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

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

I. INTRODUCTION

On May 20, 2010, the Court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Order").[1] There, the Court upheld the Director of the Idaho Department of Water Resources' ("Director" or "Department") conclusions that: (1) Idaho's Ground Water Act applies retroactively to the A&B Irrigation District's ("A&B") pre-1951 irrigation water right, 36-2080; (2) that A&B's reasonable pumping levels have not been exceeded; (3) that A&B's water right is properly analyzed as an integrated system; and (4) that it was not necessary to create a Ground Water Management Area where the Director had already created Water Districts. *Order* at 1-2. The Court, however, found that the Director "erred in failing to apply [a] proper evidentiary standard of clear and convincing evidence in [his] finding of no material injury to A&B's right." *Id.* at 2. The Court remanded the Director's finding of no material injury for purposes of applying the clear and convincing evidentiary standard. *Id.*

On August 3, 2010, petitions for rehearing on the issue set for remand were filed by the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc. ("IGWA"). Generally, IGWA and Pocatello argue that while it is proper to apply a clear and convincing evidence standard in determinations of waste, forfeiture, or abandonment, the proper standard to apply in a delivery call proceeding is preponderance of the evidence.

[1] The Order was signed by the Court on May 4, 2010. The Order was not served on the parties until May 19, 2010. On May 20, 2010, the Court entered an *Order of Extension Re: Filing Date of Memorandum Decision*, which established entry of the Order "as May 20, 2010."

II. ARGUMENT

The Director concurs with the Court's assessment that in matters of adjudication, licensure, and in proceedings that *per se* alter the elements of a decree or license (abandonment, adverse possession, forfeiture, or waste), it is correct to apply a clear and convincing standard of evidence. *See Order* at 28-30. In those proceedings, it is proper to apply the heightened standard because property rights are being created or forever changed.

In administration of hydraulically connected water rights, however, the issue before the Director is what amount of water does the senior currently need to accomplish a beneficial use. Idaho's constitution requires that "priority over water be extended only to those using the water." *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007). If the Director determines that the senior does not currently require the full extent of the water right to accomplish the beneficial use, then junior users are entitled to divert any water not required to achieve the senior's authorized beneficial use. "Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use." *Order* at 33. This legal principle is based upon balancing the core objectives of the prior appropriation doctrine: security of right and full economic development of the resource.

Application of a preponderance of the evidence standard will allow the Director to ensure the senior's right to make full beneficial use of the water right is protected while at the same time ensuring the senior does not seek to use the water right to defeat full economic development of the State's water resources. Idaho Const. Art. XV, §§ 3, 7; Idaho Code § 42-226; and CM Rule 20.03. Application of a clear and convincing evidence standard, on the other hand, would allow the senior to defeat the objective of optimum beneficial use of the resource.

Simply stated, the Director's determination that a senior is entitled to seek curtailment of junior water rights based upon the facts existing at the time of the delivery call in no way diminishes the senior water right. As such, the proper standard of review of the Director's decision in this delivery call is the preponderance of the evidence standard.

A. Because A&B's Water Right Was Not Altered In The Delivery Call, A&B May File A Subsequent Delivery Call If Current Conditions Warrant An Increase In Beneficial Use

In the Snake River Basin Adjudication, the Director was tasked with determining a claimant's maximum extent of beneficial use for the most water intensive crop (alfalfa) during the peak period of use (hottest period of the summer). *Order* at 30, 32. For A&B, water right 36-2080 is a reflection of its peak beneficial use at licensure when the project was flood irrigated by leaky ditches and laterals. The license provides for diversion of up to 1,100 cfs for the irrigation of 62,604 acres. Since licensure, it is undisputed that A&B, like many other users on the ESPA, has dramatically improved its project efficiency by: (1) converting from predominantly flood irrigation to 96% sprinkler irrigation; and (2) lining its ditches and laterals and piping water directly from the well head to the field to reduce conveyance loss to approximately 3%. R. at 1114-1115, 3088. Because of its actions, the record establishes that A&B needs less water today to accomplish the same beneficial use than it did at the time of licensure. R. at 3107.

Beneficial use is the basis of a water right and may vary over time. In the context of a delivery call, the Director is obligated to consider all known facts to determine the senior's current beneficial needs. According to the Court in *American Falls*, the Director must begin with the presumption that the water right held by the calling senior is valid. 143 Idaho at 877-78, 154 P.3d at 448-49. The CM Rules allow the Director to not only review the information filed

by the senior, but also develop a record upon which to base a decision. *Id.* at 446, 154 P.3d at 875. "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *Id.* If the Director's review leads to a finding of material injury, "the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *Id.* at 878, 154 P.3d at 449.

Regardless of whether the Director finds material injury, the CM Rules do not require the Director to forever alter the senior's water right—through a finding of abandonment, adverse possession, forfeiture, or waste—if the Director determines that the senior does not presently require the full extent of his or her water right to accomplish the same beneficial purpose. This is consistent with *American Falls*, where the Court stated that the Director may determine that the senior does not need the "full quantity" of his or her decreed right and that such determination does not constitute a re-adjudication of the right. *Id.* at 876-77, 154 P.3d at 447-48. "If this Court were to rule the Director <u>lacks the power in a delivery call</u> to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that <u>priority over water be extended only to those using the water</u>." *Id.* at 876, 154 P.3d at 447 (emphasis added).

In accord with *American Falls*, the Director began with the presumption that A&B was authorized to divert in accordance with 36-2080. R. at 3102. While 36-2080 authorizes a maximum diversion rate of 0.88 miner's inches per acre, the Director found that A&B could presently accomplish the same beneficial use with 0.75 miner's inches per acre. The progression of A&B's project from inefficient flood irrigation with leaky conveyance works to the highly

efficient system that it employs today emphasizes that what is necessary to accomplish the same beneficial use may vary over time.

Moreover, the record established that patrons of A&B, like other water users, rotate crops with varying water needs. This also demonstrates that A&B's reasonable irrigation needs will vary from year-to-year. *See e.g. American Falls* at 438, 154 P.3d at 867 (this is why the Director sought information from the Surface Water Coalition over the prior "fifteen irrigation seasons" regarding cropping patterns, delivery records, and the number of acres that were sprinkler irrigated as opposed to flood irrigated). Because of these factors, the Director's evaluation of A&B's current beneficial needs is not, as this Court suggests, "Déjà Vu" of the adjudication or licensure process. *Order* at 36. The adjudication and licensure proceedings established the historical maximum extent of beneficial use, which may be less than what the senior requires today for beneficial use.

While administration of water rights recognizes the historical maximum, it is only concerned with determining whether curtailment is necessary to provide for the senior's current beneficial use. Because beneficial use varies from year-to-year, administration of water rights does not re-establish the quantity element of the water right—absent a finding of abandonment, adverse possession, forfeiture, or waste. The senior's water right is protected up to the full entitlement of the right if the senior needs that amount to achieve the authorized beneficial use. The senior continues to possess the right as set forth in the decree or license and has the right to call out junior users up to the full quantity of the right, to the extent it is needed for current beneficial use.

By not forever altering water right 36-2080 with a finding of abandonment, adverse possession, forfeiture, or waste, the Director ensured that A&B would maintain the ability to

divert 0.88 miner's inches per acre and file a subsequent CM Rule 40 delivery call if the full extent of the right is needed for current beneficial use. By determining A&B's current beneficial needs, the Director intelligently balanced priority of right with full economic development of the resource.

B. Because A&B's Water Right Was Not Altered, The Proper Standard Of Review To Apply Is Preponderance Of The Evidence

In *American Falls*, the Court reversed the district court and held that the CM Rules were not facially unconstitutional because they failed to set out the evidentiary standard to apply in a delivery call proceeding. *American Falls* at 873, 154 P.3d at 444. The Court stated that the applicable burdens of proof were incorporated into the CM Rules by reference. *Id.*

In its Order, this Court stated "that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source." *Order* at 34. In support of its decision, the Court cites three cases involving junior appropriators, without sanctioned water rights, to establish by clear and convincing evidence that their proposed diversions would not injure senior users. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904).

The rationale of the Idaho Supreme Court in *Cantlin*, *Josslyn*, and *Moe* is in direct accord with the United States Supreme Court regarding proposed new diversions of interstate waters in prior appropriation states. *Colorado v. New Mexico*, 467 U.S. 310 (1984). There, the state of Colorado petitioned the Court for an equitable apportionment of the Vermejo River. After reference to a special master, the Court stated as follows:

> Last Term, the Court made clear that Colorado's proof would be judged by a clear-and-convincing-evidence standard. *Colorado v. New Mexico*, 459 U.S., at 187188, and n. 13, 103 S.Ct., at 547548, and n. 13. In contrast to the ordinary

> civil case, which typically is judged by a "preponderance of the evidence" standard, we thought a [proposed] diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable."
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> . . . .
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> Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."

Id. at 316 (emphasis added).

Application of a clear and convincing standard of proof makes sense in cases regarding proposed new diversions because of the need to protect the rights of existing users. While clear and convincing is not an insurmountable hurdle, the risk of an erroneous decision is properly placed on the new user to establish that water is available for beneficial use. The paradigm changes, however, once junior rights have been sanctioned.

There is no case law or rule in the state of Idaho that establishes the standard of proof to apply in a delivery call proceeding between established water rights. Therefore, the standard of proof to apply is "preponderance of the evidence." *Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). *See also Colorado* at 316 ("ordinary civil case is . . . judged by a preponderance of the evidence standard").

Application of a preponderance of the evidence standard is consistent with decisions from the United States Supreme Court regarding administration of established interstate water uses in prior appropriation states.[2] *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993). There, the Court

[2] As discussed by Pocatello in its *Opening Brief on Rehearing*, at least one state court has held that the appropriate standard of proof to apply in a delivery call proceeding between users with established water rights is "preponderance of the evidence." *Willadsen v. Christopulos*, 731 P.2d 1181, 1184 (Wyo. 1987).

was asked by the state of Nebraska for enforcement of a 1945 decree against the state of Wyoming that established interstate priority to waters from the North Platte River. *Id.* at 587. A special master was assigned to the dispute.

Before the special master, Wyoming argued that Nebraska was required to prove its case by "the clear and convincing evidence standard."[3] "Nebraska, on the other hand, points out that while [the clear and convincing] standard is properly used in actions for equitable apportionment, it should not apply here because this proceeding entails enforcement of a prior equitable apportionment (the Decree), not whether there should be an apportionment." *See supra* fn. 3 at 12-13 (emphasis added). The special master concluded "the clear and convincing standard is inapplicable to the issues in these proceedings. The Court requires states to bear a heavier burden than the usual civil litigant [preponderance of the evidence standard] only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). Here, the interference has already occurred by entry of the Decree. *Cf. Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)." *See supra* fn. 3 at 13 (emphasis added).

On review, the United States Supreme Court concurred with the special master's assessment: "we find merit in [the] contention that, to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different." *Nebraska*, 507 U.S. at 592 (emphasis added).

Following the Court's 1993 decision in *Nebraska*, the prior appropriation states of Colorado and Kansas brought an action in the United States Supreme Court for administration of an interstate compact to the waters of the Arkansas River. *Kansas v. Colorado*, 514 U.S.

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[3] Page 12 at http://www.supremecourt.gov/SpecMastRpt/ORG%20108%20040992.pdf (last visited August 24, 2010).

673 (1995). Relying on *Nebraska*, the special master held that, because Kansas was seeking enforcement of an existing interstate compact against Colorado, it was required to prove its case by "the traditional [burden] of ordinary civil litigation, that is, preponderance of the evidence." *Kansas v. Colorado*, 1994 WL 16189353, 29 (U.S. 1994) (emphasis added). Because the special master found that under either burden of proof Kansas proved that Colorado breached the compact, the United States Supreme Court did not disturb the special master's findings on review. *Kansas*, 514 U.S. at 694.

Here, A&B seeks administration of its established senior-priority water right. At the time of decree or licensure, new water users were required to prove to the court or the Director, by clear and convincing evidence, that their new diversions would not injure established water rights. *Colorado*; *Cantlin*; *Josslyn*; *Moe*. All of the water rights at issue in this proceeding have since been sanctioned in accordance with the heightened clear and convincing evidence standard. The Director must now administer the established water rights in accordance with the prior appropriation doctrine as established by Idaho law. Idaho Code § 42-602.

The purpose of administration is not to ensure by "clear and convincing evidence" that "there is no risk of injury to the senior." *Order* at 35. That was already asked and answered by the court and Director in the adjudication and licensure proceedings, respectively. This is precisely why the United States Supreme Court stated in *Nebraska* that administration of water rights is "markedly different" from creation or modification of water rights. 507 U.S. at 592. And furthermore, why the clear and convincing standard of proof does not apply in administration of established water rights. *Id.*

In administration, the Director is required to balance all principles of the prior appropriation doctrine, namely priority of right with full economic development of the resource.

Idaho Const. Art. XV, §§ 3, 7; Idaho Code § 42-226; CM Rule 20.03. Preponderance of the evidence is the proper standard to apply in order to allow the Director to exercise his discretion in balancing these principles where the outcome does not modify the senior's right. *Kansas*; *Nebraska*; *Colorado*; *American Falls*; *Willadsen*; *Northern Frontiers*. If, however, the Director finds, or sustains a defense asserted by juniors, that abandonment, adverse possession, forfeiture, or waste apply, the standard of review should be clear and convincing evidence. The heightened standard of proof should only apply in those instances where the senior's water right is forever altered by the outcome of the administrative proceeding.

III. CONCLUSION

In this delivery call, the Director afforded proper deference to A&B's water right by affirmatively stating that, if current facts support a beneficial need of up to 0.88 miner's inches per acre, A&B would have the right to call for delivery of that amount. By not altering the elements of A&B's water right, the Director protected A&B's senior right, while also ensuring that junior users with established rights could continue to divert water that was not currently needed by A&B for beneficial use. Because the administrative proceeding involved enforcement of established water rights, and did not forever alter A&B's water right, the burden of proof to apply is preponderance of the evidence. *See Kansas*; *Nebraska*; *Colorado*; *American Falls*; *Cantlin*; *Josslyn*; *Moe*; *Willadsen*; *Northern Frontiers*. Application of a preponderance of the evidence standard will allow the Director to properly balance priority of right with full economic development of the resource. Had the Director determined that A&B's right was forever changed by a finding of abandonment, adverse possession, forfeiture, or waste, the proper burden of proof to apply would have been clear and convincing evidence. The Director therefore respectfully requests that the Court revisit its holding that clear and convincing evidence is the

only standard of proof to apply in delivery call proceedings between holders of established water rights.

RESPECTFULLY SUBMITTED this 25th day of August, 2010.

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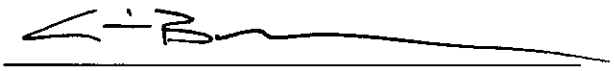

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 25th day of August, 2010.

Document Served: **IDWR RESPONDENTS' BRIEF ON REHEARING**

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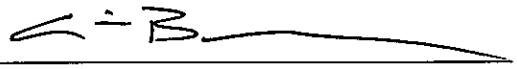

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