding A&B's means of diversion. It is well settled law that a senior appropriator may not sustain a delivery call if his or her means of diversion are unreasonable. CM Rule 42.01.g; *Schodde* at 119-20; *Clear Springs* at 90, 252 P.3d at 809. Allowing a senior to sustain a delivery call with an unreasonable means of diversion would result in waste of the State's water resources. CM Rule 42.01.g; *American Falls* at 880, 154 P.3d at 451 ("the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use"). By applying these well-settled legal principles, the Court could still affirm conclusions of law 33, 34, and 41.

D. Proper Deference Was Given To The Decreed Elements Of Water Right No. 36-2080 And The Director's Review Of Data Does Not Readjudicate A&B's Water Right

A&B raises various issues regarding the decreed elements of its water right and the Director's analysis in the Final Order on Remand. This section will respond to those criticisms.

A&B argues the Director did not give proper deference to A&B's decreed water right, 36-2080, when he examined material injury. *Opening Brief* at 12. This allegation is without merit, as the record is replete with statements that water right no 36-2080 authorizes diversion of up to 1,100 cfs for the irrigation of 62,604.3 acres. R. at 3102; R. at 3489; *A&B* at ___, 284 P.3d

at 228. As the Department has previously represented to this Court, and as quoted by A&B in its *Opening Brief*: "A&B maintains the ability to exercise the full extent of its right . . . at no time in these proceedings was A&B informed, or should it infer, that it was not authorized to exercise the full extent of its right . . . ." *Opening Brief* at 16 (ellipses in original) *citing IDWR Respondents' Brief* at 26 (Case No. CV-2009-647, Jan. 28, 2010). There is no question that A&B maintains the ability to divert 1,100 cfs for the irrigation of 62,604.3 acres. However, this does not mean that the Director may not evaluate efficiency and waste when A&B makes a delivery call. CM Rule 42.01; *Memorandum Decision on Rehearing* at 8 ("In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted."). A&B's water use is still subject to the requirement that the decreed quantity is necessary for beneficial use, present water needs, and will not be wasted.

A&B also argues the Director "re-adjudicated" its water right by examining its seasonal variability when the Final Order on Remand found: "A&B has never had the entire diversion rate available during the peak season." *Opening Brief* at 42. The Director's examination of the seasonal variability of A&B's water right is consistent with CM Rule 42.01.c and does not constitute a readjudication. *American Falls* at 876-77, 154 P.3d at 447-48 ("responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication"). *See also Order on Petition for Judicial Review*, CV-2008-444 at 21-22 (Fifth Jud. Dist., June 19, 2009) (Director's consideration of a water right's seasonal variability is authorized by the CM Rules). Here, the record shows that the highest recorded peak demand well capacity was 1,087 cfs. R. at 3475 ¶ 34. Based on this fact, the Director found that 1,100 cfs "has not been available

for diversion during the peak season." R. at 3486 ¶ 29. The Director's finding is supported by substantial evidence and should be affirmed on review.[15]

A&B also argues the Director relied on "pre-decree information and theoretical average water deliveries from prior years to re-adjudicate A&B's water right." *Opening Brief* at 9. Contrary to A&B's assertions, and as explained above, the Director relied on actual data to support his finding of no material injury. Regarding the dates associated with the data relied upon by the Director, the data was in the record before the Department and "no additional evidence [was] considered by the Director." R. at 3471 ¶ 13. The Court remanded the June 2009 Final Order to the Director "to apply the [clear and convincing] evidentiary standard to the existing record." *Memorandum Decision* at 49. The Final Order on Remand evaluated the evidence in the record consistent with this Court's holding that the Director apply the clear and convincing standard of 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." *A&B* at ___284 P.3d at 249. "The clear and convincing evidence in the record supports the Director's conclusion that the 1,100 cfs (0.88 miner's inches per acre) decreed to A&B exceeds the quantity being put to beneficial use for purposes of determining material injury." R. at 3489 ¶ 45.[16] The Final Order on Remand is supported by substantial evidence and should be affirmed on review.

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[15] The seasonal variability of A&B's water right was examined by the Director in the January 2008 Final Order, R. at 1118 ¶ 62, and accepted by the hearing officer, R. at 3085. A&B never challenged the Director's review of the seasonal variability of its right before this Court or the Idaho Supreme Court. Because the issue has never been raised, A&B should be precluded from arguing it now, *Flying Joseph* at 930, 265 P.3d at 1142 (court will not address issues not raised below), and it is "law of the case," *Taylor* at 709, 201 P.3d at 1286.

[16] A&B argues "the Director wrongly assumed the juniors'" burden in finding no material injury. *Opening Brief* at 9, fn. 4. Junior-priority ground water users responded to the delivery call and, along with A&B, created the record. R. at 3469-70. Analyzing the record, the Director found, by clear and convincing evidence, that A&B was not materially injured. R. at 3489 ¶ 45. The Director did not assume the juniors' defense, he made findings based on the record before him.

E. Because The Issue Has Not Been Raised Previously, A&B Is Precluded From Alleging That The Director Failed To Consider Junior-Priority Ground Water Pumping

A&B asks the Court to set aside the Final Order on Remand because of its allegation that the Director failed to consider junior-priority ground water pumping: "The Director plainly violated his duty under the CM Rules by not making specific findings on this issue." *Opening Brief* at 26. Because the issue has never been raised, A&B should be precluded from arguing it now, *Flying Joseph* at 930, 265 P.3d at 1142 (court will not address issues not raised below), and it is "law of the case," *Taylor* at 709, 201 P.3d at 1286.

Even if the issue has been preserved, the record supports the fact that the issue was taken into consideration. CM Rule 40.03 states as follows:

> In determining whether the diversion and use of water under rights will be regulated under Rule Subsection 040.01.a or 040.01.b, the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. <u>The Director will also consider</u> whether the respondent junior-priority water right holder is using water efficiently and without waste.

Emphasis added.

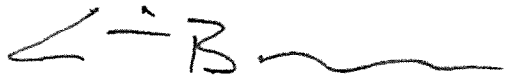
In this case, the hearing officer specifically considered ground water pumping by junior-priority users. R. at 3106-07. The Director accepted the hearing officer's recommendations on this point. R. at 3322-23. A&B references these record citations on page 27 of its *Opening Brief*, yet claims the hearing officer and Director were not "specific" enough. *Opening Brief* at 26. Consistent with the plain language of CM Rule 40.03, the Director was required to "consider" water use by junior-priority ground water rights. Because the Director did that in this case, the Final Order on Remand is supported by substantial evidence should be affirmed on review.

VIII. CONCLUSION

In this case, A&B has not met its legal obligation to interconnect it well system; as such, A&B's petition for judicial review must be dismissed. However, even if this action is not dismissed, the Director complied with this Court's ordered remand by applying the clear and convincing evidentiary standard to the record. In the Final Order on Remand, the Director found, by clear and convincing evidence, that A&B was not materially injured because it did not require the full quantity of its water right to meet its present water need. The Final Order on Remand is supported by substantial evidence in the record and must be affirmed on judicial review.

RESPECTFULLY SUBMITTED this 15th day of February, 2013.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION



CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by mailing in the United States mail, first class, with the correct postage affixed thereto on this 15th day of February, 2013.

Document Served: **IDWR RESPONDENTS' BRIEF**

Hand Delivered: SRBA District Court 253 3rd Ave. N. P.O. Box 2707 Twin Falls, ID 83303-2707	Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON LLP 195 River Vista Pl., Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com
Sarah A. Klahn Mitra M. Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us	*Courtesy Electronic Copy Only:* Jerry R. Rigby RIGBY ANDRUS & RIGBY 25 North 2nd East Rexburg, ID 83440 jrigby@rex-law.com

CHRIS M. BROMLEY
Deputy Attorney General