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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 RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents.	CASE NO. CV 2009-647 **A&B IRRIGATION DISTRICT'S RESPONSE TO IGWA'S & POCATELLO'S OPENING BRIEFS ON REHEARING**
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	

A&B Irrigation District ("A&B"), by and through counsel of record, submits this *Response* to the opening briefs on rehearing filed by the Idaho Ground Water Appropriators, Inc. ("IGWA") and the City of Pocatello ("Pocatello") (hereinafter collectively referred to as "Ground Water Users").

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INTRODUCTION

The sole issue before the Court is the manner in which the Director of the Idaho Department of Water Resources ("Department") must apply the presumptive effect of a decree in water right administration. As recognized by this Court, the question was squarely answered by the Idaho Supreme Court in *American Falls Reservoir District #2 et al. v. Idaho Dept. of Water Resources, et al.*, 143 Idaho 862 (2007) ("*AFRD #2*"). In that case the Supreme Court confirmed that "the presumption under Idaho law is that the senior is entitled to his decreed water right." 143 Idaho at 877. The Court further held that "the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes, administrative rules and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules." *Id.* at 873. Accordingly, as properly recognized by this Court in the *Order on Petition for Judicial Review* ("*Order*"), the Director is bound to apply the proper presumptions, burdens of proof, and evidentiary standards in responding to A&B's water delivery call. *Order* at 27.

The legal requirement that a junior water right holder must establish a defense to a call by "clear and convincing evidence" is not a new concept in Idaho water law. In the *Order on Plaintiffs' Motion for Summary Judgment*[1], Judge R. Barry Wood specifically held that "as soon as the senior establishes his prior appropriation and use, the burden then shifts to the junior who claims the diversion will not injure the senior, to establish that fact first by clear and convincing evidence." *AFRD #2 Summary Judgment Order* at 78-79 (emphasis added).[2] Similarly, the Director cannot assume this burden for the juniors in evaluating material injury to the senior

[1] *AFRD #2 et al. v. IDWR et al.* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2005-600, June 2, 2006) ("*AFRD #2 Summary Judgment Order*").
[2] Although the Ground Water Users appealed Judge Wood's decision, none challenged his holding on the applicable burdens and standards to apply in conjunctive administration.

right and refuse to distribute the decreed quantity in favor of allowing out-of-priority diversions. This Court properly found that such a finding constitutes a "defense" to a call and unlawfully "circumvents the constitutionally inculcated presumptions and burdens of proof." *Order* at 38.

Although the Ground Water Users urge the Court to reverse its decision, they provide no meritorious basis to support their arguments. Instead, both IGWA and Pocatello ask the Court to ignore the Idaho Constitution and well-established precedent in favor of protecting junior priority ground water rights. The Ground Water Users advocate a new rule that forces seniors to carry the burden and prove juniors cause "material injury" to the senior right. They would further authorize the Director to wholly disregard decreed water rights instead burdening the senior to re-prove that its decreed quantity is necessary for beneficial use every time administration is required.

Contrary to these theories, Idaho law does not require A&B to prove injury to its senior water right in administration. As recognized by this Court, A&B is not required to "re-prove" the amount of water that it beneficially uses under its decree every time administration takes place. Although certain "post adjudication" factors may affect the quantity of water delivered in administration, *AFRD#2, supra*, a water right decree constitutes a judicial determination of beneficial use. *See Head v. Merrick*, 69 Idaho 106, 109 (1949) ("Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied"); *see also*, *The Cottonwood Water & Light Co. v. St. Michael's Monastery*, 29 Idaho 761, 769 (1916) ("The defendant and its predecessor were the prior appropriators of said water, hence under the law <u>they are entitled to the full amount appropriated</u>.") (emphasis added).

Provided A&B can put its decreed quantity to beneficial use, it is entitled to use that amount of water. Pursuant to Idaho's constitution and water distribution statutes, A&B also has the right to use that water prior to a junior's use. *AFRD#2, supra.*

To the extent that diversions under junior ground water rights are preventing A&B from obtaining its water, they must be administered unless a valid, constitutional defense can be proven by "clear and convincing evidence". Despite their efforts to redefine the issue before the Court, the Ground Water Users cannot overcome prior judicial decisions confirming the proper presumptions, burdens, and evidentiary standards the Director is bound to apply in water right administration. Since the Court correctly concluded that the Director erred in failing to apply the constitutionally engrained presumptions and burden of proof in this case, there is no basis to reconsider that decision. The Ground Water Users' petition for rehearing should be denied accordingly.

APPLICABLE BURDENS & STANDARDS IN ADMINISTRATION

The Ground Water Users mistakenly assert that the Court's *Order* is "a double-barreled finding at odds with Idaho law." *Pocatello Br.* at 4; *IGWA Br.* at 5 ("The *Order* imposes an incorrect evidentiary standard that contradicts Idaho Supreme Court precedent and undermines the Ground Water Act and CM Rules"). They misquote the Court's *Order* and instead attempt to hide behind misinterpretations of Idaho water law, all in an effort to force senior water right holders like A&B, "to prove injury" before administration of interfering junior rights is allowed. *IGWA Br.* at 8. The concept that a senior must prove "injury" prior to receiving the watermaster's lawful distribution of water within an organized water district flies in the face of Idaho's prior appropriation doctrine. IDAHO CONST. Art. XV, § 3; I.C. §§ 602, 607; CM Rule 20.02. Moreover, water right administration is not like a criminal case where junior ground

water users are "innocent" until proven guilty. To the contrary, Idaho law protects senior water rights first in times of shortage, and juniors carry the burden to prove defenses in order to obtain permission to divert out-of-priority. In order to give "presumptive weight" to a senior's decree, the Director cannot assume the junior's burden by reducing the senior's water right and cloak that finding in a shroud of "agency discretion".

The Ground Water Users ignore well-established Supreme Court precedent and other District Court decisions that confirm the appropriate burdens and standards set forth in this Court's *Order*. Over a century ago, the Idaho Supreme Court held that any attempt by a junior on the same source to use water prior to a senior appropriator must be supported by clear and convincing evidence. *See Moe v. Harger*, 10 Idaho 302 (1904). In that case, plaintiffs argued that diversion and use under their junior rights did not reduce the flow of water to downstream senior appropriators. *See* 10 Idaho at 304-305. The Court held that "***in any given case***" where a junior appropriator seeks to take water before the senior appropriator "clear and convincing evidence" is required. The Court upheld the trial court's injunction[3] in the decree prohibiting the junior's diversion:

> This court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and ***it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable*** as its application and so generally and uniformly applied by the courts.

[3] By enjoining the junior's use, the trial court determined the administration of the water rights at issue in the case as part of the decree. The case did not simply concern the establishment of new water rights as suggested by the Ground Water Users. *See IGWA Br.* at 6; *Pocatello Br.* at 15. The Court commented on the trial court's administrative provisions in the decree: "By the decree the time was fixed from which each appropriator and claimant was entitled to have his right date and the number of inches to which he was entitled. It is the usual and approved practice in this state in all water cases where a decree is entered establishing the rights and priorities of the parties litigation ***to incorporate in the decree an order in the nature of cross-injunctions restraining each and every party thereto from in any wise interfering with the use of water by any party thereto as fixed and established by the decree. That is what was done in this case, and we think it was proper to incorporate such an order in the decree.***" 10 Idaho at 306 (emphasis added).

> . . .
>
> So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. ***The 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.***

Id. at 305-07 (emphasis added).

There is no question, as recognized by the *Moe* Court, that the Idaho Constitution protects senior water rights and that the "first appropriator has the first right". *Id.* Over the century following *Moe*, Idaho courts have adhered to the Court's holding that "in any given case" where a junior appropriator seeks to take water before the senior appropriator "clear and convincing evidence" is required.

In *Josslyn v. Daly*, 15 Idaho 137 (1908), a junior water user asserted that water flowing from a spring, which was allegedly developed when that water user "opened up" the springs, was not tributary to Seaman's Creek at the time of decree and, therefore, was not part of the water supply for the senior water rights on Seaman's Creek. 15 Idaho at 147-48. According to the junior appropriator there was no impact to the senior water rights. The Supreme Court remanded the case, and, citing *Moe, supra*, confirmed "clear and convincing evidence" was required because the junior appropriator sought to take water before the senior appropriator:

> It seems self-evidence that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, ***where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should, as we observed in Moe v. Harger, produce 'clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.'*** The burden is on him to show such facts.

Josslyn, 15 Idaho at 149 (emphasis added).

Following the *Moe* decision, the *Josslyn* Court affirmed the rule that junior appropriators carry the burden when seeking to establish rights and then divert water out-of-priority as against senior rights. The rule applied in *Moe* and *Josslyn* was later followed in *Neil v. Hyde*, 32 Idaho 576, 586 (1920) (on rehearing) and *Jackson v. Cowan*, 33 Idaho 525, 528 (1921), cases where juniors attempted to take water that became tributary underflow and then later reappeared as surface water to supply senior rights. For example, in *Neil*, the Supreme Court held that the burden rested upon junior appropriators to show that both surface water and ground water would not reach a senior's surface water diversion downstream before they would be allowed to divert water out-of-priority:

> The burden rested on the appellants to show that neither the surface nor underflow, if uninterrupted, would reach the point of diversion of respondent, the senior appropriator.

32 Idaho at 586.

In *Jackson* the Court similarly found:

> While there is evidence that the water sinks at times in the bed of the creek some distance above the reservoir, there is evidence that, as is usually the case with mountain streams, it then flows beneath the surface, following the course of the stream and thus reaching the reservoir. The burden of proving that it did not reach the reservoir was upon the appellants . . . and this they fail to do.

33 Idaho at 528.

In addition to the above cases, the Supreme Court again confirmed this foundational principle in the context of competing ground water rights to an artesian basin in *Silkey v. Tiegs*, 54 Idaho 126 (1934).[4] In *Silkey*, the trial court refused to modify a decree restricting the use by junior appropriators since they failed to prove their diversions would not interfere with the senior's right. *See* 54 Idaho at 128. The Supreme Court affirmed, specifically relying upon the holding in *Moe* that protects senior appropriators. *Id.* at 128-29. The Court stated that "[n]o

[4] *See also*, *Silkey v. Tiegs*, 51 Idaho 344 (1931).

engineer enlightens us, and adherence to the rule requiring protection of the prior appropriator, precludes relief to the appellants on the showing presented." *Id.* at 129.

Finally, the Court upheld the standard in *Cantlin v. Carter*, 88 Idaho 179 (1964). There, the plaintiff sought to appropriate water from a source that the senior appropriators contended was fully appropriated. In affirming the denial of the permit to the junior appropriator, the Court cited *Josslyn, supra* and *Moe, supra*, confirming the rule that any attempt by a junior appropriator to divert water on the claim that it will not impact a senior appropriator's diversion, must be supported by clear and convincing evidence. *Cantlin*, 88 Idaho at 186-87. The Court stated that "a subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations." *Id.* As recognized by the above decisions, the rule applies whether it is a new appropriation or in the context of administration of existing rights.

In 2006, the Honorable R. Barry Wood specifically addressed the respective burdens in the context of conjunctive administration in his *AFRD #2 Summary Judgment Order*.[5] Judge Wood examined the facial constitutionality of the CM Rules and provided a comprehensive history of the development of Idaho's prior appropriation doctrine. After citing to *Moe, supra*, *Josslyn, supra* and *Cantlin, supra*, Judge Wood concluded that, "relative to the administration/delivery/curtailment" of water rights, there are "at least three additional components or tents of the prior appropriation doctrine" including the following:

> 2. as soon as the senior establishes his prior appropriation and use, the burden then shifts to the junior who claims the diversion will not injure the senior, ***to establish that fact first by clear and convincing evidence.***

[5] *American Falls Reservoir Dist. #2 et al. v. Idaho Dept. of Water Resources et al.* (Gooding County Dist. Ct. Case No. CV-2005-0600) (June 2, 2006).

AFRD#2 Summary Judgment Order at 78-79 (emphasis added); *id.* at 94 ("Hydraulically connected junior then have the burden of demonstrating by ***a standard of clear and convincing evidence*** that curtailing their rights would not result in a return to the senior making the call") (emphasis added). Importantly, no parties appealed this holding to the Idaho Supreme Court.

On appeal, the *AFRD #2* Court commended Judge Wood's "scholarly" and "exemplary" opinion and, although it reached a different conclusion as to the facial constitutionality of the CMR, the Court "accept[ed] large parts of the district judge's analysis." 143 Idaho at 869. In particular, the Court confirmed that "***Requirements pertaining to the standards of proof and who bears it have been developed over the years.***" *Id.* at 874 (emphasis added). The Court did not find that the district court erred in holding that a "clear and convincing" standard was required in administration. Nor did it hold that the evidentiary standards applicable in ground water and surface water administration differ or that junior ground water rights receive special protection as against seniors. *See IGWA Br.* at 6 (asserting that the standards are "not the same"). In short, the constitutional principles announced in the early cases remain good law and have not been altered by any court since that time.

The requirement for a junior to prove a defense by "clear and convincing evidence" stems from the long-standing recognition that a decree is to be given "presumptive weight" in administration within organized water districts. In *AFRD #2*, the Supreme Court confirmed this when it held that there is a "presumption under Idaho law … that the senior is ***entitled to his decreed water rights***." 143 Idaho at 878 (emphasis added).

This Court thoroughly explained the statutory foundation and rationale for giving "presumptive weight" to a senior's decreed water right. *See Order* at pages 28-30. As this Court recognized, Idaho law requires that a recommendation and subsequent decree reflect the "extent

and nature of each water right," including "the extent of beneficial use and administration of each water right under state law." *Id.* (citing Idaho Code §§ 42-1401B & 42-1410); *see also* Idaho Code § 42-1402 (the Director's recommendation "shall never be in excess of the amount actually used for beneficial purposes"). Importantly, "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." *Id.* at § 42-1420.

> Issues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in Director's recommendation and ultimately litigated in the context of the SRBA proceedings.

Order at 37. Any party to the adjudication may object to the Director's recommendation to challenge, among other things, the conclusions as to "the extent of beneficial use." *Id.* at § 42-1412. In the event the Ground Water Users disagreed with the recommended quantity for A&B's senior water right, the SRBA provided a forum to challenge and prove that A&B could not beneficially use that amount. No such objections were filed, and the Director's recommendation, defining the "nature and extent" of the quantity element, was decreed to A&B in 2003. Ex. 139. Although the Ground Water Users attempt to minimize the importance of a decree, it is clear that Idaho law does not view the SRBA as a simple cataloging exercise. 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. *See Order* at 37 ("The priority date is the essence of a water right in a prior appropriation system.").

"Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.'" *State v. Nelson*, 131 Idaho 12, 16 (1998). As such, the decreed elements of a water right must be recognized and enforced through administration unless

there is "a high decree of certainty supporting the Director's [contrary] determination." *Order* at 35. A decree represents much more than the right to another "lawsuit" every time the watermaster is called to distribute water to the right in administration. *See Almo Water Co. v. Darrington*, 95 Idaho 16, 21 (1972) ("a water right consists of more than the mere right to a lawsuit against an interfering water user.").

The *AFRD #2* Court carefully explained how the presumptive weight of the decree is to be applied in the context of conjunctive administration under the CMR:

> The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. ... While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, ***the burden is <u>not on the senior</u> water rights holder to re-prove an adjudicated right***. The ***<u>presumption under Idaho law</u>*** is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; ***that is presumed by the filing of a petition containing information about the decreed right***. ... Once the initial determination is made that material injury is occurring or will occur, the junior bears the burden of proving that the call would be futile or to challenge, on some other constitutionally permissible way, the senior's call.

143 Idaho at 877-78 (emphasis added).

Relying upon the *AFRD #2* decision, the Honorable John M. Melanson also followed the rule set out in prior cases and rejected the Department's refusal to find injury to certain senior water rights held by Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc.[6] In his *Order on Petitions for Judicial Review*, Judge Melanson held that the Director improperly shifted the burden to the seniors by failing to give proper presumptive weight to their decrees when the Director concluded that certain senior rights were not materially injured because of seasonal fluctuations in spring flows. *Id.* at 17-23.

[6] *Clear Springs Foods, Inc. et. al. v. Tuthill, et al.* (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2008-444 (June 19, 2009).

Judge Melanson further reasoned that the Director erred because "no presumptive weight was accorded the partial decree" and the "senior right holder is put in the position of having to re-prove the historical beneficial use of the right." *Id.* at 24. He held:

> In effect, the lack of data regarding historical conditions and the insufficiency of the evidence regarding conditions at the time of the appropriation was construed against the Spring Users. The Spring User is put in the position of having to prove up the historical use of his water right as opposed to defending against a futile call ***where the senior is accorded the established burdens of proof*** – this in effect became a re-adjudication of the quantity element of the right. … In sum, seasonal variability is relevant to simulating and establishing the effects of a delivery call ***but not as a means for establishing the quantity to which a senior is entitled viz a viz a material injury analysis***. … [T]he determination cannot be made based on a re-quantification of the senior's right, ***rather must be made based on determining the effects of curtailment of junior right holders***.

Id. (emphasis added). The case was remanded to IDWR so that the Director could "apply the concomitant burdens of proof and evidentiary standards."[7] *Id.* Similar to the circumstances in *AFRD #2*, no party appealed the court's decision: 1) remanding the case back to IDWR to apply the appropriate burdens on the question of injury to the more senior rights; and 2) finding the Director's failure to give presumptive weight to the Spring Users' decreed water rights. As such, that decision is binding upon IGWA and the Department.

On rehearing in this case, the Ground Water Users seek to undue more than a century of Idaho water law by arguing that "no Idaho case has held that" clear and convincing evidence is required in the administration of water rights. *Pocatello Br.* at 15. As explained above, this claim is wrong and misinterprets Idaho law.[8] The Ground Water Users' arguments ignore the

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[7] On July 17, 2010 Interim Director Gary Spackman issued a final order on remand finding injury to the more senior rights held by Blue Lakes and Clear Springs. Petitions requesting hearing on the order were filed and the case remains pending before IDWR.

[8] Pocatello cites numerous cases from Idaho, Wyoming and the United States Supreme Court in making its argument that, unless held otherwise by statute or Supreme Court decision, the evidentiary standard in administrative proceedings is a preponderance of the evidence. *Pocatello Br.* at 12-16. As this Court properly recognized, the Supreme Court has affirmed, on numerous occasions, that the standard is clear and convincing evidence that must be proven by junior appropriators. *Moe, supra; Josslyn, supra; AFRD#2, supra.*

constitutional and statutory mandate that "first in time, first in right" and the necessary standards and burdens that flow from that foundational tenet. IDAHO CONST. art. XV § 3; Idaho Code §§ 42-106, 602, 607.

Moreover, the arguments disregard the Supreme Court's *AFRD #2* decision. Contrary to the Ground Water Users' theories, a water right decree stands for more than a just a "paper catalog" of water use reflecting what might be achieved in perfect water conditions. Rather, a decree defines what a senior appropriator is entitled to use in times of shortage as against junior water rights on the same source and provides the foundation for the Director's administrative decisions. *See Head*, 69 Idaho at 109; *Cottonwood Water & Light Co.*, 29 Idaho at 769. The Supreme Court long ago rejected the Ground Water Users' arguments, holding that any attempt by a junior appropriator to take water to which the senior appropriator is entitled must be supported by "clear and convincing evidence". *Moe, supra; Josslyn, supra; ADRD#2, supra.* That burden was properly stated by the Court in this case and there is no basis to reconsider that decision.

In sum, a water right decree represents the result of an administrative and judicial process that (i) requires the Director to issue a recommendation as to the extent of historical beneficial use, (ii) provides an opportunity for other water users to challenge the recommendation; and (iii) culminates in the issuance of a decree that is conclusive as to the extent and nature of the water right for purposes of administration. At that point, the decree is given presumptive weight and any attempt to deliver less water contrary to the elements of the decree, or in response to a defense raised by a junior, must be based on "clear and convincing evidence".

ARGUMENT

The Ground Water Users argue that the Court's *Order* is "at odds with Idaho law," *Pocatello Br.* at 4, and "contradicts Idaho Supreme Court precedent," *IGWA Br.* at 5. They disagree with existing Idaho law and instead seek to establish a regime where a decree only represents a "hollow" maximum diversion rate that must be defended and "re-proven" by the senior appropriator as a condition to administration. They further claim that ground water administration incorporates different standards than those applied in surface water administration, and that the senior carries the burden to "prove" injury. Each of these allegations is wrong. Fortunately, as discussed above, Idaho courts have been consistent in their treatment of the respective presumptions, burdens, and standards to be applied in the administration of any right, regardless of source.

The cases and rules provide certainty to all water users and set the framework for the Director's decisions in conjunctive administration. This Court's *Order* properly follows the well-established precedent and confirms the constitutional protections afforded senior water rights. The Ground Water Users' arguments and petitions for rehearing should be denied accordingly.

I. The Evidentiary Standards and Burdens for Administration of Junior Ground Water Rights are the Same as Those Applied to the Administration of Junior Surface Water Rights.

IGWA claims that the standards applied to ground water administration are different than those used in surface water administration. *IGWA Br.* at 6-9. IGWA asserts that the Court's reliance on prior Supreme Court precedent such as *Moe, supra*, *Josslyn, supra* and *Cantlin, supra* is misplaced because those cases did not address administration. *Id.* IGWA misinterprets the facts, particularly the injunction issued by the trial court in *Moe* that governed administration of

the water rights in that case. *See* 10 Idaho at 306. Moreover, IGWA ignores the Supreme Court's decision in *Silkey v. Tiegs* which also applied the same rule in the context of administration of ground water rights in an artesian basin.[9] *See* 54 Idaho at 129. In addition, although the facts in *Cantlin* concerned the denial of a new water right permit, the Court properly concluded that a "subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations". 88 Idaho at 186.

The same burden applies if the junior seeks to divert water for the first time to establish a water right or if he seeks to divert water in a year of shortage when only senior rights are filled. Indeed, the *Moe* Court specifically held that the burden to prove a defense by "clear and convincing evidence" applied "***in any given case***" where a junior appropriator seeks to take water before the senior appropriator. Accordingly, IGWA's efforts to distinguish those prior cases fail.

Instead of recognizing the prior precedent, IGWA cites a few selected statements from *AFRD #2* and *Jones v. Vanausdeln*, 28 Idaho 743 (1916) to support its claim that ground water and surface water administration require different standards. *IGWA Br.* at 7-8.

Although the *AFRD #2* Court recognized that "the ***issues***" related to surface water administration and the impacts of ground water use on surface water sources are "not the same" in finding the CM Rules to be facially constitutional, 143 Idaho at 877,[10] the Court did not

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[9] The appellant in *Silkey* filed an action to modify the prior decree and change administration of the affected water rights. 54 Idaho at 128. The Court described the administrative provisions of the decree in the earlier case. *Silkey I*, 51 Idaho at 357.

[10] IGWA takes this phrase out of context when it attempts to construe it as recognition by the Court that the evidentiary standards for ground water and surface water administration are different. Indeed, after stating that the "issues presented are simply not the same," the Court continued:

> When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower.

143 Idaho at 877 (citation omitted).

disturb the established burdens of proof and evidentiary standards for administration. The Court specifically noted that the CM Rules as written, "do not unconstitutionally force a senior water rights holder to re-adjudicate a right, nor do the Rules fail to give adequate consideration to a partial decree." *Id.* at 878. The Court further stated that "[i]n an 'as applied' challenge, it would be possible to analyze on a fully developed factual record whether the Director has improperly applied the Rules to place too great a burden on the senior water rights holder." The Court's warning of placing "too great a burden on the senior" is exactly what happened in this case concerning A&B's decreed senior water right.

IGWA relies on *Jones, supra* and asserts that it is a case that "places the burden on the senior to prove injury." *IGWA Br.* at 8. IGWA argues that *Jones* confirms that the evidentiary standards are different for ground water rights – particularly because the "Court's holdings in *Moe* and *Josslyn* did not prevent it from placing the burden on the senior to prove injury." *Id.* This conclusion is wrong and misinterprets the facts in *Jones*.

Unlike 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" from their wells. 28 Idaho 743. The trial court held that the senior appropriator had not met its burden in requesting a permanent injunction because "the evidence does not show any connection between the wells of the plaintiffs and the wells of the defendants, or that they take water from the same or common source." 28 Idaho at 748. The Supreme Court affirmed and noted "[w]e think this matter is entirely disposed of by the court finding unqualifiedly that ***the evidence does not show any connection whatever*** between the two groups of wells. ***The ultimate fact in issue was whether the respondents' wells drew their supply from the same underground flow as appellants' wells***, thereby causing a

dimunition in flow of the appellants' wells." *Id.* at 751 (emphasis added). Since the water rights did not divert from the same source the Court refused the senior's requested injunction.

Unlike the facts in *Jones*, there was no question of hydrologic connection in *Moe* and *Josslyn*, and *Silkey*. Accordingly, the *Jones* case does not apply where appropriators divert from a common source. Therefore, the *Jones* facts are distinguishable from the facts in this case where the Ground Water Users and A&B divert water from the same aquifer or "common ground water supply". *See* CM Rule 50; *SRBA Basin-Wide 5* ("connected sources" general provision)[11]; *see generally*, Director's February 18, 2002 *Orders Creating Water Districts 120 and 130*. Since it is undisputed that the Ground Water Users are pumping water from the same aquifer that supplies water to A&B's senior water right, the rule set forth in *Moe* applies.

Contrary to IGWA's claim, the case did not express any new or unique rule of law applicable only to ground water administration. Indeed, the rule set forth in *Moe* was later applied in the context of ground water administration in *Silkey v. Tiegs*, 54 Idaho 126 (1934). In *Silkey*, the trial court refused to modify a decree restricting the use by junior appropriators since they failed to prove their diversions would not interfere with the senior's right. 54 Idaho at 128. The Supreme Court affirmed, specifically relying upon the holding in *Moe* that protects senior appropriators. *Id.* at 128-29. The Court stated that "[n]o engineer enlightens us, and adherence to the rule requiring protection of the prior appropriator, precludes relief to the appellants on the showing presented." *Id.* Accordingly, contrary to IGWA's argument, the Supreme Court has applied the "clear and convincing evidence" standard in the context of ground water administration, and similar to the facts in *Moe* and *Josslyn*, the rule was applied to protect the senior appropriator.

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[11] *See* SRBA Court's connected sources general provision and *Memorandum Decision and Order of Partial Decree* (Subcase No. 91-00005; Basin-Wide Issue No. 5; February 27, 2002) available on the Court's website at: http://www.srba.state.id.us/FORMS/connect.PDF

Pocatello asserts that the senior appropriator must prove material injury and that this Court's *Order* "effectively announces that the mere allegation by a senior of injury is the only necessary proof of injury." *Pocatello Br.* at 10. This argument is also misplaced. Nowhere does the Court rule that the mere "allegation" of injury constitutes material injury. Pocatello fails to cite to any such statement in the *Order*. Indeed, CM Rules 40 and 42 and *AFRD#2*'s discussion of "post-adjudication" factors, 143 Idaho at 878, refutes this assertion and provides the relevant inquiry undertaken by the Director in responding to a water delivery call within an organized water district. How the Director performs that analysis by applying the proper burdens and standards is the real inquiry. Since the Director failed to apply the appropriate burdens and standards in the administration of A&B's decreed senior water right this Court rightfully remanded the matter back to IDWR to correct that error.

Moreover, A&B did not "merely" allege injury, as Pocatello asserts. Rather, A&B showed a declining water supply, R. 12-14; R. 3087, declining ground water levels over time, R. 3087, abandoned wells, R. 835 & 3090, an inability to divert its decreed water right, R. 13, including testimony from its landowners that they need and can beneficially use the decreed water right (0.88 miner's inches per acre for irrigation purposes), Tr. Vol. IV, pp. 815-16 (Mr. Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops); Tr. Vol. V, pp. 888-89 & 893, lns. 2-13 (Mr. Adamms testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-2080); Tr. Vol. V, p. 956; lns. 9-14, p. 957, lns. 5-13; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Mr. Kostka testifying that he could use the decreed rate of delivery per acre). *See also* R. 834-36.

Contrary to Pocatello's misinterpretation of Idaho law, administration within water districts is not about a senior appropriator proving a "claim" in the context of civil litigation. Such a view of administration improperly places the presumptions in favor of the junior appropriator and the burden to prove otherwise on the senior. Rather, lawful administration centers on proper distribution of water in times of shortage. By law, the watermaster and Director must distribute water to senior rights "first". Idaho Code §§ 42-106, 602, 607. Whether the senior right is a surface or ground water right, the burdens and standards are the same, a junior must prove any defense to administration by "clear and convincing evidence".

II. The Quantity Element of a Decreed Water Right is Not a "Hollow" Maximum that is Subject to Re-Adjudication and Re-Consideration as a Prerequisite to Administration.

IGWA spends a substantial portion of its brief attempting to justify its failure to address concerns over A&B's decreed diversion rate in the SRBA. *IGWA Br.* at 9-18. They assert that the Director merely "rubber-stamps" prior licenses in his recommendations to the SRBA Court and that, as such, "it would be futile for water users to contest SRBA claims." *Id.*[12] IGWA would have this Court believe that the SRBA Court does not provide an adequate forum to address their concerns over the historical beneficial use of a water right and that they must wait until administration occurs to challenge the recommendation and decree.

IGWA's assertions, however, do not comport with the law. Although, generally, a party may not "challenge elements or conditions decided in a license" in the SRBA, *Order on Motion to Dismiss Objections & Request for Attorney Fees*, Subcase Nos. 37-494, *et al* (The Valley

[12] IGWA improperly attempts to transmute factual testimony from other administrative and SRBA cases as though it applies to A&B's water right, or how A&B's water right was recommended and decreed by the SRBA Court. *See* Appendices A, B to *IGWA Br.* The evidence provided concerns other water rights in separate proceedings and is not part of the record in this case. The Court should disregard the information accordingly.

Club) (Oct. 10, 2008) (the "*Valley Club Order*"),[13] "a party may raise issues based on facts which occur after the administrative decision if they impact elements of a water right," *id.* at 6. *Cf. State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 741 (1997) (Idaho has a "longstanding" recognition that "decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water rights has been forfeited").

Since (i) a recommendation by the Director reflects "the extent of beneficial use" of the water rights, Idaho Code § 42-1401B, and (ii) once decreed, the water right is "conclusive" as to the nature and extent of that water right, *id.* § 42-1420, it is imperative that any party seeking to challenge the extent of beneficial use raise such issues before the SRBA Court. Yet, none of Ground Water Users raised such challenges or filed objections to A&B's water right, even though A&B had filed its delivery call back in 1994. Consequently, the right was decreed in 2003. This is especially important here, where the Ground Water Users collaterally attack the decree now and claim that A&B "has never" delivered "for even one day" the decreed diversion rate. *IGWA Br* at 21; *Pocatello Br.* at 17. IGWA even goes so far to offer the former Director's testimony from a wholly separate administrative proceeding to somehow imply that the evidence applies to A&B's decreed water right in this case.[14] *See IGWA Br.* at 11-14.

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[13] *See also, e.g., Memorandum Decision & Order on Motions for Summary Judgment*, (Subcase Nos. 63-2529, *et al.*) (June 11, 2009) (attempt to challenge licensed diversion volume "constitutes an impermissible collateral attack on the prior administrative proceedings"); *Memorandum Decision and Order on Challenge; Order on State's Motion to Dismiss Claimant's Notice of Challenge* (Subcase No. 36-8099) (2000) (IDWR license becomes final when the time to appeal it has expired); *Response to United States Motion for Status Conference*, (Subcase No. 03-10022) (2000) (scope of what can be litigated in SRBA is limited and does not included collateral attacks on previously perfected water rights); *Memorandum Decisions & Order On Challenge, Order On State of Idaho's Motion to Dismiss Claimants Notice of Challenge*, (Subcase No. 36-8099) (2000) (collateral attack on IDWR license is not permissible when a party has failed to exhaust administrative remedies); *Order on Challenge of "Facility Volume" Issue & Additional Evidence Issues*, (Subcase Nos. 37-2708, *et al.*) (1999) (the SRBA Court disfavors collateral attacks on licenses).

[14] In addition, A&B's water right was subject to a transfer proceeding in 2006. Ex. 157. The final order approving the transfer confirmed, again, A&B's right to use its decreed diversion rate. None of the Ground Water Users participated in or challenged A&B's diversion rate based on their new theory that A&B had never diverted the

In other words, the Ground Water Users now dispute "the extent of beneficial use" of A&B's water right that they failed to object to before the SRBA Court. The Ground Water users' failure to challenge the recommended and subsequently decreed diversion rate for A&B's senior water right does not justify an attempt to abolish the presumptive weight that must be given to the decree for purposes of administration.

Giving presumptive weight to a decree does not equate to a presumption of material injury. This Court's *Order* confirmed as much when it relied on the *AFRD #2* Court's conclusion that "post-adjudication" factors may be "relevant to the determination of how much water is actually needed." *Order* at 37. The problem arises, however, when, as here, the Director applies a lesser standard of proof in determining that the decreed diversion rate is not necessary for purposes of administration. A decree must be given presumptive weight and anything less than "clear and convincing evidence" turns an administrative proceeding into a re-adjudication that places an impermissible burden upon the senior appropriator. 143 Idaho at 877-78; *Order* at 38.

Pocatello would have the Court adopt a "maximum" versus "minimum" quantity needed for beneficial use standard for administration. *Pocatello Br.* at 5-6. Pocatello claims that the Director can only deliver the bare minimum quantity of water "necessary to satisfy beneficial uses" regardless of the senior appropriator's ability to beneficially use the decreed amount. *Id.* Under Pocatello's theory no senior would ever be able to have its decreed quantity delivered as long as the senior could "get by" on less water. Idaho water law does not dictate that a watermaster only deliver a "minimum" quantity under a water right. *See Caldwell v. Twin Falls*

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decreed diversion rate even though the statute specifically provided an opportunity to protest the transfer. Idaho Code § 42-222.

Salmon River Land & Water Co., 225 F. 584, 596 (D. Idaho 1915) ("Economy of use is not synonymous with minimum use."); *see also*, *Cottonwood Light & Water Co.*, 29 Idaho at 769.

Moreover, Pocatello makes no mention that junior appropriators causing material injury to senior rights are held to the same standard of water use.[15] Material injury is defined as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." Rule 10.14. The CM Rules recognize material injury – and demand curtailment or mitigation – whenever there is an impact on the "exercise of a ***water right***." *Id.* Yet, under the Ground Water Users' theory, a senior appropriator is punished for seeking administration so long as he can use less water in the junior's opinion. The law does not demand such a restriction. If a water user can beneficially use its decreed diversion rate (i.e., not "waste" the water), as is the case with A&B, *infra* at Part I, then the senior appropriator is entitled to that diversion rate in administration, *AFRD#2, supra.*[16] The Court properly recognized this principle and the Ground Water Users have provided no legal justification to change that decision now.

Finally, although a decreed diversion rate represents the maximum quantity of water that can be put to beneficial use, that maximum quantity is not a "hollow" number that can only be achieved in perfect water conditions. Rather, it is based on a judicial determination of the "extent of beneficial use" of the water right that is protected against interfering juniors in administration. I.C. § 42-1401B.[17] The law is clear. If a senior appropriator has a need for the decreed quantity of water, that quantity is protected and hydraulically connected junior water

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[15] While the Ground Water Users demand that A&B be limited to a lesser amount of water "necessary to satisfy beneficial use", *Pocatello Br.* at 5; *IGWA Br.* at 21, they have never alleged that junior appropriators must be held to the same standard – regardless of their impacts on the common water supply.

[16] Indeed, the factors that the Director can consider in determining material injury include a consideration of the "amount of water being diverted and used compared to the water rights." CMR 42.01.e.

[17] Accordingly, Pocatello is wrong when it asserts that "an adjudication determines the amount of water an appropriator *could use* to meet his beneficial uses and a volume or flow rate that an appropriator *may* legally divert when water is available." *Pocatello Br.* at 7-8 (italics in original). To the contrary, a decree is a judicial determination of the "extent of beneficial use" under the water right. Idaho Code § 42-1401B.

rights, regardless if they divert from a surface or ground water source, must either be curtailed or allowed to divert through an approved CM Rule 43 mitigation plan.

III. The Director's Obligation to Determine Material Injury under the CMR Does Not Affect the Presumptive Weight That Must be Given to the Decree or the Evidentiary Standards Applicable to Administration of Junior Priority Ground Water Rights.

Under CM Rule 40, the Director must respond to a delivery call and determine whether hydraulically connected junior ground water rights injure senior rights within organized water districts. *See* Rules 40 & 42. If the Director determines that injury is occurring, the watermaster is required to either curtail the out-of-priority diversions or allow the diversions pursuant to an approved mitigation plan. CM Rule 40.01.a, b. In determining whether a senior is injured, the Director must apply the proper presumptions and evidentiary standards developed under Idaho law. *See* CM Rule 20.02 ("These rules acknowledge all elements of the prior appropriation doctrine established by Idaho law."); CM Rule 10.12 ("Idaho law" defined as "the constitution, statutes, administrative rules and case law of Idaho."). The *AFRD #2* Court specifically found that the CM Rules incorporate the presumptions and evidentiary standards that have been developed under Idaho water law:

> Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, ***those are a part of the CM Rules. . . . Requirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules***. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call.

143 Idaho at 873-74 (emphasis added).

Contrary to the Ground Water Users' argument, Idaho law provides a decreed senior water right with "presumptive weight" and the burden falls squarely on hydraulically connected junior rights to prove defenses to a delivery call by "clear and convincing evidence". *See infra*,

at 7-12. Seniors do not have to "prove" that juniors are materially injuring their water rights. *See AFRD #2*, 143 Idaho at 873 ("Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume that the Director will act in accordance with Idaho law, as he is directed to do under Rule 20.02").

The *AFRD#2* Court recognized that there may be some "post-adjudication" considerations that bear on administration. 143 Idaho at 878. Furthermore, the *AFRD#2* Court confirmed that the Director has some discretion in responding to a delivery call. *Id.* However, that discretion is not unfettered. Any material injury analysis must be tempered by the presumptive weight of the decree and the "clear and convincing evidence" standard. *See AFRD#2, supra; Moe, supra; Josslyn, supra.* Yet, the Ground Water Users claim that the application of a "clear and convincing evidence" standard effectively creates a presumption of material injury in all cases. *Pocatello Br.* at 6. Not true.

CM Rule 42 provides a list of factors the Director may consider in determining material injury. They include the "post-adjudication" factors referred to by the *AFRD#2* Court, such as reasonableness of the diversion, amount of water available from the source and the effort/expense required to obtain the water from the source. The Ground Water Users allege that the ability of the Director to consider these factors means that administration is not a re-adjudication of the decreed water right. *IGWA Br.* at 18-20; *Pocatello Br.* at 5-7. The Ground Water Users miss the point on how those factors are applied in the context of the overriding presumptions and burdens imposed by Idaho law.

The question here is *not* whether the Director may consider "post-adjudication" factors in determining whether or not there is material injury to the senior right. The question is *not*

whether the Director can determine that a senior appropriator should receive less than the decreed quantity of water in administration. Rather, the question is the extent of the presumptive weight that is afforded a water right decree and who carries the burden to prove that the decreed quantity cannot be beneficially used. 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. The law prohibits such a result. *AFRD#2, supra; Moe, supra; Josslyn, supra; Silkey, supra.*

Pocatello claims that "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" consider the post-adjudication factors alluded to in *AFRD#2* as well as the material injury factors identified in CMR 42. *Pocatello Br.* at 9. In particular, Pocatello alleges that the existence of A&B's enlargement rights creates confusion in relation to the standards confirmed in the *Order*. Despite these arguments, the Court was clear as to how the enlargement water rights and acres are to be considered. *Order* at 41. In addition, on page 35 of the *Order*, the Court carefully addressed how the Director could consider a claim that the senior appropriator "can satisfy the decreed purpose of use on less than the decreed quantity reflected." However, the associated burdens and standards are clear and must be properly applied, *AFRD#2, supra; Josslyn, supra; Moe, supra.* Any determination that less than the decreed quantity of water is required by the senior appropriator must be supported by clear and convincing evidence. *See Order* at 33-35. The existence of a separate enlargement water right on the project does not affect the respective burdens and standards the Director must apply.

Pocatello next cites to the District Court's decision in *A&B Irrigation Dist. et al. v. Spackman*[18] and asserts that this Court's *Order* is "in direct conflict with" that decision. *Pocatello Br.* at 9. To the contrary, similar to Judge Wood's prior decision and the Supreme Court's decision in *AFRD #2*, Judge Melanson recently confirmed the applicable standards in water right administration in the context of the Surface Water Coalition delivery call. On petitions for rehearing filed by IGWA and Pocatello in that case, Judge Melanson held the following:

> An in-depth analysis addressing the Director's ability to make the determination, in the context of a delivery call proceeding, that the quantity decreed in the senior's water right exceeds the quantity being put to beneficial use by the senior user at the time of the delivery was recently set forth in a ***Memorandum Decision and Order on Petition for Judicial Review*** issued by Judge Wildman in Minidoka County Case No. CV 2009-000647 on May 4, 2010 ("***Memorandum Decision***"). In that case, the Court held that, in order to give the proper presumptive weight to a decree, any finding by the Director in the context of a delivery call proceeding that the quantity exceeds the amount being put to beneficial use by the senior user must be supported by clear and convincing evidence. Rather than repeat the analysis of this issue, this *Order* expressly incorporates herein by reference the ***Memorandum Decision's*** analysis, located on pages 24-38.

Order on Petitions for Rehearing at 8 (emphasis in original). *See* Attachment A.

The above decision agrees with this Court's analysis in this case and is consistent with prior decisions issued by Judge Melanson relating to delivery calls filed by senior water right holders Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. *See Order on Petitions for Judicial Review.*[19] As set forth in the decision involving the Spring Users' calls, Judge Melanson ruled the Director erred in analyzing material injury to the senior water rights held by Blue Lakes (1971) and Clear Springs (1955) because no "presumptive weight" was given to the seniors' decrees.

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[18] Gooding County Dist. Ct., Fifth Jud. Dist., Case No. CV-2008-551, July 24, 2009.
[19] Gooding County Dist. Ct., Fifth. Jud. Dist., Case No. CV-2008-444, June 19, 2009.

Contrary to the Ground Water Users' claims, this Court's decision is entirely consistent with the prior rulings issued by Judge Melanson and complies with the standards set forth by the Idaho Supreme Court.[20]

IV. Arguments about Evidence Reviewed under the Preponderance of the Evidence Standard are Not Relevant.

The Ground Water Users each conclude their briefing by arguing that under the preponderance of the evidence standard, there is no injury to A&B's senior water right. *IGWA Br.* at 20; *Pocatello Br.* at 16. IGWA analogizes water right administration decisions to any other "agency decision" resulting from an administrative hearing. *IGWA Br.* at 19. Pocatello also argues that the Director's injury determination is the same as any other administrative adjudication and that the petitioner carries the burden to prove material injury by a "preponderance of the evidence" standard. *Pocatello Br.* at 14-15. Ignoring Idaho law and prior decisions on the issue of the respective burdens, presumptions, and standards in water right administration, including *AFRD #2*, the Ground Water Users argue no such standard has been expressed by the legislature or Idaho Supreme Court.

Contrary to these arguments, administration of rights by watermasters within organized water districts does not follow the same process and does not apply the same burdens as any other case or hearing under Idaho's Administrative Procedures Act, I.C. § 67-5201 *et seq.*

First, the CMR differentiate the type of proceeding for administration depending upon the location of the affected water rights. Under Rule 30, for areas outside of organized water

[20] While Pocatello disagrees with the Court's analysis and the standards set forth under Idaho law, it has since attempted to improperly "appeal" this issue through a separate proceeding currently before the Idaho Supreme Court. *See Pocatello's Petition to Appear as Amicus Curiae* (Docket No. 37308-2010); Attachment B. Although the separate appeal has been pending before the Supreme Court since January 2010, Pocatello only recently filed a petition to appear as amicus curiae. Pocatello singled out this Court's May 4, 2010 *Order* as a basis to appear in the appeal and wrongly claimed that "issues" decided by this Court "address the same issues of law as are present in the pending appeal before the [Supreme] Court". *Pocatello Petition* at 6-7. Rather than follow the procedural rules for any appeal in this case, Pocatello has instead attempted an "end around" this Court in an effort to have the Supreme Court address its arguments outside the context of an appeal of this Court's decision.

districts, the senior water right holder is required to file a "petition" and the Director must consider the matter as a "contested case" under IDWR's rules of procedure. CM Rule 30.01, 02. This type of proceeding is analogous to the administrative hearings referenced by IGWA and Pocatello.[21] Within ground water management areas covered by Rule 41, the senior water right holder is similarly required to submit available information and the Director is required to hold a "fact-finding" hearing on the state of the water supply and existing diversions. CM Rule 40.01.

Unlike the procedures set forth in Rules 30 and 41, however, the administrative process within organized water districts differs under Rule 40. The senior water right holder is not required to prove "material injury" through an administrative hearing. Instead, after a call is filed the Director is required to respond and determine material injury consistent with Idaho law, including an analysis of the Rule 42 factors. The Director must apply the proper burdens and evidentiary standards in making his determination. There is no process that requires the senior water right holder to prove "material injury" by a "preponderance of the evidence" after an administrative hearing before IDWR. *See AFRD #2*, 143 Idaho at 873 ("Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding.") (Court specifically referencing CM Rule 40). Just the opposite, the constitution protects senior water rights from injury caused by juniors, and Idaho law places the burden upon juniors to prove a defense to a call. Accordingly, Idaho law does identify a standard and burden of proof to apply in administration, and the cases cited by the Ground Water Users are inapplicable.

Not satisfied with the standard under Idaho law, IGWA and Pocatello go a step further in their petitions and ask the Court to step in and weigh the evidence before IDWR to find "no

[21] A&B disputes whether this type of proceeding would pass constitutional muster if the Director forced the senior water right holder to "prove" material injury and carry the burdens that fall upon junior water right holders in Idaho water law. However, this type of proceeding is inapplicable to the facts in this case where all ground water rights divert from a common water source (ESPA) within organized water districts. Therefore, an "as applied" challenge to a Rule 30 proceeding is not before the Court on any constitutional challenge.

injury" to A&B's senior water right. *IGWA Br.* at 20-21; *Pocatello Br.* at 16-17. Despite their arguments, this Court identified the correct standard to apply on judicial review, which does not include presiding as a trier of fact. *Order* at 10. Since the Court properly remanded the case back to IDWR to apply the proper burdens and standards set forth under Idaho law, the Ground Water Users' arguments about what the evidence in the record shows are irrelevant and should be ignored.

In summary, Idaho law provides the appropriate standards and burdens for water right administration within organized water districts. The Idaho Constitution protects decreed senior water rights and places the burden squarely upon juniors to prove defenses to a water right delivery call in times of shortage.

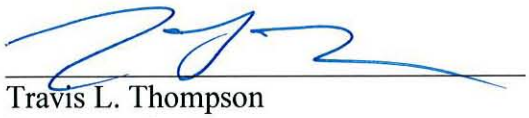
CONCLUSION

A water right decree is more than just a "suggestion" to the Director. A water right decree is more than just a "maximum" to only be enjoyed in times of ample water supply. It is a binding judicial decision confirming the amount of water that can be beneficially used by a senior in administration as against junior water rights. The Director must give a decreed water right "presumptive weight" in analyzing injury caused by out-of-priority junior diversions. Idaho law further requires that any attempt to restrict the use of water by a senior, through a material determination, or by a defense offered by a junior user, must be proven by "clear and convincing evidence".

This standard has been in place for well over a century in Idaho and has been confirmed by multiple district judges (Hon. R. Barry Wood, Hon John M. Melanson) as well as the Idaho Supreme Court. This Court properly applied that precedent in this case and should deny the Ground Water Users' petitions for rehearing.

DATED this 25th day of August, 2010.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of August, 2010, I served true and correct copies of the **PETITIONER'S RESPONSE TO IGWA'S & POCATELLO'S OPENING BRIEFS ON REHEARING** upon the following by the method indicated:

Deputy Clerk Minidoka County District Court 715 G Street P.O. Box 368 Rupert, Idaho 83350 Fax: (208) 436-5272	____ U.S. Mail, Postage Prepaid ✓ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Hon. Eric J. Wildman (courtesy copy) SRBA District Court 253 3rd Avenue N. P.O. Box 2707 Twin Falls, ID 83303-2707	____ U.S. Mail, Postage Prepaid ✓ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick 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	✓ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ✓ Email

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Travis L. Thompson

Attachment
A

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BY: R. Tanner
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, UNITED STATES OF AMERICA BUREAU OF RECLAMATION, Petitioners, vs. IDAHO DAIRYMEN'S ASSOCIATION, INC., Cross-Petitioner, vs. GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources,[1] and THE DEPARTMENT OF WATER RESOURCES, Respondents. IN THE MATTER OF DISTRIBUTION	Case No. 2008-000551 ORDER ON PETITIONS FOR REHEARING

[1] Director David R. Tuthill retired as Director of Idaho Department of Water Resources effective June 30, 2009. Gary Spackman was appointed as Interim Director, I.R.C.P. 25 (d) and (e).

OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

Appearances:

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John C. Cruden, Acting Assistant Attorney General, and David Gehlert, of the United States Department of Justice, Denver, Colorado, attorneys for the United States Bureau of Reclamation.

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I.

PROCEDURAL BACKGROUND AND FACTS

This case is an appeal from an administrative decision of the Director of the Idaho Department of Water Resources ("Director," "IDWR," or "Department") issued in response to a delivery call filed by the Petitioner Surface Water Coalition ("SWC") on January 14, 2005. This Court issued its ***Order on Petition for Judicial Review*** in this matter on July 24, 2009 ("July 24, 2009 ***Order***"). In the ***Order***, this Court held, among other things, that the Director failed to apply new methodologies for determining material injury to reasonable in-season demand and reasonable carryover, that the Director exceeded authority by failing to follow procedural steps for mitigation plans as set forth in the Rules for Conjunctive Management ("CMR"), and that the Director exceeded authority by determining that full headgate delivery for Twin Falls Canal Company should be calculated at 5/8 of an inch per acre. In the ***Order***, this Court remanded this matter to the Director so that he may determine the methodology for reasonable in-season demand and carryover.

On August 13, 2009, the Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and Magic Valley Ground Water District (collectively "Ground Water Users") timely filed a *Petition for Rehearing*. On August 14, 2009, the City of Pocatello also timely filed a *Petition for Rehearing*.

The facts and procedural history of this case are explained in detail in the Court's July 24, 2009 ***Order***. The nature of the case, course of proceedings, and relevant facts are therefore incorporated herein by reference.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held February 22, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter was initially deemed fully submitted for decision on the next business day, or February 23, 2010.

However, pursuant to I.A.R. 13(b)(14), this Court issued an ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** in this matter on March 4, 2010. In the ***Order***, this Court ordered a stay of the decision on rehearing until the Director issued a final order determining the methodology for determining material injury to reasonable in-season demand and reasonable carryover, and the time period for filing motions for reconsideration and petitions for judicial review of the order on remand had expired.

On June 23, 2010, the Director issued a *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("*Methodology Order*"). On June 24, 2010, the Director issued a *Final Order Regarding April 2010 Forecast Supply Methodology Steps 3 & 4 and Order on Reconsideration* ("*As-Applied Order*"). Parties to this matter have filed petitions for judicial review of these two orders. As such, this Court lifted the stay of the issuance of this ***Order on Petitions for Rehearing*** on August 6, 2010. Therefore, the matter is deemed fully submitted for decision on the next business day, or August 9, 2010.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code §42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code §67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code §67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code §67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code §67-5279(4); *Barron v. IDWR,* 135 Idaho 414, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[2] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section §67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.,* 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

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[2] Substantial does not mean that the evidence was uncontradicted. 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. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.,* 125 Idaho 473, 478, 849 P.2d 934,939 (1993).

IV.
ISSUES PRESENTED

A. Issues Raised by the Ground Water Users

The Ground Water Users raise a number of issues on rehearing. The Court characterizes those issues as follows:

1. Whether the Court should clarify that the Director must decide the issue on the methodology for determining material injury and reasonable carryover based exclusively upon facts and evidence contained in the current record without holding any additional hearings on this issue?

2. Whether the Court should clarify that the Director has the authority to determine that in times of shortage Twin Falls Canal Company may not be entitled to its full recommended amount?

3. Whether due process allows for junior groundwater users to be physically curtailed while the hearing process is proceeding under a proposed mitigation plan and before a final order has been entered?

B. Issues Raised by the City of Pocatello

1. Whether the Court should clarify that any remaining hearings on mitigation plans presented by the Ground Water Users should not revisit the determination of injury made by Hearing Officer Schroeder in 2008?

V.
ANALYSIS AND DECISION

A. Hearing Prior to the Director's Methodology Decision

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by issuing two *Final Orders* in response to the Hearing Officer's *Recommended Order*. The Hearing Officer found that adjustments should be made to the methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director did not make such adjustments in the *Final Order* of September 5, 2008. Rather, the Director issued a separate *Order Regarding Protocol for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* on June 30, 2009, well after the proceedings on this petition for judicial review had commenced. Therefore, this Court remanded this matter to the Director to issue a final methodology order.

In their petition for rehearing, the Ground Water Users urged this Court to clarify whether the Director may hold additional hearings prior to the issuance of a final methodology order on remand. This Court did not contemplate that the Director would take additional evidence prior to issuing the *Methodology Order* on remand. Further, the Director issued the *Methodology Order* without conducting a hearing. The Director properly relied upon the facts contained in the record in order to formulate the methodology for determining reasonable in-season demand and reasonable carryover. As such, this issue has been resolved by the proceedings on remand.

B. Director's Authority to Determine Beneficial Use of Recommended Right in the Context of a Delivery Call Proceeding

The Ground Water Users urge this Court to clarify its earlier holding that the Director abused his authority in determining that full headgate delivery for Twin Falls Canal Company ("TFCC") should be calculated at 5/8 of an inch, instead of 3/4 of an inch per acre. As a result, this Court will take this opportunity to clarify its conclusion that the Director abused his authority in this regard.

An in-depth analysis addressing the Director's ability to make the determination, in the context of a delivery call proceeding, that the quantity decreed in the senior user's water right exceeds that the quantity being put to beneficial use by the senior user at the time of the delivery was recently set forth in a ***Memorandum Decision and Order on***

Petition For Judicial Review issued by Judge Wildman in Minidoka County Case No. CV 2009-000647 on May 4, 2010 ("***Memorandum Decision***"). In that case, the Court held that, in order to give the proper presumptive weight to a decree, any finding by the Director in the context of a delivery call proceeding that the quantity decreed exceeds the amount being put to beneficial use by the senior user must be supported by clear and convincing evidence. Rather than repeat the analysis of this issue, this *Order* expressly incorporates herein by reference the ***Memorandum's Decision's*** analysis, located on pages 24-38.

In this case, this Court held in its July 24, 2009 ***Order*** that the Director exceeded his authority in determining that full headgate delivery for TFCC should be calculated at 5/8 of an inch instead of 3/4 of an inch per acre. Of significance to this Court's decision was that TFCC's water right was recommended by the Director in the SRBA with a quantity element based on 3/4 inch per acre. The Ground Water Users objected to the recommendation, asserting that the quantity should be based on 5/8 inch per acre. While the objection was still pending, the SRBA District Court ordered interim administration for the basin, which included TFCC's water right.[3] However, in the delivery call proceeding, the Director concluded that TFCC had failed to establish that it was entitled to the 3/4 inch per acre headgate delivery (the quantity recommended by the Director in the SRBA) because conflicting evidence demonstrated that TFCC could only put 5/8 of an inch per acre to beneficial use. The Director exceeded his authority in this respect because he did not apply the proper evidentiary standard or burdens of proof when determining that TFCC was entitled to an amount of water less than what was recommended in the SRBA.

In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 873, 154 P.3d 433, 444 (2007) ("*AFRD #2*"), the Idaho Supreme Court held that the CMR incorporate

[3] Idaho Code Section 42-1417 provides for interim administration based on a director's recommendation. The concern expressed in the prior decision stems from the Court ordering interim administration based on a Director's Report, as opposed to a partial decree, where there are pending objections to the Director's recommendation. As a result, the parties litigate substantive elements (such as quantity) in the administration proceedings as opposed to in the SRBA. On rehearing, the Court acknowledges that, for purposes of interim administration, the recommendation should be treated the same as a partial decree. Accordingly, once interim administration is ordered, the same principles that apply to responding to a delivery call made by a holder of a decreed right apply equally to a delivery call made by the holder of a recommended right. Therefore, a discussion of those principles is necessary.

the proper presumptions, burdens of proof, evidentiary standards, and time parameters of the prior appropriation doctrine as established by Idaho law. The Court directed that the CMR could not "be read as containing a burden-shifting provision to make the petitioner reprove or re-adjudicate the right which he already has." *Id.* at 877–78, 154 P.3d at 448–49. It further directed that "the presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 878, 154 P.3d at 449.

The Ground Water Users are correct that a decreed or recommended amount is not conclusive evidence of the quantity of water that the senior is putting to beneficial use at the time of the delivery call. *See e.g. State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997) (providing that, in the context of the SRBA, the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced, based on evidence that the water right has been forfeited). This Court recognizes that there may be instances where a senior is not putting the full recommended or decreed quantity to beneficial use at the time of the delivery call. In such instances, the Director has the ability under the CMR (particularly CMR 42), to examine a number of factors to determine whether the delivery of the full recommended or decreed quantity of water to the senior user would result in the failure of the senior to put the full recommended or decreed quantity to beneficial use. Yet, in each of these instances, pursuant to the well-established burdens of proof and evidentiary standards, the Director shall not require the senior to re-prove his right. *AFRD #2*, 143 Idaho at 877–78, 154 P.3d at 448–49. As explained by Judge Wildman in the ***Memorandum Decision***, if the Director determines in the context of a delivery call proceeding that a decreed (or recommended) amount exceeds the amount being put to beneficial use by the senior at the time of the delivery call, that decision must be made based upon a standard of clear and convincing evidence.[4] *See* ***Memorandum Decision***,

[4] Otherwise, the risk of underestimating the quantity required by the senior, if less than the decreed or recommended quantity, impermissibly rests with the senior. For purposes of applying the respective burdens and presumptions, this Court has difficulty distinguishing between a circumstance where a senior's water right is permanently reduced, based on a determination of partial forfeiture as a result of waste or non-use, or temporarily reduced within the confines of an irrigation season incident to a delivery call based on essentially the same reasons. The property interest in a water right is more than what is simply reflected

p. 35; *Cantlin v. Carter* 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904).

In this case, the Director, in the context of the delivery call proceeding, concluded, based on conflicting evidence, that TFCC was entitled to less than the recommended quantity. No reference was made, however, to the evidentiary standard applied. The Director erred by failing to apply the correct presumptions and burden of proof in making the determination under the CMR that TFCC was entitled to less than the recommended quantity. Therefore, this Court concludes that this case should be remanded to the Director, so that he may apply the "clear and convincing" evidentiary standard to the determination of the amount of water TFCC may put to beneficial use. It is not the role of a reviewing court to examine the evidence in the record and to decide whether there is clear and convincing evidence supporting the Director's findings. *Sagewillow v. IDWR*, 138 Idaho 831, 843, 70 P.3d 669, 681 (2003).

C. Due Process and Curtailment Prior to Approval of Mitigation Plan

The Ground Water Users assert that due process requires that junior ground water users not be physically curtailed until after a hearing on a proposed mitigation plan. At the hearing on the petitions for rehearing, the SWC argued that the Director must immediately curtail junior water users, upon a determination of material injury, and only allow out-of-priority diversions once a mitigation plan is approved. The SWC asserts that nothing in CMR 43 allows the Director to suspend curtailment while considering the approval of a submitted mitigation plan. In essence, the SWC argues that the burden of a delay in holding a hearing to approve a mitigation plan should be placed on the junior water users, not the seniors.

The CMR provide an opportunity for junior water users to submit a mitigation plan after a determination of material injury, in order to prevent further injury and/or compensate a senior user. Further, CMR 43 provides an opportunity for the Director to hold a hearing on that mitigation plan as determined necessary. A reasonable

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on paper; rather, it's the right to have the water delivered if available. Accordingly, whether the right is reduced on a permanent basis or on a temporary basis incident to a delivery call, the property interest is nonetheless reduced. Accordingly, the same burdens and presumptions should apply, prior to reducing a senior's right below the quantity supplied in the decree or recommendation.

interpretation of the CMR reveals that curtailment of junior water rights should not occur until after the Director has an opportunity to review any mitigation plan submitted and conduct a hearing on such a plan if necessary, in accordance with the procedures set out in CMR 43. Curtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigation plans in the first place.

In its July 24, 2009 ***Order***, this Court held that the Director abused discretion by not holding a proper mitigation hearing, or issuing a proper order on material injury to reasonable in-season demand and reasonable carryover. This Court recognizes that the CMR are being applied for the first time in recent delivery calls, which has resulted in much delay for all of the parties involved. However, in the future, mitigation plan hearings should occur within a reasonable time after the submission of a mitigation plan and should not result in the type of delay experienced in this case. *See AFRD #2,* 143 Idaho at 874, 154 P.3d at 445 ("a timely response is required when a delivery call is made and water is necessary to respond to that call").

Finally, the City of Pocatello urges this Court to declare that the matter of material injury shall not be addressed in future mitigation plan hearings in this case. As stated in the July 24, 2009 ***Order***, pursuant to CMR 43, once the Director makes a finding of material injury and upon receipt of a mitigation plan, the Director may hold a hearing on such a mitigation plan in order to determine whether the proposed plan in fact mitigates the senior user's injury. The City of Pocatello is concerned that future mitigation plan hearings will be a venue for parties to dispute the initial material injury determination. In future delivery calls, it may be practical for the Director to hold a hearing on the determination of material injury in conjunction with a mitigation plan hearing, in order to eliminate delay and further injury to senior users.[5] However, in this case, a hearing on material injury was held in 2008. As such, it is unnecessary for the Director to revisit the issue of material injury in future mitigation plan hearings.

VI.
CONCLUSION

[5] *See* Gooding County Case No. 2008-444 ***Order on Petitions for Rehearing*** (December 4, 2009) at 11-12.

The Court has reviewed its July 24, 2009 ***Order*** and concludes as follows:

1. The Director abused discretion by failing to determine a methodology for determining material injury to reasonable in-season demand and reasonable carryover. However, the Director has complied with this Court's order on remand, and has since issued a *Methodology Order*. The time period for filing petitions for judicial review of the Director's *Methodology Order* on remand has expired. As a result, during a status conference on August 6, 2010, this Court announced its intention to lift the ***Order Staying Decision on Petition for Rehearing Pending Issuance of Revised Final Order*** issued by this Court on March 4, 2010. As such, IT IS HEREBY ORDERED that the above-mentioned stay is hereby lifted.

2. While the Court has ruled that the Director abused his discretion and exceeded his authority by failing to follow procedural steps for mitigation plans as set forth in the CMR, there is no practical remedy to cure that error at this point in the proceedings.

3. This case is **remanded** to the Director so that he may apply the "clear and convincing" evidentiary standard and appropriate burdens of proof when determining full headgate delivery for the Twin Falls Canal Company water right at issue in this case.

4. Consistent with this Court's July 24, 2009 ***Order***, in all other respects, the Director's September 5, 2008 *Order* is **affirmed.**

IT IS SO ORDERED.

Dated: August 23, 2010

John M. Melanson
District Judge, *Pro Tem*

NOTICE OF ORDERS
I.R.C.P. 77(d)

I, Cynthia R. Eagle-Ervin, Deputy Clerk of Gooding County do hereby certify that on the 23 of August 2010, pursuant to Rule 5(e)(1) the District Court filed in chambers the foregoing instrument and further pursuant to Rule 77(d) I.R.C.P., I have this day caused to be delivered a true and correct copy of the within and foregoing instrument: Order on Petitions for Rehearing to the parties listed below via the U.S. Postal Service, postage prepaid:

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Dated: August 23, 2010

Cynthia R. Eagle-Ervin, Deputy Clerk

Notice of Orders
Certificate of Mailing
IRCP 77(d)

Attachment
B

Docket No. 37308-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-04013A, 36-04013B, AND 36-07148 (Clear Springs Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02356A, 36-07210M AND 36-07427 (Blue Lakes Delivery Call)

CLEAR SPRINGS FOODS, INC.,
Petitioner/Respondent/Cross-Appellant,

v.

BLUE LAKES TROUT FARM, INC.,
Cross Petitioner/Respondent/Cross-Appellant,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., NORTH SNAKE GROUND WATER DISTRICT, and MAGIC VALLEY GROUND WATER DISTRICT,
Cross Petitioners/Appellants/Cross-Respondents,

v.

GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents/Respondents on Appeal/Cross-Respondents,

v.

IDAHO DAIRYMEN'S ASSOCIATION, INC., and RANGEN, INC.,
Intervenors/Respondents/Cross-Respondents.

POCATELLO'S PETITION TO APPEAR AS AMICUS CURIAE

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Gooding.

Honorable John M. Melanson, District Judge, Presiding.

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COMES NOW the City of Pocatello ("Pocatello" or "City") and petitions this Court pursuant to Idaho Appellate Rule 8 to grant Pocatello's Petition to Appear as Amicus Curiae.

INTRODUCTION

The City of Pocatello is a municipal corporation of the State of Idaho which diverts its municipal water supply from wells in the Eastern Snake Plan Aquifer (ESPA) within Water District 120. Pocatello also owns and operates associated surface water rights, including rights to water stored in Palisade Reservoir. Pocatello is not a member of Appellant Idaho Ground Water Appropriators ("Ground Water Users").

Although it is a junior ground water right holder, Pocatello was not a party to the above-captioned matter before the Department because the Department limited curtailment of water rights to Water District 130. *See* R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66. However, Pocatello is a party to two other ongoing delivery call matters: the Surface Water Coalition ("SWC") delivery call, which is currently on appeal before the Honorable Judge John Melanson and the A&B delivery call which is currently on appeal before the Honorable Judge Eric Wildman. A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (5th Judicial Dist., Gooding Cty) ("SWC Delivery Call"); A&B Irrigation District v. Idaho Department of Water Resources, Case No. CV-2009-647 (5th Judicial Dist., Minidoka Cty) ("A&B Delivery Call").

As described more fully within, the Blue Lakes Trout Farm, Inc. and Clear Springs Foods, Inc. (collectively "Spring Users") raise substantive legal issues through their Joint Response Brief and their Opening Brief on Cross-Appeal that are identical to the issues on appeal in the SWC and A&B Delivery Calls. Furthermore, if the Spring Users prevail on their

argument that IDWR curtailment should extend to Water District 120, Pocatello's ground water supply may become the subject of curtailment orders. Thus, Pocatello requests that it be allowed to participate in this matter as an amicus in the interests of judicial economy and to avoid prejudice.

ARGUMENT

I. This Appeal Raises Identical Issues to Those At Issue in Other Related Matters

This appeal involves a delivery call initiated in 2005, in which the Spring Users alleged material injury from a failure to receive their decreed amounts of water and requested curtailment of junior ground water rights on the Eastern Snake Plain Aquifer (ESPA). *See* R. Vol. 1, p. 11 and R. Vol. 1, pp. 2 & 4. The Director found, *inter alia*, that the Spring Users were experiencing shortage but that only a portion of that shortage was due to junior groundwater pumping. As such, the Director ordered curtailment of junior ground water rights in Water District 130. The so-called "trim line" was the factual basis for the Director's extending curtailment only to Water District 130. R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66.

On appeal, the Spring Users argue:

- That the "trim line" used by the Director to curtail only those junior water rights shown by the ESPA Model to impact the seniors' water rights is arbitrary and capricious and unconstitutionally results in shifting the burden of proof to the senior to show injury. Spring Users' Joint Opening Brief p. 12-17; Spring Users Joint Response Brief p. 57-59.
- That the evidentiary standard to be applied to junior ground water users in a delivery call is "clear and convincing" evidence: "Idaho law requires junior

appropriators to prove any valid defenses [to a delivery call] by 'clear and convincing evidence'" and that the Director's administration of the Spring Users' delivery call "impermissibly shift[ed] the burden to the Spring Users to rebut a defense that was never presented by the ground water users." Spring Users' Joint Opening Brief p. 9.

- Finally, that material injury is established when a senior asserts it *can* use more water–not that the senior *requires* more water in order to satisfy beneficial uses, and that in a delivery call proceeding injury is determined by whether a senior appropriator is receiving its entire decreed amount of water, regardless of whether it is possible for the senior to receive less than the decreed amount and not suffer injury. *See, e.g.*, Springs Users Joint Response Brief p. 25-26 ("The injury addressed in conjunctive administration is to the water right. The law does not require a showing that . . . a farmer could raise more, larger, or healthier crops with additional water.").

These arguments are mirror images of the issues already decided and likely to be on appeal in the SWC Delivery Call case before Judge Melanson and the A&B Delivery Call case before Judge Wildman[1].

For example, the "trim line" issue is identical in both cases, as Judge Melanson incorporated wholesale his ruling in the Spring Users' *Order on Petition for Judicial Review* into the ruling on the SWC Delivery call appeal:

[1] Note that Judge Wildman recently took jurisdiction of certain issues that are still pending on rehearing in the SWC Delivery Call case. *See* Order Denying Motion to Renumber; Order Consolidating Proceedings Involving Petitions for Judicial Review of "Methodology Order" and "As-Applied Order", Idaho Ground Water Appropriators, Inc. v. Twin Falls Canal Co., Case No. 2010-382 (July 29, 2010) (5th Judicial Dist., Gooding Cty), attached as Exhibit 1.

> The Court addressed this issue at length in the *Order on Petitions for Judicial Review* recently issued in Gooding County Case No. 2008-000444, which involves many of the same parties to this action. The Court's analysis and holding in that decision are incorporated herein by reference.

Order on Petition for Judicial Review ¶ V.C, at 26-27, A&B Irrigation Dist. v. Idaho Dairymen's Ass'n, Inc., Case No. 2008-0000551 (July 24, 2009) (pending before the district court on rehearing).

In addition to the "trim line" matter, the Court's resolution of the remaining issues raised by the Spring Users in their arguments in this matter will also directly affect the outcome of the A&B and SWC pending matters and impact the administration of Pocatello's water rights. In the SWC Delivery Call, the district court affirmed the Director's injury methodology, which began by evaluating the amount of water an appropriator requires to avoid injury, based on in-season irrigation requirements, and rejected the senior water user's argument that injury is *per se* established if a senior received less than its decreed or licensed quantity. 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) (pending before the district court on rehearing and agency remand).

The Springs Users assertion that the threshold showing of material injury can be established by the senior's mere allegation of shortage is also a live issue in the A&B Delivery Call. There, Judge Wildman ruled that junior users have the burden of showing by "clear and convincing" evidence that senior users have wasted, forfeited, abandoned or otherwise failed to beneficially use the entire decreed right to avoid curtailment. *Memorandum Decision and Order on Petition for Judicial Review* ¶ 6, at 35 (May 4, 2010) (5th Judicial Dist., Minidoka Cty) (pending before the Court on rehearing). The Court also held that the Department's failure to

find by clear and convincing evidence that A&B was capable of satisfying its beneficial uses without injury to its water right upon delivery of an amount less than the decreed amount was reversible error. *Id.* at 49. The district court held that instead of evaluating whether A&B was receiving an adequate water supply to satisfy its uses, the Department should instead evaluate whether A&B was receiving its entire decreed amount of water.

These pending district court matters, therefore, address the same issues of law as are present in the pending appeal before the Court. Pocatello does not wish to participate in the other issues in this matter, or to raise any factual disputes: it asks the Court's leave to be permitted as amicus to participate in the Court's determination of these common legal issues alone.

II. Pocatello's Risk of Curtailment

In the case at hand, the Director limited curtailment to Water District 130 because, *inter alia*, the Department's model indicated curtailment of juniors in Water District 120 would have insignificant effect on the amount water available at the Spring Users' diversion points. *See* R. Vol. 1, p. 59, ¶ 67 and R. Vol. 3, p. 501, ¶ 66. The Director's relied upon a 10% "trim line" in reaching this conclusion, which reflects the uncertainty in model simulations. The 10% trim line was affirmed by the Hearing Officer [R. Vol 16, pp. 3703-04, ¶ 4], the Director in the Final Order [R. Vol. 16, p. 3950], and Judge Melanson's Order on Petition for Judicial Review [Clerk's R. at 44]. Pocatello has an interest in affirming the Director's curtailment order which limited curtailment to Water District 130, as this determination will have a direct and immediate effect on the administration of the City's water rights in future administration under this call.

CONCLUSION

Issues raised by the Spring Users in their cross-appeal are common legal issues in the SWC Delivery Call and the A&B Delivery Call. Pocatello anticipates appealing those decisions, but is unable to file such an appeal until the respective district courts issue final orders pursuant to Idaho Rule of Civil Procedure 54 on rehearing. Pocatello therefore requests to participate as amicus solely on the two legal issues before this Court raised in the Spring Users' Joint Opening Brief. Pocatello's participation as Amicus Curiae will not delay the appeal or prejudice other parties. Pocatello therefore requests to submit an Amicus Brief on the issues described above, in support of the Ground Water Users, and to participate at oral argument. True and correct copies of this Petition have been served upon all counsel of record in the above-captioned case.

Respectfully submitted this 12th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2010, the above and foregoing document was served in the following manner:

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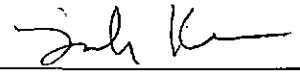

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