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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESEROUCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents. --- 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 GROUND WATER MANAGEMENT AREA	CASE NO. CV-2009-647 **CITY OF POCATELLO'S BRIEF IN SUPPORT OF PETITION FOR REHEARING**

COMES NOW, City of Pocatello ("City" or "Pocatello") by and through undersigned counsel, to file a brief in support of the its Petition for Rehearing, filed on June 9, 2010. The

City also endorses as basis for rehearing in this matter the arguments made in the brief filed by the Idaho Ground Water Appropriators, Inc. ("IGWA").

On May 20, 2010, the Court entered its Memorandum Decision and Order on Petition for Judicial Review ("Order") in this matter. The Court ordered a remand to the Idaho Department of Water Resources ("IDWR" or "Department") on the ground that "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 36-2080 exceeds the quantity being put to beneficla use for purposes of determining material injury." Order at 49. The Court also directed that the Director apply the "clear and convincing" standard in evaluating the evidence of non-injury in this matter. *See* Order, ¶ V.C., at 24-38. The Court rendered these holdings without briefing or argument from counsel on what standard of proof applies in a delivery call proceeding; indeed, a review of the entire record in this matter turns up *no* mention of "clear and convincing" evidence asserted by any party. As the issue has not previously been raised by any party or the Department, the parties should be allowed to brief the propriety of the "clear and convincing" standard in response to the Court's *sua sponte* conclusions. If the Court grants the Petitions for Rehearing, the City shall provide additional briefing in accordance with a briefing schedule as ordered by the Court.

ARGUMENT

The Court's announcement and application of a "clear and convincing" evidence standard in the administration of water rights by IDWR is erroneous as a matter of law. *See id.* at 25-38. If the result of a delivery call were to in fact readjudicate a decreed property right, there might be some merit in considering a clear and convincing evidentiary standard. This position, articulated by the Surface Water Coalition at the trial court level in *AFRD#2,* was soundly rejected by the

Idaho Supreme Court which distinguished between adjudication and administration of water rights:

> [T]hus, responding to delivery calls, as conducted pursuant to the [Conjunctive Management] Rules, do not constitute a re-adjudication.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (2007) (*AFRD #2*).[1] The *AFRD#2* Court also held that because "reasonableness is not an element of a water right," adjudications of water rights do not address the questions answered in delivery calls: "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *Id.* at 877, 154 P.3d at 448.[2]

Because a delivery call does not require modification of the underlying decree in order to apply administrative discretion following the initiation of a delivery call, there is no basis to apply a heightened evidentiary standard to the Director's determination of injury.[3] No Idaho case stands for the proposition that "incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source." Order at 34 (citations omitted). The cases cited in the Court's Order involved adjudications in which a junior argued that the amount, time, and location of the junior's rights should be decreed or permitted because the

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[1] *See also*, Order, ¶ V.A.2., at 13 ("the Legislature intended a distinction between 'the right to the use of ground water' and the '*administration* of all rights to the use of ground water.'") (emphasis in the original); *see also*, *id.* ¶ V.A.5., at 21.

[2] *See also*, *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997); Order on Petition for Judicial Review at 26, *A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc.*, No. 2008-0000551 (5th Jud. Dist. Idaho July 24, 2009) ("[S]enior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights, but in times of shortage juniors will only be regulated or required to provide mitigation subject to the material injury factors set fort in CMR 042.").

[3] Where property rights are not the subject of modification there is no legal basis to apply a heightened level of evidentiary scrutiny. Case law and agency rules in Idaho support this, and suggest there is no basis to apply a heightened level of evidentiary scrutiny unless the issues in dispute involve deprivation of individual liberty, citizenship or parental rights. *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) ("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.").

senior would not be injured. *See Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964)[4]; *Josslyn* v. *Daly,* 15 Idaho 137, 96 P. 568 (1908)[5]; *Moe* v. *Harger,* 10 Idaho 302, 77 P. 645 (1904)[6].

The Court's Order is also erroneous because it requires the Director to ignore the gravamen of the delivery call–an assertion by the senior of a shortage causing injury–and instead turn the proceeding into an inquiry into waste, abandonment, or forfeiture. This formulation fundamentally alters the Director's discretion, and under such a legal framework, there is no need for the Rules for the Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CMR"). The Idaho Supreme Court already had an opportunity to interpret the Director's discretion (and minimize the CMR) accordingly in *AFRD#2*. In that matter, the Court found that the Director was obligated to apply discretion to determining whether a senior was suffering *material injury* under CMR 42, not whether the senior was wasting water or whether the water had been forfeited or abandoned. 143 Idaho at 876, 154 P.3d at 447.

CMR 42 outlines factors that the Director may consider "in determining whether the holders of water rights are suffering material injury and using water efficiently without waste..." IDAPA 37.03.11.42.01. In *AFRD#2*, the Idaho Supreme Court found that that "there must be some exercise of discretion" in the Director's determination of injury, and the Court upheld the use of CMR 42 factors in making his determination of injury. 143 Idaho at 875, 154 P.3d at 446. There, the Court agreed with the district court's acknowledgement that consideration of such

[4] Where Cantlin applied for a permit with the Department of Reclamation and seniors claimed that this was seepage water that seniors had a right to, Cantlin had to prove by "clear and convincing evidence" that seepage water was not subject to appropriation by another. 88 Idaho at 187, 397 P.2d at 766.

[5] Idaho Supreme Court ordered a new trial on whether the spring appropriated by junior user was tributary and thus owed to downstream senior, and directed that "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 . . . produce clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion." 96 P. at 571-72 (internal citations omitted).

[6] Trial court denied juniors request for right to irrigate because juniors did not prove by "clear and convincing" evidence that irrigation of intervening valley lands wouldn't reduce the amount of water to reach senior downstream users. 77 P. at 646-47.

factors is part of the Director's discretion in administration, as "even with decreed water rights, *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.*" *Id.* at 876, 154 P.3d at 447 (emphasis added).

The Court's Order appears to provide that the Director should determine only whether a senior is wasting water and, if the senior cannot be said to be wasting water, the Director must conclude there is no injury. This is contrary to the Hearing Officer's determination, made on Motions for Summary Judgment, that the *AFRD#2* holding that the Director must exercise discretion to determine material injury means that the, Director has the obligation to determine *whether* there is injury, not merely whether there is waste. Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations, ¶ III.2. at 8 (Mar. 27, 2009)[7].

CONCLUSION

The Court's Order, imposing the "clear and convincing" standard and requiring delivery of the full decreed amount unless the Director finds waste, abandonment or forfeiture, turns upside down the legal framework applied by the Department in the three years since the Idaho Supreme Court announced *AFRD#2*. For the reasons identified herein, Pocatello respectfully requests an opportunity to brief the issues raised on reconsideration.

Respectfully submitted, this 28th day of June, 2010.

[7] In fact this citation to the March 27, 2009, Opinion references an oral ruling made by the Hearing Officer at the (apparently unrecorded) pretrial conference on November 5, 2008. The parties argued this at the November 5, 2008 pretrial conference after briefing in response to A&B's Motion for Summary Judgment, *see, e.g.*, R. p. 2401-2405, 2653, 2655-2657, 2675-2677.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Brief in Support of Petition for Rehearing** for **Case No. CV-2009-000647, Minidoka County,** upon the following by the method indicated:

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