

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

**IN THE MATTER OF THE BANBURY )  
HOT SPRINGS GROUND WATER )  
MANAGEMENT AREA )  
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**FINAL ORDER AMENDING ORDER  
STAYING APPROVAL OF  
APPLICATIONS AND SUSPENDING  
FURTHER DEVELOPMENT OF  
PERMITS TO APPROPRIATE  
GROUND WATER**

On April 12, 1983, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) designated an area in Twin Falls County as the Banbury Hot Springs Ground Water Management Area (“BGWMA”) pursuant to Idaho Code § 42-233b. The Department created the BGWMA because the artesian pressure in the thermal (low temperature) ground water aquifer underlying the BGWMA was declining.

On December 4, 1985, the Director of the Department issued an order staying approval of any pending applications for permit to appropriate ground water within the BGWMA and suspending any further development under existing permits to appropriate ground water within the BGWMA as of the date of service of the order (“1985 order”). The 1985 order stayed approval of applications until further order by the Director.

The 1985 order did not provide for the appropriation of ground water within the BGWMA in situations where it can be demonstrated that the appropriation would not increase depletions from the aquifer and would not increase pumping lift or decrease pressure or temperature for uses under existing prior rights.

IDWR has received reports of continued pressure drops in some wells in the BGWMA and received some informal requests to address pumping by new domestic wells.

**FINDINGS OF FACT**

1. IDWR continues to monitor temperature and pressure of several wells in the BGWMA since the 1985 order. Hydrologic data from five of the six active monitoring wells indicate that artesian pressure in wells completed in the low temperature geothermal aquifer, located in the BGWMA, show declines of 20 to 75 feet over the past 25 years.

2. Artesian pressure in the low temperature geothermal aquifer underlying the BGWMA continues to decline. The data supports a conclusion that the ground water withdrawals are exceeding the average annual rate of recharge.

3. Existing water right holders rely on the low temperature geothermal aquifer's pressure for delivery of water to the right holders' facilities.

4. The Department has issued drilling permits, both by written approval and by start cards, for domestic uses as defined by Idaho Code § 42-111, within the BGWMA. Low temperature geothermal water is diverted from some of the wells constructed under these domestic drilling permits.

### **CONCLUSIONS OF LAW**

1. Idaho Code § 42-226 states, in part:

Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department as herein provided. In determining a reasonable ground water pumping level or levels, the director of the department 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.

2. Idaho Code § 42-1805 (7) authorizes the Director to suspend the issuance or further action on permits or applications to appropriate water as necessary to protect existing water rights.

3. IDAPA Rule 37.03.08055 (Water Appropriation Rule 55) authorizes the Director to cease approvals of applications and undeveloped permits in a designated geographical area upon finding a need to protect existing water rights.

4. It is in the public interest to protect the low temperature geothermal resource in the BGWMA.

### **The Effect of the Stay and Suspension of Further Development on Domestic Uses**

5. Idaho Code § 42-229 states:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 – 42-225, Idaho Code, may be completed under the provisions of said sections and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.

6. Idaho Code § 42-227 states:

The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

7. Idaho Code § 42-229 and Idaho Code § 42-227 were enacted in 1951. Idaho Code § 42-229 was subsequently amended in 1963 and Idaho Code § 42-227 was subsequently amended in 1970, 1978, and 2001.

8. Idaho Code § 42-111 defines domestic use as follows:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

9. Idaho Code § 42-233 states in part:

(1) The right to the use of low temperature geothermal resources of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; (iii) the exemption is in the public interest.

10. Idaho Code § 42-233 was enacted in 1987 and amended in 1988.

11. Idaho Code § 42-229 requires a prospective appropriator of ground water to file an application for and obtain a water right prior to beneficially using water in the state of Idaho. Idaho Code § 42-233 separately and specifically requires a prospective appropriator in the state of Idaho to file an application for and obtain a water right prior to beneficially using low temperature geothermal water in the state of Idaho.

12. Idaho Code § 42-227 expressly exempts domestic ground water uses, as defined by Idaho Code § 42-111, from the water right filing requirements of Idaho Code § 42-229. Idaho Code § 42-227 does not include an exemption from the requirement under Idaho Code § 42-233 to file an application for permit when appropriating low temperature geothermal water for domestic purposes.

13. To the extent these statutes may be viewed in conflict, they should be read, so far as reasonably possible, to be construed in harmony with each other. To the extent the statutes deal with a common subject matter, the statute containing the more detailed and specific language relating to a particular matter will prevail. To the extent there is an irreconcilable inconsistency between statutes, the most recent legislative expression will control.

14. Low temperature geothermal ground water is a subset of the larger ground water resource described by Idaho Code § 42-229. Applying the previously stated principles of statutory construction, Idaho Code § 42-233 defines a process for appropriating low temperature geothermal ground water that is separate from Idaho Code § 42-229. As a result, the requirements of Idaho Code § 42-233 are not subsumed by Idaho Code § 42-229.

15. Idaho Code § 42-227 exempts only domestic ground water uses proposed under Idaho Code § 42-229. Idaho Code § 42-227 does not exempt prospective appropriators of low temperature geothermal ground water for domestic uses from the application and water right requirements of Idaho Code § 42-233. A domestic ground water right from low temperature geothermal ground water cannot be perfected by beneficial use, but must be established by the filing of an application with the Department and subsequent approval by the Department as a water right.

16. Idaho Code § 42-1805 (7) authorizes the Director to suspend the issuance of permits or actions on applications to appropriate water as necessary to protect existing water rights. Low temperature geothermal ground water rights must be established by an approved permit, and the Director has the authority to refuse to process applications to appropriate low temperature geothermal water for domestic use.

17. Idaho Code § 42-235 states in part:

Prior to beginning construction of any well or changing the construction of any well, the driller or well owner shall obtain a permit from the director of the department of water resources to protect the public health, safety and welfare and the environment...

18. Idaho Code § 42-231 states, in part:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

19. To protect the artesian pressure of the low temperature geothermal aquifer underlying the BGWMA, the Director should not approve drilling permits for any purpose in the BGWMA, including domestic use, unless the applicant for a drilling permit holds a water right authorizing diversion of low temperature geothermal water from a point of diversion at the proposed well site.

20. Owners of domestic wells diverting water from the low temperature geothermal aquifer that were constructed prior to this order without a water right should be entitled to seek a water right for the existing domestic use as defined by Idaho Code § 42-111.

## **ORDER**

IT IS HEREBY ORDERED, pursuant to Idaho Code § 42-1805(7) and IDAPA Rule 37.03.08055 (Water Appropriation Rule 55), that the order dated December 4, 1985, staying approval of any pending applications for permit to appropriate ground water within the BGWMA and suspending any further development under existing permits to appropriate ground water within the BGWMA is superseded by this amended order.

IT IS FURTHER ORDERED that approval of any application for permit to appropriate low temperature geothermal water within the BGWMA, including the appropriation of low temperature geothermal ground water for “domestic purposes” under Idaho Code § 42-111, is stayed with the exceptions provided below.

IT IS FURTHER ORDERED that the Department shall not issue drilling permits for domestic purposes as defined by Idaho Code § 42-111, or for any other purpose, to construct or modify a well proposing, or resulting in, a production zone within the low temperature geothermal aquifer underlying the BGWMA unless the proposed construction is for a well described as a point of diversion by a valid water right or water right permit authorizing the appropriation of low temperature geothermal ground water.

IT IS FURTHER ORDERED that pending and future applications to appropriate ground water within the BGWMA will be rejected unless information is provided to demonstrate the use: a) will not increase depletions from the low temperature geothermal aquifer; b) will not increase pumping lift or decrease pressure of existing prior users; and c) will not reduce temperature to existing users causing systems operating at reasonable efficiencies to no longer operate. In addition, pending and future applications will not be rejected if they meet one of the domestic exceptions provided below.

IT IS FURTHER ORDERED that the Department shall process and consider, and may approve, applications to appropriate water for domestic use of low temperature geothermal ground

water underlying the BGWMA from owners of existing domestic wells whose use satisfies the limitations of Idaho Code § 42-111, if the well was constructed and used prior to the date of this order.

IT IS FURTHER ORDERED that the Department shall process and consider, and may approve, applications to appropriate water for domestic use of low temperature geothermal ground water underlying the BGWMA from owners of existing domestic wells or future wells whose use satisfies the limitations of Idaho Code § 42-111 and the following:

1. Domestic use is limited to in-house culinary or potable use for 1 house and may include heating of the house and ancillary buildings as long as all water used for heating is maintained in a closed loop system and the water is returned/injected into the same source aquifer at similar pressure and depth. This may be accomplished by injection of spent water in the diversion well or separate injection well.
2. Domestic use shall not include irrigation.
3. Injection of spent heating water shall be pursuant to a separate injection well permit. Prior to injection a prospectus of the injection plan shall be reviewed and approved by IDWR during the injection well permitting process.

IT IS FURTHER ORDERED that the Department shall serve a copy of this order upon holders of pending applications proposing appropriation of ground water in the BGWMA and shall publish notice of this order as required by IDAPA Rule 37.03.08055 (Water Appropriation Rule 55).

IT IS FURTHER ORDERED that this order shall be effective on August 30, 2011 and shall remain in effect until withdrawn or modified by order of the Director. A petition for reconsideration or exceptions to this order must be filed with the Department on or before September 13, 2011. Any person aggrieved by this order may request a hearing on or before September 14, 2011 as authorized by Idaho Code § 42-1701A. Remedies following issuance of a final order are further explained in the enclosure to this order.

Dated this 4<sup>th</sup> day of August, 2011.

  
GARY SPACKMAN  
Interim Director