Docket No. 38403-2011
38421-2011 and 38422-2011
Minidoka County District Court Case No. 2009-647

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.

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

and

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

and

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.

CROSS-APPELLANT IDAHO GROUND WATER APPROPRIATORS, INC.'S ("IGWA" or "GROUND WATER USERS") REPLY BRIEF

On Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Minidoka.

Honorable Eric Wildman, District Judge, Presiding.

ATTORNEYS FOR RESPONDENTS- CROSS-APPELLANTS

Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB #5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 East Center St.; Post Office Box 1391
Pocatello, Idaho 83201
(208) 232-6101 - Telephone
(208) 232-6109 - Facsimile

Attorneys for Idaho Ground Water Appropriators

A. Dean Tranmer
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

ATTORNEYS FOR PETITIONER-APPELLANT

Travis L. Thompson
John K. Simpson
BARKER ROSHOLT & SIMPSON, LLP
113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 - Telephone
(208) 735-2444 - Facsimile

Attorneys for A&B Irrigation District

ATTORNEYS FOR DEFENDANTS-RESPONDENTS ON APPEAL

Garrick Baxter
Chris M. Bromley
IDAHO DEPT. OF WATER RESOURCES
Post Office Box 83720
Boise, Idaho 83720-0098
(208) 287-4800 - Telephone
(208) 287-6700 - Facsimile

Attorneys for the Idaho Department of Water Resources

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I. REPLY ARUGMENT

This case is about A&B Irrigation District ("A&B"), a senior water user that has enough water to raise full crops to maturity R. 3103-04, has a unique water right that allows it ultimate flexibility to provide its farmers water sufficient to raise full crops, Clerk's R. 83-85, has 11 wells sitting idle R. 1132, and that attempts, through legal argument, to refute the factual reality that its water delivery problems in a portion of its project are due to well design, pumping problems and unique hydrogeology, not outside junior groundwater pumping. R. 1149. The overwhelming evidence shows that A&B does not need its entire decreed quantity to raise full crops and is not suffering material injury; thus, this case is not about whether a senior user is entitled to a remedy for material injury.

A&B has sufficient water to meet its beneficial use. R. 3108-09. The facts show that A&B farmers have more water than surrounding farmers and sufficient amounts to raise full crops. These facts cannot be emphasized enough! A&B's "delivery rate of 0.75 is higher than that of nearby surface water users," R. 3107, "[t]here is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate," R. 3110. See too Cross-Appellant's Idaho Ground Water Appropriator's Opening and Response Brief ("IGWA's Opening Brief") at pages 44-45. Yet, A&B wants 0.88 inches per acre, regardless of what it needs to raise crops. The facts show that A&B has been able to expand and irrigate 4,081.9 more acres using the water under its senior water right. R. 1148. These junior and "enlargement" acres continue to be irrigated, even though A&B claims it does not have enough water under its senior right to meet its farmers' needs. Tr. Vol. III, p. 605, l. 18-25, p. 606, l. 1-4. Furthermore, A&B's aggregate diversions have increased in recent years from 150,000 acre-feet to over 175,000 acre-feet. Exs. 409 and 430-C. Notably, A&B in its Reply Brief does not

address the overwhelming evidence that shows it has more than enough water to meet its farmers' irrigation needs. Instead, A&B focuses solely on its "depletion equals injury" theory and claims that the Ground Water Act mandates the Director to set a reasonable pumping level, which ignores the permissive language set forth in the statute, and even though the Director has found no material injury.

Conjunctive administration requires the Director to exercise his discretion and to apply the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules"), to the facts of the case and does not simply require an examination of aquifer or pumping levels as argued by A&B. The Director must evaluate the use of water under A&B's water right, including its diversion, conveyance facilities and the hydrogeologic setting in order to determine whether or not A&B is suffering material injury and if so whether the injury is due to outside junior ground water pumping.

The Ground Water Act, I.C. § 42-226 *et seq.* and the 1953 amendment to I.C. § 42-226 protecting seniors to reasonable pumping levels applies to A&B's 1948 priority water right contrary to A&B's assertion.

Administrative decisions that evaluate whether or not a senior user is suffering material injury should be based on a preponderance of the evidence standard, not the heightened standard of clear and convincing evidence advocated by A&B since these administrative decisions do not alter the senior's water right.

A. Conjunctive Administration Is Not Simply An Examination of Aquifer or Pumping Levels

A&B's claims that the Director "has no discretion to refuse administration" and that refusing to set a reasonable pumping level is refusing to administer junior water rights. Reply Br. at 8. A&B argues that if its "water right is subject to a 'reasonable pumping level,' then the

Director must establish one to implement that administration."[1] *Reply Br.* at 7. This argument assumes that 1) setting reasonable pumping levels is mandatory and that any lowering of the aquifer level equates to material injury and 2) conjunctive administration is limited only to examining aquifer levels not an evaluation of the use of water by the senior under the factors set forth in the CM Rules. In other words, A&B's argument is that depletion always equals material injury, an argument that has been rejected by this Court. In *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources ("AFRD2")*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007), this Court held "the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." If the Director's duty was simply to set a pumping level, then evaluation of reasonableness of diversion and use and full economic development would be unnecessary and the CM Rules would be pointless.

1. Setting Reasonable Pumping Levels is Not a Mandatory Requirement Especially When the Senior is Not Materially Injured

A&B argues that setting a reasonable pumping level is mandatory. Yet, the language in the Ground Water Act uses permissive, discretionary language, not obligatory directives. Idaho Code § 42-226 says that prior appropriators are protected "in the maintenance of reasonable ground water pumping levels as *may* be established by the director." (emphasis added). Likewise, the portion of Idaho Code that sets forth the powers of the Director uses discretionary language and states that the Director "in his sole *discretion*, is empowered:"

> To 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* initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. *To assist the director* of the department of water

[1] Section B. below addresses the fact that A&B's water right is subject to the Ground Water Act's reasonable pumping level provision.

> resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, *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.

I.C. § 42-237a.g (emphasis added). A&B confuses the Director's mandatory duty to administer water rights with his discretion to choose tools appropriate to exercise that duty. "The 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].'" *AFRD2* at 878, 154 P.3d at 449 (internal citation omitted). The CM Rules were promulgated to give the Director the procedures and tools to distribute waters of the State and respond to delivery calls made "against the holder of a junior-priority ground water right." CM Rule 001. An evaluation of whether A&B is using water "efficiently and without waste" as contemplated under CM Rule 42 requires an examination of the source of water, the use and diversion of water, and the nature of the water right itself. The Director's discretionary decision not to set a reasonable pumping level in this case does not impact a substantial right of A&B because the Director found that A&B does not need its full water right quantity and is not materially injured; thus, A&B is not entitled to a remedy from junior ground water users.

In sum, the Director is not required to establish a reasonable pumping level simply because a senior ground water user alleges material injury and makes a delivery call. This argument by A&B must be rejected.

2. Examination of Hydrogeology is Necessary in Conjunctive Administration

A&B argues that "IDWR's duty to administer water rights in an organized water district is not conditioned upon geology." Reply Br. at 14. Yet, "[t]o conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship

between ground and surface water rights is necessary." *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). A&B is insistent that hydrogeology not be considered because A&B knows that the location of its project is the cause of its problems, not pumping by outside junior ground water users. A&B believes it will prevail on appeal if it can convince this Court that location is not important. The Director did not use geology or hydrogeology as an excuse not to administer junior water rights nor did he use location to excuse himself from performing his duty. See, A&B Reply Br. at 17. Rather, he used hydrogeologic information, at least in part, to examine the extent of interconnection between A&B's supply of water with outside junior ground water pumping and concluded:

> [F]ailure to take geology into account is a primary contributor to A&B's reduced pumping yields, *not depletions by junior-priority ground water users*. Hydrogeology is critical to the siting of wells. If A&B employed appropriate well drilling techniques for the geological environment in which it is located and sited its wells based upon a comprehensive hydrogeologic study of its service area, water would be available to supply its well production and on-farm deliveries.

R. 1149 (emphasis added). This is precisely the inquiry that this Court contemplated the Director would make when distributing water under the CM Rule. See, *A & B Irrigation Dist. supra*. Also, in *AFRD2*, this Court explained that given the complexity of the factual determinations that must be made in conjunctive administration the Director must have all necessary and pertinent information, including that which may show the extent of interconnection. *AFRD2*, 143 Idaho at 875, 876, 154 P.3d at 446, 447. The Director properly exercised his discretion when he examined the hyrdogeologic setting of A&B's project when evaluating material injury.

3. Examination of A&B's Conveyance Facilities and How it Uses Water Is Necessary to Evaluate Material Injury Under the CM Rules

A&B argues that the Director may not examine A&B's "water conveyance facilities" as part of his analysis of A&B's means of diversion when evaluating whether A&B is suffering material

injury. A&B Reply Br. at 18. A&B argues that its means of diversion are its "individual wells and pumps." Id. at 19. Yet, both common sense and the CM Rules show that this narrow definition of "diversion" cannot be supported.

If one were to take A&B's argument to its logical conclusion, it would mean that so long as the senior user has a properly drilled well and a working pump that he can be found to be materially injured even though he has allowed his ditch to be trampled by cattle, filled with debris and has no way to actually convey water to his field. This is simply unreasonable.

Furthermore, evaluation of the means of diversion is broader than just wells and pumps. The CM Rules specifically state that the Director may inquire into "whether the holders of water rights are suffering material injury and using water efficiently and without waste" and as part of that evaluation he may examine the "rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water applications." CM Rules 42.01. and 42.01.d. This evaluation necessarily includes not only the wells and pumps of a ground water user, but his ability to deliver that water to the field where it is needed.

The Director has the discretion to examine A&B's water use which includes not only its wells and pumps but also its well drilling problems, well siting issues, refusal to interconnect some of its well systems, unused wells, and its inherent delivery methods and processes. As found by the Director, if A&B would address these issues it is likely that A&B could pump and deliver its full authorized water right volume. R. 1148-49.

4. Requiring A&B to Interconnect and Use Water in Conformance With Its Water Right is a Proper Exercise of the Director's Discretion

A&B complains that it should not be required to comply with the flexibility afforded it under its water right and that it cannot be required to interconnect any of its well systems since 1)

IDWR is prohibited from examining its "conveyance facilities" (this argument has been addressed above) and 2) placing any requirement on the senior to interconnect is "unconstitutional." A&B Reply Br. at 24. However, as discussed at length in IGWA's Opening Brief at pages 45-47, the requirement by the Director was not for A&B to interconnect its entire project but to examine the feasibility to interconnect some of its poorer performing well systems with nearby water abundant well systems.

The Director fulfilled his duty to administer A&B's water delivery call, but in doing so, the Hearing Officer, the Director and the District Court all recognized that A&B has some obligation to adhere to the privileges it enjoys under its unique water right. As the District Court explained, A&B's water right provides it with ultimate flexibility to water lands within its boundaries with any well or any combination of wells

> The way in which the 36-2080 water right was licensed and ultimately decreed in the SRBA *is not typical*. The partial decree does not define or limit the place of use for any of the 177 points of diversion within the boundaries of the Unit. Instead, the decree lists the 177 different points of diversion and describes the place of use as "the boundary of A&B Irrigation District service area pursuant to Section 43-323, Idaho Code." See Exh. 139. *The legal effect is that water diverted from any one of the points of diversion is appurtenant to and therefore can be used on any and all of the 62,604.3 acres within the defined place of use.* The license or partial decree also does not describe or assign a rate of diversion or volumetric limitation to any of the individual points of diversion. Instead, the right is licensed and decreed at the cumulative diversion rate of 1,100 cfs with a 250,417.20 AFY limitation for the entire water right. *The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion up to the AFY volumetric limitation and applied to any of the lands within the Unit. Structuring the right in this manner was not due to oversight. The USBOR applied for the right to be licensed as such in order to provide for the greatest amount of flexibility in distributing water throughout the project.* R. 3093-94.

Clerk's R. 83.

> [T]he right is essentially decreed as having alternative 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. Simply put, based on the way in which the right is decreed A & B does not get to dictate particular quantities that need to be diverted from particular points of diversion.*

Clerk's R. 84.

> *Until such time as the right is defined with more particularity, the extent to which the Director can require interconnectedness is left to his discretion.*

Clerk's R. 85. Exhibit 481 shows that more interconnection is possible between select well systems; the Director simply wants A&B to avail itself of the flexibility under its water right to explore interconnection or demonstrate that further interconnection is not feasible. R. 3096. This is a proper use of the Director's discretion and did not place an unlawful condition to interconnect before seeking administration under its water right.

Although A&B wants to have the benefits that accompany its water right, which are unique and important as set forth in the District Court decision, it refuses to accept its obligation to use its water right as decreed. A&B has an obligation to maximize its interconnections or demonstrate that doing so would be infeasible before looking to curtail outside junior users. A&B fails to address the reality that as a matter of fact and law A&B can interconnect its well systems. See Ex. 481; Tr. Vol. VI, p. 1316, L. 18 – p. 1318, L. 7, p. 1318, L. 22 – p. 1319, L. 4.; Clerk's record at 83. It is within the Director's discretion to require them to do so.

B. A&B's Irrigation Water Right No. 36-2080 is Subject to the Entire Ground Water Act and Thus is Not Entitled to Historic Pumping Levels.

A&B argues that the 1953 Amendment to the 1951 Ground Water Act does not apply to its 1948 priority date water right. A&B Reply Br. at 3. The 1953 Amendment protects seniors to a reasonable pumping level and not an historic pumping level. A&B claims it is entitled to historic water levels. Id. A&B contends that this Court's decision in *Clear Springs* found that "even

after passage of the Ground Water Act in 1951, senior rights were still protected to their historic pumping levels at that time." Id. However, this Court clearly held that prior appropriators are not protected to their historic pumping levels "[t]he only right modified concerned the prior appropriator's pumping level. The prior appropriator was protected to a reasonable pumping level, not his historic pumping level." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, ___, 252 P. 3d 71, 83 (2011).

A&B's argument that the 1953 Amendment itself must have an express retroactive statement in order to apply to its water right is not the law in Idaho. A&B claims that the clear, retroactive language in I.C. § 42-229 does not make the 1953 amendment on reasonable pumping levels retroactive. Yet, that question was answered squarely against A&B's position by this Court in *Stuart v. State*, 149 Idaho 35, 232 P.3d 813 (2010). A&B cites *Stuart* in support of its position, however, A&B misreads the case. A&B Reply Br. at 4. The issue in *Stuart* was "whether retroactive language *in an existing statute* is nullified by operation of a subsequent amendment. We conclude that the 1995 and 2001 *amendment did not affect the applicability* of the statute to Stuart's case and conclude the I.C. § 19-2719 applied to his petition." *Id.* 44, 232 P.3d 813, 822 (2010) (emphasis added). In other words, if the existing statute had retroactive application but was subsequently amended, then the amendment was also retroactive. In this case, the Ground Water Act clearly applies retroactively to A&B's 1948 water right: "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act." I.C. § 42-229 (emphasis added). Thus, following the holding in *Stuart*, the amendment to I.C. § 42-226 that protects senior users only to reasonable pumping levels also applies retroactively to A&B's water right. Not only is this is in line with this Court's holding in *Stuart*, it is consistent

with the statute's legislative history and public policy as set forth in detail in IGWA's Opening Brief at pages 38-41.

A&B's claim that the *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) case rejected this argument is also without merit because prior to the 1978 amendment, domestic water rights were not subject to the Ground Water Act at all, thus, I.C. § 42-229 did not apply to domestic rights. However, this is not the case with A&B's irrigation right that was always subject to the Ground Water Act provisions in I.C. § 42-229.

The District Court's decision that the Ground Water Act's reasonable pumping level provision applies to A&B's water right should be affirmed.

C. Preponderance of the Evidence Standard Is the Proper Standard

A&B argues that administrative decisions under the CM Rules must be supported by clear and convincing evidence if the Director finds the senior's present needs show it requires less than its decreed quantity. However, no case in Idaho directly answers this question as applied to conjunctive administration and the cases cited by A&B are adjudicative in nature. The presumption is that in administrative proceedings a preponderance of the evidence standard is proper and that rule should not be altered in a conjunctive administration case." *N. Frontiers v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Idaho Ct. App. 1996). IGWA has thoroughly briefed this issue in its Opening Brief on pages 16-32 and those arguments will not be repeated here. IGWA also incorporates by reference pursuant to Idaho Appellate Rule 35(g), the arguments made in the City of Pocatello's reply brief filed contemporaneously herewith.

II. CONCLUSION

Conjunctive administration requires the Director to exercise his discretion and to apply the CM Rules to the facts of the case and does not simply require an examination of aquifer or pumping levels. Contrary to A&B's claim, the Director has not refused administration; he

examined the evidence, applied the CM Rules and determined that A&B was not suffering material injury. R. 1151, 3318. The Director must evaluate the use of water under A&B's water right, including its diversion, conveyance facilities and the hydrogeologic setting in order to determine whether or not A&B is suffering material injury due to outside junior ground water pumping. Although A&B does not like the result of the Director's administrative action – that A&B is not materially injured and thus not entitled to seek relief from junior users – that does not mean that the Director has failed to "administer" A&B's water right.

If A&B is found not to be suffering material injury under an application of the CM Rules because it has sufficient water to meet its beneficial use, as is the case here, then it is not entitled to a remedy from junior users. Likewise, if A&B's ability to secure sufficient water in some wells is not caused by outside junior pumping but by hydrogeology or its own inaction, as is the case here, then A&B is not entitled to a remedy from junior users. Although a reasonable pumping level might provide a remedy to an injured senior, if the senior is not injured there is no need to examine whether the "junior water right holders have the ability to compensate A&B for increased costs associated with pumping at depths beyond the 'reasonable pumping level.'" *A&B Reply Br.* at 9. The Director's conclusions that A&B is not suffering material injury are based upon substantial, competent evidence in the record and should be affirmed.

The Ground Water Act and the 1953 amendment protecting seniors to reasonable pumping levels applies to A&B's 1948 priority water right and the District Court's decision on that issue should also be affirmed.

Finally, administrative decisions that evaluate whether or not a senior user is suffering material injury should be based on a preponderance of the evidence standard, not the heightened

standard of clear and convincing evidence since these administrative decisions do not alter the senior's water right. The District Court's decision finding otherwise should be reversed.

SUBMITTED this 11th day of October, 2011.

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED

Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of October, 2011, **CROSS-APPELLANT IDAHO GROUND WATER APPROPRIATORS, INC.'S REPLY BRIEF** was served in the following manner:

Clerk of the Court
Idaho Supreme Court
451 W. State St.
PO Box 83720
Boise, ID 83720-0101

- ☐ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☒ Hand Delivery
- ☐ E-mail

Garrick L. Baxter
Chris Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, ID 83303-0485
tlt@idahowaters.com
pla@idahowaters.com
jks@idahowaters.com

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

Sarah A. Klahn
Mitra Pemberton
White & Jankowski LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

A. Dean Tranmer
City of Pocatello
PO Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

Jerry R. Rigby
Rigby Andrus and Moeller
25 N 2nd East
PO Box 250
Rexburg, ID 83440-0250
jrigby@rex-law.com

- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail