Docket No. 38403-2011 [38421-2011 / 38422-2011]

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA

A&B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,
and GARY SPACKMAN, in his official capacity as Interim Director
of the IDAHO DEPARTMENT OF WATER RESOURCES; and,
Defendants-Respondents,

v.

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO;
Respondents-Cross Appellants,

FREMONT-MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE;
District Court Intervenors.

RESPONDENT-CROSS APPELLANT CITY OF POCATELLO'S BRIEF

Appeal from the District Court of the Fifth Judicial District
for Minidoka County District Court No. 2009-647
Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the scope of the discretion of the Director of the Idaho Department of Water Resources ("Department" or "IDWR") to conclude that a senior water user (in this case, the A&B Irrigation District) ("A&B" or "the District") is *not* suffering material injury[1] because it did not require the full quantity of its decreed water right. The Director, the Hearing Officer and the district court all agree there is substantial evidence in the record that A&B does not require its full decreed quantity associated with water right no. 36-2080; however, the district court remanded to IDWR for the Director to re-evaluate this substantial evidence under the "clear and convincing" standard.

"Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources* ("*AFRD#2*"), 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). The district court's imposition of the clear and convincing standard imposes a restraint on the Director's discretion to evaluate delivery calls that is inconsistent with Idaho law. Furthermore, this constraint effectively abrogates this Court's decision in *AFRD#2* that depletion does not equal injury insofar as it requires the Director to deliver to the decreed amount unless and until juniors produce clear and convincing evidence that the senior does not require the full decreed amount.

[1] The other two recent delivery calls, Clear Springs Foods, Inc. and the Surface Water Coalition both resulted in initial findings by the Director of material injury to the senior's water rights. *See generally Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *A&B Irrigation Dist., et al. v. Spackman*, No. 38191-2010 (38192-2010/38193-2010) (Idaho).

Pocatello appeals the district court's imposition of the "clear and convincing" evidence standard. The Director's determinations in a delivery call are constrained only by the "preponderance of the evidence" standard because administering water rights does not effect a permanent re-adjudication of rights such as that which arises from a finding of abandonment or adverse possession, but only determines when juniors may lawfully be curtailed to supply water to seniors.

B. Standard of Review

This Court reviews matters of law freely, but will not disturb the Department's factual findings so long as they are supported by substantial evidence. *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666, 669 (2011); I.C. § 67-5279. "Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion." *Rivas v. K.C. Logging*, 134 Idaho 603, 607, 7 P.3d 212, 216 (2000) (citation omitted). The Department is the fact finder, and "its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous." *Id.* (citation omitted). "This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Id.* (citation omitted).

C. Statement of Facts

1. <u>The Eastern Snake Plain Aquifer ("ESPA")</u>

The ESPA is an aquifer underlying an area of the Eastern Snake River Plain, approximately 170 miles long and 60 miles wide. R. 1107; *see also Clear Springs*, 150 Idaho 790, 252 P.3d at 74. The ESPA is also defined by IDWR as an area having a common ground

water supply. *See* IDAPA 37.03.11.050. The ESPA currently contains "up to a billion acre feet of water" more than 35 years after the issuance of the A&B water right license, and today includes 2.3 million acre-feet of pumping and 8.3 million acre-feet per year of recharge. *Clear Springs*, 150 Idaho 790, 252 P.3d at 74; *see also* Exh. 301, at 34. Therefore, annual recharge of the aquifer exceeds depletions as "[m]ore water enters the aquifer than is being removed by ground water pumping", and there is no evidence in the record that the aquifer is being mined. R. 3113.

2. The City of Pocatello

Pocatello relies on an interconnected well system for its culinary supplies. Exh. 337, at 2-2 & 301, at 3. While a few of Pocatello's wells are senior to A&B's water right no. 36-2080, many are junior and would be potentially impacted by a curtailment order to satisfy a finding of injury to A&B's water right no. 36-2080. Exh. 337 & 301, at Table 1.

3. Idaho Ground Water Users Association

The Idaho Ground Water Appropriators, Inc. ("IGWA") is comprised of groundwater districts, municipal users, industrial users and dairies. R. 3081. IGWA's members include many of the junior ground water users that would have potentially been curtailed if the Department had found injury to A&B. *Id.*

4. A&B Irrigation District

The Northside Pumping Division of the Minidoka Project ("Project") was developed by the United States Bureau of Reclamation ("Bureau") to develop irrigable land in the southern portion of the eastern Snake River Plain. *Id.* at 3080-81. A&B is an irrigation district organized

by the landowners of the Project to manage the Project. *Id.* "Unit A" consists of approximately 15,000 acres in the western portion of the District that are irrigated with senior surface water diverted from the Snake River at Milner Dam. R. 1111. "Unit B" pumps ground water from the ESPA for delivery to farms in the eastern portion of the District.[2] *Id.* at 1152. The wells in the Unit B system were constructed beginning in the late 1940s. *Id.* at 1111.

5. A&B's Water Right No. 36-2080

In this litigation, A&B characterized its water right *not* as 1,100 cfs (as expressed in its partial decree) but as 0.88 miner's inches/acre, which can be calculated as follows: 1,100 cfs/62,604.3 acres = 0.0176 cfs or 0.88 miner's inches/acre.[3] Cl. R. 49 n.2. Although A&B framed its evidence in this proceeding by reference to 0.88 miner's inches/acre, this number is actually an average across Unit B. R. 3093. Some wells deliver more than 0.88 miner's inches/acre and some deliver less. Exh. 301, at 5; Exh. 400, at 15. In fact, the Bureau declined to obtain individual water rights for each of the well systems, and instead sought a license that would allow the District flexibility to deliver ground water from *any* well to *any* acre within the 62,604 acre place of use. Exh. 157B & 157D. The right was licensed and decreed to allow cumulative diversion of 1,100 cfs from the separate points of diversion (from wells), and to allow diversions from any of the wells to be delivered to any of 62,604.3 acres between April 1 to October 31. Tr. Vol. VI, p. 1301, L. 23 – p. 1302, L. 6.

[2] Due to geologic irregularities which make ground water delivery challenging in the southwest portion of Unit B, some of the lands in this area now receive surface water. R. 1127; R. 3081.

[3] Under Idaho law, 50 miner's inches is the equivalent of 1 cfs, so 1 miner's inch equals 0.02 cfs. Using the math above, 0.0176 cfs/0.02 cfs = 0.88 miner's inches.

6. Unit B Project and Operations

Unit B was originally designed as an open discharge system where ground water was pumped into surface ponds, delivered through open canals, and applied to crops through gravity flow. R. 3098. Over the last 15 years, A&B has installed pressurized (closed) pipe systems which deliver water from the wells to the lands where sprinklers, rather than gravity flow, apply the water to the crops. *Id.* at 3098-99. This change in delivery from open discharge and gravity flow to pressurized pipe and sprinkler delivery has increased efficiencies substantially, so conveyance losses between the well and the field have dropped from 8% to 3%. R. 1116; R. 3099. A&B has interconnected its well systems to enhance flexibility in Project operations; it continues to interconnect well systems today to take advantage of the operational flexibility it has under the terms of its 36-2080 right. Tr. Vol. III, p. 473, L. 14 – p. 474, L. 25.

The Unit B wells also operate to serve A&B's junior enlargement rights and beneficial use rights. Collectively referred to as "the water spread rights", these rights allow A&B to take an additional *quantity* of water, but at no additional rate of flow. Tr. Vol. VI, p. 1290, L. 3-12. In addition to the 62,604 acres that are the place of use for the 36-2080 right, the junior enlargement and beneficial use rights also are authorized to serve an additional 4,082 acres for a total of 66,686.2 acres (referred to below as the "water spread acres"). R. 1112; Exh. 349 – 353. The senior 36-2080 right is only authorized to serve 62,604 acres; however, A&B has no means to prevent delivery of diversions made under the senior 36-2080 right to the water spread acres. Tr. Vol. IV, p. 742, L. 8 – p. 743, L. 6; Tr. Vol. V, p. 934, L. 5-12. As a result, when the system is "on allotment" and demand for water is high, Unit B is delivering nearly 8% of its diversions

under water right no. 36-2080—diversions that are authorized only for 36-2080 acres—to the junior water spread acres. Tr. Vol. VI, p. 1200, L. 24 – p. 1202, L. 25; Cl. R. 83-85.

Unit B, relying as it does on ground water within the ESPA, has an ample water supply. R. 3113; Cl. R. 51. Farmers place orders in writing for deliveries of water; however, the capacity of the well system to deliver water to Unit B farmers far outstrips the demands placed on the water supply by the farmers. Exh. 331; Tr. Vol XI, p. 2260, L. 22 – p. 2262, L. 4. The record below demonstrated that the wells—in effect the headgates for diversion of water within Unit B—have unused capacity during peak demand periods, and Unit B can deliver additional water supplies beyond those requested by the farmers. Exh. 331; Tr. Vol. XI, p. 2260, L. 22 – p. 2262, L. 4.

D. Procedural History

On June 26, 1994, A&B filed a Petition for Delivery Call ("Petition") with the IDWR alleging that diversions from the ESPA by junior priority ground water users caused A&B to "suffer[] material injury as the result of the lowering of the ground water pumping level within the [ESPA] . . . since 1959." R. 13. After filing the Petition, A&B entered into a stipulation with IDWR to stay the Petition.

On March 16, 2007, A&B filed a Motion to Proceed with its delivery call. R. 830-41. A&B alleged that it was suffering material injury "as a result of the lowering of the ground water pumping level within the [ESPA]", and asserted that 0.75 miner's inch is "the minimum amount necessary to irrigate lands within A&B during the peek [sic] periods when irrigation water is

most needed." R. 13; R. 836.[4] The stay was lifted, and on January 29, 2008, the Director issued an Order denying A&B's Petition, finding that A&B's 36-2080 water right had not suffered material injury. R. 1105-60. In reaching this conclusion, the Director considered the factors outlined in Conjunctive Management Rule ("CMR") 42 to determine "whether junior priority ground water rights are causing injury" to A&B's 36-2080 right. *Id.* at 1146.

The Director found that ground water declines within A&B's boundaries are not caused by junior groundwater pumping alone, but "because of conversion from application by gravity flood/furrow irrigation to sprinkler systems, a sequence of prolonged drought, and ground water diversions for irrigation and other consumptive purposes." *Id.*; *see also* IDAPA 37.03.11.042.01.c (The Director may consider "[w]hether the exercise of junior-priority ground water rights" affects the water available to the senior.). The Director concluded that A&B's reduced well yields were not caused by junior pumping, as there was water available to pump in the aquifer, but A&B's wells as-built could not get at the water. "A&B's own data shows that its inability to irrigate some portions of [its decreed place of use] is attributable to an inefficient well and delivery system." R. 1148. A&B's "failure to take geology into account is a primary contributor to A&B's reduced pumping yields, not depletions by junior-priority ground water users." *Id.* at 1149. "If A&B employed appropriate well drilling techniques . . . water would be available to supply its well production and on-farm deliveries." *Id.*; *see also* IDAPA 37.03.11.042.01.a (The Director may consider the amount of water available "in the source" for the senior to divert).

[4] It is important to note that A&B did not request delivery of its maximum decreed flow rate (0.88 miner's inches/acre) but instead acknowledged that what it needed to avoid injury was less—0.77 miner's inches per acre.

The Director determined that A&B's method of diversion was not reasonable because it was not using technology "well suited for use in the geological environment in the southwestern portion of the District." R. 1149; *see also* IDAPA 37.03.11.042.01.g (the Director may consider whether its requirements could be met if it employed "reasonable diversion and conveyance efficiency and conservation practices."). A&B failed "to use appropriate technology [which] artificially limits access to available water supplies and [this] is not consistent with the requirement for the appropriator to use reasonable access." R. 1149.

Finally, in response to A&B's delivery demand of 0.75 miner's inches (which is *less* than A&B's calculated decreed amount of 0.88 miner's inches), the Director found that A&B was receiving 0.74 miner's inch per acre. The difference in what A&B was demanding and what it was receiving is "less than 2% [which] is within reasonable margins of error for measurement." R. 1148. The Director also noted that "the locations identified by A&B as being short of water were not short of water", and that if A&B had limited its irrigation using water right no. 36-2080 to the 62,604.3 acres under its decree, and had not developed an additional 4,100 acres of irrigation, A&B may have more water available to its legally permitted uses. *Id.*

A hearing was conducted December 3 through 17, 2008, before Hearing Officer Gerald F. Schroeder ("Hearing Officer"). The Hearing Officer entered an *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommendations") on March 27, 2009, agreeing that A&B had not suffered material injury to its water right. R. 3078-120. In addition, the Hearing Officer found that (1) A&B's 36-2080 right was subject to provisions of the Idaho Ground Water Act ("GWA" or "Act") (codified at Idaho Code sections 42-226 through

42-329), (2) A&B's position that it was suffering material injury because it was not receiving its maximum decreed flow rate at each of its 177 alternate points of diversion was without legal basis; (3) hydrological conditions in certain areas of the project make pumping difficult; (4) A&B was required to take reasonable measures to move water to underperforming areas within the project; and (5) the formation of a GMA would not result in any benefit to the management of the ESPA.[5] *Id.* On June 30, 2009, the Director issued the Final Order Regarding the A&B Irrigation District Delivery Call accepting all substantive recommendations of the Hearing Officer. R. 3318-25.

E. District Court's Decision

In a *Memorandum Decision and Order on Petition for Judicial Review,* May 4, 2010, the district court affirmed the Director on all issues litigated and determined by the Department. Cl. R. 45-94. The court concluded that the GWA applies to the administration of ground water rights that pre-date its enactment, finding that the legislature clearly "[i]ntended the GWA to [a]pply to the [*a*]*dministration* of [*a*]*ll* [r]ights to the [u]se of [g]round [w]ater [w]henever or [h]owever [a]cquired." *Id.* at 57. The trial court also concluded that A&B had sufficient water to satisfy the 36-2080 right at current pumping levels, and therefore the department had correctly concluded that it was not necessary to establish a reasonable pumping level in conjunction with the A&B delivery call. *Id.* at 66-67. The court affirmed the Director's determination that A&B

[5] On May 29, 2009, the Hearing Officer issued a response to A&B's Petition for Reconsideration correcting certain errors in the Recommendations but otherwise affirming. R. 3231-35. The Hearing Officer also issued an order regarding A&B's Petition for Clarification on June 19, 2009. R. 3265-68.

is not injured simply because it receives 0.75 miner's inches/acre across the project, rather than on a well-by-well basis:

> This Court agrees that the system must be considered as a whole based on the way in which the water right is decreed. Further, that the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. . . . A & B does not get to dictate particular quantities that need to be diverted from particular points of diversion.

Cl. R. 83, 84.

Recognizing that "Idaho Law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use", the district court found the Department's investigation of A&B's water needs and diversion system to be proper. *Id.* at 76. Further, the trial court recognized that injury does not equal depletion, and that A&B's partial decree does not *per se* preclude inquiry into its water needs:

> [A] water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season.

Id. at 75. Furthermore,

> [c]onditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required . . . .

Id. at 74.

The court also affirmed the Director's determination of lack of material injury, disapproving of A&B's use of its 36-2080 right on the "water spread" acres while A&B was simultaneously claiming injury to the original 36-2080 acres. "A & B seeks regulation of juniors

. . . for the 36-2080 right while at the same time continues to irrigate enlargement acres from alternative points of diversion authorized under the same right." Cl. R. 85.

However, the district court's agreement with the Director's finding of no material injury was limited by the "proviso" that the Director had failed "to apply the constitutionally protected presumptions and burdens of proof" in reaching his conclusion of no material injury. *Id.* at 68. This conclusion is the subject of Pocatello's appeal. The trial court concluded that the relevant standard of proof is "clear and convincing evidence", and Pocatello respectfully contends that this is in error, and that instead a "preponderance of the evidence" is the proper standard for the Director to find lack of material injury.

II. CROSS APPELLANT'S ISSUE ON APPEAL

A. Whether the district court erred in imposing the "clear and convincing" evidence standard on the Director's determination of material injury in a delivery call.

III. ARGUMENT

A&B's allegation of injury hinges on its assertion that it is entitled, as an appropriator with a priority date senior to 1951, to maintenance of historic pumping levels without consideration of A&B's actual water deliveries, delivery system, partial decree provisions, or the amount of water it requires for beneficial uses. Only by establishing itself as exempt to Idaho statutes and case law can A&B hope to prevail in the face of so much substantial evidence that it does *not* require its full decreed quantity. However, A&B challenges the district court's rulings of law related to the application of the Ground Water Act and the appropriate scope of the Director's discretion to administer a delivery call consistent with the Ground Water Act and

other Idaho law. The district court properly rejected A&B's arguments below, and this Court should affirm.

A. The GWA of 1951 applies to administration of A&B's 36-2080 water right.

A&B argues erroneously that the language of Idaho Code section 42-226 exempts all pre-1951 water rights (including its water right no. 36-2080 with an appropriation date of 1948) from the provisions of the Act. An examination of the language of the GWA and relevant legislative history demonstrates that the legislature expressly recognized the validity of all pre-GWA rights to the use of water, but also intended for the GWA to apply in the administration of all ground water rights, "whenever or however acquired." I.C. § 42-229.

1. The GWA applies in administration to all Idaho ground water rights, regardless of priority date.

In 1951, the Idaho Legislature enacted the GWA, currently codified at Idaho Code sections 42-226 through 42-329. The legislature addressed the applicability of the Act in the administration of ground water rights by the State in section 4:

> the administration of all rights to the use of ground water, **whenever or however acquired** or to be acquired, shall, unless specifically excepted therefrom, **be governed by the provisions of this act**."

1951 Idaho Sess. Laws 424, ch. 200, § 4 (emphasis added) (currently codified at I.C. § 42-229). The above-quoted language has not been amended since the Act's enactment. The GWA contains two specific exemptions pursuant to section 42-229: section 227 exempts domestic wells, and section 228 exempts wells drilled for drainage or recovery purposes. These exemptions do not apply to A&B's 36-2080 water right, and the Act contains no other specific exemption for pre-1951 ground water rights.

2. Idaho Code section 42-226 and its legislative history do not except pre-1951 water rights from administration pursuant to the GWA.

As enacted, section 1 of the GWA provided as follows:

> It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. *All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed*.

Id. at 423-24 (emphasis added) (currently codified at I.C. § 42-226). A court's purpose in interpreting the language of a statute is to derive the intent of the legislative body that adopted the act. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). Statutory interpretation begins with the plain language of the statute, and when unambiguous, must be given effect. *Id.* The purpose of the original italicized language above of section 42-226 is clear: to confirm the validity of pre-1951 rights to the use of groundwater and, as such, "eliminate any confusion that ground water rights of existing holders were unauthorized or that existing right holders would have to make application under the GWA." Cl. R. 65.

Section 42-226 of the GWA has been amended twice. First in 1953, when the Idaho Legislature added the underlined language below:

> It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined * *: and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state*

> *reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws 278-79, ch. 182, § 1 (underline emphasis added). The legislature again amended section 42-226 in 1987 to address concerns involving the administration of rights to the use of geothermal ground water resources. The 1987 amendment also amended what was originally the last sentence of section 42-226 to read as follows:

> ~~All~~ This act shall not affect the rights to the use of ground water in this state however acquired before ~~the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws 743, ch. 347, § 1.

A&B's argument that the 1987 amendment to section 42-226 creates an exception to the application of the GWA in the administration of pre-1951 ground water rights is in error. Nothing in the current (or original) language supports this interpretation. Indeed, the district court reasoned instead that "the more plausible justification behind the [1987] amendment . . . was to avoid confusion in the forthcoming SRBA. . . . as a legislative determination of the validity of pre-existing rights." Cl. R. 66.

Further, A&B's expanded reading of the last sentence of section 42-226 is in conflict with section 42-229 ("the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act"). I.C. § 42-229. The rules of statutory interpretation require that a statute be construed as a whole, with all sections read together harmoniously, and not each

section in a vacuum individually. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 198, 46 P.3d 9, 15 (2002). As stated by the district court, A&B's interpretation

> renders the "whenever or however acquired" language of the last sentence of I.C. § 42-229, which pertains to the administration of the right to use ground water, meaningless. Courts must give effect to all the words and provisions of a statute so that none will be void, superfluous or redundant.

Cl. R. 59 (citation omitted).

The legislature has not amended section 42-229, which directly addresses the application of the Act to ground water rights. The district court correctly concluded that for these provisions to be read together, the effect of 42-226 is to confirm the validity of pre-1951 rights, not exempt them from the Act entirely:

> When the two above-mentioned provisions are read in conjunction it is clear that the last sentence of I.C. § 42-226 governs the applicability of the GWA to rights to the use of ground water acquired before its enactment, whereas the last sentence of I.C. § 42-229 applies to the *administration* of rights to the use of ground water acquired before its enactment. By its plain language then, the GWA applies to the *administration* of rights to the use of ground water "whenever or however" acquired.

Id. (citation omitted) (emphasis in original).

The legislative history of the 1987 amendment does not contain any evidence of legislative intent to support A&B's contention that the language of section 42-226 creates an exception to the application of the Act in administration of pre-1951 rights.[6] Because A&B's

[6] The title of Senate Bill 1133 containing the changes made in the 1987 amendment, ("An Act . . . Amending Section 42-226, Idaho Code, to Provide that In Determining a Reasonable Ground Water Pumping Level or Levels, the Director of the Department of Water Resources Shall Consider and Protect the Thermal and/or Artesian Pressure Values for Low Temperature Geothermal Resources . . . and to Make Grammatical Changes . . . .") implies that the purpose for changing the last sentence of section 42-226 was merely grammatical. 1987 Idaho Sess. Laws 741, ch. 347.

interpretation fails to read the GWA as a whole or give effect to the plain language of the legislature, it must fail.

3. Idaho Supreme Court case law supports the conclusion that the GWA Applies to the Administration of A&B's 36-2080 right.

A&B contends that this Court has held on two occasions that the GWA does not apply to pre-1951 water rights: *Musser v. Higginson* ("*Musser*"), 125 Idaho 392, 871 P.2d 809 (1994), which involved a surface water delivery call, and *Noh v. Stoner* ("*Noh*"), 53 Idaho 651, 26 P.2d 1112 (1933), which this Court has expressly abrogated. The district court properly rejected A&B's interpretation of these cases and concluded that in addition to the legislature's express intent to apply the Act in the administration of pre-1951 water rights, discussed *supra*, case law applying the provisions of the GWA indicate that the Act applies to A&B's water right.

a. *Baker v. Ore Ida Foods, Inc*. abrogated the common law holding of *Noh*.

In *Baker v. Ore-Ida Foods, Inc.* ("*Baker*"), 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court held that the common law rule announced in *Noh* was abrogated by the GWA of 1951, and expressly stated that Noh is "inconsistent with the full economic development of our ground water resources." 95 Idaho at 581-82, 513 P.2d at 633-34. The Court found that in contrast, the "Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest", the Act was "intended to eliminate the harsh doctrine of *Noh*." *Id.* at 584, 582, 513 P.2d at 636, 634 (citing to Idaho Const. art. 15, § 7).

Baker involved a dispute between ground water pumpers over the maintenance of ground water tables. Some of the senior rights at issue in *Baker* were pre-GWA ground water rights, just like A&B's 36-2080 water right. *Id.* at 577, 513 P.2d at 629 n.1. The Court held:

> A senior appropriator is only entitled to be protected to the extent of the "reasonable ground water pumping levels' as established by the [GWA]. I.C. s. 42-226. A senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.

Id. at 584, 513 P.2d at 636. The *Baker* Court recognized that at common law, senior well owners were protected in administration absolutely to the extent of their historical pumping level. However:

> Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate common law. **We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act**.

Id. at 583, 513 P.2d at 635 (citations omitted) (emphasis added). Importantly, the *Baker* Court recognized the legislature's clear intent in passing the GWA to overturn the common law rule of *Noh*. "It is true that, as a general principal, 'the rules of common law are not to be changed by doubtful implication. However, 'where the implication is obvious it cannot be ignored.'" *Statewide Constr., Inc. v. Pietri,* 150 Idaho 423, 247 P.3d 650, 656 (2011) (citations omitted). The district court also noted that while the *Baker* Court "never specifically addressed the issue of whether or not the reasonable pumping level provisions of the GWA were intended to apply to

pre-existing rights . . . the Court did in fact apply the reasonable pumping provision to pre-existing rights." Cl. R. 62.

This should end the matter. A&B, however, ignores the express holding of the *Baker* Court and argues that the decision did not overrule *Noh* because that case involved pumping from an aquifer being mined. Petr.'s Opening Br. 21-23. A&B further ignores this Court's recent decision, *Clear Springs Foods, Inc. v. Spackman*, where the Court discussed the *Baker* decision and affirmed that the GWA abrogated the common law rule of *Noh*:

> The 1953 amendment recognized that in order for there to be full economic development of underground water resources, a senior appropriator with a shallow well should not be able to block subsequent appropriators of groundwater. To prevent that from occurring, the senior appropriator is protected only "in the maintenance of reasonable ground water pumping levels . . . .

This Court went on:

> [W]ith respect to ground water pumping, the prior appropriation doctrine was modified so that it only protects senior ground water appropriators in the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources.

Clear Springs, 150 Idaho 790, 252 P.3d at 83 (emphasis added). A&B neither provided nor attempted to distinguish the *Clear Springs* decision. Relevant authority cannot be ignored: this Court has twice held that the common law rule of *Noh* was abrogated by the Idaho legislature's changes to the GWA and the district court properly affirmed the application of the GWA to A&B's 36-2080 rights.

b. A&B's reliance on *Parker v. Wallentine* and *Musser v. Higginsen* is misplaced.

A&B argues that because the senior domestic ground water user in *Parker* was entitled to historic water levels, its senior irrigation rights should also be entitled to historic water levels.

Petr.'s Opening Br. 13; *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). However, unlike irrigation uses, domestic uses were expressly exempt from the GWA under the original version of the Act. Because the GWA as enacted expressly excluded from its application domestic wells,[7] and the 1978 amendment eliminating this exception did not expressly state that it was to apply retroactively,[8] the GWA did not apply to the senior's 1964 domestic water right. *Parker*, 103 Idaho at 513 n.11, 650 P.2d at 655 n.11. A&B argues that this logical analysis should also apply to its pre-1951 irrigation ground water rights.

This argument mischaracterizes the *Parker* analysis, which relied on the express exclusion of domestic uses from the GWA under the original version of the Act. As the district court noted in rejecting A&B's arguments on this point:

> [I]t is important to note that prior to the 1978 amendment, the GWA did not apply in any respect, retroactively or otherwise, to **domestic wells**. . . . Accordingly, the holding in *Parker* is consistent with *Baker* for purposes of applying the GWA to water rights that are not expressly exempt from its application.

Cl. R. 63 (bold emphasis added). Unlike domestic rights, pre-GWA irrigation rights are expressly subject to the GWA pursuant to Idaho Code section 42-229, and always have been since its enactment. Therefore, *Parker* is inapposite, and only relevant in that it confirms that where the legislature intended to except a category of water rights from the Act, it did so expressly.

A&B also relies upon *Musser v. Higginson*, a surface water delivery call proceeding which did not involve the question of whether the GWA applies to pre-1951 ground water rights.

[7] "The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act . . . ." 1951 Idaho Sess. Laws 424, ch. 200, § 2 (now codified at I.C. § 42-227).
[8] 1978 Idaho Sess. Laws 819, ch. 323 (amending I.C. § 42-227).

Petr.'s Opening Br. 15; *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). *Musser* was a case involving the propriety of the Director's response to Musser's request for delivery of water and whether the writ, issued by the trial court, should be affirmed. *Id.* at 393, 871 P.2d at 810. It is not a case that wrestled with the GWA—in fact, the Court only mentions Idaho Code section 42-226 in passing.

As with the *Parker* argument, the district court also rejected A&B's arguments regarding the *Musser* decision.

> *Musser* was decided based on principles governing mandamus in relation to the Director's duty to distribute water in water districts pursuant to I.C. § 42-602 and not the application of the GWA. . . . The application of I.C. § 42-226 . . . was not before the Court in *Musser*. Accordingly, the Court did not have the occasion to analyze the issue in the framework of the entire GWA . . . .

Cl. R. 65. Indeed, this Court recently clarified that *Musser* simply stands for the proposition that "hydrologically connected surface and ground waters must be managed conjunctively." *Clear Springs*, 150 Idaho 790, 252 P.3d at 89. In the context of the issues presented in the *Musser* case, the Court's comment regarding the Ground Water Act simply establishes that rights acquired prior to adoption of the Ground Water Act are valid and may initiate delivery calls. Importantly, the *Musser* Court indicated no intent to overrule *Baker*, and did not interpret Idaho Code section 42-229.

B. The Department properly interpreted A&B's 36-2080 Decree in the delivery call proceeding to evaluate material injury on a cumulative system-wide basis.

A&B argues that the Department erred in its injury analysis by evaluating material injury based on depletions to A&B's cumulative decreed quantity instead of on a well-by-well basis.

The Director rejected this position and the district court agreed, finding that the provisions of A&B's license and partial decree for water right no. 36-2080 create maximum flexibility that allows A&B to arrange its delivery system to its decreed place of use (62,604 acres) in a way that satisfies all its water users. Cl. R. 83-85.

A&B's partial decree lists its original 177 different points of diversion (wells) within the boundaries of the Unit and describes the place of use as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." Exh. 139, at 5. Both the Department and the district court agreed that because of this provision regarding place of use, all ground water pumping under A&B's 36-2080 right is appurtenant to all acres in the decreed place of use. Cl. R. 83. Indeed, the evidence at hearing established that the Bureau bargained for those terms and conditions in the partial decree in order to maximize the flexibility of the project. R. 3093-94; Exh. 157B & 157D. In the permit application process, the Bureau stated that:

> We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impracticable and undesirable to designate precise land area within the project served only by each of the specific wells on the list.

Exh. 157D, at 1. The district court concluded that

> the right is essentially decreed as having alternate points of diversion for the 1100 cfs for the entire 62,604.3 acres. Therefore, because no rate of diversion or volumetric limitation is decreed to a particular point of diversion, A & B has no basis on which to seek regulation of juniors in order to divert a particular rate of diversion from a particular point of diversion, provided a sufficient quantity can be diverted through the various alternative points of diversion that are appurtenant to the same lands.

Cl. R. 84. Because A&B bargained for and received a water right allowing it maximum flexibility in its water distribution system, it does not have the right under its decree to demand delivery of a particular amount at a particular well. Both the district court and the Department agreed that "A&B can't have it both ways"—A&B has taken advantage of the flexibility it obtained through its partial decree for a single water right, and cannot simultaneously assert a right to call for its entire right at 177 separate points of diversion.

C. The Director did not require A&B to interconnect their wells but instead properly found that it has a duty to take steps to maximize use of its water right so as to have a reasonable means of diversion.

A&B contends that the Department has ordered it to interconnect all 188 wells before it may seek administration of its water right, and has raised this issue on appeal. A&B misstates the determination of the Department on this issue. To the contrary, the Hearing Officer concluded that, given the flexibility explicit in the language of the A&B partial decree and the IDWR duty to satisfy the terms of the partial decree, A&B has a duty to "maximize the use of that flexibility . . . before it can seek curtailment or compensation from junior users." R. 3096. However, the Hearing Officer recognized that topography limits A&B's ability to interconnect its system, and specifically found that "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury." *Id.* The Department adopted these conclusions in its Final Order without further comment.

The Department's conclusion that A&B has the flexibility under its decree to interconnect its system to serve well systems it views as short is consistent with Idaho law: a single water right may not command the entire natural body of water to effect a diversion of a

water right. *Schodde v. Twin Falls Land & Water Co*., 224 U.S. 107, 125, 32 S. Ct. 470, 474 (1912). Such consideration is expressly outlined in the Conjunctive Management Rules: CMR 42.01.g.a. permits the Director to consider "[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" in determining material injury. IDAPA 37.03.11.042.01. Pursuant to Idaho Code section 42-602, the Director "shall have discretion and control of the distribution of water from all natural sources . . . . in accordance with the prior appropriation doctrine." The district court agreed that such consideration was within the Director's discretion:

> [T]he extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A & B must make reasonable efforts to maximize interconnection . . . . [t]he Director did not abuse discretion in imposing such a requirement.

Cl. R. 83.

The Department reached this conclusion based in large part on the range of hydrogeologic attributes associated with A&B's well systems. The Bureau was aware of the variable hydrogeologic conditions associated with the B Unit at the time it proposed development of the project. R. 1127-29. "The [geologic] materials range from highly permeable to nearly impermeable. Permeability influences the rate at which the materials accept recharge, transmit water, and yield water to wells." *Id.* at 1128. While water bearing basalts are predominately located in the northern portion of the project, Tr. Vol. I, p. 80, L. 10-13, sedimentary interbeds that bear little water are predominantly located in the southern portion of

the project. Exh. 121, at 1076; Exh. 215. Predictably, greater well yield occurs in the northern and eastern portions of the project, while the southwestern area has lower yields. Tr. Vol. I, p. 95, L. 25 – p. 96, L. 22; Tr. Vol. IX, p. 1733, L. 10 – p. 1734, L. 5.

Due to these and other hydrogeologic factors, A&B has experienced lower well yields in the southwestern portion of the project since the 1950s. In fact, the Bureau was warned against development of lands in the southwest in 1948. R. 3091. According to Mr. Vincent, IDWR's witness, "[t]he greatest problem with the water supply system at A & B is, and always has been, A & B's inability to effectively deal with the sediment layers." Tr. Vol. IX, p. 1757, L. 10-13. Indeed, in reviewing the evidence, the Hearing Officer found that A&B's request for curtailment was not warranted because, to the extent wells in the southwestern area are not producing water, this is due in large part to A&B's unreasonable configuration of its diversion system:

> **The conditions of a difficult area for water production do not justify curtailment or mitigation.** The conditions in the southwest area create a situation which in significant ways is analogous to the problem addressed in [*Schodde*], which weighed the public interest against the exercise of an established water right. . . . Th[e] injury [in *Schodde*] was to his means of diversion, not to his underlying water right. This case creates a similar issue. . . . That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.

R. 3111. Contrary to A&B's allegations, the Department has not ordered A&B to interconnect each and every well within the District: instead, the Department considered the natural geologic conditions that exist in the District and the flexibility of A&B's partial decree, and concluded

that A&B should utilize that flexibility to reasonably manage its water delivery system prior to seeking administration of juniors.

D. The Director did not err in his determination that A&B has not been required to pump below a reasonable pumping level.

As noted by the district court, Idaho Code section 42-237a.g. outlines the Director's duties regarding establishing ground water levels. Cl. R. 67. Pursuant to this statute the Director, "in his sole discretion", is given authority

> [t]o supervise and control the exercise and administration of all rights to the use of ground waters ***and in the exercise of this discretionary power*** . . . . he ***may*** establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided.

Id. (citing I.C. § 42-237a.g.). The plain language of section 42-237a.g. makes clear that the Director is not required to set reasonable pumping levels, but may do so as part of the Department's administration of water rights. The district court properly found that "the GWA does not mandate that the Director establish ground water levels automatically as a matter of course in conjunction with a delivery call by a ground water pumper." *Id.*

E. The clear and convincing evidence standard does not apply in delivery call proceedings.

At all stages of A&B's delivery call, A&B's claims of injury were rejected on the ground that A&B does not require the full quantity of its decreed water right and thus its water right is not materially injured from junior ground water pumping. A&B does not assert on appeal that it requires the full decreed quantity of its water right,[9] and evidence below demonstrated that A&B

[9] A&B's issues on appeal are limited to challenging the application of the Idaho Ground Water Act against its water right no. 36-2080, amounting to an assertion that it need not show that it requires the full decreed quantity but rather

has never even diverted the full decreed quantity of its water right (let alone delivered that amount for beneficial uses). Tr. Vol. VIII, p. 1670, L. 9 – p. 1671, L. 3 & p. 1696, L. 3 – p. 1697, L. 4; *see also* Exh. 319. The complex factual circumstances inherent to the dispute in this case, as is clear in the agency record, requires the exercise of professional expertise and agency discretion in responding to a delivery call. Nonetheless, the district court established a significant restraint on the Director's discretion by requiring the Director to evaluate the delivery call under the heightened evidentiary standard of "clear and convincing evidence." This imposition of a heightened evidentiary standard is Pocatello's sole issue on cross-appeal. The Court has free review of questions of law. *Rahas v. Ver Mett*, 141 Idaho 412, 414, 111 P.3d 97, 99 (2005). The district court imposed the heightened evidentiary standard as a means to "give proper legal effect" to A&B's decree and to fashion a procedure that would streamline conjunctive administration in an organized water district. Cl. R. 86. The application of the heightened evidentiary standard is not supported by Idaho law. The clear and convincing standard has been applied in Idaho only in the context of adjudications or re-adjudications (such as adverse possession) which serve to permanently deprive a water right holder of its decreed property right. Under this Court's rubric as announced in *AFRD#2*, a delivery call is not a re-adjudication. 143 Idaho at 878, 154 P.3d at 449. Further, the district court's imposition of the heightened evidentiary standard appears to also be aimed at protecting a senior from bearing *any* burden of proof in advancing its claims of material injury in a delivery call and at the same time tying the Department's hands in evaluating a senior's claims of injury.

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that it may rely on either historic water levels or "reasonable pumping levels" as a basis to show injury. Cl. R. 143-46.

The trial court's ruling fails to consider the relationship between burdens of proof and evidentiary standards that apply under Idaho law. No evidentiary standard, no matter how strict or relaxed, can change the allocation of burden of persuasion under administrative law—when challenging an agency's initial determination by requesting a hearing, the appellant bears the burden of persuasion. While the district court is correct that the Director's initial determination upon receiving a delivery call petition requires the Director to presume—and A&B is protected from having to re-adjudicate—its entitlement to its decreed quantity, upon a challenge to the Director's initial order A&B bears the burden of persuasion just like any other appellant in an administrative matter. The district court's imposition of the clear and convincing standard, except as it has been previously applied to affirmative defenses to determinations of injury in delivery calls, such as the futile call defense, is clearly erroneous, an interference with the Director's discretion, and should be reversed.

F. *AFRD#2* frames the proper manner in which burdens of proof and presumptions are to operate in delivery call proceedings.

To put these problems with the district court's order into perspective, it is useful to review a portion of this Court's decision in *AFRD#2*. *AFRD#2* involved an appeal from a lower court ruling in which the CMR were found to be constitutionally defective because, *inter alia*, they failed to include "procedural components" of the prior appropriation system, including the "evidentiary standards that the Director is [to] apply in responding to a call" and to "give the proper legal effect to a partial decree."[10] *AFRD#2*, 143 Idaho at 870, 154 P.3d at 441. The Idaho

[10] As recited in the Idaho Supreme Court decision, the *AFRD#2* district court identified five failures of the CMR, in ruling them unconstitutional: "1) to establish a procedural framework properly allocating the well established

Supreme Court noted the lower court's concerns that the CMR "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.'" *Id.* at 874, 154 P.3d at 445. The Court declined to decide this issue finding that it was inappropriate in a facial constitutional challenge to the Rules. "[T]he failure to state which standard applies does not mean the CM Rules can never be applied in a constitutional fashion—and the Rules' incorporation of the Idaho Constitution, statutes and case law would indicate to the contrary." *Id.*

Although declining to rule on the precise evidentiary standards that apply in a delivery call, the *AFRD#2* Court established the appropriate means to give "proper legal effect to a partial decree" by establishing a presumption that the senior is entitled to his decreed quantity. *AFRD#2*, 143 Idaho at 872, 154 P.3d at 443. "The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 878, 154 P.3d at 449.

The Court announced this presumption in response to the appellant senior water users' argument that the Director's consideration and application of CMR 42 factors resulted in re-adjudication of their water rights. *Id.* at 876, 154 P.3d at 447. The appellant senior water users argued that Rule 30.01 of the CMR improperly shifted the burden to the senior appropriator to

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burdens of proof; 2) to define the evidentiary standards that the Director is [to] apply in responding to a call; 3) to give the proper legal effect to a partial decree; 4) to establish objective criteria necessary to evaluate the aforementioned factors; and 5) to establish a workable, procedural framework for processing a call in a time frame commensurate with the need for water—especially irrigation water." 143 Idaho at 872, 154 P.3d at 443.

"re-adjudicate or re-prove his decreed right whenever he makes a delivery call" and that "in times of a water shortage, it is presumed that there is injury to a senior." *Id.* at 877, 154 P.3d at 448. In rejecting this argument, the *AFRD#2* Court said:

> The [district] court cited *Moe v. Harger* as support for that holding. *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.

Id. (internal citation omitted). The Court framed the senior's presumption of entitlement to the decreed amount by reference to the Director's *initial* request for information from the senior water users, acknowledging that:

> [t]he Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]."

AFRD#2, 143 Idaho at 878, 154 P.3d at 449 (citation omitted). But, in the context of the Director's initial request for information upon receipt of a delivery call petition, the Court also held:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner reprove or re-adjudicate the right which he already has. We note that in the initial Order entered in this case, the Director requested extensive information from American Falls . . . . [w]hile there is no question that some information is relevant and necessary to the Director's determination . . . the burden is not on the senior water rights holder to re-prove an adjudicated right.

Id. at 877-78, 154 P.3d at 448-49. Upon a finding by the Director that the senior is suffering 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.

As this Court noted, by establishing that the senior is legally presumed to be entitled to the decreed quantity, the Director can implement an evaluation of the senior's requirements under the "doctrine of beneficial use", to which water users continue to be subject to even after entry of a partial decree:

> 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. . . . water rights adjudications neither address, nor answer, the questions presented in delivery calls . . . . **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**.

Id. at 876-77, 154 P.3d at 447-48 (emphasis added) (citation omitted).

This Court, through *AFRD#2*, properly identified the elements of the Director's discretion, including the necessary authority to evaluate whether the senior is putting water to beneficial use and the reasonableness of any uses being made. There is no need for a blanket rule applying clear and convincing evidence. Idaho law provides ample direction in that regard. The appellant who initiates a contested case appealing the Director's initial determination bears the burden of persuasion, even if that is the senior water right holder. In *AFRD#2*, this Court drew the contours of lawful and constitutional application of the burdens of persuasion and legal presumptions as they apply to the Director's application of the CMR. This includes application of the clear and convincing evidence standard *if* the junior asserts an affirmative defense such as waste or abandonment, defenses which, if successful, permanently deprive the senior of his decreed quantity. The district court effectively ignored the parameters of administration outlined

in *AFRD#2* as well as existing law on burdens of proof to reach the wrong conclusion regarding the operation of evidentiary standards in delivery call proceedings.

G. The district court's reasoning fundamentally misunderstands the rubric of water rights administration as explained by *AFRD#2*.

The district court in this matter has made the first judicial effort to answer one of the questions left open by the *AFRD#2* Court: what standard of evidence must IDWR apply in a delivery call? The district court, while acknowledging the application of the clear and convincing evidence standard solely in proceedings involving the risk of permanent deprivation of property rights (Cl. R. 78), reasoned that the Director's failure to apply the heightened evidentiary standard (applicable only in adjudicatory proceedings) fails to give a senior's decree "proper presumptive weight." Cl. R. 82. The district court's erroneous reasoning starts from its concern that imposing any burden on the seniors will be too much like a re-adjudication, and leads the Court to conclude that a delivery call is a re-adjudication:

> [T]he issues litigated and evidence presented in support of the quantity element in the adjudication can be exactly the same as . . . [in a] delivery call. . . . [T]he argument that the issues are distinguishable because the issue in the adjudication is historical maximum beneficial use and in a delivery call only present need is at issue may be a difference in label only.

Cl. R. 123-24. Even if the evidence is the same in a delivery call as that which may be proffered in an adjudication, it is not the nature of the evidence that defines the evidentiary standard to be imposed—it is the legal effect that any decision of the fact finder imposes on the parties. The clear and convincing standard only applies when the legal effect of the fact finder's decision is permanent deprivation or modification of a property right.

The clear and convincing standard applies in a delivery call proceeding only if the junior appropriators do not *challenge* the Director's determination of injury but instead plead an affirmative defense[11] (the effective equivalent of saying "yes, but"): In other words, where juniors acknowledge the fact that the senior is injured, but attempt to avoid curtailment pursuant to a legitimate defense. An example of a "yes but" defense is futile call. In such an instance, junior appropriators are not refuting injury to the senior appropriator, but instead are alleging that curtailment of juniors will not provide the water necessary to remedy injury.

In other words, if juniors plead a defense that, if successful, will have the legal effect of altering decreed priorities of water to allow juniors to divert out of priority and injure senior users, such defense must be proven by clear and convincing evidence.[12] However, in the absence of the juniors pleading a defense to excuse the senior's injury and to allow out of priority diversions, the clear and convincing evidence standard plays no role in delivery call proceedings.[13]

As explained below, clear and convincing evidence is an evidentiary standard imposed by fact finders when parties face permanent deprivation or modifications to their property rights.

[11] According to Black's Law Dictionary, an affirmative defense is any "assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." BLACK'S LAW DICTIONARY 430 (7th ed. 1999).

[12] The trial court also declared that "waste" is a defense to a delivery call in the same manner that the "futile call" defense operates. Cl. R. 77-78. This determination is in error: a defense to a delivery call proceeding comes after a finding of injury. In contrast, when a senior appropriator is committing waste, he cannot be found to be injured by junior diversions: "Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use." *Id.* at 77. Therefore, by definition, a senior that is "wasting" cannot be found to be injured by junior appropriators, and the issue of waste is not something that juniors will raise as an affirmative defense to a finding of injury, but instead an issue that will be raised in the initial injury determination.

[13] For example, in this matter, the Director found in his initial order, by a variety of engineering determinations, that A&B did not require its full decreed amount. R. 1143-50. The juniors in this case participated in the case in support of the Director's finding and also submitted engineering analyses in support of the Director's position. Exh. 301 & 400. Affirmative defenses were not appropriate in this case, and in any event were not plead by the juniors.

The district court, however, let the "tail wag the dog" by relying on the nature of the evidence offered as a basis for imposing a heightened evidentiary standard. Cl. R. 123. The fact that evidence in a delivery call proceeding is similar to evidence in an adjudication does not make the two proceedings identical for purposes of the burdens to be borne by parties to the case. Further, while some legal issues surrounding delivery calls have not been decided (*see, e.g.*, footnote 7 above) the Idaho Supreme Court has expressly rejected arguments that delivery calls are the equivalent of a re-adjudication. *AFRD#2*, 143 Idaho at 876-77, 154 P.3d at 448-49 ("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"). Except in the limited circumstances explained above (which were not present in the A&B proceeding, where Pocatello contested A&B's allegation of injury), the clear and convincing evidence standard has no place in a delivery call context and the district court's order is clearly erroneous on this point.

1. The district court's reasoning fundamentally misunderstands the rubric of water rights administration as explained by *AFRD#2*.

The district court rejected Pocatello's argument on rehearing that in the administrative proceeding below, once A&B appealed the Director's finding that A&B did not require its full decreed quantity, A&B bore the burden of persuasion regarding material injury. Cl. R. 111. The Court went on:

> 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.
>
> . . . .

> . . . Once it is determined that the senior and junior derive water from a common source . . . 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.
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> . . . .
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> [In an area of common ground water supply] [t]he 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.

Cl. R. 111, 116, 118. The district court's conclusion regarding the applicable standard of evidence does not directly acknowledge the facts or procedural history of the delivery call proceeding below; however, the import of the district court's Order is that the Director's initial determination that A&B was not suffering material injury becomes meaningless if A&B bore *no* burden of proof to persuade the Hearing Officer that it was in fact injured or, in the alternative, that it required its full decreed amount. Furthermore, in relieving the senior water user of *any* burden, even that accorded an appellant of an agency order in an administrative contested case, the district court has effectively overruled the *AFRD#2* holding that rejected the presumption of injury to seniors. After all, if the senior bears no burden ever during a delivery call, the juniors must refute what is effectively a presumption of injury, not merely a presumption that the senior requires the decreed quantity.

Evidentiary standards are the measure of the burdens of proof by which the fact finder must resolve a dispute. IDAHO TRIAL HANDBOOK § 10.12 (2d ed. 2005). While "[t]he burden of producing evidence may shift as the trial progresses", the burden of persuasion "is assigned by the law to a particular party and dictates how the trier of fact should balance the evidence for and

against a proposition in determining the issue." *Id.* § 10:1. A presumption does not shift the burden of proof or persuasion on an issue, but instead "operates to relieve the party with the benefit of the presumption from the necessity of proof of the presumed fact unless evidence of the nonexistence of the presumed fact is offered, in which event the 'bubble bursts' and the presumption disappears." *Id.* § 12.1. Under Idaho law, all presumptions not created by statute are governed by Idaho Rule of Evidence 301. Judicially created presumptions such as that identified in the *AFRD#2* decision do not shift the burden of persuasion, and require only that the party opposing the presumption come forward with evidence to rebut the presumption. *Id.* § 12:4; *see also AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 ("[T]he junior bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.").

The Director's initial determination of the delivery call petition is the point in the process where the senior is protected from having to re-prove or re-adjudicate his entitlement to the decreed quantity by virtue of the *AFRD#2* legal presumption. This is logical, as time is of the essence, and the Director's examination should be timely and protective of the senior in order to remedy any injury. A contested case initiated to challenge the Director's initial determination, however, is governed by IDWR procedural regulations, the Idaho Administrative Code, and a plethora of Idaho Supreme Court decisions outlining the black letter law regarding the burden of persuasion in an administrative contested case. As explained by the *AFRD#2* Court, "[o]nce 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." 143 Idaho at 878, 154 P.3d at 449. In Idaho, "[t]he customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings." *Intermountain Health Care, Inc., v. Bd. of County Comm'rs of Blaine County*, 107 Idaho Ct. App. 248, 251, 688 P.2d 260, 263 (1984) (citation omitted), *rev'd on other grounds*, 109 Idaho 299, 707 P.2d 410 (1985).

In the context of the A&B delivery call, A&B challenged the Director's initial determination that A&B *did not* require its decreed quantity of water, and thus was not materially injured. Here, once lack of injury was determined, the *AFRD#2* presumption no longer applied—the Director's initial January 29, 2008 Order concluded that the presumption was dissolved based on evidence that A&B was not suffering injury and did not require its decreed quantity. R. 1105-60. The senior (in this case, A&B) is a petitioner under the IDWR procedural rules challenging the Director's initial determination, and bore the burden of persuasion on the particular claims it advanced.

In Idaho, the burden of persuasion rests with the proponent of a position in an administrative challenge. "[T]he party asserting a claim is in the best position to establish the existence of a controverted fact, and must, therefore, bear the burden of proving the existence of that fact." *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996). There is no principled basis for a different rule in delivery calls. As described above, there are certain defenses to a finding of material injury by the Department in a delivery call (such as futile call), and those

defenses must be established by clear and convincing evidence; however, to the extent the juniors simply refute the entitlement to the decreed quantity and the existence of any injury to the senior appropriator, that showing may be made pursuant to the preponderance of the evidence standard, as neither the juniors' showing in a delivery call nor the Director's authority in a delivery call authorize permanent modification of the senior's water right.

2. Because administration of water rights does not require re-adjudication, the clear and convincing standard is inapposite.

The district court decided that the proper burden of proof should be "clear and convincing" evidence in order to give the "proper legal effect" to a partial decree. Cl. R. 86. The court's legal conclusion can be reached only by reliance on cases involving re-adjudication or permanent deprivation of property rights and by ignoring this Court's ruling in *AFRD#2* that delivery calls by their terms—and the Director's authority by extension—involve temporary administrative decisions, and simply do not re-adjudicate senior's water rights. *See AFRD#2*, 143 Idaho at 876, 154 P.3d at 447.

The "clear and convincing" standard of proof applies in adjudications which determine rights or any action where a party is attempting to permanently eliminate or reduce an appropriator's water right. When another appropriator brings an action claiming a legal right to part of a senior's decreed right (either through adverse possession or abandonment by the senior) which, if successful, would cause part of the senior's water right to "revert to the state", the junior appropriator must present clear and convincing proof before the senior right can be readjudicated. *Gilbert v. Smith*, 97 Idaho 735, 738-39, 552 P.2d 1220, 1223-24 (1976) (clear and

convincing evidence applies to adverse possession claims). "One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence." *Id.* at 738, 552 P.2d at 1223 (emphasis added). Thus, in such an adjudication or other judicial proceeding, when a party raises a defense or claim of forfeiture, abandonment or waste of another's water right as part of an attempt to re-adjudicate a senior's right to divert the waters of the state of Idaho, the party asserting the claim must present clear and convincing proof. *See, e.g., Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984) (in quiet title action involving adverse possession claim, forfeiture or abandonment must be established by clear and convincing evidence).

However, a delivery call against junior appropriators is a proceeding distinct from an action initiated to alter a water user's decreed water right: the Department does not have responsibility or jurisdiction to re-adjudicate water rights through administration. *See AFRD#2*, 143 Idaho at 876, 154 P.3d at 447.

In Idaho, the legislature and this Court have expressly stated where clear and convincing proof is required: for example, clear and convincing evidence is required in proceedings terminating parental rights (I.C. § 16-2009), involuntary institutional commitment (I.C. § 66-329 (11)), claims of fraud (*G&M Farms v. Funk Irrigation* Co., 119 Idaho 514, 808 P.2d 851 (1991)), and adverse possession (*Cardenas v. Kurpjuweit*, 116 Idaho 739, 742-43, 779 P.2d 414, 417-18 (1989)).[14] Absent any legislative directive to apply the clear and convincing standard of

[14] Further, Idaho's application of the clear and convincing standard is consistent with federal law, which generally requires that proof by clear and convincing evidence is required "in a variety of cases involving deprivations of individual rights not rising to the level of criminal prosecution, including commitment to a mental hospital,

proof in a delivery call proceeding, the applicable standard of proof is preponderance of the evidence. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho Ct. App. 437, 439, 926 P.2d 213, 215 (1996) (citing 2 AM. JUR. 2d *Administrative Law* § 363 (1994) *infra*). Idaho law does not direct that clear and convincing proof that a senior does not require its decreed quantity in order to avoid curtailment of juniors in a delivery call, and the district court is in error in concluding as much.

Contrary to the court's Order, no published Idaho case has reached the conclusion that the clear and convincing evidence standard applies in a delivery call. *Cf.* Cl. R. 78 & 114-16. Delivery call proceedings do not answer the same questions asked by courts in quiet title actions, where rights to water are being adjudicated or ownership is being judicially resolved. *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).

Similarly, a court proceeding where an appropriator is attempting to adjudicate or permit a water right and must show that its proposed appropriation will not injure senior users is distinguishable from delivery call proceedings, which, in contrast, do not determine decreed priorities. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964) (Cantlin had to prove by "clear and convincing evidence" that seepage water that was the subject of its permit request was not subject to appropriation by seniors); *Moe* v. *Harger*, 10 Idaho 302, 7 P. 645 (1904) (petition for water right denied because juniors did not prove by "clear and convincing" evidence that

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termination of parental rights, denaturalization and deportation." MCCORMICK ON EVIDENCE § 340, at 576 (4th ed. 1992).

proposed diversion would not reduce the amount of water to reach senior downstream users); *Josslyn* v. *Daly*, 15 Idaho 137, 96 P. 568 (1908) (junior must prove nontributariness of source by clear and convincing evidence).[15] *Cf.* Cl. R. 78. The trial court's reliance on *Moe* is particularly misplaced, as this Court rejected application of *Moe* in the conjunctive management context in its opinion in *AFRD#2*: "*Moe*, however, was a case dealing with competing surface rights and this case involves interconnected ground and surface water rights. The issues presented are simply not the same." *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448.

In sum, these cases hold that when a junior user is proposing a new diversion or attempting to alter decreed water priorities, the junior must prove that said diversion will not reduce the amount of water in the stream available to the senior such that the senior would be injured. Therefore, the Court's reliance therein is inapposite. In adjudications, a higher evidentiary burden is properly placed on the new user to establish that water is available for beneficial use. Similarly, when a user it attempting to reduce or eliminate a senior user's decree, that user should be required to prove such a result by more than a preponderance of the evidence. This is not the effect of a delivery call proceeding: the central question before the Department is whether junior appropriator's diversions are injuring the calling senior water users, which, as explained by this Court, does not alter decreed water priorities. *Id.*

[15] *See also Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) (proponent must prove lack of interconnectivity of a stream and reservoir in order for a court in an adjudication proceeding to make a finding on same).

H. Preponderance of the evidence is the proper standard of proof in a delivery call.

Under Idaho law, "preponderance of the evidence" is the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers*, 129 Idaho Ct. App. at 439, 926 P.2d at 215. "A 'preponderance of the evidence' means evidence which, when weighed against the evidence opposed, has the more convincing force . . . ." IDAHO TRIAL HANDBOOK § 10:12. "Absent 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*, 129 Idaho Ct. App. at 439, 926 P.2d at 215 (citing 2 AM. JUR. 2d *Administrative Law* § 363 (1994)). In Idaho, "'[i]n most hearings the burden of persuasion is met by the usual civil case standard of a 'preponderance of evidence.'" *Intermountain Health Care*, 107 Idaho Ct. App. at 251, 688 P.2d at 263 (citation omitted) (an applicant bears the burden of proving by a preponderance of the evidence medical indigency). Without a ruling by the Idaho Supreme Court or a clear action by the legislature announcing that clear and convincing proof is required in a water rights delivery call proceeding, the trial court has no legal basis for its ruling that the Department must require juniors to prove lack of injury by clear and convincing evidence.

At least one other prior appropriation state—Wyoming—applies the preponderance of the evidence standard in delivery call proceedings, based in part on the Wyoming Supreme Court's reliance on the persuasive effect of Idaho law. *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987). In *Willadsen*, the Wyoming Supreme Court held that when an appropriator files a

complaint with the State Engineer alleging interference by a junior water right, the applicable standard of proof is "preponderance of the evidence."[16] *Id.* There, as in the proceeding below, the agency found that the junior appropriator was not causing injury to the senior water user and therefore curtailment was not required. *Willadsen*, 731 P.2d at 1182. The senior water user protested that finding and requested a hearing. The Wyoming Supreme Court found that the proponent challenging the agency order through a hearing—the senior water user—bore the burden of proving the agency erred in failing to find material injury. *Id*. 1183-84.

Similarly the United States Supreme Court has determined that the applicable standard of proof in interstate compact disputes is preponderance of the evidence, which are similar in procedure and substance to delivery call proceedings. *Nebraska v. Wyoming*, 507 U.S. 584, 113 S. Ct. 1689 (1993). In *Nebraska*, Nebraska asked the United States Supreme Court to enforce a 1945 decree against the state of Wyoming that established interstate priority to waters from the North Platte River. Wyoming argued that Nebraska was required to prove its case by the "clear and convincing" evidence standard, and Nebraska objected, pointing out that "this proceeding entails *enforcement* of a prior equitable apportionment (the Decree), not whether there should be an *apportionment*."[17] The Special Master rejected the clear and convincing standard, and the United States Supreme Court, agreed: "to the extent Nebraska seeks modification of the decree,

[16] In reaching this conclusion the *Willadsen* Court cited to the Idaho Supreme Court's holding in *Intermountain Health Care*, discussed *supra*. The Wyoming Supreme Court's reliance on *Intermountain Health Care* is instructive, as it indicates that, in the Wyoming Supreme Court's review, in Idaho preponderance of the evidence is that applicable standard of proof in contested agency proceedings, including water delivery calls.

[17] Special Master Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 12-13, Nebraska v. Wyoming, No. 108 (U.S. Apr. 9, 1992) (emphasis added), *available at* http://www.supremecourt.gov/SpecMastRpt/ORG%20108%20040992.pdf (last visited June 22, 2011).

rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different." *Nebraska*, 507 U.S. at 592, 113 S. Ct. at 1695.[18]

The use of preponderance of the evidence by Idaho in administrative proceedings is consistent with the United States Supreme Court's and other states' interpretations of administrative law.[19] "Utilization of a higher level of proof [than preponderance of the evidence] is ordinarily reserved for situations where particularly important individual interests or rights are at stake, such as the potential deprivation of individual liberty, citizenship, or parental rights." 2 AM. JUR. 2D *Administrative Law* § 357 (2011). Because a delivery call proceeding is not a re-adjudication of decreed water priorities, and Idaho law indicates that preponderance of the evidence is the appropriate standard, there is no justification for the application of the clear and convincing evidence standard and this Court must correct the trial court's erroneous ruling.

IV. CONCLUSION

Pocatello requests that this Court determine that, except in proceedings where a junior water user is injuring a senior and is pleading an affirmative defense that admits injury, the Director must evaluate material injury based on a preponderance of the evidence. This result is

[18] *See also Kansas v. Colorado*, 514 U.S. 673, 693, 115 S. Ct. 1733, 1745 (1995) (Special Master found that because Kansas was seeking enforcement of an existing interstate compact and not attempting to modify a judicial decree, it must prove its case by a preponderance of the evidence rather than clear and convincing evidence) (undisturbed by the United States Supreme Court); *Colorado v. New Mexico*, 467 U.S. 310, 310-11, 104 S. Ct. 2433, 2435 (1984) (Colorado was required to prove by clear and convincing evidence that new water rights on the Vermejo River should be permitted).

[19] *See Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 101 S. Ct. 999, 1007 (1981) (under the federal Administrative Procedure Act Congress intended agencies to apply the "preponderance of the evidence" standard in adjudications); *see, e.g., Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175, 180, 183, 974 P.2d 814, 816, 818 (1999) (the legislature intended the "usual civil standard" of preponderance of the evidence to apply in the agency proceeding "if the legislature had wanted a burden of proof higher than the preponderance standard to apply, it would have said so"); *Burke v. City of Anderson*, 612 N.E.2d 559, 565 (Ind. App. 1993) (preponderance of the evidence is appropriate standard where a protected property interest exists; clear and convincing is not appropriate unless a liberty interest is involved).

consistent with the applicable standard of proof in agency proceedings under Idaho law and this Court's determination in *AFRD#2* that administration of water rights does not constitute re-adjudication. Because the central question in a delivery call proceeding is whether a senior water user is suffering material injury caused by junior appropriators, and not a determination of whether the senior is entitled to its decreed quantity of water, the clear and convincing evidence standard has no place in delivery calls.

Respectfully submitted, this 27th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2011, I caused to be served a true and correct copy of the foregoing RESPONDENT-CROSS APPELLANT **CITY OF POCATELLO'S** BRIEF in **Idaho Supreme Court Docket No. 38403-2011 [consolidated with Nos. 38421-2011, 38422-2011 -Minidoka County Case CV-2009-647]** via the following marked method to:

/s/ Mitch Pemberton for:
Sarah Klahn, White & Jankowski, LLP

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