DOCKET NO. 40169-2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

A & B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,
and GARY SPACKMAN, in his official capacity as Director
of the IDAHO DEPARTMENT OF WATER RESOURCES; Respondents,
and,
IDAHO GROUND WATER APPROPRIATORS, INC. and THE CITY OF POCATELLO;
Intervenors-Respondents.

RESPONDENT IDAHO DEPARTMENT OF WATER RESOURCES' OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District for Minidoka County
Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal filed by A&B Irrigation District ("A&B") from the District Court's April 25, 2013 *Memorandum Decision on Petition for Judicial Review*. Clerk's R. 279.[1] The District Court partially dismissed A&B's *Second Amended Notice of Appeal and Petition for Judicial Review* ("Second Amended Petition for Judicial Review") because A&B failed to take reasonable steps to interconnect its water delivery system as required by this Court in *A&B Irrigation Dist. v. Idaho Dept. of Water Res.* (*A&B I*), 153 Idaho 500, 284 P.3d 225 (2012). Clerks R. 25. The District Court also held that A&B is foreclosed by the law of the case doctrine from raising certain issues in this proceeding because the issues were either raised and decided in prior proceedings or could have been raised in prior proceedings. Clerk's R. 289–291.[2] Respondents, the Idaho Department of Water Resources ("IDWR") and Gary Spackman, Director of IDWR ("Director"), respectfully request that this Court affirm the District Court's *Memorandum Decision on Petition for Judicial Review*.

II. Course of Proceedings and Statement of Facts

A. The Administrative Proceedings

In 1994, A&B filed its *Petition for Delivery Call* with IDWR. R. 12. The delivery call was initially stayed, R. 669, but in 2007 A&B filed a *Motion to Proceed* with the delivery call.

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[1] In keeping with the format used in *A&B Irrigation District's Opening Brief*, references in this brief to the record are as follows:

The Administrative Record will be referenced as "R. [#];"
The Limited Clerk's Record on Appeal will be referenced as "Clerk's R. [#];"
The Supplemental Clerk's Record on Appeal will be referenced as "Clerk's Supp. R. [#]."

[2] The District Court also decided one issue on the merits, Clerk's R. 291–294, but that issue was not appealed by A&B and thus has been waived. *See infra* Section V.

R. 830. In 2008, the Director issued an *Order* denying the delivery call. R. 1105. In response, A&B filed a petition requesting an administrative hearing. R. 1182. A hearing was held, and Hearing Officer Gerald Schroeder issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations*. R. 3078. The Hearing Officer found, among other things, that A&B has an obligation:

> "to take reasonable steps to maximize the use of [its] flexibility to move water within the system before it can seek curtailment or compensation from junior users. A&B has some interconnection within the system . . . but the record does not establish whether further interconnection is either financially or technically practical." R.3096–3097.

In 2009, the Director issued his *Final Order Regarding the A&B Irrigation District Delivery Call* ("2009 Final Order"), which adopted nearly all of the Hearing Officer's findings and denied A&B's delivery call. R. 3318. A&B filed a *Petition for Reconsideration of Director's June 30, 2009 Final Order Regarding the A&B Irrigation District Delivery Call* asserting, among other things, that the Director applied the incorrect legal standard to his determination of no material injury, R. 3331, and erred in finding A&B must demonstrate interconnection of its well systems "as a condition to seeking administration of junior priority ground water rights." R. 3338. The Director denied A&B's request for reconsideration of the 2009 Final Order. R. 3360.

B. The District Court Appeal

On August 31, 2009, A&B filed a *Notice of Appeal and Petition for Judicial Review of Agency Action* with the District Court. R. 3363. A&B presented multiple issues on appeal including, whether the Director applied the incorrect burden of proof to his material injury

analysis and whether the Director erred in "finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed . . . ." Clerk's R. 83–84.

The District Court issued its *Memorandum Decision and Order on Petition for Judicial Review* on May 4, 2010 ("2010 Memorandum Decision"). Clerk's Supp. R. 366. The District Court affirmed the Director's 2009 Final Order in most respects including the holding that it was within the Director's discretion to require A&B to maximize interconnection of its well systems "prior to regulating junior pumpers." Clerk's Supp. R. 404. The District Court held, however, that the correct evidentiary standard to apply to a delivery call is the clear and convincing evidence standard, Clerk's Supp. R. 399–400, and that the Director "erred by failing to apply the evidentiary standard of clear and convincing evidence" to the material injury analysis in the 2009 Final Order. Clerk's Supp. R. 414. The District Court remanded the proceedings back for the limited purpose of having the Director apply the clear and convincing evidence standard to the material injury analysis and further instructed that "[n]o further evidence is required." Clerk's Supp. R. 414.

C. The First Supreme Court Appeal: A&B I

In December 2010, A&B filed a *Notice of Appeal* with this Court from the District Court's 2010 Memorandum Decision. Clerk's Supp. R. 647. A&B presented several issues on appeal, including: "whether the Director unconstitutionally applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed." *A&B I*, 153 Idaho at 505, 284 P.3d at 230. The City of Pocatello and the Idaho Ground Water Appropriators, Inc. ("IGWA") filed cross appeals that raised the issue of "[w]hether the district court erred in imposing the 'clear and convincing' evidence standard on

the Director's determination of material injury in a delivery call." *Id.* at 502–503, 284 P.3d at 227–228. The appeal remained with this Court until its opinion was issued in August 2012.

D. The District Court's Order Enforcing Remand

While the issues of interconnection and the clear and convincing evidence standard were on appeal in *A&B I*, the proceedings on remand from the District Court's 2010 Memorandum Decision continued. In January 2011, A&B filed its *Motion to Enforce Orders and Motion for Expedited Hearing* ("Motion to Enforce"). Clerk's Supp. R. 664. A&B requested that the District Court issue a writ of mandate compelling the Director to comply with the District Court's 2010 Memorandum Decision, which had remanded the matter to the Director for the limited purpose of applying the clear and convincing evidence standard to the 2009 Final Order's material injury analysis. Clerk's Supp. R. 665. A&B also requested that the District Court "order the Director to consider A&B's proposed 'interconnection' feasibility study in conjunction with the ordered remand." Clerk's Supp. R. 665.

In February 2011, the District Court issued its *Order Granting Motion to Enforce in Part and Denying Motion to Enforce in Part* ("Order Granting Motion to Enforce"). Clerk's Supp. R. 789. The District Court found that the notices of appeal filed with this Court in *A&B I* did not divest it of jurisdiction to enter a writ enforcing its order of remand. Clerk's Supp. R. 791. Therefore, the District Court ordered the Director to comply with the order of remand and apply the clear and convincing evidence standard to his material injury analysis. Clerk's Supp. R. 793. However, the District Court denied A&B's request that the Director consider its interconnection study.

The District Court held that it lacked "the jurisdiction to compel the Director to consider A&B's proposed 'interconnection' feasibility study in conjunction with the ordered remand" because

"the evidence A&B seeks to introduce to the Director regarding the interconnectivity of its system is outside the scope of the *Order of Remand*," which stated that "no further evidence is required." Clerk's Supp. R. 793–794.

E. The Administrative Proceedings on Remand

On April 27, 2011, in compliance with the District Court's Order Granting Motion to Enforce, the Director issued a *Final Order on Remand* ("April 27th Remand Order"). R. 3469. The Director's April 27th Remand Order applied the clear and convincing evidence standard to the existing agency record without taking any new evidence. Based on the District Court's Order Granting Motion to Enforce, the April 27th Remand Order did not address well interconnection. *See* R. 3469–3491. The Director's April 27th Remand Order found that A&B was not suffering material injury and denied A&B's delivery call. R. 3490.

On May 10, 2011, A&B and the other parties on remand filed a *Stipulated Motion and Proposed Order to Stay Proceedings on Remand* with the Director. R. 3507. The Motion requested that the administrative proceedings be stayed until the Supreme Court issued its decision in *A&B I*. The Director denied the request to stay the administrative proceedings "as the request [was] contrary to the [district] court's *Order Granting Motion to Enforce*." R. 3514.

On May 11, 2011, A&B filed a *Petition for Reconsideration of Interim Director's April 27, 2011 Final Order on Remand/Request For Hearing* with the Director. R. 3492. On June 1, 2011, the Director issued an order granting the petition for reconsideration for the sole purpose of allowing additional time for the Director to respond to the merits of the petition. *A&B Irrigation Dist. v. Idaho Dept. of Water Res.* (*A&B II*), 154 Idaho 652, ___, 301 P.3d 1270, 1271 (2012).

On June 27, 2011, A&B filed a petition for judicial review from the April 27th Remand

Order. *Id.* On June 30, 2011, the Director granted in part, and denied in part A&B's petition for reconsideration. *Id.* On the same day the Director issued an *Amended Final Order on Remand* ("June 30th Amended Remand Order"). *Id.* On July 7, 2011, IDWR moved to dismiss A&B's petition for judicial review because it was based on the April 27th Remand Order and not on the newly issued June 30th Amended Remand Order. *Id.*

F. The Second Supreme Court Appeal: A&B II.

In response to IDWR's motion to dismiss its petition for judicial review from the April 27th Remand Order, A&B filed a *Notice of Appeal* with this Court in September 2011. The issue on appeal was the "meaning of the term 'dispose of' as it is used in subsections (4) and (5) of Idaho Code section 67-5246." *A&B II*, 154 Idaho at ___, 301 P.3d at 1271. A&B argued on appeal that, because the Director failed to dispose of A&B's petition for reconsideration within twenty-one days, A&B's petition for reconsideration was denied by operation of law, and therefore its petition for judicial review from the April 27th Remand Order was proper. *Id.* This Court agreed holding that, because A&B's petition for reconsideration was not disposed of within twenty-one days, it was deemed denied. *Id.* 154 Idaho at ___, 301 P.3d at 1274. As a result, this Court held the June 30th Amended Remand Order was a nullity and the April 27th Remand Order was a final, appealable order. *Id.*

G. The District Court Proceedings Post-A&B I and A&B II.

This Court's opinions in *A&B I* and *A&B II* were issued one month apart. The decision in *A&B I* was issued in August 2012. The decision in *A&B II* was issued in September 2012. The *A&B II* opinion makes no reference to the holdings in *A&B I*, but simply states that A&B is entitled to seek judicial review of the April 27th Remand Order. *See A&B II*, 154 Idaho 652, 301 P.3d 1270 (2012). This Court issued *Remittiturs* in both *A&B I* and *A&B II* requiring the District

Court to comply with the directives of the opinions. Clerk's Supp. R. 831; Clerk's R. 15.

In October 2012, IDWR filed a *Motion to Remand Proceeding to IDWR*. Clerk's R. 16. IDWR argued that the proceeding should be remanded to IDWR "because neither A&B nor the Director support the *April 27 Final Order.*" Clerk's R. 18. A&B opposed IDWR's *Motion to Remand*, Clerk's R. 34, and it was denied by the District Court. Clerk's R. 45.

Also in October 2012, A&B filed its Second Amended Petition for Judicial Review from the April 27th Remand Order. Clerk's R. 25. A&B raised seven issues on appeal:

> (1) Whether the Director unconstitutionally applied the CM Rules to A&B's decreed water right for purposes of administration;
> (2) Whether the Director erred in applying the clear and convincing evidence standard in finding that A&B could not beneficially use the quantity of its decreed water right for irrigation purposes;
> (3) Whether the Director erred in using an undefined "crop maturity" standard, not the water right, for purposes of administration;
> (4) Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were "wasting" water;
> (5) Whether the Director erred in applying a concept of "full economic development" based upon a misreading of I.C. § 42-226 and statements in CM Rule 20.03, most of which the Idaho Supreme Court has declared void in *Clear Springs Foods, Inc. v. Spackman et. al.*, 150 Idaho 790 (2011);
> (6) Whether the Director violated the mandate rule and exceeded the Court's *Memorandum Decision* by reconsidering settled findings beyond the scope of the ordered remand; and
> (7) Whether the Director erred in making findings that are not supported by clear and convincing evidence to conclude A&B's water right is not materially injured.

Clerk's R. 284–285.

In response, IDWR and IGWA argued A&B's petition for judicial review should be dismissed because A&B failed to comply with the interconnection holding of *A&B I*. Clerk's R. 115, 194. In its *Memorandum Decision on Petition for Judicial Review*, the District Court agreed holding that "based on the Idaho Supreme Court's holding A&B has a duty to 'work to

reasonably interconnect some individual wells or well systems before a delivery call can be filed'," and that, therefore, Issues 2, 6, and 7 were moot. Clerk's R. 287–288. In considering the legal arguments raised by A&B, the District Court held that Issues 1, 3, and 4 were waived because they were either issues A&B could have raised or issues that had already been dealt with in previous appeals in this matter. Clerk's R. 288–290. The District Court dealt with the merits of Issue 5, but ultimately found A&B's argument unpersuasive. Clerk's R. 291–294. On April 25, 2013, the District Court held that A&B's Second Amended Petition for Judicial Review was "dismissed in part with prejudice and to those matters not dismissed the *Remand Order* is affirmed consistent with this *Memorandum Decision*." Clerk's R. 295.

STANDARD OF REVIEW

Judicial review of a final decision or order of the Director is governed by the Idaho Administrative Procedure Act ("IDAPA"), title 67, chapter 52 of the Idaho Code. I.C. § 42-1701A(4). In an appeal from the decision of a district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). This 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). This court "instead defers to the agency's findings of fact unless they are clearly erroneous. 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). Idaho Code § 67-5279(3) provides:

> When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action 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; or
> (d) 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.

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); *see also Barron*, 135 Idaho at 417, 18 P.3d at 222. The Supreme Court exercises free review of the legal issues analyzed by the district court. *Baruch v. Clark*, 154 Idaho 732, ___, 302 P.3d 357, 361 (2013)

SUMMARY OF ARGUMENT

The District Court's dismissal of Issues 2, 6, and 7 in A&B's Second Amended Petition for Judicial Review should be affirmed. Under this Court's holding in *A&B I*, A&B has an affirmative duty to demonstrate it has reasonably interconnected its well system prior to proceeding with its delivery call. The holding of *A&B I* is law of the case and must be applied to any further proceedings in this matter. A&B attempts to use the complex procedural record of this case to divert this Court's attention from the fact it has not complied with the holding of *A&B I.* The District Court correctly held that Issues 2, 6, and 7 in A&B's Second Amended Petition for Judicial Review should be dismissed.

In bringing Issues 2, 6, and 7 on judicial review, A&B is asking this Court to ignore its duty under *A&B I* to present evidence of well interconnection prior to moving forward with its delivery call. Well interconnection is a factor in the Director's material injury analysis. Yet, as a

procedural and legal matter the April 27th Remand Order did not, and could not, consider any factual information regarding well interconnection. Therefore, the District Court properly held that Issues 2, 6, and 7, which deal directly with the Director's material injury analysis in the April 27th Remand Order, are moot.

An examination of the record demonstrates the predicament A&B now finds itself in is of its own making. Rather than seeking a remand to the Director for further factual development on the interconnection issue, A&B pursued appeal of an order it knew did not comply with the directive of *A&B I*. A&B should not now be heard to complain about the partial dismissal of its Second Amended Petition for Judicial Review. A&B will have ample opportunity to appeal the Director's material injury analysis once it has presented factual evidence regarding well interconnection.

The District Court properly held that Issues 1 and 3 were waived because they were issues A&B raised in a previous appeal or failed to appeal in *A&B I*. In addition, A&B failed to raise Issues 4 and 5 in this appeal, therefore the District Court's holdings on these issues are now law of the case. Accordingly, the District Court's partial dismissal of the Second Amended Petition for Judicial Review should be upheld, and the District Court's holdings as to Issues 1 and 3 affirmed. The April 27th Remand Order should be vacated, and the matter remanded to the District Court with direction for further proceedings consistent with this Court's opinions.

ARGUMENT

As a result of procedural maneuvers orchestrated in a large part by A&B, this case has zigzagged through a procedural maze involving the administrative agency, the district court, and the appellate court. A&B now seeks to use the procedural complexities of this case to obscure the clear legal duty placed on it by *A&B I*: "A&B must work to reasonably interconnect some

individual wells or well systems *before a delivery call can be filed.*" *A&B I*, 153 Idaho at 516, 284 P.3d at 241 (emphasis added). In partially dismissing A&B's Second Amended Petition for Judicial Review, the District Court correctly recognized that no further judicial actions should be taken on A&B's delivery call until A&B has complied with this Court's holding in *A&B I.*

I. The Holding of *A&B I* Regarding A&B's Obligation to Interconnect its Well System is a Precondition to A&B Proceeding with its Delivery Call.

In *A&B I*, this Court held: "Given the language of 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 I*, 153 Idaho at 516, 284 P.2d at 241 (emphasis added). The issue of whether interconnection of A&B's well system is a precondition to its pursuit of a delivery call has been fully and finally litigated. This Court's use of the term "before" makes A&B's obligation to interconnect a precondition to A&B's delivery call. A&B must comply with that precondition before moving forward with its delivery call.

A. The interconnection issue has been fully litigated and decided.

A&B's obligation to interconnect individual wells or well systems has been fully litigated and decided through the course of these proceedings. Interconnection was first mentioned by the Hearing Officer in his 2009 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation.* R. 3078. The Hearing Officer recognized that A&B's water right 36-2080 was decreed in such a way as to allow A&B to use water from any of its points of diversion anywhere within its place of use. R. 3094. In his findings, the Hearing Officer stated that A&B has an obligation to take "reasonable steps to maximize the use of [its] flexibility to move water within the system before it can seek curtailment or compensation from junior users." R. 3096.

The Hearing Officer also noted that "the record does not establish whether further interconnection is either financially or technically practical." R. 3097. The Director's 2009 Final Order adopted the Hearing Officer's findings with regard to interconnection. R. 3322–3323.

In 2010, A&B appealed the issue of interconnection to the District Court. In its *Statement of Initial Issues*, A&B framed the issue on appeal as "whether the Director erred in finding A&B is required to take additional measures to interconnect individual wells (points of diversion) or well systems across the A&B irrigation project *before a delivery call against junior priority ground water rights can be filed.*" Clerk's Supp. R. 71 (emphasis added). In its *Opening Brief on Appeal* A&B framed the issue as whether "A&B must interconnect individual wells or well systems across the project *before a delivery call can be filed . . . .*" Clerk's Supp. R. 84 (emphasis added). In its 2010 Memorandum Decision, the District Court directly addressed the interconnection issue holding that the Director did not abuse his discretion when he concluded that "*prior to regulating junior pumpers* . . . . A&B must make reasonable efforts to maximize interconnection of the system," and the burden is on "A&B to demonstrate where interconnection is not physically or financially practical." Clerk's Supp. R. 404 (emphasis added).

On appeal to this Court in *A&B* I, A&B again framed the issue as whether the Director unconstitutionally applied the Conjunctive Management Rules by finding that A&B "must interconnect individual well or well systems across the project *before a delivery call can be filed.*" *A&B I*, 153 Idaho at 505, 284 P.3d at 230. Thus, the record demonstrates A&B itself framed the issue of interconnection in the terms "before a delivery call can be filed." Clerk's Supp. R. 71, 84; *A&B I*, 153 Idaho at 505, 284 P.3d at 230.

The language of this Court's interconnection holding in *A&B I* is clear. This Court considered the issue as framed by A&B and found the Director did not err in requiring interconnection "before a delivery call can be filed." *Id.* 153 Idaho at 516, 284 P.3d at 241. The holding uses the term "before" to make explicit that reasonable interconnection must occur before further action may be taken on A&B's delivery call. In addition, in discussing A&B's arguments, this Court noted that they included whether "a mandate of interconnection as a *prerequisite* of administration is an unconstitutional application of the CM Rules" and whether "this *precondition* to administration shifts the burden onto A&B . . . ." *A&B I*, 153 Idaho at 514, 284 P.3d at 239 (emphasis added). Therefore, the holding of *A&B I* is plain; A&B must demonstrate reasonable interconnection of its wells or well system or show financial or technical impracticability of interconnection *before* it can proceed with its delivery call.

B. The holding of A&B I is law of the case and, therefore, A&B must show well interconnection before its delivery call can proceed.

The holding of *A&B I* regarding interconnection is law of the case and therefore must be applied in any further proceedings on this delivery call. 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." *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) (internal citations omitted). This Court's holding in *A&B I* stated A&B must work to interconnect some individual well or well systems before a delivery call can be filed. Under the law of the case doctrine this holding must be adhered to throughout the progress of the case, including in any future administrative or appellate judicial actions.

A&B tries to use the complicated procedural stance of this case to argue that the law of the case doctrine prevents application of *A&B I* to this delivery call. *A&B Irrigation District's Opening Brief* at 15 ("Since the law of this case provides that A&B's call would proceed on remand before the agency, and the Director issued a final order without an interconnection study in the record, the district court wrongly dismissed A&B's petition for judicial review."). However, the record clearly demonstrates that this argument ignores the procedural timeframes of this case and turns the law of the case doctrine on its head. The District Court's remand order cannot take precedence over this Court's *A&B I* decision.

The District Court's remand of the case occurred in May 2010, well before this Court's decision in *A&B I*. Clerk's Supp. R. 366. A&B's *Notice of Appeal*, which lead to this Court's decision in *A&B I*, was filed in December 2010. Clerk's Supp. R. 647. The issues in A&B's appeal notice included whether A&B "must interconnect individual wells or well systems across the project before a delivery call can be filed" and whether the District Court "erred in imposing the 'clear and convincing' evidence standard . . . ." *A&B I*, 153 Idaho at 505, 284 P.3d at 230. The *A&B I* appeal was with this Court from December 2010 until it issued its opinion in August 2012.

During the time this Court had under consideration the "clear and convincing evidence" and "interconnection" issues in *A&B I*, A&B pursued further administrative and appellate actions on its delivery call. A&B filed a Motion to Enforce asking for a writ of mandate compelling the Director to comply with the District Court's remand in the 2010 Memorandum Decision. Clerk's Supp. R. 665. A&B's Motion to Enforce was granted and, in 2011, the Director issued the April 27th Remand Order. R. 3469. The District Court held, however, that, because of the limited nature of the District Court's remand order the Director was precluded from considering

any new evidence regarding well interconnection in issuing his new order. Clerk's Supp. R. 793–794. Thus the Director was precluded, by order of the District Court, from considering any evidence of well interconnection in the April 27th Remand Order. *See* R. 3469.

The record clearly demonstrates that, at the time the District Court issued its 2010 Memorandum Decision and the Director issued the April 27th Remand Order, the *A&B I* opinion had yet to be issued. When this Court issued the *A&B I* opinion, it became law of the case and effectively superseded the April 27th Remand Order. A&B's argument that the District Court's remand in its 2010 Memorandum Decision somehow created law of the case that overrides this Court's subsequent *A&B I* opinion is without legal support. Essentially, A&B is arguing that the District Court's remand order takes precedence over the *A&B I* opinion. It is clear that the law of the case doctrine *requires* A&B to comply with this Court's holdings in *A&B I.* Thus, the District Court correctly concluded that the holding in *A&B I* required dismissal of the Second Amended Petition for Judicial Review.

II. The District Court's Dismissal of Issues 2, 6, and 7 as Moot Should be Upheld because A&B has Failed to Comply with the Court's Holding in *A&B I.*

A&B presented seven issues on appeal to the District Court. Clerk's R. 64; *see supra* Section II.G. The District Court's decision to dismiss Issues 2[3], 6[4], and 7[5] as moot should be upheld because A&B has failed to comply with this Court's interconnection holding set forth in *A&B I.* Clerk's R. 285–290. The interconnection study is a factual matter the Director must

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[3] A&B Issue 2 states: "Whether the Director erred in applying the clear and convincing evidence standard in finding that A&B could not beneficially use the quantity of its decreed water right for irrigation purposes." Clerk's R. 284.
[4] A&B Issue 6 states: "Whether the Director violated the mandate rule and exceeded the Court's Memorandum Decision by reconsidering settled findings beyond the scope of the ordered remand." Clerk's R. 285.
[5] A&B Issue 7 states: Whether the Director erred in making findings that are not supported by clear and convincing evidence to conclude A&B's water right is not materially injured." Clerk's Supp. R. 285.

consider in making his determination of material injury, yet the April 27th Remand Order did not, and could not, consider A&B's well interconnection. Therefore, Issues 2, 6, and 7, which appeal the material injury analysis in the April 27th Remand Order, are moot.

A. A&B's Issues 2, 6, and 7 are moot because A&B has failed to comply with its duty to show that its well system has been reasonably interconnected.

The District Court correctly held that A&B's Issues 2, 6, and 7 are moot.[6] The doctrine of mootness provides that "[a]n issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief." *Taylor v. Maile*, 146 Idaho 705, 710, 201 P.3d 1282, 1287 (2009) (quoting *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 1069, 1072 (2005)). Mootness also applies "when a favorable judicial decision would not result in any relief." *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004). An action is "moot where the judgment, if granted, would have no effect either directly or collaterally on the plaintiff, the plaintiff would be unable to obtain further relief based on the judgment and no other relief is sought in the action." *Idaho Schools for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281, 912 P.2d 644, 650 (1996).

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[6] Alternatively, the District Court's dismissal of A&B's Second Amended Petition for Judicial Review should be upheld under the ripeness doctrine. Ripeness "concerns the timing of a suit and asks whether a case is brought too early." *United Investors Life Ins. Co. v. Severson*, 143 Idaho 628, 633, 151 P.3d 824, 829 (2006). The ripeness doctrine requires a "petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002) (internal citations omitted). In this case, the April 27th Remand Order is not yet ripe for review because A&B has not complied with this Court's holding in *A&B I* requiring it to demonstrate interconnection of its wells/well systems (or financial or technical impracticability thereof). A&B's ability or inability to connect its well systems is a factual issue that must be addressed as part of the material injury analysis. *See* IDAPA 37.03.11.042.01(g); *infra* footnote 7. The factual record considered in the April 27th Remand Order is incomplete because, at the time the April 27th Remand Order was issued, the Director did not, (and could not), have considered any evidence of interconnection. Therefore, the material injury findings in the April 27th Remand Order are not ripe for review, and the delivery call should be remanded with instructions that A&B must present factual evidence of well interconnection to the Director.

Issues 2, 6, and 7 are moot because they appeal a material injury analysis that does not, and could not, have applied the interconnection holding set forth in *A&B I*. As a legal matter, the Director was precluded from considering an interconnection study when he issued the April 27th Remand Order. In its Order Granting Motion to Enforce, the District Court expressly held such a study was outside the scope of remand. Clerk's Supp. R. 793–794; *see supra* Sections II.D, I.B. In addition, the April 27th Remand Order could not, from a procedural timing standpoint, have applied the interconnection holding of *A&B I* because the April 27th Remand Order was issued in 2011, nearly a year before this Court issued its decision in *A&B I* in August 2012. Thus, both as a legal and procedural matter, the well interconnection holding of *A&B I* was not, and could not, have been considered by the Director in the April 27th Remand Order.

A&B's Issues 2, 6, and 7 deal directly with the merits of the material injury analysis in the April 27th Remand Order. As noted by this Court in *A&B I*, the CM Rules "provide a list of factors that the Director can consider in his determination of a senior right holder's material injury." *A&B I*, 153 Idaho at 516, 284 P.3d at 241. One of the factors is "the extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices." *Id.* This Court recognized that the interconnection study is a factor that the Director can consider under IDAPA 37.03.11.042.01(g) in making his determination of material injury. *A&B I*, 153 Idaho at 515, 284 P.3d at 240. This Court went on to hold that A&B must present evidence of interconnection before its delivery call could be filed. *A&B I*, 153

Idaho at 516, 284 P.3d at 241. Consequently, factual evidence of interconnection is an essential factor that must be considered as part of the Director's material injury determination.[7] Reviewing the April 27th Remand Order at this point in the proceedings would be premature and futile. Until there is a fully developed record, it is impossible to render a decision on the correctness of the Director's determination of material injury.[8]

In bringing Issues 2, 6, and 7 on judicial review, A&B is asking this Court to ignore its previous holding in *A&B I*. The holding of *A&B I* requires consideration of interconnection before A&B can proceed with its delivery call. Therefore, the District Court did not err in holding that A&B's Issues 2, 6, and 7 are moot and its dismissal of this portion of A&B's Second Amended Petition for Judicial Review should be upheld.

B. Exception to mootness does not apply to A&B's Issues 2, 6, and 7.

A&B asserts that Issues 2, 6, and 7 can be reviewed under the exception to the mootness doctrine that allows review when "the challenged conduct is likely to evade judicial review and thus is capable of repetition." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.,* 141 Idaho 849, 852, 119 P. 3d 1069, 1072 (2005). A&B may raise Issue 2, 6, and 7 when it has complied with its duty to show reasonable interconnection of its well system. At that point, A&B can develop these issues as part of any challenge to the Director's determination of material injury to its water rights. A factual record will be developed that will allow this Court to consider the

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[7] IDWR is not speculating as to the effect any new evidence of interconnection may or may not have on the material injury analysis. It is merely noting that evidence of interconnection is factual evidence that must be considered as part of the material injury analysis provided for under IDAPA 37.03.11.042.01.

[8] A&B argues that the interconnection study does not preclude this Court from issuing an opinion determining the merits of A&B's delivery call and postponing the curtailment of junior water users until after an interconnection study has been submitted. *A&B Irrigation District's Opening Brief* at 15. As noted above, determining the merits of A&B's delivery call before the interconnection study is in evidence would be putting the horse before the cart because interconnection is a precondition to the material injury analysis.

issues that A&B has prematurely raised in this appeal. Accordingly, the exception to mootness doctrine raised by A&B does not apply.

C. A&B's due process rights have not been violated because the District Court heard its appeal and issued a decision.

A&B argues that the District Court's dismissal of Issues 2, 6 and 7 in its Second Amended Petition for Judicial Review violated its due process rights. The record is clear, however, that the reason A&B's Second Amended Petition for Judicial Review was dismissed is because it pursued this appeal rather than seeking to have the matter remanded back to the Director for the limited purpose of presenting evidence on the interconnection of its well systems.

At the time A&B filed its Second Amended Petition for Judicial Review in October 2012, this Court had issued its decision in *A&B I.* The decision placed a clear obligation on A&B to present evidence of well interconnection before it proceeded with its delivery call. *A&B I*, 153 Idaho at 516, 284 P.3d at 241 (A&B must "work to reasonably interconnect some individual wells or wells systems before a delivery call can be filed."); *see supra* Section I. Rather than taking action to address its duty under *A&B I*, A&B elected to pursue this appeal based on an incomplete record. In doing so A&B has, of its own volition, created an appeal that contains issues that are moot. *See A&B II*, 154 Idaho at ___, 301 P.3d at 1275 (J. Jones J., specially concurring) ("A&B filed its motion for reconsideration [of the April 27th Remand Order] on May 11, 2011. Apparently, it did so because it was unhappy with the final order and sought changes . . . . Consideration of the initial order on the merits has been substantially delayed and the appeal will involve a final order [April 27th Remand Order] that A&B was apparently not happy with in the first place.").

When confronted with an appeal from the April 27th Remand Order, that did not and could not have complied with the holding of *A&B I*, the District Court reached the only legally defensible conclusion it could; Issue 2, 6, and 7 are moot and should be dismissed. A&B is not denied due process by this holding; rather the District Court heard its argument and simply determined that A&B had failed to comply with the holding of *A&B I*.

III. The April 27th Remand Order Should be Vacated.

Because Issues 2, 6, and 7, which arise from the material injury analysis in the April 27th Remand Order are moot, the April 27th Remand Order should be vacated.[9] *See* I.C. § 67-5279(3) (When a District Court reviews an agency order in its appellate capacity, and it finds that the agency action is not affirmed, "it shall set aside, in whole or in part, and [remand] for further proceedings as necessary."). This matter should be remanded to the District Court with direction for further proceedings consistent with this Court's opinions.

IV. The District Court Did Not Err in Holding A&B Waived Issues 1 and 3 because they are issues that either were or could have been raised in a previous appeal and A&B is precluded from raising them again here.

The District Court held that Issues 1[10], 3[11], and 4[12] were waived because they were either

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[9] A&B argues "if the interconnection study was jurisdictional then all decisions by IDWR and the reviewing courts should be rendered void." However, recognizing that A&B must comply with the interconnection holding of *A&B I* does not render the entire matter void. It is clear that this Court had jurisdiction to consider and decide the interconnection issue in *A&B I*. Therefore, at best, A&B can argue only that decisions made after the *A&B I* decision was issued in August 2012 are void. However, this argument is without merits. The legal determinations made by the District Court in its 2013 *Memorandum Decision on Petition for Judicial Review* are law of the case. The District Court's holdings as to Issues 1 and 3 have been appealed to this Court. This Court's decision on these issues will become law of the case. Because A&B did not appeal the District Court's holdings as to Issues 4 and 5, they are already law of the case and will remain binding on any future proceedings in this matter.

[10] A&B Issue 1 states: "Whether the Director unconstitutionally applied the CM Rules to A&B's decreed water right for purposes of administration." Clerk's R. 284.

[11] A&B Issue 3 states: "Whether the Director erred in using an undefined 'crop maturity' standard, not the water right, for purposes of administration." Clerk's R. 285.

[12] A&B Issue 4 states: "Whether the Director erred in failing to apply CM Rules 20.03 and 40.05 for purposes of evaluating whether junior ground water right holders were 'wasting' water." Clerk's R. 285. A&B does not address Issue 4 in this appeal. *See A&B Irrigation District's Opening Brief.* Because A&B does not address Issue 4, it is not on appeal before this Court. *See infra* Section V. Therefore, this section will deal only with Issues 1 and 3.

issues that had already been addressed or issues that A&B could have raised in the previous appeals in this matter. Clerk's R. 288–290. A&B Issues 1 and 3 can be distilled into asking whether the Director unconstitutionally applied the CM Rules to find that A&B could raise crops with less than its decreed water right. A&B argues that "A&B's challenge to [the April 27th Remand Order], including whether the Director properly applied the standard under the law in determining that A&B only needs 0.75 miners inches rather than the decreed 0.88 miners inches is subject to judicial review." A&B Opening Brief at 24 (emphasis in original).[13]

The issue of whether the Director can properly apply the CM Rules to find that A&B can raise crops with less than its decreed quantity, however, was raised and determined in A&B's 2010 appeal to the District Court. In the 2010 appeal, A&B raised the following issue: "Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in: i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miner's inches; (ii) creating a new 'failure of the project' standard for injury; and (iii) using a "minimum amount needed' for crop maturity standard?" Clerk's Supp. R. 373. The District Court correctly recognized that A&B Issues 1 and 3 are merely a repackaging of these issues.

In its 2010 Memorandum Decision the District Court held: "In this case, the Director determined that A&B successfully implemented a number of measures that have reduced the amount of water required to irrigate [its land] . . . . 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." Clerk's Supp. R. 396. As the District Court explained concerning its 2010 Memorandum Decision:

[13] To the extent that A&B's argument is that they are entitled to judicial review of the material injury analysis in the April 27th Remand Order, that issue is moot because A&B has not complied with this Court's holding in *A&B I*. *See supra* Section II.

> "The [District] Court did not reject the evidence considered by the Director in the injury analysis nor did the court reject the conclusion that pursuant to the application of the CM Rules it is possible for a senior water right holder to receive less than the decreed quantity and not suffer material injury, provided the Director's determination is supported by clear and convincing evidence."

Clerk's R. 289. Therefore, the District Court's holding that A&B waived Issues 1 and 3, which deal with whether A&B is entitled to its full decreed water right for purposes of administration, should be upheld.

In addition, A&B failed to raise Issues 1 and 3 in its appeal to this Court in *A&B I*. *See A&B I*, 153 Idaho 500, 284 P.3d 225. Because A&B failed to raise these issues to this Court in *A&B I*, it is precluded from raising them in this appeal. *See Taylor v. Maile,* 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) ("The 'law of the case' doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal."). Therefore, the District Court's finding that Issues 1 and 3 are waived should be upheld.

V. A&B Failed to Raise Issues 4 and 5 in this Appeal, Therefore, the District Court's Holdings on those Issues is Law of the Case.

A&B failed to raise Issues 4 and 5[14] in this appeal. *See A&B Irrigation District's Opening Brief.* Because A&B does not address Issues 4 and 5, they are not properly before this Court. *See* I.A.R. 35(a)(4), (6); *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525, 272 P.3d 491, 497 (2012) ("Thus, we have repeatedly stated that we will not consider an issue not supported by argument and authority in the opening brief."). Accordingly, the District

[14] A&B Issue 5 states: "Whether the Director erred in applying a concept of 'full economic development' based upon a misreading of I.C. § 42-226 and statements in CM Rule 20.03, most of which the Idaho Supreme Court has declared void in *Clear Springs Foods, Inc., et. al. v. Spackman, et. al.*, 150 Idaho 790 (2011)." Clerk's R. 285.

Court's holdings[15] regarding Issues 4 and 5 are final and must be adhered to throughout the subsequent course of this proceeding. *See Taylor*, 146 Idaho at 709, 201 P.3d at 1286.

CONCLUSION

The District Court's dismissal of A&B's Issues 2, 6, and 7 should be upheld, and its holding on Issues 1 and 3 affirmed. This matter should be remanded to the District Court with instructions to vacate the April 27th Remand Order and take any other actions consistent with this Court's opinions.

Respectfully submitted this 14th day of November, 2013.

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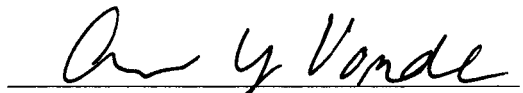

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[15] As to Issue 4, the District Court held that: "This is an issue that could have been raised in the first *Petition for Judicial Review* in Minidoka County Case No. CV-2009-647 but was not. Since A&B failed to raise this issue in the prior proceeding it is deemed waived for the limited scope of this appeal." Clerk's R. 288. As to Issue 5, the District Court held that: "[T]he Director did not misapply I.C. § 42-226 in support of his conclusion that 'requiring curtailment when there are sufficient reasonable alternative means of diversion is contrary to full economic development of the State's water resources' and 'A&B may not seek curtailment of junior-priority ground water rights when it is not fully utilizing its capacity to divert water." Clerk's R. 294.