BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION SEEKING TO ESTABLISH A MORATORIUM ON THE APPROVAL OF PERMITS TO APPROPRIATE WATER FROM THE RATHDRUM PRAIRIE AQUIFER	)	**PRELIMINARY ORDER**

This matter has come before the Idaho Department of Water Resources ("Department") as a petition ("the petition") seeking the establishment of a moratorium on the approval of permits to appropriate water from the Rathdrum Prairie Aquifer ("the aquifer"). After holding public meetings and receiving written public comment, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. The following organizations submitted a letter on March 19, 2002, petitioning the Department to establish a moratorium on approval of permits to appropriate water from the aquifer:

Idaho Conservation League
The Lands Council
Kootenai Environmental Alliance
Sierra Club

Appended to the letter were petition forms signed by approximately 950 people asking for a moratorium on the approval of applications to appropriate water from the Rathdrum Prairie Aquifer for "heavy industrial uses" and specifically exempting diversions for domestic, municipal and agriculture purposes withdrawing less than 2 cubic feet per second ("cfs"). The letter also requested that consideration be given to designating the aquifer as either a ground water management area or a critical ground water area.

2. On September 17, 2002, two meetings were held in Hayden, Idaho, to obtain public comment on the moratorium request. Approximately 75 people attended the

meetings, and 38 of those attending, including representatives of each of the petitioning organizations, provided oral comment. The record was left open for 10 days following the meeting to receive written comment and, in response to a request from the City of Post Falls, the written comment period was extended through October 11, 2002. Over 150 letters, including email, were received commenting on the petition to establish a moratorium. Nearly all of the comments supported increased management of the aquifer to protect existing water rights and the public interest in the present and future use of the resource. However, the actions recommended to increase management were varied, particularly regarding the need for a moratorium and its nature and extent.

3. Those favoring establishment of the moratorium cite the following reasons:

- Insufficient technical information is available at this time to allow further commitment of the resource. Decisions concerning further use of water from the aquifer should be delayed until a comprehensive study of water availability and present use from the aquifer is completed.

- Domestic and municipal uses should have priority for use of the water. Large industrial, commercial and agricultural uses should not be allowed until an adequate supply of water is assured for present and future domestic and municipal uses.

- Conservation programs should be implemented to optimize the present use of water thereby foregoing or at least reducing the need for new withdrawals.

- The aquifer may already be over-allocated or is approaching a condition of being fully allocated.

- Because the aquifer extends from Idaho into Washington, time is needed to develop a bi-state cooperative management approach.

- Economic development in other areas with moratoriums or other restrictive designations has not been affected because existing, undeveloped permits can be used or existing vested rights can be changed to provide water needed for new uses.

4. Those opposing establishment of the moratorium cite the following reasons:

- The available information indicates that the water supply in the aquifer is adequate for present and new uses for the foreseeable future.

- The statutorily prescribed conditions necessary for establishing a moratorium do not exist at this time.

- Imposition of a moratorium would stall economic development because of the difficulty and expense of obtaining needed water supplies for new and

expanded uses and because of the challenge of attracting and retaining business entities in an area perceived to be water short.

- The moratorium would unfairly stop economic development in Idaho while not preventing growth from occurring in Washington using water from the aquifer.

- If established, a moratorium should be limited in duration, scope and nature; i.e., it should: (1) not apply to the filing of applications but only to the issuance of permits; (2) not apply to applications pending prior to the petition or, alternatively, the order establishing the moratorium; and (3) apply only to certain uses such as large consumptive uses, heavy industrial or long-term municipal needs, etc., but not to other uses such as small, non-consumptive uses, domestic, immediate needs for municipal, etc.

5. On September 30, 2002, the Department received a petition seeking to intervene from the City of Post Falls.

6. The Spokane Valley-Rathdrum Prairie aquifer is a thick layer (as much as 600 feet) of coarse sediments (gravels, cobbles, and boulders) deposited by catastrophic flooding associated with the rapid draining of ancient lakes when ice dams broke. This geologic feature extends southwest from the southern end of Lake Pend Oreille in northern Kootenai County, Idaho, past the Washington-Idaho border and then west towards Spokane, Washington, covering an area of about 320 square miles of which approximately 200 square miles are in Idaho. (Ref. Spokane Valley-Rathdrum Prairie Aquifer Atlas, 2000) The portion of the aquifer located in Idaho is herein called the "Rathdrum Prairie Aquifer" or "the aquifer" (see Attachment A). Ground water within the aquifer occurs under unconfined, non-artesian conditions. The top of the saturated surface within the aquifer (the water table) is lower than the surface elevation of all of the lakes and the reach of the Spokane River located within Idaho. Hence, ground water is not tributary to surface water within Idaho, but is tributary to the Spokane River and tributaries in Washington beginning at a point about five to seven miles west of the state line.

7. Development of surface and ground water for consumptive uses from areas in Idaho up gradient from the aquifer is limited and has not significantly reduced water availability in the aquifer.

8. Existing development in Idaho relying upon water from the aquifer has a total recorded diversion rate of about 610 cfs and consumptively uses an estimated 251 cfs (Chapman, 2001). Recharge to the aquifer in Idaho may be as much as 1450 cfs (Thomas, 1963) or as little as 571 cfs [320 cfs underflow leaving Idaho (Buchanan, 1994) plus consumptive use of 251 cfs in Idaho (Chapman, 2001)]. Hydrographs do not indicate that there are long-term water level declines associated with ground water use. However, short-term fluctuations due to changes in annual precipitation may mask long-term water level declines.

9. The Department's electronic data base lists twenty-five applications seeking to appropriate a total diversion rate of about 44 cfs of water from the aquifer. Sixteen of the applications seek less than 2 cfs, while the rate sought by the other nine applications totals 38.5 cfs. The additional consumptive use resulting from full development of the uses requested in these applications is estimated to be about 20 cfs. This estimate is based upon the ratio of consumptive use to recorded diversion rate evidenced in the study referenced in Finding of Fact no. 7 (Chapman, 2001).

10. Increased water use will not increase losses from Spokane River in Idaho because that reach of the river is perched above the aquifer. Consumptive use from irrigation and other uses may reduce gains to the Spokane River in Washington and the Little Spokane River, which receive discharge from the aquifer. There appears to be a long-term decline in gains to the Spokane River based upon records from 1950 to 1994. Changes in gains to the rivers caused by increased diversions and consumptive use appear to be insignificant in comparison to changes resulting from variations in annual precipitation.

11. License No. 95-08780 has been issued by the state of Idaho for a minimum stream flow of 2495 cfs in the Spokane River in the reach between Post Falls Power Dam and the Idaho-Washington state line.

12. Statements from representatives of the state of Washington Department of Ecology indicate that the state of Washington is not at the present actively processing new permits from the aquifer, but it may resume doing so when an on-going planning study is completed. There is no assurance that the state of Washington will delay processing of applications until a joint study of the aquifer is completed. Statements from representatives of the state of Washington Department of Ecology, indicate that a significant, but unquantified amount of new development can occur under existing permits.

13. Because of the uncertainty of funding, it is not clear that a new, comprehensive study of the aquifer will begin in the near term.

14. A moratorium on issuance of permits for new consumptive uses is not required at this time to protect existing water rights, to comply with the allocation and administration requirements of Idaho law or to protect established minimum stream flows. The conditions required to designate the aquifer as a critical ground water area do not exist at this time, but such conditions could be approached without increased management of withdrawal and use of water from the aquifer.

15. Designation of the aquifer as a ground water management area will aid in administration of the aquifer to protect prior rights, prevent the aquifer from becoming a critical ground water area, and will allow development of a ground water management plan to be adopted by the Director. Holders of water rights, applicants seeking water permits and others interested in the management of the aquifer should have the opportunity to assist in preparation of the management plan.

CONCLUSIONS OF LAW

1. Rule 353 of the "Rules of Practice and Procedure of the Department of Water Resources," IDAPA 37.01.01 provides for granting intervention.

2. Section 42-1805, Idaho Code, provides, in part, that:

> **Additional duties.** – In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:
>
> ....
>
> (7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

3. Rule 55 of the Department's Water Appropriation Rules, IDAPA 37.03.08, implements the provisions of Section 42-1805(7), Idaho Code, with respect to applications and permits to appropriate water. Subsection 01 of Rule 55 provides as follows:

> **01. Applications for Permit.**
>
> a. The director may cease to approve applications for permit in a designated geographical area upon finding a need to:
>
> i. Protect existing rights;
>
> ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and
>
> iii. Prevent reduction of flows below a minimum stream flow which has been established by the director or board pursuant to applicable law.
>
> b. Notice of the director's action to cease application approval will be by:
>
> i. Summary Order served by certified mail upon the then existing affected applicants; and
>
> ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.
>
> c. Objections to the director's action shall be considered under the department's adopted Rules of Procedure and applicable law.

4. Section 42-233a, Idaho Code, provides for designation of all or part of a ground water basin as a critical ground water area if the Director determines that the ground water supply is not sufficient to provide a reasonably safe supply for irrigation or other uses existing in the basin and for valid and outstanding applications and permits.

5. Section 42-233b, Idaho Code, provides for designation of a ground water management area if the Director determines that conditions may be approaching those of a critical ground water area and authorizes the Director to approve a ground water management plan for the area. The plan shall provide for managing the effects of ground water withdrawals on the aquifer and on hydraulically connected sources of water.

6. Article XV, Section 3, of Idaho's Constitution, provides that: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water...."

7. Because Idaho water law is governed by the principle of first in time is first in right, a moratorium cannot prevent the filing of applications and cannot provide for selective processing of applications based upon considerations other than priority.

8. The conditions required for placing a moratorium on approval of new permits from the aquifer or designating the aquifer as a critical ground water area do not now exist.

9. The aquifer should be designated as a ground water management area to provide the statutory basis for adoption of a ground water management plan ("management plan").

10. A management plan should be adopted to guide the allocation and use of water from the aquifer.

ORDER

The petition to intervene in this proceeding filed by the City of Post Falls is hereby granted.

The petition seeking to establish a moratorium on the approval of permits seeking to withdraw water from the Rathdrum Prairie Aquifer is hereby denied.

The Rathdrum Prairie Aquifer is **hereby designated as a ground water management area** to be known as the Rathdrum Prairie Ground Water Management Area ("RPGWMA") encompassing the area denoted on Attachment A, which is hereby incorporated as a part of this order.

Management of water appropriations within the RPGWMA shall be guided by a management plan adopted by the Director. An advisory committee of representative water users and citizen group interests will be selected to assist in drafting the management plan. The matters considered in preparation and adoption of the management plan will include the following:

1. Identification of requirements and conditions needed to protect existing water rights and the interests of the public as applications for new consumptive uses from the aquifer are considered.
2. Evaluation of the need for policies to encourage development and use of water supply systems to provide water for multiple ownership subdivisions rather than individual wells for each residence or business.
3. Identification of appropriate requirements for measuring and reporting of water withdrawals by new and existing uses from the aquifer, including the need for a water measurement district to operate in accordance with Chapter 7, Title 42, Idaho Code.
4. Assessment of the need for identification and quantification of existing rights from the aquifer and the implementation of programs to administer diversion and use of water to prevent unauthorized uses.
5. Assessment of the need for development and implementation of a program to encourage conservation of water diverted and used from the aquifer.
6. Identification of actions needed to coordinate management of the aquifer with the state of Washington.
7. Development of strategies to provide for studies and data gathering programs to better understand and monitor the aquifer.
8. Consideration of the need and opportunities for conducting managed recharge of the aquifer.

The Rathdrum Prairie Ground Water Management Area Advisory Committee is hereby created with the following membership and responsibilities:

1. Committee membership: two (2) members from Idaho representing the petitioning organizations, two (2) members representing municipalities or municipal providers located within the RPGWMA; two (2) members representing counties included within the RPGWMA (Kootenai County and Bonner County), and three (3) members representing irrigation/commercial/industrial uses within the area. The Department will ask for nominations from the various entities and the public as the committee is formed. The Director or his designee will chair the advisory committee meetings.

2. Responsibilities: the advisory committee will meet at the call of the Director at a location in RPGWMA to provide guidance in the preparation of a management plan. The members or the entities they represent are responsible for the costs and expenses incurred by the members in attending the meetings and otherwise serving on the committee.

Processing of applications now pending and those received after the date of this order shall continue, provided that any approval issued prior to adoption of the management plan shall be conditioned to require compliance with the management plan adopted by the Director.

Notice of the ground water management area designation shall be given as provided in Section 42-233b, Idaho Code.

DATED this 11TH day of December, 2002.

Norman C. Young
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 11TH day of December, 2002, I mailed a true and correct copy of the foregoing Preliminary Order on the following persons listed below by U.S. Mail, postage prepaid, and addressed as follows:

Idaho Conservation League
P.O. Box 844
Boise, Idaho 83701

Kootenai Environmental Alliance
P.O. Box 1598
Coeur d'Alene, Idaho 83816

The Lands Council
921 W. Sprague, Suite 205
Spokane, Washington 99201

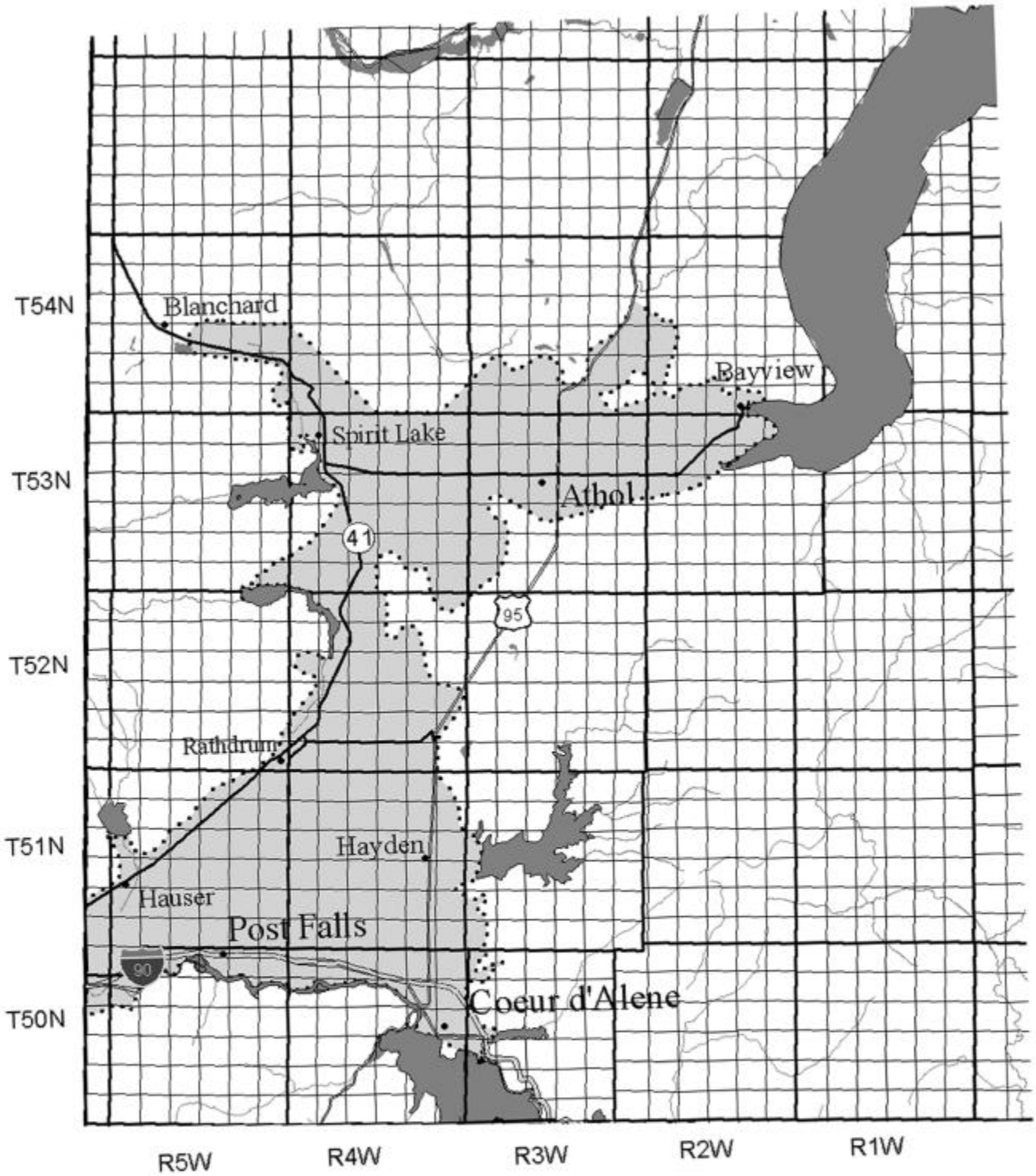
Sierra Club, Inland Northwest Office
10 N. Post St., Suite 447
Spokane, Washington 99201

City of Post Falls
Jerry Mason, City Attorney
250 Northwest Blvd, Suite 204
Coeur d' Alene, Idaho 83814

Victoria Wigle
Assistant to the Director

Attachment A

Rathdrum Prairie Ground Water Management Area



Legend

- Rathdrum Prairie GWMA Boundary
- State Boundary
- Township Line
- Section Line

Prepared by:

Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706
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N

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