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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 REPLY BRIEF IN SUPPORT OF REHEARING**

The City of Pocatello ("City" or "Pocatello") hereby files its Reply Brief on Rehearing. The City endorses and incorporates by reference the Reply Brief filed by the Idaho Ground

Water Appropriators, Inc. ("IGWA") and the Idaho Department of Water Resources' ("IDWR") Response Brief filed August 25, 2010.

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INTRODUCTION

I. A&B failed to cite legal authority in which the clear and convincing evidence standard was applied to a delivery call.

In a delivery call, Idaho water rights are limited to the amount necessary to fulfill the authorized beneficial use, "regardless of the amount of [the] decreed right." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 434 n.5, 546 P.2d 382, 389 n.5 (1976). IDWR is not authorized to readjudicate decreed rights through conjunctive management of ground water and surface water, and as such, applying the "clear and convincing" evidence standard previously applied in the context of adjudications is inapposite. Further, conjunctive management is limited by the constitutional doctrines of maximum utilization and public interest. Indeed,

> "[An irrigator's] rights are to be measured by his necessities . . . and not by any fanciful notion of his own."

State Dep't of Ecology v. Grimes, 121 Wash.2d 459, 475, 852 P.2d 1044, 1053 (1993) (quoting *Shafford v. White Bluffs Land & Irrigation Co.*, 63 Wash. 10, 13, 114 P. 883, 884 (1911).

A&B Irrigation District ("A&B") has yet to cite to the Court to a single case involving administration of water rights that applies the clear and convincing standard of proof or places the burden of proving lack of injury on juniors. *A&B's Response to IGWA's and Pocatello's Opening Briefs on Rehearing* ("A&B Response") pages 6-15, purports to present a comprehensive explanation of the supposedly "well-settled" law of applicable burdens and standards of proof in delivery calls in Idaho. A&B presents the same cases distinguished by *Pocatello's Opening Brief on Rehearing*: rather than present those explanations to the Court yet again, Pocatello incorporates pages 15-16 of its Opening Brief to establish that *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904), *Josslyn v. Daily*, 15 Idaho 137, 96 P. 568 (1908), and *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964) involve the application by a junior appropriator for a

new water right, not the administration of a delivery call by senior water users against junior appropriators with established rights.

Further, contrary to A&B's assertions, *Silkey v, Tiegs*, *Jackson v. Cowan*, and *Neil v. Hyde* are not cases in which the Supreme Court established the evidentiary burden of proof in a delivery call. *See, e.g., Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) (quiet title action to certain waters appropriated by artesian wells); *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) (proponent must prove lack of interconnectivity of a stream and reservoir in order for a court in an adjudication proceeding to make a finding on the issue); *Neil v. Hyde*, 32 Idaho 576, 186 P. 710 (1919) (in action to quiet title of the waters of Catherine Creek, proponents must prove lack of interconnectivity for the court to make such a finding).

Finally, A&B argues that *Head v. Merrick* and *Cottonwood Water & Light Company, Limited v. Saint Michael's Monastery* stand for the rule that "a decree defines what a senior appropriator is entitled to use in times of shortage as against junior water rights." A&B Response at 15. However, neither of these cases involves the curtailment of junior water rights in times of shortage. *Head v. Merrick*, 69 Idaho 106, 109, 203 P.2d 608, 609 (1949) (action to quiet title to certain decreed water rights between competing owners) (quoting *Reno v. Richard*s, 32 Idaho 1, 15, 178 P. 81, 86 (1918) (private adjudication of rights on Birch Creek)); *Cottonwood Water & Light Co., Ltd. v. St. Michael's Monastery*, 29 Idaho 761, 162 P. 242 (1916)[1].

[1] Further, in *Cottonwood Water & Light Co.*, the trial court found that the senior water user, who did not have a decree for its water right, had a prior right to that of plaintiffs, but nevertheless ordered that plaintiff be allowed the flows from the subject springs during certain hours of the day from July to October. 29 Idaho at 244. The Idaho Supreme Court found that the trial court erred in so ordering and that there was no basis to force defendants to share their water right. *Id.* This is not what the Director found in A&B's delivery call, and is inapposite to the matter before the Court.

A&B also relies on certain findings from Judge Wood's *AFRD#2 Summary Judgment Order*[2]. However, the Idaho Supreme Court reversed Judge Wood's ruling that the conjunctive management rules ("CMR") were unconstitutional, and rejected the entirety of the "as-applied" portions of Judge Wood's order as being outside the district court's jurisdiction. *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources* ("*ARFD#2*"), 143 Idaho 862, 870-71, 154 P.3d 433, 441-42 (2007). The Court concluded:

> To the extent the district court engaged in an analysis of the constitutionality of the Rules "as applied" to the facts of this case before administrative remedies were exhausted, it was in error. As to the perceived lack of procedural components articulated in the Rules, Rule 20.02 incorporates Idaho law; therefore, the failure to recite certain burdens and evidentiary standards, set specific timelines and set objective standards does not make the Rules facially unconstitutional. The CM Rules also survive a facial challenge in the recognition given to partial decrees and in the treatment of carryover water. The decision of the district court granting partial summary judgment to American Falls is reversed.

Id. at 882-83, 154 P.3d at 453-54. Thus, the Supreme Court rejected Judge Wood's ruling that the CMR were unconstitutional because they failed to include the "clear and convincing" evidentiary standard, as well as other dicta relating to AFRD#2's "as-applied" challenge to the rules. The Supreme Court's opinion in *AFRD#2* establishes the baseline legal standards for conjunctive management in Idaho, and the Supreme Court did *not* rule that the "clear and convincing" evidence standard applies in a delivery call.[3]

Further, as has been repeatedly acknowledged and re-affirmed, "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Id.* at 447, 154 P.3d at 876. In fact, the SRBA Court has recognized that "[t]he purpose of the SRBA is to

[2] *American Falls Reservoir Dist. #2 v. Idaho Dep't of Water Resources* (Gooding County Dist. Ct. Case No. CV-2005-0000600) (June 2, 2006) ("AFRD#2 Summary Judgment Order"), *rev'd*, *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007).

[3] Judge Wood's ruling is a double-edged sword for A&B, as it contains holdings Pocatello and IGWA find to be useful as well, including holdings which AFRD#2 did not appeal, to wit: "The result [of the CMR] is that a senior user cannot call for water if the water is not, or will not, be put to a beneficial use, irrespective of whether the right is decreed." AFRD#2 Summary Judgment Order at 86.

ascertain the validity of individual water right claims. The adjudication is *not* a predetermination of delivery during times of shortage." R. p. 2286 (emphasis added). The SRBA Court went on to define a decreed water right as a "peak amount" of water that senior is entitled to:

> **However, the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time**. **In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc.**

AFRD#2 Summary Judgment Order at 87 (quoting *Mem. Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Adjudicative Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999) (Barry Wood, SRBA Presiding Judge). As such, the evidentiary standards identified in initial water adjudications—such as *Moe*, *Josslyn* and the other cases distinguished by Pocatello in its Opening Brief are simply inapposite.

II. Because there is substantial evidence in the record to support the Director's finding that A&B is not injured—irrespective of the evidentiary standard applied by the Department—the Court must affirm.

Assuming for the sake of argument[4] that the applicable standard is indeed "clear and convincing," and that the burden of proving lack of injury is borne by the junior appropriators, this Court's review of the decision on APA review is based on the substantial evidence standard. Put another way, this Court must affirm the agency decision unless the Court finds that the agency's decision is "not supported by substantial evidence on the record as a whole." I.C. § 67-

[4] Without waiving its previous arguments and its right to raise the issue of burden of proof and standards of evidence on appeal.

5279(3)(d). Because there is substantial evidence in the record to support IDWR's determination of no injury—regardless of the evidentiary standard applied by the Director—the Court must affirm.

Even if the evidence in the record is conflicting, the Court cannot overturn an agency's decision that is based on substantial competent evidence in the record. *ld.* As noted by the Court,

> All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached.

Memorandum Decision and Order on Petition for Judicial Review at 10 n.3[5].

No matter what standard of evidence this Court believes should be applied by the Director to a delivery call proceeding, ground water users unequivocally established at hearing that A&B was not suffering injury. Remand of this issue will not change the outcome as there is substantial evidence of injury in the record to support the Director's findings on the matter. Junior groundwater users' Pocatello and IGWA presented evidence at hearing as follows:

> 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[6], and therefore had never relied upon its full decreed water amount. R. pp. 001118-19, FOF ¶¶ 61-64;

[5] A&B bore the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision in this appeal. *Payette River Prop. Owners Ass'n. v. Bd. of Comm'rs of Valley County*, 132 Idaho 552, 976 P.2d 477 (1999).

[6] 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 miner's inches per acre).

> There was no evidence of injury to A&B's beneficial uses from deliveries below 0.88 miner's inches per acre[7];
> 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;
> 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 hearing did A&B alter its theory to suggest that 0.88 miner's inches/acre was injury. *See, e.g.*, R. pp. 000012-14; R. pp. 000830-41; Ex. 210;
> The farmer witnesses[8] testified that 0.75 miner's inches per acre was adequate for A&B's decreed beneficial uses;
> Therefore, A&B's water supply was adequate because its wells could deliver at least 0.75 miner's inches per acre. R. p. 001119, ¶ 63.

In response to this evidence, A&B alleges that it presented evidence that supports a finding of injury. A&B Response at 20. However, A&B merely established that individual farmers would *like* more water; such testimony does not rebut the overwhelming weight of other lay testimony—including testimony from A&B farmers—that 0.75 miner's inches per acre is enough water to meet A&B's beneficial uses. Further, testimony of the ground water users' expert witnesses, Greg Sullivan and Christian Petrich, established that A&B was not injured. A&B's evidence did not rebut what the ground water users proved at hearing, and what the Director concluded to be a fact: that injury has not occurred to A&B or any of its members due to any actions by junior ground water appropriators.

Even if the matter is indeed remanded to the Department for application of the clear and convincing standard and the appropriate burdens of proof, the Department will make a finding

[7] 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. pp. 000012-14; R. pp. 000830-41; Ex. 210.
[8] *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.

regarding injury, the parties will appeal to this Court, and the Court will yet again have to determine if the evidence in the record supports the Director's finding[9]. Ground water users provided evidence at hearing that A&B was not suffering injury. There is substantial evidence in the record to support this finding, and therefore remand is unnecessary and will present the Court with the exact question before it today.

III. The harmless error rule requires the Court to affirm the Director's findings if A&B's substantial rights have not been prejudiced.

An agency's decision, even if based upon unlawful procedure, "shall still be affirmed unless Applicants' substantial rights have been prejudiced by that decision." *Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm'rs*, 148 Idaho 937, 231 P.3d 1034, 1040 (2010), reh'g denied (May 19, 2010) (citing I.C. § 67-5279). For instance, when a property owner impermissibly built within certain County setback areas without first receiving a permit, the denial of a variance by the County did not deprive the property owner of a substantial right:

> Respondents are still able to use their property as permitted under state laws and regulations and county ordinances . . . . Respondents are not entitled to the granting of variances; instead, variances are issued upon the discretion of the Board. They are still able to put their property to reasonable use . . . .

Wohrle v. Kootenai County, 147 Idaho 267, 276, 207 P.3d 998, 1007 (2009). A similar analogy is applicable here: even if the Director applied the wrong burden proof at hearing, A&B has been deprived of no substantial right. A&B may still divert the decreed amount of water in any given year, and therefore may put its property to use. *See Spencer v. Kootenai County*, 145 Idaho 448, 453, 180 P.3d 487, 492 (2008) (agency decision upheld despite unlawful procedure); *In re Idaho Dep't of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318, 325 (2009) (same).

[9] The Court has not required a new hearing; therefore, the evidence before the Court of injury or lack thereof will be essentially identical to what is in the record now.

Remand for application of the proper burdens of proof and evidentiary standards is not necessary, as A&B does not have a right to any certain procedure if the Director's decision is supported by substantial evidence. "No one has a vested right in any given mode of procedure . . . ." *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975). "If an error could be shown to be prejudicial merely on the basis of adverse result, the concept of harmless error would disappear from appellate review." *Guillard v. Dep't of Employment*, 100 Idaho 647, 651, 603 P.2d 981, 985 (1979). The Court, therefore, must review the record below to determine if there is substantial evidence to support the decision, regardless of whatever procedural errors it believes the Director may have made. If the finding of no injury is supported by substantial evidence, the Court must affirm the Director's decision.

CONCLUSION

The Director initially found no injury to A&B in his January 2008 Order. A&B appealed the Director's Order and presented evidence in front of the Hearing Officer; IDWR and the ground water users also presented evidence at the hearing. Yet, despite their efforts, A&B failed to present persuasive evidence of injury and thus Hearing Officer Justice Schroeder affirmed the Director's initial finding of no injury. The Director reviewed the Recommendations of the Hearing Officer and affirmed his prior finding based on the evidentiary record established before the Hearing Officer. The Court's role is to evaluate whether the Director's finding of non-injury is supported by substantial evidence in the record. The Court should affirm, regardless of any procedural errors made by the Director.

DATED this 7th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2010, a copy of **City of Pocatello's Reply Brief in Support of Rehearing** in **Case No. CV 2009-647** was served by facsimile to Minidoka County District Court and via email addressed to the following:

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