C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir District #2

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. 38191-2010 (38192-2010/381932010) Gooding County Case No. 2008-551 **SURFACE WATER COALITION'S MOTION TO AUGMENT RECORD**
A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and **TWIN FALLS CANAL COMPANY,**	

Petitioners-Respondents,

vs.

IDAHO DAIRYMEN'S ASSN., INC.

Cross-Petitioners-Respondents,

vs.

GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES**,

Respondents-Respondents on Appeal,

and

IDAHO GROUND WATER APPROPRIATORS, INC. and **CITY OF POCATELLO**,

Intervenors-Respondents.

COME NOW, Petitioners, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the "Coalition"), by and through their undersigned counsel, and move this Court for an order augmenting the record to include analysis incorporated by the District Court in its *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification*, dated September 9, 2010, Clerk's R. Vol. 7 at 1240, but that was inadvertently excluded from the original record filed with this Court. A copy of the document requested to be added to the record is attached to this motion.

In the District Court's *Amended Order,* the court held:

> An in-depth analysis addressing the Director's ability to make the determination, in the context of a delivery call proceeding, that the quantity decreed in the senior user's water right exceeds that [sic] the quantity being put to beneficial use by the senior user at the time of the delivery recently set forth in a *Memorandum Decision & Order on Petition for Judicial Review* issued by Judge Wildman in Minidoka County Case No. CV 2009-000647 on May 4, 2010 … ***Rather than repeat the analysis of this issue, this Order expressly incorporates herein by reference the Memorandum's [sic] Decision's analysis, located on pages 24-38***.

Id. at 1247 (emphasis added). Even though the District Court "incorporates" pages 24-38 of the *Memorandum Decision* into its analysis, the portions relied on by the District Court were not included in the record on appeal.

It is important that these excerpts are included in the record on appeal. Indeed, these pages provide the analysis supporting the District Court's conclusion that the Director's decision to deviate from the elements of decreed water rights in responding to a delivery call must be supported by clear and convincing evidence. *Id.* at 1248-49. This analysis is central to the issues raised by the Coalition.

Accordingly, the Court should augment the record to include these pages from the *Memorandum Decision* as identified by the District Court.

///

///

///

///

///

///

DATED this 29th day of July, 2011.

CAPITOL LAW GROUP, PLLC

C. Tom Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2011, I served true and correct copies of the foregoing upon the following by the method indicated:

Idaho Supreme Court Clerk of the Court P.O. Box 83720 451 W. State St. Boise, ID 83720	_____ U.S. Mail, Postage Prepaid ✓ Hand Delivery _____ Overnight Mail _____ Facsimile _____ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	✓ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Randy Budge Candice M. McHugh T.J. Budge RACINE OLSON P.O. Box 1391 Pocatello, Idaho 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Sarah Klahn Mitra Pemberton WHITE & JANKOWSKI, LLP 511 16th St., Suite 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Dean Tranmer CITY OF POCATELLO P.O. Box 4169 Pocatello, Idaho 83205 dtranmer@pocatello.us	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email

Kathryn E. Kovacs U.S. Dept. of Justice Env. & Nat. Res. Appellate Section P.O. Box 23795 Washington, D.C. 20026 kathryn.kovacs@usdoj.gov	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Kathleen Marion Carr U.S. Department of the Interior P.O. Box 4169 Boise, Idaho 83706 kathleenmarion.carr@sol.doi.gov	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
David W. Gehlert Natural Resources Section Environment & Natural Resources Division U.S. Department of Justice 1961 Stout ST. 8th Floor Denver, CO 80294 david.gehlert@usdoj.gov	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Road Boise, Idaho 83706-1234 matt.howard@pn.usbr.gov	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email
Mike Creamer Jeff Fereday GIVENS PURSLEY P.O. Box 2720 Boise, Idaho 83701-2720 jcf@givenspursley.com mcc@givenspursley.com	_____ U.S. Mail, Postage Prepaid _____ Hand Delivery _____ Overnight Mail _____ Facsimile ✓ Email

Travis L. Thompson

ATTACHMENT

FILED-
CASE
2010 MAY -4 AM 9:46
DUANE
CLERK
DEPUTY

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. **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. 2009-000647 **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

Ruling:

The 1951 Idaho Ground Water Act, I.C. § 42-226 *et seq.*, applies retroactively with respect to the administration of ground water rights including the management of ground water levels.

The Director did not err in finding that reasonable pumping levels had not been exceeded based on determination that the 36-2080 right suffered no material injury at current levels. Consistent with a finding of no material injury, Director was not required to make a determination on reasonableness of pumping levels.

The Director's conclusion is based on two threshold determinations made in conjunction with the material injury analysis. First, the Director's determination that sufficient water exists at current pumping levels relies on the finding that 0.75 miner's inches per acre is sufficient quantity to satisfy the purpose of use for the 36-2080 right despite the right being decreed for 0.88 miner's inches per acre. Second, the Director's determination that it was appropriate to analyze injury cumulatively based on injury to the entire right as opposed to evaluating injury to the 177 separate points of diversion. The significance of which would require A & B to move available water around within the project from wells capable of over performing to those areas served by underperforming wells. In other words injury would not be determined without looking at the depletive effects to entire right as opposed to individual points of diversion. These threshold issues are addressed separately in this opinion. To the extent the Director erred in either of these determinations it may require that the Director revisit the issue of the reasonableness of the pumping levels.

C. The Director erred in failing to apply the constitutionally protected presumptions and burdens of proof.

A & B argues the Director unconstitutionally applied the CMR by failing to apply the proper presumptions and burdens of proof resulting the reduced diversion rate per acre for the 36-2080 right from 0.88 to 0.75 miner's inches. This Court agrees. The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,604.3 acre place of use.[10] Following application of the CMR, Rule 42 in particular, the Director determined that 0.75 miner's inches met A & B's minimum irrigation needs. The 0.75 miner's inches per acre, among other things, was therefore used to arrive at the finding of no material injury.

1. The CMR, Material Injury, and Efficient use of Water Without Waste.

[10] The fact that the right was decreed for 1,100 cfs to a 62,604.3 place of use involves a separate issue addressed later in this opinion.

The 36-2080 right is included in an organized water district. CMR Rule 40 pertains to responses to delivery calls in organized water districts, and in relevant part provides as follows:

> **040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).**
>
> **01. Responding To a Delivery Call.** When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of a diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering ***material injury***, and upon a finding by the Director as provided in Rule 42 that ***material injury*** is occurring, the Director, through the water master, shall:
>
> **a.** Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district . . . .

IDAPA 37.03.11.040.01.a (emphasis added). CMR Rule 040.03 provides:

> **Reasonable exercise of rights.** In determining whether diversion and the use of water under rights will be regulated under Subsection 040.01.a. or 040.01.b, the Director shall consider whether the petitioner making the delivery call is ***suffering material injury to a senior-priority water right and is diverting and using water efficiently without waste***, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. ***The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.***

IDAPA 37.03.11.040.03. (emphasis added). CMR 010.14 defines "***material injury***" as: "***Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42.***" IDAPA 37.03.11.010.14 (emphasis added).

CMR Rule 42 sets forth the factors for determining material injury and the use of water efficiently without waste as follows:

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are ***suffering material injury and using water efficiently without waste***, include but are not limited to:

a. The amount of water available in the source from which the water is diverted.

b. The effort or expense of the holder of the water right to divert the water from the source.

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year cumulative impacts of all ground water withdrawals from and area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of the land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to other rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. . . .

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

IDAPA 37.03.11.042.01.a.-h.

2. *American Falls Reservoir Dist. No. 2 v. IDWR*

In *American Falls Reservoir Dist. No. 2 v. IDWR,* 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*), the Idaho Supreme Court addressed the constitutionality of the CMR in the context of a facial challenge. The issue arose as a result of senior surface right holders challenging the constitutionality of the CMR because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed elements of the water right. The district court held the CMR to be facially unconstitutional for failing to "also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . ." *Id.* at 870, 154 P.3d at 441. The district court held that "under these circumstances, no burden equates to impermissible burden shifting." *Id.* at 873, 154 P.3d at 444.

On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court's determination was the recognition that:

> CM Rule 20.02 provides that: '[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.' 'Idaho law' as defined by CM Rule 10.12 means '[T]he constitution, statutes, administrative rules and case law of Idaho.' Thus, the Rules incorporate by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.'

Id. at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that "**the Rules do not permit or direct the shifting of the burden of proof . . . [r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules**." *Id.* at 874, 154 P.3d at 445 (emphasis added). Further:

> **The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.** . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, **the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right.** The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. **Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.**

Id. at 877-78, 154 P.3d at 448-49 (emphasis added).

3. The Significance of a Licensed or Decreed Water Right.

In applying the factors as set forth in CMR Rule 42, the Director concluded that despite a decreed rate of diversion of 0.88 miner's inches per acre, the minimum rate of diversion per acre that would satisfy A & B's irrigation requirements was 0.75 miner's inches. The Director concluded sufficient water supply was available to provide the 0.75 miner's inches and denied A & B's delivery call. The issue arises as a result of the variance between the quantity decreed for the water right and the quantity the Director determined was actually needed to accomplish the decreed purpose of use, or put differently, the quantity that could be put to beneficial use.

As part of Idaho's licensure statutes the permit holder is required to make proof of beneficial use and the Department is required to examine such use. I.C. § 42-219. Idaho Code § 42-219 provides:

> [U]pon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law

> has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall . . . state . . . the purpose for which such water is used, the quantity of water which may be used, ***which in no case shall be an amount in excess of the amount that has been beneficially applied.***

Id. (emphasis added). Idaho Code § 42-220 provides that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . . ." Further, "neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed . . . ." I.C. § 42-220.

Idaho's adjudication statutes require the Director to evaluate the extent and nature of each water right for which a claim was filed based on state law. I.C. § 42-1410. The Department's role in the adjudication "is that of an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported." Further, [t]he director shall make recommendations as to the extent of beneficial use and administration of each water right under state law. . . . I.C. § 41-1401B. Idaho Code § 42-1402 provides: "The right confirmed by such decree . . . shall describe the land to which such water shall become appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed . . . ." Idaho Code § 42-1411 requires the Director to prepare and file a director's report which among other things determines the quantity of water used. The statute further provides that "[e]ach claimant of a water right has the ultimate burden of persuasion for each element of the water right." Further, that because the "director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." I.C. § 42-1411(5). Finally, Idaho Code § 42-1420 provides "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system." I.C. § 42-1420.

Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right <u>is a judicial determination of beneficial use</u> consistent with the purpose of use for the water right**.

4. The License or Decree However, is not Conclusive as to the Quantity Put to Beneficial Use Due to Post-Decree Factors.

Although a license or decree among other things includes a determination of beneficial use for a water right, it is not conclusive that the water user is actually putting the full quantity to beneficial use. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court acknowledged in the context of the SRBA that the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced based on evidence that the water right has been forfeited. *Id.* at 741, 947 P.2d at 414. The Supreme Court acknowledged this same point in *AFRD#2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. *AFRD#2* at 878, 154 P.3d at 449.

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.[11] Year to year variations in water

[11] Also, the rate of diversion for an irrigation water right sets a maximum rate of diversion to satisfy the peak water demand for the most water intensive crop grown in the region. In the event the senior is irrigating a less water intensive crop, the maximum rate of diversion may not be required. However, this limitation is less significant in the administration of ground water and tempered by the fact that any relief

requirements also result from the types of crops that may be planted. The Idaho Legislature specifically acknowledged water users could reduce water requirements through the implementation of efficiencies and authorized the ability to expand irrigated acreage so long as the rate of diversion was not increased. *See* I.C. § 42-1426.

In this case, the Director determined that A & B successfully implemented a number of measures that have reduced the amount of water required to irrigate the 62,604.3 acres: including the conversion of 1440 acres from ground to surface water irrigation; reduction of conveyance losses from approximately 8 percent to 3 percent; conversion of 96 percent of the irrigation systems to sprinkler; and the re-use of drain water. R. 1148. It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, 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.

5. Waste Results from the Failure to Put the Full Diverted Quantity to Beneficial Use.

If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste. The wasting of water is not only contrary to Idaho law but it is a recognized defense to a delivery call. In *Martiny v. Wells*, 91 Idaho 215, 218-19, 419 P.2d 470 (1966), the Idaho Supreme Court held:

> Wasting of irrigation water is disapproved by the constitution and laws of this state. As we said in *Mountain Home Irrigation District v. Duffy*, supra, ***it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.***

Id. (emphasis added). Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste.

---

from regulation of junior wells is typically not instantaneous. Therefore, even though a senior may not be irrigating the most water intensive crop in the current irrigation season administration needs to take into account the ability of a senior to rotate to a more water intensive crop in the next irrigation season.

Consequently, Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.

This exact issue was addressed in context of the SRBA. The SRBA Court addressed the issue of whether or not partial decrees should include a remark qualifying that the amount of water that could be sought incident to a delivery call was limited to the quantity that could be beneficially used as opposed to the quantity actually stated in the decree. The Hon. R. Barry Wood presiding, expressly rejected the necessity of such a remark based on the following reasoning:

> Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, **the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time** (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). **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, 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. 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 result in a loss or reduction to the water right.** State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:
>
>> A water user is not entitled to waste water...It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put

> to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, forfeiture has taken place.

Id. (citations omitted).

> NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

American Falls Reservoir District # 2 v. IDWR, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)) (emphasis in original). The significance of the decision is the recognition that the partial decree is a determination of beneficial use. The inclusion of the remark would require the senior to "prove up" the extent of beneficial use every time administration is sought. The decision did not reject the argument that the senior has no right to call for water that is not or will not be put to beneficial use. However, implicit in the rejection of the remark is the recognition that the senior's failure to put the decreed quantity to beneficial use is a defense to a delivery call. The SRBA Court rejected the inclusion of an undefined limitation on the decreed quantity requiring the senior making the call to re-establish the extent of beneficial use.

In sum, if a water user is not making beneficial use of the water diverted, irrespective of the quantity decreed, the result is waste. Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use. Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.

6. The Burden to Establish Waste as a Defense is on the Junior Appropriator and Must be Shown by Clear and Convincing Evidence.

Idaho law provides that the burden of establishing waste is on the junior appropriator. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Idaho law has also consistently required 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. *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). Accordingly whether the junior's defense is that there is no injury because the diversions of the junior do not physically interfere with the right of the senior (i.e futile call) or that the senior is not injured because the senior is putting less than the decreed quantity of water to beneficial use or wasting water, that burden rests on the junior. Clear and convincing evidence refers to a degree of proof greater than a mere preponderance of the evidence or evidence indicating that the thing to be proved is highly probable or reasonably certain. *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008); *Idaho State Bar v. Top*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996).

A determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right. The decreed quantity is reduced by the amount determined not being put to beneficial use. Whether the senior is deprived of water for part of an irrigation season, an entire irrigation season or the quantity element is permanently reduced through a finding of partial forfeiture, the senior's right to divert water up to the decreed quantity is nonetheless diminished.[12] The

[12] The counter-argument raised by Respondents is that there is not a diminishment in the property right because the senior's property right is limited to the amount that can be put to beneficial use. While that may be true, the argument overlooks the fact that the decree is a determination of the beneficial use subject to various defenses. The burden is on the junior to show by clear and convincing evidence that less than the decreed amount is being put beneficial use. To conclude otherwise accords no presumptive weight to the decree. This is precisely the reason why the SRBA Court rejected including a remark expressly limiting quantity to that put to beneficial use. The inclusion of such a remark would have resulted in an unlawful shifting of the burden of proof by making the senior re-prove quantity in conjunction with a delivery call. Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use. The process gives proper presumptive weight to the decree and at the same time takes into account that the decree is not conclusive. However, the standard of proof (clear and convincing evidence) required for establishing that less than the decreed quantity is being put to beneficial use is much higher than the standard of proof (preponderance) initially required in the adjudication and distinguishes what is truly a defense to the right from a re-adjudication of the right.

Idaho Supreme Court has consistently held that actions resulting in the diminishment of a water right must be proved by clear and convincing evidence. Forfeiture or abandonment of a water right must be established by a standard of clear and convincing evidence. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984); *Jenkins v. IDWR*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). The same is true with respect to establishing prescriptive title to the water right of another. *Gilbert* at 739, 552 P.2d at 1224 (citing *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945)). Similarly, a futile call defense requires a showing of clear and convincing evidence that diversions by a junior appropriator will not injure the rights of a senior appropriator.

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season. Any burden of this uncertainty should be borne by the junior. The only way to eliminate risk to the senior while at the same time give effect to full economic development and optimum use of the water resources is to require a high degree of certainty supporting the Director's determination. Put differently, if the Director has a high degree of certainty that the senior is exceeding beneficial use requirements then there is no risk of injury to the senior. However, if the Director's determination is only based on a finding "more probable than not," the senior's right is put at risk and the junior is essentially accorded the benefit of that uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

7. Reconciling the Alleged Disparity Between the Decreed Quantity and the Quantity of Water Actually Required to Satisfy the Purpose of Use Consistent with Idaho Law and Without Re-Adjudicating the Quantity Element.

In recognizing that a difference can exist between the decreed quantity and the quantity put to beneficial use, the question becomes how the Director can give proper effect to the decree and still administer to the quantity put to beneficial use without resulting in a *de facto* re-adjudication of the water right? The answer lies in the application of the constitutionally engrained presumptions and burdens of proof.

The following example illustrates the conundrum that occurs when proper effect is not given to the decree. Assume for the sake of discussion that A & B claimed the 36-2080 right in the SRBA with a diversion rate of 0.88 miner's inches per acre. The Director investigated the claim and recommended a diversion rate of 0.75 miner's inches. A & B filed an objection to the recommendation. IGWA, the City of Pocatello and Fremont Madison *et al.* file responses and a trial is held. At trial A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondents present conflicting evidence including expert testimony that 0.75 miner's inches or less is sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Ultimately, the SRBA Court finds that A & B established a quantity of 0.88 miner's inches by a preponderance of the evidence and issues a partial decree for that quantity. Six months later A & B is unable to pump the full decreed quantity and seeks administration from the Department. The Director performs a "material injury" analysis and concludes that 0.75 miner's inches is sufficient to satisfy A & B's purposes of use. A & B disagrees with the determination and requests a hearing. At the hearing A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondent's present conflicting evidence, including the expert testimony that 0.75 miner's inches or less would be sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Déjà Vu? Ultimately the Director concludes by a preponderance of the evidence that 0.75 miner's inch per acre is sufficient. The example illustrates that under

the Director's application of the CMR the senior can be forced to re-litigate the exact same issue when proving up the elements of the water right and when subsequently seeking administration for the same right.

In this case the Hearing Officer's recommendation acknowledged that "the analysis of experts varies dramatically" on the amount of water needed to meet the minimum requirements for the crops. "Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements." R. 3109. The Hearing Officer ultimately concluded "the Director's determination is supported by substantial evidence." R. 3110. No reference was made to the evidentiary standard applied.

In *AFRD #2* the Supreme Court made it clear that the CMR should not be read to require the senior to re-prove or re-adjudicate a decreed right but also acknowledged that there may be post-adjudication factors relevant to the determination of how much water is actually needed. At the district court level in *AFRD#2* Judge Wood opined that "a decreed water right is far more than a right to have another lawsuit only this time with the Director." *American Falls Reservoir District # 2 v. IDWR*, at 93. Absent the application of an evidentiary standard of clear and convincing evidence this Court has difficulty distinguishing how this is not a re-adjudication of A & B's right. Issues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in Director's recommendation and ultimately litigated in the context of the SRBA proceedings. The Director reasons that it is not a re-adjudication of A & B's right because A & B still has the right to divert up to the full 0.88 miner's inches when water is available but that the Director will only consider the administration of junior's based on the determination of actual need of the senior, which is the 0.75 miner's inch per acre. This Court fails to see the distinction. In a prior appropriation system a water right becomes meaningless if not honored in times of shortage. The call is the means by which effect is given to the priority date. The priority date is the essence of a water right in a prior appropriation system.

The problem arises with the initial determination of "material injury." *In AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be

futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

The CMR distinguish between "material injury" and "using a water right efficiently without waste." CMR Rule 010.14 defines "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." CMR Rule 010.25 defines "water right" as the legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree, permit or license . . . ." Prior to regulating junior rights in an organized water district, CMR Rule 040.03 requires the Director to consider whether the senior is suffering "material injury" ***and*** "is diverting and using water efficiently and without waste." The factors in Rule 042.01 also provides "[f]actors the Director may consider in determining whether holders of water rights are suffering material injury ***and*** using water efficiently without waste include. . . ." (emphasis added). Although the CMR address the two concepts in conjunction with each other, the Supreme Court held the rules cannot be read as a burden shifting provision to require the senior to re-prove or re-adjudicate his right. *AFRD#2* 143 Idaho at 877-78, 154 P.3d at 448-49.

Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.

D. The Director Did Not Err by Failing to Separately Consider Depletions to Individual Points of Diversion For Purposes of Determining Material Injury to the 36-2080 Right.

A & B argues the Director erred in failing to determine material injury based on depletions to the 177 individual points of diversion as opposed to determining injury