

Attorneys for A&B Irrigation District

BACKGROUND

1. On judicial review the Honorable Eric J. Wildman concluded the Director erred in failing to apply the proper evidentiary standard of clear and convincing evidence in finding no material injury to A&B's water right 36-2080. *See Memorandum Decision and Order on Petition for Judicial Review ("Order") (A&B Irr. Dist. v. IDWR et al., Minidoka County Dist. Ct., Fifth Jud. Dist., Case No. 2009-647)*. The Court's findings and conclusions govern the Director's decision on remand:

FINDINGS OF FACT

A&B Irrigation District's Beneficial Use of Decreed Water Right 36-2080.

2. IDWR issued water right license no. 20736 to the United States Bureau of Reclamation on June 10, 1965 (now water right no. 36-2080). The license identified a diversion rate of 1,100 cfs to be used for irrigation purposes on 62,604.3 acres within the A&B project. A&B is the beneficial owner of this water right license. R. 3081.
3. The SRBA Court issued a partial decree for water right 36-2080 on May 7, 2003. Ex. 139. The decree entitles A&B to divert 1,100 cfs and 250,417.20 acre feet per year for the irrigation of 62,604.3 acres with a priority date of September 9, 1948. R. 3081.
4. There is a legal presumption that A&B is entitled to and can beneficially use 1,100 cfs for irrigation purposes on its project, or 0.88 miner's inch per acre for 62,604.3 acres. *See AFRD #2 et al. v. IDWR et al.*, 143 Idaho 862, 878 (2007); *Clear Springs v. IDWR* (2011 Opinion No. 32 at 30-31, March 17, 2011); *Order* at 30.
5. A&B's landowners testified that they beneficially use 0.88 miner's inch per acre for irrigation purposes. *See Tim Eames Testimony*, Tr. Vol. IV, p. 815, ln. 11 – p. 816, ln.3; *Timm Adams Testimony*, Tr. Vol. V, p. 888, ln. 20 – p. 889, ln. 1, p. 893, lns. 2-13; *Ken Kostka Testimony*, Tr. Vol. V, p. 957, lns. 5-13, p. 956, lns. 9-14, p. 960, lns. 13-25, p. 961, lns. 1-6, 13-16; *Harold Mohlman Testimony*, Tr. Vol. V, p. 1017, lns. 2-12.
6. A&B's landowners also testified that they use sprinklers (pivots, wheel lines, hand lines) as their method of irrigation. *Tim Eames Testimony*, Tr. Vol. IV, p. 810, lns. 15-16; *Timm Adams Testimony*, Tr. Vol. V, p. 872, lns. 11-13; *Ken Kostka Testimony*, Tr. Vol. V, p. 948, lns. 16-18; *Harold Mohlman Testimony*, Tr. Vol. V, p. 1015, lns. 17-18 (estimated "99%" sprinkler).
7. The Hearing Officer and former Director David Tuthill found that A&B's landowners can beneficially use 0.88 miner's inch per acre. R. 3102 ("A&B is entitled to a higher rate of delivery if its delivery system can produce the higher rate and the amount can be applied to beneficial use."); 3108 ("A&B is entitled to the amount of its water right."); 3110 ("More [above 0.75] is sought, and more is better . . ."); 3322.

8. Tim Luke, IDWR's manager of the Water Distribution Section, confirmed that a water right holder can beneficially use the amount stated on his water right. *Tim Luke Testimony*, Tr. Vol. VI, p. 1281, lns. 9-12. Mr. Luke further testified that A&B's landowners are in the best position to know how much water they need to apply for irrigation purposes. *Luke Testimony*, p. 1213, lns. 2-7, p. 1281, lns. 23-25. Finally, Mr. Luke confirmed that IDWR has issued licenses authorizing up to 1 miner's inch per acre for irrigation purposes. *See id.*, p. 1282, lns. 1-4; *see also*, Idaho Code § 42-202(6).
9. A&B's manager, Dan Temple, testified that when the District improves a well system to increase capacity or water production, the District seeks to provide a rate of 0.85 to 0.90 miner's inch per acre. *Dan Temple Testimony*, Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9. Mr. Temple confirmed that the District designs wells to produce this amount because “dealing with the water users, that is what they need to meet their crop requirements” . . . “We try to deliver to our water right of .88 and the water users’ needs.” p. 553, lns. 8-9, p. 541, lns. 3-4.
10. Testimony provided by A&B's expert witnesses confirms that A&B's landowners can beneficially use 0.88 miner's inch per acre for irrigation purposes. Exhibit 200 at 4-6 to 4-8; *Dr. Charles Brockway Testimony*, Tr. Vol. XI, p. 2240, lns. 13-24, p. 2243, lns. 3-6; R. 3109.

Evidence from IGWA's and Pocatello's Witnesses Supports the Fact that A&B's Landowners Can Beneficially Use 0.88 Miner's Inch Per Acre.

11. Pocatello's expert witness Greg Sullivan testified that A&B's landowners could beneficially use 0.88 miner's inch per acre. *Greg Sullivan Testimony*, Tr. Vol. VIII, p. 1614, ln. 17 – p. 1615, ln. 5. Mr. Sullivan further confirmed that potatoes and sugar beets, common crops on A&B's project, would be stressed if they were only irrigated at his recommended rate of 0.65 miner's inch per acre. *Id.*, p. 1715, ln. 2 – p. 1716, ln. 3.
12. IGWA's witness Dean Stevenson testified that he has to “order in” 0.90 miner's inch per acre in order to run both his pivot and a swing “corner” arm on lands under the A&B 15AB823 well system. *Dean Stevenson Testimony*, Tr. Vol. X, p. 2108, lns. 14-25. Mr. Stevenson further testified that in order to keep his pressure up on his pivots that results in some operational spill. *Id.*
13. IGWA's witness Orlo Maughan testified that he could beneficially use 0.84 miner's inch per acre on lands under the A&B 10A823 well system. *Orlo Maughan Testimony*, Tr. Vol. X, p. 2138, lns. 3-16.
14. IGWA's witness Tim Deeg acknowledged he has a private ground water right for 1 miner's inch per acre and has beneficially used that amount of water. *Tim Deeg Testimony*, Tr. Vol. V, p. 1075, lns. 17 – p. 1076, ln. 6.

15. IGWA's expert witness performed no irrigation diversion requirements analysis for A&B's landowners or IGWA's members in this case. *Dr. Christian Petrich Testimony*, Tr. Vol. IX, p. 1943, lns. 3 – 22.
16. Pocatello's witness Mr. Sullivan used "monthly" irrigation demand data in an attempt to show that A&B landowners need less than 0.88 miner's inch per acre to meet the peak irrigation demands. Ex. 301, Appx. A. "Average" monthly irrigation demand data does not establish the peak capacity requirements for the Unit B project. *John Koreny Testimony*, Tr. Vol. IX, p. 2194. A&B's expert Dr. Charles Brockway showed that the peak capacity period for irrigation occurs on a daily basis and that failure to obtain sufficient water within an irrigation week will cause crop damage during a high-demand period. *Dr. Charles Brockway Testimony*, Tr. Vol. XI, p. 2290.
17. Mr. Sullivan further suggested that a lower per acre delivery rate (0.65 miner's inch) is possible because Unit B landowners can store water in the soil moisture column to make up for a reduced delivery rate below the full irrigation demand. Ex. 301, Appx. A. A&B's expert Dr. Brockway presented evidence that shows soil moisture is exhausted within a 3-day period during hot, dry conditions for shallow rooted crops like potatoes and sugar beets. *Dr. Charles Brockway Testimony*, Tr. Vol. XI, p. 2290-93.
18. The Director adopts the Hearing Officer's findings that "the use of soil moisture to reduce peak demand for water is crop specific and does not substitute for an adequate supply of water during the peak period. . . . Building soil moisture in the fall and spring is not a substitute for an adequate water supply during the peak period of heat during the summer." R. 3110.
19. IDWR's witness Bill Kramber testified that his metric analysis in 2006 revealed that A&B lands were not short of water compared to surrounding lands, not that the lands were not absolutely short of water. *Bill Kramber Testimony*, Tr. Vol. VI, p. 1127, lns. 8-25. Mr. Kramber testified that he performed no analysis in reference to water diversion requirements for the A&B lands or in reference to A&B's decreed rate of delivery. *Id.*; p. 1130, ln. 21 – p. 1131, ln. 4. Mr. Kramber further recognized that his analysis looked at single days during the irrigation season and that crops could be water short or stressed during that 30 day interval. Tr. Vol. VI, p. 1130, lns. 1-20. A&B's expert, Dr. Brockway testified that water shortages can occur within days in a month causing stress and crop damage. *Dr. Charles E. Brockway Testimony*, Tr. Vol. XI, pp. 2289-2291.

Available Water Supply

20. The declines in aquifer levels have resulted in A&B being unable to pump the full amount of its authorized rate of diversion during peak demand periods. *Memorandum Decision and Order on Petition for Judicial Review* at 7.
21. Ground water levels have declined significantly in the western portion of the Eastern Snake Plain Aquifer ("ESPA"), including in the area around A&B. Ex. 200 at 3-47, 5-6. IDWR's witness Dr. Dale Ralston testified that ground water levels had declined

throughout the A&B project, and that lower aquifer levels can impact pumping discharge. *Dr. Dale Ralston Testimony*, Tr. Vol. I, p. 127, lns. 14-20, p. 128, lns. 18-25.

22. Ground water levels across the A&B project continued to decline into 2008. Ex. 225, *Dan Temple Testimony*, Tr. Vol. III, p. 529, ln. 30 – p. 530, ln. 25.
23. IDWR’s witness Dr. Allan Wylie testified that the rate of discharge and water leaving the ESPA around A&B is greater than the amount of water that is being recharged to the aquifer. (“That’s correct. The clear indication that there’s less water coming into A&B than there is leaving the area around A&B.”). *Dr. Allan Wylie Testimony*, Tr. Vol. III, p. 1520, ln. 18 – p. 1521, ln. 19.
24. Testimony from A&B’s witnesses confirms that lower aquifer levels have reduced pumping rates in A&B’s wells. Ex. 200 at 3-9; *Dan Temple Testimony*, Vol. III, p. 531, lns. 12-20. A&B has abandoned wells, increased horsepower, drilled wells deeper, drilled additional wells, replaced pump bowls, and added pumping column as a result of lowered aquifer levels. *Temple Testimony*, Tr. Vol. III, p. 537, ln. 20 – p. 538, ln. 25, p. 539, lns. 1-25, p. 555, ln. 19 – p. 556, ln. 19.
25. Deepening wells is also not likely to produce more ground water in the western half of the project where shortages are occurring. *Dr. Dale Ralston Testimony*, Tr. Vol. I, p. 90, lns. 14-23, p. 130, ln. 21 – p. 131, ln. 2.
26. Unit B wells had the capacity to pump 1,100 cfs prior to the onset of ground water level declines. Ex. 200, p. 3-57. Figure 3-13 from the A&B Expert Report shows the pumping capacity from the middle of the irrigation season during the peak-demand period when the well systems are “on allotment”. *Id.*; *John Koreny Testimony*, Tr. Vol. IX, p. 2128.

Junior Water Right Holders Did Not Prove Any Lawful Defenses to A&B’s Delivery Call.

27. IGWA and Pocatello did not prove, by clear and convincing evidence, any defenses provided for by law to A&B’s delivery call. *AFRD #2*, 143 Idaho at 873, 878.
28. IGWA and Pocatello did not prove that A&B’s landowners are irrigating fewer than the 62,604.3 acres decreed in 2003.
29. IGWA and Pocatello did not prove, by clear and convincing evidence, that A&B’s landowners would “waste” water when using 0.88 miner’s inch per acre for irrigation purposes.
30. IGWA and Pocatello did not prove, by clear and convincing evidence, that curtailment of water rights junior to A&B’s senior water right 36-2080 would be “futile”.

Irrigation of Enlargement Acres By Certain Individual Landowners on the A&B Project Does Not Excuse Administration of Water Right No. 36-2080.

31. A&B's delivery call concerned water right no. 36-2080 only. R. 12-14.
32. A&B has 6 decreed water rights based upon "beneficial use". R. 1112. The priority date for A&B's "beneficial use" water rights is April 1, 1962. The water rights authorize the irrigation of 2,018 acres within the A&B project.
33. A&B has 5 decreed water rights based upon statutory "enlargement". R. 1112. Based upon the statutory subordination, the priority date for A&B's "enlargement" water rights is April 12, 1994. The water rights authorize the irrigation of 2,022 acres within the A&B project, provided certain conditions are met.
34. Although individual landowners may irrigate additional acres pursuant to A&B's "beneficial use" or "enlargement" water rights that does not preclude priority administration of A&B's water right no. 36-2080. If a landowner does not receive 0.88 miner's inch per acre for acres irrigated under water right no. 36-2080, the fact that the landowner may cause additional "shortage" by irrigating additional acres does not excuse the injury to water right no. 36-2080.
35. A&B's junior "beneficial use" and "enlargement" rights are subject to administration.

CONCLUSIONS OF LAW

1. The Director hereby incorporates the following conclusions from the Minidoka County District Court's May 4, 2010 *Memorandum Decision and Order on Petition for Judicial Review*:

A&B argues the Director unconstitutionally applied the CMR by failing to apply the proper presumptions and burdens of proof resulting [in] the reduced diversion rate per acre for the 36-2080 right from 0.88 to 0.75 miner's inches. This Court agrees. The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,403.3 acre place of use.

Order at 24.

Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

Order at 30 (emphasis in original).

The Supreme Court acknowledged this same point in *AFRD #2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. *AFRD #2* at 878, 154 P.3d at 449.

Id.

In sum, if a water user is not making beneficial use of the water diverted, irrespective of the quantity decreed, the result is waste. . . . Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.

* * *

Idaho law provides that the burden of establishing waste is on the junior appropriator. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Idaho law has also consistently required that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source. . . .

Order at 33, 34.

However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

* * *

Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.

Id. at 38 (emphasis in original).

The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B's 35-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

Order at 49.

2. Demonstrating crop loss, yield reduction, or increased costs of water management is not required for a finding of “material injury” to a senior water right under Idaho law. *See Clear Springs v. IDWR* (2011 Opinion No. 32, at 30) (“The Rule requires impact upon the exercise of a water right. It does not require showing an impact on the profitability of the senior appropriator’s business. Such a holding would conflict with Article XV, § 3, of the Idaho Constitution, which states that ‘[p]riority of appropriation shall give the better right as between those using the water.’ . . . If business profitability was the basis for appropriation, decreed water rights would become meaningless.”).
3. Clear and convincing evidence means a degree of proof greater than a mere preponderance, and is synonymous with the “clear and undoubted preponderance” evidentiary standard. *Idaho State Bar v. Jenkins*, 120 Idaho 379, 383 (1991). Clear and convincing evidence is generally understood to be “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *State v. Kimball*, 145 Idaho 542, 546 (2008).
4. The Director finds that the A&B’s landowners are entitled to divert and can beneficially use the decreed quantity under water right no. 36-2080, 1,100 cfs (0.88 miner’ inch per ace for 62,604.3 acres).
5. The diversion and consumptive use of ground water within the ESPA, including water rights junior in priority to water right no. 36-2080, reduces the quantity of water available to water right no. 36-2080, thereby causing material injury.
6. The Director finds that A&B’s water right 36-2080 is materially injured.
7. The Director finds that affected junior ground water right holders, including IGWA and the City of Pocatello, did not prove, by clear and convincing evidence, any defenses provided by law to A&B’s delivery call.
8. The Director finds that affected junior ground water right holders, including IGWA and the City of Pocatello, did not prove, by clear and convincing evidence, that the use of 0.88 miner’s inch per acre by A&B’s landowners would result in unlawful “waste” of water.

DATED this _____ day of April, 2011.

Gary Spackman
Interim Director

Respectfully submitted, this 18th day of April, 2011.

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CERTIFICATE OF MAILING

I hereby certify that on this 18th day of April, 2011, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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