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,

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' REPLY BRIEF

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

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In this brief, Idaho Ground Water Appropriators, Inc. ("IGWA" or "Groundwater Users") replies to response briefs filed by the Surface Water Coalition ("SWC") and the Idaho Department of Water Resources ("IDWR").

ARGUMENT

I. The Groundwater Users agree that whether TFCC's maximum authorized rate of diversion should be 5/8 or 3/4 of a miner's inch is not on appeal in this proceeding.

The IDWR questions whether the Groundwater Users are "asking this Court to establish, in this proceeding, that TFCC's full headgate delivery is 5/8 of a miner's inch." (IDWR Br. 33.) They are not. The Groundwater Users agree that whether the maximum rate of diversion under TFCC's (Twin Falls Canal Company) water rights should be 5/8 or 3/4 of a miner's inch per acre is an issue presently pending before the SRBA court and is not on appeal in this proceeding.

However, irrespective of what the SRBA court determines TFCC's maximum rate of diversion to be, the Director has a duty when responding to the SWC delivery call under the CM Rules to evaluate whether the SWC members are "suffering material injury and using water efficiently and without waste." (CM Rule 42.01.) This analysis considers the SWC's current use of water and whether their water needs can be met without resort to curtailment by employing reasonable conveyance efficiencies or conservation practices.

The issue appealed by the Groundwater Users is not whether TFCC's maximum rate of diversion should be 5/8 or 3/4 of an inch per acre, but whether the Director's determination of material injury under CM Rule 42 should be based on the traditional standard of "preponderance of the evidence" instead of the heightened standard of "clear and convincing proof" that the dis-

trict court adopted. (*See* Groundwater Users' Open. Br. 23 ("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.")).

II. The Groundwater Users agree with the SWC's request that this Court reject the assumption that the SWC needs its full decreed amount.

The SWC Reply Brief contains an important admission that illustrates why the preponderance of the evidence standard is most appropriate for determining material injury. While the SWC's water rights authorize the diversion of up to 9 million acre-feet (natural flow plus storage water), the SWC admits that they never need even the 6.7 million acre-feet that their natural flow rights allow. (SWC Reply Br. 12.) They rebuff the "assumption that all of the Coalition's water rights would be fully satisfied every single day of the entire irrigation season," pointing out that it has "two critical flaws" in that it: (1) "fails to account for daily surface water right administration," and (2) "fails to account for the Coalition's actual operations on their irrigation projects." *Id*. (emphasis in original). The SWC concludes that the "assumption that administration to the decreed quantities of the Coalition's natural flow rights requires delivery of 6.7 million acre-feet is flawed and should be rejected." *Id*. at 16. The Groundwater Users agree.

The foregoing admission illustrates the dynamic nature of water use. Water needs vary over time according to conditions and as irrigation practices evolve and change. The amount of water a senior needs to today to raise full crops may be less than in the past due to irrigation efficiencies. As this occurs, water right licenses and decrees allow water users to divert less water. While licenses and decrees set a maximum rate of diversion allowed under a water right, they do

not require that the maximum rate be diverted. Similarly, water licenses and decrees define the maximum number of acres that may be irrigated, but do not require that they be irrigated. Irrigated farmland is often taken out of production due to urban development, placement into a government set-aside program, or as part of a crop-rotation program. For example, there are at least 6,600 acres within TFCC alone that have been removed from irrigation. (*See* Groundwater Users' Open. Br. 11.)

This is why the Director has a duty when responding to a delivery call under the CM Rules to consider the extent of the senior's current use of water. (CM Rule 42.01.e.) He must also consider whether the senior's water needs can be met without resort to curtailment by employing reasonable conveyance efficiencies and conservation practices. (CM Rule 42.01.g.) This obligation is grounded in the "policy of the law of this state [] to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs v. Spackman*, 252 P.3d 71, 89 (2011) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502 (1960)). The time-honored rule is that "[e]conomy must be required and demanded in the use and application of water." *Id*. (quoting *Farmer's Co-operative Ditch Co. v. Riverside Irr. Dist., Ltd.*, 16 Idaho 525, 535 (1909)).

The Director need not assume that material injury exists because the extent of beneficial use is an implied limitation on the right of a senior to demand curtailment. The commonly expressed tenet is that beneficial is "the basis, the measure, and the limit of the right." *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 24 (9th Cir. 1932). The Supreme Court of Colorado perhaps best explained what this means in terms of a delivery call:

> An implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion. Thus, an appropriator has no right as against a junior appropriator to divert more water than can be used beneficially, or to extend the time of diversion to irrigate lands other than those for which the appropriation was made.

Rominiecki v. McIntyre Livestock Corp, 633 P.2d 1064, 1067 (Colo. 1981) (internal cites omitted); *see also Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 588 (1927) ("No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates. . . .") and Idaho Code § 42-104 (" The 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.")

The SWC contends that if the Director does not assume that material injury exists, but is instead allowed to make that determination based on the preponderance of the evidence, the effect will be to "reduce a senior's decreed water right in administration." (SWC Reply Br. 30.) That is simply untrue. The determination of material injury is an administrative function that does not alter the decreed elements of a water right. For example, if a water right authorizes the irrigation of up to 40 acres, but only 20 acres are irrigated in a given season, the Director's determination that the farmer's present irrigation needs will be met with enough water to irrigate 20 acres does not reduce the farmer's right to irrigate 40 acres in the future. Similarly, if a farmer's use of drip irrigation enables him to accomplish his beneficial use with less than the full rate of diversion, the Director's decision to deliver only as much water as the farmer presently needs

does not reduce the farmer's right to divert more water in the future if the farmer reverts to less efficient means of irrigating.

This Court has already rejected the notion that the Director should assume that material injury exists. In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* ("*AFRD2*") the SWC argued, and the district court agreed, that when a delivery call is made the Director must assume the senior is suffering material injury until proven otherwise. 143 Idaho 864 (2007). The district court held that the CM Rules were "fatally defective in not containing a presumption that 'when a junior diverts water in times of shortage, it is presumed there is injury to the senior.'" *Id*. at 877. This Court reversed that ruling, holding that while the senior is presumed to be entitled to his decreed water right (if needed), the Director should not assume that the senior at all times needs the maximum rate of diversion allowed under his water right. *Id*. The Court held that "there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id*.

This Court further held in *AFRD2* that the Director's discretion to determine material injury does not cause a re-adjudication of the senior's right. The SWC tried to paint the Director's determination of material injury as an re-adjudication of their water rights, but this Court found otherwise since the material injury factors in CM Rule 42 address issues that are not defined in a water right decree:

> Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed [in CM Rule 42] in water rights administration. Specifically, 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. Additionally, the 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. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.

Id. at 876-77. The fact that the determination of material injury is an administrative function that does not alter decreed elements of water rights is significant. While this Court has required clear and convincing evidence to permanently redefine, eliminate, or fix title to water rights (i.e. adjudicative acts), it has recognized that administrative decisions involving the distribution of water are different and that the preponderance of the evidence standard applies to administrative decisions. (*See* Groundwater Users' Open. Br. 24-26).

Since material injury is not to be presumed, the Director must determine material injury based on the preponderance of the evidence before him. The heightened clear and convincing proof standard that the district court adopted cannot operate without also requiring the Director to presume that material injury exists. As stated above, such a presumption would (i) ignore the reality that most water users do not need their full decreed amounts at all times, (ii) disregard the rule that beneficial use is an implied limitation on every water right, and (iii) defy this Court's *AFRD2* decision.

III. Idaho law and precedent from other states support the preponderance of the evidence standard for water distribution decisions.

The Groundwater Users assert in their opening brief that the cases relied upon by the district court do not require the Director to presume that material injury exists until proven otherwise. (Groundwater Users' Open. Br. 30-34.) In response, the SWC argues that the Groundwater Users have misread *Moe v. Harger* and the *Silkey v. Tiegs* decisions. (SWC Reply Br. 32.) The SWC contends that these decisions collectively require the Director to presume that material injury exists until clear and convincing evidence proves otherwise. *Id*. The Groundwater Users disagree.

Moe was decided in 1904—nearly a century before the IDWR undertook to conjunctively manage the State's surface and ground water resources. Further, *Moe* was a surface water administration case. In *AFRD2* this Court rejected the district court's reliance on *Moe* concerning a related issue, reasoning that "*Moe*, however, was a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights. The issues presented are simply not the same." 143 Idaho at 877. Additionally, this Court's decision in *Jones v. Vanausdeln*, which came after *Moe*, 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." 28 Idaho 743, 749 (1916). This Court recognized in *Jones*, as it did in *AFRD2*, that 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 SWC does not address *Jones* in its reply brief.

The *Silkey v. Tiegs* decisions also occurred many decades before the advent of conjunctive management. The first decision, issued in 1931, was an appeal from a water right decree, and does not address evidentiary standards at all. *Silkey v. Tiegs*, 51 Idaho 344, 350 (1931) ("*Silkey I*"). The second decision, issued in 1934, involved a motion to modify the prior decree in order to permanently reduce the maximum rate of diversion of one of the decreed water rights. *Silkey v. Tiegs*, 54 Idaho 126 (1934) ("*Silkey II*"). In the first case Silkey was granted a right to divert up to 40 miner's inches of water. *Id*. at 128. In the second case the other parties argued that Silkey "never has been able to obtain more than 21 inches from her wells." *Id*. Their request was that Silkey's rate of diversion be reduced to 21 inches, which would enable them to divert more water. *Id*. ("Appellants now urge as a basis of their right to have respondent's heretofore determined prior amount of water decreased, that she cannot now obtain that amount ….") The Court held that Silkey's right to divert 40 inches was the law of the case, and the appellants had not proven by clear and convincing evidence that her rate of diversion should be reduced to 21 inches. *Id*. at 129. The Court's citation to *Moe* and the clear and convincing evidence standard was not inappropriate since the requested relief was to permanently reduce Silkey's water right. The decision does not address the issues that must be decided by the Director when responding to a delivery call under the CM Rules, let alone conclude that he must presume that material injury exists until proven otherwise by clear and convincing evidence.

The SWC also attempts to recast this Court's *AFRD2* decision as having held that water distribution decisions require clear and convincing evidence. They state that "[s]ince the Court in *AFRD2* expressly recognized that the burdens of proof and evidentiary standards that had been

developed over the years were incorporated into the CM Rules, the entire foundation for the Ground Water Users' argument is flawed." (SWC Reply Br. 32.) Nowhere, however, does the *AFRD2* decision enunciate what evidentiary standard applies to water distributions decisions in the conjunctive management context. In fact, there is some indication that the Court intentionally withheld judgment on that issue. After noting that the district court was "concerned that the CM Rules did not specifically articulate an appropriate standard for the Director to apply when responding to a delivery call: that is, should the required proof be clear and convincing, a preponderance of the evidence, or merely what the Director deems 'reasonable,'" the Court declined to endorse any one standard. *AFRD2*, 43 Idaho at 874. The Court stated simply 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*.

Idaho has adopted the general rule that "[a]bsent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings are governed by a preponderance of the evidence standard." *N. Frontiers v. State ex re. Cade*, 129 Idaho 437, 439 (Ct. App. 1996) (citing 2 Am. Jur. 2d Administrative Law § 363 (1994)). As explained previously, the United States Supreme Court and the Wyoming Supreme Court have both taken the position that water administration decisions should be based on the preponderance of the evidence. (*See* Groundwater Users' Open. Br. 27-28.) The Wyoming Supreme Court considered this issue specifically with respect to a delivery call by a senior surface water right against a junior groundwater right and ruled that the decision of the state engineer to refuse curtailment was properly based on "the

preponderance of the evidence standard customarily used in civil cases." *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987). The SWC Reply Brief does not address these cases.

The Groundwater Users ask this Court to follow established precedent by ruling that the Director's determination of material injury in response to a delivery call under CM Rules be based on the preponderance of the evidence.

IV. The interests of seniors, juniors, and the general public support the preponderance of the evidence standard.

The SWC argues that water administration decisions must be based on clear and convincing evidence since water rights are an "important individual interest." (SWC Reply Br. 33.) Water is, of course, vitally important to those whose survival depends on it. No less vital to junior water uses than to senior water users. Moreover, the general public has an important interest in seeing that Idaho maximizes beneficial use of its water resources. As this Court stated in *Miles v. Idaho Power Company*, "[t]he water of this state is an important resource. Not only farmers, but industry and residential users depend on it." 116 Idaho 635-36 (1989); see also *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904 (1990) ("Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially delivery stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops ....") and *Clear Springs*, 252 P.3d at 89 ("The 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 ….") The introductory sentence of Idaho's water code confirms as much:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just

> apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

Idaho Code § 42-101.

The Groundwater Users do not contend that this means the Director must disregard priority in favor of some type of equitable apportionment of water, but it does demonstrate how important it is that the Director be able distribute water in the manner that in his best judgment he believes will meet the senior's water needs, maximize beneficial use, and minimize waste of the resource. The preponderance of the evidence standard favors senior rights by ensuring that they receive their full decreed amount unless the greater weight of the evidence proves they can meet their needs with less. The practical effect of imposing the heightened clear and convincing standard onto water distribution decisions is that seniors will in some cases be delivered water that they don't need, and juniors will be curtailed unnecessarily. The clear and convincing standard is counter-productive to the "policy of the law of this State [] to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole*, 82 Idaho at 502.

V. The Groundwater Users do not ask this Court to shift burdens of proof.

The SWC Reply Brief quotes and emphasizes in bold text the statement from this Court's decision in *AFRD2* that the CM Rules "do not permit or direct the shifting of the burden of proof." (SWC Open. Br. 31; quoting *AFRD2*, 143 Idaho 864, 873 (2007).) The Groundwater Users do not ask this Court to shift burdens of proof. Were this Court to agree that water distribution decisions should be made based on the preponderance of the evidence, it would in no way

shift any burden of proof. Senior-priority water users would still benefit from the presumption that they are entitled to their maximum rate of diversion so long as it is needed.

VI. The IDWR's advocacy for the "clear and convincing" standard contradicts its prior position.

The Groundwater Users are surprised by the IDWR's advocacy for a heightened evidentiary standard when making water distribution decisions. If this Court adopts the clear and convincing standard it will make such decisions more difficult for the Director and every watermaster throughout the State. Instead using their best judgment to distribute water to meet the needs of seniors while minimizing waste and unnecessary curtailment, they will be forced to analyze whether their best judgment is strong enough to surpass the heightened clear and convincing standard of proof—something that can be difficult even for experienced judges.

It is noteworthy that the Director's initial determination of material injury was based on the preponderance of the evidence, and that the IDWR defended his use of that standard. The IDWR argued then that

> Application of a preponderance of the evidence standard will allow the Director to ensure the senior's right to make full beneficial use of the water right is protected while at the same time ensuring the senior does not seek to use the water right to defeat full economic development of the State's water resources. Idaho Const. Art. XV, §§ 3,7; Idaho Code § 42-226; and CM Rule 20.03. Application of a clear and convincing evidence standard, on the other hand, would allow the senior to defeat the objective of optimum beneficial use of the resource.

(IDWR Rehr'g Br. 3; attached hereto as App A.) The IDWR concluded that "[a]pplication of a preponderance of the evidence standard will allow the Director to properly balance priority of

right with full economic development of the resource." *Id.* at 11. This reasoning is as persuasive now as it was then.

If the IDWR has any interest in this issue, it would seem to be simply to obtain guidance from the Court as to the correct standard of proof, to defend the Director's use of the preponderance of the evidence standard in the *Final Order*, or to advocate for a standard that will simplify the water administration decisions that must be made by water masters throughout the State. The IDWR's decision to do otherwise is perplexing and contrary to its prior position.

VII. The SWC should not be permitted to expand their "minimum full supply" issue to encompass other methodologies that are not before this Court.

The SWC raised on appeal the issue of "[w]hether the Director erred in failing to apply the constitutionally protected presumptions and burdens of proof when he used a 'minimum full supply' rather than the decreed quantity in determining material injury to the Coalition's senior surface water rights." (SWC Open. Br. 13.) Both the Groundwater Users and the State of Idaho argued in response that issues involving the "minimum fully supply" methodology are moot because the Director has abandoned that methodology in favor of a much different methodology called "reasonable in-season demand." (Groundwater Users' Open. Br. 36; IDWR Br. 16.) In reply, the SWC for the first time attempts to broaden their issue on appeal to challenge not only the "minimum full supply" methodology, but also any other methodology that they would characterize as a "baseline" approach to administration. (SWC Reply Br. 2.) They say that "[w]hether the Director's methodology is termed 'baseline' or 'minimum full supply' analysis, the decision to reduce the Coalition's decreed quantities at the outset of administration is prohibited by law …."

Id. at 3-4. This Court should decline to issue an advisory ruling on undefined "baseline" methodologies, for at least two reasons.

First, it is this Court's policy to not issue advisory opinions. *State v. Barclay*, 149 Idaho 6, 9 (2010). The SWC's generic request for a prohibition of "baseline" methodologies is just that. There is no definition in the record in this case of what a "baseline" methodology is, so any ruling that declares such methodologies unlawful would be advisory and speculative.

Second, the SWC's attempt to prohibit "baseline" methodologies appears to be a preemptive attack against the "reasonable in-season demand" methodology that is currently on appeal in Minidoka County consolidated case no. CV-2010-382. This is apparent by the statement that "the Director's new methodology similarly caps the 'reasonable in-season demand' as a fixed amount at the beginning of the irrigation season" (SWC Reply Br. 6 n.6) and the statement that "[w]hether the Director's methodology is termed 'baseline' or 'minimum full supply' analysis, the decision to reduce the Coalition's decreed quantities at the outset of administration is prohibited by law …" (*Id*. at 3-4.) The notion that the "reasonable in-season demand" methodology is the same as the "minimum full supply" methodology is false. Of course, the evidence needed to demonstrate important differences between the methodologies is not part of this record.

Since the Director has abandoned the "minimum full supply" methodology, there is no need for this Court to determine whether or not it was legally justifiable. Such a determination will have no practical effect on the outcome of this case. The issue is moot. Nor should the Court consider whether undefined "baseline" approaches to administration are proper, since that issue

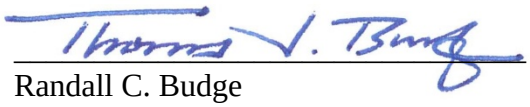
was not properly raised on a appeal, the term is not defined, and such a ruling would be advisory and speculative.

CONCLUSION

Based on the foregoing, this Court should find that the preponderance of the evidence standard is the proper evidentiary standard for the Director to apply when evaluating material injury under the CM Rules, and reject the SWC's attempts to eliminate the Director's discretion in evaluating the amount of water needed for beneficial use.

RESPECTFULLY SUBMITTED this 18th day of November, 2011.

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2011, the above and foregoing document was served on the following persons in the manner(s) indicated:

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APPENDIX A

IDWR Respondents' Brief on Rehearing

Minidoka County Case No. 2009-647 (Aug. 25, 2010)

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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.	Case No. CV 2009-647 **IDWR RESPONDENTS' BRIEF ON REHEARING**
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	

I. INTRODUCTION

On May 20, 2010, the Court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Order").[1] There, the Court upheld the Director of the Idaho Department of Water Resources' ("Director" or "Department") conclusions that: (1) Idaho's Ground Water Act applies retroactively to the A&B Irrigation District's ("A&B") pre-1951 irrigation water right, 36-2080; (2) that A&B's reasonable pumping levels have not been exceeded; (3) that A&B's water right is properly analyzed as an integrated system; and (4) that it was not necessary to create a Ground Water Management Area where the Director had already created Water Districts. *Order* at 1-2. The Court, however, found that the Director "erred in failing to apply [a] proper evidentiary standard of clear and convincing evidence in [his] finding of no material injury to A&B's right." *Id.* at 2. The Court remanded the Director's finding of no material injury for purposes of applying the clear and convincing evidentiary standard. *Id.*

On August 3, 2010, petitions for rehearing on the issue set for remand were filed by the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc. ("IGWA"). Generally, IGWA and Pocatello argue that while it is proper to apply a clear and convincing evidence standard in determinations of waste, forfeiture, or abandonment, the proper standard to apply in a delivery call proceeding is preponderance of the evidence.

[1] The Order was signed by the Court on May 4, 2010. The Order was not served on the parties until May 19, 2010. On May 20, 2010, the Court entered an *Order of Extension Re: Filing Date of Memorandum Decision*, which established entry of the Order "as May 20, 2010."

II. ARGUMENT

The Director concurs with the Court's assessment that in matters of adjudication, licensure, and in proceedings that *per se* alter the elements of a decree or license (abandonment, adverse possession, forfeiture, or waste), it is correct to apply a clear and convincing standard of evidence. *See Order* at 28-30. In those proceedings, it is proper to apply the heightened standard because property rights are being created or forever changed.

In administration of hydraulically connected water rights, however, the issue before the Director is what amount of water does the senior currently need to accomplish a beneficial use. Idaho's constitution requires that "priority over water be extended only to those using the water." *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007). If the Director determines that the senior does not currently require the full extent of the water right to accomplish the beneficial use, then junior users are entitled to divert any water not required to achieve the senior's authorized beneficial use. "Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use." *Order* at 33. This legal principle is based upon balancing the core objectives of the prior appropriation doctrine: security of right and full economic development of the resource.

Application of a preponderance of the evidence standard will allow the Director to ensure the senior's right to make full beneficial use of the water right is protected while at the same time ensuring the senior does not seek to use the water right to defeat full economic development of the State's water resources. Idaho Const. Art. XV, §§ 3, 7; Idaho Code § 42-226; and CM Rule 20.03. Application of a clear and convincing evidence standard, on the other hand, would allow the senior to defeat the objective of optimum beneficial use of the resource.

Simply stated, the Director's determination that a senior is entitled to seek curtailment of junior water rights based upon the facts existing at the time of the delivery call in no way diminishes the senior water right. As such, the proper standard of review of the Director's decision in this delivery call is the preponderance of the evidence standard.

A. Because A&B's Water Right Was Not Altered In The Delivery Call, A&B May File A Subsequent Delivery Call If Current Conditions Warrant An Increase In Beneficial Use

In the Snake River Basin Adjudication, the Director was tasked with determining a claimant's maximum extent of beneficial use for the most water intensive crop (alfalfa) during the peak period of use (hottest period of the summer). *Order* at 30, 32. For A&B, water right 36-2080 is a reflection of its peak beneficial use at licensure when the project was flood irrigated by leaky ditches and laterals. The license provides for diversion of up to 1,100 cfs for the irrigation of 62,604 acres. Since licensure, it is undisputed that A&B, like many other users on the ESPA, has dramatically improved its project efficiency by: (1) converting from predominantly flood irrigation to 96% sprinkler irrigation; and (2) lining its ditches and laterals and piping water directly from the well head to the field to reduce conveyance loss to approximately 3%. R. at 1114-1115, 3088. Because of its actions, the record establishes that A&B needs less water today to accomplish the same beneficial use than it did at the time of licensure. R. at 3107.

Beneficial use is the basis of a water right and may vary over time. In the context of a delivery call, the Director is obligated to consider all known facts to determine the senior's current beneficial needs. According to the Court in *American Falls*, the Director must begin with the presumption that the water right held by the calling senior is valid. 143 Idaho at 877-78, 154 P.3d at 448-49. The CM Rules allow the Director to not only review the information filed

by the senior, but also develop a record upon which to base a decision. *Id.* at 446, 154 P.3d at 875. "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *Id.* If the Director's review leads to a finding of material injury, "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.* at 878, 154 P.3d at 449.

Regardless of whether the Director finds material injury, the CM Rules do not require the Director to forever alter the senior's water right—through a finding of abandonment, adverse possession, forfeiture, or waste—if the Director determines that the senior does not presently require the full extent of his or her water right to accomplish the same beneficial purpose. This is consistent with *American Falls*, where the Court stated that the Director may determine that the senior does not need the "full quantity" of his or her decreed right and that such determination does not constitute a re-adjudication of the right. *Id.* at 876-77, 154 P.3d at 447-48. "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." *Id.* at 876, 154 P.3d at 447 (emphasis added).

In accord with *American Falls*, the Director began with the presumption that A&B was authorized to divert in accordance with 36-2080. R. at 3102. While 36-2080 authorizes a maximum diversion rate of 0.88 miner's inches per acre, the Director found that A&B could presently accomplish the same beneficial use with 0.75 miner's inches per acre. The progression of A&B's project from inefficient flood irrigation with leaky conveyance works to the highly

efficient system that it employs today emphasizes that what is necessary to accomplish the same beneficial use may vary over time.

Moreover, the record established that patrons of A&B, like other water users, rotate crops with varying water needs. This also demonstrates that A&B's reasonable irrigation needs will vary from year-to-year. *See e.g. American Falls* at 438, 154 P.3d at 867 (this is why the Director sought information from the Surface Water Coalition over the prior "fifteen irrigation seasons" regarding cropping patterns, delivery records, and the number of acres that were sprinkler irrigated as opposed to flood irrigated). Because of these factors, the Director's evaluation of A&B's current beneficial needs is not, as this Court suggests, "Déjà Vu" of the adjudication or licensure process. *Order* at 36. The adjudication and licensure proceedings established the historical maximum extent of beneficial use, which may be less than what the senior requires today for beneficial use.

While administration of water rights recognizes the historical maximum, it is only concerned with determining whether curtailment is necessary to provide for the senior's current beneficial use. Because beneficial use varies from year-to-year, administration of water rights does not re-establish the quantity element of the water right—absent a finding of abandonment, adverse possession, forfeiture, or waste. The senior's water right is protected up to the full entitlement of the right if the senior needs that amount to achieve the authorized beneficial use. The senior continues to possess the right as set forth in the decree or license and has the right to call out junior users up to the full quantity of the right, to the extent it is needed for current beneficial use.

By not forever altering water right 36-2080 with a finding of abandonment, adverse possession, forfeiture, or waste, the Director ensured that A&B would maintain the ability to

divert 0.88 miner's inches per acre and file a subsequent CM Rule 40 delivery call if the full extent of the right is needed for current beneficial use. By determining A&B's current beneficial needs, the Director intelligently balanced priority of right with full economic development of the resource.

B. Because A&B's Water Right Was Not Altered, The Proper Standard Of Review To Apply Is Preponderance Of The Evidence

In *American Falls*, the Court reversed the district court and held that the CM Rules were not facially unconstitutional because they failed to set out the evidentiary standard to apply in a delivery call proceeding. *American Falls* at 873, 154 P.3d at 444. The Court stated that the applicable burdens of proof were incorporated into the CM Rules by reference. *Id.*

In its Order, this Court stated "that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source." *Order* at 34. In support of its decision, the Court cites three cases involving junior appropriators, without sanctioned water rights, to establish by clear and convincing evidence that their proposed diversions would not injure senior users. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904).

The rationale of the Idaho Supreme Court in *Cantlin*, *Josslyn*, and *Moe* is in direct accord with the United States Supreme Court regarding proposed new diversions of interstate waters in prior appropriation states. *Colorado v. New Mexico*, 467 U.S. 310 (1984). There, the state of Colorado petitioned the Court for an equitable apportionment of the Vermejo River. After reference to a special master, the Court stated as follows:

> Last Term, the Court made clear that Colorado's proof would be judged by a clear-and-convincing-evidence standard. *Colorado v. New Mexico*, 459 U.S., at 187188, and n. 13, 103 S.Ct., at 547548, and n. 13. In contrast to the ordinary

> civil case, which typically is judged by a "preponderance of the evidence" standard, we thought a [proposed] diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable."
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> . . . .
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> 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."

Id. at 316 (emphasis added).

Application of a clear and convincing standard of proof makes sense in cases regarding proposed new diversions because of the need to protect the rights of existing users. While clear and convincing is not an insurmountable hurdle, the risk of an erroneous decision is properly placed on the new user to establish that water is available for beneficial use. The paradigm changes, however, once junior rights have been sanctioned.

There is no case law or rule in the state of Idaho that establishes the standard of proof to apply in a delivery call proceeding between established water rights. Therefore, the standard of proof to apply is "preponderance of the evidence." *Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). *See also Colorado* at 316 ("ordinary civil case is . . . judged by a preponderance of the evidence standard").

Application of a preponderance of the evidence standard is consistent with decisions from the United States Supreme Court regarding administration of established interstate water uses in prior appropriation states.[2] *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993). There, the Court

[2] As discussed by Pocatello in its *Opening Brief on Rehearing*, at least one state court has held that the appropriate standard of proof to apply in a delivery call proceeding between users with established water rights is "preponderance of the evidence." *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987).

was asked by the state of Nebraska for enforcement of a 1945 decree against the state of Wyoming that established interstate priority to waters from the North Platte River. *Id.* at 587. A special master was assigned to the dispute.

Before the special master, Wyoming argued that Nebraska was required to prove its case by "the clear and convincing evidence standard."[3] "Nebraska, on the other hand, points out that while [the clear and convincing] standard is properly used in actions for equitable apportionment, it should not apply here because this proceeding entails enforcement of a prior equitable apportionment (the Decree), not whether there should be an apportionment." *See supra* fn. 3 at 12-13 (emphasis added). The special master concluded "the clear and convincing standard is inapplicable to the issues in these proceedings. The Court requires states to bear a heavier burden than the usual civil litigant [preponderance of the evidence standard] only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). Here, the interference has already occurred by entry of the Decree. *Cf. Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)." *See supra* fn. 3 at 13 (emphasis added).

On review, the United States Supreme Court concurred with the special master's assessment: "we find merit in [the] contention that, to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different." *Nebraska*, 507 U.S. at 592 (emphasis added).

Following the Court's 1993 decision in *Nebraska*, the prior appropriation states of Colorado and Kansas brought an action in the United States Supreme Court for administration of an interstate compact to the waters of the Arkansas River. *Kansas v. Colorado*, 514 U.S.

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[3] Page 12 at http://www.supremecourt.gov/SpecMastRpt/ORG%20108%20040992.pdf (last visited August 24, 2010).

673 (1995). Relying on *Nebraska*, the special master held that, because Kansas was seeking enforcement of an existing interstate compact against Colorado, it was required to prove its case by "the traditional [burden] of ordinary civil litigation, that is, preponderance of the evidence." *Kansas v. Colorado*, 1994 WL 16189353, 29 (U.S. 1994) (emphasis added). Because the special master found that under either burden of proof Kansas proved that Colorado breached the compact, the United States Supreme Court did not disturb the special master's findings on review. *Kansas*, 514 U.S. at 694.

Here, A&B seeks administration of its established senior-priority water right. At the time of decree or licensure, new water users were required to prove to the court or the Director, by clear and convincing evidence, that their new diversions would not injure established water rights. *Colorado*; *Cantlin*; *Josslyn*; *Moe*. All of the water rights at issue in this proceeding have since been sanctioned in accordance with the heightened clear and convincing evidence standard. The Director must now administer the established water rights in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602.

The purpose of administration is not to ensure by "clear and convincing evidence" that "there is no risk of injury to the senior." *Order* at 35. That was already asked and answered by the court and Director in the adjudication and licensure proceedings, respectively. This is precisely why the United States Supreme Court stated in *Nebraska* that administration of water rights is "markedly different" from creation or modification of water rights. 507 U.S. at 592. And furthermore, why the clear and convincing standard of proof does not apply in administration of established water rights. *Id.*

In administration, the Director is required to balance all principles of the prior appropriation doctrine, namely priority of right with full economic development of the resource.

Idaho Const. Art. XV, §§ 3, 7; Idaho Code § 42-226; CM Rule 20.03. Preponderance of the evidence is the proper standard to apply in order to allow the Director to exercise his discretion in balancing these principles where the outcome does not modify the senior's right. *Kansas*; *Nebraska*; *Colorado*; *American Falls*; *Willadsen*; *Northern Frontiers*. If, however, the Director finds, or sustains a defense asserted by juniors, that abandonment, adverse possession, forfeiture, or waste apply, the standard of review should be clear and convincing evidence. The heightened standard of proof should only apply in those instances where the senior's water right is forever altered by the outcome of the administrative proceeding.

III. CONCLUSION

In this delivery call, the Director afforded proper deference to A&B's water right by affirmatively stating that, if current facts support a beneficial need of up to 0.88 miner's inches per acre, A&B would have the right to call for delivery of that amount. By not altering the elements of A&B's water right, the Director protected A&B's senior right, while also ensuring that junior users with established rights could continue to divert water that was not currently needed by A&B for beneficial use. Because the administrative proceeding involved enforcement of established water rights, and did not forever alter A&B's water right, the burden of proof to apply is preponderance of the evidence. *See Kansas*; *Nebraska*; *Colorado*; *American Falls*; *Cantlin*; *Josslyn*; *Moe*; *Willadsen*; *Northern Frontiers*. Application of a preponderance of the evidence standard will allow the Director to properly balance priority of right with full economic development of the resource. Had the Director determined that A&B's right was forever changed by a finding of abandonment, adverse possession, forfeiture, or waste, the proper burden of proof to apply would have been clear and convincing evidence. The Director therefore respectfully requests that the Court revisit its holding that clear and convincing evidence is the

only standard of proof to apply in delivery call proceedings between holders of established water rights.

RESPECTFULLY SUBMITTED this 25th day of August, 2010.

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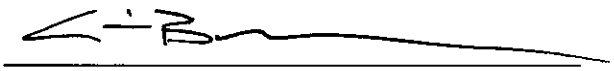

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 25th day of August, 2010.

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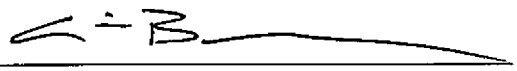

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