

9-1-2012

## A & B Irrigation Dist. v. Idaho Dep't of Water Res., 284 P.3d 255 (Idaho 2012)

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Accordingly, the appeals court affirmed the judgment of the trial court in favor of Mesa Land Trust, requiring the Allens to convey the Big Creek shares to their purchaser along with the land.

*Winslow Taylor*

## IDAHO

**A & B Irrigation Dist. v. Idaho Dep't of Water Res., 284 P.3d 225 (Idaho 2012)** (holding that the district court did not err in holding (i) the Ground Water Act applied to the administration of appellant's water right; (ii) the Director had sufficient evidence to support his decision not to set a reasonable groundwater pumping level; (iii) the Director could force appellant to interconnect prior to filing for a delivery call; and (iv) a clear and convincing evidence standard was proper when a court analyzes the Director's determinations).

This was an appeal of the District Court of Minidoka County's ("district court") decision regarding the Director of the Idaho Department of Water Resources' ("Director") application of the Rules for Conjunctive Management of Surface and Groundwater Resources ("CM Rules") to a groundwater delivery call filed by A & B Irrigation District ("A&B"). A&B acquired water rights on the Snake River in 1948, three years prior to the enactment of the Idaho Ground Water Act ("Act"). The Idaho Department of Water Resources ("IDWR") licensed and authorized A&B to divert 1,100 cfs from 177 points of diversion in order to irrigate approximately 62,000 acres in south-central Idaho.

Underlying the A&B project is the Eastern Snake Plain Aquifer ("ESPA"), which serves as the Minidoka Project's ("project") water source. A&B's delivery call petition sought an administration of junior-priority groundwater rights from the ESPA and a designation of the ESPA as a groundwater management area ("GWMA"). The delivery call petition alleged that junior-priority groundwater pumping from the ESPA lowered the water table an average of twenty feet, resulting in a 126-cfs reduction in A&B's diversion rate.

Citing a lack of material injury, the Director denied A&B's request to designate the ESPA as a GWMA. Moreover, the Director concluded, A&B had an obligation to take reasonable steps to maximize the use of interconnection to move water within the system before seeking curtailment or compensation from junior appropriators. The Director also noted that while conditions in the southwest area make recovery of water from the wells difficult, it is not a proper justification for curtailment. Further, A&B did not need to exceed reasonable pumping levels.

In response, A&B filed a petition for review with the district court. The district court affirmed the Director's findings on all of A&B's claims except for the standard the Director applied to whether or not A&B suffered a material injury. Therefore, the district court remanded the proceedings with an instruction to apply the clear and convincing evidence standard.

A&B then appealed to the Idaho Supreme Court alleging: (i) the Director erred in concluding that A&B's water right is subject to the Act; (ii) the Director erred in finding that A&B did not need to exceed reasonable pumping levels, even though the Director did not provide a specific level; (iii) the Direc-

tor erred in applying the CM Rules to find that A&B must interconnect wells or well systems across the project before filing a delivery call; and (iv) the district court erred in imposing the clear and convincing evidence standard.

Citing a line in the Act that states, “[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment,” A&B argued the Act unambiguously does not apply to their water right because it has a priority date that predates the Act. The district court had examined the Act in its entirety and found that the legislature intended a distinction between the “right to the use of ground water” and “the administration of all rights to use of ground water.” On appeal, the Idaho Supreme Court agreed and held that Section 4 of the Act provided “the administration of all rights to the use of ground water, whenever or however acquired, shall, unless specifically excepted therefrom, be governed by the provision of this act.” The Court, after relying on precedent for emphasis, held that a plain reading of the Act shows that the Act applies to the administration of all groundwater rights in Idaho, and therefore applied to A&B’s water right.

The Court next focused its analysis on the district court’s ruling that the Director failed to establish a reasonable groundwater pumping level, and also that the Act gave the Director discretion to determine whether to establish groundwater levels in conjunction with a delivery call. The Court noted groundwater pumping levels were never historically an element of a water right. The Court held a plain reading of the duties of the Director showed he has a duty to respond to a delivery call and determine whether the right holder suffered an injury, but not to establish a reasonable groundwater pumping level.

A&B next argued Idaho law did not require that it interconnect its separate points of diversion as a condition to administering junior priority groundwater rights. A&B claimed the mandate as unconstitutional, the Director’s actions contradicted the language of A&B’s water right decree, there was no mention in the CM Rules of a need to interconnect, and interconnection would not solve the problem of diminished groundwater supply. The Court rejected each of these arguments in turn by deferring to the Director’s discretion.

Finally, A&B argued the district court erred in applying the clear and convincing evidence standard of review because Idaho law did not support this higher evidentiary standard. The Court examined a variety of case law on the matter and concluded that it is a longstanding rule in Idaho that a junior appropriator in a water delivery call must offer proof of no-injury by clear and convincing evidence and that all changes to an existing decree must also be supported by clear and convincing evidence. The Court therefore affirmed the district court’s ruling on that issue.

The Court ultimately held the Act applied to A&B’s water right; the Director did not need to provide a specific reasonable groundwater pumping level; the Director was entitled to force A&B to interconnect before a delivery call; and the district court did not err in applying a clear and convincing evidence standard. Affirmed.