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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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.

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

Case No. CV-2009-647

GROUND WATER USERS' REPLY BRIEF ON REHEARING

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IDAHO GROUND WATER APPROPRIATORS, INC., on behalf of its members (the "Ground Water Users") submits this brief in reply to *A&B Irrigation District's Response to IGWA's & Pocatello's Opening Briefs on Rehearing* ("A&B's Response Brief"), pursuant to the Court's *Order Granting Petitions for Rehearing; Notice of Hearing and Scheduling Order on Petitions for Rehearing* dated July 7, 2010.

PROCEDURAL BACKGROUND

On July 7, 2010, the Court granted rehearing of its *Memorandum Decision and Order on Petition for Judicial Review* entered May 4, 2010, on the issue of the proper standard of proof to be applied by the Director of the Idaho Department of Water Resources ("IDWR" or "Department") when determining "material injury" under rule 42 of the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"). *Order Granting Petitions for Rehearing; Notice of Hearing and Scheduling on Petitions for Rehearing* at 2 (the "*Order*"). Pursuant to the *Order*, the Ground Water Users and the City of Pocatello filed opening briefs on rehearing on August 4, 2010. IDWR and A&B Irrigation District ("A&B") filed response briefs on August 25, 2010. IDWR's *Respondents' Brief on Rehearing* supports the arguments and position of the Ground Water Users. Therefore, this reply brief addresses only the arguments put forth in *A&B's Response to IGWA's and Pocatello's Opening Briefs on Rehearing* ("A&B's Response Brief").

ARGUMENT

A&B attempts to substantially hinder the Director's ability to use his expertise[1] in administering groundwater by arguing 1) that the Director is not permitted to independently determine "material injury" under CM Rule 42, but must instead wait upon junior-priority water users to assert lack of material injury as a "defense" to a delivery call; and 2) that even if a junior does raise material injury issues, the Director is not permitted to use his expertise to determine material injury, but must instead presume there is no material injury until proven otherwise by a high standard of clear and convincing evidence. (A&B's Response Br. 4-5.)

A&B's position fails to recognize the realities of water rights adjudications and water administration. First, as explained in *IDWR Respondents' Brief on Rehearing*, A&B fails to recognize that water administration decisions do not change the defined elements of a water right decree and do not result in a "re-adjudication" of the senior's right.

Second, A&B refuses to acknowledge that the "diversion rate" element of a water right defines the maximum authorized rate of diversion, not a guaranteed water supply. Neither the IDWR when licensing water rights nor the SRBA when adjudicating water rights determines the reliability of the water supply from which the right is diverted. The scope of their investigation is much more narrow and focuses on the maximum amount of water that may be diverted and used at a single moment in time. They do not determine how often the maximum diversion rate is actually available, used, or needed by the water user. These decisions are saved for administration, as are decisions about reasonableness of use and full economic development.

Third, A&B mistakenly treats the Director's role in administering water resources as nothing more than a judge of claims and defenses asserted by water users. The Director has a

[1] The Director of the Idaho Department of Water Resources must be a licensed civil or hydraulic engineer. I.C. §42-1701(2)

statutory duty to administer water resources. He must independently apply the CM Rules regardless of whether a junior asserts the CM Rules as some sort of defense to curtailment.

A. Cases Involving The Adjudication Of New Water Rights Do Not Establish The Standard Of Evidence That Applies To The Unique Issues Raised In The Distribution Of Water Between Established Water Rights.

A&B relies heavily on the 1904 decision of the Idaho Supreme Court in *Moe v. Harger*, 101 Idaho 302, to support its assertion that the Director must presume that material injury exists until proved otherwise by clear and convincing evidence. (A&B's Response Br. 7-8.) A&B made this very same argument in the *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources* (*AFRD2*) case, with the district court relying on *Moe* to conclude that "when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to the senior." 143 Idaho 862, 877 (2007). The Idaho Supreme Court, however, reversed the district court on this point, explaining that "*Moe* [] was a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights. The issues presented are simply not the same." *Id.* A major failing of the *Order* is that it confines the CM Rules into the familiar constructs of surface water administration, rather than recognize that the CM Rules exist precisely because groundwater administration is in some respects <u>different</u> than surface water administration.

A&B also cites to *Neil v. Hyde*, 32 Idaho 576 (1920) and *Jackson v. Cowan*, 33 Idaho 525 (1921) to support its allegation that groundwater administration decisions must be based on clear and convincing evidence instead of the Director's best judgment. However, like *Moe*, neither of those cases involved the <u>administration</u> of groundwater. In *Neil* the court explained that "[t]his is an action brought in Owyhee county to determine the rights to the use of the waters of Catherine Creek and its tributaries... and the priorities of those rights between the original

parties...." 32 Idaho at 578. At issue was whether new water rights should be granted to new appropriators and whether the senior user(s) had abandoned or forfeited prior rights. *Id. Neil* involved the adjudication—not administration—of water rights. The *Jackson* case was also adjudicative in nature, with the court explaining that "[t]his is an action to determine priorities in the use of the waters of Rattlesnake Creek, in Elmore County." *Jackson*, 33 Idaho at 526. Similarly, the *Silkey v. Tiegs* case was a quiet title action to determine the right to use water from hot water artesian wells. *Silkey v. Tiegs*, 51 Idaho 344, 346 (1931). None of these cases define the evidentiary standards that pertain to water administration.

A&B also cites to the *Summary Judgment Order* in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources,* Case No. CV-2005-0600, (Gooding County Dist. Ct. June 2, 2006) to claim that the Supreme Court somehow "affirmed" the district court's "decision" that "'clear and convincing evidence' standard was required in administration". (A&B Response Br. 11.) However, the *Summary Judgment Order* was reversed in its entirety in *AFRD2* by the Idaho Supreme Court: "[a]s 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 decision of the district court granting partial summary judgment to American Falls is reversed." *AFRD2* at 883 (emphasis added). Hence, any standard or ruling made in the summary judgment order is no longer valid, and any reliance on statements in the *Summary Judgment Order* is improper.

Further, it is important to note that the Idaho Supreme Court refused to enunciate the evidentiary standards that apply in water administration, instead explaining that "to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules." *Id.* at 873. Having

recognized that the issues presented in groundwater administration are simply not the same as in surface water administration, it certainly appears that the Court deliberately refused to superimpose the evidentiary standards of surface water administration onto groundwater administration. This was wise indeed, since *Jones v. Vanausdeln*, 28 Idaho 743 (1916)—the only case directly on point—does not require juniors to prove "defenses" by clear and convincing evidence. (See Groundwater Users' Opening Br. 8.)

In attempting to distinguish *Jones*, A&B actually reinforces the fact that *Jones* is directly applicable to A&B's delivery call in this case. A&B itself differentiates *Jones* from the adjudicative cases of *Moe* and *Silkey*, pointing out that "[u]nlike the orders governing administration of the rights set forth in *Moe* and *Silkey,* the senior appropriator in *Jones* initiated the case and requested a 'permanent injunction against the defendants requiring them to cease diverting and' from their wells." (A&B's Response Br. 18.) Just like the senior in *Jones*, A&B initiated a delivery call asking the Director to curtail junior users from diverting water from their wells. The facts could not be more congruent, and *Jones* could not be more persuasive. What is so important about *Jones* is that (1) it was a groundwater administration case, and (2) the Court determined that the senior had not met its burden that would justify shutting down (i.e., curtailing) the junior well user. *Jones*, 143 Idaho at 749. The senior was unable to show that it was being materially injured by the junior's use and diversion of water.

As explained in the *Ground Water Users' Opening Brief on Rehearing*, the *City of Pocatello's Opening Brief on Rehearing* and the *IDWR Respondents' Brief on Rehearing*, the adjudication or licensing of water rights is simply different than the administration of water resources. This case involves the administration of Idaho's groundwater resources, not an adjudication of A&B's or the Ground Water Users' water rights. As such, the cases cited by A&B and in the *Order*—which involve adjudicative issues—do not require a heightened level of

proof for the administrative decisions made by the Director in this case. The unique issues presented in administration, such as material injury, public interest and full economic development, must be based on the Director's best judgment, not on a heightened clear and convincing proof standard required to permanently change the defined elements of a water right. (See *Ground Water Users' Opening Br. on Rehearing* at 6; see also *Pocatello's Opening Br. on Rehearing* at 15-16; see also *IDWR Respondents' Br.* 10.)

B. A&B's Decree Does Not Guarantee A Full Quantity In Times of Shortage.

A&B's argument boils down to a shut and fasten strict priority administrative scheme that would leave little discretion with the Director in administering water resources. A&B argues that "after all, if a decree issued by the SRBA Court only represents a 'maximum quantity' to be enjoyed only when there is enough water for all users, then the core function of Idaho's prior appropriation doctrine would be entirely defeated." (A&B's Response Br. 12.) Under A&B's proposal, the Director's authority for management of Idaho's water resources would be limited to a rote comparison of priority dates. The more global issues of reasonable use and full economic development could not be considered unless raised as "defenses" to the defined elements of an individual water right.

Because beneficial use is a "continuing obligation" that can vary from year to year, Idaho Code §42-220 states that no one, "claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied...." "[W]hatever be the extent of a proprietor's right to use water until his needs are supplied, his right is dependent upon his necessities, and ceases with them." *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589 (1927). It follows, then, that the decree issued by the SRBA sets the "peak" or "maximum" amount of water that a senior may be authorized to divert, but the SRBA decree does not define the amount of water <u>needed</u> during a delivery call. To claim otherwise simply ignores Idaho law

and the function and goals of adjudications versus the function and goals of administration of water rights.

The SRBA Court has repeatedly recognized that its decrees do not make all factual determinations necessary for conjunctive administration of water rights. "The purpose of the SRBA is to ascertain the validity of individual water right claims. The adjudication is not a predetermination of delivery during times of shortage." In Re SRBA, *Response To United States' Motion For Status Conference; Order On Nez Perce Tribe's Motion To Set Aside All Decisions, Judgments And Orders On Instream Flow Claims Entered In Consolidated Subcase 03-10022 By Judge R. Barry Wood, And Motion To Disqualify Judge Wood,* Consolidated Subcase No. 03-10022 Nez Perce Tribe Off-Reservation Instream Flow Claims (March 23, 2000) at ¶ C.3. Without a doubt, A&B's argument that conjunctive administration should essentially be reduced to guaranteeing the maximum quantity under their water right by a strict priority system is not in keeping with Idaho law. Idaho water rights are "administered according to the prior appropriation doctrine as opposed to strict priority." In re SRBA, Subcase No. 92-000021-37 SW (Surface Water), *Order Granting Motion for Interim Administration for Basin 37 Part 1 Surface Water* (5th Jud. Dist. Dec. 13, 2005) at 6; see also In re SRBA, Subcase 91-00005 (Basin-Wide Issue 5) *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* (6th Jud. Dist., July 2, 2001) ("Order on Basin-Wide Issue 5") at 30 ("Prior appropriation doctrine as developed in Idaho does not require that water rights sharing a given source be administered according to strict priority. The prior appropriation doctrine also recognizes various principles that protect junior water rights which should be incorporated into the administration of water rights.")

C. A Finding Of The Amount Of Water Needed For Beneficial Use In Conjunctive Administration Does Not Challenge Or Alter Elements Of A Decreed Water Right.

A&B argues that "if the Director is permitted to alter the elements of a water right based simply on a 'preponderance of the evidence,' then the presumptive weight of the decree is undermined and the senior appropriator is forced to 're-prove' the water right in order to have the decreed quantity delivered." (A&B Response Br. 27; emphasis added). This statement highlights the fundamental error A&B's position. In responding to a delivery call pursuant to the CM Rules, the Director did not alter any of the elements of A&B's water rights.

When determining whether material injury exists under CM Rule 42, the central questions before the Director are (1) whether the senior needs additional water to accomplish his or her beneficial use, and (2) if so, can the senior's needs be met via conservation efficiencies or alternate means of diversion. If material injury exists, the Director must then determine whether curtailment is in accordance with the Ground Water Act (i.e. whether curtailment is necessary to sustain reasonable pumping levels). None of these decisions alter or change the defined elements of the senior's right, and therefore do not constitute a "re-adjudication" of the senior's water right, as explained in *AFRD2.*

> responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period, and purpose of use. However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.
>
> 143 Idaho at 876-77.

The Supreme Court in *AFRD2* further stated that a finding of waste (or a finding that less than the decreed amount of water is needed for beneficial use) is not a re-adjudication of water right:

> Conjunctive administration requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, 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 the water flows from that source and other sources. That is precisely the reason for the CM Rules and the need for analysis by the Director. In that same vein, determining whether waste is taking place is not a re-adjudication because clearly that, too, is not a decreed element of a right.

Id. at 877 (quoting *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422 (1997), internal quotes omitted.)

The *Order* fundamentally errs by treating the Director's determinations of reasonable use, full economic development, and waste (or a finding that the less than the maximum rate of diversion is needed) as a re-adjudication, even though these issues do not change the defined elements of the senior's right. Defenses that affect the defined elements of a water right (such as forfeiture) do not arise until after the Director determines that material injury exists:[o]nce the initial determination is made 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 emphasis added.

D. The Director Applied The Proper Evidentiary Standard

In this case, the Director relied on his specialized knowledge, analyzed the evidence before him, examined the amount of water that A&B "has a need for" (which can be something less than the decreed quantity) and concluded that A&B was not water short and not materially injured. These findings are required under the CM Rules and the Director's obligation to manage the state's water resources and are all contemplated by the prior appropriation doctrine as established by Idaho law.

In this case, the Director presumed that A&B's water right for 1,100 cfs was valid. R. 3108 ("A&B is entitled to the amount of its water right.") However, the facts, as established by

the record, show that A&B did not need its full water right and in fact showed that A&B likely never simultaneously diverted the full 1,100 cfs at any one point in time. R. 1118-19. Further, many of A&B's well systems never provided the 0.88 miner's inches A&B claims it is entitled. R. 1118-19. The Director examined the crop mix within A&B's B Unit, (R. 1123-27) compared ET to the claimed water short lands to lands that were not water short, (R. *Id.*) examined evidence from A&B farmers as well as neighboring farmers that showed they use and divert less water than claimed by A&B[2] and concluded that A&B's beneficial use was met with 0.75 miner's inches. R. 1119.

The Director properly applied the evidentiary standard established in *Jones* and conformed in *AFRD2*. He rightly concluded that "depletion does not equate to material injury" (CL 21, R. 1147) and reviewed the evidence to determine whether material injury exists in fact, finding:

- "[T]herefore, based on A&B's method of calculating total water supply, the 2006 supply actually increased from 1994 by about 14 cfs." FF61 Order of January 29, 2008 R. 1118;
- "[I]t is notable that there are 1,750 acres represented by an enlargement right bearing an April 1, 1984 priority date." FF 58; *Id.*
- "Figure 13 shows that the ratio of ETrF NDVI (the "ET" per amount of vegetation (for the item – G area is highest of all the areas on June 20th and August 7th, and near the middle of all the areas on July 22, indicating that the item-G area is not short of water." FF 80; R. 1125.
- "Sediment intervals,[not junior ground water pumping] where they occur, reduce the well yield, particularly in the southwest part of Unit B." FF 89; R. 1129.
- A&B's problems are due to their wells are either located in the area where transmissivity is typically lower. FF 91; R. 1130.

[2] Stevenson, Tr. Vol. X, p. 2068, L. 12 – p. 2069, L. 7, p. 2074, L. 19 – p. 2075, L. 10, p. 2088, L. 2-11, p. 2113, L. 5-21; Carlquist, Tr. Vol. X, p. 2036, L. 14-18, p. 2039, L. 5-16, p. 2040, L. 21 – p. 2041, L. 8; Maughan, Tr. Vol. X, p. 2138, L. 17 – p. 2139, L. 13, p. 2138, L. 12-16; R. 3107-08.

- A&B's problems were due to faulty well design, drilling and construction FF 96-108. R. 1131-34.

On this and other evidence, the Director concluded that the locations "identified by A&B as being short of water were not short of water" (CL 27, R. 1148) and that A&B's "failure to take geology into account is a primary contributor to A&B's reduced pumping yields, not depletions by junior-priority groundwater users." (CL 30, R. 1149) (emphasis added). Simply, "it is the Director's conclusion that junior groundwater right holders are not causing material injury to water right number 36-2080." (CL 37 *Id.* (emphasis added); see also Ground Water Users' Opening Brief at 8-9.) These findings are reasoned, in keeping with Idaho law, supported by substantial evidence and must be upheld. I.C. §67-5279(3).

CONCLUSION

Based on the foregoing, the Ground Water Users request that the Court re-evaluate its decision regarding the standard of proof and determine that the Director properly concluded that A&B's beneficial use is met by 0.75 cfs, less than its decreed quantity, and that evaluation of that evidence under the preponderance of evidence standard is correct.

SUBMITTED this 7th day of September, 2010

RANDALL C. BUDGE
CANDICE M. McHUGH
THOMAS J. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2010, the above and foregoing document was served in the following manner:

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