8-20-2011

A & B Irrigation v. Spackman Cross Appellant's Reply Brief 1 Dckt. 38191

Docket No. 38191-2010, 38192-2010 and 38193-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE 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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL CAMPANY, TWIN FALLS CANAL COMPANY,
Petitioners-Appellants,

UNITED STATES OF AMERICA, BUREAU OF RECLAMATION,
Petitioners-Respondents on Appeal,

IDAHO DAIRYMEN'S ASSOCIATION, INC.,
District Court Cross-Petitioner,

v.

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

IDAHO GROUND WATER APPROPRIATORS, INC.,
Intervenor-Respondent-Cross Appellant,

THE CITY OF POCATELLO,
Intervenor-Respondent-Cross Appellant.

THE CITY OF POCATELLO'S INTERVENOR-RESPONDENT-CROSS APPELLANT BRIEF

Appeal from the District Court of the Fifth Judicial District for Gooding County
Honorable John M. Melanson, District Judge, Presiding
Case No. 2008-551

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of a senior surface delivery call in the Snake River Basin by seven irrigation districts that refer to themselves as the "Surface Water Coalition" ("SWC") and hold natural flow and storage rights in the Upper Snake River Basin. The central dispute on appeal concerns whether the Director had discretion to look beyond the face of the SWC entities' water rights in administrating the delivery call. The SWC entities have asked this Court to reverse a 2005 Order by the Idaho Department of Water Resources ("IDWR" or "Department") because they contend the Director failed to apply the "constitutionally protected" presumptions and burdens of proof in evaluating the SWC's delivery call for delivery of over 9 million acre-feet of water to their place of use, which totals approximately 500,000 acres. Exh. 3007A, at 20. However, because the SWC entities' natural flow and storage rights are overlapping in nature, and are intended to irrigate the same places of use, the Director properly exercised his discretion by evaluating how much water the SWC entities required to avoid injury to their water rights rather than deliver more water than the entities could put to beneficial use. The Director declined to curtail all junior ESPA ground water rights to deliver the maximum SWC entitlement because he concluded the SWC entities could not put that amount to beneficial use, and thus curtailment would be contrary to Idaho law.

Pocatello's sole issue on appeal is the evidentiary standard applicable to delivery call proceedings. The district court imposed the heightened evidentiary standard of clear and convincing evidence because the court saw it as necessary to "apply the correct presumptions and burden of proof" in a delivery call proceeding. Cl. R. Vol. 7, at 1249. This is contrary to Idaho law, where courts have applied the clear and convincing standard only in the context of

adjudications or re-adjudications which permanently deprive a water right holder of its decreed property right. Under this Court's rubric as announced in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* ("*AFRD#2*"), 143 Idaho 862, 877-78, 154 P.3d 448-49 (2007) a delivery call is not a readjudication.[1]

II. Statement of Facts

A. SWC water rights

Members of the SWC claim natural flow rights and storage rights on the Upper Snake River. *See* R. 1369-74. The SWC's claims are currently pending before the SRBA. Exh. 4001A. The total claimed flow rate of the SWC's natural flow rights that are the subject of its delivery call is in excess of 13,000 cfs. Exh. 3007A, Table 1. This rate of flow, converted to a volume of water (by assuming the rate of flow delivered 24 hours a day throughout the irrigation season of March 15 to November 15) amounts to more than 6.5 million acre-feet of water[2]. Exh. 4001A, at 2-23. The SWC also claim over 2.3 million acre-feet of storage water. R. 1373-74; Exh. 3007A, Table 7. Cumulatively, therefore, the SWC's maximum entitlement for all water rights amount to over 9 million acre feet.

The place of use for SWC's natural flow rights and storage right is overlapping, and both sets of rights are intended to serve a total of 500,000 acres. Exh. 3007A, at 20. Thus, SWC's delivery call for its entire claimed entitlement requested delivery of over 9 million acre-feet of water. By comparison, the Bureau of Reclamation-United States Army Corps of Engineers

[1] As discussed within, the district court found error with regard to this evidentiary issue in its last order in relation to the IDWR reduction of Twin Falls Canal Company's ("TFCC") rate of flow from TFCC's claimed 3/4 inch to 5/8 miner's inches. IDWR's order on remand evaluated TFCC's claims of injuries by reference to the ¾ inch standard, an action which arguably neutralizes the dispute over the evidentiary standard. Cl. R. Vol. 7, at 1249.

[2] The SWC entities have natural flow water rights that have maximum decreed rates of a total of approximately 13,756 cfs. The irrigation season for the SWC rights is March 15 to November 15 (246 days). Exh. 4001A, at 2-23. One cubic foot per second is converted to acre-feet per day as follows: 1 cfs x 1.9835. Over a 246-day irrigation season, the SWC's natural flow water rights are converted to a volume as follows: 13,756 x 1.9835 x 246 = approximately 6,712,116 acre-feet.

unregulated inflow predictions for Heise gage flows in 2006, a good water year in which the reservoirs filled[3] and the SWC had a full water supply, was only 3.9 million acre-feet. R. 3750-51, 4290-92. The historical record flow was 8.7 million acre-feet over the 1996-1997 irrigation season. R. 1377, ¶ 88.

B. Bureau of Reclamation storage reservoirs

The need for a supplemental storage supply for irrigation uses on the Upper Snake became apparent early in the twentieth century as the available natural flow became fully appropriated. Exh. 8000, Vol. 1, ch. 2; Dreher Testimony, Tr. Vol. I, p. 27.[4] The Bureau of Reclamation built over 4 million acre-feet of storage in the Upper Snake (i.e., above Milner Dam). *See* location map, Figure 1, Exhibit 3007A. The Upper Snake River storage reservoirs were designed to fill two-thirds of the time, and the record reflects that they have done so, notwithstanding ground water pumping. R. 7062. The SWC entities acquired rights to use storage water in the Upper Snake reservoirs to supplement natural flow irrigation supplies for their existing places of use. *See* Exh. 4001A.

Pursuant to their Bureau of Reclamation contracts, the SWC entities are entitled to carryover water to protect against water conditions in future dry years. Gregg Testimony, Tr. Vol. VI, p. 1227, L. 13 – p. 1228, L. 9. The Bureau contracts do not limit carryover storage;

[3] The final accounting showed 100% fill, but the Bureau made what were termed "flood releases" in early summer of 2006, so the final accounting showed some reduction from 100% fill for Palisades and Jackson Lake. *See* R. 4290-91.

[4] "[C]ertainly from the beginning days of development in the Snake River, particularly as the natural flow was approaching full appropriation, it became obvious that the water supply, the natural [flow] water supply in the river was inadequate to fully irrigate crops for the duration of the irrigation season. And of course, that, again, goes to the priority of the natural flow of water rights you have. The more senior rights certainly were in a better position than the—than the subsequent rights. And so . . . the Bureau of Reclamation looked at providing supplemental supplies through storage reservoirs. . . . But those reservoirs were developed because the natural flow was inadequate at all times in all years to fully irrigate crops during the entirety of the irrigation season." Tr. Vol. I, p. 26, L. 15 – p. 27, L. 12.

however, interpretation of Bureau contract rights, including what constitutes "reasonable carryover," are subject to Idaho law. *Id.* at p. 1227, L. 13 – p. 1228, L. 9 & p. 1266-71.

In addition to storing water for beneficial uses, storage water from the Bureau's Upper Snake Reservoir system is the source of supply for the so-called "flow augmentation water" required to protect endangered fish under the Nez Perce Agreement. *See* Tr. Vol. VI, p. 1261 & p. 1279, L. 11 – p. 1290, L. 11 for a discussion of flow augmentation requirements. More water in the Upper Snake Reservoirs translates into more available water to satisfy flow augmentation requirements of that agreement (Tr. Vol. VII, p. 1413, L. 23 – p. 1414, L. 19 & p. 1426, L. 5-13); during dry years, the Bureau has had difficulty satisfying the Nez Perce Agreement flow augmentation requirements. *Id.* at p. 1412-13; R. 7062-63. However, under Idaho law, flow augmentation is not a beneficial use, and a delivery call cannot be maintained to satisfy flow augmentation requirements to satisfy the Nez Perce agreement. I.C. § 42-1763B. S*ee also* R. 7062 (noting that "[i]t is not the purpose of this litigation to meet [flow augmentation] interests.").

C. Administration of water rights in the Upper Snake River

The staff at Water District 01 administer water rights day-to-day on the Upper Snake River Basin. Under routine Water District 01 administrative practices, SWC member entities (and other surface water irrigators) divert water as necessary at their headgates throughout the irrigation season. There is no final daily accounting for whether the water being taken through a particular entities' headgate is attributable to natural flow rights or storage rights. Dreher Testimony, Tr. Vol. I, p. 110, L. 2-21. Water District 01 performs after-the-fact accounting, reporting the nature of the rights under which entities made diversions in the spring of the following irrigation season. *Id.* For example, Water District 01's final accounting report for 2005 was not published until March 22, 2006. Exh. 3012 ¶ 10, at 7. In other words, "[a]t the

end of the year there is application of an accounting model to determine what portion of the water they consumed during the year was considered to be natural flow and what portion was considered to be storage." R. 7058. This timing allows Water District 01 to rely upon "the best available data. That usually requires us to wait until the USGS data has been reviewed." Tr. Vol. IV., p. 802, L. 10-15.

The SWC entities operate what the WD01 Water Master, Lyle Swank, described as a "demand driven" system, meaning that they divert adequate water to satisfy their crop requirements. Tr. Vol. V, p. 977, L. 7 – p. 978, L. 7. The record reflects that WD01 officials generally understand whether an SWC entity is diverting water under a natural flow or storage account, and the overall magnitude of an SWC entity's natural flow or storage supply in relation to the actual water year. *Id.* at p. 996, L. 20 – p. 998, L. 24.

D. Conjunctive administration of ground water and surface water rights in Water District 01.

The procedural history of the SWC's delivery call is described within; however, it is important to note that until expiration of the Interim Stipulated Agreement in late 2004 (R. 1), the Conjunctive Management Rules ("CMR") had not formed the basis of any administrative actions by IDWR. The SWC's delivery call presented a case of first impression for the IDWR. The Springs Users call and the A&B call followed, both presenting facts distinct from those of the SWC. *See Clear Springs Foods, Inc. v. Spackman* ("*Clear Springs*"), 150 Idaho 790, 252 P.3d 71, 74-77 (2011); *see also* Respondent-Cross Appellant City of Pocatello's Brief, *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*, Supreme Court Docket Nos. 38403-2011 [38421-2011 / 38422-2011] ("A&B Delivery Call Appeal") (Idaho July 27, 2011).

However, all three delivery calls involved the Director examining the claims and exercising discretion to determine, pursuant to the CMR, the extent (if any) of injury to the senior.

In the SWC matter, from the issuance of the May 2005 Order and until the Department's Order on Remand in April of 2010, the Department used what was termed the "minimum full supply" analysis ("MFS"). This analysis required the Director to start with the maximum entitlement for the SWC's natural flow and storage water rights, and compare that entitlement to recent data reflecting annual diversions and predicted inflows (i.e., available water supply) to the Upper Snake River to determine whether predicted supplies would satisfy the SWC's uses. R. 1377-79. In the event that supplies were inadequate, as the Director determined in the May 2, 2005 Order and in several of the subsequent orders, the Director ordered curtailment, or alternatively, that the juniors supply replacement water. Although the SWC's delivery call demand was for curtailment (R. 2), the reality is that many years are required before curtailment of junior ground water rights provides meaningful flows to the Snake River. *See* R. 1415-22; R. 4957, Figure 1 (showing the effect of curtailment on accruals to the river; if all ground water rights were curtailed approximately 750,000 acre-feet would accrue to the river within 50 years); Exh. 3007A, at 29-30 (to obtain full replacement of the 2005 injury amounts in one irrigation season would require curtailment of 1.1 million acres irrigated by junior ground water pumping).

III. Procedural History

A. January 14, 2005 Delivery Call and May 2, 2005 Order.

On January 14, 2005, the Surface Water Coalition filed a letter with IDWR requesting administration of all of the SWC entities natural flow and storage water rights. R. 1. SWC claimed that the entities required the entire decreed amounts of both their natural flow and storage rights for beneficial use, and that "[t]he extent of injury equals the amount of water diminished and the cumulative shortages in natural flow and storage water." R. 2, 3. The same

day, the SWC filed a Petition for Water Right Administration pursuant to Rules 30 and 41 of the CMR (IDAPA 37.03.11) and Rule 230 of IDWR's rules of procedure (IDAPA 37.01.01). R. 53.

After requesting and receiving additional information from the SWC, the Director issued an order in response to the delivery call on May 2, 2005 ("May 2005 Order"). R. 1359. The Director examined the SWC's SRBA claims to natural flow and storage water rights as the starting point of his analysis. R. 1369-74. The Director concluded that because the SWC's storage water rights supplement natural flow water rights for identical beneficial uses at overlapping places of use, and because "the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount but not suffer injury." R. 1401, ¶ 45.

Given these facts, the Director concluded that the SWC entities' water rights are injured when "diversion under the junior rights intercept a sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights <u>for the authorized beneficial use</u>." *Id.* (emphasis added). The Director rejected the SWC's claim that the entities were, as a matter of law, entitled to curtailment of all ESPA junior water users to provide delivery of their maximum decreed flow rates and storage volumetric limits. "Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury." *Id.* ¶ 47. The Director proceeded to determine injury by evaluating what was necessary for the "authorized beneficial use" based on the "minimum full supply" of combined of storage and direct flow water rights for each of the SWC entities. Ultimately, the Director concluded that administering the SWC's surface and storage rights as independent entitlements, rather than integrated and supplemental water rights, would violate Idaho law, and would

> (1) lead to the curtailment of junior priority ground water rights, absent mitigation, when there is insufficient natural flow for the senior water rights held

> by the members of the [SWC] even though the reservoir space allocated to members of the [SWC] is full; or (2) lead to the curtailment of junior priority ground water rights, absent mitigation, anytime when the reservoir space allocated to the members of the [SWC] is not full even though the natural flow water rights held by members of the [SWC] were complete satisfied.

Id. ¶ 48. As explained by Director Dreher in testimony at hearing: "Those are the two extremes. And neither one of them would be compatible with this principle of maximum utilization of the resource." Dreher Testimony, Tr. Vol. I, p. 83, L. 2-4. In keeping with the philosophy of the MFS methodology to allow for adjustments upwards or downwards over the course of the irrigation season, the Director issued several additional supplemental orders during 2005 and 2006 to adjust or otherwise revise the determinations made in the May 2005 Order (the 2nd, 3rd and 4th Supplemental Orders). In early 2007, Mr. Tuthill replaced Mr. Dreher as Director. During 2007-2008 he issued the 5th, 6th and 7th Supplemental Orders to the May 2005 Order.

B. Curtailment or Provision of Replacement Water

After determining that the SWC's water rights were injured by a shortage of 133,900 acre-feet (R. 1383-84), the Director used the ground water model to determine the ground water priority date to be curtailed to replace 27,700 acre-feet, the minimum to be replaced in one year, to the SWC. R. 1386-88; R. 1404. Because time lag in gains to the river from curtailment mean that curtailment would not provide the water when the SWC needed it, the Director offered ground water users the possibility of providing replacement water in the amount of the shortage. R. 1388.

C. AFRD#2 and its aftermath

In August of 2005, as the delivery call was on track for a trial in early 2006, the SWC entities filed a new proceeding in Gooding County district court challenging the constitutionality

of the Director's application of the CMR[5] to the delivery call, and the constitutionality of the CMR rules themselves. Proceedings in the captioned matter were stayed during the pendency of appeal from the Gooding County district court's decision, which was resolved in *AFRD#2*, 143 Idaho 862, 154 P.3d 433 (2007). The intertwined procedural history of the delivery call proceedings and *AFRD#2* is described in more detail in the Court's 2007 Opinion. *Id*. at 868, 154 P.3d at 439.

In *AFRD#2*, the Court upheld the CMR as facially constitutional. *Id.* at 883, 154 P.3d at 454. Although the SWC's appeal was made on both facial and as-applied constitutional grounds, the Court rejected on ripeness grounds the as-applied claims, and evaluated the appeal on facial grounds alone. *Id*. at 868, 154 P.3d at 439. After this Court's denial of various Motions for Re-Hearing in the *AFRD#2* decision, IDWR restarted the proceedings in the above-captioned matter via an August 1, 2007 Scheduling Order. A hearing was set for January 18, 2008, and Hon. Gerald F. Schroeder was appointed to preside over the hearing.

D. Administrative hearing and Final Agency Order

After a three week hearing, Hearing Officer Schroeder concluded that, *inter alia*, the Director's application of the "minimum full supply" methodology was proper, so long as the methodology was flexible enough to adjust as conditions change. R. 7091.[6] Once again, the Hearing Officer rejected the SWC's argument that the irrigation districts were entitled to shut-and-fasten administration of their overlapping natural flow and storage rights:

> [t]he Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment . .

[5] IDWR's *Rules for Conjunctive Management of Surface and Ground Water Resources* are codified at IDAPA 37.03.11.

[6] On April 7, 2010 the Director issued a *Final Order Regarding Methodology for Determining Material Injury to Reasonable In Season Demand and Reasonable Carryover*. Cl. R. 1354(s). The Director's revised methodology takes into account changes in conditions as the Director and Hearing Officer concluded was proper in order to permit flexibility.

> . . Application of the water to a beneficial use must be present, not simply a desire to use the maximum right in the license or decree because that simplifies management . . . .

R. 7086 (emphasis added).

Director Tuthill considered the Hearing Officer's Recommendations and accepted all of the Hearing Officer's findings and conclusions, except the Director concluded that his authorization of temporary replacement plans during pendency of the call was proper. R. 7381-95. He also announced an intention to issue a subsequent order revising the material injury methodology.

E. District Court Decision

On appeal, the district court, Hon. J. Melansen presiding, upheld the Director's analysis of injury to SWC's water rights. Cl. R. Vol. 3, at 511-44. The district court found that the Director did not err in determining that, after examining the SWC entities' water right decrees, more analysis of the entities' water needs was required because the storage rights were developed and appropriated to supplement irrigation for the same lands as the natural flow rights. *Id*. at 533. The court reasoned that because the water rights are used to satisfy the same beneficial use, and because the evidence before the Department demonstrated that the combined sources often produce more water than is necessary for irrigation demands in a single season, it was appropriate for the Director to consider the extent which the SWC entities could be satisfied with existing water supplies. *Id*. at 535-36. The court agreed that administration requires "more than shortfalls to the decreed or licensed quantity of the senior right," and while "senior right holders are authorized to divert and store up to the full decreed or licensed quantities of their storage rights," where there is not water available to meet the decreed or licensed quantity, "juniors will only be regulated or required to provide mitigation subject to the material injury factors set forth in CMR 042." *Id.* at 536. The court went on to find that the Director did not

abuse his discretion or violate Idaho law by evaluating the amount of water predicted (from both natural flow and storage) to be necessary to meet the SWC entities' irrigation requirements and reasonable carryover. *Id.* at 535-36. The district court also agreed that carryover is an element of a surface water storage right, and although the court rejected the Director's decision to categorically deny multiple year carryover storage, it found that the Director has discretion to determine whether or not carryover storage must be provided on a single year or multi-year basis. *Id*. at 530-32.

The City of Pocatello and IGWA both moved for rehearing of the district court's July 2009 Order, asking the court to reconsider or clarify its conclusions regarding several issues. Cl. R. Vol. 4, at 558-568 & 569-583. The Court's affirmation of the Director's use of MFS was not one of these issues. *Id*. IGWA requested a clarification that the Director had authority to determine that in times of shortage TFCC may not be entitled to its full recommended amount of 3/4 miners inches. In an amended order on rehearing, the district court stated that the Director exceeded his authority when he found that TFCC was entitled to an amount of water less than TFCC claimed entitlement because "he did not apply the proper evidentiary standard or burdens of proof." Cl. R. Vol. 7, at 1247. Despite the fact that "this issue has been resolved by the proceedings on remand" because IDWR considered TFCC's injury on remand by reference to 3/4 of an inch, the court went on to *sua sponte* determine "that decision must be made based upon a standard of clear and convincing evidence." *Id.* at 1249 & 1248-49. The district court adopted this standard based on the analysis of the district court, J. Wildman presiding, in CV 2009-0647, and an appeal of this issue is currently pending before this court. *See* Delivery Call Appeal, Supreme Court Docket No. 38403-2011 [38421-2011 / 38422-2011]. Subsequently, the SWC entities filed a *Motion for Clarification*, asking that the district court clarify whether the

clear and convincing standard applied to the Director's MFS analysis, but the district court declined, noting that SWC had not previously raised this issue in the proceeding. *Id*. at 1251-52.

CROSS APPELLANT'S ISSUE ON REVIEW

Whether the Court erred in adopting the "clear and convincing" evidence standard after the Director on remand administered TFCC's water right in accordance with his Snake River Basin Adjudication recommended amount.

STANDARD OF REVIEW

The Idaho Administrative Procedure Act governs judicial review of agency decisions. I.C. § 42-1701A(4). The Court shall affirm IDWR's decision unless the Court finds that the decision was "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (d) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3).

The Court freely reviews questions of law independent of the district court's decision. *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666, 669 (2011). In contrast, "[t]he agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, By & Through Bd. of Commr's*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). "Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion." *Rivas v. K.C. Logging*, 134 Idaho 603, 607, 7 P.3d 212, 216 (2000) (citation omitted).

ARGUMENT

I. Because of the overlapping nature of the SWC's natural flow and storage rights, Idaho law required the Director to conduct an analysis of need rather than simply order delivery of the full decreed amounts of water.

Contrary to the allegations in the SWC's Opening Brief (SWC Open. Br. 24), the Director did not ignore the SWC's SRBA water rights claims: the Director began his analysis with an examination of the SWC's water rights as claimed in the SRBA and took the amounts of those water rights as claimed on their face. *See* R. 1369-74; Tr. Vol. II, p 302, L. 22-25 ("[T]he first thing I did was looked at the licenses and decrees to determine what the maximum amounts that could be diverted or diverted to storage . . . ."). However, because of the nature of the SWC's water rights, the Director had to go further. The Director explained at hearing the process by which the Department determined the nature and extent of material injury:

> Well, we started with the decrees . . . . [b]ut as I've already described, that maximum amount that's authorized under the decree, is not necessarily representative of what's actually needed. . . .
>
> The next thing that we did was to look at the combination of water that was likely to be available in the form of natural flow and storage. And, again, storage has always been supplemental to natural flow. . . .
>
> That's not always the case, but it is the case on the Snake River.

Tr. Vol. I, p. 40, L. 23 – p. 42, L. 9. As explained by the *AFRD#2* Court, Idaho constitutional and statutory provisions require that the Director administer water rights in recognition of the doctrine of beneficial use without waste. *AFRD#2*, 143 Idaho at 876-77, 154 P.3d at 447-48. The Director's use of MFS or other appropriate supply and demand algorithm that reflects an exercise of professional judgment and agency discretion is required by Idaho law.

A. The *AFRD#2* Court previously rejected the SWC's contention that it may call for its full decreed amounts of surface and supplemental storage water, regardless of duplicative beneficial use requirements.

The SWC entities' arguments on appeal rest entirely on the theory that proper administration by the Department requires that all junior ground water users be curtailed until the maximum decreed amounts of the entities' surface and storage rights are satisfied. The Court rejected the same theory when propounded by the senior surface users[7] in challenging the constitutionality of the CMR in *AFRD#2*. In explaining that the SWC entities are not "entitled to insist on all available water to carryover for future years in order to assure that their full storage water right is met (regardless of need)," *Id.* at 878, 154 P.2d at 449, the Court found that an examination of beneficial use and need is indeed appropriate in administration:

> Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho.

Id. at 880, 154 P.3d at 451 (emphasis added). The Court went on to explain that the doctrine of beneficial use without waste is alive and well in Idaho water law, and applies with equal force in delivery call proceedings:

> While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.

[7] American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls Canal Company were parties in *AFRD#2*, and are also appellants in the above-captioned appeal. *AFRD#2*, 143 Idaho at 862, 154 P.3d at 433. Milner Irrigation District and North Side Canal Company are appellants in the above-captioned appeal but did not participate in the *AFRD#2* appeal. *Id.*

Id.

The SWC entities' rights to appropriate water are conditioned by their ability to put the water to beneficial use. In administration, their rights are also subject to a determination of whether the amount of water sought through a delivery call is necessary in light of the principles of beneficial use. As explained by this Court, scrutiny of the water right does not end at the time a license or decree is entered:

> If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.

Id. at 876, 154 P.3d at 447 (emphasis added).

This Court's reasoning in *AFRD#2* has not been disturbed since the case was announced in 2007, and applies with equal force to the matter at hand. However, during cross-examination in the hearing before Hearing Officer Schroeder, SWC's counsel suggested that if IDWR did not deliver the SWC's maximum entitlement automatically upon demand, SWC would be forced to "prove" an entitlement to the water. Director Dreher vigorously disagreed:

> [n]ow apparently, you would prefer that [IDWR] simply take whatever diversion rate of the water right is [sic] and multiply that by the number of days in the irrigation season to get an inflated volume of water and then put the burden on somebody else to prove that much isn't needed, to prove the negative.

Dreher Testimony, Tr. Vol. I, p. 157, L. 22 – p. 158, L. 3. Because the SWC purported entitlement far outstrips the amount required to meet its beneficial use based on historical diversions, and because crop demand varies over the irrigation season,[8] the Director properly concluded an evaluation was necessary to determine how much water the SWC required to avoid injury to its beneficial uses.

[8] *See* Exh. 3035A, Figure 2 ("spaghetti" lines on the graph show patterns of daily diversion by year and on an annual average basis).

Director Dreher's defense of agency discretion was prescient: effectively the SWC have argued in this appeal that the Director has no discretion but instead is merely a handmaiden of the evidentiary record created during a hearing. In the view of SWC, their delivery call should have been answered by curtailing all junior wells on the ESPA and at the same time, placing the burden on the juniors to prove by clear and convincing evidence that SWC could not put that water to beneficial use over the course of the coming irrigation season. The problems with imposing the clear and convincing standard on a delivery call are discussed *infra* at section II; for purposes of this discussion, it need only be said that whatever the evidentiary burden, the Director has discretion to make an initial determination regarding injury based upon facts in the record and his expertise, including the one made in the captioned matter that the SWC did not require their full entitlements.

The Director and IDWR are charged with administering the waters of the State of Idaho during a delivery call, not merely shutting down junior ground water users upon receipt of a senior's affidavit and leaving the juniors to prepare for a hearing without any attempt by the Department to apply the law. *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448 (rejecting SWC arguments that the Director must presume injury and finding "[t]he 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]."). The Director has the authority, and indeed the responsibility, to investigate and "develop the facts upon which a well-informed decision could be made and to make a decision from the best information developed." R. 7074-75. As recognized by Hearing Office Schroeder, to do otherwise would be "irresponsible to the public interest and often unduly expensive for parties." *Id*. at 7075.

B. The doctrine of beneficial use without waste is well established in Idaho law.

By examining the SWC's total water supply and need, the Director ensured that the SWC's right to make beneficial use of its water was protected and also made certain that the entities exercised their rights in a way that did not unreasonably preclude optimum development of the State's water resources or otherwise monopolize the resource. At hearing, the Director explained the likely consequences to the thousands of junior water rights upon which much of the eastern Idaho's economy depends if IDWR were to order delivery of SWC's full legal entitlement and impose the kind of shut-and-fasten administration that the SWC entities were requesting:

> If the administration of these junior-priority rights is going to be based upon the maximum quantity authorized under these [SWC] surface rights, **there will be no ground water irrigation in Idaho** [and]. . . . there will be a whole lot of water that goes down the Snake River in flood control releases and out of the state without being beneficially used.

Dreher Testimony Tr. Vol. I, p. 170, L. 19 – p. 71, L. 9 (emphasis added).

Under Idaho law, the Director could not ignore the fact that delivering the SWC's maximum entitlement would result in non-use of a significant part of that water. As explained by the *AFRD#2* Court, "[n]either the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use." *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. By the plain language of the Constitution, the prior appropriation doctrine in Idaho provides that an appropriator's right to exercise a water right is tempered by the requirement of beneficial use: "[t]he right to divert and appropriate the unappropriated waters of any natural stream to *beneficial uses*, shall never be denied . . . ." IDAHO CONST. art. XV, § 3 (emphasis added). A water right, whether licensed or decreed, cannot operate in a manner that wastes water or applies it in a non-beneficial manner.

> [a] water right does not constitute the ownership of the water; it is simply a right to use the water to apply it to a beneficial use. In the absence of a beneficial use, actual or at least potential, a water right can have no existence.

Joyce Livestock Co. v. United States, 144 Idaho 1, 19, 156 P.3d 502, 520 (2007) (internal citations and quotations omitted). Pursuant to the same rule, a senior appropriator cannot place a delivery call for water that he cannot put to a beneficial use. "A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it." *Id*. "Wasting of irrigation water is disapproved by the constitution and laws of this state." *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473 (1966) (citing Article XV of the Idaho Constitution). Furthermore, "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*.

The Idaho Supreme Court has confirmed that "it is clearly state policy that water be put to its maximum use and benefit. . . [and] [t]hat policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution." *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982), *citing Poole v. Olaveson,* 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L.Rev. 1, 2 (1968). *See also Clear Springs*, 150 Idaho 790, 252 P.3d at 89 ("The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters . . . ."). Pursuant to Idaho Constitution Article XV, Section 7, IDWR is tasked with administration of the waters of Idaho and may develop a water plan consistent with the principles of "optimum development of water resources in the public interest." As noted by the Court in its recent *Clear Springs* decision, these principles necessarily apply in delivery call proceedings:

> "[t]here is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. . . . [t]he policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively."

Clear Springs, 150 Idaho 790, 252 P.3d at 89. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

Furthermore, the Idaho Constitution establishes that the public trust doctrine applies in Idaho, and that IDWR has the power and responsibility to regulate water rights pursuant to the doctrine of beneficial use. "The use of all waters now appropriated . . . is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law." IDAHO CONST. art. XV, § 1 (emphasis added). "The proprietary rights to use water, which are the subject of the SRBA, are held subject to the public trust." *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 157, 911 P.2d 748, 750 (1995). As such, the legislature may impose limitations on the ability of a senior to exercise his paper right that recognize the doctrines of beneficial use. IDAHO CONST. art. XV, § 5 ("priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both of such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.").

Pursuant to this constitutional prerogative, the legislature has recognized that an appropriation must be for "some useful or beneficial purpose," I.C. § 42-104, and that

> Water being essential to the industrial prosperity of the state, and all agricultural development . . . depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, **its control shall be in the state, which, in providing for its use shall equally guard all the various interests involved. All the waters of the state . . . are declared to be**

> **the property of the state…** and the right to continue the use of any such water shall never be denied . . .

I.C. § 42-101 (emphasis added).

Furthermore, Idaho Code section 42-602 requires the Director to distribute water according to all elements of the prior appropriation doctrine, including beneficial use without waste. The Director administered SWC's water delivery call in accordance with the constitution as well as the legislature's instructions by concluding that the SWC did not need the entirety of its combined natural flow and storage claims in order to meet the beneficial use, predicted injury to the seniors in 2005, and ordered mitigation of that injury. SWC's right to appropriate water pursuant to its natural flow and storage rights "is not an unrestricted right," and SWC's contention that their rights should be administered otherwise finds no support in Idaho water law. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120, 32 S.Ct. 470, 473 (1912).

C. The Director's application of the CMR, and the terms of the CMR themselves, support the Director's determination that an evaluation of more than the SWC's paper rights was required.

Contrary to the SWC's position on appeal, there is no presumption of material injury upon the filing of a delivery call. SWC Open. Br. 16 (contending that once a senior files a delivery call, "material injury is presumed"). This argument must be rejected. Conjunctive Management Rules 42 and 20.03, on their face, require the Director to administer water rights by reference to beneficial use, rather than merely a senior's allegation of injury and the volumes and rates of flow in a senior's paper right. The Director's ability to consider these factors, in addition to an appropriators' paper water right, was upheld as facially constitutional in *AFRD#2*.[9]

[9] As noted by Hearing Officer Schroeder, "Rule 20.03 is at the heart of the rules and how they would be applied. Had any Rule been subject to a facial challenge, 20.03 was one." R. 7086.

As the record reflects, the Director evaluated the factors under the CMR to conclude that the SWC's natural flow and storage rights satisfy the same irrigation use, and that the decreed quantity of the total combined rights exceed irrigation demands for a single irrigation season. R. 1377-79. For example, the Director examined "[t]he 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."in evaluating the SWC's claims of injury. CMR 42.01.g; R. 1397-98. The Director also considered "the rate of diversion compared to the acreage of land served, the annual volume of water diverted . . . the method of irrigation water application [and] [t]he amount of water being diverted and used compared to the water rights." CMR 42.01.d & e; R. 1398.

Furthermore, the MFS analysis expressly incorporated elements of CMR 20.03 which requires examination of the concepts of reasonable use and economic development in administration:

> These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use . . . [a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

CMR 20.03. The SWC rejects the holding of *AFRD#2* and the direction of the CMR, and argues that the only "factor" that the Director may consider in a delivery call are the flow rates of the senior's decree. *See* SWC Open. Br. 30. This is inconsistent with Idaho law. *AFRD#2*, 143 Idaho at 876, 154 P.3d at 447 ("American Falls argues that the Director is not authorized to consider such factors before administering water rights; rather, the Director is required to deliver the *full quantity* of decreed senior water rights according to their priority . . . .") (quotations omitted). The *AFRD#2* Court upheld the CMR as facially constitutional, and specifically examined Rules 20.03 and 42. "Clearly, even as acknowledged by the district court, the Director

may consider factors such as those listed [in the CMR] in water rights administration." *Id.* at 876, 154 P.3d at 447.

D. There is substantial evidence in the record to support the Director's finding that SWC's natural flow and storage rights must be considered together for purposes of administration, and thus an injury methodology that evaluates need is proper.

Although the SWC has argued on appeal only that the Director had an obligation to assume injury to the SWC upon receipt of the delivery call, and to curtail juniors to ensure delivery of the full entitlement on the face of the decree, license or claim, at hearing the SWC did not present evidence that it actually required over 9 million acre-feet of water to satisfy beneficial uses. Instead, it presented evidence of a total annual irrigation need of 3,274,948 acre-feet (R. 7096), a significantly lower amount than the SWC's total maximum authorized water supply pursuant to its claimed natural flow and storage entitlements. *See* R. 1370-74. The record is devoid of evidence suggesting that the Director should have ordered curtailment to ensure delivery of the SWC's over 9 million acre-feet of water.

The record contains ample evidence of the bases for the Director's conclusion that an evaluation beyond "shut and fasten" administration was required. As noted by Director in his May 2005 Order, the SWC's surface and storage rights are often "overlapping or redundant," and the storage rights are considered "supplemental to the water rights held by the members of the Surface Water Coalition authorizing the diversion and beneficial use of the natural flow of the Snake River." R. 1369, ¶ 54 & 1374, ¶ 72; R. 7051, ¶ I.4 ("[r]eservoirs were developed to capture water and retain it in storage for release at a later time when natural flow in the river is inadequate to meet irrigation needs."). The Director found that "actual amount of storage used for irrigation during any given irrigation season varies based upon climatic conditions." R. 1374, ¶ 72. As explained by the Director, the storage system was not built to completely eliminate risk to the SWC entities:

> [I]f there is water in the system that can be appropriated subject to prior rights and put to beneficial use, that's what we do.
>
> Now, if the [prior appropriation] system was all about minimizing risk to the senior right, if that's what this was designed around, then there would be a point at which we would not allow junior appropriators to appropriate the unappropriated water because the senior might need it. Not because the senior does need it. Because he might need it at some point in the future.
>
> And that's the difference between I think what you're implying I should have done versus what I attempted to do . . . .

Tr. Vol. I, p. 193, L. 9-23. As explained by this Court in *AFRD#2*, "storage rights are property rights entitled to legal protection. . . . Nevertheless, that property right is still subject to other requirements of the prior appropriation doctrine." *AFRD#2*, 143 Idaho at 879, 154 P.3d at 450.

Also relevant in evaluating the Director's determination to exercise discretion is the fact that the demand for water varies across the irrigation season. The graph at Exhibit 3035A, Figure 2, reflects the change in irrigation demand over the season; similarly, testimony established that natural flow water rights are generally available earlier in the season, storage may be relied on during the peak demand times, and cooler late summer or fall weather together with return flows often allows resumed reliance on natural flow rights. Tr. Vol. V, p. 996, L. 20 – p. 998, L. 24. If natural flow declines earlier than usual in a particular irrigation season, SWC entities will generally have a greater reliance on storage water. R. 7057. Furthermore, the SWC entities are not identically situated with respect to their needs because of differential rates of flow and volumes of natural flow and storage water rights. R. 1408-14; R. 7056-57.

These facts, as established at hearing and relied upon by the Director, provide substantial evidence in support of the Director's determination that he was required to go beyond the face of the SWC water rights and examine the needs of the SWC entities in administering the delivery call.

E. Because of the nature of the SWC rights and Water District 01's protocol to administer in a manner that provides the entities operational flexibility, the timing of the Directors orders was proper and within his discretion

Despite the role it played in delaying the above-captioned matter for over two years pending the *AFRD#2* proceeding, the SWC entities now complain that the Director's response was untimely and in error because the Director did not order immediate curtailment and delivery of water in the year that injury was predicted. SWC Open. Br. 12, 25, 29.[10] The SWC entities raised this issue with respect to the timing of IDWR's orders in *AFRD#2*. While the Court declined to address the SWC's as-applied challenge, the Court addressed the timeliness challenge on its merits because "completion of the administrative record would not aid the Court in its determination of what has transpired so far." *AFRD#2*, 143 Idaho at 445, 154 P.3d at 874. The Court then went on to find that "the facts developed thus far do not support American Falls' contention that it was deprived of timely administration in response to the Delivery Call." *Id.* The Court explained why the Director's orders were timely:

> American Falls submitted its Delivery Call to the Director in January of 2005, fearing that shortages would occur in the upcoming year. Thus, this was not at a time when water was actually needed. IDWR received the inflow forecast in April of 2005 and the Director issued a Relief Order less than two weeks later. The Director made the Order effective immediately pursuant to I.C. § 67-5247 (Emergency Proceedings), ordering juniors to provide "replacement" water in sufficient quantities to offset depletions in American Falls' water supplies. Thus, American Falls was provided timely relief in response to the Delivery Call in the form of the Relief Order issued just months after their call and only weeks after the Director received water forecasts for the upcoming year.

Id. at 875, 154 P.3d at 446 (emphasis added).

As explained by this Court, the timing of the Director's orders is in large part based on the timing of inflow forecasts, which are out of the control of IDWR. The Bureau and the Army Corps of Engineers prepare an operating forecast that projects the unregulated flow from the

[10] IDWR found injury in the May 2005 Order; subsequently, the amount was revised downward after an extremely rainy irrigation season, determining that only Twin Falls Canal Company had shortages. R. 2994-3012.

Upper Snake River Basin at the Heise Gage periodically between January and May of each calendar year. R. 1379. The forecast issued on or around April 1 "is generally as accurate a forecast as is possible" for predicting natural flow during the irrigation season. *Id.*

The *AFRD#2* Court also recognized that the SWC entities played a central role in causing the multiple year delay of the delivery call proceeding:

> Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuances in the hearing schedule, one of which requested that the hearing be reset to no sooner than June 15, 2006. It appears that American Falls preferred to have its case heard outside of the administrative process and went to great lengths, first to remove the case from the administrative process and second, to delay the hearing.

AFRD#2, 143 Idaho at 875, 154 P.3d at 446. Given the delays caused by the SWC entities and the nature of administration in Water District 1, the Director's orders were not untimely. What the SWC entities really take issue with is that the Department did not immediately proceed upon the filing of the delivery call to find injury to senior appropriators and shut down the entire ESPA until the SWC entities rights were satisfied in full. SWC Open. Br. 16.

As explained above, given the nature of the SWC water rights and the requirement that the Director administer water rights in compliance with the prior appropriation doctrine, including the tenant of beneficial use without waste, the Director proceeded to evaluate need within his discretion and in compliance with Idaho water law. The Court should affirm the district court's decision upholding the Director's discretion to evaluate need in administering delivery calls, as outlined in the CMR, and, in the case at hand, as required by the facts in evidence.

II. The District Court erred in finding that the Clear and Convincing evidence standard applies to the determination of injury in delivery call proceedings

As explained *supra*, on reconsideration the district court announced *sua sponte* that the Director erred in concluding that TFCC was entitled to a lower rate than IDWR had recommended in the SRBA proceeding because the Director did not make reference to the evidentiary standard applicable to his finding, which the court declared to be clear and convincing evidence. Cl. R. Vol. 7, 1248-49 (adopting Judge Wildman's *Memorandum Decision and Order on Petition for Judicial Review*, Minidoka County Case No. CV 2009-0647; appealed in Supreme Court Docket Nos. 38403-2011 [38421-2011 / 38422-2011]).

This is the only instance in the entire history of the SWC delivery call when the Director failed to evaluate injury claims based on an SWC entity's full claimed entitlement. IDWR resolved that dispute when, in its order on remand, IDWR considered TFCC's injury by reference to 3/4 of an inch rather than 5/8 of an inch. *Id.* at 1249. In its Amended Order on Petitions for Rehearing, the district court recognized that by reversing its analysis of TFCC's delivery rate, "this issue has been resolved by the proceedings on remand." *Id.* However, despite this conclusion and the lack of any remaining dispute between the parties, the district court did not withdraw the provisions of its order regarding the applicability of clear and convincing evidence. Arguably, the issue of whether the Department erred in not applying the clear and convincing evidentiary standard is not even live in this appeal, because the Director has otherwise evaluated SWC's claims of injury by reference to their full claimed entitlements. If that is the rubric under which the clear and convincing standard is to be applied—to support determinations that senior water rights cannot rely on their full claimed entitlements to make a delivery call–the Court need not consider the issue.

However, if the issue is properly before this Court, Pocatello has previously appealed the clear and convincing evidence decision in the A&B Delivery Call Appeal and hereby incorporates by reference its response brief in the A&B Delivery Call Appeal dated July 27, 2011, pages 25-43, regarding this issue. It is Pocatello's position that preponderance of the evidence, rather than clear and convincing evidence, is the appropriate standard of proof in a delivery call proceeding.

CONCLUSION

It is undisputed that if over 9 million acre-feet of water was delivered to the SWC entities in a single year, they would not be able to put all the water to beneficial use. As such, and given the supplemental nature of the SWC's storage rights, the Director declined to curtail all junior ground water users in the ESPA in order to deliver the amount of water that SWC claimed an entitlement to. The Director's decision to do so did not re-adjudicate the SWC's water rights: the SWC entities water rights are subject to the doctrine of beneficial use without waste, and as such, the SWC entities do not have a right *as a matter of law* to demand more water than they can beneficially use. The Director properly relied upon his discretion and expertise to apply an analysis of need in the delivery call and evaluate how much water the entities required to avoid injury. The Court should affirm the Director's administration of the SWC entities water rights and, because that administration did not result in a readjudication, determine that preponderance of the evidence, rather than clear and convincing evidence, was the applicable standard of proof in this delivery call proceeding.

Respectfully submitted, this 30th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2011, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Intervenor-Respondent-Cross Appellant Brief** in **Supreme Court Docket No. 38191-2010 [consolidated with Nos. 38192-2010 & 38193-2010) Gooding County Case CV-2008-551** upon the following by the method indicated:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted in **Supreme Court Docket No. 38191-2010 [38192-2010 / 38193-2010]** is in compliance with all of the requirements set out in I.A.R. 34.1, and that the electronic copy of **the City of Pocatello's Intervenor-Respondent-Cross Appellant Brief** was served on each party at the following email addresses:

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