10-12-2011

A & B Irrigation District v. Idaho Dept of Water Resources Cross Appellant's Reply 4 Dckt. 38403

Docket No. 38403-2011 [38421-2011 / 38422-2011]

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA

A&B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,
and GARY SPACKMAN, in his official capacity as Interim Director
of the IDAHO DEPARTMENT OF WATER RESOURCES; and,
Defendants-Respondents,

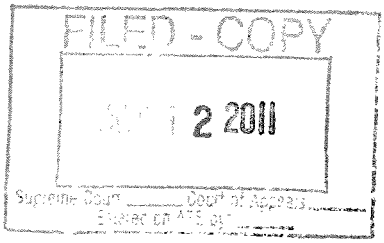
v.

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO;
Respondents-Cross Appellants,

FREMONT-MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE;
District Court Intervenors.

RESPONDENT-CROSS APPELLANT CITY OF POCATELLO'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District
for Minidoka County District Court No. 2009-647
Honorable Eric J. Wildman, District Judge, Presiding



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INTRODUCTION

A&B Irrigation District's ("A&B") position on appeal seeks a ruling from this Court that would require remand and direction to the Idaho Department of Water Resources ("IDWR" or "Department") to find injury to A&B's water right no. 36-2080. A&B's legal analyses are erroneous because they ignore the language of A&B's partial decree, which incorporates operational flexibility to apply water from any of its wells to any of the acres within its decreed place of use, as well as applicable Idaho law. A&B's legal arguments, disposed of in summary below and in detail within, are an attempt to overcome the findings in the record below, which is replete with evidence of the adequacy of A&B's ground water supplies and A&B's lack of need for its entire decreed flow rate.

- A&B asks the Court to ignore the discretion vested in the Director under Idaho Code section 42-237a.g, which provides that the Director "may establish" reasonable pumping levels, in favor of a finding that the initiation of ground water delivery call requires the setting of a reasonable pumping level, regardless of the adequacy of the senior's water supply.
- A&B argues erroneously that its water right no. 36-2080 is exempt from the application of the Ground Water Act ("GWA" or "Act"), despite the plain language of the Act demonstrating legislative intent to regulate all ground water rights regardless of priority date.
- A&B asks the Court to overturn the findings of the Director, Hearing Officer and District Court that charged A&B with both the benefit and burden of the operational flexibility

allowed under its partial decree in favor of a mechanistic reading of the Conjunctive Management Rules ("CMR"), codified at Idaho Administrative Code 37.03.11.

- A&B adopts the district court's position that "clear and convincing" evidence is the appropriate standard in a delivery call, although it cites no case law in support of its arguments.

ARGUMENT

I. THE GWA APPLIES TO A&B'S 36-2080 RIGHT

On appeal, A&B continues to rely on the argument that 1987 amendments to section 42-226, amendments the legislature described as "grammatical"[1] in nature, were intended to undo the plain language of section 42-229. Idaho Code section 42-229 of the GWA provides:

> the administration of all rights to the use of ground water, **whenever or however acquired** or to be acquired, shall, unless specifically excepted therefrom, **be governed by the provisions of this act**.

(emphasis added).[2] The district court, relying on *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) interpreted section 42-229 to require application of the Act's provisions against *all* ground water rights, including those that carry priority dates prior to the enactment of the Act. Cl. R. 61-62. The court rejected A&B's arguments that section 42-226 somehow undid the legislature's intent as expressed in 42-229:

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[1] Senate Bill 1133 containing the changes made in the 1987 amendment was entitled "An Act . . . Amending Section 42-226, Idaho Code, to Provide that In Determining a Reasonable Ground Water Pumping Level or Levels, the Director of the Department of Water Resources Shall Consider and Protect the Thermal and/or Artesian Pressure Values for Low Temperature Geothermal Resources . . . and to Make *Grammatical* Changes . . . ." 1987 Idaho Sess. Laws 741, ch. 347 (emphasis added).

[2] Originally enacted as section 4 of the GWA under 1951 Idaho Sess. Laws 424, ch. 200, § 4.

> I.C. § 42-226 governs the applicability of the GWA to rights to the use of ground water acquired before its enactment, whereas the last sentence of I.C. § 42-229 applies to the *administration* of rights to the use of ground water acquired before its enactment. By its plain language then, the GWA applies to the *administration* of rights to the use of ground water 'whenever or however' acquired. I.C. § 42-229.

Cl. R. 59 (emphasis added).

The district court's interpretation is consistent with this Court's previous consideration of these sections of the GWA, first in *Baker*, and affirmed in *Clear Springs Foods Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). It is also consistent with the legislative history of the Act, which confirms that the last sentence of section 42-226 was included to confirm the *validity* of pre-GWA rights, not to exclude pre-GWA rights from the administrative provisions of the Act.

A&B's arguments would require this Court to reverse its prior rulings, and decide that the "grammatical" 1987 amendment to section 42-226 somehow undid the legislature's intent as reflected in section 42-229. This Court should affirm the district court's determination that the plain language of 42-229 requires the application of the GWA as a whole to the administration of ground water rights, regardless of when the rights were acquired.

A. The 1953 amendment to 42-226 regarding reasonable pumping levels did not require express language to affirm the application of the GWA to the administration of pre-enactment rights.

A&B argues in its Reply Brief dated September 16, 2011 ("Reply") that even if the legislature intended the GWA to apply in administration of pre-enactment rights, the "reasonable ground water pumping levels" provision in section 42-226 does not apply to pre-GWA water rights because the amendment does not contain additional language requiring such retroactive

application. Reply at 3. Not only does A&B's argument find no support in Idaho law, it misconstrues the very cases relied upon in its Reply. Reply at 3-4.

For example, A&B erroneously relies on *Nebeker v. Piper Aircraft Corp.* In *Nebeker*, the Court examined an act that contained no retroactivity clause, either as enacted or as amended. *Nebeker*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987) (amendment to definition of "heirs" did not apply retroactively to wrongful death suit based on death prior to amendment); *cf.* Reply at 3-4. The *Nebeker* Court found that where neither an amendment nor any other part of an act contains a declaration of retroactivity, neither the act nor the amendment can apply retroactively. 113 Idaho at 614, 747 P.2d at 23. As such, *Nebeker* is inapposite—unlike the legislation at issue in *Nebeker*, the GWA as enacted contains an express declaration that it applies to the administration of ground water rights "whenever or however acquired". 1951 Idaho Sess. Laws 423, ch. 200, § 4.

Stuart v. State is directly on point in this matter, but stands for a rule of law contrary to that proposed by A&B. 149 Idaho 35, 44, 232 P.3d 813, 822 (2010). When asked "whether the retroactive language in an existing statute is nullified by operation of a subsequent amendment," the *Stuart* Court answered a resounding "no." *Stuart*, 149 Idaho at 44, 232 P.3d at 822; *cf.* Reply at 4. In *Stuart*, a petitioner argued that Idaho Code section 19-2719 did not apply to his request for post-conviction relief because the statute was enacted after his conviction, and because the provision was subsequently amended without express retroactive provisions. *Stuart*, 149 Idaho at 43-44, 232 P.2d at 821-22. This Court found that the legislature included express language in Idaho Code section 19-2719 (regarding post-conviction relief) to make the statute applicable to

criminal convictions entered prior to the statute's enactment, and that later amendments to the statute that did not address the class of actions to which it applied did not somehow overturn this legislative intent. *Id.*

Similarly, section 42-229 makes clear that the GWA applies to the administration of ground water rights, "whenever or however" acquired. Importantly, the GWA is not retroactive in any substantive sense—it applies to *future* administration of ground water rights. A retroactive statute is one that "changes the legal effect" of previously occurring events. *Engen v. James*, 92 Idaho 690, 695, 448 P.2d 977, 982 (1969). "A statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, is deemed retroactive." *State v. Lindquist*, 99 Idaho 766, 777, 589 P.2d 101, 112 (1979) (emphasis added) (citation omitted). "[W]here a statute is procedural or merely draws upon facts antecedent to its enactment it will be held to be prospective in nature." *Stuart*, 149 Idaho at 43, 232 P.3d at 821 (citation omitted).

A&B initiated its delivery call and first alleged injury in 1994, long after enactment of the GWA and the 1953 amendment regarding reasonable pumping levels. In *Stuart*, the Court reached the same "prospective" conclusion regarding the post-conviction relief statute. Just like a delivery call,

> a post-conviction proceeding is entirely new and distinct from the underlying criminal action. . . . The original enactment of I.C. § 19-2719 included language making it applicable to convictions prior to the statute's enactment, but it was not, itself, 'retroactive' in any substantive sense. . . . **Because I.C. § 19-2719 applies to post-conviction relief actions rather than the underlying criminal actions, its application is prospective**—operating on all post-conviction petitions submitted after the effective date of the statute.

Id. (emphasis added) (citations omitted).

Just as the *Stuart* court found the post-conviction statute to operate prospectively on post-conviction proceedings brought after its enactment, regardless of when the underlying conviction occurred, this Court should find that the GWA applies in administration to all ground water rights, "whenever or however" acquired. I.C. § 42-229.

B. *Parker v. Wallentine* does not change this analysis.

Finally, A&B's reliance on *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) is not persuasive. Reply at 4-5. *Parker* involved the application of the GWA to domestic rights, which the legislature has addressed with unique and separate terms in the GWA. Originally, domestic wells were exempt entirely from the GWA. *Id.* at 510, 650 P.2d at 652. However, in 1978 the legislature amended the GWA to make domestic wells subject to the Act, with an exemption from the permitting requirements of 42-229.[3] *Id.* at 511, 650 P.2d at 653. The *Parker* suit was brought by a senior appropriator in 1977 (before the 1978 amendment was enacted) to enjoin the pumping of the junior appropriator in order to restore historic water levels. The junior appropriator argued that even though the suit was brought against him prior to the 1978 amendment, the amendment demonstrated that the legislature always intended domestic wells to be subject to the reasonable pumping level provisions in section 42-226, and that the amendment should therefore be applied retroactively to the senior in *Parker*. *Id.*

The Court rejected this argument, finding that wells involved in an action initiated before the enactment of the 1978 amendment were not subject to the amendment, and that there was

[3] The ground water rights are acquired by appropriation and "[s]uch appropriation may be perfected by means of the application permit and license procedure as provided in this act." I.C. § 42-229.

nothing in the 1953 amendment to section 42-226 indicating that rights expressly exempt from the Act at that time were somehow subject to its reasonable pumping level provision:

> [w]hen the legislature amended I.C. § 42-226, it is presumed to have had in mind the broad exemption originally granted to domestic wells. It is also to be presumed that in retaining I.C. § 42-227 as it was originally enacted, the legislature intended that the provision have continuing validity and force.

Id. In other words, because at the time the reasonable pumping level language was added domestic wells were exempt from the Act, the legislature did not need to re-state this exemption to make it so. A&B, to the contrary, has an irrigation right that has always been subject to the Act pursuant to section 42-229, including the 1953 amendment regarding reasonable pumping levels. In fact, *Parker* shows that without an express exemption from 42-229 of the GWA, all ground water rights wherever and however acquired are subject to the Act in administration.

The legislature made clear that the GWA applies to the administration of pre-GWA rights. Idaho law does not require every amendment to the Act to reaffirm this intent. Under the logic of the *Parker* Court, A&B's argument must fail: pre-GWA rights were subject to the provisions of the GWA in 1953 when 42-226 was amended—the legislature is "presumed to have had in mind" this broad application, and did not amend 42-229 in 1953 to state otherwise. *Id.* As such, 42-229 has "continuing validity and force" to pre-GWA rights, including the Act's provisions regarding reasonable pumping levels. *Id.*

II. THE DIRECTOR HAS DISCRETION TO SET REASONABLE PUMPING LEVELS

A&B argues that if its water right is subject to the reasonable pumping level provisions of the GWA, the Director is obligated to set a reasonable pumping level for the Eastern Snake Plain

Aquifer ("ESPA") as a precondition of administration of its delivery call. Reply at 8-9. A&B cites to this Court's recent decision in *Clear Springs* as "specifically" rejecting the argument that the Director must find that an aquifer is being "mined" and find injury before a reasonable pumping level must be set under Idaho Code section 42-237a.g and section 42-226. Reply at 11-12.

The *Clear Springs* Court determined that the fact that the SRBA is not being mined does not preclude the Director from administering a delivery call and inquiring into whether a senior is suffering material injury. *Clear Springs*, 252 P.3d at 84-85 ("There is absolutely nothing in the [§ 42-237a] that could be interpreted as providing that ground water users are exempt from the doctrine of prior appropriation as long as they are not mining the aquifer."). Because setting a reasonable pumping level is not part and parcel of the injury determination, it need not occur in a delivery call unless injury is determined, and without such a determination, setting reasonable pumping levels is left to the Director's discretion.

The Director did not conclude that the Department must first find that an aquifer is being mined before administration of a delivery call; rather, that once the record in a delivery call shows that a senior water user is not suffering material injury, the Director is not required to establish a reasonable pumping level. A&B is only entitled to a reasonable pumping level if it is being materially injured. In other words, setting a reasonable pumping level is among the administrative tools the Director has discretion to use in the event of a factual record supporting injury to the senior's water right.

A&B, by contrast, suggests erroneously that the injury inquiry requires determination of a reasonable pumping level. However, the water table level is irrelevant unless the senior can be said to require its entire decreed amount to avoid material injury. Until it is known whether the senior is actually suffering material injury—i.e., requires and is using its full decreed amount—no facts exist to support an exercise of agency discretion under section 42-237a.g to establish reasonable pumping levels. Setting a reasonable pumping level for the entire ESPA would not be an inconsequential task for IDWR, and would effectively impact the operation of every ground water right in the entire ESPA. And if, as the record below demonstrates with regard to A&B, the senior does not require its full decreed amount and its partial decree includes the types of operational flexibility decreed to A&B, the setting of a reasonable pumping level would be a hollow and expensive exercise of little practical use.

III. THE COURT SHOULD REJECT A&B'S ARGUMENT THAT THE OPERATIONAL FLEXIBILITY GRANTED TO IT UNDER THE TERMS OF ITS DECREE SHOULD BE IGNORED IN FAVOR OF A HYPERTECHNICAL READING OF THE CMR

On reply, A&B argues that the Director's findings regarding A&B's "drilling techniques," combined with the language of CMR 42.01.g, invalidate the Director's determination (affirmed by the district court) that A&B is obligated to take steps to maximize its water deliveries consistent with the terms of its partial decree. Reply at 18-25; Cl. R. 82-85. A&B's argument would require the Court to ignore not only the language of A&B's partial decree but also facts in the record. At the end of the day, regardless of the adequacy of A&B's

drilling techniques or the hair-splitting arguments in the Reply Brief regarding what constitutes a "means of diversion," A&B has both the benefit and the burden of its unique decree terms.

A. The Director is not required to apply the terms of CMR 42.01.g in a vacuum without regard to the hydrogeology of the southwestern section of the District and the flexibility afforded to A&B in its partial decree.

While A&B is correct that the Department found that "A&B utilizes acceptable drilling techniques" and that A&B has developed some "alternative systems" that increase efficiencies and reduce conveyance losses, these two conclusions do not foreclose the Department's finding that A&B is not suffering injury. R. 3098. A&B's argument that "[l]ocation does not excuse an agency's failure to perform a mandatory duty," and that by taking into account the hydrogeologic factors present in the southwestern portion of the district the Director has, by analogy, chosen to disregard junior groundwater users "theft" of water ignores the very basis of the Department's conclusion. Reply at 17.

First, the record below fails to establish the fact of a "theft" of ground water to which A&B was entitled. The Hearing Officer found that the hydrogeologic conditions in the southwestern portion of A&B's delivery system make ground water production difficult, that the Bureau had knowledge of such conditions, and that the Bureau's knowledge of the difficult hydrogeology predated the drilling of the wells. R. 3092; Exh. 152QQ, 152BBB. As such, the Hearing Officer found that "[s]hortages in the water available from pumping in the southwestern part of Unit B and the potential need to import water from more productive areas were foreseeable" to A&B, and the flexibility to address these needs was built into A&B's decree to allow the District to address that need. R. 3092.

Second, A&B's selective reliance on findings related to the adequacy of its "drilling techniques" and its parsing of CMR 42.01.g wholly ignores the terms of its partial decree. As has been described by the cross-appellants and respondents to this matter, and as found by the Hearing Officer, Director and district court on appeal (R. 3094-97; R. 3321; Cl. R. 84-85), A&B's partial decree on its face imposes both a benefit and burden on A&B—the benefit is the flexibility to deliver water to any acres in the place of use; the burden is to deliver water to any acres in the place of use. The decree language cannot be ignored in favor of a crabbed reading of the CMR.

A&B's hyper-technical interpretation of CMR 42.01.g at the expense of the terms of its partial decree is just a new twist on its argument, made at various points in the record below, that the Director must answer delivery calls with "shut and fasten" administration. *E.g.*, R. 2384. A&B deconstructs the terms of CMR 42.01.g and suggests that if a senior's means of diversion are "reasonable" and that A&B has taken steps to improve the efficiency of its conveyance system, the Director is required to find injury—regardless of other facts in evidence—if A&B is not receiving its maximum decreed amount. However, the threshold finding required under the CMR in evaluating injury is whether the senior's water right is suffering an "impact" from junior ground water pumping. CMR 10.14. This "impact" has been described by the district court as a showing that the senior requires his full decreed amount, which also requires interpretation of the

partial decree terms. In the absence of this type of evidence in the record, the realities of A&B's "drilling techniques" and conveyance system are beside the point.[4]

Furthermore, "reasonableness is not an element of a water right," and it is within the Director's discretion to consider the reasonableness of A&B's delivery system as a whole and not its discrete parts. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.* ("*AFRD#2*"), 143 Idaho 862, 877, 154 P.3d 433, 448 (2007). Hearing Officer Schroeder found that "there is an obligation of A&B to take reasonable steps to maximize the use of [] flexibility [under its partial decree] to move water within the system before it can seek curtailment or compensation from junior users." R. 3096. The district court agreed, concluding that "the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director." Cl. R. 83.

B. Regardless of whether A&B's drilling techniques are adequate, Idaho law does not permit it to command the entire ESPA to raise ground water levels in the southwestern area: A&B has a water right, not a right to existing means of diversion.

A&B's demand for curtailment as a means to obtain water levels adequate to deliver water at the rates A&B alleges would effectively require the Director to allow A&B to command the entirety of the aquifer, an outcome that is contrary to Idaho law. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 125, 32 S.Ct. 470, 474 (1912). Hearing Officer Schroeder rejected this argument, and found *Schodde* to be controlling:

[4] Further, A&B's argument that the elements of CMR 42.01.g should be interpreted strictly and are to be used as the sole basis of administration runs contrary to the arguments in A&B's opening brief that its "decree is binding on IDWR and shall be conclusive as to the nature and extent of the water right. . . . The Director and state watermasters are bound to honor the plain terms of the decree for purposes of administration." A&B's Opening Brief at 36 (quotations and citations omitted).

> Th[e] injury was to [Schodde's] means of diversion, not to his underlying water right. This case creates a similar issue. . . . That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.

R. 3111.

To continue to operate his water rights, Mr. Schodde had to modify his means of diversion to access the water available to him under his prior rights *not* because the water wheel was technical or physically compromised—indeed, by all accounts, Schodde's water wheel worked just fine—but because his existing means of diversion required adequate current in the stream to turn the water wheel. *Schodde*, 224 U.S. at 116, 32 S.Ct. at 471. Similarly, the district court rejected A&B's demand for curtailment of all junior ground water rights in the ESPA to raise ground water levels in the southwestern portion of the project. A&B may have to modify its means of diversion by realigning its wells or by constructing additional interconnection between its distribution system, and the Director's requirement that it make such changes to its operations—changes expressly called for under its partial decree—is consistent with the Director's discretion.

C. Adoption of A&B's mechanistic arguments regarding the CMR would require remand to the Director to find injury, a finding that would be wholly at odds with the facts in the record below.

There is substantial evidence in the record to support the findings of the Director, as upheld by the district court, that A&B is not suffering material injury. This Court reviews matters of law freely, but will not disturb the Department's factual findings so long as they are

supported by substantial evidence. *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666, 669 (2011). Junior ground water users' Pocatello and the Idaho Ground Water Appropriators Inc. presented evidence at hearing as follows:

- In the entire history of the operations of the B Unit, A&B has never had the well capacity to deliver 1100 cfs (or 0.88 miner's inches per acre) during the irrigation season,[5] and therefore had never relied upon its full decreed water amount. R. 1118-19, FOF ¶¶ 61-64;
- There was no evidence of injury to A&B's beneficial uses from deliveries below 0.88 miner's inches per acre;[6]
- The farmer witnesses[7] testified that 0.75 miner's inches per acre was adequate for A&B's decreed beneficial uses; and
- Therefore, A&B's water supply was adequate because its wells could deliver at least 0.75 miner's inches per acre. R. 1119, FOF ¶ 63.

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[5] Koreny testimony, Tr. Vol. XI, p. 2196, L. 14 – p. 2197, L. 3, p. 2201, L. 14 – p. 2203, L. 18 (referring to Figure 3-20); Sullivan testimony, Tr. Vol. VIII, p. 1670, L. 9 – p. 1671, L. 3, p. 1696, L. 3 – p. 1697, L. 4 (referring in part to Exhibit 319); Luke testimony, Tr. Vol. VI, p. 1266, L. 14 – p. 1267, L. 5. *See also*, R. 1118 (Director found that well capacities in 1963 were only 1007 cfs); R. 3108 (since at least 1963 there was no time at which all well systems could produce 0.88 miner's inches per acre).

[6] As the record shows, A&B repeatedly characterized injury to its water right as deliveries that dropped below 0.75 miner's inches/acre and only at trial did A&B alter its theory to suggest that 0.88 miner's inches/acre (or 1100 cfs divided pro rata amongst the 177 well systems) was injury. *See, e.g.*, R. 12-14; R. 830-41; Exh. 210.

[7] *See* Temple testimony, Tr. Vol. IV, p. 664, L. 1-4; Deeg testimony, Tr. Vol. V, p. 1067, L. 9 – p. 1068, L. 11, p. 1081, L. 19 – p. 1082, L. 11; Mohlman testimony, Tr. Vol. V, p. 1018, L. 8-21, p. 1031, L. 5-18, p. 1031, L. 23 – p. 1032, L. 1, p. 1035, L. 1-8; Maughan testimony, Tr. Vol. X, p. 2136, L. 22 – p. 2137, L. 12, p. 2137, L. 13 – p. 2138, L. 2; Adams testimony, Tr. Vol. V, p. 877, L. 20 – p. 879, L. 10, p. 905, L. 23 – p. 907, L.5, p. 919, L. 24 – p. 920, L. 11, p. 938, L. 6-16; Eames testimony, Tr. Vol. IV, p. 812, L. 7-21, p. 814, L. 5-19, p. 827, L. 3-23, p. 829, L. 17-22, p. 835, L. 14-25, p. 837, L. 18 – p. 838, L. 2, p. 854, L. 3-12; Kostka testimony, Tr. Vol. V, p. 950, L. 7-19, p. 974, L. 10 – p. 975, L. 12, p. 979, L. 1 – p. 980, L. 2, p. 990, L. 6-8, p. 993, L. 6-25; Stevenson testimony, Tr. Vol. X, p. 2084, L. 6 – p. 2085, L. 14.

The Hearing Officer relied upon this evidence in concluding that A&B was not suffering material injury, and reached additional findings of fact to support that conclusion:

- "The decline in water levels has not resulted in the need [for A&B] to withdraw significant amounts of land from cultivation." R. 3103.
- "Despite water supply difficulties across the Eastern Snake Plain River Basin, there has been a general increase in crop production." R. 3104.
- There has been a "decline in [A&B's allegedly] water short wells" since 2004. *Id.*
- A&B's average received flow rate is "higher than that of nearby surface water users." R. 3107.

With the exception of its proviso regarding the clear and convincing evidence issue, discussed below, the district court similarly affirmed the finding that A&B was not suffering material injury. Indeed, the district court remanded this matter to the Department for application of the clear and convincing standard of evidence, and on remand the Director found that A&B has sufficient water and is not suffering material injury even under this heightened evidentiary standard.[8] A&B failed to present evidence refuting any of the evidence or findings identified above; as such, this Court should affirm the determination of both the Director and the district court that A&B is not suffering material injury.

[8] The Director's determination on remand is the subject of multiple appeals currently pending before the Fourth Judicial District, County of Ada District Court and the Fifth Judicial District, County of Minidoka District Court. Pocatello's appeal has been stayed pending the outcome of the above-captioned proceeding before this Court.

IV. BECAUSE DELIVERY CALLS INVOLVE AN ADMINISTRATIVE DETERMINATION OF INJURY, AND NOT READJUDICATION, THE APPLICABLE EVIDENTIARY STANDARD IS A PREPONDERANCE OF THE EVIDENCE AND NOT CLEAR AND CONVINCING EVIDENCE.

In *AFRD#2*, this Court rejected the concept that a senior is entitled to shut-and-fasten administration to deliver the amount on the face of the senior's decree, and instead found that it is within the Director's discretion to consider a variety of factors outlined in the CMR and Idaho law to evaluate claims of injury. *AFRD#2*, 143 Idaho at 878, 154 P.3d at 449. A&B's arguments on reply attempt to twist the *AFRD#2* decision to stand for proposition exactly opposite of that adopted by the court therein. Reply at 37. The question before IDWR in a delivery call is whether there is injury to the senior water user, not an attempt to alter decreed rights. As stated by the hearing officer, "[t]he question of material injury depends on a number of factors beyond the fact that A&B is not receiving 0.88 miner's inches from all well systems in Unit B during the peak period." R. 3088.

A&B's arguments in reply notwithstanding, it has failed to point to one case that applies the clear and convincing standard in the administration of water rights and instead continues to assert that Idaho case law involving adjudications and quiet titles are controlling with respect to the applicable standard of evidence. Reply at 28-31. Its reliance on these cases is not persuasive.

Moe v. Harger, 10 Idaho 302, 77 P. 645 (1904) does not determine the respective evidentiary standard in delivery call proceedings. *Moe* stands for the simple proposition that juniors are bound to the diversions allowed under their decree unless they establish by clear and

convincing evidence that excess diversions will not injure senior appropriators.[9] 77 P. at 647. *Moe* concerned a claim by junior water users to divert an amount of water in excess of that allowed under of their decree, *id.*, and a senior irrigator brought an action seeking to enjoin such excess diversions. *Id.* at 644. The juniors put on an expert who testified that due to the unique hydrology of the basin the level of the stream would emerge from the ground above the senior's property undiminished, regardless of how much water the juniors diverted. *Id.* at 646. The *Moe* Court found that the juniors had not provided clear and convincing evidence of lack of injury to the senior from excess diversions. *Id.* at 647. Accordingly, the *Moe* holding is inapposite and inapplicable to the facts of a delivery call proceeding where juniors are not attempting to divert in excess.[10]

A&B's reliance on *Silkey v. Tiegs* ("*Silkey I*"), 51 Idaho 344, 5 P.2d 1049 (1931) and *Silkey v. Tiegs* ("*Silkey II*"), 54 Idaho 126, 28 P.2d 1037 (1934) is similarly off-point. Reply at 29-32. The *Silkey* cases involved an action where juniors attempted to permanently modify the prior decree to reduce—and thus readjudicate—the seniors' decreed water rights, and was not a proceeding to administer competing water rights. In *Silkey I* the Idaho Supreme Court upheld a district court's authority to include administrative provisions in a water rights decree without committing an impermissible delegation of executive authority. *Silkey I*, 51 Idaho at 358, 5 P.2d at 1055. Contrary to A&B's position, the fact that the decree at issue in *Silkey I* contained

[9] A claim to divert more water than is allowed under a decree amounts to a new appropriation, and is accordingly subject to the clear and convincing standard of proof. *See* Pocatello's Opening Brief at 37-40.
[10] Further, the *AFRD#2* Court found the rule of *Moe* inapposite in cases involving conjunctive management, and rejected the district court's analysis. 143 Idaho at 877, 154 P.3d at 448.

administrative provisions that were upheld on appeal does not turn the proceeding into an administration akin to a delivery call. *Cf.* Reply at 30.

A. The preponderance standard of evidence applies in delivery call proceedings.

In reply, A&B and IDWR have provided no explanation to distinguish why the default standard in Idaho administrative proceedings—preponderance of the evidence—does not apply in delivery calls. *N. Frontiers, Inc. v. State*, 129 Idaho Ct. App. 437, 439, 926 P.2d 213, 215 (1996). Pocatello has provided the Court with an explanation of why preponderance of the evidence is an appropriate standard in the case at hand. *Respondent Cross-Appellant City of Pocatello's Brief*, July 27, 2011 at 43. Further, the use of preponderance of the evidence is also consistent with the United States Supreme Court's and other states' interpretations of administrative law. *See Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 101 S.Ct. 999 (1981) (under the federal Administrative Procedure Act Congress agencies apply the "preponderance of the evidence" standard in administration); *see, e.g., Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175, 180, 183, 974 P.2d 814, 816, 818 (1999) (the legislature intended the "usual civil standard" of preponderance of the evidence to apply in the agency proceeding "if the legislature had wanted a burden of proof higher than the preponderance standard to apply, it would have said so."); *Burke v. City of Anderson*, 612 N.E.2d 559, 565 (Ind. App. 1993) (preponderance of the evidence is appropriate standard where a protected property interest exists; clear and convincing is not appropriate unless a liberty interest is involved).

CONCLUSION

The Director, as confirmed by the Hearing Officer and the district court, found that A&B does not require its maximum decreed amount to avoid material injury, and as such, declined A&B's demand to curtail all junior ground water users in the entire ESPA to raise groundwater levels in the southwestern area of the district. The flexibility of A&B's decree allows it, under a single right, to realign its wells and conveyance facilities to serve its water users, including those in the southwestern area. That, combined with the lack of any evidence of material injury, led the district court to properly conclude that while the Ground Water Act applies in administration to A&B's pre-act right, and affords A&B protection if injured to reasonable pumping levels, the Director acted within his discretion in declining to set reasonable pumping levels as a prerequisite to administering A&B's delivery call. This Court should affirm those determinations of the district court.

However, the district court's application of the clear and convincing evidence standard applies to the showing required in an administrative delivery call proceeding should be reversed. A decree entitles a water user to a maximum delivery rate, and Idaho law authorizes the Director to evaluate the factors under CMR 42 in order to determine whether the senior requires his full decreed amount and is suffering injury from a shortage. CMR 42 similarly guides the Director in evaluation of the record evidence and initial determination of the hearing officer after a hearing. Neither of these administrative decisions serve to readjudicate the senior's maximum decreed amount. This Court should find that because administration of a delivery call answers questions not determined in an adjudication, and because administration cannot, by its terms, readjudicate a

senior's right, the evidentiary standard used by the Director to evaluate the CMR 42 factors should be a preponderance of the evidence.

Respectfully submitted this 11th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2011, I caused to be served a true and correct copy of the foregoing **RESPONDENT-CROSS APPELLANT CITY OF POCATELLO'S REPLY BRIEF** in **Supreme Court Docket No. 38403-2011 [38421-2011 / 38422-2011] (Minidoka County District Court No. CV-2009-647)** via the following marked method to:

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