

3. On June 1, 2011, the Director entered an *Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he ordered that A&B's *Petition for Reconsideration* be granted "for the sole purposes of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.1. The *Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 9, 2011." *Id.*

4. On June 9, 2011, the Director entered an *Amended Order Granting Petition for Reconsideration to Allow Time for Further Review* in the administrative proceeding, wherein he again granted A&B's *Petition for Reconsideration* "for the sole purpose of allowing additional time for the Department to respond to the Petition." *Second Bromley Aff.*, Ex.2. The *Amended Order* further provided that "an order responding to the merits of the Petition shall issue no later than June 30, 2011." *Id.*

5. On June 27, 2011, Petitioner A&B Irrigation District ("A&B") filed a *Petition for Judicial Review* in the above-entitled district court seeking judicial review of the *Final Order*. The case was reassigned by the clerk of the court to this Court on June 27, 2011.

6. On June 30, 2011, the Director entered an *Order Regarding Petition for Reconsideration* as well as an *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* ("*Amended Final Order*") in the administrative proceeding. By its terms the *Amended Final Order* purported to supersede the *Final Order*.

7. On July 7, 2011, IDWR filed a *Motion to Dismiss* in the above-captioned action, requesting that this Court dismiss A&B's *Petition for Judicial Review*. The basis of IDWR's *Motion* is that the *Final Order* from which judicial review was taken by A&B has been superseded by the *Amended Final Order* and therefore is not ripe for review. In support of its *Motion to Dismiss*, IDWR filed the *Affidavit of Chris M. Bromley*.

8. On July 21, 2011, A&B filed its *Response* to IDWR's *Motion to Dismiss* as well as a *Motion to Strike*. A&B's *Response* asserts that the *Final Order* is a final order from which judicial review may be sought, and that the Director lacked the authority to issue, among other things, the *Amended Final Order*. A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.

9. IDWR filed its *Response* to A&B's *Motion to Strike* on July 26, 2011, and its *Reply* in support of its *Motion to Dismiss* on August 2, 2011. With its *Reply*, IDWR filed the *Second Affidavit of Chris M. Bromley*.

10. Oral argument on the *Motion to Dismiss* and the *Motion to Strike* was held before this Court on August 4, 2011.

II. ANALYSIS

A. Motion to Dismiss.

The Department argues that A&B's *Petition for Judicial Review* should be dismissed as a matter of law because the Director's *Final Order*, which A&B seeks judicial review of, has been superseded by the Director's *Amended Final Order* and is no longer ripe for review. A&B argues in response that the Director's *Final Order* is the only order from which judicial review may be taken in this case. A&B asserts that the Director's subsequent *Amended Final Order* is *ultra vires* and void due to the Director's failure to comply with the timeframes set forth in Idaho Code § 67-5246.

The case involves the interpretation of Idaho Code § 67-5246. When interpreting a statute, a court's primary objective is to derive the Legislature's intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Therefore, statutory interpretation begins with the literal language of the statute. *Id.* If the statutory language is unambiguous, this Court need not engage in statutory construction and should apply the statute's plain meaning. *Id.* In other words, "[a]n unambiguous statute must be given its plain, usual, and ordinary meaning." *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006). On the other hand, if the statutory language is ambiguous, a court must examine the proffered interpretations "and consider the context in which [the] language is used, the evils to be remedied and the objects in view." *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). A statute will be regarded as ambiguous if the language of the statute is capable of more than one reasonable construction. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). Statutory provisions should not be read in isolation but instead are interpreted in the context of the entire document. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). All sections of applicable statutes must be construed

together so as to determine the legislature's intent. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2008).

Idaho Code § 67-5246 governs final orders and the effectiveness of final orders issued by administrative agencies under Idaho's Administrative Procedure Act, I.C. § 67-5201, *et al.* ("IDAPA"). It provides in pertinent part as follows:

(4) Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or

(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

I.C. §§ 67-5246(4) & (5) (emphasis added). IDWR regulations include similar language. IDAPA 37.01.01.740.02(a) ("The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.") (emphasis added).

A&B and the Department propose differing interpretations of the term "disposed of" as used in I.C. §§ 67-5246(4) & (5). A&B interprets the term as requiring that the agency head decide the merits of a petition for reconsideration of a final order via the issuance of a written order within 21 days of its filing. It is A&B's position that if the merits are not decided within that timeframe, operation of law works to deny the petition under I.C. § 67-5246. Consistent with its position, A&B argues that in this case its *Petition for Reconsideration* was denied via operation of law on June 1, 2011 (i.e., 21 days following its filing) when the Director failed to issue a written opinion deciding the merits of the *Petition* on that date. A&B further contends that the Director's *Amended Final Order* is void and *ultra vires* as it was entered after (1) its *Petition for Reconsideration* was deemed denied via operation of law; and (2) its *Petition for*

Judicial Review was timely filed with the district court seeking review of the Director's *Final Order*. A&B contends the Director lacked authority to issue his *Amended Final Order* subsequent to the statutory denial of the *Petition for Reconsideration* and its filing of a timely *Petition for Judicial Review* of the *Final Order* with the district court.

The Department contends that A&B interprets the term "disposed of" too narrowly. It argues the term does not require an agency head to decide the merits of a petition for reconsideration within 21 days. Rather, that it simply requires the agency head to accept or deny the petition within that timeframe. It is the Department's position that when an agency head accepts a petition for reconsideration within 21 days of its filing via the issuance of a written order, the agency head can then take further actions beyond the prescribed 21 day timeframe, such as enter orders regarding briefing schedules, oral argument dates, and/or set other proceedings on the petition as necessary. In this case the Department asserts that the Director timely "disposed of" A&B's *Petition for Reconsideration* on June 1, 2011 when it entered its *Order* granting the *Petition* "for the sole purposes of allowing additional time for the Department respond to the *Petition*."

This Court finds the term "disposed of" as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a) to be ambiguous. The term is not a defined term under IDAPA and the Court finds that reasonable minds might differ as to its interpretation, making it subject to conflicting interpretations. Where a statute governing an administrative agency is ambiguous, the level of deference that should be granted the agency interpretation is determined under the four prong test announced by the Idaho Supreme Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n*:

[1] The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law.

[2] The second prong of the test is that the agency's statutory construction must be reasonable....

[3] The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue....

[4] If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.

J.R. Simplot Co. v. Idaho State Tax Comm'n, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

The first prong of the test is met in this case as the Department is entrusted to administer Idaho Code § 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it. The second prong is met since as the Department's interpretation is reasonable. The Department points out, and this Court agrees, that the substance and content of petitions for reconsideration can vary significantly. Some are simple and some are complex. Most that deal with the administration of groundwater pursuant to a delivery call fall under the latter category. With respect to those petitions that raise complex issues, this Court does not read I.C. § 67-5246 as prohibiting the agency head from issuing a briefing schedule, and scheduling an oral argument, which may extend past 21 days of the filing of the petition so long as the agency head acts upon the petition within the 21 day period by issuing a written order granting the petition. A&B's interpretation is unreasonable and would lead to absurd results in this respect in that if there is a scheduling conflict wherein the agency head cannot, for whatever reason, have briefing, oral argument, and a written opinion completed within the 21 day period, the agency head would simply be forced to issue a written opinion addressing the merits without the benefit of briefing and/or oral argument. An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. *Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 328 (1993). The Department's interpretation is reasonable in that it allows the agency the time to take the steps necessary to adequately consider and respond to a complex motion for reconsideration should the agency head decide to accept it.

Since the term "disposed of" is undefined, and subject to conflicting interpretations, the third prong of the test is met. Last, the fourth prong of the test is met in this case. One of the rationales underlying deference is that the agency interpretation is "practical." *Canty v. Idaho State Tax Commission*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). The Idaho Supreme Court has instructed that this rationale "refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." *Id.* As a practical matter the Department's interpretation makes sense in that it is not always possible or practical for an agency head to have to rule on the merits of a petition for reconsideration with 21 days of filing, especially where the agency head desires further

briefing to be submitted and oral argument on the issues raised. The alternative result would undermine any meaningful opportunity to have the agency head consider the merits of a petition for reconsideration. Therefore the Department's interpretation is a practical interpretation of the statute. Another rationale asks whether the agency has expertise. In this case, the Department has expertise in the field of water law and delivery calls, which is the subject matter of the *Petition for Reconsideration* in this case. Therefore, several rationales underlying deference are present in this case and application of the *Simplot Test* weights in favor of deference to the agency interpretation.

The Department's interpretation is also consistent with one of the leading commentaries on Idaho's Administrative Procedure Act, which provides as follows:

An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. The APA's provisions for contested cases incorporate this principle by explicitly authorizing petitions for reconsideration. Regardless of the kind of order, the presiding officer has authority to entertain petitions for reconsideration of the order if the petition is filed within fourteen days of the issuance of the order. While the filing of a petition for reconsideration is not a prerequisite to administrative or judicial review of the order, the officer who issued the order will have greater familiarity with the factual and legal issues than will other potential decision makers. It is therefore far more efficient for all parties to have that officer reconsider the order, particularly when minor or technical problems arise.

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied. *It is not necessary, however, that the officer decide the issues presented by the petition within twenty-one days; it is only necessary that the petition be accepted, which can be accomplished through notification of the parties that the officer will reconsider the order.*

Dale D. Goble, Michael S. Gilmore, The Idaho Administrative Procedure Act: A Primer for the Practitioner, 30 Idaho L. Rev. 273, 328–29 (1993) (emphasis added).

The Department's interpretation is further consistent with the written explanatory comments that accompany the Idaho Rules of Administrative Procedure of the Attorney General:

In Rules 720, 730 and 740, the presiding officer has twenty-one days to act on a petition for reconsideration. But granting reconsideration is not the same as issuing the final decision following reconsideration. Reconsideration can be granted by issuing an order that says, "The petition for reconsideration is granted," then proceeding to schedule further hearings, briefing, etc., on reconsideration.

Idaho Administrative Procedure Act with Comments and Idaho Attorney General's Model Rules of Practice and Procedure, Written Comments to Rules 710 through 789 (effective July 1, 1993). A copy of the pertinent Written Comments is attached hereto as Exhibit A.

Therefore, for the reasons set forth herein, this Court finds that A&B urges this Court to accept too narrow a reading of the term “disposed of” as used in I.C. § 67-5246 and IDAPA 37.01.01.740.02(a). The Court holds that the “disposed of” language of I.C. § 67-5246 does not require that an agency head issue a written decision deciding the merits of a petition for reconsideration within 21 days.

B. Motion to Strike.

A&B's *Motion to Strike* requests that this Court strike the *Affidavit of Chris M. Bromley* on the grounds that it is immaterial to this proceeding.¹ The decision to grant or deny a motion to strike is left to the sound discretion of the district court. *See e.g., Mallonee v. State*, 139 Idaho 615, 623, 84 P.3d 551, 559 (2004) (“whether the district court erred when it granted the motion to strike is reviewed on appeal under an abuse of discretion standard”).

In this case, the entirety of the *Affidavit of Chris M. Bromley* consists of two attachments. Attached as Exhibit A to the *Affidavit* is a copy of the Director's June 30, 2011 *Order Regarding Petition for Reconsideration*. Attached as Exhibit B to the *Affidavit* is a copy of the Director's June 30, 2011 *Amended Final Order*. A&B's *Motion to Strike* is premised and relies upon the same arguments and rationale that it set forth in its *Response* to the Department's *Motion to Dismiss*. Namely, that the Director lacked the authority to issue the *Orders* attached as Exhibit A and B to the *Affidavit of Chris M. Bromley*. Since A&B's arguments in this respect have been rejected by the Court for the reasons stated above, the basis for its *Motion to Strike* must likewise be rejected. Therefore, this Court finds A&B's *Motion to Strike* to be unavailing.

C. A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.

A&B asserts that if the Court determines to grant the Department's *Motion to Dismiss*, then it should be permitted to amend its *Petition for Judicial Review* to seek judicial review of

¹ The Court notes that A&B did not move to strike the *Second Affidavit of Chris M. Bromley* filed on August 2, 2011 in the above-captioned matter.

the Director's *Amended Final Order*. This Court agrees. Since Idaho Rule of Civil Procedure 84 does not address the amendment of *Petitions for Judicial Review*, this Court looks to the Idaho Appellate Rules for further guidance. I.R.C.P. 84(r). Idaho Appellate Rule 17(m) provides as follows:

In the event the original notice of appeal erroneously states any of the information and requirements of this rule or additional facts arise after the filing of the initial notice of appeal, the appellant may thereafter file an amended notice of appeal correctly setting forth the facts and information. The amended notice of appeal shall indicate changes from the original notice of appeal by means of strikethroughs and underlining. An amended notice of appeal shall be filed with the clerk of the district court in the same manner as the original notice of appeal but no filing fee shall be required. If the original notice of appeal was timely filed from an appealable judgment, order or decree, the amended notice of appeal will relate back to the date of filing of the original notice of appeal. If the amended notice of appeal includes a request for preparation of additional transcripts, the notice must include an estimate of the number of additional pages requested and a certification that the amended notice has been served on each reporter of whom a request for additional transcript is made.

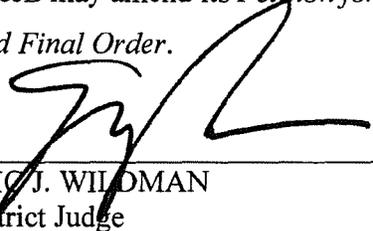
This Court holds that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order* pursuant to I.A.R. 17(m). The *Amended Petition for Judicial Review* will relate back to the to the date of filing of the original *Petition for Judicial Review* and will be treated as a premature filing of a *Petition for Judicial Review* that became valid upon the Director's issuance of the *Amended Final Order*. I.A.R. 17(c)(2).

III.

ORDER

1. Based on the forgoing, it is hereby ordered that the Department's *Motion to Dismiss is granted*.
2. It is hereby further ordered that A&B's *Motion to Strike is denied*.
3. It is hereby further ordered that A&B may amend its *Petition for Judicial Review* to seek judicial review of the Director's *Amended Final Order*.

Dated August 11, 2011.


ERIC J. WILOMAN
District Judge

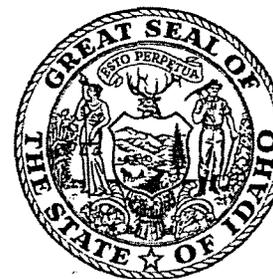
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**IDAHO ADMINISTRATIVE PROCEDURE ACT
WITH COMMENTS**

AND

**IDAHO ATTORNEY GENERAL'S
MODEL RULES OF PRACTICE AND PROCEDURE**

Effective July 1, 1993



Larry EchoHawk
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

(Subcase No.) EXHIBIT A
Date: _____

731. -- 739. (RESERVED).

740. FINAL ORDERS (Rule 740). (7-1-93)

01. **Definition.** Final orders are preliminary orders that have become final under Rule 730 pursuant to section 67-5245, Idaho Code, or orders issued by the agency head pursuant to section 67-5246, Idaho Code. Emergency orders issued under section 67-5247, Idaho Code, shall be designated as final orders if the agency will not issue further orders or conduct further proceedings in the matter. (7-1-93)

02. **Content.** Every final order issued by the agency head must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (7-1-93)

- a. This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code. (7-1-93)
- b. Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (7-1-93)
 - i. A hearing was held, (7-1-93)
 - ii. The final agency action was taken, (7-1-93)
 - iii. The party seeking review of the order resides, or (7-1-93)
 - iv. The real property or personal property that was the subject of the agency action is located. (7-1-93)
- c. An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. (7-1-93)

741. -- 749. (RESERVED).

750. **ORDER NOT DESIGNATED (Rule 750).** If an order is not designated as recommended, preliminary or final at its release, but is designated as recommended, preliminary or final after its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate. (7-1-93)

751. -- 759. (RESERVED).

760. **MODIFICATION OF ORDER ON PRESIDING OFFICER'S OWN MOTION (Rule 760).** A hearing officer issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within fourteen (14) days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order and issuing a substitute recommended or preliminary order. The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) at any time before notice of appeal to district court has been filed or the expiration of the time for appeal to district court, whichever is earlier, by withdrawing the earlier final order and substituting a new final order for it. (7-1-93)

761. -- 769. (RESERVED).

770. **CLARIFICATION OF ORDERS (Rule 770).** Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or to appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration. (7-1-93)

771. -- 779. (RESERVED).

780. **STAY OF ORDERS (Rule 780).** Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion. (7-1-93)

781. -- 789. (RESERVED).

Comments to Rules 710 through 789.

Rule 710 recognizes the existence of interlocutory orders and gives several examples of interlocutory orders.

Rule 711 sets forth the rules for reviewing interlocutory orders.

Rule 720 implements section 67-5244, Idaho Code, on recommended orders of hearing officers. Recommended orders do not become final orders until reviewed and adopted, modified, etc., by the agency head.

Rule 730 implements section 67-5245, Idaho Code, on preliminary orders of hearing officers. Preliminary orders become final orders unless a party petitions the agency head to review them.

Rule 740 implements section 67-5246, Idaho Code, on final orders. Emergency orders in cases in which no further orders will be issued are included in the categories of orders that are final orders.

Rule 750 provides a mechanism for correcting

the failure to designate an order as recommended, preliminary or final.

In Rules 720, 730 and 740, the presiding officer has twenty-one days to act on petition for reconsideration. This means the officer must grant or deny reconsideration. But granting reconsideration is not the same as issuing the final decision following reconsideration. Reconsideration can be granted by issuing an order that says, "The petition for reconsideration is granted," then proceeding to schedule further hearings, briefing, etc., on reconsideration.

Rule 760 provides a mechanism for the agency to correct mistakes in recommended, preliminary or final orders before the orders become final.

Rules 770 and 780 set forth the rules for staying and clarifying orders and reviewing interlocutory orders.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE was mailed on August 11, 2011, with sufficient first-class postage to the following:

IDWR AND GARY SPACKMAN, IN HIS

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ORDER

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