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In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, 315 P.3d 828 (Idaho 2013)

Peter Almaas

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**In re Distribution of Water to Various Water Rights Held by or for the Benefit of
A&B Irrigation District, 315 P.3d 828 (Idaho 2013)**

due diligence every six years. These applications help ensure that the holder is continuing to work toward completion of the project that initially led to the conditionally decreed appropriation. The water court then publishes the applications, allowing interested parties to contest the continuation of these conditional water rights.

The Court next examined the holdover provision of the WCA. Looking at the plain language of the statute and construing that language according to rules of grammar and common usage, the Court found that the WCA unambiguously allows a director to hold office for the original term, as well as any interim term without limitation, pending the appointment of a duly qualified successor. The Court noted its longstanding position that when a statute provides that an incumbent may remain in office until a successor is duly qualified, the incumbent remains as a de jure officer with all the authority vested in such position. Finding no legislative intent to impose temporal or reasonableness requirements on holdover terms, the Court declined to read either limitation into the statute.

The Court held the water court had erred in its reliance on a standard of reasonableness, rather than the plain language of the holdover provision of the WCA. Accordingly, the Court reversed the water court's decision to cancel Yellow Jacket's conditional water rights and remanded the case for further proceedings.

Gina Tincher

IDAHO

In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, 315 P.3d 828 (Idaho 2013) (holding (i) the Director of the Idaho Department of Water Resources may use a predicted baseline of senior water right holders' needs as a starting point in considering material injury in a water call in both the management and administrative contexts; and (ii) clear and convincing evidence is the proper evidentiary standard to meet the burden of proof for material injury).

In January 2005, senior surface water rights holders ("Coalition") initiated a delivery call alleging they had suffered material injury due to pumping by junior groundwater rights holders ("Groundwater Appropriators"). The basin serving water rights holders in this matter is of a hydrological character that groundwater pumping will have an effect on surface flows. In response to the delivery call, the Director of the Idaho Department of Water Resources ("Director") issued an initial order that described the methodology used to determine whether the senior rights holders had suffered material harm. In May 2005, the Director issued an amended order that emphasized that material injury only exists if a senior rights holder lacks sufficient water to meet its authorized beneficial uses and that this amount may differ from the total decreed or licensed right. Later in May 2005, the Director granted the City of Pocatello ("City") leave to intervene. Subsequent to the amended order, the Director issued three supplemental orders refining the methodology to calculate material harm. In April 2008, a hearing officer reviewed the Director's orders and issued an opinion and recommendation that noted the use of a baseline was a departure from the

practice of recognizing a call at the level of the licenses or decrees, and called for improvements to the methodology to make it more responsive to actual conditions. The Director adopted most of the findings of the hearing officer, but retained the baseline methodology in a September 2008 final order.

The parties petitioned the district court for judicial review of this. The district court reviewed the final order and determined that although the Director had erred on several points, the use of a baseline methodology to determine material injury was acceptable. The district court also noted that the proper evidentiary standard to evaluate material injury is the clear and convincing evidence standard. However, the Director had abused their discretion by failing to determine a methodology for material injury to reasonable in-season demand and carryover. The district court remanded the matter to the Department, and ordered the agency to produce a final order determining material injury to reasonable in-season demand and reasonable carryover. Upon issuance of the final order by the Department, the district court ruled that the abuse of discretion had been absolved through compliance with the district court's order. The Coalition appealed to the Idaho Supreme Court to review the district court's affirmation of the Director's baseline model. Groundwater Appropriators and the City also appealed on the evidentiary issue.

The district court described the methodology as using a baseline quantity independent of the decreed quantity derived from predicted flow and storage needed and using deviations from the baseline to calculate material damages. The Coalition argued the use of any baseline methodology that must predict the amount of water a senior appropriator requires to meet beneficial needs is contrary to the doctrine of prior appropriation. The Coalition stated that a decreed or licensed water right creates a presumption that the beneficial use defines the full extent of the right.

The Court noted that the water rights involved in this matter were not in dispute, making this an issue of water management rather than water rights. Idaho uses the prior appropriation framework for water rights and had previously adjudicated the water rights of the Snake River basin. Even though water rights are not at the center of the dispute, the Court has held that the director must conduct management and administration with the basic tenets of the prior appropriations doctrine in mind. The Idaho legislature granted the Director power to manage the distribution from water sources in accordance with the priorities of the rights of the users thereof. The Court recognizes that the legislature vested the Director with the discretion to implement a water allocation plan. The purpose of granting discretion to the Director in this matter is to resolve the tension between the absolute right to use a decreed water right and the obligation to avoid waste and protect an important public resource. The Court concluded that the use of a baseline methodology in the management context is consistent with Idaho law.

The administrative context presented a more challenging issue to the Court. The Director used the baseline methodology as a starting point for considering the Coalition's call for administration and for determining the issue of material injury. The Director may, under Conjunctive Management ("CM") Rule 42, consider factors relating to material waste in the context of water rights. The

Court extended the power to consider these factors to water rights administration. The Court stated that preventing the Director from considering whether a senior rights holder is putting their water to beneficial use would be to ignore the constitutional requirement that only to those using the water enjoy priority over the water. The Court also noted that the Director has discretionary authority in water management and administration cases that is not available in a water rights case. The Court reasoned that reasonableness is not an element of a water right, so evaluation of whether a diversion is reasonable in the administration context should not be a re-adjudication. The application of established evidentiary standards, legal presumptions, and burdens of proof tempers the Director's discretion. The senior rights holder is not required to prove their entitlement to the water. The rules do allow the Director to use various tools, including baseline methodology, to determine how diversion can impact other water sources.

Groundwater Appropriators and the City argued there is no basis in Idaho law to require use of the clear and convincing evidence standard as opposed to the preponderance of the evidence standard. They both requested the establishment of the preponderance of the evidence standard as the appropriate standard. The Court readily dispensed with the evidentiary issue by citing *A&B Irr. Dist. v. Idaho Dep't of Water Resources*, stating a longstanding rule that clear and convincing evidence must support changes to a decree. The Court saw no reason to change this established precedent.

The Court concluded the Director had authority to use a baseline methodology to determine whether to initiate administrative proceedings or to manage the water resources. The Court also concluded that the district court had applied the correct evidentiary standard. The Court therefore affirmed the district court ruling, and allowed the Director to proceed with the water management and administration plan.

Peter Almaas

MONTANA

Heavirland v. State, 311 P.3d 813 (Mont. 2013). (holding (i) Montana case law applies retroactively in determining sufficiency of evidence rebutting the presumption of abandonment of water rights founded on a prolonged time of non-use, and (ii) claimants provided sufficient evidence to defeat the presumption of abandonment and excuse twenty-four years of nonuse of irrigation rights).

Frank Truchot filed and perfected the subject water right in 1904. Under this right, Truchot diverted water from Muddy Creek for irrigation. Christina and Henry Weist purchased the water right in 1913. Their son, Ray Weist, took over the farm and continued to utilize the water right for flood irrigation, when available, from the mid-1940's until 1961. Utilization of the right was particularly difficult because of the slope and heavy clay soil of the Weists' fields. Ray stopped irrigating in 1962. His son, Lyle, stated that his father's age and the inefficiency of flood irrigation were the reasons Ray stopped irrigating. Lyle also testified that Ray had three-phase power connected to the farm to accommodate potential future pivot irrigation.