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

Attorneys for the Ground Water Users

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

A & B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents. IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	Case No. CV-2009-647 **GROUND WATER USERS' OPENING BRIEF ON REHEARING**

Idaho Ground Water Appropriators, Inc., on behalf of their members (the "Ground Water Users"), submit this opening brief on rehearing pursuant to the Court's *Order Granting Petitions for Rehearing; Notice of Hearing and Scheduling Order on Petitions for Rehearing* dated July 7, 2010.

TABLE OF CONTENTS

BACKGROUND 4

ARGUMENT 5

A. The Evidentiary Standards That Apply To The Administration of Groundwater Are Not The Same As Those in Surface Water Determinations. 6

B. The Director's Determination Of The Amount Of Water Needed In Evaluating Issues Of Material Injury May Result In A Quantity Less Than What Was Decreed 9

1. SRBA Decrees Are Based On A Limited Determination Of Beneficial Use. 9

2. The Director Has An Independent Duty To Determine Material Injury And Full Economic Development Based On A Preponderance Of Evidence. 18

C. The Director's Finding Of No Material Injury To A&B Comports With Appropriate And Established Evidentiary Standards. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Cantlin v. Carter, 88 Idaho 179 (1964) 6
Crow v. Carlson, 107 Idaho 461 (1984) 6
Gilbert v. Smith, 97 Idaho 735 (1976) 6
Jenkins v. State, 103 Idaho 384 (1982) 6
Jones v. Vanausdeln, 28 Idaho 743 (1916) 8, 18
Josslyn v. Daly, 15 Idaho 137 (1908) 6, 8
Moe v. Harger, 10 Idaho 302 (1904) 6, 7, 8
Second Amended Order on Summary Judgment 1-SRBA 60 at 60.3, 60.7 (1996) 13
State v. Hagerman Water Right Owners, 947 P.2d 400,. 403 (1997 14

Statutes

I.C. § 42-1411(4) 10
I.C. § 42-101 22
I.C. § 42-1401B 10
I.C. § 42-226 20

Other Authorities

Legal Guideline, at 3-4 16

Rules

CM Rule 42 ..... 18, 19, 20

Treatises

2 Am Jur 2d Administrative Law § 354 (2010) 9
2 Am Jur 2d Administrative Law § 357 (2010) 19

Appendices

Appendix A -- AFFIDAVIT OF DAVID R. TUTHILL, JR. DATED AUGUST 10, 1999
IN RE SRBA, 39576, SUBCASE NO. 36-00035E

Appendix B -- EXCERPTS OF KARL DREHER TESTIMONY DATED
DECEMBER 6 AND 7, 2007

Appendix C -- LEGAL GUIDELINE FROM CLIVE J. STRONG TO SENATOR NOH AND
REPRESENTATIVE STEVENSON, DATED FEBRUARY 24, 2004

BACKGROUND

A&B Irrigation District (hereafter referred to as "A&B") made a delivery call to the Director of the Idaho Department of Water Resources (the "Director"), asking him to curtail junior-priority groundwater rights. (R. 12-14 and 830.) The Director issued an order (the "January 29 Order") denying the delivery call because A&B had not suffered material injury. (R.1105.) The Director's determination that A&B had not suffered material injury is based upon his application of the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("Conjunctive Management Rules" or "CM Rules"). IDAPA 37.03.11.

A&B asked the Director for a hearing to challenge the January 29 Order. (R. 1182.) A hearing was held December 3-17, 2008, before the Honorable Gerald F. Schroeder as hearing officer. After considering the findings, conclusions and recommendations of the hearing officer, the Director issued a *Final Order* on June 30, 2009. (R. 3318.) The Final Order again found no material injury to A&B. (*Id.* at 3322).

A&B petitioned this Court for judicial review of the *Final Order* on August 31, 2009. The parties submitted briefs and made oral argument. The Court entered a *Memorandum Decision and Order on Petition for Judicial Review* (the "*Order*") on May 4, 2010. The Order remands this case to the Director on the basis that the wrong evidentiary standard was applied in determining no material injury to A&B.

The Ground Water Users and the City of Pocatello both filed petitions for rehearing on June 10, 2010, asking the Court to reconsider its ruling concerning the evidentiary standards to be applied by the Director in administering groundwater. The Court granted rehearing pursuant to its *Order Granting Petitions for Rehearing; Notice of Hearing and Scheduling Order on Petitions for Rehearing* dated July 7, 2010. This brief is filed in response thereto.

ARGUMENT

The *Order* remands this case to the Director with instructions to "apply the appropriate evidentiary standard." (*Order* 49.) The *Order* states that the Director "erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury." *Id.* In sum, the *Order* requires the Director to 1) presume the senior is suffering material injury any time he receives less than the maximum rate of diversion authorized under his water rights, 2) presume that curtailment is in accord with the Ground Water Act and other groundwater administration criteria, and 3) automatically curtail junior groundwater rights, unless and until proven otherwise by clear and convincing evidence.

The *Order* imposes an incorrect evidentiary standard that contradicts Idaho Supreme Court precedent and undermines the Ground Water Act and CM Rules. Rather than the Director using his best judgment to make water administration decisions based on the evidence before him, the Order requires him to apply an elevated standard of proof and effectively creates new law that makes the quantity element of a water right a guaranteed amount of water, as opposed to a maximum authorized rate that may be diverted if available and needed for beneficial use. The end result will be water rights for seniors that are greater in quantity and certainty than ever existed historically, all at the expense of junior ground water users.

As explained below, the clear and convincing proof standard does not apply to the unique issues presented in the context of groundwater administration. Decisions involving material injury and full economic development must reflect the Director's best judgment based on a preponderance of available evidence and a reviewing court reviews those decisions to determine if they were based on substantial evidence. Clear precedent from the Idaho Supreme Court allows the Director to make those decisions without causing a re-adjudication of senior rights.

The Director's finding of no material injury to A&B is supported by substantial evidence and does reflect the preponderance of the evidence in the record—the appropriate evidentiary standard. Therefore, the Court should withdraw its remand order.

A. The Evidentiary Standards That Apply To The Administration of Groundwater Are Not The Same As Those in Surface Water Determinations.

The *Order* relies on surface water cases to conclude that the Director must apply a clear and convincing proof standard to groundwater administration determinations involving material injury and the Ground Water Act. The *Order* essentially forces the Director to assume that material injury exists any time the quantity of water available is less than the maximum rate of diversion authorized under a water right, and that curtailment is always in accord with the Ground Water Act, unless junior groundwater users prove otherwise by clear and convincing evidence. However, none of the cases cited in the *Order* involve groundwater rights, none address material injury as defined by the CM Rules, none address the requirements of the Ground Water Act, and none require that groundwater administration be subject to the same evidentiary standards as surface water determinations.

The cases cited in the *Order* are limited to decisions about whether to grant an additional water right or whether an established water right had been abandoned or forfeited: *Gilbert v. Smith*, 97 Idaho 735 (1976) (case regarding abandonment, forfeiture and adverse possession); *Cantlin v. Carter*, 88 Idaho 179 (1964) (case regarding whether to issue a new water right due to availability of supply); (*Josslyn v. Daly*, 15 Idaho 137 (1908) (determination of quantity and source of an additional water right); *Moe v. Harger*, 10 Idaho 302 (1904) (case regarding whether there was sufficient water to grant a new appropriation); *Crow v. Carlson*, 107 Idaho 461 (1984) (quiet title action regarding water rights); *Jenkins v. State*, 103 Idaho 384 (1982) (holding Director had authority to consider forfeiture and abandonment in evaluating a transfer).

None of these questions are present when administering groundwater under the Conjunctive Management Rules. The Director has not concluded that A&B has abandoned or forfeited all or a portion of its water right. The Director has simply concluded that A&B does not presently need the maximum rate of diversion authorized under its water right to accomplish its designated beneficial use.

The Idaho Supreme Court unequivocally affirmed that a senior water user is not presumed to suffer material injury just because he receives less than the maximum authorized rate of diversion. *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"), 143 Idaho 862 (2007). In *AFRD2*, senior surface water users argued that the Director must presume that material injury exists any time a senior receives less than the maximum authorized rate of diversion of his or her water right. The district court agreed, relying on *Moe* to hold that "when a junior diverts or withdraws water in times of shortage, it is presumed that there is injury to the senior." *Id.* at 877. On appeal, the Idaho Supreme Court reversed the district court on this point. The Court distinguished *Moe* on the basis that it "was a case dealing with competing surface water rights, and this is a case involving interconnected ground and surface water rights." *Id.* The Court explained that "[t]he issues presented are simply not the same." *Id.*

The *Order* flatly contradicts the Idaho Supreme Court decision in SFRD2 by concluding that the Director must presume A&B has suffered material injury just because it does not receive its maximum authorized quantity. The *Order* effectively relieves the Director of any responsibility to examine the historic facts that bear on material injury and other unique issues presented in groundwater administration, casting the entire burden on juniors to prove otherwise by clear and convincing evidence.

The presumptions and burdens required by the *Order* are contrary to all Idaho precedent involving groundwater rights.

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

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

burden of proof, that is, the burden of persuasion." *2 Am Jur 2d Administrative Law § 354* (2010).

B. The Director's Determination Of The Amount Of Water Needed In Evaluating Issues Of Material Injury May Result In A Quantity Less Than What Was Decreed.

The *Order* imposes a "clear and convincing proof" standard because of the Court's belief that "[t]o conclude otherwise accords no presumptive weight to the decree." (*Order* 34, n. 12.) This view fails to recognize important differences between adjudication versus administration of water rights. As recognized by the Idaho Supreme Court in *AFRD2*, "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." 143 Idaho at 876-77.

1. SRBA Decrees Are Based On A Limited Determination Of Beneficial Use.

In order to support its adoption of a clear and convincing proof standard, the *Order* relies heavily on the premise that "the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use." *Id.* at 30 (emphasis in original). The *Order* fails to acknowledge, however, that an SRBA decree defines maximum parameters of authorized water use. An SRBA decree is not a guarantee that the maximum rate of diversion has been or always will be available, or even that the water user put the maximum amount of water to beneficial use at the time of the adjudication. For instance, water rights were decreed with the amount of water that could be put to beneficial use under flood irrigation practices, even though most irrigation is now accomplished with less water and more efficiently by sprinklers. This has been explained by former IDWR Director, and then Adjudication Bureau Chief, David R. Tuthill, Jr.:

> In this, and similar, subcases where the water right holder (1) is presently irrigating by sprinkler or similar method, but (2) the right which the water right

> holder is claiming was previously for an irrigation diversion rate of greater than one miners inch per are (0.02 cfs) for gravity irrigation, and (3) the water right holder has claimed the higher quantity in the SRBA, then IDWR will recommend a reasonable diversion rate for gravity irrigation to provide sufficient water should the water right holder choose in the future to convert back to a gravity irrigation system. Accordingly, the recommended quantity does not constitute the quantity which the water right holder is presently placing to actual beneficial use.

Affidavit of David R. Tuthill, Jr. dated August 10, 1999, ¶ 3, filed in In Re SRBA Case No. 39576, Subcase No. 36-00035E[1] (emphasis in original).

The recommendations of the IDWR are important since the SRBA Court does not itself perform any investigation of water use practices when decreeing water rights. The Court instead relies on "Director's Reports" prepared by the IDWR which recommend the elements of each SRBA claim. I.C. § 42-1411(4). The *Order* recognizes this, citing, Idaho Code § 42-1411 which requires Director's Reports to describe the rate of diversion, since Idaho Code § 42-1401B requires the Director to "make recommendations as to the extent of beneficial use." However, the *Order* improperly assumes that the Director's Reports reflect a contemporary examination of the claimant's actual water use and needs. This is not the case.

The Director is not required to perform a field exam, to investigate reliability and historic variations and limitations on available supply, nor review of beneficial water use when recommending SRBA claims. Instead, the Director is simply required to investigate water use "to the extent the director deems appropriate and proper." I.C. § 42-1411(2). IDWR typically only investigates historic water use for what are known as "beneficial use claims" (i.e. claims that are not based on a prior water right license or decree). In contrast, the IDWR does not normally investigate beneficial use for SRBA claims that are based on a prior water right licenses or decrees, like that of A&B.

---

[1] A copy of this affidavit is attached hereto as Appendix A.

The process of recommending the quantity element of previously licensed or decreed water rights in the SRBA was explained by former IDWR Director Karl Dreher, who was the Director during a majority of the SRBA:

Q. Hadn't that [the evaluation of the quantity element] been done in the adjudication and when the water right was licensed?

A. Some review of that had been done when the water right was licensed. But no additional review if, you know, as I indicated in my deposition, if a water right had been licensed, that license was the basis for the recommendation in the SRBA and there was no further analysis done unless there was some objection.

Q. And don't the claim investigation procedures of the Department provide for claim investigators to go through the Department's records when investigating water rights?

A. Not necessarily.

Q. Okay. Could you turn to Exhibit 210 in the black book. And do you recognize this document entitled Claim Investigation Handbook? And at page 5 of this handbook under the heading Review of IDWR records -- and this is under a broader section heading Initial In-Office Investigation Pertaining to Claims Made in the Adjudication.

A. Which page, I'm sorry?

Q. Page 5, under the section heading Review of IDWR Records. The paragraph begins the agent needs to review IDWR records regarding the water use. And goes on and further describes the investigation that is done for purposes of preparing a recommendation to the SRBA court as to how the water rights should be decreed. It is the case, isn't it, that in the process of preparing recommendations to the SRBA court that claim investigators are to go through Departmental records concerning the water right.

A. As I indicated though, I know that if the right had been licensed that was the basis for the recommendation and generally no additional investigation was done. Now this document that you're referring to says revised October 5, 2007. So I don't know that this is -- I don't know that these provisions were in the guidelines for agents at the time that these rights were recommended for decree or not.

Q. Okay. Now, why would the Department, as you say generally -- you don't know if it occurred in this, if the Department relied exclusively on the license in these

cases -- but why generally would the Department be relying on the licenses in making their recommendations to the SRBA court?

A. Because it was presumed that the necessary investigations had already been undertaken as part of the licensing procedure. And you know, from my review of water rights files, that's sometimes the case, sometimes it's not the case.

Q. And by investigations in the licensing what do you mean?

A. Well, generally the -- the licensing investigations are conducted to confirm that -- that the appropriator has in fact developed the means necessary to divert and apply the quantity of water sought for authorization. That that quantity of water has actually been diverted and applied to beneficial use.

Q. And that investigation includes an examination upon the submission of proof of beneficial use, which would include measuring water that the permit holder has diverted and seeks to have licensed; correct?

A. Correct. But those, you know, sometimes those investigations are not entirely accurate, unfortunately.

(Tr. Vol. 11, pp. 2219, L. 9 – 2223, L. 8 (Judicial Notice taken of Dreher Testimony, Tr. p. 1347, L. 18-25 and p. 1348 - p. 1350, L. 22 given *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, 36-07210, and 36-07427- Blue Lakes Delivery Call,* "Dreher Testimony").[2]

Since the quantity element of a water right defines a maximum parameter of authorized water user, the Director's Report is necessarily established based on a maximum supply that might only have been received for one day in one year, as opposed to a definitive determination of the amount of water needed to accomplish beneficial use at any given time. (Dreher Testimony, Tr. p. 1202 L. 1 – p. 1206 L. 16.

[2] Attached as Appendix B is a true and correct copy of the relevant portions of Dreher's Testimony.

The IDWR originally tried to reduce the authorized rate of diversion for SRBA claims that are based on prior licenses or decrees to reflect the amount of water actually put to beneficial use. However, the SRBA Court rejected that approach, ruling that claims based on prior decrees or licenses cannot be reduced based on reductions in beneficial use. *Second Amended Order on Summary Judgment* 1-SRBA 60 at 60.3, 60.7 (1996).[3] The Court reasoned that "[a]n implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount of water sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion." *Id.* at 60.6. Unless and until a water user takes affirmative action to change his or her water right, the Court ruled that the decree defines the authorized diversion rate "despite the likelihood that the water user <u>may never actually divert that amount</u>." *Recommendation for Permissive Review*, 1 SRBA 62 at 62.4 (1996) (emphasis added; internal quotes omitted). Since SRBA claims based on prior licenses or decrees cannot be reduced based on beneficial use, the IDWR typically makes no investigation of beneficial use other than a "desk top" review. As Former Director Dreher testified:

> Q. Okay. And with respect to the extent of the Department's examination of the water right that had been licensed. Isn't it part of the Department's process to evaluate the extent to which changes have occurred since the water right was license that should be reflected in a recommendation to the SRBA court?
>
> A. What kind of changes?
>
> Q. Well, abandonment, forfeiture, some other change that would necessitate or warrant a recommendation different than the license?
>
> A. No. The only time, you know, the only time that the Department would look at whether a right had been abandoned or forfeited, is if it's brought forward in an application for transfer, or if, as in these cases, if there was a demand that water rights be administered for the purposes of distributing water to rights and there

[3] While the Special Master in the SRBA issued this decision, the District Court affirmed the Special Master's decisions in the Court's 1996 *Recommendation for Permissive Review*. Thus, the reference is made here to the SRBA District Court although it is acknowledged that the summary judgment decision was issued by the Special Master.

had not been a determination of -- previously made of abandonment or forfeiture. That would be one aspect that would be looked at.

Q. Thank you.

A. Other changes, I mean if a right had been licensed and then a subsequent transfer had occurred prior to the SRBA, the commencement of the SRBA, then that -- that right would have been recommended as transferred. But did we routinely look at -- go back and see if there were any changes to rights that had been licensed but not transferred? And the answer is no.

(Tr. Vol. 11, pp. 2219, L. 9 – 2223, L. 8 Dreher Testimony, Tr. p. 1455, L. 18 – p. 1456, L. 19.)

For SRBA decrees based on prior licenses or decrees, the last time a real investigation of beneficial water use performed is in many cases when the underlying license or decree was issued, often decades before the SRBA commenced. Dreher testimony, *supra.*

Since decrees define maximum parameters of authorized water use, and since previously licensed and decreed water rights cannot be reduced based on beneficial use, it would be futile for water users to contest SRBA claims on the basis that a water user has not used the maximum authorized rate of diversion. The Court's *Order* seems to acknowledge this by stating that the "quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season." *Order* at 31.

> The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, <u>and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc.</u> The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short results in a loss or reduction to the water right.

In Re. SRBA Case No. 39576, *Memorandum Decision and Order on Challenge*, Subcases 36-Subcase Nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L, and 36-00003M citing, *State v. Hagerman Water Right Owners*, 947 P.2d 400,. 403 (1997) (emphasis

added). While the *Order* cites this very same *SRBA* decision, it fails to apply its rationale to the case at hand. In this case, A&B's decree reflects an amount that was originally licensed for a flood irrigation project, not the amount needed to accomplish the beneficial use of irrigation from a now primarily, sprinkler irrigated project. A&B's decree reflects a maximum amount even though that amount had not been simultaneously diverted for even one day. (R. 3107 – 09) The facts establish in this case, that over 96% of A&B is irrigated by sprinklers (R. 3099) and that sprinklers require less water than flood irrigation practices (R. 3099). As was proper, the Director looked at the amount of water needed by A&B to meet its beneficial use and determined that A&B has enough water to irrigate its crops and as such, there is no material injury and no burden shifts to the junior users. The *Order* fails to acknowledge the key finding of the Director that is supported by substantial and competent evidence in the record: A&B's lands are not water short.

As the *Order* notes, SRBA decrees set a "peak limit on the rate of diversion that a water right holder may use at any given point in time." *Order* 32; quoting *American Falls Reservoir Dist. # 2 v. IDWR*, Gooding Dist. Court Case No. CV-2005-600, p. 95 (2006); internal quotations omitted; emphasis added. Consequently, the IDWR investigation in the SRBA focuses on the peak amount of water ever diverted under the right at any one moment, as opposed to that amount of water actually put to beneficial use at the time of the adjudication or actually needed at the time of a delivery call. Again, this was specifically stated by former Director Tuthill:

> IDWR construes its statutory authority in the event of a call as precluding it from delivering, or directing the water master to deliver, any quantity greater than what the water right holder making the call can put to actual beneficial use at the time the call is made.... IDWR's position is that this limitation applies notwithstanding the fact that the water right holder's water right may be decreed listing a higher, gravity irrigation quantity.

Tuthill Aff. at ¶ 4 (emphasis added).

Prior to this Court's *Order,* the SRBA recommendation process of recommending maximum parameters of authorized use was of no concern because the Director was understood to be charged with responsibility to further investigate and determine beneficial use and material injury as a part of the administration process that occur after the entry of a decree and *before* any junior right could be subjected to curtailment. *Id.* It is clearly part of the Director's duties in various administrative proceedings to review actual beneficial use made a licensed or decreed water right. Deputy Attorney General, Clive Strong, and chief of the Attorney General's Natural Resources Section, in a February 24, 2004 "Legal Guideline"[4] to Senator Noh and Representative Stevenson provides an excellent summary of how the administrative process works as it relates to actual beneficial use:

> [E]ven if an individual possess [sic] a right to divert a certain quantity of water, that individual's entitlement is limited by the amount of water he or she can apply to a beneficial purpose .... Limiting an individual's ability to use water only for beneficial uses maximizes water resources; helps prevent waste, and injury to other users....
>
> Consistent with the theory that water is a public resource that should be managed for the greater good, and that beneficial use is the measure of a water right '[a] water holder *can only transfer the amount that he has historically put to beneficial use*. Beneficial use is the measure and limit of the transferable right whether the right is a permit or no-permit based right.'

Legal Guideline, at 3-4 (internal citations omitted, italics in original).

> Under the prior appropriation doctrine, water authorized to be diverted and beneficially used under a permit, license, or decree <u>but not required to accomplish the beneficial use being made must remain part of the public water resource</u> available to meet the needs of other water right holders.

Id. at 7 (emphasis added).

While not specifically addressing conjunctive management, the above portions of the Legal Guideline further demonstrates that considerations in <u>administration</u> of water rights are not

[4] A true and correct copy of this Legal Guideline is attached as Appendix C for the Court's convenient reference.

the same as those in adjudications of water rights. The factors and evaluation under the CM Rules, is like the situation where a senior water user seeks administration of his water right in a transfer and the Director looks at the amount of water the senior has actually applied to beneficial use before approving the transfer and agreeing with the senior user.

Here, the Director looked at the amount of water A&B actually needed to accomplish beneficial use to achieve its beneficial use before agreeing with them that they were injured. The Director did not conclude, as the Court assumes, that A&B would "waste" water if it was allowed to divert up to the 0.88 miners' inches per acre, (*Order* at 38), which the *Order* then uses to essentially force a presumption of injury. More recently, the Court explained in its *AFRD2* decision that

> [g]iven the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

143 Idaho at 875 (emphasis added). The Court felt it "important to point out" that the district court properly rejected the argument "that water rights in Idaho should be administered strictly on a priority in time basis." 143 Idaho at 870. Rather, the Court upheld the Director's duty to consider other concepts in responding to delivery calls, "such as: material injury; reasonableness of the senior water right diversion; whether a senior right can be satisfied using alternate points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use." *Id.* This further demonstrates that the Director's administration of water is not subject to the same standards that govern adjudication of the defined elements of a water right.

The *Order* errs by treating SRBA decreed quantities as guaranteed amounts and as a conclusive determination of beneficial use at future times of administration.[5] The assertion that "[i]ssues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in the Director's recommendation and ultimately litigated in the context of the SRBA proceedings" misapprehends the realities of the SRBA and has lead to the wrong conclusion in this case.

2. The Director Has An Independent Duty To Determine Material Injury And Full Economic Development Based On A Preponderance Of Evidence.

The *Order* mistakenly treats the material injury requirements of CM Rule 42 and the Ground Water Act requirement of full economic development as nothing more than restatements of the common law prohibition of wasteful water use. (*Order* 31-38.) On this basis, the *Order* instructs the Director to assume that material injury exists and assume that curtailment does not block full economic development, until proven otherwise by clear and convincing evidence. Essentially, the *Order* reduces conjunctive administration as a defense only determination. This ruling contradicts unequivocal precedent from the Idaho Supreme Court.

As stated above, administration and adjudication serve separate and distinct purposes and involve substantially different analyses. The Idaho Supreme Court acknowledged this in *Jones*, stating that a water administration dispute "differs somewhat from the ordinary action for the adjudication of conflicting water rights on the same stream." 28 Idaho at 752. The Supreme Court explained that "[i]n finding that plaintiffs had not made sufficient showing to warrant a

---

[5] It must also be recognized that the Director's Reports submitted to the SRBA Court, and the decrees ultimately issued by the Court, are a snapshot in time of parameters of authorized water use as of November 19, 1987, when the SRBA commenced. The SRBA Court does not allow evidence of water use (or non-use) after that date. *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* (In Re SRBA Case No. 39576, Subcases *36-02708 et at.)* (Dec. 29, 1999). Thus, even for SRBA claims that receive an investigation of beneficial use, the evidence upon which the decree is based is more than two decades old.

permanent injunction in their favor against the operation of defendants' wells, it was not necessary in this action for the lower court to adjudicate defendants' water rights to the subterraneous flow in question." *Id.*

Determinations of material injury and futile call do not result in an adjudicated change to the defined elements of a water right. In *AFRD2*, senior surface water users argued that these matters result in a re-adjudication of their water rights. In response, the Court affirmed the Director's duty in the context of groundwater administration to consider "the reasonableness of a diversion, the reasonableness of use and full economic development." *AFRD2*, 143 Idaho at 876. The Court further explained that this does not result in diminishment of a property right, stating that "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." 143 Idaho at 876-77.

In *AFRD2*, the Idaho Supreme Court explained that defenses such as futile call do not arise until <u>after</u> the Director has determined that "material injury" exists per CM Rule 42: "Once the initial determination is made that material injury is occurring or will occur, the junior <u>then</u> bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." 143 Idaho at 877. This partly explains why the Supreme Court instructed that material injury not be presumed. *Id.* Rather, material injury is an independent analysis to be made by the Director, and like most agency decisions it should be based on the preponderance of the evidence. *2 Am Jur 2d Administrative Law § 357* (2010) ("The general standard of proof for administrative hearings is by a preponderance, that is, the greater weight, of the evidence, and it is error to require a showing by clear, cogent, and convincing evidence.")

None of the surface water cases cited in the *Order* involve the unique determinations that must be made by the Director when administering groundwater, such as the Director's obligation to determine "material injury" under CM Rule 42. Material injury asks whether the senior water user needs more water than he currently has access to in order to accomplish his designated purpose of use, and if so, whether the senior's needs can be met and material injury avoided with a quantity less than the authorized maximum which might occur by using conservation efficiencies or different diversion practices. CM Rule 42.01.b (effort or expense to divert from the source); d. (evaluate rate of diversion, acres, efficiencies, irrigation method); e. (amount of water used compared to the water right); and g. (whether the senior can meet their needs with existing facilities).

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

C. The Director's Finding Of No Material Injury To A&B Comports With Appropriate And Established Evidentiary Standards.

Water right no. 36-2080 has been "partially decreed" in the SRBA. (Ex. 139.) After the entry of the partial decree, water right no. 36-2080 at A&B's request was subject to a transfer proceeding before IDWR. The approved transfer provides for an authorized maximum rate of diversion of 1,100 cfs and allows A&B to use up to 188 authorized points of diversion. (Ex. 157.) Yet, A&B currently operates only 177 wells to provide irrigation water to its members to

irrigate up to 66,686.2 acres under water right no. 36-2080 and A&B's beneficial use and enlargement water rights. (R.1112-13.) *See January 29 Order FF 23-24 and IGWA's Proposed Findings of Fact and Conclusions of Law*, (R. 2905 and 2907.)

Although A&B claimed water shortage based upon an authorized maximum diversion rate of 0.88 inches per acre, an amount that has never been delivered for even one day to every acre, the Director concluded otherwise. (R. 3107 – 09.) Evidence in the record shows that "crops could be grown and that the lands in question were in no worse condition than the surrounding areas." (R.3104 *Recommended Order* at 27.) "The evidence indicates that farmers outside the A&B project are often able to raise crops to full maturity on less water than is used on the Unit B lands." (R. 3106. *Recommended Order* at 29.) The delivery rate of 0.75 cfs is "higher than nearby surface water users." (R. 3107. *Recommended Order* at 30.) "Crops may be grown to full maturity on less water than demanded by A&B in this delivery." *Id.* "Going back at least to 1963 it does not appear that there was a time when all well systems could produce 0.88 miner's inches per acre." (R. 3108. *Recommended Order* at 31.) To create a presumption that A&B automatically suffers material injury any time it receives less than 0.88 cfs per acre is to establish a right that is greater in quantity and certainty than has ever existed, assuring that A&B can waste water at the expense of ground water users.

The Director's *Final Order* in response to A&B's delivery call properly determined the amount of water needed for crop irrigation to avoid any material injury under A&B's water right. The Director found, that based on climate, crop distribution, irrigation application and efficiencies, and surrounding lands that A&B was not materially injured. As such, the burden of the juniors to prove a defense has not yet arisen.

CONCLUSION

The CM Rules only exist because surface water and ground water were historically treated as separate water resources and managed differently from each other. The Director's Final Order concluded that A&B farmers are not water short. By administration, the senior's water right is certainly not being re-adjudicated or reduced and neither the Director nor the juniors are seeking to revise the elements of the water right. Idaho law recognizes that administration must go beyond the defined water right elements and clearly focused on whether the senior is materially injured by evaluating the amount of water needed for beneficial use at the time the delivery call is made. Only then is it proper to determine how much water the senior can demand from juniors until the established principles of full economic development is violated or the public interest offended.

It is the Director's duty and discretion to evaluate these issues and manage the resource in a manner that equally guards all uses to the water. I.C. §42-101. The determination of the amount of water that was actually needed by a senior in an administrative delivery call is properly left for the Director's discretion when the water right is administered and must be based on a preponderance of the evidence. It would be improper to reduce conjunctive administration to a defense only event by presuming injury and applying adjudicative evidentiary standards to an administrative determination.

RESPECTFULLY SUBMITTED this 4th day of August, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2010, the above and foregoing document was served in the following manner:

Deputy Clerk Clerk of Minidoka County Court 715 G Street PO Box 368 Rupert, ID 83350 Fax: (208) 436-5272	☒U.S. Mail/Postage Prepaid ☐Facsimile 208-334-2616 ☐Overnight Mail ☐Hand Delivery ☐E-mail
Clerk of the SRBA SRBA District Court 253 3rd Avenue N. P.O. Box 2707 Twin Falls, Idaho 83303-2707	☒U.S. Mail/Postage Prepaid ☐Facsimile 208-334-2616 ☐Overnight Mail ☐Hand Delivery ☐E-mail
Garrick L. Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	☒U.S. Mail/Postage Prepaid ☐Facsimile 208-334-2616 ☐Overnight Mail ☐Hand Delivery ☒E-mail garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov
John K. Simpson Travis L. Thompson Paul L. Arrington Barker Rosholt P.O. Box 485 Twin Falls, ID 83303-0485	☒U.S. Mail/Postage Prepaid ☐Facsimile 208-334-2616 ☐Overnight Mail ☐Hand Delivery ☒E-mail jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com
Sarah A. Klahn Mitra Pemberton White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202	☒U.S. Mail/Postage Prepaid ☐Facsimile 208-334-2616 ☐Overnight Mail ☐Hand Delivery ☒E-mailsarahk@white-jankowski.com mitrap@white-jankowski.com

A. Dean Tranmer
City of Pocatello
PO Box 4169
Pocatello, ID 83201

☒ U.S. Mail/Postage Prepaid
☐ Facsimile 208-334-2616
☐ Overnight Mail
☐ Hand Delivery
☒ E-mail dtranmer@pocatello.us

Jerry R. Rigby
Rigby Andrus and Moeller
25 N 2nd East
Rexburg, ID 83440

☒ U.S. Mail/Postage Prepaid
☐ Facsimile 208-334-2616
☐ Overnight Mail
☐ Hand Delivery
☒ E-mail jrigby@rex-law.com

APPENDIX A

AFFIDAVIT OF DAVID R. TUTHILL, JR. DATED AUGUST 10, 1999
IN RE SRBA, 39576, SUBCASE NO. 36-00035E

NICHOLAS B. SPENCER
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 327-7900
Fax: (208) 327-5400
Idaho State Bar #2911

Attorney for IDWR

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COURT OF TWIN FALLS

In Re SRBA	)	Subcase No. 36-00035E
	)	
	)	AFFIDAVIT OF DAVID R.
Case No. 39576	)	TUTHILL, JR.
	)	

STATE OF IDAHO)
) ss.
County of Ada)

DAVID R. TUTHILL, JR., being first duly sworn upon oath, deposes and states as follows:

1. I am the Adjudication Bureau Chief for the Idaho Department of Water Resources (IDWR). I make the following statements based upon my personal knowledge of the facts related therein.

2. This affidavit is submitted in response to that certain Order Requesting Affidavit, entered by Special Master Terrence A. Dolan in the above-referenced SRBA Subcase on July 23, 1999. In that order he referenced the following language, drafted by legal counsel for the North Snake Ground Water District (NSGWD language), contained in the quantity element of the water right description from the Amended Standard Form 5 filed on September 23, 1998, in that subcase:

> The volume or rate of water diversions allowed for irrigation designated under this right is based on the reasonable amounts that would be needed to supply a surface or "gravity" irrigation system. However, the actual means of irrigation may involve sprinklers or another irrigation method which requires a smaller rate or volume of diversions. In the event of a water shortage, a delivery call for water, or other action to administer water rights, the water right holder shall be entitled to divert no more than the quantity reasonably necessary for the method of irrigation actually employed. This quantity may be less than, and shall never be greater than, the quantity of water designated in the SRBA decree.

In his order the Special Master requested IDWR to lodge with the Court an affidavit concerning whether this language constitutes, as provided for by Idaho Code §42-1411(2)(j), ". . .remarks or other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director."[1]

---

[1] Idaho Code §42-1411(2) provides in part that "[t]he director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

(a) . . .

* * *

(j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." [Emphasis added.]

Idaho Code §42-1412(6) in turn provides in part that "[t]he decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." [Emphasis added.]

For ease and clarity of explanation the paragraphs that follow simply refer to the issue

3. The position of IDWR is that the first two sentences of the NSGWD language constitute accurate statements of fact. In this, and similar, subcases where the water right holder (1) is presently irrigating by sprinkler or similar method, but (2) the right which the water right holder is claiming was previously for an irrigation diversion rate of greater than one miners inch per acre (0.02 cfs) for gravity irrigation, and (3) the water right holder has claimed the higher quantity in the SRBA, then IDWR will recommend a reasonable diversion rate for gravity irrigation to provide sufficient water should the water right holder choose in the future to convert back to a gravity irrigation system. Accordingly, the recommended quantity does not constitute the quantity which the water right holder is presently placing to actual beneficial use.

4. The position of IDWR is that the last two sentences of the NSGWD language constitute accurate statements of Idaho law. IDWR construes its statutory authority in the event of a call as precluding it from delivering, or directing the water master to deliver, any quantity greater than what the water right holder making the call can put to actual beneficial use at the time the call is made. Therefore, if the water right holder is irrigating with a sprinkler system, the quantity that can be called out is limited to the quantity which the water right holder can apply to actual beneficial use with that sprinkler system. IDWR's position is that this limitation applies notwithstanding the fact that the water right holder's water right may be decreed listing a higher, gravity irrigation, quantity. IDWR's position is that in the

---

of whether the language in question should be partially decreed as "necessary" pursuant to Idaho Code §42-1411(2)(j); this discussion subsumes within it the separate duties of IDWR to recommend pursuant to Idaho Code §42-1411(2) and of the SRBA Court to decree pursuant to Idaho Code §42-1412(6).

event of a call under these circumstances it will instruct the water master to deliver only the quantity that can be put to actual beneficial use through the sprinkler system.

5. IDWR's policy is to concur in Standard Forms 5 containing the NSGWD language. It does this for two reasons. First, in such cases inclusion of the NSGWD language is necessary to resolve the dispute between the claimant and the North Snake Ground Water District; it constitutes a material part of the settlement agreement, and unless it is carried forward into the partial decree of the water right there is no final settlement of the dispute. Second, since the NSGWD language is accurate both as a matter of fact and as a matter of law, IDWR is aware of no harm that would arise from including it on the face of the partial decree.

6. IDWR recognizes that there are good faith differences of opinion as to whether the NSGWD language is "necessary" as that term is used in Idaho Code §42-1411(2)(j). Representatives of IDWR have met with legal counsel for the North Snake Ground Water District. IDWR understands their concerns regarding (1) the issue of whether the quantity decreed must be the quantity being put to actual present beneficial use, and (2) issues concerning the effective date of the partial decree and whether principles of res judicata may operate to preclude the North Snake Ground Water District or others from challenging a call for a decreed gravity quantity made by a water right holder presently diverting a smaller quantity through a sprinkler system. These are questions as to which reasonable minds may differ.

7. Nonetheless, IDWR does not believe that the NSGWD language is "necessary," as that term is used in Idaho Code §42-1411(2)(j), to define, clarify, or administer the water right,

since it views the NSGWD language in essence as a restatement of existing law and IDWR does not believe it necessary to restate existing law on the face of the partial decree. However, IDWR does not read the statute as excluding from the partial decree any language that is not strictly "necessary." Rather, it construes the statute as one of inclusion rather than exclusion: viz. that remarks or other matters which are necessary must be included, but that the contents of the partial decree is not thereby limited to such necessary matters. Where, as here, the language in question is both accurate and necessary to resolve the dispute between the parties, IDWR knows of no reason why it should not be included in the partial decree.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

David R. Tuthill Jr.

DAVID R. TUTHILL, JR
Adjudication Bureau Chief

SUBSCRIBED AND SWORN to before me this 10th day of August, 1999.

Dawn M Smith

Notary Public for the State of Idaho
Residing at: Boise ID
My commission expires: 12/5/2000

CERTIFICATE OF SERVICE

I certify that on 8-10, 1999, I served copies of this form entitled **Affidavit of David R. Tuthill, Jr.**, to the following persons by serving copies addressed as follows:

Clerk of the District Court Snake River Basin Adjudication 253 Third Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707	__Overnight Mail __Regular Mail __Hand-Delivered X Facsimile
Lloyd Brown Box 543 Hagerman, ID 83332	__Overnight Mail X Regular Mail __Hand-Delivered __Facsimile
Josephine Beeman Box 1427 Boise, ID 83701-1427	__Overnight Mail __Regular Mail __Hand-Delivered X Facsimile
Office of the Attorney General Peter J. Ampe Box 83270 Boise, ID 83720-0010	__Overnight Mail __Regular Mail X Hand-Delivered __Facsimile

APPENDIX B

EXCERPTS OF KARL DREHER TESTIMONY
DATED DECEMBER 6 AND 7, 2007

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-2356A, 36-7210, AND 36-7427 (BLUE LAKES)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-4013A, 36-4013B, AND 36-7148 (SNAKE RIVER FARM)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARMS)

(Clear Springs Delivery Call)

HEARING HELD NOVEMBER 28 - DECEMBER 13, 2007

BEFORE HEARING OFFICER GERALD SCHROEDER

BOISE, IDAHO

Suzanne Gribbin

1 DAY 7, THURSDAY, DECEMBER 6, 2007, PART 1:
2
3 HEARING OFFICER: It's December 6th,
4 approximately 9:00 a.m. We'll resume hearing in the spring
5 users' cases.
6 Call your next witness, please.
7 MR. BROMLEY: The Department calls Karl
8 Dreher.
9 HEARING OFFICER: Please raise your right
10 hand.
11
12 KARL DREHER
13 a witness having been first duly sworn to tell the truth,
14 the whole truth, and nothing but the truth, testified as
15 follows:
16
17 EXAMINATION
18 BY MR. BROMLEY:
19 Q. Mr. Dreher, could you please state and spell
20 your name for the record.
21 A. My name is Karl, Karl is spelled with a K,
22 a-r-l, middle initial J, last name Dreher, D-r-e-h-e-r.
23 Q. And Mr. Dreher, what is your current business
24 address?
25 A. Current business address is 1697 Cole

1 And I marked this as Exhibit 464, which is
2 simply for illustrative purposes. And it's entitled Water
3 Right Quantity. And looking at the top, what I drew out
4 here is just a simple graph showing a water quantity in
5 cubic feet per second on that access, and listing the
6 months of an irrigation year here. And I wanted to use
7 this to illustrate how one might establish a quantity for
8 purposes of a water right.
9 And assuming that I were to design my
10 irrigation system off a river or stream to utilize 100
11 cubic feet per second of water, the red line. And I went
12 out and obtained from the Department of Water Resources a
13 permit that allowed me to go out and begin to apply that to
14 beneficial use. Let's assume the person that is the
15 Department is trying to evaluate the proof in order to
16 issue my license. And looking backwards they saw three
17 years. Year number one would be the year in the middle
18 that shows I was able to apply to beneficial use one day in
19 July, or June, of that year, the full 100 CFS to beneficial
20 use. And then the stream tapered off through the rest of
21 the irrigation season.
22 In year two, looking backwards, which we'll
23 assume was a dryer year is the lower line, we had a
24 relatively small run off in the spring and taper. And then
25 year three is what would be a high runoff year where there

1 was more than 100 CFS available.
2 Now if you were looking backwards in time
3 deciding if this water right user had applied for water
4 shown here to beneficial use in each of those years, up to
5 the 100 CFS capacity of the system, and you look backwards,
6 what is the quantity that you would recommend for purposes
7 of establishing that right?
8 A. Let me clarify for my own purposes. The
9 diversion capacity at this hypothetical facility was
10 constructed at 100 CFS?
11 Q. Yes. That's the capacity of the system and
12 assuming that that's the most we could apply to beneficial
13 use to raise a crop.
14 A. Okay. That's the most that could be applied.
15 And that quantity was -- was diverted -- it was documented
16 that that quantity was diverted and applied to beneficial
17 use, then 100 CFS would be the -- the quantity authorized
18 under the right because that would be the basis for it
19 whether that quantity was diverted and applied to
20 beneficial use on one day, or for three months as you've
21 got it illustrated for condition number three.
22 Q. And during the wet water year when there was
23 more than 100 CFS available, I couldn't obtain a right for
24 that larger amount because I didn't have the ability to
25 apply that to beneficial use based on the limitations of my

1 system.
2 A. That's correct.
3 Q. And so does this illustrate, then, that the
4 quantity of water under a water right at the time it's
5 licensed or decreed, is simply an authorized amount that I
6 can take up to the 100 CFS if it's available?
7 A. That's correct.
8 Q. And it doesn't guarantee, for example, the
9 hatch marks here would indicate a potential hypothetical
10 irrigation season from April 1 through October. That
11 quantity of 100 CFS would not necessarily guarantee that
12 that amount would be available for me for the entire
13 irrigation season if it were not available?
14 A. That's correct.
15 Q. And so if a call were being made under this
16 type of situation and you were trying to administer that
17 delivery call, is that why you say it is relevant to go
18 back and look at the water supply that was available at the
19 time the water right was established?
20 A. That's correct.
21 Q. And that's why historical information is of
22 some significance?
23 A. That's correct.
24 Q. And does this also indicate why seasonal and
25 intrayear variation is also relevant for administration

1 purposes?

2 A. It's one illustration of that, yes.

3 Q. Now let's -- let's move down to the lower

4 illustration, which is somewhat similar. Use the same

5 quantities again. And we'll assume that this is a fish

6 farm aquaculture operator. Again he applies for a permit

7 and establishes a capacity of his aquaculture facility at

8 100 cubic feet per second. And here I've simply shown

9 years. So if one were out here looking backwards trying to

10 determine what would be the quantity that would be used for

11 issuing that water right, would that again be the 100 cubic

12 feet per second of right if the aquaculture user was able

13 to achieve that and put it to beneficial use on one day in

14 one year?

15 A. Yes.

16 Q. And to the extent there may have been water

17 more than that on a particular year, since it was not

18 applied to beneficial use, he couldn't get that amount?

19 A. Well, presumably if the capacity of the system

20 is limited to 100 CFS, then there would be no way to divert

21 that additional amount and apply it to beneficial use.

22 Plus, if the water right had already been issued with an

23 authorized diversion rate of 100 CFS, it wouldn't be

24 authorized to divert more than that and apply it to

25 beneficial use.

1 Q. So the issuance of a quantity for a maximum
2 amount doesn't necessarily indicate that that amount is
3 available at all times during the year?
4 A. That's correct.
5 Q. And so similarly in this situation, if you
6 looked at this year three to year four, if a spring user
7 were trying to contend that they were entitled to have that
8 amount in their decree simply because the decree says they
9 get 100 CFS, if they were able to obtain the amount during
10 the entire year, for 24 hours a day 52 weeks a year, would
11 the -- would they in fact be then obtaining a water right
12 that was greater in quantity and greater in certainty than
13 they had at the time the right was established?
14 A. That's correct. And depending upon the facts
15 they may or may not, you know, be entitled to divert that
16 additional water ahead of other juniors.
17 Q. Okay. Thank you. You gave some testimony
18 about the history and experience the State has had with
19 administering surface water rights, and seemed to indicate
20 we have a lot of history going back to delivery calls at
21 the turn of the century, or perhaps before. And then you
22 gave us some discussion of the doctrine of futile call on
23 how that would apply to a surface water situation. And you
24 gave the Big Lost River situation as an example of where
25 they commonly deal with the futile call issue.

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-02356A, 36-07210, AND 36-07427

(Blue Lakes Delivery Call)

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A 36-04013B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARMS)

(Clear Springs Delivery Call)

HEARING HELD NOVEMBER 28 - DECEMBER 13, 2007

BEFORE HEARING OFFICER GERALD SCHROEDER

BOISE, IDAHO

Suzanne Gribbin

DAY 8, FRIDAY, DECEMBER 7, 2007, PART 1:

HEARING OFFICER: It's December 7th at 8:15, we'll proceed further with the testimony.

MR. STEENSON: Thank you, Your Honor.

EXAMINATION

BY MR. STEENSON:

Q. Good morning, Mr. Dreher. Again, I'm Dan Steenson for Blue Lakes Trout Farm.

Mr. Dreher, we're going to try to move quickly this morning so you can make your plane. So directing your attention again to Exhibit 21.

A. Exhibit what?

Q. 21, it's in one of the white books.

And this, again, is the agreement between Blue Lakes Trout Farm and Blue Lakes Country Club.

And for the record that's not my binder.

A. I have it. I'll continue to put this back together if you want to ask your question.

Q. I need to refer you to the document --

A. Okay.

Q. -- so I want to be fair to you.

A. Then I'll not put it back together. Okay.

Q. Okay. And looking at page 2, paragraph number 1 --

1 that correct?
2 A. That's one aspect of timing. That's not the
3 only aspect of timing.
4 Q. Okay. But there's no reference in that rule
5 to seasonal variations; is there?
6 A. Well, the seasonal variation is -- goes
7 directly to what the -- to the timing of when water is or
8 isn't available at the authorized amounts.
9 Q. Okay. And my understanding of your analysis
10 under this section heading was that what you were doing
11 when you looked, for example at paragraph 50 at page 11, is
12 that you were evaluating what the quantity element of Blue
13 Lakes water rights means; is that correct?
14 A. No, I don't think that's correct. The
15 quantity element, I've said it numerous times, is the
16 maximum amount authorized to be diverted. It's nothing
17 more than that.
18 Q. And my understanding further is that this
19 analysis was your attempt to interpret a quantity for
20 purposes of administering junior ground water rights that
21 were diverting from a different source?
22 A. Well, the analysis of quantity was for the
23 purposes of administering -- eventually administering
24 junior priority ground water rights; that's correct.
25 Q. Okay. And what you did was you looked back at

1 historic measurements in IDWR's files going back even to
2 times prior to the appropriation of these Blue Lakes water
3 rights; isn't that correct?
4 A. That's correct.
5 Q. Okay. And you -- why did you do that?
6 A. Well, it was all part of reviewing the history
7 of how the right had been developed and applied to
8 beneficial use.
9 Q. Hadn't that been done in the adjudication and
10 when the water right was licensed?
11 A. Some review of that had been done when the
12 water right was licensed. But no additional review if, you
13 know, as I indicated in my deposition, if a water right had
14 been licensed, that license was the basis for the
15 recommendation in the SRBA and there was no further
16 analysis done unless there was some objection.
17 Q. And don't the claim investigation procedures
18 of the Department provide for claim investigators to go
19 through the Department's records when investigating water
20 rights?
21 A. Not necessarily.
22 Q. Okay. Could you turn to Exhibit 210 in the
23 black book. And do you recognize this document entitled
24 Claim Investigation Handbook?
25 And at page 5 of this handbook under the

1 heading Review of IDWR records -- and this is under a
2 broader section heading Initial In-Office Investigation
3 Pertaining to Claims Made in the Adjudication.
4 A. Which page, I'm sorry?
5 Q. Page 5, under the section heading Review of
6 IDWR Records. The paragraph begins the agent needs to
7 review IDWR records regarding the water use. And goes on
8 and further describes the investigation that is done for
9 purposes of preparing a recommendation to the SRBA court as
10 to how the water rights should be decreed. I is the case,
11 isn't it, that in the process of preparing recommendations
12 to the SRBA court that claim investigators are to go
13 through Departmental records concerning the water right.
14 A. As I indicated though, I know that if the
15 right had been licensed that was the basis for the
16 recommendation and generally no additional investigation
17 was done.
18 Now this document that you're referring to
19 says revised October 5, 2007. So I don't know that this is
20 -- I don't know that these provisions were in the
21 guidelines for agents at the time that these rights were
22 recommended for decree, or not.
23 Q. Okay. Now, why would the Department, as you
24 say generally -- you don't know if it occurred in this, if
25 the Department relied exclusively on the license in these

1 cases -- but why generally would the Department be relying
2 on the licenses in making their recommendations to the SRBA
3 court?
4 A. Because it was presumed that the necessary
5 investigations had already been undertaken as part of the
6 licensing procedure. And you know, from my review of water
7 rights files, that's sometimes the case, sometimes it's not
8 the case.
9 Q. And by investigations in the licensing what do
10 you mean?
11 A. Well, generally the -- the licensing
12 investigations are conducted to confirm that -- that the
13 appropriator has in fact developed the means necessary to
14 divert and apply the quantity of water sought for
15 authorization. That that quantity of water has actually
16 been diverted and applied to beneficial use.
17 Q. And that investigation includes an examination
18 upon the submission of proof of beneficial use, which would
19 include measuring water that the permit holder has diverted
20 and seeks to have licensed; correct?
21 A. Correct. But those, you know, sometimes those
22 investigations are not entirely accurate, unfortunately.
23 Q. Okay. So are you saying that you went back to
24 this historical information because you felt that perhaps
25 the investigations were not accurate with the Blue Lakes

BY MR. STEENSON:

Q. In fact in -- with respect to Blue Lakes Trout company's water rights the Department attempted to add a condition to the quantity element, namely the facility volume; correct?

A. The facility volume, you know, again the court's made its decision and facility volume is not an element. But the facility volume was never intended to be appurtenant to the quantity element. It was intended to be a separate element that defined the extent of beneficial use.

Q. Okay. And to the extent that the Department in briefing in the SRBA explained that it's relevant to quantity, I take it you just wouldn't know about that.

A. Well, it's -- the facility volume is a quantity, but it's not the same quantity as the rate of diversion.

Q. Okay. And with respect to the extent of the Department's examination of the water right that had been licensed. Isn't it part of the Department's process to evaluate the extent to which changes have occurred since the water right was license that should be reflected in a recommendation to the SRBA court?

A. What kind of changes?

Q. Well, abandonment, forfeiture, some other

1 change that would necessitate or warrant a recommendation
2 different than the license?
3 A. No. The only time, you know, the only time
4 that the Department would look at whether a right had been
5 abandoned or forfeited, is if it's brought forward in an
6 application for transfer, or if, as in these cases, if
7 there was a demand that water rights be administered for
8 the purposes of distributing water to rights and there had
9 not been a determination of -- previously made of
10 abandonment or forfeiture. That would be one aspect that
11 would be looked at.
12 Q. Thank you.
13 A. Other changes, I mean if a right had been
14 licensed and then a subsequent transfer had occurred prior
15 to the SRBA, the commencement of the SRBA, then that --
16 that right would have been recommended as transferred.
17 But did we routinely look at -- go back and
18 see if there were any changes to rights that had been
19 licensed but not transferred? And the answer is no.
20 HEARING OFFICER: Any further questions?
21 MR. SIMPSON: Just a couple, Your Honor. Just
22 to clarify.
23 BY MR. SIMPSON:
24 Q. Karl, you determined that both Clear Springs
25 and Blue Lakes were diverting from surface water sources;

APPENDIX C

LEGAL GUIDELINE FROM CLIVE J. STRONG TO SENATOR NOH AND REPRESENTATIVE STEVENSON, DATED FEBRUARY 24, 2004

RECEIVED
FEB 27 2004
Department of Water Resources

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G WASDEN

February 24, 2004

The Honorable Laird Noh
Capitol Building
P.O. Box 83720
Boise, Idaho 83720-0081

The Honorable Bert Stevenson
Capitol Building
P.O. Box 83720
Boise, Idaho 83720-0081

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Senator Noh and Representative Stevenson:

This letter is in response to the questions presented in your February 3, 2004, inquiry regarding the revisions proposed by House Bill (H.B.) 636, which would amend the definition of "consumptive use" under Idaho Code § 42-202B and preclude the Director of the Department of Water Resources from considering actual or historic consumptive use in taking action upon an application to change any element of a water right under Idaho Code § 42-222.

QUESTIONS PRESENTED

1. Does the Prior Appropriation Doctrine, adopted by Article XV, Section 3, of the Idaho Constitution, implemented through statutes by the Legislature, and endorsed by the Idaho courts, require that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights?

2. If not, what recourse, if any, do the holders of other affected water rights have to ensure that injury to their water rights does not occur as a result of such transfers?

Natural Resources Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2690
Located at 700 W. Jefferson Street, Suite 210

SCANNED
NOV 30 2004

CONCLUSION

Our reading of the prior appropriation doctrine as implemented by Idaho and most other prior appropriation states requires that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights. The current provisions of Idaho Code §§ 42-202B and -222 are in accord with the statutes and law of other prior appropriation states.[1] If H.B. 636 were enacted as proposed, the Director would be precluded from considering historical consumptive use "as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." An affected water right holder would still be entitled to challenge the proposed transfer of an existing right on the grounds that the change would result in injury, is inconsistent with the State's policy on the conservation of water, or is not in the local public interest. However, enactment of H.B. 636 would seriously limit the ability of an affected water right holder to successfully protect his or her water right from any injury caused by an increase in consumptive use authorized by the transfer or change in use of another water right.

ANALYSIS

A. Doctrine of Historical Consumptive Use in Idaho

The only reported Idaho case that applies Idaho Code §§ 42-202B and -222 is *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).[2] Barron applied to the Idaho Department of Water Resources ("Department") to transfer a water right. During the preliminary stages, the local watermaster recommended that the Department deny the transfer on the basis that, if granted, injury to downstream appropriators might occur. Following the watermaster's recommendation, the Department requested that Barron provide additional information that the transfer would not injure other users. Concluding that the additional information was insufficient to establish that downstream appropriators would not be injured if the transfer were approved, the Department denied the request. Barron subsequently sought judicial review of the Department's decision, which was affirmed by the district court.

---

[1] The prior appropriation states are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[2] The Idaho Supreme Court historically has not allowed transfer applications based on injury to downstream junior appropriators. In *Washington State Sugar Co v. Goodrich*, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915), a sawmill owner sought to transfer his water right to upstream irrigators. Concluding that change in the nature of use from non-consumptive to consumptive, and change in place of use to an upstream location, would injure downstream junior appropriators, the court denied the transfer. "As against the change sought by petitioners, the junior appropriators had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriations, unless the change can be made without injury to such right." 27 Idaho at 41, 147 P. at 1078.

SCANNED
NOV 3 0 2004

On appeal from the district court, the Idaho Supreme Court concluded Barron had not met his burden of demonstrating no injury would occur if the transfer were granted. *Id.* at 418, 18 P.3d at 223. In applying Idaho Code §§ 42-202B and -222, the Idaho Supreme Court ruled, "Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use." *Id.* at 420, 18 P.3d at 225. The court further found that Barron had failed to supply sufficient information for the Department to establish the historical consumptive use under the water right proposed for transfer. *Id.* at 419, 18 P.3d at 224. Therefore, the court affirmed the Department's denial of Barron's transfer application.

B. Doctrine of Historical Consumptive Use in Other Prior Appropriation States

Because the Idaho courts have not discussed the theoretical basis behind the application of the doctrine of historical consumptive use in a transfer proceeding, it is appropriate to examine the reasoning from courts in other prior appropriation states. Before examining the opinions of other prior appropriation states, however, the precise nature of a water right must be discussed.

According to the doctrine of prior appropriation, water is a public resource to which individuals are allotted a right to use. *See, e.g.*, Idaho Code § 42-101. While water rights are considered real property, Idaho Code § 55-101(1), water rights are unique because they are "usufructuary."[3] As a usufructuary right, water rights do not stand on their own. Instead, water rights "are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ." Idaho Code § 42-101.

Because a water right is a usufructuary right, a water right is quantified by the amount of water an individual can beneficially use. To be a beneficial use, "the end use for the water must be generally recognized and socially acceptable use . . . ." WATER AND WATER RIGHTS § 12-24 (Robert E. Beck ed., 2001). Therefore, even if an individual possess a right to divert a certain quantity of water, that individual's entitlement is limited by the amount of water he or she can apply to a beneficial purpose. *See* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho Law Review 1; 38 (1968) ("The [Idaho] supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use . . . ."). Limiting an individual's ability to use water only for beneficial uses maximizes water resources; helps prevent waste, and injury to other users. *Id.* at 2-3.

Consistent with the theory that water is a public resource that should be managed for the greater good, and that beneficial use is the measure of a water right, "[a] water holder *can only transfer the amount that he has historically put to beneficial use.* Beneficial use is the measure and limit of the transferable right whether the right is a permit or non-permit based right." A.

---

[3] "[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself." SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 18 (1911).

SCANNED
NOV 3 0 2004

DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:139 (2003) (emphasis added). Therefore, under the doctrine of prior appropriation, the amount of water available to transfer cannot be quantified without an examination of the past use of that right.

While both the Arizona[4] and Colorado[5] supreme courts have expressly stated that the amount of water available to transfer under the doctrine of prior appropriation is limited to historical consumptive use, the most thorough analysis behind the application of historical consumptive use appears to have been undertaken by the Washington and Wyoming supreme courts. According to the Washington Supreme Court:

> Washington's [transfer] statute *is consistent with the principle of Western water law* that the diversion point of a water right put to beneficial use may be granted unless that change causes harm to other water rights. Both upstream and downstream water right holders can object to a change in the point of diversion or the place of use, which could affect natural and return flows and, thus, adversely affect their rights. A. Dan Tarlock, *Law of Water Rights and Resources* § 5.17[3][a], at 5-92.1 to .3 (1996); *see, e.g., Haberman v. Sander*, 166 Wash. 453, 7 P.2d 563 (1932); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629 (1954). The statute also presumes that a change in point of diversion may be made only where water has been put to a beneficial use. This is also consistent with established water law principles. *A transferred right or a change in point of diversion may be granted only to the extent the water right has historically been put to beneficial use. E.g., May v. United States*, 756 P.2d 362, 370-71 (Colo. 1988); *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52, 57 (1968); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988); *Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978); *see also* Tarlock, § 5.17[5], at 5-93. "[B]eneficial use determines the measure of a water right. The owner of a water right is entitled to the amount of water necessary for the purpose to which it has been put, provided that purpose constitutes a beneficial use." *Dep't of Ecology v. Grimes*, 121 Wash.2d 459, 468, 852 P.2d 1044 (1993).

Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 737 (Wash. 1997) (emphasis added).

In Wyoming, the state supreme court engaged in an extended discussion of the policy behind limiting the amount of water available in a transfer proceeding to the amount historically

---

[4] In a groundwater reallocation proceeding involving the city of Tucson, the Arizona Supreme Court stated that the amount of water subject to reallocation was limited to the "*annual historical maximum use* upon the lands so acquired." *Jarvis v. State Land Dep't*, 550 P.2d 227, 228 (Ariz. 1976) (emphasis added).

[5] "The amount of consumable water available for transfer depends upon *the historic beneficial consumptive use* of the appropriation for its decreed purpose at its place of use." *Santa Fe Trail Ranches Property Owners Ass'n v. Simpson*, 990 P.2d 46, 59 (Colo. 1999) (emphasis added).

SCANNED
NOV 3 0 2004

used for a beneficial purpose. *Basin Elec. Power Co-Op v. State Board of Control*, 578 P.2d 557 (Wyo. 1978). There, the court stated:

> While this court has for many years recognized that one of the fundamental principles applicable to any transfer of water rights for change in use is the avoidance of injury (Johnston v. Little Horse Creek Irrigation Co., supra), *equally fundamental is the principle which holds that an appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use.* Our statutes provide:
>
> > " . . . Beneficial use shall be the basis, the measure and the limit of the right to use water at all times, not exceeding the statutory limit . . . ." (Emphasis supplied) Section 41-3-101, W.S .1977 (Section 41-2, W.S.1957).
>
> *We have previously said that the water right of an appropriator is limited to beneficial use, even though a larger amount has been adjudicated.* Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 P.2d 568, 570-571, and Budd v. Bishop, Wyo., 543 P.2d 368, 373. *The decreed amount of water may be prima facie evidence of an appropriator's entitlement* (Quinn, supra), *but such evidence may be rebutted by showing actual historic beneficial use. Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable.* The state's abandonment statutes, ss 41-3-401 and 41-3-402, W.S.1977 (ss 41-47.1 and 41-47.2, W.S.1957, 1975 Cum. Supp.), are recognition of this requirement. See also, Budd v. Bishop, supra. This principle announced in Johnston, supra, at 79 P. 24, continues to be the law to this day. We said in Johnston:
>
> > "As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he cannot sell surplus water which he does not need, while retaining his original appropriation; . . ." (Emphasis supplied)
>
> As we have heretofore observed, the Johnston decision indicates that if the seller-appropriator or the buyer were shown to have committed waste or that they intend the commission of waste the court would interfere.
>
> . . . .
>
> *The key to understanding the application of beneficial-use concepts to a change-of-use proceeding is a recognition that the issues of nonuse and misuse are inextricably interwoven with the issues of change of use and change in the place of use.* This is true even without the formal initiation of abandonment

SCANNED
NOV 3 0 2004

> proceedings under the statutes. If an appropriator, either by misuse or failure to use, has effectively abandoned either all or part of his water right through noncompliance with the beneficial-use requirements imposed by law, he could not effect a change of use or place of use for that amount of his appropriation which had been abandoned.
>
> . . . .
>
> Prior to the enactment of s 41-3-104, supra, the laws of Wyoming did not clearly recognize the role played by the concept of beneficial use in the context of a change-of-use proceeding. Emphasis was placed, in cases where such changes were allowed, on the avoidance of injury to other appropriators. Commentators and those involved in water administration, however, came to realize the great disparity between the actual practices of water users and adjudicated water rights.

Id. at 564-566 (emphasis added).

C. Codification of Historical Consumptive Use in the Prior Appropriation States

While the appellate courts in many of the prior appropriation states have seemingly not engaged in a thorough theoretical analysis of the doctrine of historical consumptive use, every prior appropriation state--with the exception of Alaska--has codified statutes that limit water transfers.[6] Of those states, Colorado, Oregon, Washington, and Wyoming appear to have statutes that are the most similar to the current version of Idaho Code §§ 42-202B and -222. Even in the states that have not expressly defined the theory of consumptive use--California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Texas--legislation prevents the reallocation of water if it will injure any vested water right holder.

Presently, Utah appears to be the only prior appropriation state with a statute similar to the proposed revisions to Idaho Code §§ 42-202B and -222. The Utah transfer statute provides that "[a] change may not be made if it impairs any vested right without just compensation." Utah Code § 73-3-3(2)(b). However, another subsection of the same statute also provides that "[t]he state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others." Utah Code § 73-3-3(7)(a).

While Utah Code § 73-3-3(7)(a) clearly states that injury may not be the sole reason for denying a request to reallocate water, the Utah Supreme Court has found the opposite. In *Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co.*, 367 P.2d 855 (Utah 1962),[7] the state supreme court was presented with an application for change of use that, if

---

[6] *See* Appendix attached.

[7] Utah Code § 73-3-3 was codified in 1919, but has been amended numerous times since its enactment. The current language in Part (7)(a) has been in existence since at least 1947. *See Moyle v. Salt Lake City*, 176 P.2d 882 (Utah 1947). Therefore, Part 7(a) predates the Utah Supreme Court's 1962 decision in *Piute*.

SCANNED
NOV 3 0 2004

evidence presented supported a finding of injury, the court denied the application: "if vested rights will be impaired by such change or application to appropriate, such application should not be approved." *Id.* at 858. Therefore, the Utah Supreme Court appears to have limited the application of Utah Code § 73-3-3 in a manner consistent with the doctrine of prior appropriation in the other western states.

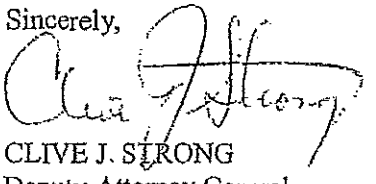
D. Recourse Available to Holders of Affected Water Rights

Even if Idaho Code §§ 42-202B and -222(1) are amended as proposed in H.B. 636, affected water right holders would still be able to object to the proposed transfer or change of a valid water right on grounds of injury, enlargement of the original right, inconsistency with the conservation of water resources, or violation of the local public interest. Idaho Code § 42-222(1). However, if Idaho Code § 42-222(1) is changed as proposed, and only the "authorized" as opposed to the "actual or historic" consumptive use volume can be considered by the Director in a transfer proceeding, it may be difficult for the holder of an affected water right to protect his or her right from injury caused by an increase in consumptive use under a transferred water right.

Under the prior appropriation doctrine, water authorized to be diverted and beneficially used under a permit, license, or decree but not required to accomplish the beneficial use being made must remain part of the public water resource available to meet the needs of other water right holders. Thus, if a water right holder has not been required to use the maximum amount of water authorized under the right in order to accomplish the beneficial use made, the remaining water has likely been left in the stream or other public source and appropriated by other users. Depending on the duration of this practice, other appropriators may have come to rely upon the unused water to meet their needs.

In the event that a water right holder seeks to transfer or change his or her water right, other appropriators could be injured if the amount of water available for transfer or change is the entire permitted, licensed, or decreed right--more than the amount beneficially used. As Idaho law currently stands, the Director could limit the transfer or change based on the historic use of the water right, determining that a transfer of the full amount of water authorized to be used under the right would injure other appropriators or constitute an enlargement of the beneficially used right. Without the ability to look at historical use, it may be difficult for the Director to deny or condition a transfer or change on the basis of injury or enlargement.

Sincerely,



CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

CJS/pb

SCANNED
NOV 3 0 2004

APPENDIX

The following is a survey of laws currently in effect in the prior appropriation states that govern water reallocation.

1. Alaska

Alaska does not statutorily regulate water transfers; however, Alaska common law recognizes that a transfer can be denied on the basis of injury. WATER AND WATER RIGHTS § 14-44 n.200 (Robert E. Beck ed., 2001).

2. Arizona

Arizona Revised Statute § 45-172 states that the amount of water available for reallocation shall not "exceed the vested rights existing at the time of such severance and transfer, and the director shall by order so define and limit the amount of water to be diverted or used annually subsequent to such transfer."

3. California

California Water Code § 1702 establishes that a reallocation of water may not occur if the change will "operate to the injury of any legal user of the water involved."

4. Colorado

Colorado Revised Statute § 37-92-305 states:

(3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

SCANNED
NOV 3 0 2004

(a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;
(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;
(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;
(d) Such other conditions as may be necessary to protect the vested rights of others.

5. **Kansas**

Kansas Statute § 82a-1502 states that in a water reallocation proceeding, "the hearing officer shall consider all matters pertaining thereto, including specifically, (1) Any current beneficial use being made of the water proposed to be diverted . . . (3) . . . other impacts of approving or denying the transfer of the water."

6. **Montana**

According to Montana Code § 85-2-402:

(2) . . . the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

7. **Nebraska**

Nebraska Revised Statute § 46-294 states:

(1) The Director of Natural Resources shall approve an application filed pursuant to section 46-290 if:

(a) The requested change of location is within the same river basin, will not adversely affect any other water appropriator,

SCANNED
NOV 30 2004

and will not significantly adversely affect any riparian water user who files an objection in writing prior to the hearing;

(b) The requested change will use water from the same source of supply as the current use;

(c) The change of location will not diminish the supply of water otherwise available;

(d) The water will be applied to a use in the same preference category as the current use, as provided in section 46-204 [domestic, agricultural, or manufacturing]; and

(e) The requested change is in the public interest.

8. Nevada

According to Nevada Revised Statute § 533.370:

1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:
   (a) The application is accompanied by the prescribed fees;
   (b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and
   (c) The applicant provides proof satisfactory to the State Engineer of:
      (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
      (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

Nevada Revised Statute § 533.371 states that a reallocation of water may not occur if "[t]he proposed use conflicts with existing rights; or [t]he proposed use threatens to prove detrimental to the public interest."

9. New Mexico

New Mexico Statute § 72-5-23 states:

All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, all or any part of the right may be severed from the land, simultaneously

SCANNED
NOV 3 0 2004

transferred and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state, on the approval of an application of the owner by the state engineer. Publication of notice of application, opportunity for the filing of objections or protests and a hearing on the application shall be provided as required by Sections 72-5-4 and 72-5-5 NMSA 1978.

10. North Dakota

According to North Dakota Century Code § 61-04-15.2, "[t]he state engineer may approve the proposed change if the state engineer determines that the proposed change will not adversely affect the rights of other appropriators."

11. Oklahoma

Oklahoma Statute § 82-105.23 states: "Any appropriator of water including but not limited to one who uses water for irrigation, may use the same for other than the purposes for which it was appropriated, or may change the place of diversion, storage or use, in the manner and under the conditions prescribed for the transfer of the right to use water for irrigation purposes in Section 105.22 of this title." Oklahoma Statute § 82-105.22 states that a change in use may occur "if such change can be made without detriment to existing rights."

12. Oregon

According to Oregon Revised Statute § 540.520:

(2) The application required under subsection (1) of this section shall include:
- (a) The name of the owner;
- (b) The previous use of the water;
- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use which is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610.

13. South Dakota

South Dakota Codified Laws § 46-5-34.1 states that a reallocation of a water right will not be granted "unless the transfer can be made without detriment to existing rights having a priority date before July 1, 1978, or to individual domestic users." Emphasis added. South

SCANNED
NOV 3 0 2004

Dakota Codified Laws § 46-5-34.1 further limits reallocation by stating that "[n]o land which has had an irrigation right transferred from it pursuant to this section, may qualify for another irrigation right from any water source."

14. Texas

According to Texas Water Code § 11.134(b):

The commission shall grant the application only if:

(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
(2) unappropriated water is available in the source of supply;
(3) the proposed appropriation:
  (A) is intended for a beneficial use;
  (B) does not impair existing water rights or vested riparian rights;
  (C) is not detrimental to the public welfare;
  (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and
  (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and
(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Subdivision (8)(B), Section 11.002.

15. Utah

Utah Code § 73-3-3 states in relevant part:

(2)(a) Any person entitled to the use of water may make permanent or temporary changes in the:
  (i) point of diversion;
  (ii) place of use; or
  (iii) purpose of use for which the water was originally appropriated.
(b) A change may not be made if it impairs any vested right without just compensation.

. . . .

(4)(a) A change may not be made unless the change application is approved by the state engineer.

SCANNED
NOV 2 0 2004

. . . .

(5)(a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.

. . . .

(7)(a) The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.

16. Washington

Revised Code of Washington § 90.03.380 states:

(1) The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.

17. Wyoming

According to Wyoming Statute § 41-3-104(a):

When an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. The petition shall set forth all pertinent facts about the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and the proposed place of use. The board may require that an advertised public hearing or hearings be held at the petitioner's expense. The petitioner shall provide a transcript of the public hearing

SCANNED
NOV 3 0 2004

to the board. The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:

(i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;

(ii) The extent to which such economic loss will be offset by the new use;

(iii) Whether other sources of water are available for the new use.

SCANNED
NOV 3 0 2004