A. Dean Tranmer ISB # 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, ISB #7928
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

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 RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents.	CASE NO. CV-2009-647
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	**CITY OF POCATELLO'S OPENING BRIEF ON REHEARING**

The City of Pocatello ("City" or "Pocatello") hereby files its Opening Brief on Rehearing. The City endorses and incorporates by reference the Opening Brief filed by the Idaho Ground Water Appropriators, Inc. ("IGWA").

TABLE OF CONTENTS

INTRODUCTION 4

ARGUMENT 5

I. The Court's order converts a delivery call to a hearing on abandonment, waste or forfeiture at the expense of constitutional provisions and Idaho Supreme court case law. 5

A. The Idaho Supreme Court has interpreted IDWR's obligation as one to examine *whether* a senior is injured and to hold a hearing on how much water is necessary to avoid injury.... 5

B. The Court's conclusion that a delivery call can only be refuted by a showing of waste, abandonment or forfeiture is incorrect as a matter of law; consideration of other post-adjudication factors, such as A&B's use of enlargement rights, is proper in determining injury. 7

C. The Court's ruling is in direct conflict with prior district court rulings. 9

D. The burden is on senior appropriators to establish material injury in a delivery call, and is not proven by the mere allegation of injury. 10

II. Because this is a delivery call and *not* a readjudication requiring a determination of waste, forfeiture or abandonment, a preponderance, rather than clear and convincing evidence is required. 12

A. Agency adjudications require application of the preponderance of the evidence standard absent a legislative or judicial mandate. 14

III. The evidence submitted to the Department and at hearing was insufficient to prove injury by a preponderance of the evidence. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

American Falls Reservoir District No. 2 v. Idaho Department of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) .... passim
Burke v. City of Anderson, 612 N.E.2d 559 (Ind. App. 1993) 15
Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964) 15
Cardenas v. Kurpjuweit, 116 Idaho 739, 779 P.2d 414 (1989) 13
Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984) 12
Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) 11
G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991) 13
Gallant v. Bd. of Med. Exam'rs, 159 Or. App. 175, 974 P.2d 814 (1999) 15
Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976) 12
In re Jenkins, 120 Idaho 379, 816 P.2d 335 (1991) 13
Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County, 107 Idaho Ct. App. 248, 688 P.2d 260 (1984) 11, 14
Josslyn v. *Daly*, 15 Idaho 137, 96 P. 568 (1908) 15
Moe v. *Harger*, 10 Idaho 302, 7 P. 645 (1904) 15
N. Frontiers, Inc. v. State ex rel. Cade, 926 P.2d 213, 129 Idaho Ct. App. 437 (1996) 14
Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981) 6
Steadman v. Securities & Exch. Comm'n, 450 U.S. 91, 101 S.Ct. 999 (1981) 15
Willadsen v. Christopulos, 731 P.2d 1181 (Wyo. 1987) 14

Statutes

Idaho Code Section 16-2009 13
Idaho Code Section 42-1411 8
Idaho Code Section 66-329 13

Other Authorities

2 AM. JUR. 2D *Administrative Law* § 363 (1994) 15
Conjunctive Management Rule 37.03.11.30 10
Conjunctive Management Rule 37.03.11.42 7
D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK (2d ed. 2005) 13
MCCORMICK ON EVIDENCE (John William Strong ed., 4th ed.1992) 11, 13

INTRODUCTION

In a double-barreled finding at odds with Idaho law, the Court concludes that in a delivery call before the Idaho Department of Water Resources ("IDWR" or "Department"), a senior is entitled *per se* to his decreed amount of water *unless* the junior can show waste, forfeiture or abandonment by clear and convincing evidence. *Memorandum Decision and Order on Petition for Judicial Review* ¶ VI.2., at 49, ¶ V.C., at 24-38. (May 4, 2010) ("Order"). The Court's conversion of a delivery call proceeding into a hearing on waste, forfeiture or abandonment in which junior appropriators bear the initial burden of refuting unsubstantiated claims of injury is at odds with the law in Idaho. Further, the Court's application of the clear and convincing standard, applicable in water rights abandonment and forfeiture cases, to IDWR's determination of injury in a delivery call is in error.

The Court's reasoning appears to arise from the following erroneous conclusions:

- A licensed or decreed water right is a quantitative "judicial determination of beneficial use," and because the decree defines the amount of water that an appropriator may call for in a delivery call, IDWR has no discretion to evaluate an appropriator's need for that amount of water or ability to put it to use, before ordering curtailment (Order ¶ V.C.3., at 30);

- The Director's determination that 0.75 miner's inches per acre is "the quantity that could be put to beneficial use" is in error because .75 miner's inches is less than A&B's decreed amount (Order ¶ V.C.3., at 28);

- That "[i]f more water is being diverted than can be put to beneficial use" as defined by an appropriator's decreed amount, "the result is waste" and readjudication of the decree is required (Order ¶ V.C.5., at 31);

- And, finally, "[w]aste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call", meaning juniors are automatically curtailed unless they can prove waste, forfeiture, or abandonment (Order ¶ V.C.5., at 33).

The Court's Order has turned Idaho law on its head and concluded that in a delivery call proceeding the senior is *per se* entitled to his maximum decreed amount unless the Director

concludes, after review of the junior's clear and convincing evidence, that the senior's right should be readjudicated due to waste, forfeiture or abandonment. Because these findings and conclusions are in error, Pocatello respectfully requests that the Court reconsider and revise its findings as described within to be consistent with Idaho law.

ARGUMENT

I. THE COURT'S ORDER CONVERTS A DELIVERY CALL TO A HEARING ON ABANDONMENT, WASTE OR FORFEITURE AT THE EXPENSE OF CONSTITUTIONAL PROVISIONS AND IDAHO SUPREME COURT CASE LAW.

As explained by the Idaho Supreme Court in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD#2*"), IDWR's determination of injury is an inquiry into more than whether an appropriator has received his decreed amount of water, and is not a readjudication of an appropriator's water right. The Director's finding in this proceeding that A&B is not water short and can satisfy its beneficial uses with a rate of 0.75 miner's inches per acre, does not, as a matter of law, modify A&B's decreed right or require a finding of forfeiture or abandonment. Under its partial decree for water right no. 36-2080, A&B has a right to divert its decreed quantity when that water is available; the Department's determination does not readjudicate this right.

A. The Idaho Supreme Court has interpreted IDWR's obligation as one to examine *whether* a senior is injured and to hold a hearing on how much water is necessary to avoid injury.

If IDWR finds injury to a senior appropriator, the Department then determines curtailment in an amount *necessary* to satisfy beneficial uses (R. p. 003110, ¶ XVII 6., Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations (Mar. 27, 2009) (Hearing Officer's Recommendations)). IDWR's obligation is not to determine the maximum amount that *could be* put to beneficial use. That amount, presumably, is contained in the senior's

decree (Order ¶ V.C.3., at 28).[1] The Court's Order, in contrast, equates an appropriator's decreed amount to the amount that is necessary to avoid injury. This is contrary to Idaho law: "[D]epletion [of the decreed amount] does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with the IDAPA conjunctive management rule 42." *AFRD#2*, 143 Idaho at 868, 154 P.3d at 439 (quoting former Director Dreher). The "evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication," and therefore such an evaluation does not diminish the subject water rights. *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448 (citations omitted).[2] Instead, in implementing the conjunctive management rules to determine whether injury has occurred to the senior, the *AFRD#2* Court found that IDWR has a duty to inquire into the senior's need for the decreed amount of water. *See, e.g., id.* at 876, 154 P.3d at 447.[3]

Thus, the Department's determination of injury is more than an evaluation of whether a senior appropriator is receiving his decreed amount: the Idaho Supreme Court has instructed IDWR to make a "determination of how much water is actually needed" (not the amount that *could be* used), and in doing so, to utilize Conjunctive Management Rule ("CMR") 42. *Id.* at 878, 154 P.3d at 449. In other words, under Idaho law there is a distinction between the amount

[1] *See,* IGWA's brief at Section B.1 regarding what the adjudication of water rights under the SRBA determined.
[2] *Cf.* Order ¶ V.C.6., at 34 ("A determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right.").
[3] *See also Second Amended Order on Summary Judgment* 1-SRBA 60 at 60.3 (1996) ("[a]n implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount of water sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion," and therefore a prior decreed or licensed water right could not be reduced based on actual beneficial use in the SRBA partial decree.) *Rominiecki v. McIntyre Livestock Corp.*, 633 P.2d 1064, 1067 (Colo. 1981) ("An implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount [of water] sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion.").

of water an appropriator may divert under his decree when available, and the amount of water for which an appropriator may demand curtailment.[4] Because

> the amount of water necessary for beneficial use <u>can be less than decreed</u> or licensed quantities, <u>it is [therefore] possible for a senior to receive less than the decree or licensed amount, but not suffer injury</u>.

AFRD#2, 143 Idaho at 868, 154 P.3d at 439 (quoting former Director Dreher) (emphasis added).

The Order recognizes this difference between administration and adjudication in the context of its Ground Water Act (GWA) ruling: "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." Order ¶ V.A.2., at 13 (citations omitted). However, the Court fails to recognize the importance of this principle in its rulings in Paragraph C, and sub-paragraphs C.1-7, pages 24-38 of the Order. Thus, the Court's finding in paragraph V.C.3 on page 28 of the Order must be revised to reflect the Hearing Officer's finding: that the Director determined the amount necessary to satisfy A&B was 0.75 miner's inches per acre, that there is no injury to A&B, and that the Director's finding does not readjudicate the decreed amount available to it under water right no. 36-2080.

B. The Court's conclusion that a delivery call can only be refuted by a showing of waste, abandonment or forfeiture is incorrect as a matter of law; consideration of other post-adjudication factors, such as A&B's use of enlargement rights, is proper in determining injury.

In administration, IDWR must consider different questions when responding to a water delivery call than the SRBA court considers when issuing a partial decree. An adjudication determines the amount of water an appropriator *could use* to meet his beneficial uses and a

---

[4] CMR 42 explains the factors that IDWR may use in evaluating injury, and includes several factors that expressly get to the question of need. For example, the Director may evaluate "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 application," and "the amount of water being diverted and used compared to the water rights." IDAPA 37.03.11.42.01 (d), (e). This factor goes to an appropriator's need for water, without implicating questions of abandonment, forfeiture, or waste.

volume or flow rate that an appropriator *may* legally divert when water is available. *See* I.C. § 42-1411 (2)(a)-(j). Administration, by contrast, requires an evaluation of the reasonableness of an appropriator's diversion, which is an inherent limitation on a decreed right and requires a determination, during times of shortage, of how much water a senior *needs*. *AFRD#2*, 143 Idaho at 876-77, 154 P.3d at 447-48. Therefore, IDWR's exercise of its discretion in answering a delivery call and any subsequent determination that the senior does not require his decreed amount does not determine that an appropriator has abandoned, forfeited or otherwise wasted water such that he has lost part of his decreed right.

The Idaho Supreme Court recognized this when it held that the Director must exercise his discretion in making the injury determination: "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." *AFRD#2*, 143 at 876, 154 P.3d at 447. With the authority to evaluate comes the authority to reject: if a senior appropriator was simply entitled to his decreed amount of water in a delivery call proceeding, the above-referenced determinations would be irrelevant to the Director's inquiry. Therefore, the common law doctrines of waste, abandonment and forfeiture, which may readjudicate a decreed water right, are legally inapposite to the Department's statutory and constitutional discretion in a delivery call proceeding.

Elsewhere in the Court's decision can be found recognition of the principle that post-adjudication factors beyond abandonment, forfeiture and waste are relevant to IDWR's determination of injury. The Court held that prior to seeking curtailment, it is "incumbent on A&B to first apply water servicing enlargement acres on its original lands," and for the Director to factor the quantity of water used on the enlargement acres in his determination of injury.

Order ¶ 1, at 41. The Court's Order recognizes that the Department has a duty under its discretion to consider a broad range of post-adjudication factors in determining injury.

It is unclear how the Department can both evaluate injury to A&B under the strict test announced by the Court's Order and also comply with this instruction; clearly, A&B's use of its senior ground water on enlargement acres does not go to proving the elements of abandonment, forfeiture, or waste. The finding regarding enlargement acres is consistent with *AFRD#2* and the CMR, and the Court should revise its order on rehearing to make clear that IDWR's consideration of such factors is appropriate in the injury analysis. Indeed, to find otherwise would be to give no effect to the condition in the A&B enlargement decree for subordination.

C. The Court's ruling is in direct conflict with prior district court rulings.

In the SWC Delivery Call appeal, the Court held that "senior 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 forth in CMR 042. . . . <u>a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right</u>." Order on Petition for Judicial Review ¶ V.B.1., at 25-26, A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (July 24, 2009) at 26 (emphasis added) (affirming Hearing Officer J. Schroeder's determination that the use of a baseline estimate to predict an irrigator's needs, rather than the irrigator's decreed amount, was proper in determination of injury in a call proceeding). The rulings of the Idaho Supreme Court and the Department's regulations require the Department's injury inquiry in a delivery call to evaluate beneficial use and need, and if injury is determined, the burden shifts to junior appropriators.

D. The burden is on senior appropriators to establish material injury in a delivery call, and is not proven by the mere allegation of injury.

As explained by the Idaho Supreme Court in *AFRD#2*, a delivery call is initiated when a senior appropriator "files[s] a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury". *AFRD#2*, 143 at 877, 154 P.3d at 448. *See also*, IDAPA 37.03.11.30.01. Then, if the Department makes a finding that material injury is occurring or will occur, "the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *Id.* at 878, P.3d at 449. In this matter, Hearing Office Schroeder interpreted this language from *AFRD#2* and held that A&B's *allegation* of material injury did not constitute an initial *determination* of injury:

> The language of *AFRD#2* is that after "the initial determination" of material injury is made the junior has the burden of establishing a defense to the senior's call, not that the allegation of material injury constitutes that determination. The allegation of material injury under oath invoked the Director's authority and responsibility to develop the facts upon which a well-informed decision could be made as to the existence of material injury and the consequences if there were material injury.

R. p. 003085, ¶ III 2, Hearing Officer's Recommendations. To hold otherwise—that the mere filing of an allegation of injury shifts the burden to junior appropriators to prove the lack of injury—would render CMR 42 a nullity and ignore the Idaho Supreme Court's affirmation of use of the Conjunctive Management Rules in water rights administration—which the Court expressly held did not violate the burdens of proof in water rights administration. *AFRD#2*, 143 at 877, 154 P.3d at 448. The Court's ruling on pages 24-38 of the Order ignores the Idaho Supreme Court's ruling in *AFRD#2* and the Hearing Officer's affirmation of that holding in this case, and effectively announces that the mere allegation by a senior of injury is the only necessary proof of injury: this approach is not consistent with Idaho law, as described above.

Further, placing the burden of proof on junior appropriators to show that a senior appropriator is committing waste or has abandoned or forfeited his rights, or be faced with curtailment, is not consistent with the fundamental principles that courts use to decide how to allocate burdens. Here, as in other proceedings, "the party asserting a claim is in the best position to establish the existence of a controverted fact, and must, therefore, bear the burden of proving the existence of that fact." *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996). A senior water user alleging injury is clearly in the best position in a delivery call proceeding to establish the existence or imminent threat of injury, and the initial burden in a delivery call proceeding, with respect to the determination of injury, must rest with the calling senior. In Idaho, "'[t]he customary common law rule that the moving party has the burden of proof-including not only the burden of going forward but also the burden of persuasion-is generally observed in administrative hearings'", such as delivery calls. *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*, 107 Idaho Ct. App. 248, 251, 688 P.2d 260, 263 (1984), *rev'd on other grounds*, 109 Idaho 299, 707 P.2d 410 (1985) (citation omitted)[5]. Because a senior appropriator has exclusive access to the best, if not all, the evidence of beneficial use of its water right, it also has nearly exclusive access to evidence of the amount of water it needs to avoid injury.

[5] *See also*, McCormick on Evidence § 337, at 570 (John William Strong ed., 4th ed.1992) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

II. BECAUSE THIS IS A DELIVERY CALL AND *NOT* A READJUDICATION REQUIRING A DETERMINATION OF WASTE, FORFEITURE OR ABANDONMENT, A PREPONDERANCE, RATHER THAN CLEAR AND CONVINCING EVIDENCE IS REQUIRED.

As explained above, curtailment is authorized only if the Department concludes that A&B is suffering or will suffer injury because it has an insufficient supply to meet the purpose of its water right, which is to irrigate and produce a crop. Therefore, while an appropriator's decree defines the amount of water that may be put to beneficial use for the appropriator's decreed purpose, it is a decreed maximum, rather than the amount necessary to grow a crop. The clear and convincing standard is applicable in proceedings for waste, forfeiture or abandonment, which may alter an appropriator's decreed right. This, in contrast, is a delivery call, not a proceeding for waste, forfeiture or abandonment with the effect of diminishing A&B's decreed amount of water.

Under Idaho law, when a party raises a defense or claim of forfeiture, abandonment or waste of another's water right, the party asserting the claim must present clear and convincing proof. *See, e.g., Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984). Indeed, the Court is correct that where another appropriator brings an action alleging abandonment or adverse possession and claims a legal right to part of a senior appropriator's decreed right, which, if successful, would cause part of the senior's water right to "revert to the state," the junior appropriator must present clear and convincing proof before the senior right can be readjudicated. *Gilbert v. Smith*, 97 Idaho 735, 738-39, 552 P.2d 1220, 1223-24 (1976). "One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence." *Id.* at 738, 552 P.2d at 1223 (emphasis added).

However, a delivery call against junior appropriators is a proceeding distinct from an action initiated for waste, forfeiture or abandonment: the Department does not have

responsibility or jurisdiction to readjudicate water rights through administration. *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447. Therefore, the inquiry into injury in a delivery call proceeding examines beneficial use pursuant to CMR 42 and *AFRD#2* without altering the amount of water a senior may lawfully divert without administrative repercussions, and without causing part of a senior's decreed right to "revert to the state." The "clear and convincing" standard is therefore not applicable in delivery call proceedings because there is no effect upon the senior appropriator's decree, which defines the amount of water he *may* divert if available.

Contrary to the Court's Order, proof by clear and convincing evidence "may be imposed by statute or by courts when deemed necessary to protect important individual interests." D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK § 10:13, at 179 (2d ed. 2005). "Clear and convincing evidence is required by courts in fact-finding situations to protect important individual interests in civil cases." *In re Jenkins*, 120 Idaho 379, 383, 816 P.2d 335, 339 (1991). In Idaho, the legislature and the state Supreme Court have expressly stated where clear and convincing proof is required: to name a few instances, clear and convincing evidence is required in proceedings terminating parental rights (I.C. § 16-2009), involuntary institutional commitment (I.C. § 66-329(11), claims of fraud (*G&M Farms v. Funk Irrigation* Co., 119 Idaho 514, 808 P.2d 851 (1991), and adverse possession (*Cardenas v. Kurpjuweit*, 116 Idaho 739, 779 P.2d 414 (1989).[6] Without a ruling by the Idaho Supreme Court or a clear action by the legislature announcing that clear and convincing proof is required in a water rights delivery call proceeding, the Court has no legal basis for its ruling that the Department must require juniors to prove lack of injury by clear and convincing evidence.

[6] Further, Idaho's application of the clear and convincing standard is consistent with federal law, which generally requires that proof by clear and convincing evidence is required "in a variety of cases involving deprivations of individual rights not rising to the level of criminal prosecution, including commitment to a mental hospital, termination of parental rights, denaturalization and deportation." MCCORMICK ON EVIDENCE § 340, at 576 (John William Strong ed., 4th ed.1992).

A. Agency adjudications require application of the preponderance of the evidence standard absent a legislative or judicial mandate.

Under Idaho law, "preponderance of the evidence" is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 926 P.2d 213, 215, 129 Idaho Ct. App. 437, 439 (1996). "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." *Id.* (*citing* 2 AM. JUR. 2D *Administrative Law* § 363 (1994)). In Idaho, "'[i]n most hearings the burden of persuasion is met by the usual civil case standard of a preponderance of evidence.'" *Intermountain Health Care*, 107 Idaho Ct. App. at 251, 688 P.2d at 263 (citation omitted) (an applicant bears the burden of proving by a preponderance of the evidence medical indigency).

Therefore, absent instruction to the contrary by the Idaho Supreme Court or legislature, the applicable standard of proof in a delivery call proceeding is preponderance of the evidence. The rule is consistent with that of Wyoming, which requires that senior appropriators prove their allegations of injury by a preponderance of the evidence in water delivery calls. *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987) (applying the "preponderance of the evidence" standard when an appropriator files a complaint with the State Engineer alleging interference by a junior water right). In applying a preponderance of the evidence standard, the *Willadsen* Court cited to the Idaho Supreme Court's holding in *Intermountain Health Care*, 107 Idaho at 251, 688 P.2d at 263. The Wyoming Supreme Court's reliance on *Intermountain Health Care* is instructive, as it indicates that, in the Wyoming Supreme Court's review, this to similarly be the state of the law in Idaho.

The use of preponderance of the evidence by Idaho in administrative proceedings is consistent with the United States Supreme Court's and other states' interpretations of

administrative law[7]. "Utilization of a higher level of proof [than preponderance of the evidence] is ordinarily reserved for situations where particularly important individual interests or rights are at stake, such as the potential deprivation of individual liberty, citizenship, or parental rights." 2 AM. JUR. 2D *Administrative Law* § 363 (1994).

Contrary to the Court's Order, no Idaho case has held 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 ¶ V.C.6., at 34. None of the cases that the Court cites to for this proposition is on point. Instead, the Court cites to cases that involve a subsequent junior user trying to obtain a right to use water (not yet decreed) and a senior user that objected to the juniors proposed diversion. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964) (where Cantlin applied for a permit and seniors argued that Cantlin was claiming seepage water used by seniors in prior years, Cantlin had to prove by "clear and convincing evidence" that seepage water was not subject to appropriation by seniors); *Moe* v. *Harger*, 10 Idaho 302, 7 P. 645 (1904) (trial court denied junior's request for water right because juniors did not prove by "clear and convincing" evidence that junior's proposed diversion would not reduce the amount of water to reach senior downstream users); *Josslyn* v. *Daly*, 15 Idaho 137, 96 P. 568, 571 (1908) (citation omitted) (new trial ordered on whether the spring appropriated by junior user was tributary and thus owed to downstream senior, and directed that junior must prove nontributariness by clear and convincing evidence). In sum, these cases hold that a junior user proposing a new diversion must prove that said

---

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

diversion will not reduce the amount of water in the stream available to the senior such that the senior would be injured, and do not stand for the proposition that a junior must prove waste, abandonment or injury by clear and convincing evidence to avoid curtailment in a delivery call proceeding. Therefore, the Court's reliance therein is inapposite.

III. THE EVIDENCE SUBMITTED TO THE DEPARTMENT AND AT HEARING WAS INSUFFICIENT TO PROVE INJURY BY A PREPONDERANCE OF THE EVIDENCE.

The Department properly considered post-adjudication factors in determining reasonableness of diversion and beneficial use of A&B's water rights pursuant to CMR 42 and *AFRD#2*. To evaluate whether A&B was injured or would suffer injury at the hands of junior appropriators, the Department first examined the nature of A&B's water supply over time. The evidence before the Director established that in the entire history of the operations of the B Unit, A&B has never had the well capacity to deliver 1100 cfs (or 0.88 miner's inches per acre) during the irrigation season[8], and therefore had never relied upon its full decreed water amount. R. p. 001118-19, FOF ¶¶ 61-64.

The Director also examined whether or not A&B had an adequate water supply to satisfy beneficial uses, and concluded that its water supply was adequate because its wells could deliver at least 0.75 miner's inches per acre. R. p. 001119, ¶ 63. At the hearing, A&B argued that it was injured if its deliveries dropped below 0.88 miner's inches per acre; however, as the Hearing Officer found in the Recommendations, there was no evidence of injury to A&B's beneficial

[8] Koreny testimony, Tr. Vol. XI, pp. 2196 ln. 14 – 2197 ln. 3, pp. 2201 ln. 14 – 2203 ln. 18 (referring to Figure 3-20); Sullivan testimony, Tr. Vol. VIII, pp. 1670 ln. 9 – 1671 ln. 3, pp. 1696 ln. 3 – 1697 ln. 4 (referring in part to Exhibit 319); Luke testimony, Tr. Vol. VI, pp. 1266 ln. 14 – 1267 ln. 5. *See also* R. p. 001118 (Director found that well capacities in 1963 were only 1007 cfs); R. p. 003108 (since at least 1963 there was no time at which all well systems could produce 0.88 miners inches per acre).

uses from deliveries below 0.88 miner's inches per acre.[9] Simply put, testimony by A&B's experts and lay witnesses did not substantiate A&B's claim that A&B has *ever* required 0.88 miner's inches per acre, or even that A&B has *ever* delivered 0.88 miner's inches/acre. At hearing, the analysis of the experts (*see* Exs. 155, 155A, 366; Luke testimony, Tr. Vol. VI, pp. 1196 ln. 4 – 1203 ln. 15) as well as the farmer witnesses[10] showed that 0.75 miner's inches per acre was adequate for A&B's decreed beneficial uses. This testimony was relied upon by the Hearing Officer in his Recommendations. R. p. 003106-07. Finally, as the evidence at trial demonstrated, even if A&B wanted to deliver more water to its farmers, it could have done so. Brockway testimony, Tr. Vol. XI, pp. 2260 ln. 22 – 2262 ln. 4.

Therefore, the Department properly concluded that there was insufficient evidence to support a finding of injury: if A&B is suffering a shortage, it is a shortage of its own creation and, because additional water supplies are available, a shortage that can therefore be resolved without requiring curtailment. In other words, even if A&B's farmers require more water than has historically been delivered, the water supply was—and is—available to make those deliveries. That A&B does not deliver (or the farmers do not request) larger volumes of water is not the fault of junior ground water users, and cannot be the basis for a finding of injury.

[9] As the record shows, A&B repeatedly characterized injury to its water right as deliveries that dropped below 0.75 miner's inches/acre and only at trial did A&B alter its theory to suggest that 0.88 miner's inches/acre (or 1100 cfs divided pro rata amongst the 177 well systems) was injury. *See, e.g.*, R. p. 000012-14; R. p. 000830-41; Ex. 210.
[10] *See* Temple testimony, Tr. Vol. IV, p. 664 lns. 1-4; Deeg testimony, Tr. Vol. V, pp. 1067 ln. 9 – 1068 ln. 11, pp. 1081 ln. 19 – 1082 ln. 11; Mohlman testimony, Tr. Vol. V, p. 1018 lns. 8-21, p. 1031 lns. 5–18, pp. 1031 ln. 23 – 1032 ln. 1, p. 1035 lns. 1-8; Maughan testimony, Tr. Vol. X, pp. 2136 ln. 22 – 2137 ln. 12, pp. 2137 ln. 13 – 2138 ln. 2; Adams testimony, Tr. Vol. V, pp. 877 ln. 20 – 879 ln. 10, pp. 905 ln. 23 – 907 ln.5, pp. 919 ln. 24 – 920 ln. 11, p. 938 lns. 6-16; Eames testimony, Vol. IV, p. 812 lns. 7-21, p. 814 lns. 5-19, p. 827 lns. 3-23, p. 829 lns. 17-22, p. 835 lns. 14-25, pp. 837 ln. 18 – 838 ln. 2, p. 854 lns. 3-12; Kostka testimony, Tr. Vol. V, p. 950 lns. 7-19, pp. 974 ln. 10 – 975 ln. 12, pp. 979 ln. 1 – 980 ln. 2, p. 990 lns. 6-8, p. 993 ln. 6-25; Stevenson testimony, Tr. Vol. X, pp. 2084 ln. 6 – 2085 ln. 14.

CONCLUSION

As a matter of law, as explained above, the injury inquiry in a delivery call proceeding is not simply the determination of whether an appropriator is receiving its decreed amount of water. Further, the Department's determination of whether a senior is materially injured is not a readjudication of the senior's decreed water right. The Court's Order requiring application of the clear and convincing standard, therefore, is erroneous and must be reconsidered. As a matter of fact, the evidence in the record shows that 0.75 miner's inches per acre was more than adequate to satisfy A&B's beneficial uses, therefore, there was not sufficient evidence of injury to A&B, and the Court should affirm the Departments findings.

WHEREFORE, Pocatello requests that the Court issue an order on rehearing stating that:

1. IDWR's material injury determination is an evaluation of whether a senior user is receiving the amount of water necessary for his beneficial use, not a "shut and fasten" evaluation of whether an appropriator is receiving his decreed amount (withdrawing Order ¶ V.C.3., at 30, and ¶ V.C.5., at 31);

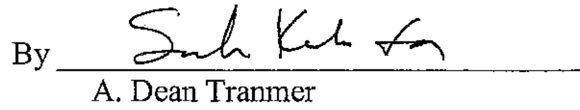
2. If the senior establishes to the satisfaction of the Director that he is suffering material injury, then junior appropriators bear the burden of proving "that the call would be futile or to challenge [the claim of injury], in some other constitutionally permissible way…." *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449 (withdrawing Order ¶ V.C.5., at 33);

3. Evidence of injury in a delivery call proceeding is to be judged by a preponderance of the evidence standard (withdrawing Order ¶ V.C.6, at 33 and ¶ V.C.7, at 36);

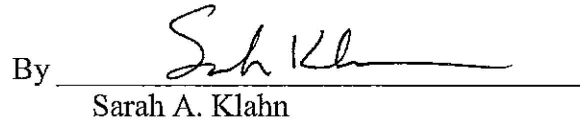
4. And, therefore, the Director's conclusion that A&B is not suffering nor will suffer material injury because it needs .75 miner's inches to prevent material injury was proper (withdrawing Order ¶ V.C.3., at 28).

Respectfully submitted, this 3rd day of August, 2010.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By 
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2010, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Opening Brief on Rehearing** for **Case No. CV-2009-000647, Minidoka County,** upon the following by the method indicated:

Sarah Klahn, White & Jankowski, LLP

Santos Garza, Deputy Clerk Clerk of Minidoka County Court 715 G Street PO Box 368 Rupert ID 83350	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery __X___ via Federal Express = on 06-28-10 ___ Facsimile – 208-436-5272 = Phone – 208-436-9041 _____ Email
John K. Simpson Travis L. Thompson Barker Rosholt & Simpson 113 Main Ave West Ste 303 PO Box 485 Twin Falls ID 83303-0485 tlt@idahowaters.com jks@idahowaters.com	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile – 208-735-2444 __X__ Email
Garrick Baxter Chris M. Bromley Deputy Attorneys General – IDWR PO Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile - 208-287-6700 __X__ Email
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey 201 E Center St PO Box 1391 Pocatello ID 83204 rcb@racinelaw.net cmm@racinelaw.net	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile – 208-232-6109 __X__ Email
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 dtranmer@pocatello.us	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile – 208-234-6297 __X__ Email
Jerry R. Rigby Rigby Andrus & Rigby 25 N 2nd East Rexburg ID 83440 jrigby@rex-law.com	__X__ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile – 208-234-6297 __X__ Email