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

RESPONDENT-INTERVENOR IDAHO GROUND WATER APPROPRIATORS, INC'S RESPONSE BRIEF

On appeal from the Idaho Department of Water Resources

Before Honorable Eric J. Wildman

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is A&B's second appeal of the Director's finding that it is not suffering material injury. It is a direct appeal from the *Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("Final Order on Remand") issued by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") on April 27, 2011. R. 3469. The Final Order on Remand denied A&B's delivery call because "the Director conclude[d] by clear and convincing evidence that A&B Irrigation District is not materially injured" and denied A&B's delivery call. R. 3490. The Idaho Ground Water Appropriators, on behalf of its members ("IGWA" or "Ground Water Users"), participated in the administrative hearing before the agency and is a Respondent-Intervenor in this appeal.

II. COURSE OF PROCEEDINGS

On July 26, 1994, A&B Irrigation District ("A&B") filed a *Petition for Delivery Call* ("Delivery Call") with the Department, requesting that the Director take actions "necessary to insure the delivery of ground water to [A&B] as provided by its water right. R. 12-14. Shortly thereafter, the parties to the proceeding stipulated to stay the contested case. R. 670, 676. On March 16, 2007, A&B filed a *Motion to Proceed*, requesting that the stay be lifted and that the Department proceed with resolution of its Delivery Call. R. 830.

On January 29, 2008, IDWR issued an Order ("January 29 Order") denying A&B's Delivery Call on the basis that A&B had not suffered any material injury through application of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (hereinafter "CM Rules" or "Conjunctive Management Rules"). R. 1105.

A&B filed a petition requesting an administrative hearing to challenge the January 29 Order. R. 1182. An evidentiary hearing was conducted December 3-17, 2008.

On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"), which agreed with the January 29 Order's conclusion that A&B's water right no. 36-2080 had not suffered material injury. R. 3078. The Director's Final Order Regarding the A&B Delivery Call issued on June 30, 2009 ("Agency Order") again denied A&B's Delivery Call and found no material injury and incorporated the Recommended Order of the Hearing Officer. R. 3318. On August 31, 2009, A&B filed a Notice of Appeal on Petition for Judicial Review of Agency Action (Case No. CV-2009-647). Clerk's R. 1.

On May 4, 2010, this Court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision") and affirmed the Director's findings, but the district court remanded the case to the Director because he "fail[ed] to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B's water right exceeds the quantity being put to beneficial use for purposes of determining material injury." Clerk's R. 45.

In its order on rehearing, this Court further explained that the clear and convincing standard "is consistent with the established presumptions and standards of proof" and "reconciles giving the proper presumptive weight to the quantity decreed [...]in particular waste under the CMR" and it "avoids putting the senior right holder in the position of re-defending or re-litigating" what was already established in the adjudication. Clerk's R. 124. This Court agreed with A&B that the higher standard will protect the senior and "avoids the risk that an erroneous determination will leave the senior short of water... promoting certainty and stability of water rights." *Id.* The

matter was remanded to the Director for the purpose of applying the correct evidentiary standard to the existing record with "[n]o further evidence [] required." *Id.* Importantly, this Court also held that "[t]he decision of the Director to require A & B to take reasonable steps to move water from performing to underperforming areas are alternatively demonstrate physical or financial impracticability is affirmed." Clerk's R. 4. Notices of appeal to the Idaho Supreme Court were filed by A&B, the Department,[1] IGWA and Pocatello. No stay of proceeding was sought, and this Court directed the Department to comply with the remand instructions set forth in the Memorandum Decision. Clerk's R. 160. The Director followed the Court's instruction and issued his Final Order on Remand on April 27, 2011. R. 3469. It is from the Final Order on Remand that A&B now seeks judicial review.

Subsequent to the Director's Final Order on Remand, the Supreme Court issued its decision on the notices of appeal filed by A&B, IGWA and Pocatello on issues contained in this Court's Memorandum Decision and Memorandum Decision on Rehearing and held:

> We find that the Ground Water Act applies to the administration of A&B's water right 36-2080. We also find that the Director had substantial and competent evidence to support his decision not to set a reasonable groundwater pumping level and to analyze the water right on a system-wide as opposed to a well-by-well basis. In addition, we find that the district court did not err in imposing a clear and convincing evidence standard on the Director's determination of material injury in a delivery call. We therefore affirm the decision of the district court.

A&B Irr. Dist. v. Idaho Dept. of Water Resources, 284 P.3d 225, 249 (2012) ("*A&B v. IDWR*") (emphasis added).

III. STATEMENT OF FACTS

The United States Bureau of Reclamation ("USBOR") built the A&B irrigation project

[1] The Department later withdrew its appeal. Idaho Supreme Court *Order Granting Motion to Withdraw Notice of Appeal and Amended Notice of Appeal*, Docket No. 38382-2010 dated May 11, 2011.

and began to develop the groundwater resource on the Eastern Snake Plain Aquifer ("ESPA") in the late 1940s. R. 1111. A&B's irrigation system consists of two separate and distinct water supplies and irrigation systems. R. 1111–13. The A Unit is supplied by surface water rights delivered from the Snake River and the B Unit is a complex irrigation system supplied by groundwater rights. R. 1112. Only the B Unit 1948 priority groundwater right no. 36-2080 is the subject of the delivery call and at issue in this case. *Id.* A complete statement of the facts is contained in the prior briefing already before this Court and will not be repeated; excerpts of the fact section of the prior briefing are attached hereto as Appendix A and are incorporated herein.

In summary, despite claims of water shortage based upon an authorized maximum diversion rate of 0.88 inches per acre, (1,100 cfs) an amount that has never been delivered to every acre, evidence in the record shows that A&B's present need is less than its full decreed quantity. The maximum amount of water that A&B has actually diverted during the peak season was 0.76 miner's inches in 1963 and 1967. R. 3486, Ex. 155. The Director concluded with reasonable certainty "that A&B has the capacity to pump more water if it in fact needs more water." R. 3487. Therefore, the Director determined that A&B is not materially injured.

ISSUES PRESENTED ON APPEAL

1. Does the record support the Director's conclusion that A&B's water right was not materially injured? (A&B Opening Br. at 3 issue a., b., c., d., g.)

2. What did the Director do with the concept of full economic development? (A&B Opening Br. at 3 issue e.)

3. Did the Director's order go beyond the scope of the remand order? (A&B Opening Br. at 3 issue f.)

STANDARD OF REVIEW

Judicial review of the Director's Final Order on Remand is governed by the Idaho Administrative Procedure Act (IDAPA), title 67, chapter 52, 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). 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). In this case, the agency's decision was based on clear and convincing evidence, but that does not change this Court's duty: "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). "In other words, 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." *Urrutia v. Blaine Cnty., 134 Idaho 353, 357, 2 P.3d 738, 742 (2000)* (internal citations omitted).

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.
>
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

I.C. § 67-5279(3). Even if one of these conditions is met, this Court will still affirm the agency action "unless substantial rights of the appellant have been prejudiced." *I.C. § 67-5279(4). A&B*

v. IDWR, 284 P.3d at 23. If the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Id.*[2]

A&B as the appellant also bears the burden of documenting and proving its case on appeal. See *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999).

ARGUMENT

I. A&B Has Failed Preserve A Necessary Issue For Appeal And Has Also Failed to Comply With the Supreme Court's Directive Therefore A&B is Without a Remedy and the Appeal Should be Dismissed Suspended.

A&B has failed to meet threshold requirements to:

1) Interconnect its well systems as required by the Supreme Court in *A&B v. IDWR,* 284 P.3d at 337 (the Director properly applied the CM Rules by finding that A&B must interconnect individual wells or swell systems across the project before a delivery call can be filed.)

2) Have mechanisms in place to limit its delivery to the authorized number of acres under water right 36-2080: "Prior to seeking curtailment of junior-priority ground water users, A&B must have mechanisms in place to limit its place of use to the place of use for the calling water right." R. 3490.

3) Exercise use of all of its points of diversion: "Prior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion." R. 3490.

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[2] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding whether it be by a jury, trial judge, special master, or hearing officer - was proper. *See e.g. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473,478,849 P.2d 934,939 (1993).

Because A&B has not met these threshold requirements and has not appealed requirements 2 and 3 above, its appeal must be denied and the Director's Final Order on Remand affirmed. A&B's failures result in no viable remedy for A&B. A&B's only redress, if it were materially injured, is to curtail junior ground water users. Even if this Court found in A&B's favor and remanded the matter back to the Department, until A&B meets the above requirements, no administrative remedy is available as a matter of law A&B cannot obtain any relief. Therefore, determination of the issues in this case will have no impact on the outcome and the Court should dismiss the appeal. "A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. An issue is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Schools for Equal Education Opportunity v. Idaho State Board of Education,* 128 Idaho 276, 281, 912 P.2d 644, 649 (1996) (emphasis added). A judicial determination in this case will have no effect upon the outcome because A&B will need to take steps, regardless of this Court's decision, to remedy its diversion and delivery system. Thus, the appeal should be dismissed.

Alternatively, if the Court is inclined to allow A&B to continue with its appeal, an order suspending the appeal for good cause under Idaho Appellate Rule 13.2 should be issued with conditions that require A&B to meet these three requirements before the parties are forced to continue to brief these issues further. Good cause is met because any relief that A&B can obtain from curtailment is not available until A&B meets the above three requirements and requiring the parties to continue with this appeal is inefficient and a waste of judicial and private resources.

A. A&B Has Not Complied with the Requirement to Interconnect, and as Such is Without a Remedy, so Its Appeal Should be Dismissed.

In *A&B v. IDWR,* 153 Idaho 500, 284 P.3d 225 (2012), the Court reaffirmed the

Director's authority to evaluate the senior's use of water and whether the senior's water needs can be met by employing conveyance efficiencies or alternate means or points of diversion, concluding in that case that "the Director properly 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. *Id.* at 237. Indeed, while noting that some "uncertainty as to whether large portions of the project can be interconnected," the Court found that the Director acted within his discretion in determining that "there is an obligation of A&B to take reasonable steps to maximize the use of [interconnection] to move water within the system before it can seek curtailment or compensation from juniors." *Id.* at 239 (citing *AFRD2*). The Court also rejected A&B's argument that the Director's imposition of an interconnection obligation resulted in impermissible burden-shifting, stating that, "Idaho law does not explicitly state that interconnection is a condition of administration, but the CM Rules allow the director to consider reasonable diversion in his determinations." *Id.* at 241. The Court quoted verbatim the material factors in CM Rules 42.01.a – h. to support this ruling. *Id.*

B. A&B has Failed to Preserve a Necessary Issue to Its Current Appeal.

The Director's Final Order on Remand has two parts, one of which A&B has appealed. That portion states:

> IT IS HEREBY ORDERED that the Director concludes by clear and convincing evidence that A&B Irrigation District is not materially injured and its delivery call is DENIED.

The Directors Final Order on Remand also states:

> IT IS HEREBY FURTHER ODERED that prior to seeking curtailment of junior-priority ground water users, A&B must have mechanisms in place to limit its place of use to the place of use for the calling water right. Prior to seeking curtailment of junior-priority ground water users, A&B must exercise all of its appurtenant points of diversion.

A&B has not appealed the second part of the order and thus, has waived its appeal on that

portion of the order.[3] It is undisputed that A&B has no mechanism in place to limit its place of use to the place of use for the calling water right. Tr. Vol. III, p. 604, L. 7- p. 606 L. 4. It is likewise undisputed that A&B has not exercised the use of all 188 points of diversion. A&B cannot obtain any remedy from junior ground water users unless and until it complies with the second part of the Director's order and as such, any ruling in this matter is purely academic. A&B's appeal should be dismissed.

II. A&B's Argument that the Director is Without Authority to Review the Amount of Water Needed For Beneficial Use (or is Wasted) is Directly Contrary to This Court's Prior Orders and Binding Precedent.

In the event that the Court does not dismiss or suspend A&B's appeal as request above, the following arguments are offered in defense of the Director's Final Order on Remand. This brief will address A&B's main argument and its subparts which are set forth in is "Issues on Appeal" a., b., c., d., g.

A&B's main argument centers around its claim that the Director "unconstitutionally reduc[ed] A&B's decreed quantity by nearly 30%." A&B makes this claim on the erroneous and frivolous legal argument that is directly contrary to this Court's prior orders and Idaho Supreme Court precedent that the Director is without authority to examine the amount of water A&B needs and that the Director "must deliver [the decreed quantity] in administration" (A&B Br. at 9). A&B's blatant disregard for the law of the case and Supreme Court precedent is illustrated by the following subparts to its main argument and a comparison to this Court's holding in its May 4, 2010 Memorandum Decision and November 2, 2010 Memorandum Decision and Order on Petitions for Rehearing ("Memorandum Decision on Rehearing").

[3] It is possible to stretch A&B's argument regarding its 11 unused wells to say that is has appealed the second half of the second part of the order, however, if one reads A&B's arguments on pages 38-39 of its Opening Brief, it is really arguing the first part of the Director's Final Order on Remand that has to do with his material injury finding.

A&B's Argument	District Court's Prior Orders
The Director is without authority to determine the "water necessary to accomplish an authorized beneficial use" (A&B Opening Br. at 11). The Director must adhere to the quantity set forth in the water right, otherwise, "diversion rates are meaningless." (A&B Opening Br. at 13).	"The Court's Order does not conclude that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree. Rather, the Order concludes that the decreed quantity includes a quantitative determination of beneficial use resulting in a presumption that the senior user is entitled to that decreed quantity." (Memorandum Decision on Rehearing at 7).
The Director may not review what amount the landowners needs "to grow a crop to full maturity" but rather, if the farmer can use the decreed quantity, then they are entitled to that quantity, without regard to changes in irrigation practices, current needs, conveyance efficiencies or crop types. (A&B Opening Br. at 13-14). In other words, the water user has a "right to that full amount in administration." (A&B Opening Br. at 19).	"Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not required the full quantity decree.... Efficiencies... can result in a circumstance where the full decree quantity may not be required.... Conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water need to accomplish the purpose of use for which the right was decreed." (Memorandum Decision at 30, see too fn 11). "[I]n 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 decree 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." (Memorandum Decision on Rehearing at 8).
"Although a landowner's 'minimum need' will certainly change with cropping patterns, weather, precipitation, and other factors, that quantity does not set the standard for conjunctive administration" (A&B Opening Br. at 17, emphasis added) "a water user does not have two different entitlements to his decree quantity depending on whether or not a delivery call is in place." (A&B Opening Br. at 16).	"The Order contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full quantity. The Order holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty." (Memorandum Decision on Rehearing at 7) "It is apparent that water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if the waste occurs for the statutory period can waste forfeiture be asserted." (Memorandum Decision on Rehearing at 8).

This Court clearly understood in its Memorandum Decisions that the issue in a delivery call is the present amount of water needed by the senior user in order to meet its beneficial use.

Although A&B has been a party to three Supreme Court appeals that have rejected its argument, A&B has not yet grasped the difference between the adjudication of its water right and the administration or distribution of water to that water right. As evidenced by the contents of the table above, A&B is again seeking a determination that depletion equals injury, and that the Director's obligation is to simply administer to the decree—the "shut and fasten" administration rejected at every turn by IDWR and reviewing courts since the decision in *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 154 P.3d 433 (2007). ("*AFRD2*").

The law of the case doctrine has long been the rule in Idaho and requires that A&B proceed within "the rules of law as announced by the appellate Court in that particular case." *Creem v. Northwestern Mut. Fire Ass'n,* 58 Idaho 349, 352, 74 P.2d 702, 703 (1937). This Court served in an appellate capacity in A&B's first appeal,and A&B must adhere to this Court's prior rulings. A&B's arguments are wholly inconsistent with this Court's prior orders—and A&B failed to challenge these holdings from Court's prior orders on rehearing and also did not litigate these issues on judicial review at the Idaho Supreme Court. A&B is not entitled to either a factual or legal "do-over". Although IGWA's position is that A&B's arguments deserve no response—as they seek to re-litigate issues already decided by Idaho courts—the remainder of this brief will expand on the substantive problems with A&B's legal arguments. A&B's appeal of the Final Order on Remand should be rejected.

A. The Senior's Present Need for Water is What is At Issue in a Delivery Call.

The Idaho Supreme Court decision in *AFRD2*, specifically upheld the constitutionality of CM Rule 42 and confirmed that the Director has the duty to consider the senior's current use of and need for water when determining material injury in response to a water delivery call. Nonetheless, the overriding theme of A&B's Opening Brief is that because a court determined

that A&B could beneficially use its quantity (at one time in history), the Director must deliver that quantity without questioning whether that quantity is currently needed. A&B also argues that the Director is precluded from examining current irrigation methods that may show that a quantity that is less than the decreed quantity is sufficient.

Nothing in the Director's Final Amended Order prohibits A&B from delivering or diverting the full quantity on its water right of 1,100 cfs. In fact, as the record reflects, A&B has the pump capacity to deliver water in excess of the amounts historically delivered—it's simply a matter of pumping the wells longer and since A&B is an on-demand system,responding to requests from A&B farmers. R. 3487.

As a legal matter, A&B's arguments are inconsistent with the Final Order on Remand. The Director found that "A&B is entitled to the amount of its water right." R. 3481. The Director acknowledged that A&B was allowed to divert water from any of its wells or combination thereof to irrigate any land within its project, just as their water right was developed and intended. Notwithstanding, the Hearing Officer and the Director correctly concluded that "failure to secure the full extent of the authorized water right does not by itself constitute injury." R. 3482.

The Director may investigate the amount of water that is found to be "actually needed" even if it is less than the authorized maximum amount decreed in the senior water right.[4] In the *A&B v. IDWR* decision, the Idaho Supreme Court held that the clear and convincing evidence standard applies when making a determination of the amount of water presently needed by the

[4] The Director, when looking to his duty to administer ground water rights, is to not just look at the priority date of the senior user. Rather, the Director must equally guard all the various interests involved because "[w]ater [is] essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depend[s] upon its just apportionment to, and economical use by, those making a beneficial application of the same [thus], its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved." I.C. § 42-101 (underline added).

senior stating that the "changing conditions that result in there being insufficient water to provide the full amount that each appropriator is entitled under the appropriator's decree or license" makes administration of water in Idaho so difficult. 284 P.3d at 249. The import of this ruling is that the Director must exercise his discretion and, if he is convinced that the senior needs less water and there is substantial competent evidence in the record to support it, then he is not required to deliver to the maximum amount on A&B's decree, as A&B claims. In fact, the Director found that, because A&B has improved efficiencies and sprinkler irrigates 96% of its land, A&B's "need for water has decreased." R. 3474.

The Supreme Court decided in A&B's first appeal, that the senior is not guaranteed relief simply because its maximum quantity is not available. A&B's arguments here ignore the decision in *A&B v. IDWR* and long-standing Idaho case law supporting the legal principal that a water right quantity is an authorized maximum amount that can be diverted if it is available, but is not a guaranteed amount. *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589, 258 P. 532, 534 (1927) (an appropriator's right to use water ceases when his needs are supplied).

Idaho case law also supports the notion that a senior cannot demand the maximum quantity of water under his water right at all times:

> It is against the public policy of this state, as well as against express enactments, for a water user to take more of the water to which he is entitled than is necessary for the beneficial use for which he has appropriated it [...] Public policy demands that, whatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them.

Glavin, 44 Idaho at 589, 258 p. at 538. It is within the Director's authority and discretion to investigate how much water is needed by a calling senior water user to raise full crops and not blindly curtail junior users to fulfill a "paper" maximum at the senior's insistence.

In this case, the Director did not limit A&B's ability to use its water right. A&B is still allowed to divert 1,100 cfs from a combination of any of its 188 wells, although it has chosen to only use 177 wells. R. 3472. Further, the Director found that A&B can interconnect its well systems and has afforded A&B all presumptions in favor of the maximum flexibility for A&B under its senior water right. R. 3472, Clerk's R. 83-85. There was no improper reduction of any aspect of A&B's water right.

The Director concluded that A&B has not suffered material injury because A&B is not water short and has an adequate supply of water to meet its farmers' irrigation needs. This is not only corroborated by A&B farmer testimony, but also by surrounding farmers, and through METRIC ET data. R. 3478-80. The Director rationally concluded, based on overwhelming evidence, that "the higher consumptive use by crops on Item-G lands [those claimed to be short by A&B] supports the conclusion that A&B is not water short. " R. 3480.

B. The Material Injury Analysis Under the CM Rules Requires an Examination of A&B's Present Use, Application and Method of Diversion of its Water Right.

A&B's argument was already considered and rejected by this Court and the Idaho Supreme Court in *AFRD2* and *A&B v. IDWR*. The Director's Final Order on Remand (and subsequent orders) included conclusions of law that "injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42." R. 3485. A&B, as a party to the *AFRD2* case, previously objected to these conclusions and filed a lawsuit in district court seeking a declaratory ruling that the CM Rules, and CM Rule 42 in particular, were facially unconstitutional. A&B, among others, argued that the Director has no authority to evaluate the senior's use of water, conveyance efficiencies, etc. in response to a delivery call. The district court judge agreed, holding the material injury analysis set forth in CM Rule 42 to be

unconstitutional because it permits the Director to "re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call." *AFRD2* at 876.

However, the Idaho Supreme Court disagreed with A&B and held that CM Rule 42 is constitutional and that the Director has the duty and authority when responding to a delivery call to evaluate the senior's "system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion." *Id.* at 876. The Court explicitly rejected the notion that "when a junior diverts or withdraws water in times of shortage, it is presumed that there is injury to a senior," explaining that "a partial decree is not conclusive as to any post-adjudication circumstances," and that "even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use, and full economic development." *Id.* at 877. "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," the Court held, "we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* at 876; *see also, e.g., Id.* at 789 (rejecting the argument that holders of storage water rights are entitled to "insist on all available water to carryover in future years in order to assure that their full storage right is met (regardless of need)").

A&B again challenged the Director's authority to require it to use water reasonably and interconnect its well systems in order to secure its authorized maximum quantity because there was no such requirement in its decree – in other words, the Director must blindly deliver to A&B's decree without investigating its use of water. The Supreme Court in *A&B v. IDWR* rejected this notion and held that the "Director's discretion includes the ability to require

reasonable methods of diversion and application by a senior right holder." 284 P.3d at 240.

Yet, here A&B is again arguing that the Director must deliver to the face of its decree. The issue of A&B's maximum quantity entitlement is not what is at issue in a delivery call that was an issue before the adjudication court. The CM Rules define material injury as "impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law, as set forth in Rule 42." CM Rule 10.14 (emphasis added). The phrase "exercise of a water right" refers to the *use* of water. A water right is not a possessory right; it is a right to use water owned by the people of the state. *Coulsen v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24 (1924). The Idaho Constitution states, "Priority of appropriation shall give the better right as between those using the water." Idaho Const. art. XV, § 3 (emphasis added). Idaho Code section 42-104 reads, "The appropriation must be for some useful and beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases."

Accordingly, the material injury factors listed in CM Rule 42 go beyond a rote delivery of the quantity set forth in a decree and instruct the Director to consider "[t]he amount of water being diverted and used compared to the water rights." CM Rule 42.01.e (emphasis added). They also instruct the Director to determine whether the senior's water needs could be met without resorting to curtailment by using water more efficiently, implementing reasonable conservation practices, or changing its means of diversion. CM Rules 42.01.g and 42.01.h. Under the CM Rules, it is not enough to demonstrate material injury by showing only that the senior is receiving less than the maximum rate of diversion authorized under its water right. There must be evidence that the senior actually needs additional water to accomplish his or her beneficial use, and that those needs cannot be met with reasonable improvements to the senior's diversion

or conveyance system. *See A&B v. IDWR* 284 P.3d at 239, the Director's discretion in evaluating A&B's delivery call includes the ability to require reasonable methods of diversion and application by a senior right holder. A&B's argument that the Director must deliver to A&B's full amount is without legal foundation and must be rejected.

III. The Director's Order that A&B is Not Materially Injured is Supported by Substantial Competent Evidence and Should be Upheld

A&B's appeal is contrary to the law of the case and binding precedent and on that basis alone should be dismissed. However, if the Court is inclined to take up A&B's arguments and review the evidence that was before the Director when he issued his Final Order on Remand, the Director's actions should still be affirmed for the following reasons.

To prevail,A&B must show that the Director'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. Idaho Code § 67-5279(3). A&B must show that the agency erred in a manner specified in Idaho above and that a substantial right has been prejudiced. I.C. § 67-5279(4).[5] The findings of fact of the Director (or Hearing Officer) should not be disturbed by this Court, if the evidence is of such quantity or quality that reasonable minds could make the conclusion, not that one must make the same conclusion. *See Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653,

[5] A&B cannot show that a substantial right has been affected. It is the claimant's burden to demonstrate that a substantial right has been prejudiced. *Krempasky v. Nez Perce County Planning & Zoning*, 150 Idaho 231, 235, 245 P.3d 983, 987 (2010). Nowhere in A&B's Opening Brief does it specifically state what "substantial right" has been prejudiced. Even if one assumes that A&B has a substantial right involved, A&B has failed to show how that right has been prejudiced. A&B's only relief is to curtail junior users. However, under the *A&B v. IDWR* decision, until A&B interconnects at least a portion of its well systems, A&B cannot obtain any relief and therefore cannot demonstrate prejudice to a substantial right, so its appeal must be denied and the Director's Final Order on Remand affirmed.

657, 67 P.3d 1265, 1269 (2003). Therefore, the Director's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion he reached.

A. The Director's Final Order on Remand is Rationally Based and Supported by Substantial Evidence.

A&B argues that the Director's reasons for finding no material injury are "not supported by clear and convincing evidence." A&B Opening Br. at 38. A&B's request to have this Court reweigh the evidence to determine whether or not the findings are supported by clear and convincing evidence is beyond the standard of review of an administrative action. "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). Clearly erroneous means that a reasonable person would not have relied on the evidence to conclude as the fact finder did. *See CASI Foundation, Inc. v. Doe*, 142 Idaho 397, 399, 128 P.3d 934, 936 (2006).

A&B must demonstrate to this Court that the Director's findings of fact are not based on "substantial competent evidence" or are "clearly erroneous" and that his conclusions are not reasonably based thereon. A&B has not met, nor can it meet the threshold to overturn the Director's Final Order on Remand.

As the Final Order on Remand demonstrates, the Director understood that it was his responsibility to "supervise and control the exercise and administration of all rights to the use of ground waters" and apply the CM Rules to determine whether A&B was suffering from material injury caused by junior users. See I.C. § 237(a)g. A hearing was held and all parties had an

opportunity to submit evidence.[6] Based upon this information and evidence, the Director concluded that A&B was not suffering from material injury and denied A&B's requested relief that junior users be curtailed.

The Director's findings, inferences, conclusion and decisions are based on facts in the record that show 1) A&B has an adequate water supply and that A&B is not water short, 2) A&B's groundwater farmers use more water than other private groundwater farmers in the area and have increased their yields over the years, 3) A&B's delivery policies and practices promote inefficiencies, and 5) A&B has expanded its irrigated acres and continues to provide water to these additional lands. The bottom line in this appeal is whether or not the Director's Final Order on Remand is supported by substantial competent evidence.

B. A&B Has an Adequate Water Supply, Is Not Water Short and A&B Farmers Use More Water Than Surrounding Private Farmers

The evidence showed that A&B was not water-short and that A&B has not historically ever pumped 1,100 cfs at any one time nor did it provide the maximum diversion quantity under its water right (0.88 inchers per acre) to every acre within its project. Evidence in the record supports the conclusion that A&B's B Unit farmers have been able to use the amount of water needed to raise crops, meet their long-standing contracts, and that they exceed the crop water requirements of adjacent farmers by 1 acre-foot per acre. Tr. Vol. X., p. 2069, L. 1-7; Vol., X., p. 2040, L. 31- p. 2041, L. 8. Exhibit 111 shows that surrounding surface water user Twin Falls Canal Company's rate of delivery is 5/8 per inch or 0.625 inches which is less than A&B's delivery rate of 0.75 inches and certainly less than their "maximum rate of 0.88 inches per acre"

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[6] A&B's complaint that the Director cannot "carry" the junior's burden is surprising, given the overwhelming evidence in the record. Regardless of where the evidence came from or who produced it, this Court's review is limited to the agency record created and A&B didn't object to including Department "created" evidence in the record. Therefore, all the evidence can be relied upon by the Director and this Court to demonstrate that there is substantial competent evidence in the record.

that they claim they are entitled to. R. 3107.

IDWR's analysis, as supported by testimony from area farmers, shows that A&B's B Unit farmers use the same or more water to raise the same or similar crops as the lands surrounding the B Unit. IDWR's evapotranspiration analysis shows that the water deliveries within the B Unit were the same or similar as those surrounding lands. Mr. Kramber's testimony shows, as determined by the Director in his analysis, that the lands identified by A&B as water short simply are not short of water. Tr. 1101-1102 and p. 1112, L. 12-19 and p. 1113, L. 7-12 and p. 1135, L. 22 – p. 1136, L. 12 along with Ex. 427-10, 427-11 and 427-12. This technical evidence is further supported by the testimony of A&B's witnesses and the Ground Water Users' witnesses that show that private farmers outside A&B use roughly 2 acre-feet per acre, while the average use by A&B farmers is about 3 acre-feet per acre. Ex. 574 at 12; Tr. Vol. X., p. 2135, L. 18-25; Tr. Vol. X., p. 2088, L. 23- p. 2089, L. 11. Further, A&B's delivery policies promote inefficiencies. Id. and Tr. Vol. IV., p. 657, L. 22- p. 658, L. 2; Tr. Vol. X., p. 2075, L. 11 – p. 2076, L. 18; Tr. Vol X. p. 2135, L. 5-8. Despite their claims shortage, A&B's farmers have increased their production and exceed county averages for crop yields. *cf.* Ex. 357 and 355A, and 358.

Exhibit 159 was used to show an array of information, including those lands that A&B has converted to surface water irrigation and the various wells that A&B claims are water short. These water short areas are, in many cases, in close proximity to other wells or well systems that have a surplus supply. Ex. 415, 416; R. 2906. Other allegedly water short well systems outside the southwest area are also in close proximity to wells or well systems that have ample water. Exhibit 481 shows that interconnecting some of these well systems is possible; yet, A&B has not even requested that such an evaluation be done. Tr. Vol. IV, p. 704, L. 8-13. Rather, A&B

wants to demand that junior groundwater users be curtailed in order to guarantee A&B some undefined historic ground water level.

The Director found that the available water supply available to A&B was adequate, that the amount of water that A&B diverts meets or exceeds the beneficial use of irrigation, and that A&B has not exercised all reasonable means of accessing the supply using the multiple options and flexibility afforded it under water right no. 36-2080. As such, the Director determined that there is no material injury. These conclusions and findings are supported by substantial and competent evidence in the record.

C. A&B Water Right Quantity Was Based on Flood Irrigation Methods, 96% of A&B's Project is Now Watered by Sprinklers Which Requires Less Water

The Director's Final Order on Remand found that "by 2005, 96 percent [of the A&B project] is irrigated by sprinkler. R. 3477. This finding is supported by Exhibits 155, 349-353, 406 and 407, Ex. 427 at 16 and Tr. Vol. III. P. 618, L. 22-24. The Director further found that "reductions in peak water use by A&B, over time, reasonably parallels its conversion from predominately flood irrigation to predominately sprinkler irrigation, and its improvements in irrigation efficiency." R. 3477. The conversion to sprinklers has reduced the per acre water requirement by 19.6 percent. R. 3478. And, "[d]ue to efficiency measures, A&B's percent reduction in water use is similar to surrounding surface water providers." *Id.* The Director therefore concluded with reasonable certainty that the amount of water required under 36-2080 was less than the decreed quantity. R. 3487.

A&B's claim that it must have its maximum amount at all times at every well is contrary to the facts. Furthermore, A&B's historical diversion records show that it has never approached the 0.88 miners inches per acre per well that it is currently demanding. Ex. 155A; Ex. 476; FF36-37; Luke, Tr. Vol. VI., p. 1176, L 12 – p. 1177, L. 13; p. 1184, L. 1-24. The facts show that

A&B has diverted roughly 3 acre-feet over time, confirmed by an engineering report from CH2M Hill done at A&B's request. Ex. 574 at 12; *see also* Ex. 407 and 408. Three acre-feet was the intended delivery when the project was designed.

IGWA adopts the arguments in Pocatello's brief on pages 20-22 in response to A&B's claim that the Director reduced its water right to .65 cfs per acre.

D. A&B Continues to Deliver Water to Enlargement Acres

Of particular note, A&B continues to serve junior acres within its system and its farmers are able to raise crops on expansion or water spread acres, despite A&B's claims of water shortage. A&B's own Exhibits 229A-O; 230-B-N; Ex. 231B-F; 234B-J all show that the members who claim to be water short continue to spread their water on expansion and enlargement acres that were not originally intended to be irrigated under water right no. 36-2080. In other words, water right no. 36-2080 now provides water to 2,063 more acres than it was historically developed to serve. Ex. 405, 406 and 407. While A&B complains that per-acre delivery is critical, A&B doesn't even track where the junior or enlarged acres are located. D. Temple, Tr. Vol. IV. p. 669, L. 10-22. As a result, when there is a shortage on a well or well system, A&B does not require that the junior acres curtail to keep the original lands at a higher per acre rate. Tr. Vol. IV. p. 675, L. 20-25 and Ex. 366 (showing that delivery to junior acres decreases the per acre delivery amount by up to 0.04 inches). As the Supreme Court noted, "[i]f water supply was an issue for A&B, it seems unlikely that they would continue this practice." *A&B v. IDWR*, 284 P.3d at 241. The Director also concluded that "[b]efore seeking curtailment of junior-priority ground water rights under 36-2080, A&B must have mechanisms in place to self-regulate its junior and subordinated enlargement acres." R. 3485. The Director concluded "with reasonable certainty" that if A&B limited its irrigation under 36-2080 to the 62,604.3

acres, it would satisfy A&B's own stated "criteria" contained in its Motion to Proceed. R. 3486.

While A&B argues that the Director applied some erroneous standard to its delivery call, the Director actually determined that A&B was not suffering any water shortages as verified through information supplied by A&B, analyzed by IDWR, and confirmed by lay witness testimony. If a senior user doesn't need more water, then it logically follows that there can be no material injury. In this case, the Director's application of the CM Rules to the evidence in the record shows and the Director's findings are not clearly erroneous and are based on substantial competent evidence that A&B is not suffering material injury and therefore the Director's Final Order should be affirmed.

IV. The Director's Final Order on Remand is Not Based on a Full Economic Development Analysis.

A review of the Director's Final Order on Remand fails to substantiate A&B's contention that the Director "applied" a full economic development analysis to deny A&B's delivery. Rather, the Director concluded that A&B was not using a reasonable means of diversion: "Requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to the full economic development of the State's water resources" (R. 3487), "not fully utilizing its capacity to divert water" R. 3487, *see also* R. 3488. Thus, A&B's claim in issue e. and on pages 21-24 of its opening brief are entirely nonsensical and certainly not based on any rationale contained in the Director's Final Order on Remand.

V. The Director's Order is Within the Scope of the Remand

The Director clearly understood his duty to evaluate whether or not A&B was entitled to the quantity reflected in the decree and, if not, he was to be certain that the evidence showed with a high probability that the full quantity was not or would not be put to beneficial use. R. 3486-88. As part of the remand, this Court instructed the Director that, when making a determination

that a portion of a decreed water is not being put to beneficial use, "waste" was part of that analysis and must be supported by clear and convincing evidence. Clerk's R. 78. Thus, A&B's argument that the Director could not find "waste" of its water right is without basis. A&B Opening Br. at 3 and 5. IGWA adopts the arguments made in Pocatello's brief on pages 15-17. in response to A&B's argument regarding this issue.

REQUESTS FOR ATTORNEYS FEES

IGWA has incurred attorneys fees because of A&B's decision to ignore the law of the case in this matter and binding precedent. Idaho Code § 12-117 allows for an award of attorneys fees "in any proceeding involving as adverse parties a state agency or a political subdivision and a person," so long as "the nonprevailing party acted without a reasonable basis in fact or law," including judicial review of agency decisions.[7] I.C. §12-117(1). A prevailing party is determined by the Court under I.R.C.P. 54(d)(1)(B), which provides that "[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties."

A&B's Opening Brief raises issues that it either litigated and lost in the first appeal or that have already been decided by this Court or the Idaho Supreme Court in cases where A&B was a party. A&B has not provided the Court with "a reasonable basis in fact or law" and cannot prevail in this appeal. The Court affirm the Director's Final Order on Remand and find that IGWA is a prevailing party in this matter and award attorneys fees and costs to IGWA accordingly.

[7] Senate Bill No. 1332 amended I.C. section 12-117(1) effective March 27, 2012.

CONCLUSION

A&B cannot prevail in this matter. The Court should dismiss the appeal for mootness or suspend the appeal until A&B has interconnected its well systems, established mechanisms to limit the delivery of water to the number of acres authorized under the calling water right, 36-2080, and uses all 188 authorized points of diversion.

The Court should affirm the Director's Final Order on Remand because A&B has failed to establish prejudice to a substantial right and/or because the Director's Final Order on Remand is well-reasoned, grounded in a full record, and supported by substantial competent evidence. The facts in the record support the Director's conclusion that A&B has not suffered material injury. The Court should decline to weigh or re-examine the substantial and competent evidence that establishes the facts supporting the Director's conclusions.

DATED this 15TH day of February, 2013.

RACINE OLSON NYE
BUDGE & BAILEY, CHARTERED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of February, 2013, I served a true and correct copy of this document on the persons listed below in the manner(s) indicated.

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APPENDIX A

evidentiary standard when evaluating material injury. Clerk's R. Supp. Ex., *City of Pocatello's Brief in Support of Rehearing*, June 29, 2010. The district court denied the relief sought by IGWA and the City of Pocatello and entered a Decision on Rehearing on November 2, 2010, concluding that "the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof." Clerk's R. 124. This issue of law regarding the proper standard is the single subject of IGWA's appeal.

C. Statement of Facts

The United States Bureau of Reclamation ("Bureau") built the A&B irrigation project and began to develop the groundwater resource on the ESPA in the late 1950s. R. 1111. The Bureau secured a water right license with a priority date of September 9, 1948, for use by A&B farmers. Ex.157B (Ex. 157 at 4181). A&B's 1948 priority date groundwater right is senior to virtually all other groundwater rights that use water from the ESPA.

A&B's irrigation system consists of two separate and distinct water supplies and irrigation systems. R. 1665. The A Unit is supplied by surface water rights delivered from the Snake River and irrigates approximately 15,000 acres. *Id.* The B Unit is a complex irrigation system supplied by groundwater rights and irrigates over 66,600 acres. *Id.* Only the B Unit 1948 priority groundwater right is the subject of the delivery call and at issue in this appeal. R. 1105.

A&B's groundwater right is unique because the 1,100 cfs quantity can be used on any of the B Unit lands and can be diverted from any or all of its 188 points of diversion. Tr. Vol. VI, p. 1160, L. 2 – p. 1161, L. 9. This was intentional and at the Bureau's specific insistence. In its Definite Plan Report dated February 1955, the Bureau explained its intent for this water right and its use:

> In the best interest of the Division as a whole, the permit [for the groundwater right that will become water right 36-2080] is upon the basis that all the wells will, as a group, be appurtenant to all the lands of the entire Division, rather than being made appurtenant to a particular parcel of land. This would permit a more satisfactory distribution of water to lands and maximum over-all development.

Ex. 111A at 73. When evaluating the licensing of A&B's water right, the Department questioned the Bureau's intent and asked for a land list that would be served by each well. Ex. 157 at 4398. In response, the Bureau made it clear that it wanted the water right licensed in order to provide for the greatest amount of flexibility in distributing water throughout the project and did not want to tie any well to any particular parcel of land. The Bureau's response letter said in part:

> Your letter ... also asked for a list of lands.
>
> We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, pending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.

Ex. 157D (Ex. 157 at 4396); R. 3094. To support this "integrated" system, the rate of diversion for the right is also in the cumulative and does not ascribe any rate of diversion to any particular well. Exs. 139 and 157A (Ex. 157 at 3772).

Water right no. 36-2080 has since been "partially decreed" in the Snake River Basin Adjudication ("SRBA") to the Bureau in trust for beneficial use by A&B landowners. R. Ex. 139. See *United States* v. *Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). After the entry of the partial decree, water right no. 36-2080, at A&B's request, was subject to a transfer proceeding before IDWR. Ex. 157A (Ex: 157 at 3772-3801). The approved transfer continues to allow for the use of the 1,100 cfs on any of the B Unit lands and approved an additional 11 wells, thus allowing A&B to use up to 188 wells. Ex. 157A (Ex. 157 at 3773-79). Yet, A&B

operates only 177 wells to provide irrigation water to its members to irrigate approximately 66,600 acres under its water right and 4,000 additional acres under A&B's beneficial use and enlargement water rights. R. 1113; Exs. 406 and 407; Tr. Vol. III, p. 503, L. 19 - p. 504, L. 8. While the water right allows for maximum flexibility and interconnection, not all the well systems are interconnected, rather, the B Unit continues to be comprised of 130 independent well systems. Ex. 200 at 3-26; Tr. Vol. III. p. 614, L. 10-16.

A&B claims water shortage because it cannot divert the authorized maximum diversion rate of 0.88 inches per acre on every acre within its boundaries, even though in the entire history of A&B, that amount has never been delivered to all its acres even for one day, Tr. Vol. III, p. 632, L. 10 – p. 634, L. 23. "Going back at least to 1963 it does not appear that there was a time when all well systems could produce 0.88 miner's inches per acre." R. 3108, Tr. Vol. VIII, p. 1667, L. 20 – p. 1671, L. 3.

Furthermore, evidence presented by A&B's own witnesses contradicts its allegations of shortage. A&B farmers testified that they meet their producer contracts for potatoes, sugar beets and barley. Tr. Vol. IV, pp. 826-828; Tr. Vol. V, pp. 1027-1030; Tr. Vol. V, pp. 907-908; Tr. Vol. V, p. 994; R. 2907 – 09. The cross examination of A&B farmer witnesses Adams, Eames, Kostka and Molhman clearly established no verifiable evidence of any fallowed ground or unharvested crops. Tr. Vol. IV, p. 722, L. 13 – p. 723, L. 12, Tr. Vol. V, p. 905, L. 23 – p. 906, L. 11, Tr. Vol. V, p. 985, L. 12 – p. 986, L. 4, p. 989, L. 4-12, p. 992, L. 15-25, p. 993, L. 6-21. And, their crop yields have increased steadily over the years and exceed the county averages. *cf.* Exs. 355A and 358 with 357 (two of A&B witnesses' crop yields as compared to the Minidoka County averages). A&B farmers have had a steady and reliable headgate delivery of 3 acre-feet per acre which exceeds the crop water requirements of adjacent farmers who only use 2 acre-feet

per acre. Tr. Vol. X, p. 2069, L. 1-7, p. 2088, L. 2-11, p. 2121, L. 19 – p. 2122, L. 6, p. 2138, L. 12-16, p. 2138, L. 17 – p. 2139, L. 13. Evidence in the record also shows that "crops could be grown and that the lands in question were in no worse condition than the surrounding areas." R. 3104; Tr. Vol. VI p. 1104, 1106-1108 (Department's analysis of evapotranspiration); see also, Tr. Vol. X, pp. 2088, 2138, and 2074-2076, 2089-90. "The evidence indicates that farmers outside the A&B project are often able to raise crops to full maturity on less water than is used on the Unit B lands." R. 3106; Tr. Vol. X, pp. 2074-2076, 2090; Tr. Vol. V, p. 1070. The A&B actual delivery rate of 0.75 cfs is "higher than nearby surface water users." R. 3107; Tr. Vol. V, p. 1070 - p. 1071, L. 2, Vol. X, p. 2036. "Crops may be grown to full maturity on less water than demanded by A&B in this delivery call." R. 3107.

Further, despite claims of water shortages, A&B developed and continues to irrigate over 4,000 additional acres with its 177 wells. Exs. 406 and 407; Tr. Vol. III, p. 503, L. 19 – p. 504, L. 8. These 4,000 acres are in addition to what is authorized in A&B's water right no. 36-2080. *Id.* This increase in irrigation is driven in part from improved efficiencies within the A&B system such as the conversion from flood to sprinkler irrigation. *Id.*

Although the Bureau knew at the time when choosing the location of the B Unit project that the southwest area would have lower well yields. Ex. 123 at 1170-74; Ex. 152QQ, Tr. Vol. IX, pp. 1765-1767. The Bureau predictions were proven correct and improvements in water supply in the southwest area are less feasible due to hydrogeology problems, not outside junior groundwater pumping, and as a result A&B has converted some lands to surface water. Ex. 215; Tr. Vol. III, p. 566, L. 11- p. 567, L. 2, Vol. IV, p. 683, L. 6-11, p. 691, L. 7-9, p. 703, L. 11-13. Like any irrigator, A&B throughout its history has needed to replace worn or failing pumps, motors and well equipment, deepen existing wells, and drill new wells. R. 1132-34. A&B has

also eliminated drains and open ditches, interconnected some well systems, and shifted land from less productive well systems to more productive well systems. R. 1131-33. The evidence is overwhelming that A&B's efforts to improve water supply in its project have and continue to be successful in maintaining reasonable and adequate water supplies to raise full crops, as readily admitted by A&B's manager Dan Temple. Tr. Vol. IV. p. 664, L. 5-17, p. 667, L 14 – p. 668, L. 5; Ex. 414 and 427-9. The associated costs incurred to continue to operate the system successfully were normal, expected and consistent with operational expenses incurred by farmers outside the A&B system. Even A&B's own consultant agrees that this case is not about water shortage, but simply about costs of operating and maintaining their system. Tr. Vol. VI., p. 1306, L. 19-23; Tr. Vol. IV, p. 757, L. 15 – p. 758, L. 6.

In sum, the Agency Order concluded that A&B farmers were not short of water; that there was an adequate water supply available to A&B, R. 1117- 1120 and 3110; that its farmers used the same or more water to irrigate their crops than surrounding farmers, R. 3107; that any water supply issues in the southwest area were not due to junior groundwater pumping but were due to the local hydrogeology, R. 1128-1130 and 3113; and, therefore there was no injury to A&B's water right. R. 1150-51 and 3322-23.

II. IGWA'S ISSUE PRESENTED ON CROSS-APPEAL

For purposes of water right administration under the CM Rules when the Director is evaluating whether there is material injury, did the District Court err in remanding the matter to the Director to require his evaluation be made under a clear and convincing evidence standard instead of a preponderance of the evidence standard?