

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

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

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

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

I. PROCEDURE

A. Issue on rehearing.

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

B. The purpose of the remand.

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

C. The reasoning supporting the *Order*.

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

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

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

II. CLARIFICATION, RESPONSES TO ISSUES RAISED AND DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court's *Order* does not conclude that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree. Rather, the *Order* concludes that the decreed quantity includes a quantitative determination of beneficial use resulting in a presumption that the senior is entitled to that decreed quantity. The *Order* contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The *Order* holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty.

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

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

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

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

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

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

It is apparent that water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if the waste occurs for the statutory period can forfeiture be asserted. However, whether the senior's right is permanently reduced through partial forfeiture or is only temporarily reduced through administration in times of shortage and the reduction leaves the senior

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

B. The historically developed burdens and presumptions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 33-34.

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

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

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

Further:

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

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

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

2 Kinney on Irrigation and Water Rights § 905 at 1595-96 (2nd ed. 1912).

The Ground Water Users assume that the quantity element of decreed water rights is not reflective of present needs, or is “bloated” (i.e. in excess of the quantity needed) or at a minimum always represents a quantity which provides for the highest degree of flexibility in order to allow for the most water intensive use within the scope of the purpose of use. The argument oversimplifies what takes place in the SRBA. Water rights are claimed based on permits and licenses, prior decrees in both private and general adjudications), beneficial use, posted notice, and adverse possession, mesne deed conveyances, splits of property and appurtenant rights etc. As a result, the quantity claimed for one water right may include excessive water for a particular purpose while for another water right the quantity may provide for little or no flexibility. Therefore the amount of excess water, if any, or the degree of flexibility built into the quantity element of partial decree issued in the SRBA could be in actuality “all over the map.”

The Director’s recommendation as to quantity, whether or not an in-depth field investigation was conducted in preparing the recommendation, is by no means the final word on the matter. The quantity recommendation is subject to objections by the claimant and any other party to the adjudication. If such an objection is made it may be litigated and determined by the Court. Issues such as waste (i.e. reasonableness of conveyance works), duty of water, partial forfeiture, and excessive conveyance loss can and have been litigated in the SRBA whether or not they were considered in the Director’s recommendation. If the Director makes a recommendation based on a prior license where the delivery system that has since changed (i.e. gravity to sprinkler), third parties can object and assert partial forfeiture of any quantity no longer put to beneficial use. Accordingly, the degree to which the quantity element is scrutinized varies among the decrees issued in the SRBA. Nonetheless, parties were provided the opportunity to raise and litigate issues affecting quantity. Consequently, the partial decree issued in the SRBA is consistent with Idaho law and represents a quantitative determination of beneficial use.

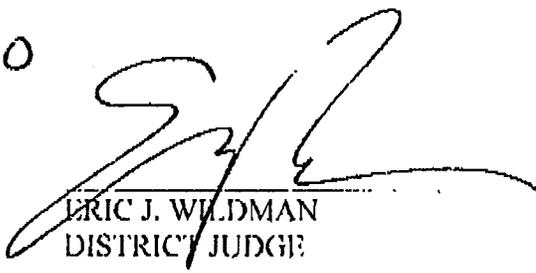
The result is that the issues litigated and evidence presented in support of the quantity element in the adjudication can be exactly the same as the issues presented and the evidence relied upon in conjunction with the delivery call. As such, depending on the

particular case, the 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.

III. CONCLUSION

In sum, the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof. The standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director's findings. The Director's determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined. The alternative is a system which lacks certainty in water rights. For these reasons the Court affirms its prior decision on this issue and **denies** the *Petitions for Rehearing*.

DATED: November 2, 2010


ERIC J. WILDMAN
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 2010, she caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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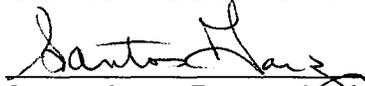
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