Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB #5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
101 S. Capitol Boulevard, Suite 208
Boise, Idaho 83702
(208) 395-0011 – Telephone
(208) 433-0167 – Facsimile

Attorneys for Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District

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' BRIEF IN SUPPORT OF REHEARING**

Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District, acting for and on behalf of their members (collectively, the "Ground Water Users"), submit this brief pursuant to Rule 84(r) of the Idaho Rules of Civil Procedure and Rule 42 of the Idaho Appellate Rules, in support of the *Ground Water Users' Petition for Rehearing* filed June 10, 2010.

Background

On May 4, 2010, the Court entered a *Memorandum Decision and Order on Petition for Judicial Review* (the "*Order*"). On June 10, 2010, the Ground Water Users filed the *Ground Water Users' Petition for Rehearing*, asking the Court to reconsider its ruling in section C.6 of the *Order* concerning the burdens of proof to be applied by the director of the Idaho Department of Water Resources (the "Director") in administering groundwater. On June 22, 2010, the Court entered an *Order Enlarging Time for Submission of Briefs In Support of Rehearing*, extending the deadline to file supporting briefs to June 29, 2010. The Ground Water Users submit this brief accordingly. The purpose of this brief is to persuade the Court to grant rehearing. If granted, the Ground Water Users anticipate the Court will set a briefing schedule pursuant to rule 42 of the Idaho Appellate Rules to allow more substantive briefing of the issue.

Argument

Section C.6 of the *Order* addresses the burden of proof to be applied by the Director when responding to delivery calls against groundwater rights, concluding that a high standard of "clear and convincing" proof applies to all decisions the Director must make when administering groundwater. (*Order* 33-35.) The *Order* effectively requires the Director to 1) presume that a senior surface water user is suffering material injury any time he receives less than the maximum rate of diversion authorized under his water rights, 2) presume that curtailment is in accord with the Ground Water Act (Idaho Code § 42-226 et seq.) and other groundwater administration criteria, and 3) automatically curtail junior-priority groundwater rights until proven otherwise by clear and convincing evidence.

These are very significant rulings that have been made *sua sponte* by the Court, without thorough briefing by the parties. Indeed, there is not a single section in any brief filed to date in this case that is dedicated to the burdens of proof that apply in the administration of groundwater. The Court should allow the parties to directly and thoroughly brief this issue. For the reasons that follow, which will be elaborated in subsequent briefing if rehearing is granted, it is clear that the traditional evidentiary concepts applied in surface water administration do not apply equally to groundwater administration.

The *Order* relies on surface water cases to conclude that a clear and convincing standard of proof applies in the context of groundwater administration.[1] None of the cases cited in the *Order* involve groundwater rights, and none require that groundwater administration be subject to the same burdens of proof as surface water administration.

In contrast, there is Idaho precedent that places the burden on the senior water user in the context of groundwater administration. In *Jones v. Vanausdeln*, the Idaho Supreme Court refused to curtail junior-priority groundwater pumping because the senior water user failed to prove by clear evidence that the junior pumping injured the senior. 28 Idaho 743 (1916). The plaintiffs (senior water users) in that case contended that their wells produced less water due to pumping of the defendants' wells which were sunk later in time. *Id.* at 748-49. The Court refused to presume injury to the plaintiffs just because their wells were producing less water, but instead held that "very convincing proof of the interference of one well with the flow of another should be adduced before a court of equity would be justified in restraining its proprietors from operating it on that ground." *Id.* at 749. The burden of proof was placed on the plaintiffs (senior water users), with the Supreme Court upheld the trial court's conclusion "that the plaintiffs' proof lacked that positive and convincing quality which alone would justify him in finding that the allegations of their complaint were sustained by the evidence." *Id.*

It is noteworthy that when the *Jones* decision was entered in 1916, the Idaho Supreme Court had already concluded that in surface water administration a "subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence." *Moe v. Harger*, 10 Idaho 302, 307 (1904); see also *Josslyn v. Daly*, 15 Idaho 137, 149 (1908). The Court's unequivocal holdings in *Moe* and *Josslyn* did not prevent it from placing the burden on the senior to prove injury in the context of groundwater administration. The placement of the burden of proof on the senior in the context of groundwater administration is consistent with the general rule that "unless otherwise provided by statute, the proponent of a rule or order has the burden of proof, that is, the burden of persuasion." *2 Am Jur 2d Administrative Law § 354* (2010).

The *Jones* decision demonstrates that the administration of groundwater has long been treated differently than surface water administration. The Idaho Supreme Court affirmed this in

[1] *Gilbert v. Smith*, 97 Idaho 735 (1976); *Cantlin v. Carter*, 88 Idaho 179 (1964); *Josslyn v. Daly*, 15 Idaho 137 (1908); *Moe v. Harger*, 10 Idaho 302 (1904); *Crow v. Carlson*, 107 Idaho 461 (1984); *Jenkins v. State*, 103 Idaho 384 (1982).

its more recent decision in *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"). 143 Idaho 862 (2007). In *AFRD2*, the district court had relied on *Moe* to support the conclusion that "when a junior diverts or withdraws water in times of shortage, it is presumed that there is injury to the senior." *Id.* at 877. The Supreme Court rejected that conclusion, distinguishing *Moe* on the basis that it "was a case dealing with competing surface water rights, and this is a case involving interconnected ground and surface water rights." *Id.* The Court explained that "[t]he issues presented are simply not the same." *Id.*

One reason given in the *Order* as to why a "clear and convincing proof" standard should apply to groundwater administration is that "[t]o conclude otherwise accords no presumptive weight to the decree." (*Order* 34, n. 12.) This conclusion fails to recognize the distinction between administration versus adjudication of water rights. As explained in *AFRD2*, "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." 143 Idaho at 876-77. The Idaho Supreme Court acknowledged this distinction in *Jones* as well, noting that a dispute of water administration "differs somewhat from the ordinary action for the adjudication of conflicting water rights on the same stream." 28 Idaho at 752. The Supreme Court explained that "[i]n finding that plaintiffs had not made sufficient showing to warrant a permanent injunction in their favor against the operation of defendants' wells, it was not necessary in this action for the lower court to adjudicate defendants' water rights to the subterraneous flow in question." *Id.*

This Court's allocation of a burden of proof on junior groundwater users to prove all administrative issues by clear and convincing evidence fails to recognize the unique decisions that must be made by the Director in administering groundwater and the process of making those decision. In *AFRD2*, the Idaho Supreme Court explained that defenses such as futile call do not arise until after the Director has determined that "material injury" exists per CM Rule 42: "Once 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." 143 Idaho at 877. This partly explains why the Supreme Court instructed that material injury not be presumed. *Id.* Rather, material injury is an independent analysis to be made by the Director, and like most agency decisions it should be based on the preponderance of the evidence. *2 Am Jur 2d Administrative Law § 357* (2010)

("The general standard of proof for administrative hearings is by a preponderance, that is, the greater weight, of the evidence, and it is error to require a showing by clear, cogent, and convincing evidence.")

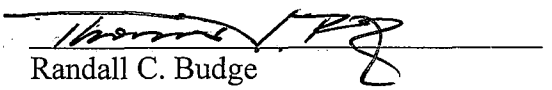
Ground water administration is also subject to the legislative mandate that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of that right shall not block full economic development of underground water resources." Idaho Code § 42-226. This mandate is not just a restatement of the common law prohibition against wasteful water use. Further, the Legislature did not instruct the Director to presume that curtailment does not block full economic development. This again is a decision that should be made by the Director based on the preponderance of the evidence.

Conclusion

For the foregoing reasons, the Ground Water Users ask the Court to grant rehearing on the issue of the burdens of proof to be applied by the Director when administering groundwater, and to set a briefing schedule accordingly.

RESPECTFULL SUBMITTED this 29th day of June, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



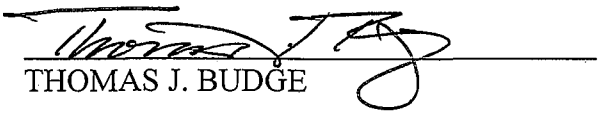
Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, the above and foregoing document was served in the following manner:

Deputy Clerk Clerk of Minidoka County Court 715 G Street PO Box 368 Rupert, ID 83350 Fax: (208) 436-5272	[ ] U.S. Mail/Postage Prepaid [X] Facsimile [ ] Overnight Mail [ ] Hand Delivery
Garrick L. Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
John K. Simpson Travis L. Thompson Paul L. Arrington Sarah W. Higer Barker Rosholt P.O. Box 2139 Boise, Idaho 83701-2139 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail

Jerry R. Rigby Rigby Andrus and Moeller 25 N 2nd East Rexburg, ID 83440 jrigby@rex-law.com	[X] U.S. Mail/Postage Prepaid [ ] Facsimile [ ] Overnight Mail [ ] Hand Delivery [X] E-Mail



THOMAS J. BUDGE