**Docket No. 38191-2010, 38192-2010 and 38193-2010**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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IN THE MATTER OF THE 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

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A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL CAMPANY, TWIN FALLS CANAL COMPANY,
Petitioners-Appellants,

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

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,

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

THE CITY OF POCATELLO,
Intervenor-Respondent Cross Appellant.

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# THE CITY OF POCATELLO'S INTERVENOR-RESPONDENT CROSS APPELLANT REPLY BRIEF

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Appeal from the District Court of the Fifth Judicial District for Gooding County
Honorable John M. Melanson, District Judge, Presiding
Case No. 2008-551

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## INTRODUCTION

The conjunctive management of surface water rights by reference to the Conjunctive Management Rules ("CMR"), by its terms neither adjudicates nor re-adjudicates water rights. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 876-877, 154 P.3d 433, 447-448 (2007) ("*AFRD#2*")). The CMR incorporate "all elements of the prior appropriation doctrine as established by Idaho Law" as well as

> integrat[ing] the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water.

CMR 20.02 and 20.03. As argued in Pocatello's opening brief (incorporating Pocatello's arguments made in *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*, Supreme Court Docket Nos. 38403-2011 [38421-2011 / 38422-2011] ("A&B Delivery Call Appeal"), the preponderance of the evidence standard applies in this matter and the Court should reverse the district court on this point.

However, regardless of the evidentiary standard imposed on delivery call proceedings by this Court, the imposition of the appropriate evidentiary standard should not be interpreted, as the SWC argue on Reply[1], to modify or alter the legal obligations of the Director to conduct conjunctive administration consistent with the concept of beneficial use as that doctrine has developed in Idaho. Regarding the relationship between the elements of the prior appropriation

[1] *See, e.g.*, SWC Reply at 4-22.

doctrine as it has developed in Idaho and the Director's discretion to apply the CMR, Hearing Officer Schroeder observed:

> The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in a license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the need for the water and the consequences to the State, its communities and citizens. *Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management of the right*.

R. Vol. 37, p. 7086 (emphasis supplied). A senior's rights are protected by the factual presumption accorded his need for the licensed or decreed amount of water (as described in *AFRD#2* 143 Idaho at 878, 154 P.3d at 449, and as applied by the finders of fact in this matter) but the evidentiary standard by which the Director evaluates evidence does not modify the Director's discretion to make the evaluation in the first place. The Director has an obligation to make an initial determination of injury upon receipt of a delivery call, and the SWC's arguments that "clear and convincing" evidence would eliminate the Director's ability to review, by reference to CMR factors, available information regarding the SWC's beneficial use of water and make an initial "baseline need" evaluation are incorrect.

The Court should reverse the district court and order the Director to impose the preponderance of the evidence standard to evaluate a delivery call, and should affirm the district court and find that the presumption that a senior is entitled to his decreed quantity does not undermine the Director's legal obligation to make an initial determination of injury upon receipt of a delivery call.

## I. CLEAR AND CONVINCING EVIDENCE IS NOT THE APPROPRIATE STANDARD IN A DELIVERY CALL.

### A. Water in Idaho is owned by the public, the right to use water is regulated by the State, and vested rights are managed by the Department which must distribute water consistently with the constitutional doctrine of beneficial use.

The SWC's Reply Brief does not directly respond to Pocatello's position that the preponderance of the evidence standard applies in a delivery call. Instead, the SWC invoke the "personal liberty" interests of its members, and imply that "personal liberty" is at issue in a delivery call, requiring application of the clear and convincing evidence standard. SWC Reply Br. 33 (positing the "critical personal interest and importance of water in an arid western state" as a basis for imposing the clear and convincing evidence test in "civil cases."). This argument erroneously links the Director's conjunctive management of surface and ground water rights to actions involving termination of parental rights or involuntary commitment—civil cases that actually do implicate personal liberty interests. *See, e.g.*, *Thompson v. Thompson*, 110 Idaho Ct. App. 93, 714 P.2d 62 (1986); I.C. § 66-329(11).

The administration of water rights impacts vested property interests, not liberty interests. In cases involving the permanent loss or modification of vested property rights—whether vested rights to land or water—courts have imposed the clear and convincing evidence standard because the property interest involved is being permanently altered. *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) (quiet title action to certain waters appropriated by artesian wells); *Neil v. Hyde*, 32 Idaho 576, 186 P. 710 (1920) (in an action to quiet title, proponents must prove lack of interconnectivity for the court to make a finding on same); *Jenkins v. State Dep't of Water Res.*,

103 Idaho 384, 647 P.2d 1256 (1982) (water rights forfeiture case). However, administration of water rights does not effect a permanent modification of the property interest, and as such the clear and convincing standard is not appropriate. *AFRD#2* at 875-876, 447-448.

Although individual water users may be personally responsible for irrigating their crops, the water so applied is not owned by the individual. To the contrary, the Idaho Constitution establishes the public ownership of the waters of the State of Idaho and further provides that the State of Idaho holds the waters in trust for the use of its citizens for beneficial purposes, subject to the broad authority of the legislature to regulate and restrict the use of waters of the state. IDAHO CONST. art. XV, §§ 1, 3; *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (state's ownership interest in and constitutional obligation to regulate distribution of waters not diminished by adjudication of rights for beneficial use). While individuals may be personally impacted by water administration, personal liberty interests do not define the terms of the debate, and are unrelated to the constitutional principles at stake in a delivery call.

The SWC's confusion over the public's ownership and regulation of the waters of the State of Idaho contributes to the SWC's confusion over Pocatello's (unfortunate) use of the term "public trust" in its Opening Brief. The SWC erroneously argue that the passage of Idaho Code section 58-1203(2)(b) eliminated the constitutionally enunciated doctrine of beneficial use. Nonetheless, the SWC attempt to shoehorn this statutory change to title 58 of the Idaho Code into a wholesale modification of the Director's obligation to consider the public interest in water administration. I.C. § 42-101.

While it is true that the legislature did indeed clarify the application of the public trust doctrine as it relates to the ownership of the bed and streams of the waters of the State of Idaho via amendments to Idaho Code section 58-1203(2)(b), the language quoted by Pocatello in its opening brief from *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157, 911 P.2d 748, 750 (1995) stands for the principle that a water right amounts to a right to use water, as limited by the beneficial use doctrine—not that the right to use water is modified by the public trust doctrine. The quoted language continues to be good law: as recently as 2007, this Court quoted the exact language SWC now take issue with in *Idaho Conservation League* for the same principle: that "[a] water right does not constitute the ownership of the water; it is simply a right to use the water to apply it to a beneficial use." *Joyce Livestock Co.*, 144 Idaho 1, 19, 156 P.3d 502, 520 (2007) (citing *Idaho Conservation League*, and quoting the same at, 144 Idaho at 7, 156 P.3d at 508. The obligation of the Director to administer water rights pursuant to Idaho law, including case law and constitutional and statutory provisions defining the doctrine of beneficial use, was not modified by the adoption of Idaho Code section 58-1203(2)(b).

### B. The Director is obligated to evaluate a delivery call to determine whether the decreed amount is required to be delivered or whether a lesser amount can be delivered, consistent with the doctrine of beneficial use.

The SWC suggest that the Hearing Office, Director, and district court all erred in concluding that the Director properly administered conjunctively related surface and ground water rights by means of a baseline need analysis. SWC Reply Brief 4-22[2]. In the SWC's view,

[2] R. Vol. 37, 7095-7101; R. Vol. 37, 7386; Cl. R. Vol. 4, R. 535-536. *See also*, R. Vol. 37, 7391 ("To require curtailment after a delivery call is filed but before a record is developed ignores the complexities of conjunctive

once the delivery call has been placed, the Director was instead required to: 1) assume that the senior requires the full decreed quantity, regardless of the terms of its supplemental storage decrees; 2) curtail all the juniors in order to see that the amount is delivered; and 3) set a hearing at which the beleaguered juniors must establish by clear and convincing evidence that the senior does not require the full decreed quantity. This process, if adopted, effectively converts the presumption that a senior is entitled to his decreed amount to the presumption of injury long sought by the SWC and rejected by this Court in *AFRD#2* at 877, 448. It also resembles the "shut and fasten" administration that the SWC continue to seek, despite this Court's rejection of such an administrative approach in the *AFRD#2* decision, as well as rejection by all other finders of fact and appellate bodies in this delivery call or in the ongoing A&B Delivery Call Appeal. In addition, the argument is contrary to the Director's statutory authority and to the framework of the Department's procedural rules.

In the case at hand, the Director evaluated the SWC's natural flow and storage decrees and concluded—consistently with the SWC's concessions in the record below and in this briefing—that it did not require its full decreed amount and issued a "Relief Order"[3] in advance of the irrigation season that set forth the Director's determinations in support of curtailment of juniors. While the adequacy of the evidentiary support for certain of the prior years' baseline determinations will require re-examination under the evidentiary standard imposed by this Court,

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administration, would not make the senior whole, and would cause irreparable harm to junior ground water users prior to a hearing on the delivery call."

[3] So termed by the *AFRD#2* Court, found at R. Vol. 8, pp. 1359-1424. *See, AFRD#2* at 143 Idaho at 875, 877, 154 P.3d at 446, 448 (approving the Director's initial determination embodied in the "Relief Order" as timely and acknowledging that the Director may constitutionally consider certain CMR factors in water rights administration).

whether that standard is preponderance of the evidence or clear and convincing evidence will not alter the Director's authority to make the initial determination and issue an initial Relief Order. The SWC's arguments on this point should be rejected, and the district court's holding that an initial baseline need analysis is proper (Cl. R. Vol. 3, pp. 535-536) should be affirmed.

### C. The doctrine of beneficial use requires the Director to evaluate the senior's decrees for purposes of a delivery call by reference to the realities of irrigation uses over the season.

As affirmed in *AFRD#2*, upon issuance of an initial decision, the seniors or intervening juniors (or other parties who satisfy a standing analysis) may protest the Director's determination and put on additional evidence to support their positions. In the captioned matter, the procedure involved parties' appealing, or intervening and appealing, the Director's initial determination made via the Relief Order.[4] The Director's issuance of the Relief Order, which included the baseline need analysis, was endorsed as an administratively appropriate and timely means to respond to the SWC's delivery call. *Id.* at 878, 154 P.3d at 449. The Court framed the burden of proof issue in the context of the Director's "initial determination" in this way

> Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

*Id.* By contrast, the approach proposed by the SWC requires no exercise of agency discretion, and indeed no judgment at all: the Director could assign the task of reviewing delivery call

[4] The Surface Water Coalition appealed the Director's Order (R. Vol. 9, p. 001704), and IGWA, Pocatello, and the Bureau of Reclamation intervened to appeal the Director's Order (R. Vol. 2, p. 00230, Vol. 9, p. 001612). While SWC and the Bureau of Reclamation appealed the Director's order arguing that the SWC's injury was greater in quantity than that determined by the Director's May 5, 2005 Order; the City of Pocatello and IGWA appealed and argued that the Director's determination overstated SWC's injury. *See, e.g.*, R. Vol. 12, p. 002113. By the same token, Idaho Power's motion to intervene was denied, as it was its request for a hearing. R. Vol. 13, pp. 2398-2401 (referring to April 6, 2005 Order denying Idaho Power's Motion to Intervene, R. Vol. 2, p. 00861.)

letters, sworn affidavits, and applicable decrees to a minion and order curtailment of the wells on the ESPA to satisfy the demand for 9 million acre-feet. These types of ministerial acts are not a "determination," and do not comport with the Director's obligations to limit delivery of water to beneficial uses.

The *AFRD#2* Court rejected a similar argument when it determined that the SWC may not demand completely full reservoirs unless it can demonstrate that full reservoirs are required to satisfy beneficial uses. The Court found that for the Director to administer a delivery call and purposefully ignore "whether there was any indication that it was necessary to fulfill current or future needs" would violate the law. *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. If the SWC are correct that the Director is required to ignore such facts until after it curtails all juniors and holds a hearing in which junior appropriators must prove by clear and convincing evidence, the Court's answer of this question would have been markedly different.

The Director's decision to evaluate more than the flow rates and volumes of the SWC decrees is consistent with the doctrine of beneficial use, and implicates the agency's technical expertise informs the "baseline" need analysis that is integral to the Director's initial determination.[5] *See* I.C. § 42-101, -602; Conjunctive Management Rules 20, 42. "[W]here the

[5] Exercise of IDWR's technical expertise is required, given the disparity in water needs based on differences in climate, water supply, and crop demand over the season:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. . . . However, the quantity element in a water right necessarily sets the "peak" limit on the rate of diversion that a water right holder may use at any given point in time. . . . The quantity element is a fixed or constant limit . . . whereas the beneficial use limit is a fluctuating limit, which contemplates both *rate of diversion* and *total volume*, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc.

agency's particular technical expertise is involved, the court must be particularly zealous in guarding the agency's discretion." *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458, 1464 (D. Idaho 1995), *aff'd*, 91 F.3d 1345 (9th Cir. 1996) (citing *Fed. Commc'ns Comm'n v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14, 98 S.Ct. 2096, 2121-22 (1978)). Contrary to the SWC's arguments, the imposition of the clear and convincing evidentiary standard would not strip the Director of authority to make an initial evaluation of whether the calling senior requires its full decreed amount of water and, in the event it does not require the full decreed amount, how much should be delivered.

### D. The Director's discretion to issue a Relief Order including a baseline need analysis is consistent with Idaho constitutional principles.

The SWC compound the error regarding the scope of the Director's discretion by suggesting that it is not constrained by constitutional principles. Reply at 25-26. This argument is based, in part, on an erroneous reading of *Clear Springs Foods, Inc. v. Spackman* ("*Clear Springs*"), 150 Idaho 790, 252 P.3d 71 (2011). In *Clear Springs*, the Court rejected the arguments of junior appropriators that the constitutional doctrines related to beneficial use, including optimum utilization, operated to prevent the Director's ability to administer the Clear Springs delivery call. *See id.* at 83 (junior appropriators argued that under the Ground Water Act, administration of juniors is precluded until junior pumping exceeded recharge and until reasonable pumping levels were exceeded, regardless of the senior appropriator's needs).

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*Memorandum Decision and Order on Petition for Judicial Review* at 32, Case No. 2009-000647, dated May 4, 2010 (original emphasis omitted, emphasis added), quoting from *AFRD#2 v. IDWR*, Gooding Dist. Court Case No. CV-2005-600, page 95 (June 2, 2006) (Hon. Barry Wood). This Court granted SWC's Motion to Augment Record with certain portions of Judge Wildman's order on August 3, 2011. A copy of Judge Wildman's order is attached to SWC's motion, dated July 29, 2011.

However, the Court's rejection of the junior's arguments in *Clear Springs* does not help the SWC. *Clear Springs* stands for the proposition that the doctrine of beneficial use and optimum utilization is not a shield to protect juniors from curtailment; by the same token, it is not a sword for the senior to blindly demand administration to the limits of his decree without exercise of discretion on the part of the Director, pursuant to the CMR and other principles of Idaho law. Indeed, "[t]he policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively." *Id.* at 89.

As such, sections 1, 3, 5 and 7 of Article IV of the Idaho Constitution must be applied and interpreted in a harmonious manner in delivery call proceedings, without undue weight to any one provision. *Engelking v. Inv. Bd.,* 93 Idaho 217, 221, 458 P.2d 213, 217 (1969). Importantly, the Director may not disregard these constitutional provisions, and the provisions inform the application of the doctrine of beneficial use. In this regard, section 5[6] of the constitution specifically applies to the administration of the SWC's water rights in this matter because, pursuant to the interpretation given this provision in *Clear Springs*, the water is to be distributed by canal or ditch companies for agricultural purposes. *Clear Springs*, 150 Idaho 790, 252 P.3d at 87-88.

[6] "Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; *but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and time of use* as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe." IDAHO CONST. art. XV, § 5 (emphasis added).

## II. IN REPLY THE SWC HAVE CONCEDED THAT AN INJURY ANALYSIS THAT EVALUATES NEED IS APPROPRIATE, AND ARGUE FOR A REMAND REGARDING THE ISSUE OF THE QUANTITY OF INJURY—AN ISSUE NOT RAISED BY THEIR OPENING BRIEF AND NOT PROPERLY BEFORE THE COURT.

In reply, the SWC on the one hand claim they must be delivered their decreed amount, but at the same time admit they do not divert their decreed amount 24 hours a day, 7 days a week. *Compare* SWC Opening Brief at 25 ("To diminish a senior's priority by taking water that would otherwise be available for his diversion and use results in an "injury" to the senior's water right") *with* SWC Reply Br. 7 ("the Coalition members have never claimed they have a right to more water than can be beneficially used on their irrigation projects"), *and* SWC Reply Br. 15 ("it is undisputed that not every Coalition natural flow right is diverted to its decreed rate of diversion every day of the irrigation season"). Further, SWC admit that consideration of such diversion demands is proper by the Director in administration. *Id*. The inconsistency between the SWC's positions illuminates the Coalition's real issue in the matter at hand: SWC's complaint comes down to not a matter of *how* the Department administered this delivery call, but ultimately with the *amount* of shortage determined by the Director.

This is the first time the SWC have raised the issue of the *amount* of shortage. SWC Reply Br. 16 (arguing that IDWR's response brief "misses the crux of how the Director failed in his administration. IDWR's theoretical calculation of what the Coalition demands pursuant to its natural flow rights is not supported by any facts in the record . . . ." (Emphasis added)). While SWC's opening brief frames its issue on appeal as an inquiry into whether the Director's reliance on the minimum full supply ("MFS") methodology to calculate baseline need rather

than the decreed quantity was erroneous as a matter of law, the Reply Brief frames the issue as one of the amount of injury that the Director found pursuant to the MFS analysis. Indeed, if the Court issues a remand pursuant to any of the respective parties' issues on appeal, it may require, *inter alia*, whether existing evidence in the record is adequate to meet the standard of evidence applicable to the prior finding of injury and shortage; however that inquiry does not include investigation into the amounts of shortage that the SWC calculated under the Department's previously used or presently revised methodologies.

To the extent that the Court is inclined to entertain this new argument, the SWC is challenging a finding of fact made by the Director and affirmed by the district court, and must be affirmed if supported by substantial evidence. *Vargas v. Keegan, Inc.*, 134 Idaho 125, 127, 997 P.2d 586, 588 (2000). In the interest of brevity, Pocatello directs the Court to Pocatello's April 29, 2009 Brief before the district court, pages 6 – 9, which reflects a portion of the record that shows there was ample evidence that the SWC did not require their full decreed amounts. Cl. R. Vol. 2, pp. 236-239.

## CONCLUSION

Absent legislative action to the contrary, the preponderance of the evidence standard applies in administrative proceedings in Idaho, and this Court should reverse the district courts determination to the contrary. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). However, regardless of the evidentiary standard, this Court instructed the Director to in his discretion consider the beneficial use of water by senior calling appropriators in a delivery call in *AFRD#2*, and no decision or legislative action has changed the

principles of that case since announced. No evidentiary standard modifies the Director's statutory obligations to make an initial determination in a delivery call regarding the amount of water required by the senior for beneficial uses; nor can the adoption of an evidentiary standard modify the application of the Department's procedural practices upon initiation of a contested case—whether that case is initiated by a senior or a junior water user, or both as in the captioned matter. Accordingly, whatever the evidentiary standard, this Court should affirm the principles affirmed in AFRD#2 and find that the Director may consider more than a senior's decreed amount in administration and make a reasoned and substantiated evaluation of need.

Respectfully submitted, this 21st day of November, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2011, I caused to be served a true and correct copy of the foregoing **City Of Pocatello's Intervenor-Respondent Cross Appellant Reply Brief** in **Supreme Court Docket No. 38191-2010 [consolidated with Nos. 38192-2010 & 38193-2010) Gooding County Case CV-2008-551** upon the following by the method indicated:

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