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Docket No. 38403-2011
38421-2011 and 38422-2011
Minidoka County District Court Case No. 2009-647

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.

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

and

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

and

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.

**CROSS-APPELLANT IDAHO GROUND WATER APPROPRIATORS, INC.'S
("IGWA" or "GROUND WATER USERS")
OPENING BRIEF AND RESPONSE BRIEF**

On Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Minidoka.

Honorable Eric Wildman, District Judge, Presiding.

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 7

A. Nature of the Case..... 7

B. The Course of the Proceedings 7

C. Statement of Facts..... 10

II. IGWA’S ISSUE PRESENTED ON CROSS-APPEAL 14

III. SUMMARY OF THE ARGUMENT IN SUPPORT..... 15

OF IGWA’S ISSUE ON APPEAL..... 15

IV. STANDARD OF REVIEW APPLICABLE TO IGWA’S ISSUE ON APPEAL 16

V. ARGUMENT IN SUPPORT OF IGWA’S ISSUE ON APPEAL..... 16

A. Preponderance of the Evidence Standard Generally Applies in Civil and Administrative Hearings. 16

B. Adjudicative Acts Relating to Water Rights Differ from Administrative Acts to Distribute Water Under Established Water Rights and As Recognized by Courts in Other Jurisdictions Require Different Standards of Proof 17

C. Key Holdings and Rationale in *AFRD2* Support Preponderance of the Evidence as the Standard of Proof..... 19

1. The Agency Order Finding No Material Injury Does Not Adjudicate Water Rights Nor Alter A&B’s Water Right; Hence, Preponderance of The Evidence Standard is the Proper Standard of Proof 20

2. *AFRD2* Provides a Framework for the Director to Make Administrative Decisions under the CM Rules 21

3. The Director’s Conclusion of No Injury is an “Administrative” Determination and the Resulting Agency Order Does Not Alter or Amend A&B’s Water Right..... 25

D. The “Presumption of Entitlement to Full Quantity” Gives Proper Weight to a Senior’s Decreed Right 26

E. The Policy of the Ground Water Act is Best Served by the Preponderance of the Evidence Standard in Evaluating Whether the Senior is Materially Injured 27

F. The Cases Cited by the District Court Are Adjudicative Cases, Not Applicable to Groundwater Administrative Cases 28

1. Cases to Grant New Appropriations Require Heightened Proof to Support A New Use from a Stream But do not Answer the Question Presented in this Case..... 29

2. The Standard of Proof for Adjudicating Water Rights or For Prevailing on Affirmative Defenses Does Not Apply to Groundwater Administrative Determinations under the CM Rules. 32

VI. ARGUMENT IN RESPONSE TO A&B’S APPELLANT’S BRIEF 33

A. Standard of Review for A&B’s Issues on Appeal 33

B. A&B’s Irrigation Water Right No. 36-2080 is Subject to the Idaho Ground Water Act. ... 34

1. This Court’s Decision in <i>Clear Springs v. Spackman</i> Rejects A&B’s Argument	34
2. The Act’s Plain Language and Case Law Supports the Conclusion that the Ground Water Act Applies to A&B’s Water Right No. 36-2080	35
3. Legislative History Shows that the Ground Water Act Applies to A&B’s Right	38
4. Public Policy Supports that the Ground Water Act Applies.....	41
C. A&B is Not Water Short, Has Sufficient Water to Meet Its Beneficial Use Therefore The Director Need Not Set a Reasonable Pumping Level.....	42
D. The Director Properly Evaluated A&B’s Use and Diversion of Water Under its Unique Water Right	45
VII. CONCLUSION.....	48

TABLE OF AUTHORITIES

Cases

<i>A & B Irrigation Dist. v. Idaho Conservation League</i> , 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).....	45
<i>American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources</i> , 143 Idaho 862, 154 P.3d 433 (2007).....	passim
<i>Baker v. Ore-Ida Foods, Inc.</i> , 95 Idaho 575, 513 P.2d 627 (1973).....	passim
<i>Barron v. Idaho Dep't of Water Resources</i> , 135 Idaho 414, 18 P.3d 219, 222 (2001).....	34
<i>Bongiovi v. Jamison</i> , 110 Idaho 734 (1986)	27
<i>Bourgeois v. Murphy</i> , 119 Idaho 611 (1991).....	17
<i>Cantlin v. Carter</i> , 88 Idaho 179 (1964)	30
<i>Cardenas v. Kurpjuweit</i> , 116 Idaho 739, 742-43, 779 P.2d 414, 417-18 (1989).....	18
<i>Castaneda v. Brighton Corp.</i> , 130 Idaho 923, 950 P.2d 1262 (1998).....	34
<i>Clear Springs Foods v. Clear Lakes Trout</i> , 136 Idaho 761 (2002)	27
<i>Clear Springs Foods, Inc. v. Spackman</i> , 252 P. 3d 71 (2011).....	passim
<i>Colorado v. New Mexico</i> , 467 U.S. 310 (1984).....	31
<i>Crow v. Carlson</i> , 107 Idaho 461, 467, 690 P.2d 916, 922 (1984).....	18,32
<i>Farmer's Co-operative Ditch Co. v. Riverside Irrigation Dist., Ltd.</i> , 16 Idaho 525, 102 P. 481 (1909).....	28
<i>Gilbert v. Smith</i> , 97 Idaho 735, 738, 553 P.2d 1220, 1224 (1976).....	18, 25,33
<i>Idaho Dept. of Health & Welfare v. Doe</i> , 150 Idaho 36, 244 P.3d 180 (2010)	17
<i>Idaho State Bar v. Top</i> , 129 Idaho 414, 415, 925 P.2d 1113,1 1114 (1996)	18
<i>In re Adoption of Doe</i> , 143 Idaho 188, 141 P.3d 1057 (2006)	17
<i>Jenkins v. Jenkins</i> , 120 Idaho 379, 816 P2d. 335 (1991).....	17,2 5, 33
<i>Jenkins v. State</i> , 103 Idaho 384, 647 P.2d 1256 (1982).....	17, 18
<i>Jones v. Vanausdeln</i> , 28 Idaho 743, 156 P. 615 (1916).....	31, 32
<i>Josslyn v. Daly</i> , 15 Idaho 137 (1908)	30, 31, 32
<i>Moe v. Harger</i> , 10 Idaho 302 (1904).....	30, 31,32
<i>Mountain Home Irrigation Dist. v. Duffy</i> , 79 Idaho 435, 319 P2d 965 (1957)	42
<i>Moyle v. Idaho Dep't of Water Resources</i> , Case No. CV OT 08 014978 (4th Jud. Dist. July 13, 2009) (Addendum A).....	38, 39
<i>Musser v. Higginson</i> , 125 Idaho 392, 871 P.2d 809 (1994)	38
<i>N. Frontiers v. State ex rel. Cade</i> , 129 Idaho 437, 439 (Idaho Ct. App. 1996).....	17
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993).....	19
<i>Neil v. Hyde</i> , 32 Idaho 576, 578, 186 P. 710, 710 (1919).....	31
<i>Nettleton v. Higginson</i> , 98 Idaho 87, 558 P.2d 1048 (1977)	42
<i>Niday v. Barker</i> , 16 Idaho 73, 101 P. 254 (1909).....	29
<i>Noh v. Stoner</i> , 53 Idaho 651, 26 P.2d 1112 (1933).....	35
<i>Payette River Property Owners Assn. v. Board of Comm'rs</i> , 132 Idaho 551, 976 P.2d 477 (1999)	34
<i>Poole v. Olaveson</i> , 82 Idaho 496, 356 P.2d 61 (1960)	29
<i>Schodde v. Twin Falls Water Co.</i> , 224 U.S. 107 (1911).....	29
<i>Silkey v. Tiegs</i> , 51 Idaho 344, 5 P.2d 1049 (1931).....	18, 25,32
<i>Silkey v. Tiegs</i> , 54 Idaho 126, 28 P.2d 1037 (1934).....	18, 25, 32, 33
<i>State v. Burnight</i> , 132 Idaho 654, 978 P.2d 214 (Ct. App. 1999).....	39
<i>State v. Creech</i> , 105 Idaho 362, 670 P.2d 463 (1983).....	39

<i>State v. Kimball</i> , 145 Idaho 542, 181 P.3d 468 (2008).....	17
<i>United States v. Pioneer Irr. Dist.</i> , 144 Idaho 106, 157 P.3d 600 (2007).....	12
<i>Vickers v. Lowe</i> , 150 Idaho 439, 442, 247 P.3d 666, 669 (2011).....	17, 34
<i>Willadsen v. Christopoulos</i> , 731 P.2d 1181 (Wyo. 1987).....	19

Statutes

Idaho Code § 16-2009.....	17
Idaho Code § 42-101.....	21, 29
Idaho Code § 42-226.....	21, 28, 29
Idaho Code § 42-227.....	36,, 40, 41
Idaho Code § 42-228.....	36, 40
Idaho Code § 42-229.....	passim
Idaho Code § 42-226.....	passim
Idaho Code § 42-607.....	43
Idaho Code § 42-1701.....	21, 34
Idaho Code § 42-1701A.....	34
Idaho Code § 66-329.....	17
Idaho Code § 67-5251.....	21
Idaho Code § 67-5277.....	34
Idaho Code § 67-5279.....	17, 34

Other Authorities

2 Am Jur.2d Administrative Law § 363 1994.....	17
1951 Idaho Sess. Laws, ch. 200, § 1, p. 423.....	40
1951 Idaho Sess. Laws, ch. 200, § 2, p. 424.....	40
1951 Idaho Sess. Laws, ch. 200, § 4, p. 424.....	40
1987 Idaho Sess. Laws, ch. 347, § 1, p. 743.....	41
1987 Idaho Sess. Laws, ch. 347, § 3, p. 741.....	41

Rules

IDAPA 37.01.01.600.....	21
IDAPA 37.03.11, CM Rule 10.14.....	25
IDAPA 37.03.11, CM Rule 20.05.....	25
IDAPA 37.03.11, CM Rule 40.....	43
IDAPA 37.03.11, CM Rule 42.01.....	25, 26

I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the first groundwater to groundwater delivery call under the Idaho Department of Water Resources (“IDWR” or “Department”) Conjunctive Management Rules for Surface and Ground Water Resources, IDAPA 37.01.01 *et seq.* (“CM Rules”). It is also the first case where, under application of the CM Rules, the Director found that the senior user, A&B Irrigation District (“A&B”), was not materially injured. R. 1151, 3318. As such, this is the first case where IGWA, representing the junior groundwater users who would have been curtailed if it had been determined that A&B was materially injured, participated in the hearing at the agency level to present evidence in support of the Director’s finding of no injury.

IGWA’s cross-appeal is limited to a single issue regarding the proper evidentiary standard of proof to be applied to the evaluation of material injury under the CM Rules. The district court concluded “in order to give the proper presumptive weight to a decree any finding by the director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence.” Clerk’s R. 82. The district court then remanded the matter back to the Director. This holding and direction to the Director to use the clear and convincing evidence standard when evaluating the amount of water needed by the senior for beneficial use and whether he is materially injured is the subject of IGWA’s appeal.

B. The Course of the Proceedings

On July 26, 1994, A&B filed a Petition for Delivery Call (“Delivery Call”) with the Department, requesting that the Director take actions “necessary to insure the delivery of ground water to [A&B] as provided by its water right, to . . . protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to [A&B], and to designate the Eastern Snake Plain Aquifer as a ground water management area. . . .” R. 12-14.

A&B's Delivery Call requested the director to administer its 1948 priority water right no. 36-2080 against junior groundwater users who divert water from the Eastern Snake Plain Aquifer ("ESPA") which would result in curtailment of virtually all other groundwater users diverting water from the ESPA. The parties to the proceeding stipulated to stay the contested case. R. 670-76. On March 16, 2007, A&B filed a Motion to Proceed, requesting that the stay be lifted and that the Department proceed with resolution of its Delivery Call. R. 830. On January 29, 2008, IDWR issued an Order ("January 2008 Order") denying A&B's Delivery Call and Motion to Proceed and determined that, under the CM Rules, A&B had not suffered any material injury and was not short of water. R. 1105.

A&B filed a petition requesting an administrative hearing to challenge the January 2008 Order. R. 1182. An evidentiary hearing was conducted December 3-17, 2008, before Hearing Officer Gerald F. Schroeder. Several interested parties participated in the hearing, including IGWA, City of Pocatello and Upper Snake River Water Users. Tr. Vol. I, pp. 2-3.

On March 27, 2009, the Hearing Officer entered his Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations ("Recommended Order"), which agreed with the January 2008 Order's conclusion that A&B's water right no. 36-2080 had not suffered material injury. R. 3078. A Director's Final Order Regarding the A&B Delivery Call issued June 30, 2009 ("Agency Order") which again denied A&B's Delivery Call and found no material injury. R. 3318. On August 31, 2009, A&B filed a Notice of Appeal on Petition for Judicial Review of Agency Action. Clerk's R. 1.

The district court reviewed A&B's appeal. The Judgment dated November 23, 2010 issued by the district court held, among other things that a "clear and convincing evidence" standard applies. Clerk's R. 127. The Judgment incorporates a Memorandum Decision and Order on

Petition for Judicial Review entered May 4, 2010, (“Decision on Judicial Review”), and a Memorandum Decision and Order on Petitions for Rehearing entered November 2, 2010, (“Decision on Rehearing”). Clerk’s R. 45 and 106. The district court’s Judgment and Decision on Judicial Review and Decision on Rehearing will be referred to collectively herein as “Judgment and Decisions.” The Judgment and Decisions upheld the substantive issues that were in the Agency Order and the subject of A&B’s appeal:

This Court agrees that the system must be considered as a whole based on the way in which the water right is decreed. Further, 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. The Director concluded that A & B must make reasonable efforts to maximize interconnection of the system and placed the burden on A & B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

Clerk’s R. 83, see also Clerk’s R. 93-94 and 140. But the district court remanded the case to the Director because he “fail[ed] to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A&B’s 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury.” Clerk’s R. 93, see also Clerk’s R. 124. Thus, the district court remanded the case to the director for the purpose of applying the correct evidentiary standard. *Id.* The district court concluded that the Director must administer to the full decreed quantity unless he is convinced that a lesser quantity is needed to meet the senior’s beneficial use under a clear and convincing evidence standard. *Id.*

On June 10, 2010, IGWA filed a petition for rehearing regarding the court’s ruling on the finding that the clear and convincing evidence standard applies in an administrative delivery call. Clerk’s R. Supp. Ex., *Petition for Rehearing*, June 10, 2010; *Ground Water Users’ Opening Brief on Rehearing*, August 5, 2010; *Ground Water Users’ Reply Brief on Rehearing*, September 7, 2010. The City of Pocatello also filed for rehearing on the issue of what is the proper

evidentiary standard when evaluating material injury. Clerk's R. Supp. Ex., *City of Pocatello's Brief in Support of Rehearing*, June 29, 2010. The district court denied the relief sought by IGWA and the City of Pocatello and entered a Decision on Rehearing on November 2, 2010, concluding that "the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof." Clerk's R. 124. This issue of law regarding the proper standard is the single subject of IGWA's appeal.

C. Statement of Facts

The United States Bureau of Reclamation ("Bureau") built the A&B irrigation project and began to develop the groundwater resource on the ESPA in the late 1950s. R. 1111. The Bureau secured a water right license with a priority date of September 9, 1948, for use by A&B farmers. Ex.157B (Ex. 157 at 4181). A&B's 1948 priority date groundwater right is senior to virtually all other groundwater rights that use water from the ESPA.

A&B's irrigation system consists of two separate and distinct water supplies and irrigation systems. R. 1665. The A Unit is supplied by surface water rights delivered from the Snake River and irrigates approximately 15,000 acres. *Id.* The B Unit is a complex irrigation system supplied by groundwater rights and irrigates over 66,600 acres. *Id.* Only the B Unit 1948 priority groundwater right is the subject of the delivery call and at issue in this appeal. R. 1105.

A&B's groundwater right is unique because the 1,100 cfs quantity can be used on any of the B Unit lands and can be diverted from any or all of its 188 points of diversion. Tr. Vol. VI, p. 1160, L. 2 – p. 1161, L. 9. This was intentional and at the Bureau's specific insistence. In its Definite Plan Report dated February 1955, the Bureau explained its intent for this water right and its use:

In the best interest of the Division as a whole, the permit [for the groundwater right that will become water right 36-2080] is upon the basis that all the wells will, as a group, be appurtenant to all the lands of the entire Division, rather than being made appurtenant to a particular parcel of land. This would permit a more satisfactory distribution of water to lands and maximum over-all development.

Ex. 111A at 73. When evaluating the licensing of A&B's water right, the Department questioned the Bureau's intent and asked for a land list that would be served by each well. Ex. 157 at 4398. In response, the Bureau made it clear that it wanted the water right licensed in order to provide for the greatest amount of flexibility in distributing water throughout the project and did not want to tie any well to any particular parcel of land. The Bureau's response letter said in part:

Your letter ... also asked for a list of lands.

We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, pending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.

Ex. 157D (Ex. 157 at 4396); R. 3094. To support this "integrated" system, the rate of diversion for the right is also in the cumulative and does not ascribe any rate of diversion to any particular well. Exs. 139 and 157A (Ex. 157 at 3772).

Water right no. 36-2080 has since been "partially decreed" in the Snake River Basin Adjudication ("SRBA") to the Bureau in trust for beneficial use by A&B landowners. R. Ex. 139. See *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). After the entry of the partial decree, water right no. 36-2080, at A&B's request, was subject to a transfer proceeding before IDWR. Ex. 157A (Ex: 157 at 3772-3801). The approved transfer continues to allow for the use of the 1,100 cfs on any of the B Unit lands and approved an additional 11 wells, thus allowing A&B to use up to 188 wells. Ex. 157A (Ex. 157 at 3773-79). Yet, A&B

operates only 177 wells to provide irrigation water to its members to irrigate approximately 66,600 acres under its water right and 4,000 additional acres under A&B's beneficial use and enlargement water rights. R. 1113; Exs. 406 and 407; Tr. Vol. III, p. 503, L. 19 - p. 504, L. 8. While the water right allows for maximum flexibility and interconnection, not all the well systems are interconnected, rather, the B Unit continues to be comprised of 130 independent well systems. Ex. 200 at 3-26; Tr. Vol. III. p. 614, L. 10-16.

A&B claims water shortage because it cannot divert the authorized maximum diversion rate of 0.88 inches per acre on every acre within its boundaries, even though in the entire history of A&B, that amount has never been delivered to all its acres even for one day, Tr. Vol. III, p. 632, L. 10 – p. 634, L. 23. “Going back at least to 1963 it does not appear that there was a time when all well systems could produce 0.88 miner’s inches per acre.” R. 3108, Tr. Vol. VIII, p. 1667, L. 20 – p. 1671, L. 3.

Furthermore, evidence presented by A&B's own witnesses contradicts its allegations of shortage. A&B farmers testified that they meet their producer contracts for potatoes, sugar beets and barley. Tr. Vol. IV, pp. 826-828; Tr. Vol. V, pp. 1027-1030; Tr. Vol. V, pp. 907-908; Tr. Vol. V, p. 994; R. 2907 – 09. The cross examination of A&B farmer witnesses Adams, Eames, Kostka and Molhman clearly established no verifiable evidence of any fallowed ground or unharvested crops. Tr. Vol. IV, p. 722, L. 13 – p. 723, L. 12, Tr. Vol. V, p. 905, L. 23 – p. 906, L. 11, Tr. Vol. V, p. 985, L. 12 – p. 986, L. 4, p. 989, L. 4-12, p. 992, L. 15-25, p. 993, L. 6-21. And, their crop yields have increased steadily over the years and exceed the county averages. *cf.* Exs. 355A and 358 with 357 (two of A&B witnesses' crop yields as compared to the Minidoka County averages). A&B farmers have had a steady and reliable headgate delivery of 3 acre-feet per acre which exceeds the crop water requirements of adjacent farmers who only use 2 acre-feet

per acre. Tr. Vol. X, p. 2069, L. 1-7, p. 2088, L. 2-11, p. 2121, L. 19 – p. 2122, L. 6, p. 2138, L. 12-16, p. 2138, L. 17 – p. 2139, L. 13. Evidence in the record also shows that “crops could be grown and that the lands in question were in no worse condition than the surrounding areas.” R. 3104; Tr. Vol. VI p. 1104, 1106-1108 (Department’s analysis of evapotranspiration); see also, Tr. Vol. X, pp. 2088, 2138, and 2074-2076, 2089-90. “The evidence indicates that farmers outside the A&B project are often able to raise crops to full maturity on less water than is used on the Unit B lands.” R. 3106; Tr. Vol. X, pp. 2074-2076, 2090; Tr. Vol. V, p. 1070. The A&B actual delivery rate of 0.75 cfs is “higher than nearby surface water users.” R. 3107; Tr. Vol. V, p. 1070 - p. 1071, L. 2, Vol. X, p. 2036. “Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.” R. 3107.

Further, despite claims of water shortages, A&B developed and continues to irrigate over 4,000 additional acres with its 177 wells. Exs. 406 and 407; Tr. Vol. III, p. 503, L. 19 – p. 504, L. 8. These 4,000 acres are in addition to what is authorized in A&B’s water right no. 36-2080. *Id.* This increase in irrigation is driven in part from improved efficiencies within the A&B system such as the conversion from flood to sprinkler irrigation. *Id.*

Although the Bureau knew at the time when choosing the location of the B Unit project that the southwest area would have lower well yields. Ex. 123 at 1170-74; Ex. 152QQ, Tr. Vol. IX, pp. 1765-1767. The Bureau predictions were proven correct and improvements in water supply in the southwest area are less feasible due to hydrogeology problems, not outside junior groundwater pumping, and as a result A&B has converted some lands to surface water. Ex. 215; Tr. Vol. III, p. 566, L. 11- p. 567, L. 2, Vol. IV, p. 683, L. 6-11, p. 691, L. 7-9, p. 703, L. 11-13. Like any irrigator, A&B throughout its history has needed to replace worn or failing pumps, motors and well equipment, deepen existing wells, and drill new wells. R. 1132-34. A&B has

also eliminated drains and open ditches, interconnected some well systems, and shifted land from less productive well systems to more productive well systems. R. 1131-33. The evidence is overwhelming that A&B's efforts to improve water supply in its project have and continue to be successful in maintaining reasonable and adequate water supplies to raise full crops, as readily admitted by A&B's manager Dan Temple. Tr. Vol. IV. p. 664, L. 5-17, p. 667, L. 14 – p. 668, L. 5; Ex. 414 and 427-9. The associated costs incurred to continue to operate the system successfully were normal, expected and consistent with operational expenses incurred by farmers outside the A&B system. Even A&B's own consultant agrees that this case is not about water shortage, but simply about costs of operating and maintaining their system. Tr. Vol. VI, p. 1306, L. 19-23; Tr. Vol. IV, p. 757, L. 15 – p. 758, L. 6.

In sum, the Agency Order concluded that A&B farmers were not short of water; that there was an adequate water supply available to A&B, R. 1117- 1120 and 3110; that its farmers used the same or more water to irrigate their crops than surrounding farmers, R. 3107; that any water supply issues in the southwest area were not due to junior groundwater pumping but were due to the local hydrogeology, R. 1128-1130 and 3113; and, therefore there was no injury to A&B's water right. R. 1150-51 and 3322-23.

II. IGWA'S ISSUE PRESENTED ON CROSS-APPEAL

For purposes of water right administration under the CM Rules when the Director is evaluating whether there is material injury, did the District Court err in remanding the matter to the Director to require his evaluation be made under a clear and convincing evidence standard instead of a preponderance of the evidence standard?

III. SUMMARY OF THE ARGUMENT IN SUPPORT OF IGWA'S ISSUE ON APPEAL

This Court should reverse the district court's decision to remand and hold that clear and convincing evidence is not required for administrative determinations regarding material injury. Idaho case law does not have a case that answers the question in this appeal. The cases cited and relied on by the district court are all adjudicative cases that decree water rights, alter or amend existing water rights or involve affirmative defenses to curtailment of juniors such as futile call; as such, they apply the clear and convincing evidence standard. However, there are several reasons a preponderance of the evidence standard should be used in administrative cases that apply the CM Rules in a delivery call against groundwater users. First, most civil suit decisions, like agency administrative decisions, are governed by a preponderance of the evidence standard. Second, the heightened standard of clear and convincing evidence, in the water law arena, is applied only to cases where water rights are permanently fixed or altered or for a futile call defense and courts in other jurisdictions have determined that a preponderance of the evidence standard applies when administering water between established water rights. Third, this Court's opinion in *American Falls Reservoir District No. 2 v. Idaho Dep't of Water Resources* ("*AFRD2*"), 143 Idaho 862, 154 P.3d 433 (2007), supports using a preponderance of the evidence standard of proof and found that the "presumption of full quantity" gives the proper legal effect to a decree. Fourth, using a preponderance of the evidence standard best serves the policy of the Idaho Ground Water Act, I.C. §§ 42-226 *et. seq.* Finally, examination of the cases relied on by the district court shows that they adjudicate water rights or seek to permanently alter water rights instead of cases that administer groundwater rights. Each argument will be addressed in turn.

IV. STANDARD OF REVIEW APPLICABLE TO IGWA'S ISSUE ON APPEAL

Judicial review of IGWA's issue on appeal concerns a pure question of law, as such, this Court exercises free review of the district court's decision regarding the proper standard for proof required in an administrative delivery call under the CM Rules. *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011); I.C. § 67-5279.

V. ARGUMENT IN SUPPORT OF IGWA'S ISSUE ON APPEAL

A. Preponderance of the Evidence Standard Generally Applies in Civil and Administrative Hearings.

In most civil actions, "the burden of proof is by a preponderance of the evidence, which means more probable than not." *Bourgeois v. Murphy*, 119 Idaho 611, 622, 809 P.2d 472, 483 (1991). "[T]he preponderance of the evidence standard [is] generally applied in administrative hearings." *N. Frontiers v. State ex rel. Cade*, 129 Idaho 437, 439 (Idaho Ct. App. 1996), citing, 2 AM. JUR. 2d Administrative Law § 363 (1994).

On the other hand, "clear and convincing" is one of the highest standards of persuasion in the civil law context. Clear and convincing evidence, for example, is evidence that makes a fact highly probable. "Clear and convincing" evidence refers to "a degree of proof greater than a mere preponderance." *Jenkins v. Jenkins*, 120 Idaho 379, 383, 816 P.2d 335, 339 (1991). Clear and convincing evidence is understood to be "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) (quoting *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010). The heightened evidentiary standard of clear and convincing evidence is generally applied to cases that involve permanent deprivations of rights such as the involuntary termination of parental rights, I.C. § 16-2009; involuntary institutional commitment, I.C. § 66-329(11); claims of

professional misconduct of a lawyer, *Idaho State Bar v. Top*, 129 Idaho 414, 415, 925 P.2d 1113, 1114 (1996), or the permanent deprivation of real property, *Cardenas v. Kurpjuweit*, 116 Idaho 739, 742-43, 779 P.2d 414, 417-18 (1989).

B. Adjudicative Acts Relating to Water Rights Differ from Administrative Acts to Distribute Water Under Established Water Rights and As Recognized by Courts in Other Jurisdictions Require Different Standards of Proof

Similarly in the water law arena when one is seeking to deprive another of his water right, clear and convincing evidence applies. “One who seeks to alter decreed water priorities has the burden to demonstrate the elements of abandonment by clear and convincing evidence.” *Gilbert v. Smith*, 97 Idaho 735, 738, 553 P.2d 1220, 1224 (1976). Clear and convincing evidence is required if a water user tries to acquire another’s water right through adverse possession. *Id.* at 740, 1225. Clear and convincing evidence is required if the state, through administrative action, is going to find forfeiture or abandonment of a water right. *Jenkins v. State*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). Clear and convincing evidence is also required in water adjudication cases or quiet title cases where the Court is asked to allow new appropriations and permanently fix title to water rights and establish priority dates and quantities. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984); *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931); *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) (“*Silkey II*”). Finally, clear and convincing evidence is required in order to prevail in a futile call defense situation which allows a junior water user to deprive a senior user of water because curtailment of the junior user will not result in a usable quantity of water to the senior. *Gilbert*, 97 Idaho at 739, 553 P.2d at 1224. These cases either permanently alter water rights, fix title to water rights, or deprive a senior of water even though they need the water because the call is futile. The foregoing examples are adjudicative acts because they permanently eliminate, redefine, or extend (in whole in or part) the elements of the water use.

In contrast to adjudicative acts, the allocation of water between existing water rights as an administrative function does not alter the defined elements of individual water rights. In other words, the inquiry made in an administrative case regarding material injury under the CM Rules does not alter the senior's water right but evaluates the current need for water and applies the CM Rules and the Ground Water Act to the relief requested by a delivery call.

This distinction of applying different standards of proof for different types of cases involving water rights issues was recognized in *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) where the U.S. Supreme Court found enforcement (i.e. administrative) decisions involving established water rights should apply the preponderance of the evidence standard but that a modification of an established right requires a higher standard of proof; the court said, distributing water under established rights between parties does not require the higher standard of proof because the "two types of proceeding are markedly different." *Id.* at 592. Although *Nebraska* is an equitable apportionment case, it is analogous here. *Nebraska* sought enforcement of its already established right against the state of Wyoming and argued that enforcement (i.e. administration) cases should be governed under a preponderance of the evidence standard. *Id.* The Special Master and the Supreme Court agreed. *Id.* at 592-593. Likewise, the state of Wyoming found that in a delivery call situation, preponderance of the evidence applied. *Willadsen v. Christopoulos*, 731 P.2d 1181, 1184 (Wyo. 1987) (the standard applicable to the State Engineer's investigation of whether the upstream well is interfering with the downstream right is the preponderance of the evidence standard customarily used in civil cases.) As these courts recognized, once the juniors' right has been set, the issue before the Director is not just a matter of whether the junior should be allowed to start using water, but rather, whether he should

be allowed to continue his use or be indefinitely curtailed because of a need by the senior; the best way to evaluate evidence in that situation is by the preponderance of the evidence standard.

The district court's ruling in this case fails to recognize important differences between adjudication of water rights that permanently establish, alter or reduce water rights as opposed to the administration of competing water rights under the CM Rules. As this Court acknowledged in its decision in *AFRD2*: "water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a re-adjudication." *AFRD2*, 143 Idaho at 876-77, 154 P.3d at 447-48. Thus, the standard of proof (i.e. clear and convincing) used in adjudication cases should not just automatically be deemed the standard of proof that should be used in administrative cases.

In this case, the district court mistakenly relied solely on water rights adjudication type cases to support its ruling that in a water right administration proceeding under the CM Rules the Director must find that the senior user is entitled to the maximum amount authorized under his right unless he is convinced by the elevated standard of clear and convincing proof that a lesser quantity is needed. A more detailed discussion of the cases cited by the district court is contained below.

C. Key Holdings and Rationale in *AFRD2* Support Preponderance of the Evidence as the Standard of Proof

An examination of this Court's ruling in *AFRD2*, is helpful because it shows that a delivery call proceeding is administrative in nature (as opposed to adjudicative), and thus, supports the application of the preponderance of the evidence standard. In *AFRD2*, this Court did not enunciate the evidentiary standards that apply in water administration. Instead, it explained that "to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules."

AFRD2, 143 Idaho at 873, 154 P.3d. at 444. While, no Idaho case directly addresses what standard of proof is required for purposes of water right administration under the CM Rules, this Court's rationale and holdings in *AFRD2* lead to the conclusion that a preponderance of the evidence standard is the appropriate standard of proof. As such, the district court's remand requiring clear and convincing evidence should be reversed.

1. The Agency Order Finding No Material Injury Does Not Adjudicate Water Rights Nor Alter A&B's Water Right; Hence, Preponderance of The Evidence Standard is the Proper Standard of Proof

Understanding the Director's role in administering water between established water rights is helpful in determining which standard of proof should apply. When it comes to allocating the use of water between existing water rights, the Legislature has instructed the Director to "equally guard all the various interests involved." Idaho Code § 42-101. With respect to groundwater specifically, the Director must ensure that "a reasonable exercise of [priority] shall not block full economic development of underground water resources." Idaho Code § 42-226. This Court in *Clear Springs Foods, Inc. v. Spackman*, 252 P. 3d 71 (2011), held that the Director must also consider policies of optimum beneficial use and reasonable use of water. *Clear Springs v. Spackman*, 252 P.3d at **34. These decisions naturally require the exercise of discretion as this Court contemplated in *AFRD2*. *AFRD2* at, 875, 154 P. 3d at 446. Accordingly, Idaho Code requires the Director to be a licensed engineer, (Idaho Code §42-1701(2)) and authorizes him to utilize his "experience, technical competence, and specialized knowledge" when administering water. I.C. § 67-5251(5); *see also* IDAPA 37.01.01.600.

CM Rule 42 "lists factors the Director may consider in determining material injury and whether the holders of water rights are using water efficiently and without waste, which are decisions properly vested in the Director. Those factors, of necessity, require some determination of 'reasonableness'..." *AFRD2*, 143 Idaho at 875, 154 P.3d at 446. This Court

found that the CM Rules give the Director “tools” to use in order to determine whether a senior user is suffering material injury. *Id.* at 878, 449. The factors the Director considers include: an evaluation of the effort or expense to divert from the source (42.01.b); rate of diversion, acres, efficiencies, and irrigation method (42.01.d); amount of water used compared to the water right (42.01.e); whether the senior can meet their needs with existing facilities, reasonable diversion, conveyance efficiencies, conservation practices (42.01.g); and alternate reasonable means of diversion or alternate points of diversion (42.01.h). These factors assist the Director in determining whether the senior is “suffering material injury and using water efficiently and without waste” which may result in a conclusion that the senior needs less water than his full quantity to meet his beneficial use and that there is enough water available to meet that need. The evaluation of these factors does not result in an order that permanently fixes or alters the senior’s water right. This Court recognized an examination of the amount of water needed for beneficial use is not a “re-adjudication” of the senior’s water right. See *AFRD2*, 143 Idaho at 876-77, 154 P. 3d at 445-46.

Given these key policy considerations, the fact that the Director has specific expertise and must equally guard all interests involved when providing for the use of water, the factors set forth in CM Rule 42 and the fact that the Director’s role in an administrative delivery call does not adjudicate the senior’s right, it follows, then, that these administrative decisions be made under the preponderance of the evidence standard.

2. *AFRD2* Provides a Framework for the Director to Make Administrative Decisions under the CM Rules

In administering water under the CM Rules the Director must keep the above considerations in mind, but must also presume that the senior is entitled to their decreed amount of water.

AFRD2, 143 Idaho at 878, 154 P.3d at 449. The Court’s key holdings in *AFRD2* provide a framework for the Director to follow in response to a conjunctive management delivery call.

First, the Director must be allowed to evaluate evidence that may be provided by the senior, in order to determine the amount of water needed for beneficial use. *AFRD2*, 143 Idaho at 875 and 877, 154 P. 3d at 446 and 448. In *AFRD2*, this Court stated that the Director must be allowed to “evaluate whether the senior is putting the water to beneficial use, [otherwise] we would be ignoring the constitutional requirement that priority over water be extended only to those using the water.” *Id.* at 876, 447. This Court held that the Director must exercise his discretion when evaluating the CM Rule 42 factors: “Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.” *Id.* at 875, 446.

Second, there is not a presumption of injury to the senior, although the Director must presume the senior is entitled to its authorized maximum quantity. *Id.* at 876-77, 447-48. Although this Court held that the Director must presume that the senior is entitled to its full decreed quantity it also held that the Director had a “duty” to examine the senior’s current needs for water and evaluate beneficial use and the factors set forth in CM Rule 42. *Id.* at 876, 447. In coming to this conclusion, this Court in *AFRD2* rejected the argument that the Director must presume material injury to the senior. *Id.* at 877, 448. As such, the Court obviously contemplated that the Director could make a finding of no material injury, like in the present case where the Director found that A&B was not short of water, had enough water to meet its beneficial use and as such, was not suffering material injury.

Third, based on the foregoing, it follows that the Director's evaluation of evidence may result in an initial finding by the Director regarding whether or not the senior is suffering material injury. *Id.* at 878, 449.

Fourth, an evaluation of the amount of water needed is not a re-adjudication of the senior's water right. *Id.* at 876-77, 447-48. While this Court held that the Director must presume that the senior is entitled to his full quantity, the Court concluded that the Director's evaluation of the amount of water needed by the senior for beneficial use when "responding to delivery calls, as conducted pursuant to the [CM Rules], do[es] not constitute a re-adjudication." *Id.*

Fifth, the water users that are parties to the proceeding are entitled to challenge the Director's findings of injury (or no injury) and juniors may also defend against the finding of material injury with affirmative defenses such as futile call and forfeiture. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *Id.* at 878, 449.

It is apparent from *AFRD2* that if the Director had found material injury to A&B, then the junior users could have responded by proving a futile call. *Id.* This would have precluded the curtailment of juniors even though the senior was injured. The junior users could have also asked the Director to find that the senior had forfeited or abandoned all or part of its water right, which finding would have ended the delivery call and resulted in the water right being lost or permanently reduced. *Id.* The Director's rulings on these kinds of responses by the junior users would require the clear and convincing standard because the junior users would be asking for the Director to ignore a finding of injury either because there would be no remedy (i.e. futile call) or because the juniors were asking the Director to permanently alter a senior's water right. See

Crow, 107 Idaho 461, 690 P.2d 916; *Silkey*, 51 Idaho 344, 5 P.2d 1049; *Silkey*, 54 Idaho 126, 28 P.2d 1027; *Jenkins*, 103 Idaho 384, 647 P.2d 1256; and *Gilbert*, 97 Idaho 735, P.2d 1220.

However, the question presented in this case, is what level of proof is required in determining “whether the holders of water rights are suffering material injury and using water efficiently and without waste” as set forth by CM Rule 42.01 and its factors, not what level of proof is required to permanently fix a water right or alter a senior’s right or to allow injury to continue because there is no remedy.

Material injury examines whether a junior user is hindering or impacting the exercise of a water right by a senior water user. CM Rule 10.14. Evaluating whether the exercise of a water right is hindered requires the Director to evaluate the “reasonableness of the diversion and use of water” by the senior. CM Rule 20.05. In evaluating whether the junior is hindering or impacting the exercise of the senior right, the Director examines evidence regarding the amount of water the senior user needs, has access to and diverts: CM Rule 42.01.b (evaluation of the effort or expense to divert from the source); CM Rule 42.01.d. (evaluation of the rate of diversion, acres, efficiencies, irrigation method); CM Rule 42.01.e. (evaluation of the amount of water used compared to the water right). The Director also examines whether the senior’s needs can be met and material injury avoided with a quantity less than the authorized maximum by using the existing facilities, reasonable means of diversion and improving conveyance efficiencies and conservation practices. CM Rule 42.01.g. These types of administrative inquiries do not adjudicate or alter the senior’s water right nor do they excuse injury. Evidence relating to these factors should be evaluated under a preponderance of the evidence standard because the Director is applying the CM Rules to determine need and material injury not altering the senior’s right.

3. The Director's Conclusion of No Injury is an "Administrative" Determination and the Resulting Agency Order Does Not Alter or Amend A&B's Water Right

In this case, the evidence showed that A&B has chosen not to fully exercise its water right by availing itself of the water right's flexibility which allows it to interconnect any or all of its points of diversion (i.e. wells). Ex. 481; Tr. Vol. VI, p. 1316, L. 18 – p. 1318, L. 7, p. 1318, L. 22 – p. 1319, L. 4; see CM Rule 42.01.g. (examination of the use of existing facilities, reasonable means of diversion, and conveyance efficiencies) and *AFRD2*, 143 Idaho at 877, 154 P.3d at 447 (“reasonableness is not an element of a water.”). The evidence also showed that A&B's needs can be met with less water because, they now sprinkle 96% of their ground and no longer need the same amount of water as originally decreed for flood irrigation. R. 1114-15; see CM Rule 42.01.d. (irrigation method) and e. (amount of water used compared to the water right) and *AFRD2*, 143 Idaho at 876, 154 P.3d at 447 (examine current needs, such as the number of acres irrigated). The evidence showed that A&B farmers use more water than surrounding farmers and that their yields meet or exceed county averages and satisfy their contracts. Tr. Vol. X, pp. 2074-76, 2090, Vol. IV, pp. 826-828, Vol. V, pp. 907-08, 994 and 1027-30; see CM Rule 42.01.b (effort and expense to divert); 42.01.d. (efficiencies, irrigation method). Further, even though A&B has the capacity to divert its full water right, it has chosen to leave 11 wells to sit idle (Ex. 157A) and not pump other wells to full capacity; see CM Rule 42.01.d. e. and g. In addition, evidence shows that A&B's means of diversion are unreasonable because it did not consider the hydrogeology of the area, sited their wells in a poor location (Ex. 124 at 16; Ex. 121 at 1090-91, Ex. 215) and did not drill the wells properly. Ex. 121 at 1131-32.

In summary, given the type of evidence examined and the nature of the factors the Director is required to evaluate, as well as I.C. § 42-101 and this Court's holdings in *AFRD2*, this Court should hold that the adjudicative standard of clear and convincing evidence is not required for

administrative determinations under the CM Rules. Rather, a preponderance of the evidence standard should be used when the Director makes an administrative determination of whether a senior is suffering material injury.

D. The “Presumption of Entitlement to Full Quantity” Gives Proper Weight to a Senior’s Decreed Right

The Judgment and Decisions of the district court imposed a “clear and convincing proof” standard because of the district court’s belief that “[t]o conclude otherwise accords no presumptive weight to the decree.” Clerk’s R. 78 n. 12. However, the Court in *AFRD2*, in its analysis under heading “4. Failure to give legal effect to partial decree” held that presuming that the senior is entitled to his full quantity is the way to give the proper legal effect to the partial decree and did not impose a heightened evidentiary standard. *AFRD*, 143 Idaho at 876, 154 P.3d at 447.

In a civil case or proceeding, a “presumption” “relieves the party in whose favor the presumption operates from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact.” *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), cited by *Clear Springs Foods v. Clear Lakes Trout*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

In this case, the evidentiary presumption of entitlement to its full quantity relieved A&B from having to re-prove its authorized maximum quantity under its decreed water right. *AFRD2*, 143 Idaho at 876-78, 154 P.3d at 447-48. However, A&B is not guaranteed its quantity. In this case, the Director presumed that A&B was entitled to its full decreed quantity, but examined post-adjudication factors to determine that even though A&B was diverting less than its authorized maximum quantity it was not suffering from water shortage, was able to raise full crops on the available supply and could have diverted more water by improving some of its

wells. Ex. 121 at 1090-91; see too, Exs. 132, 155; R. 1114-15, 1117, 1120, 1148-50. A&B needs less water today for its sprinkler irrigated lands than it did to flood irrigate in 1963; in other words, A&B needs less water to accomplish the beneficial use under its water right to raise full crops. R. 1148-49 and 3107-08. This is precisely the inquiry this Court expected the Director to make in a delivery call. In *AFRD2*, this Court explained the Director's duty to use his professional judgment reasonably, and in a way that will "protect the public's interest in this valuable commodity ...[but, this discretion] is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record...." *AFRD2*, 143 Idaho at 880, 154 P.3d at 451. A proper limit to this discretion was to presume the senior was entitled to his full quantity, not a heightened evidentiary standard.

E. The Policy of the Ground Water Act is Best Served by the Preponderance of the Evidence Standard in Evaluating Whether the Senior is Materially Injured

Groundwater administration is subject to the legislative mandate that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of that right shall not block full economic development of underground water resources." I.C. § 42-226. Idaho Code § 42-226's principles of full economic development and reasonable pumping levels apply to distribution of water between junior and senior groundwater users. *Clear Springs Foods, Inc. v. Spackman*, 252 P. 3d 71, at **33; *Baker v. Ore-Ida*, 95 Idaho 575, 513 P.2d 627 (1973). Furthermore, other important policies apply when the Director is evaluating material injury and determining if a remedy is needed. These policies were recently summarized by this Court in *Clear Springs Foods, Inc. v. Spackman*, "Economy must be required and demanded in the use and application of water." *Id.* at **54 citing *Farmer's Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.*, 16 Idaho 525, 535, 102 P. 481,483 (1909). Further, the "public waters of this state shall be

subjected to the highest and greatest duty." *Id.* citing *Niday v. Barker*, 16 Idaho 73, 79, 101 P. 254, 256 (1909). "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Id.* citing *Poole v. Olaveson*, 82 Idaho 496,502,356 P.2d 61, 65 (1960). Along with these policy considerations, the Director must "equally guard all the various interests involved." *Id.* at **53-54 citing Idaho Code § 42-101.

The district court's ruling here runs contrary to the Director's duty to equally guard all interests and to apply the Ground Water Act so as to not block full economic development of the aquifer. See, I.C. §§ 42-101 and 42-226. It also runs afoul of the policies of optimum beneficial use and reasonable use of water so as to not hoard water for one water user only. See *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911).

In light of these policies, evaluating whether or not a senior user needs his full quantity of water or is materially injured should be made by the Director under a preponderance of the evidence to ensure that junior users' interests that are inherent and specifically protected by these policies are equally guarded. This case involves the administration of Idaho's groundwater resources where a senior groundwater user is asking for curtailment of junior groundwater users; this case does not involve adjudication of water rights. Both sides have settled and decreed water rights and are putting the water to beneficial use. The unique issues presented in administration of groundwater, such as material injury, reasonableness, public interest and full economic development, must be based on the Director's discretion, which is best served by a preponderance of the evidence standard, not on a heightened standard.

F. The Cases Cited by the District Court Are Adjudicative Cases, Not Applicable to Groundwater Administrative Cases

The Judgment and Decisions incorrectly relies on cases that adjudicate water rights or seek to permanently alter water rights. None of those cases control the issue because this appeal

involves a groundwater administrative action under the CM Rules where the Director is determining whether the senior is suffering materially injured.

1. Cases to Grant New Appropriations Require Heightened Proof to Support A New Use from a Stream But do not Answer the Question Presented in this Case

The district court cites to the 1904 decision *Moe v. Harger*, 101 Idaho 302, to support its assertion that the Director must evaluate material injury under a heightened standard. Clerk's R. 114-15. The argument that a senior user should be presumed to suffer material injury just because he receives less water than the maximum authorized rate of diversion was made in the *AFRD2* case, with the district court there relying on *Moe* to conclude that "when a junior diverts or withdraws water in times of water shortage, it is presumed there is injury to the senior." *AFRD2*, 143 Idaho at 877, 154 P. 3d at 448. This Court, however, reversed the district court in *AFRD2*, explaining that *Moe* "was a case dealing with competing surface water rights, and this is a case involving interconnected ground and surface water rights." *Id.* The Court explained that "[t]he issues presented are simply not the same." *Id.* A major failing of the Judgment and Decisions is that it again tries to confine the CM Rules to the familiar constructs of surface water administration, rather than recognize that the CM Rules exist precisely because groundwater administration is significantly different than surface water administration.

Three of the cases cited in the Judgment and Decisions by the district court are cases that require junior surface appropriators to establish by clear and convincing evidence that there was sufficient water available from the source in order to support new appropriations: *Cantlin v. Carter*, 88 Idaho 179, 182, 397 P. 2d 761, 762 (1964) (case regarding whether to issue a new water right); (*Josslyn v. Daly*, 15 Idaho at 149, 96 P. at 572 (determination of quantity and source of an additional water right); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (case regarding whether there was sufficient water to grant a new appropriation). The reason for requiring a heightened

standard of proof to allow a new diversion on a stream was explained by the United States Supreme Court in *Colorado v. New Mexico*, 467 U.S. 310 (1984):

Requiring Colorado to present clear and convincing evidence in support of its proposed diversion is necessary to appropriately balance the unique interests involved in water rights disputes between sovereigns. The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."

Id. at 316 (emphasis added). Supporting a proposed diversion whose benefit may be speculative and remote is different than the issue before the Director in this groundwater administration case where a senior user is asking the Director to curtail hundreds of established, decreed junior water rights.

Likewise, the case of *Neil v. Hyde*, 32 Idaho 576, 578, 186 P. 710, 710 (1919) also involves an adjudication of rights amongst the parties but is a case regarding *res judicata* and not about what standard of proof is required. In *Jones v. Vanausdell*, 28 Idaho 743, 156 P. 615 (1916) a senior groundwater user was asking for curtailment of (an injunction against) junior groundwater users. The *Jones* case established that a groundwater administration dispute “differs somewhat from the ordinary action for the adjudication of conflicting water rights on the same stream.” *Id.* at 752, 681. At the time the *Jones* case was decided, this Court had already held the clear and convincing standard applies in the adjudication of surface water rights. *Moe* 10 Idaho at 307, 77 P. at 648 1904 (holding in a surface water case that “subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.”); see also *Josslyn* 15 Idaho at 149, 96 P. at 571-72. The Court’s holdings in *Moe* and *Josslyn* did not prevent the Court in *Jones* from examining the senior’s evidence to determine whether or not its claim of injury in the context of a dispute over

the use of groundwater was supportable. In other words, the considerations in cases like *Moe* and *Josslyn*, and hence the burdens and standard of proof in those cases did not entirely direct the Court's decision in *Jones*.

Three other cases cited by the district court involved quiet title actions, which permanently fixed water rights amongst the parties. *Crow*, 107 Idaho 461, 690 P. 2d 916, involved quiet title and issues of abandonment. *Id.* at 464 and 467, 690 P.2d at 918 and 922. The district court here also discussed at some length the quiet title cases of *Silkey*, 51 Idaho 344, 5 P.2d 1049 ("*Silkey I*") and *Silkey*, 54 Idaho 126, 28 P.2d 1037 ("*Silkey II*") and claimed these cases stand for the proposition that administrative determination of injury by the Director requires a heightened standard of proof. While *Silkey I* and *Silkey II* involved groundwater rights, they are quiet title cases that determined how much water was available in the basin for appropriation and as such adjudicated water rights between the parties by affixing priority dates and quantities of the water rights. *Silkey I* at 348. In *Silkey I*, the court effectively denied the right to use water to Tiegs and Ryan, because there was not enough available water to appropriate. *Id.* at 348. The basis for the denial of any right to use water to these two users was because the district court found that "sixty miner's inches is the maximum amount of water that can be diverted from the artesian basin supplying the water to all the wells without depleting the supply available to respondent's well." *Id.* at 353 and 355. *Silkey I* is not a groundwater administrative case; rather it is an adjudication case that decrees water rights to the parties. *Id.* at 359.

Silkey II has the same defendants. In *Silkey II*, the two defendants, who were effectively denied water rights in *Silkey I*, argued that the senior user's decreed right should be decreased and that there is sufficient water in the basin to support their appropriations. *Silkey II*, at 128. The Court found that the junior users (the new appropriators) must establish their facts by clear

and convincing evidence to decrease the senior's right and to prove that there was sufficient water to sustain their claimed appropriations. *Id. Silkey II* was simply a continuation of the previous adjudication suit involving the question about whether the junior appropriator is entitled to a water right by showing that his appropriation will not injure the senior user because there is sufficient water available in the source to appropriate. *Silkey II* does not establish that clear and convincing evidence is the standard required when deciding whether or not a senior user is materially injured, the remedy of which is to curtail established, vested junior water rights.

2. The Standard of Proof for Adjudicating Water Rights or For Prevailing on Affirmative Defenses Does Not Apply to Groundwater Administrative Determinations under the CM Rules.

Finally, the district court cited two cases involving the abandonment or forfeiture of established water rights in support of its conclusion that the Director must be convinced by clear and convincing evidence that the senior needs less water than his maximum decreed quantity to support a finding of no material injury. *Gilbert*, 97 Idaho 735, 552 P. 2d 1220 (involving abandonment, forfeiture and adverse possession and requiring a heightened standard of proof); *Jenkins*, 103 Idaho 384, 647 P. 2d 1256 (holding that the Director had authority to consider forfeiture and abandonment in evaluating a transfer, the result of which would have been a permanent change to the water right.) Admittedly, altering an established water right through abandonment or forfeiture should require heightened scrutiny since a real property right is being lost. Yet, neither of these cases control here where A&B's water right is not being re-adjudicated or examined in order to be permanently altered.

In conclusion, none of the cases that the district court below relied upon support requiring the clear and convincing standard when determining whether material injury exists for purposes of administering groundwater rights under the administrative CM Rules.

VI. ARGUMENT IN RESPONSE TO A&B'S APPELLANT'S BRIEF

A. Standard of Review for A&B's Issues on Appeal

Review of the Agency Order under A&B's appeal is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277. The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Review of pure questions of law is given free review by this Court. *Vickers*, 150 Idaho at 442, 247 P.3d at 669.

The Court shall affirm the agency decision unless the Court finds that the agency's findings, inferences, conclusions, or decisions are: (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, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. In order to obtain the relief they seek, A&B must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right has been prejudiced. I.C. § 67-5279(4); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). A&B as the appellant also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999). If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3) .

B. A&B's Irrigation Water Right No. 36-2080 is Subject to the Idaho Ground Water Act.

District Court Judge Wildman, district court Judge McKee in the Fourth Judicial District, Hearing Officer Schroeder and the Director have all found that the Ground Water Act applies to pre-act groundwater rights. Their reasoning is sound. This Court should affirm the district court's conclusion that the Ground Water Act applies to A&B's 1948 priority date water right. The district court recognized that whether the Ground Water Act applied to A&B's 1948 priority date water right is a question of law over which it exercised free review. Decision on Judicial Review at 12.

1. This Court's Decision in *Clear Springs v. Spackman* Rejects A&B's Argument

A&B argues that the Ground Water Act, adopted in 1951, does not apply to its 1948 priority date water right. A&B Opening Br. at 12-15. A&B also argues that the 1953 amendment to the Ground Water Act that protects senior users to a reasonable pumping level does not apply to its 1948 priority date water right. *Id.* at 16-20. A&B argues that it is entitled to its historic pumping level, i.e. those levels that existed when they first began pumping from the ESPA without regard to reasonable pumping levels or the impacts on subsequent groundwater rights. *Id.* at 13. A&B's arguments were rejected in this Court's recent decision in *Clear Springs Foods v. Spackman*, 252 P.3d at **31. The Court there held that the 1953 amendment to the Ground Water Act "modified the doctrine of first in time is first in right for ground water appropriators only with respect to their pumping levels." *Id.* at ** 31. The Court further held that "the purpose of the 1953 amendment was to change the holding in *Noh v. Stoner* ... that a prior appropriator of ground water was protected to his historic pumping level." *Id.* The Court examined its decision in *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho at 581-81, 513 P.2d at 633-34 and held that, "with respect to ground water pumping, the prior appropriation doctrine was modified so

that it only protects senior ground water appropriators to the maintenance of reasonable pumping levels in order to obtain full economic development of ground water resources.” *Id.* **32. The court found that “[t]he prior appropriator was protected to a reasonable pumping level, not his historic pumping level.” *Id.* at **33. Thus, this Court has already decided and rejected A&B’s arguments in this appeal. However, if the Court does not find that its decision in *Clear Springs v. Spackman* resolves A&B’s argument in this appeal, further argument is provided below.

2. The Act’s Plain Language and Case Law Supports the Conclusion that the Ground Water Act Applies to A&B’s Water Right No. 36-2080

In this case, the Hearing Officer below rejected A&B’s argument in his *Order Regarding Motion for Declaratory Ruling*. R. 1630-38. The Hearing Officer emphasized that I.C. § 42-229 of the Ground Water Act provided that “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.” *Id.* at 5. (emphasis added). The Hearing Officer also noted that the only groundwater rights specifically excepted from the retroactive application of the Ground Water Act were groundwater rights used for domestic purposes and for drainage or recovery purposes. R. 1631. See I.C. §§ 42-227, 42-228. A&B’s irrigation groundwater right does not fit within either exception. These plain and unambiguous statutes clearly reveal the legislative intent that the Ground Water Act apply both retroactively and prospectively to “all” ground water rights “whenever” acquired unless those water rights are for domestic uses or for drainage or recovery uses. The Hearing Officer further noted that his interpretation of these statutes was fully supported by the case of *Baker*. R. 1632.

On appeal, A&B requests that this Court judicially re-write I.C. § 42-229 by redacting or disregarding the phrase “all rights” and the phrase “whenever ... acquired” and thereby eliminate its retroactive effect and rely only on I.C. § 42-226. A&B’s argument should be rejected.

In *Baker*, this Court addressed certain irrigation groundwater rights. A number of those rights had priority dates of 1948 and 1950, which pre-dated the adoption of the Ground Water Act. There was an argument of whether all of the irrigation water rights were subject to the Ground Water Act and its “reasonable pumping level” requirement. This Court prefaced its analysis by stating: “This Court must for the first time, interpret our Ground Water Act (I.C. sec. 42-226 et seq.) as it relates to withdrawals of water from an underground aquifer.” *Baker* 95 Idaho at 576, 513 P.2d at 628. During its extensive analysis of the development of Idaho water law, this Court overruled the 1933 case of *Noh*, which had previously held that senior appropriators of groundwater were “forever” entitled to their historic pumping levels without regard to the reasonableness of those pumping levels. Contrary to A&B’s argument that *Noh* is still good law and applies to its irrigation water right, this Court overruled *Noh* on two alternative bases. First, the holding in *Noh* violated the constitution because granting senior appropriators a perpetual entitlement to historic pumping levels was “inconsistent with our constitutionally enunciated policy of optimum development of water resources in the public interest.” *Baker*, 95 Idaho at 583, 513 P.2d at 635. Second, the legislative enactment of the Ground Water Act and its requirement of reasonable pumping levels were intended to eliminate “the harsh doctrine of *Noh*.” *Id.* Based on these alternative bases, this Court agreed that all of the irrigation water rights at issue in *Baker* were subject to the Ground Water Act and the reasonable pumping level requirement. *Id.* at 584, 513 P.2d at 636. Consequently, this Court made it clear that the *Noh* case was overruled both judicially and legislatively and that the Ground Water Act applies to all rights pre-dating the Act.

A&B attempts to avoid the holding in *Baker* by focusing its attention upon the subsequent case of *Musser v. Higginson*, 125 Idaho 392, 393, 871 P.2d 809, 810 (1994). The *Musser* case,

however, did not address the issue now argued by A&B. In *Musser*, this Court stated in dicta that: “Both the original version and the current statute [i.e. I.C. § 42-226] make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.” *Musser*, 125 Idaho at 396, 871 P.2d at 813. However, this Court in *Musser* did not address the interplay of I.C. § 42-226 with I.C. § 42-229. Even more significantly, the question on the application of the Ground Water Act to pre-1951 water rights was neither briefed nor argued on appeal in *Musser*. This is supported by the appellate briefing filed in that case. *Musser* was not a case that wrestled with applying the Ground Water Act or the reasonable pumping level requirement to pre-1951 ground water rights. The one case on point regarding the application of the Ground Water Act to pre-1951 ground water rights – *Baker* – is not even mentioned or cited in the *Musser* decision. *Musser* is simply a case which analyzed and applied Idaho law concerning writs of mandate. As explained by the Hearing Officer, “[t]he issue before the Court [in *Musser*] was a claimed failure of departmental action, not an analysis of the effect of the Ground Water Act on rights established before enactment of the Act.” R. 1635.

The district court in *Moyle v. Idaho Dep’t of Water Resources*, Case No. CV OT 08 014978 (4th Jud. Dist. July 13, 2009)¹ was presented with the very same arguments A&B has presented in this case. After considering all of those arguments, the district court agreed that the Ground Water Act applied to pre-act water rights:

I am persuaded by the reasoning advanced by the IDWR and in the brief of the *amicus curiae*. Simply recognizing the priority of the water right does not necessarily mean exclusion of such prior right from any administration or regulation by the department of water resources whatsoever. To so hold would emasculate the policy declaration of the first paragraph of I.C. § 42-226 and the broad sweep of I.C. § 42-229, that the administrative and regulatory provisions of the act were to apply to all rights, whenever and however acquired.

Id. Memorandum Decision at 7.

¹ A copy of this district court Memorandum Decision is attached as an addendum hereto.

Similarly, the district court here reasoned, “when construing the Act in its entirety, and specifically taking into account the plain language of I.C. § 42-229, it becomes clear that the Legislature intended a distinction between the ‘right to the use of ground water’ and the administration of all right to the use of ground water.” Clerk’s R. 57. Based on the foregoing, the district court’s decision that the Ground Water Act applies to A&B’s 1948 priority date water right should be affirmed.

3. Legislative History Shows that the Ground Water Act Applies to A&B’s Right

The conclusion reached by the Hearing Officer, Director, the district court here, and the district court in *Moyle* are further supported by legislative history. A brief history and analysis of the Ground Water Act and Idaho’s constitutional requirements of optimum beneficial use in the public interest supports the application of the Ground Water Act and the reasonable pumping level requirement to pre-1951 groundwater rights.

It is a fundamental law of statutory construction that statutes that relate to the same subject are to be construed together in order to give effect to the intent of the legislature. *State v. Creech*, 105 Idaho 362, 367, 670 P.2d 463, 468 (1983). In attempting to discern and implement the intent of the legislature, the court may seek edification from the statute’s legislative history and contemporaneous context. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (Ct. App. 1999).

In 1951, the Idaho Legislature enacted the Ground Water Act. Idaho’s current Ground Water Act is codified at Idaho Code §§ 42-226 through 42-239. Section 1 of the Ground Water Act as passed in 1951 reads:

SECTION 1 GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All

rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1951 Idaho Sess. Laws, ch. 200, § 1, p. 423 (approved Mar. 19, 1951) (emphasis added). The last sentence of the Ground Water Act is merely a confirmation that prior water rights are validated and confirmed, but does not provide a specific exception to pre-1951 water rights, nor except them from the administrative decisions of the Director. Section 2 of the original Ground Water Act reads:

SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. - The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

1951 Idaho Sess. Laws, ch. 200, § 2, p. 424 (approved Mar., 1951) (emphasis added). Further, the 1951 Ground Water Act in Section 4 specifically addressed administration of ground water rights and stated that administration of all non-expected water rights (i.e. groundwater rights other than for domestic, drainage or recovery) “whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.” 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424 (emphasis added). Section 4 of the Ground Water Act is currently codified at Idaho Code § 42-229.

In 1953, the Idaho Legislature amended Section 1 of the 1951 Ground Water Act but the Ground Water Act already applied to pre-1951 ground water rights as explained above and that was not changed. The 1953 amendment provided two important changes: 1) it qualified the application of the “first in time first in right” doctrine as it applies to ground water rights and 2) it protected “early” ground water users but only as to a “reasonable pumping level” established by the Department, not to their historic pumping levels. Still, the only water rights “specifically excepted” were domestic rights, and drainage or recovery wells. I.C. §§ 42-227 and 42-228.

In 1978, the Idaho Legislature amended Section 2 of the Ground Water Act, now I.C. § 42-227, to limit the exception on domestic wells stating that the drilling and use of wells for domestic purposes shall not be “subject to the permit requirement under section 42-229, Idaho Code.” Finally, in 1987, the Idaho Legislature amended section 42-233 to restrict the use of geothermal ground water resources. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 741. The Legislature also added language relating to the reasonable pumping levels as it related to geothermal resources under Idaho Code § 42-226:

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 for geothermal resources to the extent that he determines such protection is in the public interest.

The 1987 legislation also amended the last sentence of Section 1 of the 1951 Ground Water Act as follows:

~~All This act shall not affect the rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed its enactment.~~

1987 Idaho Sess. Laws, ch. 347, § 1, p. 743. Importantly, Idaho Code § 42-229 regarding the administration of ground water rights remained unchanged and still states that administration of all rights to the use of ground water, “unless specifically excepted herefrom”, are governed by the Ground Water Act. The original language of the 1951 Ground Water Act merely affirmed the existence of prior water rights, but did not “specifically except” administration of them from the provisions of the Ground Water Act; the subsequent amendments do not change that fact. Consequently, because A&B’s water right is not a domestic nor a drainage or recovery right, it is subject to the Ground Water Act.

4. Public Policy Supports that the Ground Water Act Applies

This history of the Ground Water Act, coupled with this Court's specific application in *Baker* to historic water rights and this Court's recent decision in *Clear Springs v. Spackman* makes it obvious that the law to be applied to A&B's Delivery Call is that contained in the Ground Water Act and reasonable pumping levels and not historic pumping levels. As explained in *Baker*, the Ground Water Act is:

consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interests . . . and that the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. . . . Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels

Baker at 584, 513 P.2d at 636.

A broad non-specific exception from the requirements under the Ground Water Act and specifically the reasonable pumping levels provisions for A&B would in effect allow A&B to unilaterally set a 1948 pumping level in the ESPA, regardless of whether that pumping level is reasonable. This would directly contradict Idaho constitutional and statutory law, including the holdings in *Baker* and *Clear Springs v. Spackman*. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home Irrigation Dist. v. Duffy*, 79 Idaho 435, 319 P2d 965 (1957). Indeed, the governmental function in enacting the entire water distribution procedure under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

Guaranteeing A&B its historic pumping levels would directly contradict the Ground Water Act's intent to not allow senior, historic users to block the full economic development of the state's underground water resources. A&B's argument that its ground water rights are not

subject to the Ground Water Act and its reasonable pumping level requirement is without merit. Thus, this Court should sustain the district court's decision.

C. A&B is Not Water Short, Has Sufficient Water to Meet Its Beneficial Use Therefore The Director Need Not Set a Reasonable Pumping Level

A&B argues that the Director's failure to set a reasonable pumping level "violates his duty to administer water rights" pursuant to the Idaho Constitution, Idaho Code § 42-607 and CM Rule 40. A&B's Opening Br. at 23. A&B's argument misses the point. The Director concluded that A&B had sufficient water to meet its beneficial use. R. 1148-50. In fact, but for A&B's unreasonable means of diversion (i.e. its well drilling problems, well siting issues, refusal to interconnect some of its well systems, and its inherent delivery problems) it is likely that A&B could pump and deliver its full authorized water right volume. R. 1148-49.

A&B argues on page 27 of its Opening Brief, "Here, the Director denied the call because A&B had not reached a reasonable pumping level." (emphasis in original). This is simply not correct. A&B cites to a page in *A&B's Reply in Support of Petition for Reconsideration* in support of this contention. Arguably, one of the basis for denying A&B's delivery call was that reasonable pumping levels have not been exceeded, but as the record demonstrates, the Director determined that A&B was not suffering material injury and denied A&B's delivery call because A&B was not water short and had sufficient water available to meet its beneficial use. The Director also found, "A&B's poorest performing wells cannot per se be the measure of whether reasonable pumping levels have been exceeded; that the ESPA is not being mined; and that A&B has not been required to exceed reasonable pumping levels." R. 3321-22. The Director further concluded as a matter of law that "[t]here is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42-226." R. 3321. These conclusions are based in part on the facts that "[a]lthough ground water

levels throughout the ESPA have declined from their highest levels reached in the 1950's, ground water levels generally remain above pre-irrigation developmental levels. There is no indication that ground water levels in the ESPA exceed reasonable ground water pumping levels....” R. 1109; see also R. 3113. Substantial competent evidence supports these conclusions. Aggregate recharge to the ESPA substantially exceeds the aggregate groundwater withdrawals. See R. 1734-59 and Ex. 400 p. 8; Ex. 408. Further, water levels are likely stabilizing because of the 1992 moratorium on groundwater permits, conversions from gravity to sprinkler irrigation is nearly 85% complete and public processes such as the Comprehensive Aquifer Management Program are in place. Tr. Vol. VI, p.1343, L. 7-10; Tr. Vol. VII, p. 1400, L. 19-24- p. 1401, L. 11.

The majority of A&B's problems accessing water are driven by the location of the B Unit. In the southwest portion of the B Unit, there are sedimentary interbeds that require site-specific considerations of the hydrogeology to determine how best to withdraw water from that source. R. 1127-30, Ex. 124 at A&B 1196, A&B 1200, A&B 1203 and A&B 1222. In a 1948 USGS document, Mr. Nace noted that “[d]ifferent well-construction and well-development methods would probably permit larger production from wells in the Burley Lake bed and other sediment.” Ex. 124 at A&B 1200. The vast majority of the aquifer underlying A&B is a highly productive water-bearing basalt aquifer. R. 1127-28.

A&B also argues that because it has been “impacted by declining aquifer levels and water supplies” the Director must “administer” (i.e. curtail) junior users. This is just another way to say that they are entitled to historic water levels which is not the law in Idaho as discussed above. Further, the lowering of the water table does not automatically constitute material injury as A&B argues; this “depletion equals injury” argument was rejected by this Court in *AFRD2*.

AFRD2, 143 Idaho at 876-78, 154 P.3d at 447-49 (quoting *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

A&B's argument is not about the Director failing to "administer" water rights. Rather, it is about the Director's failure to curtail other junior users to provide A&B more water, even though the record shows that A&B is not suffering water shortages. A summary of some of the key evidence supporting this conclusion is as follows:

- A&B's B Unit farmers have been able to use the amount of water needed to raise full crops, meet their long-standing contracts and exceed the crop water requirements of adjacent farmers by 1 acre-foot per acre. Tr. Vol. X., p. 2069, L. 1-7; Vol., X., p. 2040, L. 21- p. 2041, L. 8.
- Exhibit 111 shows that surrounding surface water user Twin Falls Canal Company's rate of delivery is 5/8 per inch or 0.625 inches which is less than A&B's delivery rate of 0.75 inches and certainly less than their "maximum rate of 0.88 inches per acre" that they claim they are entitled to. R. 3107.
- A&B's B Unit farmers use the same or more water to raise the same or similar crops as the lands surrounding the B Unit. Tr. Vol. X, p. pp. 2074-76, p. 2088, p. 2090, and 2138 along with Exs. 427-10, 427-11 and 427-12 show, as determined by the Director in his analysis, that the lands identified by A&B as water short simply are not short of water.
- A&B's witnesses and IGWA's witnesses show that private farmers outside A&B use roughly 2 acre-feet per acre, while the average use by A&B farmers is about 3 acre-feet per acre. Ex. 574 at 12; Tr. Vol. X., p. 2135, L. 18-25; Tr. Vol. X., p. 2088, L. 23- p. 2089, L. 11. Further, A&B's delivery policies promote inefficiencies. *Id.* and Tr. Vol. IV., p. 657, L. 22- p. 658, L. 2; Stevenson Tr. Vol. X., p. 2075, L. 11 – p. 2076, L. 18; Tr. Vol. X. p. 2135, L. 5-8.
- Despite their claims shortage, A&B's farmers have increased their production and exceed county averages for crop yields. *cf.* Exs. 357 and 355A, and 358.
- Exhibits 409, and 430-C show that A&B's aggregate diversions have increased in recent years from 150,000 acre-feet to over 175,000 acre-feet.
- A&B's own Exhibits 229A-O, 230-B-N, Ex. 231B-F all show that the members who claim to be water short continue to spread their water on expansion and enlargement acres that were not originally intended to be irrigated with water under water right no. 36-2080. In other words, water right no. 36-2080 now provides water to 2,063 more acres than it was historically developed to serve. Exs. 405, 406 and 407.

- A&B developed its project near the peak of the ground water level but the ESPA is still above the level that existed prior to surface water irrigation. R. 1739-1740.
- A&B's water right allows it to supplement that supply by interconnecting its wells or wells systems, to add additional points of diversion as needed or to replace abandoned or low yielding wells. Yet, A&B has refused to explore interconnection R. 1909-11, 1943, 3096, Tr. Vol. IV, p. 704, L. 8-13.

While there is substantial and competent evidence to support the Director's conclusion that reasonable pumping levels have not been exceeded, there are many valid reasons why the Director denied A&B's delivery call.

D. The Director Properly Evaluated A&B's Use and Diversion of Water Under its Unique Water Right

A&B insists that the Hearing Officer, the Director and the district court concluded that A&B must interconnect its "entire" system before it is allowed to seek "administration." A&B Opening Br. at 36-38. However, this argument misstates the record. Contrary to A&B's assertion, the Director did not place an unlawful condition to interconnect its entire system before seeking administration under its water right. Rather, the Director adopted the Hearing Officer's conclusion that A&B has a duty to "maximize the use of [the] flexibility [in its water right]... before it can seek curtailment or compensation from juniors." R. 3096. This conclusion was reasonably conditioned by recognizing the fact that topography limits A&B's ability to interconnect its entire system, thus, "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury." *Id.* As a matter of fact and law, however, A&B can interconnect its well systems. Ex. 157A, 481, Tr. Vol. VI, p. 1318, L. 22 – p. 1319, L. 4.

A&B argues that the Director must evaluate its claim of injury to its water right on a well-by-well basis and is not allowed to hold A&B to the flexibility to interconnect its well system that is

part of its water right. A&B Opening Br. at 35. When the Bureau developed the A&B project in the 1950a, there was an understanding that the service area for the A&B Irrigation District encompassed a variety of lands and that the aquifer underlying A&B had a variety of characteristics. Ex. 124 at 11-14; Ex. 470. Historical documents show that at the time of development the Bureau chose to develop wells in the high producing basalt aquifer located primarily in the northern portion of the B Unit and later moved to the “922 problem area” in the southwest portion. Ex. 152P and QQ; Tr. Vol. VII, p. 1368, L. 16- p. 1369, L. 9; Tr. Vol. I, p. 64, L. 18- p. 65, L. 2. When the Bureau developed the wells in the southwest portion, it was known that the water-bearing characteristics of the aquifer underlying the southwest portion were poor and differed from the hydrogeologic setting for a majority of the B Unit. *Id.* Yet, the Bureau consciously decided to drill wells in the sedimentary zones of the southwest area. Ultimately, the Bureau re-drilled nearly 50% of its wells throughout the project within a ten-year period. Ex. 404.

Although withdrawing water from the sedimentary interbeds is more difficult than the higher transmissive areas located in the northern part of the B Unit, A&B is not without remedy. First, A&B could employ hydrogeologic consultants to determine whether or not small or supplemental wells would result in additional well yield for its claimed water short wells as recommended by Dr. Ralston and could use different well screens to enhance success. Tr. Vol. I, p. 196, L. 4-9; Ex. 400 at 36. Further, A&B could consider the interconnection of its wells or well systems in order to supplement its supply. “[I]t is ... clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from

junior users.” R. 3097. Dr. Petrich showed that limited interconnection of some well systems that are adjacent to well systems with surplus supply is possible. Ex. 481. The Director properly weighed the evidence to conclude that A&B must take advantage of the flexibility of its water rights and interconnect its wells.

A&B further argues that unless its partial decree from the SRBA Court included a condition that it must interconnect its well systems, then the Director is precluded from requiring A&B to take advantage of the flexibility under its water right that allows for interconnection of its wells. This argument would eliminate the Director’s ability to examine a water users’ means of diversion, its irrigation method and application as set forth in CM Rule 40.01.d. (system diversion, conveyance efficiency, method of irrigation water application), 40.01.g. (can the senior’s need be met using reasonable diversion, reasonable conveyance efficiency and reasonable conservation practices) and 40.01.h. (can the senior’s need be met using alternate reasonable means of diversion). Further, A&B’s argument ignores the fact that a reasonable means of diversion is an inherent condition on every water right.

A&B’s water right, with its 177 wells and the right to divert from 188 wells that are not tied to any particular diversion rate or parcel of land, provides it with ultimate flexibility to water lands within its boundaries with any well or any combination of wells. While A&B does not want the Director to limit its flexibility in moving water between its wells or well systems, it wants to dictate to the Director that he only be allowed to consider individual wells in evaluating material injury. A&B simply cannot have it both ways. The Director properly considered A&B’s water right and required that A&B maximize its interconnections in a reasonable manner before he will consider curtailing outside junior users. The Director’s order on this issue is reasonable and based on substantial, competent evidence in the record and the district court

found that he did not abuse his discretion on this issue. As such, the Director's and the district court decision in this issue should be affirmed.

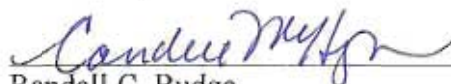
VII. CONCLUSION

Administration of water rights and distribution of water between water users serves a different function than the adjudication of water rights that permanently assigns title, fixes priorities and quantities or alters the elements of water rights. The two types of proceedings require different standards of proof. In evaluating material injury under the CM Rules the Director must review the evidence under a preponderance standard in order to give the proper effect to all of the considerations involved in administering groundwater rights. IGWA asks this Court to reverse the district court decision and its remand and find that clear and convincing evidence is not required for administrative determinations regarding material injury and as such, it follows that the court should affirm the Director's decision that A&B's water right was properly evaluated, reasonable pumping levels have not been exceeded and as such, A&B's water right is not materially injured.

A&B's water right 36-2080 is subject to the Ground Water Act and its argument that it should be entitled to its historic water level is entirely contrary to the express language and purpose of the Ground Water Act. The district court's decision on this issue should also be affirmed.

RESPECTFULLY SUBMITTED this 29th day of July, 2011.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2011, CROSS-APPELLANT IDAHO GROUND WATER APPROPRIATORS, INC.'S OPENING BRIEF AND RESPONSE BRIEF was served in the following manner:

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Idaho Supreme Court
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Boise, ID 83720-0101

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ADDENDUM A

Memorandum Decision

Moyle v. Idaho Department of Water Resources

4th Jud. Dist.

Case No. CV OT 08 014978

NO. _____
FILED _____
A.M. _____ P.M. 3:30

JUL 13 2009
By J. DAVID NARRRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOSEPH MOYLE, LYNN MOYLE and
MICHAEL MOYLE, individually, and
CITY OF EAGLE,

Petitioner and Cross Petitioner,

v.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent

Case No. CV OT 08 014978

MEMORANDUM DECISION

This matter is before the court on administrative appeal from an order issued by the Idaho Department of Water Resources adjudicating the rights of parties under certain applications for ground water permits.¹ The Moyle family, a protestant before the agency below, initiated the judicial proceedings by petition for judicial review. The City of Eagle, the applicant before the agency below, appeared in this action by way of a "cross

¹ The administrative caption on this mater was "In the matter of applications to appropriate water nos. 63-32089 and 63-32090 in the name of the City of Eagle." The administrative captlon was used as the caption in the initial pleadings filed in this litigation. I have recast the caption here in the manner adopted by the parties in subsequent submissions to the court, to reflect the identity of the parties in interest to this proceeding.

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petition," generally challenging the position of the Moyles. It has filed its own direct action for administrative appeal against the agency's final order in a separate action that is not consolidated in this action. The Idaho Ground Water Appropriator's Inc. was not a party to the administrative proceedings below and has been permitted to submit an *amicus curiae* brief in this action.

For reasons stated, I conclude that if the merits are to be reached, the final order of the Department should be affirmed as to all issues raised in this proceeding. However, I conclude that the petition filed was untimely and, therefore, the court lacks jurisdiction. The petition and cross-petition should be dismissed.

Facts and Procedural History

In January of 2005, the City of Eagle filed two applications with the IDWR for permits to appropriate ground water, being essentially permits to dig two wells at specific locations. A number of parties and entities, including the Moyles, protested the applications. A hearing officer was designated by the IDWR, and hearings were held.

It is not disputed that the Moyles maintain a number of artesian wells under water rights that were acquired prior to 1953. The wells desired by the City of Eagle would be approximately one mile from the wells belonging to the Moyles and would tap into the aquifer that probably serves the Moyles' wells. The well water from Moyle wells is used for both domestic and non-domestic purposes. Domestic water is not involved in these proceedings.

After an evidentiary hearing, the hearing officer issued his findings of fact, conclusions of law and recommendations for final order. In his findings, the hearing officer concluded that the permits of the city should be granted subject to conditions. As

is relevant to this appeal, the hearing officer concluded that the water rights of the Moyles predated the 1953 enactment of the Idaho Ground Water Act, and therefore were not subject to regulation or administration by the department. He concluded that the Moyles were entitled to protection in their wells from any encroachment by the city wells at their "historical water levels."

The hearing officer's preliminary orders were transmitted to the director of IDWR for final action. In February of 2008 the director of IDWR issued an order wherein the director accepted the hearing officer's conclusion approving the application of the city subject to conditions. However, he did not accept the hearing officer's conclusion that the Moyles' agricultural and non-domestic water rights were entitled to the level of protection as stated; the director concluded that the Moyles' rights were subject to administration by the department, including determination and regulation in accordance with "reasonable pumping levels" as defined and determined under the Idaho Ground Water Act.

Motions for reconsideration were filed, and further hearings before the director were held. By an order dated July 3, 2008, the director denied the motion to reconsider and affirmed the final order entered in February, without modification on any of the areas relevant to this appeal. The final order on reconsideration was manually signed and manually dated by the director on July 3. A certificate of service signed by the administrative assistant to the director indicates that service by mail was attempted on that day.

Apparently, the mailing of this order was not sufficient as to all of the parties and attorneys. On July 16, 2008, the director's administrative assistant mailed everything out

again. She included a letter of transmittal covering the order and a new certificate of mailing, which included several corrections and additional individuals and entities not identified on the first certificate of service. The transmittal letter and new certificate of mailing are dated July 16, 2008. In her letter, the administrative assistant advised, "Therefore, for the purpose of filing an appeal, the date of service referred to in the enclosed order is now July 16, 2008."

The petition for judicial review in this case was filed by the Moyles on August 11, 2008. This date was within 28 days of the second mailing and corrected service of the order on July 16, but was more than 28 days' from the date appearing on the document entitled "Order on Reconsideration," which was July 3, 2008. The City of Eagle entered this case by a cross petition, filed after the petition of the Moyles. The city's participation in this case is limited to the issues raised in cross petition against the Moyles' protest.

Issues on Appeal

The Moyles contend that the sole issue presented in this case is whether their water rights are subject to any regulation or administration by the IDWR. Specifically, they contend that regulation under "reasonable ground water pumping levels" as defined and limited in the Idaho Ground Water Act at Idaho Code § 42-226 do not apply to their non-domestic water rights because their rights have priority dates earlier than the effective date of the act.

The City contends that the Moyles have no standing to raise this issue before the court because (1) they failed to raise this issue before the agency, and (2) there is no cognizable injury under the facts of this case because the only potential injury is to water pressure, and pressure is not a protected element of a water right.

The IDWR contends, in a last minute round of briefing, that the recent case of *Erickson v Board of Engineers*, ___ Idaho ___, 203 P.3rd 1251 (2009) applies, that the time for appeal begins on the date of the order not the date of service, and that the petition for judicial review in this case was, therefore, untimely. It is of note that the agency did not raise this issue by motion when the petition was filed, nor did it raise this issue in the principle round of briefing to the issues raised in the appeal. The issue was raised only after the initial briefing was closed, and just prior to the date originally scheduled for oral argument. Because of this, the oral argument was rescheduled and all parties were offered the opportunity to submit briefs on the issue.

If the Moyles' petition is dismissed on the jurisdictional basis, the City's cross petition in this case goes with it.

Analysis

A. The Ground Water Act applies to water rights acquired prior to enactment

The principle issue was exhaustively briefed by the parties in extremely well written and well argued briefs, including the brief submitted by the *amicus curiae*. I am satisfied that previous Idaho cases may surround the issue, but none are squarely on point. Of the three cases that appear closest, none clearly address the issue. *Baker v. Ore Ida Foods*, 95 Idaho 575, 513 P.2d 627(1973) does not address the issue of regulation or administration of rights acquired before enactment of the Ground Water Act in Idaho. *Parker v Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) deals with domestic water, which is specifically excluded by the statute and is not involved in this case. *Musser v Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) was an action in mandamus to compel the director to act. The court there held only that the director was obligated to act, but did

not define the limits or restrictions on his authority with respect to rights existing before the enactment of the statute. The discussion on point was directed to issues in mandamus, and is *dicta* in any event on anything germane to the case here. I am not persuaded that an answer is apparent from prior cases; rather, I conclude the issue is one of first impression in Idaho.

Tension exists both within I.C. § 42-226, and between this section and I.C. § 42-229. The first part of the first paragraph of I.C. § 42-226 provides that acquiring water rights by appropriation to beneficial use, under the doctrine of “first in time, first in right” is to be recognized, provided that this recognition is subject to regulation by the director in the maintenance of “reasonable ground water pumping levels.” However, in the last sentence of the first paragraph thereof, it is provided that, “This act shall not affect the rights to the use of ground water in this state acquired before its enactment.” Then, in I.C. § 42-229, it is provided that, “...the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically exempted herefrom, be governed by the provisions of this act.”

The Moyles contend that the phrase in section 226 to the effect that the act shall not apply to rights acquired before enactment of the statute effectively trump the conflicting provisions of the act that seem to say that the prior rights are subject to some level of regulation and administration by the director.

IDWR points to the policy language of the first paragraph of section 226 together with the language of section 229 and contend that, while the prior rights may be “recognized,” this does not preclude such rights from being subject to some level of regulation, such as the “reasonable pumping levels” mandated by other provisions of the

act. IDWR points to the language of section 229 providing that all rights to the use of ground water "whenever or however acquired" are subject to administration and regulation by the director, and contends that the only exceptions to the act are contained in I.C. §§ 42-227 and 42-228, neither of which are relevant here.

I am persuaded by the reasoning advanced by the IDWR and in the brief of the *amicus curiae*. Simply recognizing the priority of the water right does not necessarily mean exclusion of such prior right from any administration or regulation by the department of water resources whatsoever. To so hold would emasculate the policy declaration of the first paragraph of I.C. § 42-226 and the broad sweep of I.C. § 42-229, that the administrative and regulatory provisions of the act were to apply to all rights, whenever and however acquired.

While the issue is not squarely addressed in prior cases, I am persuaded by the rationale expressed in *Baker v Ore-Ida Foods, Inc., supra*. In that case, Justice Shepard, after a careful analysis of the development of water law in Idaho, observed that one purpose of the Ground Water Act was to promote the constitutionally enunciated policy of optimum development of water rights in the public interest. To that end, he concluded that the Ground Water Act could be applied to water rights acquired prior to the enactment of the act and overruled a doctrine previously expressed in *Noh v Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), to the effect that a senior ground water user had the unfettered right to preclude interference from a junior user. He concluded instead that the Ground Water Act was "intended to eliminate the harsh doctrine of Noh."

In this case, there was no evidence of actual interference with the water rights of Moyle. All that was offered was speculative testimony that the wells desired by the city

would probably draw from the aquifer used by the Moyles, and would probably impact pumping and pressure levels. No conclusions were offered as to the actual impact. The Moyles do not pump their water. Their wells are fed by artesian pressure. Although there was a finding by the hearing officer in this case that the Moyles' rights might be affected, and a conclusion that if so, they would be entitled to redress from the city in order to be made whole, it is uncertain at this point to what degree the rights of Moyle would actually be impacted. The director, in revising the hearing officer's conclusion on this point, did not say that the Moyles had no rights in the matter. Rather, he concluded that the hearing officer erred in concluding that the Moyles were entitled to protection based on "historical pumping levels" by reason of their priority. The director's final order concluded that as to the agricultural, non-domestic uses, the Moyles' prior rights would be subject to administration or regulation by the department under the statutory and regulatory provisions pertaining to "reasonable pumping levels."

To my mind, providing that one's prior water right may be subject to some degree of administration by the department does not abrogate the principle of right by appropriation or the doctrine of first in time, first in right. The statute clearly does provide that all ground waters are the property of the state, and that the state is obligated to supervise their appropriations and allotments. While the statute provides that rights acquired prior to the enactment of the statute are to be recognized, it also provides an overriding policy of requiring that even those prior-acquired and first-in-time water resources are to be devoted to beneficial uses and in reasonable amounts, and it does impose upon the director the duty of administration and enforcement. I conclude that the

director's determinations in this regard are consistent with the historical, constitutional and statutory mandates expressed in *Baker v. Ore-Ida Foods, Inc.*, *supra*.

The conditions adopted and imposed by the director in his final order are not inconsistent with these overriding policies. Accordingly, I decline to disturb the director's conclusion on this point. The final order of the director, as affirmed by him after reconsideration, should be affirmed by the courts.

B. Determination of whether "pressure" is a protected interest is premature.

Given my conclusion affirming the director's order that the rights at issue in this case are subject to some level of administration and regulation under the Ground Water Act, the issue raised by the city is premature. For this reason, I do not address the question of whether water pressure, as in the case of water flowing from an artesian well, can be an element of a water right subject to protection by prior appropriation.

C. Under the *Erickson* decision, this court has no jurisdiction.

I am constrained to conclude that *Erickson v Idaho Board of Professional Engineers*, __ Idaho __, 203 P.3d 1251 (2009), does apply to this case, and in accordance with the dictates of that decision, I am constrained to conclude that the court has no jurisdiction to hear this administrative appeal.

However, I believe the *Erickson* decision to be wrongly decided, and I suspect that the decision cannot stand. The decision unnecessarily disregards long established administrative practices of triggering action from the date of service of administrative decisions and orders, rather than the date applied to the order or decision itself. I would observe from empirical and pragmatic experience that most agencies do not give much significance to the date placed on the documents that are prepared, but rather concentrate

on the date these documents are actually distributed, both internally and to affected parties. Language in administrative orders universally recite that any appeal time begins with the date of service – not with the date appearing on the order. In the instant case, separate correspondence from the agency advised all parties that the appeal time would run from the date of the correspondence rather than from the date of the order. (The correspondence enclosed a revised certificate of service, prepared to correct a prior error in distribution of the order on reconsideration.) I think it of note here that the agency itself did not raise any question over the timing of the appeal until well after the *Erickson* decision was released.

Were it not for the unmistakable reach of the *Erickson* decision, I would conclude that the determination of when an order or decision of an agency is to be deemed “final” or “issued” within the parameters of Idaho Code § 67-5273(2) is an appropriate executive determination to be made by the agency. I would find as a fact in this case that the actions by the agency itself clearly established that the agency did not consider the orders it promulgated to be “issued” or “final” until the pertinent document was actually placed in distribution to the parties, and that, according to the agency’s own declarations and determinations, this did not occur until a satisfactory mailing of the order to all parties occurred. I would therefore conclude that the petitions in this case were timely filed within 28 days of the date of issuance of the order on reconsideration, that date being July 16, 2008, the date a satisfactory mailing to all parties and entities occurred. However, the *Erickson* decision preempts this conclusion and factual determination, and directs instead that I must observe the date of order as being determinative.

Although I confirm that *Erickson* does control, I have also ruled on the merits in this case as a matter of expediency. This may obviate the need for the parties to pursue a needless loop through the appellate process in order to reach the merits of the case, in the event this decision is appealed and the *Erickson* decision is revised, withdrawn or overturned along the way.

Conclusion

Under the conclusion stated in *Erickson v Idaho Board of Professional Engineers, supra*, the petition for judicial review was untimely filed, and should be dismissed. If the merits of the case are reached, the decision of the Director of the Department of Water Resources as to the applicability of the Ground Water Act in Idaho upon the water rights of the petitioners should be affirmed in all respects. Under either conclusion, costs, but no attorney fees, are awarded to the respondent IDWR and against the petitioner Moyle. No award to the cross-petitioner.

It is so ordered.

Dated this BT day of July 2009.


Senior Judge D. Duff McKee