Docket Nos. 38191-2010 / 38192-2010 / 38193-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA BUREAU OF RECLAMATION,
Petitioners-Appellants, and

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents on Appeal, and

IDAHO DAIRYMEN'S ASSOCIATION, INC.,
District Court Cross Petitioner,

v.

GARY SPACKMAN, in his official capacity as Interim Director of the Idaho Department of Water Resources, and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Respondents on Appeal, and

IDAHO GROUND WATER APPROPRIATORS, INC.
Intervenor-Respondent-Cross Appellant, and

THE CITY OF POCATELLO, IDAHO
Intervenor-Respondent-Cross Appellant.

GROUNDWATER USERS' OPENING BRIEF

Appeal from Gooding County District Court Case No. 2008-551.
Honorable John M. Melanson, District Judge, Presiding.

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STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from a water right curtailment order issued by the Director of the Idaho Department of Water Resources ("IDWR"). The order stops farmers, cities, and businesses from pumping groundwater from the Eastern Snake Plain Aquifer ("ESPA") so that more groundwater will overflow from the ESPA into the Snake River. The beneficiaries of the order are seven irrigation entities known collectively as the Surface Water Coalition ("SWC") who divert water out of the Snake River at various points between American Falls Reservoir and Milner Dam (near Burley).

The district court reversed the Director's order concerning "material injury" to Twin Falls Canal Company ("TFCC") on the basis that the Director utilized a "preponderance of the evidence" standard of proof instead of a "clear and convincing" standard. Idaho Ground Water Appropriators, Inc. ("IGWA") asks this Court to sustain the Director's decision because material injury should be determined based on the preponderance of the evidence standard that normally applies to agency decisions.

IGWA also asks this Court to reject the SWC appeal concerning the "minimum full supply" methodology because the issue is moot. Even if this Court considers the issue, the SWC argument should be rejected because it is predicated on the false premise that depletion to the water supply automatically equates to material injury.

2. Procedural History.

On January 14, 2005, the SWC petitioned the Director to curtail groundwater diversions from the ESPA. (R. Vol. 1, p. 1.)[1] The Director responded with an *Order* dated February 15, 2005 ("*February 2005 Order*") that initiated a contested case. (R. Vol. 2, p. 197.) The Director then issued an *Order* dated April 19, 2005 ("*April 2005 Order*") concluding that the SWC had suffered "material injury" due to groundwater pumping, and requiring groundwater users to provide 27,700 acre-feet of replacement water to the SWC to mitigate the injury, or suffer curtailment. (R. Vol. 7, pp. 1157-1219.) On May 2, 2005, the Director issued an *Amended Order* ("*May 2005 Order*") that revised certain findings in the *April 2005 Order* but still required groundwater users to provide 27,700 acre-feet of mitigation water to the SWC. (R. Vol. 8, pp. 1359-1424.) These orders are referred to collectively herein as the "*2005 Curtailment Order*."

Several parties objected to the *2005 Curtailment Order* and requested a hearing, including IGWA, Idaho Dairymen's Association ("Dairymen"), City of Pocatello ("Pocatello"), Bureau of Reclamation ("Bureau"), State Agency Ground Water Users ("State Users"), and SWC. However, the SWC preempted the hearing by filing suit in district court to have the IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"), IDAPA 37.03.11, declared facially unconstitutional. *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862 (2007) ("*AFRD2*"). After that proved unsuccessful, the Director appointed former Chief Justice Gerald F. Schroeder to preside as hearing officer, and a hearing was held over three weeks in January and February of 2008.

[1] Citations to the agency record are identified by "R. Vol." Citations to the clerk's record on appeal are identified by "Clerk's R. Vol."

The hearing officer issued an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("*Recommended Order*") on April 29, 2008. (R. Vol. 37, p. 7048.) The Director subsequently issued a *Final Order Regarding the Surface Water Coalition Delivery Call* ("*Final Order*") on September 5, 2008. (R. Vol. 39, p. 7381.) The *Final Order* adopts the findings and conclusions contained in the *Recommended Order* and the prior orders of the Director except as specifically modified by the *Final Order*. *Id.* at 7382.

The SWC and the Bureau filed petitions for judicial review of the *Final Order*, and the Dairymen filed a cross-petition for judicial review. (R. Vol. 39, pp. 7450 and 7406.) The petitions were assigned to the Honorable John M. Melanson, District Judge of the Fifth Judicial District. (Clerk's R. Vol. 1, p. 19.) Judge Melanson issued an *Order on Petition for Judicial Review* on July 24, 2009 (Clerk's R. Vol. 3, p.511) and an *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification* on September 9, 2009 (Clerk's R. Vol. 7, p. 1240.) The district court orders have been appealed to this Court by IGWA, the SWC, and Pocatello.

The Director stated in the *Final Order* that he was in the process of developing an improved methodology for determining material injury. (R. Vol. 39, p. 7386.) He subsequently issued a series of orders, beginning with the *Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order"*) on April 7, 2010 (Clerk's R. Vol. 7, p. 1354(s)) and culminating, after a hearing, with the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Amended Methodology Order*") on

June 23, 2010. The *Methodology Order* is included in this record; the *Amended Methodology Order* is not. The *Amended Methodology Order* is currently on appeal to the Twin Falls County District Court, case no. CV-2010-5520 (consolidated with Gooding County Case No. CV-2010-382).

3. Standard of Review.

This appeal is taken from the district court, but the subject of review is the *Final Order* issued by the Director. When reviewing agency decisions, this Court generally reviews the agency record independent of the district court decision. *First Interstate Bank, N.A. v. West*, 107 Idaho 851, 852-53 (1984). The *Final Order* is to be reviewed under the Idaho Administrative Procedures Act. Idaho Code § 42-1701A(4). It must be affirmed unless the Court finds that the findings, inferences, conclusions, or decisions of the Director 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). Even if the Director erred in one of the foregoing manners, the *Final Order* should be affirmed if no substantial rights of the SWC were prejudiced. *Id*.

The Court's review of issues of disputed fact must be confined to the record, and the Court should not substitute its judgment for that of the Director as to the weight of the evidence on issues of fact. Idaho Code §§ 67-5277 and 67-5279(1). If the evidence in the record is conflicting, the Court must sustain the *Final Order* so long as it is based on substantial evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417 (2001).

With respect to discretionary matters, courts defer to the agency decision unless the agency "acted without a reasonable basis in fact or law." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 88 (2007). The agency decision should be affirmed if the agency "perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason." *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54 (2006).

If the *Final Order* is not affirmed, it should be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

4. Statement of Facts.

A. SWC water rights.

The SWC entities all operate canal systems that divert water from the Snake River near Burley, Idaho. Their water rights have priority dates ranging from 1900 to 1939. (R. Vol. 1 p. 8; Exs. 4001A and 4001.) They also have contracts with the Bureau to use water that is stored in Jackson Lake, Palisades Reservoir, American Falls Reservoir, and Lake Walcott. (R. Vol. 37, pp. 7055, 7060-61; Ex. 9704.) These reservoirs capture water during the winter and spring that can then released during the summer for irrigation. (R. Vol. 8, p. 1372.) Water is stored in the reservoirs under water rights owned by the Bureau with priority dates ranging from 1906 to 1957. (Exs. 4001A and 4000.) Neither the SWC's nor the Bureau's water rights have been decreed in the Snake River Basin Adjudication ("SRBA") because they are subject to unresolved objections. (R. Exs. 4615, 9723-9729.)

Like all water rights, the SWC water rights define the maximum amount of water that may be diverted under the right. (R. Vol. 37, pp. 7073-75.) The amount actually needed for irrigation can be substantially less. (R. Vol. 8, p. 1378.) One reason is because farmland is often paved over, turned into a residential or commercial development, or otherwise removed from irrigation. (Exs. 4300, 4310, 4339-4352, 4353-4357.) At least 6,600 acres claimed by TFCC are not irrigated due to development (Ex. 8190 at 14; Tr. Vol. 11, p. 2247), 2,907 are non-irrigated in Burley Irrigation District (Ex. 4300 at 3, 10; Ex. 4301), and 5,008 are non-irrigated in Minidoka Irrigation District (Ex. 4302.) Another reason is that essentially all irrigation in southern Idaho is now done by sprinkler, which requires less water per acre than the flood irrigation practices used historically. (R. Vol. 4, pp. 621-22; R. Vol. 8, p. 1378; R. Vol. 12, p. 2149; R. Vol. 28, p. 5305.)

The disparity between the maximum authorized rate of diversion shown on the face of a water right and the amount of water actually needed for beneficial use is illustrated by comparing the amount of water authorized for diversion under the SWC's water rights with the amount of water it actually diverts when there was no scarcity of water. The SWC's natural flow rights collectively authorize the diversion of 13,756 cfs, or 6.7 million acre-feet, each irrigation season. (R. Vol. 8, pp. 1370-72.)[2] Their storage water rights collectively authorize the diversion of up to 2.3 million acre-feet, for a combined total of 9 million acre-feet. (R. Vol. 8, pp. 1373-74.) Yet, the maximum amount of water the SWC has ever actually diverted is just over 4 million acre-feet. (Ex. 8000 at Vol. 4, p. AS-8.)

[2] The irrigation season for the SWC water rights is March 15 to November 15 (246 days). (Ex. 4001A at 2-23.) The diversion of one cfs equals 1.9835 acre-feet per day. Over a 246-day irrigation season, the SWC's natural flow rights allow the diversion of up to 6,712,116 acre-feet (1.9835 x 13,756 cfs x 246 days).

The SWC's storage water rights are intended to provide a measure of insurance against drought. (Ex. 1023 at 6-8; Ex. 3048 at 21; R. Vol. 2, p. 207.) It was never expected, however, that storage water would insulate the SWC from the effects of drought. Even with the construction of Palisades Reservoir (the last storage facility to be constructed, primarily for drought relief) the Bureau anticipated that the SWC and other spaceholders would occasionally suffer water shortages. (Ex. 7001 at 11-16.)

B. The Snake River and the ESPA.

The ESPA and the Snake River are hydraulically connected at various locations and in varying degrees. (R. Vol. 8, pp. 1363-64; Ex. 4100 at 5-6.) In some places groundwater flows from the ESPA into the Snake River; in other places the opposite occurs. *Id*.

The key connection in this case is in the Blackfoot to Neeley reach of the Snake River, which runs from Blackfoot to just south of Massacre Rocks near American Falls, Idaho. (R. Vol. 3, p. 542.) In this reach there are numerous springs that discharge groundwater from the ESPA into the River. (Ex. 8013.) Since the SWC canals are all located downstream from this reach, they filed their delivery call with the Director in 2005 asking him to shut down groundwater pumping so that more water will overflow from the ESPA into this reach of the Snake River. (R. Vol. 1, pp. 2-4.)

The impact of groundwater pumping on the Blackfoot to Neeley reach was vigorously contested at the hearing. Exhibits 4113 shows no statistically significant trend in reach gains over the 93 year period of measurement for this reach. Significantly, the large expansion of ground-

water pumping in the 1960s and 1970s does not correlate with any decline in reach gains, indicating that groundwater pumping has little impact on this reach of the River. (Ex. 4100 at 7.)

It is also significant that groundwater, unlike surface water, cannot be directed through physical channels from a junior user's point of diversion to a senior's point of diversion. (R. Vol. 37, p. 7050.) Given the varying degrees of connectivity between the ESPA and the Snake River, shutting off a well does not always mean that a usable quantity of water will accrue to the senior. (R. Vol. 3, p. 556.) Even when curtailment will increase surface water flows, typically only a portion of the curtailed water will accrue to the target reach of the River. This is because when groundwater is pumped from an aquifer there results a "cone of depression" in the groundwater table that has a radial impact on the aquifer (*i.e.* the impact emanates 360 degrees). (R. Vol. 8, p. 1364.) When pumping ceases, the recovery to the aquifer is likewise radial. *Id.* When a well is shut off, the impact is dissipated across the aquifer, with only a portion accruing to the target reach of the River. (R. Vol. 2, p. 199.) The rest is effectively lost from beneficial use. The degree of loss is exacerbated by distance—the further away a well is from the Snake River, the less impact it has on River flows, and the greater the loss of beneficial use. (R. Vol. 8, p. 1364.) In addition, the effects of groundwater curtailment are spread throughout the year, which means that the effects of curtailment may be largely realized during the non-irrigation season when the SWC cannot use the water anyway.

C. Drought.

The worst drought on record in Idaho occurred from 2000 to 2005. (Tr. Vol.3, p. 625.) It was so severe that it is expected to be repeated no more than once every 500 years. (*Id.*; Exs.

4105 and 4106.) It caused a reduction in "reach gains" to the Snake River between Blackfoot and Neeley (downstream from American Falls). Before this drought, there had been no statistically significant change in reach gains for this reach. (Ex. 4113; R. Vol. Vol. 3, pp. 546, 553; R Vol. 27, p. 5090; Exs. 4145-49.)

D. The curtailment order.

In response to the SWC delivery call, the Director ordered groundwater users to provide the SWC with enough water to meet their irrigation needs, or suffer curtailment. (R. Vol. 9, pp. 1559-1560 and 1569.) The Director determined what their irrigation needs would be by developing what he termed their "minimum full supply." (R. Vol. 8, pp. 1383-84.) The Director subsequently adopted a more sophisticated methodology for determining irrigation needs, termed "reasonable in-season demand." (Clerk's R. Vol. 7, pp. 1354(s)-1354(iii).) Under both methodologies, the extent of curtailment and mitigation is recalculated annually and adjusted throughout the year to account for water conditions.

E. Mitigation.

The *SWC Opening Brief* states that "a lack of mitigation water provided no relief to the injured Coalition members while junior groundwater users continued to pump without constraint." (*SWC Open. Br*. 12.) The implication is that groundwater users provided no mitigation, and the SWC was left without water to meet its irrigation needs. This is simply untrue.

Groundwater users have not actually been curtailed because they have at great effort and expense delivered to the SWC the full amount of mitigation water required by every order of the Director, fully offsetting any material injury. In 2005, 2007, 2009 and 2010, IGWA rented sto-

rage water from other spaceholders in the upper Snake River reservoir system to fully mitigate TFCC's predicted material injury (Exs. 4501, 4502A at 10, 4603; R. Vol. 34, p. 6431.) (No mitigation was required in 2006, 2008, or 2011 due to adequate water supplies.)

The SWC also gives the misimpression that IGWA failed to provide storage water mitigation in a timely manner, claiming that "the Director's administration produced no mitigation water for the Coalition during the irrigation season *even though the Director found material injury*." (*SWC Open. Br.* 11, emphasis in original.) This allegation simply ignores how the Water District 01 accounts for the use of storage water. Because Water District 01 completes its accounting for the use of storage water following the irrigation season, water leased by IGWA for mitigation has at times been transferred into the SWC's storage water accounts after the irrigation season. (Tr. Vol. 4, p. 826; R. Vol. 38, p. 7208.)

F. Impact to the SWC.

The SWC often claims dire harm as a result of groundwater pumping, yet it has failed to present any competent evidence that a single acre of farmland had gone without water. The SWC put on a number of lay witnesses who offered their personal opinion that they experienced reduced crop yields, but none could provide substantiating evidence (it should not have been difficult to provide documentation comparing crop yields between wet and dry years, if a disparity legitimately existed). (R. Vol. 34, pp. 6361-66; R. Vol. 33, pp. 6269-72; R. Vol. 33, pp. 6333-39; R. Vol. 40, pp. 7546-48; R. Vol. 33, pp. 6286-88; R. Vol. 33, pp. 6279-80; R. Vol. 33, pp. 6260-62; R. Vol. 33, pp. 6342-44.) The manager of the largest SWC entity testified that he had no evidence of crop loss either:

Q. There's no examples of fallowing based on water shortage?
A. No.
Q. And no examples of fallowing you can point to based on -- I'm sorry -- crop loss that you can point to based on water shortage; correct?
A. No.

(Tr. Vol. 8, p. 1788.) Some of the SWC's lay witnesses testified that they had changed their cropping patterns, but they admitted that this was not necessarily a result of reduced water supplies. North Side Canal Company's long-time manager testified that, if anything, more water-consumptive crops like corn and hay had been planted in recent years due to the growth of the dairy industry in the area. (Tr. Vol. 9, pp. 1873-74, 1889-90.)

In addition, the evidence showed that the SWC entities never had their storage water deliveries restricted despite record drought. (Tr. Vol. 4, p. 713; Tr. Vol. 5, pp. 977-78.) Even in 2004, the driest year of the drought, the SWC had 288,300 acre-feet of storage left at the end of the irrigation season. (Ex. 4100 at 14.) The Director predicted that TFCC and AFRD2 would suffer material injury in both 2005 and 2007, yet still the SWC was able to meet its irrigation needs, with carryover remaining at the end of the irrigation season (R. Vol. 23, p. 4298). The SWC's contention that it was without water, or even without sufficient water to meet its irrigation needs, remains unsubstantiated. (R. Vol. 8, pp. 1377-78.)

ISSUE ON APPEAL

1. Did the Director act within his authority and discretion in determining that Twin Falls Canal Company can meet its irrigation needs based on the "preponderance of the evidence" standard of proof?

SUMMARY OF THE ARGUMENT

Conjunctive administration of surface and ground water requires the Director to make complex and difficult decisions concerning whether senior-priority water users are "suffering material injury and using water efficiently and without waste." CM Rule 42.01. As this Court explained in *AFRD2*, these decisions "require some determination of 'reasonableness'" and "some exercise of discretion by the Director." 143 Idaho at 880.

In applying the CM Rules in this case, the Director determined that Twin Falls Canal Company ("TFCC") could meet its irrigation needs with 5/8 inch of water per acre. The district court reversed that decision on the basis that the Director must use a heightened "clear and convincing" standard of proof as opposed to the "preponderance of the evidence" standard that typically applies to agency decisions.

This Court should reverse the district court decision and uphold the preponderance of the evidence standard because (a) most civil suit decisions, like agency administrative decisions, are governed by a preponderance of the evidence standard, (b) the heightened clear and convincing standard applies in the water law arena only where water rights are permanently fixed or altered, which does not happen as a result of a material injury determination, (c) courts in other jurisdic-

tions distinguish between the adjudication of water rights and the distribution of water between established rights, and apply a preponderance of the evidence standard to administrative decisions involving water distribution, (d) this Court's decision in *AFRD2* supports using a preponderance of the evidence standard of proof, (e) the preponderance of the evidence standard affords presumptive weight to water right decrees, and (f) the cases relied on by the district court do not define the standard of proof that should apply to the conjunctive administration of surface and ground water rights under the CM Rules.

The SWC argument that the "minimum full supply" methodology is improper is moot because the Director has abandoned that methodology in favor of a new, more sophisticated methodology called "reasonable in-season demand." Even if this Court considers the SWC's argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equates to material injury.

ARGUMENT

When responding to a delivery call under the CM Rules, the Director has an obligation to determine whether the senior water user is "suffering material injury and using water efficiently and without waste." CM Rule 42.01. In this case, the Director determined that TFCC can meet its current irrigation needs with a "full headgate delivery" of 5/8 inch of water per acre (i.e. the SWC does not suffer material injury). (R. Vol. 8, p. 1378.) However, since the Director had recommended to the SRBA court that TFCC's water right have a maximum permissible rate of diversion of 3/4 inch per acre, the district court ruled that the Director has no authority to find that

TFCC's current irrigation needs can be met with less than 3/4 inch. (Clerk's R. Vol. 3, p. 541.) On rehearing, the district court added that the Director erred by "failing to apply the correct presumptions and burden of proof in making the determination under the CM [Rules] that TFCC was entitled to less than the recommended quantity." (Clerk's R. Vol. 7, pp. 1247, 1249.)

As set forth below, this Court should reverse the district court and uphold the Director's determination because he has clear authority under the CM Rules to determine whether TFCC can meet its irrigation needs with less than its maximum authorized rate of diversion, and the appropriate standard of proof for making that determination is "preponderance of the evidence."

1. The Director has clear authority to determine whether TFCC can meet its irrigation needs with less than its maximum authorized rate of diversion.

The first sentence of Idaho's water code proclaims that water is "essential to the industrial prosperity of this 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." Idaho Code § 42-101. Accordingly, this Court has for more than a century held that "[e]conomy must be required and demanded in the use and application of water." *Clear Springs v. Spackman*, 252 P.3d 71, 89 (2011) (quoting *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist., Ltd.*, 16 Idaho 525, 535 (1909)). The "settled law of this state" is that

> no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44 (1915) (internal cite omitted); *see also, Clear Springs*, 252 P.3d at 89 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)) ("The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources.")

These rulings reflect the universal principle of western water law that beneficial use is the basis, measure, and limit of any water right. As stated in Idaho Code § 42-104, the appropriation of water "must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." *See also, Lee v. Hanford*, 21 Idaho 327, 330-31 (1912) (holding that an appropriator is limited to the quantity of water he is able to apply to beneficial use at a particular time, within the limit of his appropriation.) This Court confirmed this principle in its *AFRD2* decision, explaining that the Director:

> has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

143 Idaho at 876.

The foregoing principles are captured in CM Rule 42, which instructs the Director, when responding to a water delivery call, to determine whether the senior water user is "suffering material injury and using water efficiently and without waste." CM Rule 42.01. The rule contains various factors the Director should consider when making this determination, including "[t]he amount of water being diverted and used compared to the water rights," CM Rule 42.01.e, and "[t]he 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 …," CM Rule 42.01.g. These factors recognize that a water user may not always need the maximum amount of water under his water right to accomplish his beneficial use. The example cited in *AFRD2* of a farmer not irrigating the full number of acres is one such instance. Similarly, if a farmer converts from flood irrigation to a much more efficient means of irrigation such as sprinkler or drip irrigation, he should be able to meet his irrigation needs with something less than the maximum rate of diversion.

These material injury factors clearly authorize the Director to determine whether TFCC can meet its irrigation needs with less than the maximum authorized rate of diversion under its water right, and they were declared facially constitutional in *AFRD2*. 143 Idaho at 876-77.

2. The "preponderance of the evidence" standard should apply to the Director's determination of material injury under CM Rule 42.

Despite the Director's clear authority to determine material injury under CM Rule 42, and the substantial evidence supporting his 5/8 inch determination, the district court reversed the Director on the basis that "[t]he Hearing Officer's recommendation appears to be based on a determination that TFCC's water right only entitles it to 5/8 inch per acre." (Clerk's R. Vol. 1, p. 541.) The district court concluded that this determination infringed on the authority of the SRBA court which is "vested with exclusive jurisdiction for determining the elements of a water right." *Id*. In other words, the district court ruled that the 5/8 inch determination was a re-adjudication of TFCC's water right.

On rehearing, the district court elaborated on its decision, explaining that "[n]o reference was made [] to the evidentiary standard applied. Therefore, the Director erred by failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the recommended quantity." (Clerk's R. Vol. 7, p. 1249.) The district court acknowledged that the Director had authority to determine material injury under CM Rule 42, but concluded that such a determination must be based on the same "clear and convincing evidence" standard that applies to water right adjudications. *Id*. at 1248-49. The district court erroneously treated the Director's application of CM Rule 42 as an adjudicative act.

The district court did not explain in detail the basis for its decision, but instead incorporated by reference a contemporary decision issued by Judge Wildman in a Minidoka County case that concludes that clear and convincing evidence is required to prove that material injury does not exist. *Id*. at 1247. Following the district court's ruling, Judge Wildman granted rehearing in the Minidoka County case and issued a subsequent order further explaining his decision. That rehearing decision, which is not a part of the record in this case, is attached hereto as Appendix A. These decisions are referred to collectively in this brief as the "*A&B Decision*."

This Court should reverse the district court decision and hold that administrative determinations regarding material injury should be based on the preponderance of the evidence. There are several reasons why a preponderance of the evidence standard should be used. First, most civil suit decisions, like agency administrative decisions, are governed by a preponderance of the evidence standard. Second, the adjudication of water rights is different from the distribution of water among established rights. Third, courts in other jurisdictions distinguish between adjudica-

tions and administration, and apply a preponderance of the evidence standard to administration. Fourth, this Court's decision in *AFRD2* supports using a preponderance of the evidence standard of proof. Fifth, the preponderance of the evidence standard affords presumptive weight to water right decrees. Finally, the cases relied on by the district court do not define the standard of proof that should apply to administrative decisions involving the distribution of water under the CM Rules. Each argument will be addressed in turn.

A. The preponderance of the evidence standard generally applies in civil and administrative hearings.

In most civil actions, "the burden of proof is by a preponderance of the evidence, which means more probable than not." *Bourgeois v. Murphy,* 119 Idaho 611, 622 (1991). "[T]he preponderance of the evidence standard [is] generally applied in administrative hearings." *N. Frontiers v. State ex re. Cade,* 129 Idaho 437, 439 (Ct. App. 1996) (citing 2 Am. Jur. 2d Administrative Law § 363 (1994)).

In contrast, the "clear and convincing" standard is a heightened evidentiary standard that typically applies only to cases that involve permanent deprivations of rights such as the involuntary termination of parental rights (Idaho Code § 16-2009); involuntary institutional commitment (Idaho Code § 66-329(11)); claims of professional misconduct of a lawyer (*Idaho State Bar v. Top,* 129 Idaho 414, 415 (1996)), or the permanent deprivation of real property (*Cardenas v. Kurpjuweit*, 116 Idaho 739, 742-43 (1989)).

B. The adjudication of a water right is different from the distribution of water among established rights.

In the water law arena, clear and convincing evidence is required when someone is seeking to eliminate or permanently alter the defined elements of a water right: "One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence." *Gilbert v. Smith*, 97 Idaho 735, 738 (1976). Clear and convincing evidence is required if a water user tries to acquire another's water right through adverse possession. *Id.* at 740. It is required to declare that a water right has been forfeited or abandoned. *Jenkins v. State*, 103 Idaho 384, 388-89 (1982). It is also required in water adjudication or quiet title cases where a court is asked to allow new appropriations or to permanently fix title to water rights and establish priority dates and quantities. *Crow v. Carlson*, 107 Idaho 461, 467 (1984); *Silkey v. Tiegs*, 51 Idaho 344 (1931) ("*Silkey I*"); *Silkey v. Tiegs*, 54 Idaho 126 (1934) *("Silkey II")*. These actions are all adjudicative in nature because they permanently redefine, eliminate, or fix title to water rights.

In contrast, the allocation of water between existing water rights is an administrative function that does not alter the defined elements of water rights. The determination of material injury under the CM Rules does not alter the elements of the senior's water right, but evaluates the senior's current need for water and ensures that water is not wasted or hoarded contrary to the public policy of reasonable use of water. CM Rules 42.01 and 20.03. This Court confirmed in *AFRD2* that "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication," and that "determining whether waste is taking place is not a

re-adjudication because clearly that too, is not a decreed element of the right." 143 Idaho at 877. This Court recognized that "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Id*. at 876.

The material injury factors in CM Rule 42 illustrate that the analysis is not concerned with defining the maximum parameters of authorized water use, but of meeting the senior's current water needs. The factors instruct the Director to consider such things as the effort and expense to divert from the source (42.01.b); rate of diversion, acres, efficiencies, and irrigation method (42.01.d); amount of water used compared to the water right (42.01.e); whether the senior can meet his or her needs with existing facilities, reasonable diversion and conveyance efficiencies, or conservation practices (42.01.g); and alternate reasonable means of diversion (42.01.h).

None of these factors are concerned with defining maximum parameters of authorized water use, and they do not permanently alter or fix the elements of the senior's water right. They are concerned with present water needs, and they are subject to change. If the Director determines that a senior can meet its current irrigation needs with less than the maximum authorized rate of diversion, that does not preclude the Director from later revisiting the issue and finding that the senior needs additional water. For instance, if a senior must convert its delivery system to a less efficient means of irrigation, the Director has authority under the CM Rules to reevaluate circumstances and make corresponding redetermination of material injury. In neither case are the elements of the water right altered; in neither case should clear and convincing evidence be required.

C. Courts in other jurisdictions distinguish between the distribution of water and the adjudication of water rights, and apply different standards of proof.

The distinction between the distribution of water and the adjudication of water rights—and the need for different standards of proof—has been recognized by the U.S. Supreme Court. In *Nebraska v. Wyoming*, the U.S. Supreme Court considered a water right decree for the North Platte River, and held that decisions involving the enforcement of priorities under the decree (*i.e.* the distribution of water) should be based on the preponderance of the evidence, whereas modifications of the decree (i.e. adjudicative decisions) require a higher standard of clear and convincing proof. 507 U.S. 584, 590-92 (1993). The Court recognized that the "two types of proceeding are markedly different." *Id*. at 592.

The Wyoming Supreme Court has specifically considered the appropriate standard of proof to be applied in the conjunctive management context. In *Willadsen v. Christopulos*, the court considered a delivery call by the holder of a surface water right against a junior-priority groundwater right that was allegedly depleting the senior's stream flow. *Willadsen*, 731 P.2d 1181, 1182 (Wyo. 1987). The State Engineer (equivalent to the Director in Idaho) found insufficient evidence of interference, and therefore refused to curtail the junior right. *Id*. On appeal, the senior challenged the State Engineer's conclusion on the basis that he applied the wrong standard of proof. The Wyoming Supreme Court upheld the State Engineer's decision, ruling that the decision of whether to curtail the junior groundwater user was properly based on "the preponderance of the evidence standard customarily used in civil cases." *Id*. at 1184.

Like the U.S. Supreme Court in the *Nebraska* case, and the Wyoming Supreme Court in the *Willadsen* case, this Court should recognize the distinction between adjudication of water rights and the distribution of water among established rights and hold that the preponderance of the evidence standard applies to water administration decisions.

D. Key holdings and rationale in *AFRD2* support the application of the preponderance of the evidence standard in the conjunctive management context.

In *AFRD2,* this Court did not enunciate the evidentiary standard that applies in the conjunctive management context, but did explain that "to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules." *AFRD2*, 143 Idaho at 873. No Idaho case directly addresses what standard of proof applies to conjunctive administration, but the Legislature has instructed the Director, when allocating water between existing rights, to "equally guard all the various interests involved." Idaho Code § 42-101. This suggests that when it comes to water distribution, the Director should not presume that material injury does or does not exist, but should instead make that determination based on the preponderance of the evidence before him. Director Dreher believed this to be the right to approach to conjunctive management, explaining that

> under this whole conflict that had developed, my view was that it was the State's responsibility – the department's responsibility to initially take the burden of determining the extent of injury and the appropriate recourse. Some might say, well, that burden should be put on the juniors. They ought to have to prove the negative. They ought to come in and prove that they're not causing injury.
>
> Well, the reason I disagree with that is because it's the State that authorized those junior-priority diversions. It's the State that issued those licenses. And the junior

> rightholders, even though they're junior and even though they are subject to all prior rights, their rights are real too. They had just been decreed in the SRBA, and I didn't think it was appropriate to say, okay, prove that you're not causing injury; we – the State has issued these water rights, we issued these decrees, now prove that you're not causing injury. I didn't think that was the appropriate way to do this.
>
> Similarly, it certainly was inappropriate to, at least in my view, put the burden on the seniors. Okay. You allege you're being injured. Now, prove it. I didn't think that was appropriate.
>
> And so in developing this May 2nd Order, I tried to develop a process under which the State would take the initial burden of making these determinations, and then there would be a hearing … under which the factual issues and the legal issues were resolved.

(Tr. Vol. 1, pp. 50-52.)

This Court's rationale and holdings in *AFRD2* lead to the same conclusion. In *AFRD2* the SWC argued that the factors set forth in CM Rule 42 are unconstitutional because they authorize the Director to effectively re-adjudicate the elements of the senior's water right. This Court rejected that argument, recognizing that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." 143 Idaho at 876-77. The Court understood, like the U.S. Supreme Court in *Nebraska* and the Wyoming Supreme Court in *Willadsen*, that the decisions that must be made in the distribution of water are markedly different than those that must be made in a water right adjudication. Since *AFRD2* confirms that a delivery call proceeding is administrative in nature (as opposed to adjudicative), it supports application of the preponderance of the evidence standard.

Other holdings in *AFRD2* further support the preponderance of the evidence standard for water administration decisions under the CM Rules. Although the senior is presumed to be entitled to its full decreed water right, this Court held that the senior is *not* presumed to suffer material injury. *Id.* at 876-77. The district court had relied on an old surface water administration case, *Moe v. Harger*, 10 Idaho 302 (1904), to hold that "when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to the senior." *AFRD2*, 143 Idaho at 877. This Court rejected that ruling, and pointed out that *Moe* "was a case dealing with competing surface water rights, and this is a case involving interconnected ground and surface water rights. The issues presented are simply not the same." *Id*.

The preponderance of the evidence standard is further warranted by the fact that the material injury determination requires the Director to "evaluate whether the senior is putting the water to beneficial use," *Id*. at 876, "whether the holders of water rights are using water efficiently and without waste," *Id*. at 875, and "the reasonableness of a diversion, the reasonableness of use and full economic development," *Id*. at 876, all of which necessitate "some exercise of discretion by the Director." *Id*. at 875. These decisions naturally require the exercise of technical judgment and discretion, which is why the Director is required by law to be a licensed engineer, Idaho Code §4 2-1701(2), and instructed to utilize his "experience, technical competence, and specialized knowledge" when administering water. Idaho Code § 67-5251(5); *see also* IDAPA 37.01.01.600. Such decisions should be made in the Director's best judgment, based on the preponderance of the evidence.

E. The preponderance of the evidence standard affords presumptive weight to the decree.

The *A&B Decision* was concerned with the statement in *AFRD2* that a senior is presumed to be entitled to their decreed amount of water. (Sup. Ct. Order Augmenting Record, Aug. 3, 2011, pp. 34-35.) The *A&B Decision* concludes that, given this presumption, a "clear and convincing proof" standard must apply, reasoning that "[t]o conclude otherwise accords no presumptive weight to the decree." *Id*. at 34, n. 12. This conclusion mistakenly presumes that a decree's presumptive weight in and of itself defies a preponderance of the evidence standard for determining material injury.

The presumption is simply the starting point against which the burden of proof (clear and convincing or preponderance) is measured. The presumption that a senior is entitled to their decreed amount exists whether the standard to prove otherwise is "clear and convincing" or "preponderance." Even under a preponderance of the evidence standard, the senior still benefits from the presumption by receiving his full decreed amount unless and until the preponderance of the evidence shows that the senior's irrigation needs can be met with something less than the full decreed amount. For example, the SWC's water rights presumptively entitle it to divert 9 million acre-feet of water. For the Director to deliver less, the preponderance of the evidence must show that the SWC can meet its irrigation needs with less than 9 million acre-feet. The preponderance of the evidence standard still affords the presumption of entitlement to the full decreed amount.

F. The cases cited by the district court do not define the standard of proof applicable to water administration decisions under the CM Rules.

The *A&B Decision* and the *A&B Rehearing Decision* rely on a number of surface water cases to conclude that in the conjunctive management context the Director must presume that material injury exists until proven otherwise by clear and convincing evidence. *Id.* at 34-35 (citing *Cantlin v. Carter*, 88 Idaho 179 (1964), *Crow v. Carlson*, 107 Idaho 461 (1984), *Jenkins v. IDWR*, 103 Idaho 384 (1982), and *Gilbert v. Smith*, 97 Idaho 735 (1976)); Appx. A at 9-10 (citing *Moe v. Harger*, 10 Idaho 302 (1904), *Josslyn v. Daly*, 15 Idaho 137 (1908), *Neil v. Hyde*, 32 Idaho 576 (1919), and *Jackson v. Cowan*, 33 Idaho 525 (1921)). These cases are all distinguishable because they all deal with competing surface water rights and therefore do not address the unique issues involved in conjunctive administration. *See, AFRD2*, 143 Idaho at 877. These cases are distinguishable for additional reasons as well, as set forth below.

Cantlin, *Josslyn*, and *Moe* are distinguishable because they involve the granting of new appropriations which is an adjudicative act. The U.S. Supreme Court explained in *Colorado v. New Mexico* why the granting of a new appropriation warrants a heightened standard of proof:

> Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.

467 U.S. 310, 316 (1984) (internal quotations omitted). While that case involved an appropriation of interstate water, the court's reasoning applies equally to new appropriations of intrastate

water. In both instances, granting a new water right whose benefit may be speculative and remote is much different than allocating water between proven beneficial uses under established water rights.

Crow, *Jenkins*, and *Gilbert* are distinguishable because they involve claims of abandonment, forfeiture, and adverse possession which are also adjudicative in nature because they permanently extinguish the right to divert water.

Neil and *Jackson* involve claims that the use of junior rights will not affect the senior due to a lack of hydraulic connectivity, but in neither case does the Court enunciate a heightened standard of proof. *Neil*, 32 Idaho at 587; *Jackson*, 33 Idaho at 528. This Court held in both cases that the burden is on the junior to prove the lack of connection, but did not state that clear and convincing evidence is required. *Id*.

The *A&B Rehearing Decision* cites two additional cases involving groundwater rights, but they are also adjudicative in nature. *Silkey v. Tiegs*, 51 Idaho 344 (1931) ("*Silkey I*"); *Silkey v. Tiegs*, 54 Idaho 126 (1934) ("*Silkey II*"). *Silkey I* involves a water right adjudication and entry of decree that permanently defined the elements of various water rights. *Silkey II* involves a motion to modify the decree to allow a junior user to divert more water. Since both cases involve the permanent definition of the elements of water rights, they are not conclusive as to the standard of proof that should apply to the Director's determination of material injury when responding to a delivery call under the CM Rules.

Finally, the *A&B Rehearing Decision* addresses the sole case involving the administration of groundwater: *Jones v. Vanausdeln*, 28 Idaho 743 (1916). In *Jones*, a senior groundwater user

sought an injunction against the operation of a junior-priority well. *Id*. at 746. This Court had previously held in *Moe* and *Josslyn* that a "subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence." *Moe*, 10 Idaho at 307; *Josslyn* 15 Idaho at 149. Yet, this Court did not require the same showing in *Jones*. Instead, this Court required the *senior* to provide "very convincing proof of the interference of one well with the flow of another … before a court of equity would be justified in restraining its proprietors from operating it on that ground." *Id*. at 749. This Court recognized that a dispute over the administration of groundwater "differs somewhat from the ordinary action for the adjudication of conflicting water rights on the same stream." *Id*. at 752.

The *A&B Rehearing* decision attempts to reconcile *Jones* with the surface water cases by ruling that:

> *Jones* instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in the above-mentioned cases except for Jones, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior's right to use.

(Appx. B at 11.) The problem with this conclusion is two-fold. First, the other cases involve surface water administration, and the issues in determining material injury in the conjunctive management context "are simply not the same." *AFRD2*, 143 Idaho at 877. Second, the SRBA court has eliminated the senior's burden to prove hydraulic connectivity, by entering an order that creates a presumption *in favor of the senior* that all water sources are hydraulically connected

unless proven otherwise. (Appx. A at 12.) The effect of the order is that the junior now bears the burden to disprove connectively, effectively reversing the burden set forth in *Jones*.

The district court's attempt to amalgamate *Jones* with the surface water cases is not in harmony with this Court's holding in *AFRD2*, and unnecessarily forces the Director's determination of material injury into the familiar constructs of surface water administration and water rights adjudications.

Given the significant differences between the issues that must be addressed in the adjudication of water rights as compared to the distribution of water among established rights, the recognition by courts in other jurisdictions that these differences warrant different standards of proof, and the key holding in *AFRD2* that the Director is not to presume that material injury exists, this Court should hold that the administrative decisions required of the Director when responding to a delivery call under the CM Rules should be based on the preponderance of the evidence standard.

RESPONSE TO SWC'S OPENING BRIEF

The *SWC Opening Brief* is principally dedicated to the argument that the Director's use of a "minimum full supply" to determine material injury violates Idaho law. (*SWC Open. Br.* 15-30.) As set forth below, the entire argument is moot because the Director no longer utilizes the "minimum full supply" methodology. Even if this Court decides to consider SWC's "minimum full supply" argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equals material injury, regardless of the senior's actual beneficial use of water.

1. The SWC argument concerning "minimum full supply" is moot.

"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 (1996); *See also, Bradshaw v. State,* 120 Idaho 429, 432 (1991).

The Director utilized the concept of "minimum full supply" in the original *2005 Curtailment Order* as part of his determination of material injury under CM Rule 42. (R. Vol. 8, pp. 1377-80.) He calculated the "minimum full supply" as the amount of water "necessary to meet water needs independent of the licensed, decreed or contracted rights." (R. Vol. 37, p. 7087.) It was "an attempt to predict the minimum amount of water the surface water users need to meet their crop requirements, below which curtailment is necessary if the minimum is not met as a consequence of junior ground water depletions." *Id*.

In response to criticisms by the Hearing Officer concerning the Director's methodology for calculating "minimum full supply," the Director developed a new methodology for determining material injury, termed "reasonable in-season demand." (Cl. R. Vol. 7, p. 1354(s).) The question of whether the new "reasonable in-season demand" methodology comports with Idaho law is currently on appeal in Minidoka County consolidated case no. CV-2010-382.

Since the Director has abandoned the "minimum full supply" methodology, there is no need for this Court to determine whether or not it is legally justifiable. Such a determination will have no practical effect on the outcome of this case. The issue is moot.

2. Depletion does not automatically equal material injury.

If the Court does consider the SWC's "minimum full supply" argument, it should be rejected because it is predicated on the false premise that depletion to the water supply automatically equals material injury, regardless of the senior's actual beneficial use of water.

The SWC argues that "the Director and watermasters must regulate and distribute water to water rights." (*SWC Open. Br*. 21, emphasis in original) They say that "any hindrance to either a natural flow or a storage water right (including the right to carryover storage) constitutes 'material injury' that must be mitigated either through curtailment or an approved CM Rule 43 mitigation plan." *Id*. at 16. They go so far as to argue that anytime a senior merely claims to be suffering material injury, then "material injury is presumed." *Id*. In other words, their position is that depletion to the water supply automatically equals material injury, regardless of whether the senior needs and will beneficially use additional water. The SWC argument is inconsistent with the definition of "material injury" given in the CM Rules, and it has already been rejected by this Court.

The distinction between injury to the water *supply* versus injury to the *use* of water is significant. If injury is measured merely by an impact to the supply of water, then the senior is automatically injured any time the water supply provides less than the maximum rate of diversion authorized under his water right, regardless of whether he actually needs additional water to accomplish his beneficial use. On the other hand, if injury is measured by the impact to the senior's beneficial use of water, then the senior suffers injury only if he is unable to meet his irrigation needs.

The CM Rules, Idaho Code, and prior decisions from this Court uniformly confirm that injury is measured by the impact on the use of water.

CM Rule 42 defines "material injury" as "hindrance to or impact upon the exercise of a water right." CM Rule 10.14 (emphasis added). The term "exercise" is significant. It means "[a]n act of employing or putting to use." *The American Heritage Dictionary of the English Language*, New Dell Ed., 1981, p. 251. By including the word "exercise," the term "material injury" denotes impact to the use of water, not merely impact to the amount of water available for diversion.

This is consistent with the Idaho Code, which provides that an "appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-104; *see also*, § 42-220 ("neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied ….")

Precedent from this Court confirms that injury is measured by beneficial use of water. More than a century ago, this Court held "the law only allows the appropriator the amount *actually necessary* for the useful or beneficial purpose to which he applies it." *Abbott v. Reedy*, 9 Idaho 577, 581 (1904) (emphasis in original); *see also*, *Cotant v. Jones*, 3 Idaho 606, 613 (1893) (a water user is "only entitled to such water, from year to year, as he puts to a beneficial use.") In *Glavin v. Salmon River Canal Co*., this Court explained that

> [i]t 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.

44 Idaho 583, 589 (1927); *see also, Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 442 (1957) ("… it is the duty of the prior appropriator to allow the water, which he has the right to use, to flow down the channel for the benefit of junior appropriators at times when he has no immediate need for the use thereof.") This Court has further held that injury requires evidence of "not merely a fanciful injury but a real and actual injury." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944).

This is not the first time that the SWC has argued that depletion to the water supply automatically equals material injury. The SWC made the same argument in *AFRD2,* claiming that by allowing the Director to consider the senior's actual beneficial use of water the CM Rules "flip the law of prior appropriation on its head" and result in "reverse 'first in time, first in right." (*Pls' Br. in Resp. to Defs'and IGWA's Open. Brs.*, Idaho S. Ct. Docket Nos. 33249, 33311, 33399 (Nov. 10, 2006), attached hereto as Appendix B at 14, 16.) The SWC's position was that "water rights in Idaho should be administered strictly on a priority in time basis." *AFRD2*, 143 Idaho at 870.

The district court decision in *AFRD2* accepted the SWC's argument, relying on *Moe* to conclude that "when a junior diverts or withdraws water in times of water shortage, it is presumed that there is injury to a senior." *AFRD2*, 143 Idaho at 877 (citing *Moe*, 10 Idaho 302 (1904)). This Court reversed the district court on this point, ruling instead that "depletion does not equate to material injury," that "[b]ecause the amount of water necessary for beneficial use

can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury," and that "senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use." *Id.* at 868. This Court reasoned that "[i]f this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id* at 876. Accordingly, the Court held that while the Director must presume that the senior is entitled to his full decreed quantity, the Director's evaluation of material injury when "responding to delivery calls, as conducted pursuant to the [CM Rules], does [sic] not constitute a re-adjudication." *Id.* at 876-77.

The importance of evaluating beneficial use is illustrated by the difference between the maximum amounts of water authorized for diversion under the SWC's natural flow and storage water rights (9 million acre-feet) and the amounts of water it actually diverts (no more than 4 million acre-feet). (Ex. 3007A, Table 7, Ex. 8000 at Vol. 4 p. AS-8.) Director Dreher explained what the result would be in this case if the Director had no discretion to examine SWC's beneficial of water, but instead had to administer strictly based on the maximums:

> If administration of these junior-priority rights is going to be based upon the maximum quantity authorized under these surface water rights, there will be no ground water irrigation in Idaho. It's not possible. ... there will be a whole lot of water that goes down the Snake River in flood control releases and out of the state without being beneficially used ... look at the flood control releases that occur with ground water depletions.

(Tr. Vol. 1, pp. 170-171.) Accordingly, both Hearing Officer Schroeder and Director Tuthill concluded that "depletion does not equate to material injury," but that the determination of whether a senior is materially injured is instead a "highly fact specific inquiry." (R. Vol. 39, p. 7388.)

For these reasons, this Court should reject SWC's proposition that depletion to the water supply automatically equals material injury.

CONCLUSION

This Court should reverse the district court and uphold the preponderance of the evidence standard of proof for determining material injury under the CM Rules because (a) most agency administrative decisions are governed by a preponderance of the evidence standard, (b) the heightened clear and convincing standard that applies to adjudicative actions should not apply to the administrative act of distributing water among established rights, (iii) courts in other jurisdictions apply a preponderance of the evidence standard to water distribution decisions, (iv) this Court's decision in *AFRD2* supports using a preponderance of the evidence standard of proof, (v) the preponderance of the evidence standard affords presumptive weight to the decree, and (vi) the cases relied on by the district court are not definitive with respect to the standard of proof that applies to the decisions that must be made by the Director when responding to a delivery call under the CM Rules.

This Court should not consider the SWC's arguments concerning the "minimum full supply" methodology because it has been superseded by the "reasonable in-season demand" methodology which is on a separate appeal. The issue of "minimum full supply" is moot because a

decision on the issue will have no practical outcome on this case. Even if this Court considers the SWC's argument concerning the "minimum full supply" methodology, it should be rejected because it is predicated on the false premise that depletion to the water supply does automatically equates to material injury.

RESPECTFULLY SUBMITTED this 31st day of August, 2011.

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED

Randall C. Budge
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Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 2011, the above and foregoing document was served in the following manner:

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THOMAS J. BUDGE

APPENDIX A

Memorandum Decision and Order on Petitions for Rehearing

Minidoka County Case No. 2009-647 (Nov. 2, 2010)

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. **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. 2009-000647 **MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING**

Ruling: Affirming prior ruling.

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, Sarah W. Higer, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District, ("A & B");

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, ("Director," "IDWR" or "Department");

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. ("IGWA");

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello ("City of Pocatello");

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, ("Fremont-Madison *et. al.*").

I. PROCEDURE

A. Issue on rehearing.

On rehearing this Court is asked by the Department, IGWA and the City of Pocatello (collectively as "Ground Water Users") to reconsider its ruling in the ***Memorandum Decision and Order on Petition for Judicial Review*** (May 4, 2010) ("***Order***") regarding the appropriate burden of proof and evidentiary standards applied in a delivery call made pursuant to the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources,* IDAPA 37.03.11. ("CMR"). In particular, the issue pertains to the standard of proof and burdens necessary to support a determination of no material injury when the determination relies on a finding by the Director that the water requirements of the senior right holder initiating the call can be satisfied with less than the decreed quantity. This Court held that such a finding must be supported by clear and convincing evidence. The issue on rehearing therefore involves the significance of a partial decree in a delivery call proceeding made pursuant to the CMR, and the standard of proof required to support a determination by the Director that the senior user initiating the call requires less water than previously decreed.

B. The purpose of the remand.

The ***Order*** remanded the case to the Director for application of the standard of proof to his determination that A & B could get by with less water than decreed to it in the SRBA. In the June 30, 2009, Final Order, the Director did not state the evidentiary standard applied. In *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 843, 70 P.3d 669, 681 (2003) the Idaho Supreme Court held that where the Department failed to state whether or not its findings were based on clear and convincing evidence it was outside the role of the reviewing court to review the evidence and decide whether there was clear and convincing evidence supporting the Department's findings. Following *Sagewillow*, this Court did not review the evidence to determine whether the above-mentioned finding was supported by clear and convincing evidence, but rather remanded the case to the Director to make such a determination.

C. The reasoning supporting the *Order*.

This Court reasoned that a decreed quantity in a SRBA decree is a judicial determination of the quantity of water put to beneficial use consistent with the purpose of use for which the right was decreed. Therefore, any determination that a senior right holder can accomplish the purpose of use for the water right on a quantity less than decreed would be akin to a finding of waste because the senior would not be making beneficial use of the entire decreed quantity. No material injury to the senior water right would inure and junior rights could not be regulated to satisfy the senior's decreed quantity. In the ***Order***, the Court held that a finding of waste requires the higher standard of clear and convincing evidence.

The holding reconciled the objectives of giving proper effect and certainty to the adjudicated elements of a water right while at the same time also giving effect to the CMR by acknowledging that a quantity less than decreed may be all that is necessary to satisfy a senior right at the time a delivery call is made. The reasoning, however, placed any risk of uncertainty in the Director's determination resulting in the senior having an insufficient water supply on junior water rights. Absent a higher standard, the senior making the call can be put in the position of re-proving or re-litigating quantity

requirements for a particular water right. Simply put, if the Director is going to administer to provide the senior with less than the decreed quantity, taking into account the implementation of any reasonable measures imposed on the senior, the Director should be convinced to a high degree of certainty that his determination will provide the senior with sufficient water to accomplish the purpose of use. The high degree of certainty is necessary because a water right is a valuable property right. If the Director is turns out to be incorrect in his determination that senior can get by with less than the decreed quantity of water, the senior will receive less water than he would otherwise be entitled under the decree. Under those circumstances the senior is in effect deprived a portion of his property right. Such diminishment of the senior's right should only be made through the evidentiary standard of clear and convincing evidence.

II. CLARIFICATION, RESPONSES TO ISSUES RAISED AND DISCUSSION

A. The clear and convincing standard does not guarantee the senior the decreed quantity nor does it require that the Director administer according to strict priority.

The Ground Water Users argue the Court's ***Order*** results in requiring that the Director administer strictly to the decree unless juniors intervene and demonstrate by clear and convincing evidence less water is necessary. This argument misunderstands the Court's ***Order***.

1. The presumptions and burdens of proof were not clearly addressed in the administrative proceedings as required by *AFRD* #2.

This Court previously discussed the significance of the Idaho Supreme Court's decision in ***American Falls Reservoir District No. 2. v. IDWR***, 143 Idaho 862, 154 P.3d 433 (2007) (***AFRD #2***). ***Order,*** 27-28. The Supreme Court held that the CMR survived a facial challenge despite the lack of stated burdens of proof and evidentiary standards applicable to a delivery call. Nevertheless, the Court recognized that the Department is

still required to apply the proper evidentiary standards and burdens of proof in order to apply the CMR in a constitutional or "as applied" manner. In the instant case, the evidentiary standards and burdens of proof were not clearly articulated by the Director.

i. Administration of rights in an organized water district does not avoid the application of the established burdens of proof.

The CMR distinguish between whether or not administration is sought in an organized water district. (*Compare* CMR Rule 40 and Rule 30). The initiation of a contested case is not required in an organized water district. This is significant because in an organized water district, water rights must first be adjudicated. *See* I.C. § 42-604 (requirements for water district). In responding to a delivery call in an organized water district, the Director is required to make findings and to administer rights through a water master if material injury is found. This is accomplished without the initiation of a contested case process. In ***AFRD #2*** the Idaho Supreme Court held that "[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call." *Id.* at 874, 154 P.3d at 445. Therefore, whether or not a junior intervenes in the proceedings, the Director must give effect to established evidentiary burdens and presumptions.

ii. The CMR do not modify the burdens or presumptions applied in a delivery call.

The Ground Water Users argue that the burden of proof is a preponderance of the evidence as it is the appropriate evidentiary standard in most administrative proceedings. The Ground Water Users additionally assert that the evidentiary standards that apply to the administration of ground water rights are different from those involving solely surface water administration. The Ground Water Users also argue the cases relied on by the Court in the ***Order*** only address surface to surface administration and that different

burdens and evidentiary standards apply in cases involving ground water administration. This Court disagrees that different burdens and evidentiary standards apply.

Again, in ***AFRD #2*** the Supreme Court did not hold that a different set of evidentiary standards and burdens apply to the administration of ground water. The Supreme Court held that the CMR were not unconstitutional for failing to articulate the appropriate standards and burdens. The Court added that "[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules." *Id.* at 874, 154 P.3d at 445. This statement is unequivocal. The argument that the CMR modify historically developed burdens and presumptions is inconsistent with that holding.

The City of Pocatello argues that the burden is on the senior to prove material injury. *Pocatello Opening Brief* at 10-11. In ***AFRD #2*** American Falls argued that specific provisions of the CMR squarely contradict Idaho law by placing the burden of proving material injury on the senior making the call. The Supreme Court held "[n]owhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. . . . [O]ur analysis is limited to the rules as written, or 'on their face,' and the rules do not permit or direct the shifting of the burden of proof." *Id.* at 873-74, 154 P.3d at 444-45. Accordingly, the express provisions of the CMR do not operate to modify the historically recognized burdens and presumptions.

Finally, the issue before this Court does not deal with the complexities and uncertainties posed by the hydraulic interrelation of ground and surface water. On rehearing, the issue focuses solely on the presumptive weight accorded a partial decree and the standard of proof required to support a determination that the senior initiating the call requires less water than previously decreed. At issue is the quantity of water necessary to accomplish the senior's purpose of use.

iii. The Court's *Order* does not result in the Director administering rights strictly in accordance with the decreed quantity.

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 is entitled to that decreed quantity. 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 decreed 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.

The clear and convincing evidentiary standard is not an insurmountable standard. The Department is not new to the administration of water and should be able to determine present water requirements taking into account multiple factors including the existing conveyance system. If the senior right holder has made efficiencies or changes to a delivery system resulting in the conservation of water, such should be no more difficult to establish at the higher evidentiary standard. Therefore the senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient. Otherwise what occurs is a redistribution of the senior right to be apportioned among junior rights. The apportionment of water among users as common property was rejected by the Idaho Supreme Court in the early stages of water development. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892).

iv. The application of a clear and convincing standard does not turn a delivery call proceeding into a hearing on forfeiture.

The Ground Water Users argue that the Court's ruling essentially turns a delivery call into a proceeding on forfeiture. The Ground Water Users argue that that the Court's reliance on waste is in error because in a delivery call the senior's water right is not permanently reduced. This argument misses the point of the ruling. The Court simply

held that the quantity element represents a quantitative determination of beneficial use. In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted. One leading commentator in analyzing the development of the use of the concepts of reasonable use and economical use in association with beneficial use among various western states, including Idaho, states:

> As considered and applied in these decisions, economical use is an antonym of waste. If an appropriator wastes, he necessarily is not using it economically. As he has no right to waste water unreasonably or unnecessarily, then of necessity he must make economical as well as reasonable and beneficial use. . . . The limitation of the appropriative right to economical and reasonable use thus precludes any waste of water that can reasonably be avoided. The use of water is so necessary as to preclude its being allowed to run to waste. Its 'full beneficial and economical use requires' that when the wants of one appropriator are supplied, another may be permitted to use the flow.

Wells A. Hutchins, *Water Rights in the Western Nineteen States*, Vol I, 502 (1971). The holdings of the SRBA District Court have historically viewed waste and beneficial use in this manner. For example, the SRBA Court rejected the inclusion of a remark in partial decrees which specified that the quantity sought in a delivery call is limited to that which the senior right holder put to beneficial use. The SRBA Court reasoned that the remark was not necessary because it was a restatement of the law and held "that a senior has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water." ***Order*** at 32 (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)).

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 forfeiture be asserted. However, whether the senior's right is permanently reduced through partial forfeiture or is only temporarily reduced though administration in times of shortage and the reduction leaves the senior

with an insufficient water supply to satisfy present needs, the property right is nonetheless diminished.

B. The historically developed burdens and presumptions.

On rehearing, the parties identify those cases that address the burdens of proof and evidentiary standards applicable to disputes between competing water users under Idaho law. A review of these cases is worthwhile.

The early case of *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904) addressed a dispute between surface water users on a common source, the Big Lost River. The case was commenced by certain senior water appropriators to enjoin certain junior water appropriators from diverting water to the alleged injury of the seniors' rights of use. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed that once the senior appropriators' rights of use are established, the burden shifts to the junior to prove by clear and convincing evidence that his use will not injure the seniors' rights of use:

> So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator, who claims that such diversion will not injure the prior appropriator below him, **should be required to establish that fact by clear and convincing evidence**.

Id. at 307, 77 P. at 647 (emphasis added).

In *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908) the Idaho Supreme Court again addressed a dispute between surface water users. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed, consistent with *Moe*, that the burden is on the party alleging that his appropriation will not injure a prior appropriator's right of use to prove the same by clear and convincing evidence:

> It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or

> prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho, 305, 77 Pac. 645, **produce 'clear and convincing evidence** showing that the prior appropriator would not be injured or affected by the diversion.' The burden is on him to show such facts.

Id. at 149, 96 P. at 571–72 (emphasis added).

Neil v. Hyde, 32 Idaho 576, 186 P. 710 (1920) and *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) likewise involved disputes between surface water users on common sources. The junior appropriators in those cases argued that their use did not injure the senior users. The Idaho Supreme Court directed in both cases that the burden of proof rested on the junior appropriators to show that their use did not injure the seniors, and held that the juniors in both cases failed to carry their burden.[1] *Neil*, 32 Idaho at 587, 186 P. at 713; *Jackson*, 33 Idaho at 528, 196 at 217.

A different issue than those addressed by the Court in the above-mentioned cases arose in the context of a dispute between two groups of artesian groundwater users in *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1916). In that case, the ultimate issue was one of hydrologic connectivity; that is, whether the respective artesian basins from which plaintiffs and defendants received their water were hydraulically connected:

> The ultimate fact in issue was whether the [defendants'] wells drew their supply from the same underground flow as [plaintiffs'] wells, thereby causing a diminution in the flow of the [plaintiffs'] wells.

Id. at 751, 156 P. at 618. The district court denied plaintiffs' request that the defendants' use be enjoined on the grounds that no subterranean connection existed between the respective artesian basins and that, as a result, the two groups received their water from separate and unconnected sources. *Id.* at 747–48, 156 at 616. The Idaho Supreme Court confirmed, providing that when the issue is whether two sources are hydraulically connected, the burden of proof is on the senior appropriator to establish that such a connection exists before a junior's use will be enjoined. *Id.* at 749, 156 at 617.

The Idaho Supreme Court again took up a dispute between various artesian groundwater users in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) ("*Silkey I*") and *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) ("*Silkey II*"). In that case, the district

[1] Although the Court directed that the burden of proof rested with the junior appropriators, in neither case did the Court specify the applicable evidentiary standard the juniors had to meet.

court adjudicated the rights of the parties, entered a decree curtailing the rights of several of the junior appropriators at the request of the senior appropriator and retained jurisdiction over the case to adjust the allowance of water permitted each user if necessary. *Silkey I*, 51 Idaho at 348–49, 5 P.2d at 1051. Unlike *Jones*, connectivity of source was not the ultimate issue in *Silkey*. Indeed, the district court found, and the Idaho Supreme Court affirmed, that "the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply." *Id.* at 348, 5 P.2d at 1051.

The appeal in *Silkey II* arose when the junior appropriators curtailed in *Silkey I* moved the district court under its retained jurisdiction to modify its earlier decree to permit them to use more water. *Silkey II*, 54 Idaho at 127, 28 P.2d at 1037. The junior appropriators argued that such additional use would not deplete the amount of water available to the senior appropriator. *Id.* The Idaho Supreme Court affirmed the district court's denial of the junior appropriators' motion, holding that the juniors failed to sustain their burden of proving that their use would not injure the senior's use:

> The burden was on appellants herein to sustain their motion by direct and convincing testimony, this language in Moe v. Harger, 10 Idaho, 302, 77 P. 645, 646, being particularly apt: "This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

Id. at 128–29, 28 P.2d at 1038. Consistent with *Moe*, the Court again made clear that the standard of proof was clear and convincing evidence if the juniors wished to prove that their use would not injure the senior appropriator.

The case history can be reconciled. *Jones* instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in all of the above-mentioned cases except for *Jones*, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior's right of use. One leading

commentator on the subject has summarized the application of the burdens of proof as follows:

> [W]hen a senior appropriator seeks to enjoin a junior diversion, the senior – the person seeking judicial intervention to change an existing situation – must prove the water sources for the two diversions are connected. But once hydrologic connection is shown, it becomes probable that the junior diversion interferes with the senior right, if the senior's source is fully appropriated by rights prior to the junior diversion. Then the junior appropriator – the person arguing against probabilities – must show his particular water use somehow does not cause interference.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 92–93 (1987).

It is significant that this Court established the hydrologic connection in ***Memorandum Decision and Order of Partial Decree*** in Basin Wide Issue No. 5 "Connected Sources General Provision" for the Snake River Basin. Among other things, the general provision identifies hydraulically connected ground and surface sources in the Snake River Basin for the purposes of administration and defining the legal relationship between connected sources. In pertinent part, the general provision provides as follows:

> Except as otherwise specified above, all other water rights within Basin __ will be administered **as connected sources** of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

(emphasis added). A *Partial Decree for Connected Sources* is issued for each basin within the Snake River Basin. Thus, unless water rights are listed as "otherwise specified" in the *Partial Decree for Connected Sources* for a given basin that the source from which a junior appropriator receives his water shall be administered separately from all other water rights in the Snake River Basin, the issue of whether or not the senior and junior divert water from a common source has already been answered in the positive. This is also consistent with the provisions of the Ground Water Act, IC. § 42-237a.g. which requires the Director to determine areas of the state having a common ground water supply. When it is determined that the area having a common ground water supply affects the flow of water in any stream in an organized water district, then the Director includes the stream in the water district. Conversely, when it is determined that the area having a common ground water supply does not affect the flow of a stream in an

organized water district, then the Director incorporates the area in a separate district. Under such circumstances, the senior appropriator's burden of proof to establish a common source is satisfied.

The burden is then on the junior right holder to show by clear and convincing evidence that his use will not injure the senior's right. One way in which this may be demonstrated is by showing that the senior's present water use does not require the full decreed quantity. A clear and convincing standard is consistent with the historically recognized burdens of proof and also insures that any amount determined to be sufficient to accomplish the present use is in fact sufficient.

C. The significance of the decree issued in a general adjudication in a delivery call.

The Ground Water Users argue the purpose and significance of a partial decree issued in a general adjudication differs substantially from its purpose and significance in delivery call proceedings. Specifically, the Ground Water Users assert the adjudication only establishes the historical maximum quantity that can be put to beneficial use. They argue that a delivery call proceeding, in contrast, requires that the Director examine the senior's current beneficial use requirements which may vary from the decreed quantity. The argument is that the decree is only conclusive as to historical maximum beneficial use for the water right and has little or no relevance as to present beneficial use requirements for the same right. This Court agrees that an appropriator's present water requirements can vary from the quantity reflected in the decree after taking into account such considerations such as post decree factors. However, the Ground Water User's characterization of decrees minimizes their intended purpose, undermines the certainty of the decrees and disregards that the issues that can be raised in a general adjudication pertaining to the quantity element extend beyond the maximum quantity that was historically put to beneficial use.

1. Idaho law contemplates certainty and finality so that water rights can be administered according to the decrees.

Idaho Code § 42-1420 provides: "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. . . ." In *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998), the Idaho Supreme Court pronounced that "[f]inality in water rights is essential." Further, "[a] decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for the source of the water. . . . If the provisions define a water right, it is essential that the provisions are in the decree, *since the water master is to distribute water according to the adjudication decree*." *Id.* (citations omitted) (emphasis added). Clearly Idaho law contemplates certainty and finality of water right decrees for effective administration. Absent a higher evidentiary standard, any certainty and finality in the decree is undermined.

The position advocated by the Ground Water Users would significantly minimize the purpose and utility of the decree in times of shortage and any reliance on the decree for effective administration, particularly in a water district, is undermined. If the sole purpose of the decreed quantity is to identify the maximum quantity when sufficient water is available, the result is that the decreed quantity has little probative or presumptive weight and litigation over the senior's present needs would be a virtual necessity in every delivery call. This is contrary to the holding in ***AFRD #2***, which provides that: "The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has . . . . The presumption under Idaho law is that the senior is entitled to his decreed water right, but there may be some post-adjudication factors which are relevant to how much water is actually needed." *Id.* at 877-78, 154 P.3d at 448-49

2. The quantity element is a quantitative determination of beneficial use.

The argument against applying the clear and convincing standard erroneously assumes that the decreed quantity element is not a quantitative determination of beneficial use. The argument assumes that the Department's role in the SRBA is to recommend water rights based on established historical maximum beneficial use rather than present beneficial use requirements. For example, the Ground Water Users assert

that recommendations for previously decreed and licensed rights were recommended based on the previously decreed or licensed quantity. As such, the last field examination for the right could have taken place as long ago when the right was previously decreed or licensed. Since that time, the right holder could have made efficiencies to the conveyance system thereby requiring less water than was decreed or licensed. An example is converting from gravity irrigation to sprinkler irrigation or a tiled ditch system. As a result, the Ground Water Users argue that the decreed quantity in the SRBA may not reflect the quantity of water that is actually put to beneficial use. The Ground Water Users also argue that the quantity element is a maximum which provides for the highest degree of flexibility to provide for the most water intensive use within the scope of the purpose of use. For example, a quantity sufficient to allow an irrigator to rotate crops allows for growing the most water intensive crop in the hottest part of the irrigation season.

The argument ignores both the purpose of the decree as well as the scope of the issues raised in a general adjudication. This Court previously discussed the Department's statutory directive in issuing licenses and recommendations which limit the quantity to the amount of water beneficially used. ***Order*** at 28-30. Idaho Code § 42-220 provides:

> [W]hen water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to use more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the [Department] in granting such license *and to the court in making such decree*, that a greater amount is necessary. . . .

I.C. § 42-220 (emphasis added). Idaho Code § 42-1420 provides "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." As such, the appropriate time for contesting the Department's recommendation as to quantity was in the adjudication. I.C. § 42-1420.

Case law also supports the proposition that the quantity element in a decree represents a quantitative determination of beneficial use. Issues over excess quantity arise in proceedings relating to the adjudication of rights. In *Abbott v. Reedy*, 9 Idaho 577, 75 P. 764 (1904), in an adjudication to determine the respective rights on Soldier Creek in Blaine County, the Idaho Supreme Court held:

> It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary. There was a clear and substantial conflict in the evidence as to the quantity of water per acre necessary for the successful irrigation of appellant's lands.

Id. at 578, 75 P. at 765. The issue arose in the context of an adjudication as opposed to a delivery call proceeding.

The case of *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 (1909), involved the adjudication of water rights on the Boise River. At issue was whether the quantity decreed for certain classes of rights exceeded the duty of water for the purpose of use of the rights. In deciding whether or not to grant a new trial on the issue, the Court relied on the following:

> In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use of application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

Farmers at 535-36, 102 P. 483-89. Again, the issue arose in the context of an adjudication as opposed to a delivery call proceeding. *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 F. 30 (D. Idaho 1917), involved an action to quiet title of water rights held on Goose Creek in Idaho and Nevada. In applying Idaho law, the Court held:

> Much is said about the duty of water. . . .The Land and Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water

> than he is able to apply to a reasonable an economical use. True, it may be that good results are obtainable from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company.

Id. at 33-34.

In *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), one of the issues before the Idaho Supreme Court was the sufficiency of the evidence supporting the adjudicated quantity of a beneficial use claim, the Court reasoned:

> 'The quantity of water decreed to an appropriator, in an action wherein priority of appropriation is the issue, should be upon the basis of cubic feet per second of time of the water actually applied to a beneficial use, and should be definite and certain as to the quantity appropriated and necessarily used by the appropriator.'

Id. at 15, 178 P.at 86. (quoting *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912)). Further:

> Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

Id. at 15. Kinney on Irrigation provides with respect to economic use and the suppression of waste:

> [T]he Courts have been and are now being called upon to fix by decrees the duty of water for certain tracts of land. . . . In fixing the duty of water for a certain tract of land, such an amount per acre should be awarded, within the lawful claim of the prior appropriator, as is essential or necessary for the proper irrigation of the land on which the water is used, and upon which the duty is being fixed; which water, when economically applied without waste, will result in the successful growing of crops on the land. Further than this, as far as the rights of the prior appropriator are concerned, the courts should not and can not lawfully go, where the result would be in cutting down the quantity of water to which the prior appropriator is entitled and reasonably needs for his purpose and the awarding of a certain amount of his water to subsequent appropriators.

APPENDIX B

Plaintiffs' Brief in Response to Defendants' and IGWA's Opening Briefs

Idaho S. Ct. Docket Nos. 33249, 33311, 33399 (Nov. 10, 2006)