

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE BIG WOOD RIVER)	ORDER ESTABLISHING
GROUND WATER MANAGEMENT AREA)	MORATORIUM
_____)	

BACKGROUND AND FINDINGS OF FACT

Beginning January 22, 1980, the Idaho Department of Water Resources (“Department”) has viewed surface water in the Big Wood River and tributaries upstream from Magic Dam to be fully appropriated.¹ Consequently, since 1980 the Department has not approved applications to appropriate surface water for unmitigated consumptive uses from the Big Wood River and tributaries upstream from Magic Dam. For decades, surface water rights in this area have been organized into water districts and administered by priority. Currently, the watermasters of Water District 37 (Big Wood River, Little Wood River, and Silver Creek and their tributaries) and Water District 37B (Camas Creek and its tributaries) address water supply shortages by curtailing junior surface water rights to satisfy senior surface water rights. Administration of surface water deliveries by priority occurs in WD37 and WD37B every year.

On June 28, 1991, the Department issued an order designating the Big Wood River Ground Water Management Area (“BWRGWMA”) (“Designation Order”).² The BWRGWMA includes that portion of the Big Wood River drainage upstream from Magic Dam, including the Camas Prairie aquifer system. The BWRGWMA also includes the upper Silver Creek drainage in the vicinity of Picabo, Idaho. A map of the geographical area of the BWRGWMA is attached to this order as Appendix 1. The Designation Order states the need for management of ground water use in the BWRGWMA in the following two Findings of Fact:

1. The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.

....

4. Injury could occur to prior surface and ground water rights including the storage right in Magic Reservoir if the flows of streams, rivers and ground water underflow

¹ See Memorandum from C. Stephen Allred, Director, Idaho Dep’t of Water Res., to Staff (Jan. 22, 1980) (Re: Big Wood River Appropriations), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Application-Processing-Memo-20.pdf>.

² See Order, *In re Designating Big Wood River Ground Water Mgmt. Area* (Idaho Dep’t of Water Res. June 28, 1991), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1991/19910628-Big-Wood-River-GWMA-Order.pdf>.

in the Big Wood River Basin are intercepted by junior priority ground water diversions.

Designation Order at 1 (Findings of Fact).

To address the potential for injury to prior surface and ground water rights from ground water pumping, the Department adopted a management policy for the BWRGWMA (“Management Policy”).³ The Management Policy includes the following directives:

Most consumptive use applications will be denied unless the applicants can demonstrate there will be no injury or can provide acceptable mitigation to prior rights.

The department will continue to consider the approval of applications for permit which propose non-consumptive uses, municipal uses, stockwater and domestic uses as defined in Section 42-111, Idaho Code.

Management Policy § III, at 3–4.

In accordance with the Management Policy, since 1991 the Department has restricted the issuance of permits for new unmitigated consumptive uses of ground water within the BWRGWMA.

In 1993, the Department established a moratorium on new appropriations of surface and ground water in an area that includes administrative basin 37, where the BWRGWMA is located (“ESPA Moratorium”).⁴ However, paragraph 8 of the order section of the ESPA Moratorium states that it “does not change or affect the administration of any area that has been previously designated as . . . a ground water management area pursuant to Section 42-233b, Idaho Code.” For the BWRGWMA, the effect of the ESPA Moratorium was to limit the development of new consumptive surface water and ground water rights in the portion of the BWRGWMA not limited in 1980 (i.e., the Silver Creek drainage in the vicinity of Picabo).

Since 1991, conditions creating the need to restrict new appropriations of water within the BWRGWMA have not substantially changed. Ongoing monitoring of ground water levels suggests that the 1991 Management Policy restricting new unmitigated consumptive uses of ground water has attenuated the significant long-term downward trends in ground water levels observed during the period of increasing ground water development between the 1950s and 1990.⁵ While

³ See Idaho Dep’t of Water Res., *Management Policy for the Big Wood River Ground Water Management Area* (June 28, 1991), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1991/19910628-Big-Wood-River-GWMA-Order.pdf>.

⁴ See Am. Moratorium Order, *In re Applications for Permits for Diversion & Use of Surface & Ground Water within E. Snake River Plain Area & Boise River Drainage Area* (Idaho Dep’t of Water Res. April 30, 1993), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1993/19930430-Moratorium-ESA.pdf>.

⁵ Allan Wylie, Idaho Dep’t of Water Res., *Summary of Ground Water Conditions in the Big Wood River Ground Water Management Area* 79 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/20190920-Summary-Groundwater-Conditions-Big-Wood-River-GWMA-2019-Update.pdf>.

consumptive use of ground water authorized by water rights developed prior to the 1991 Management Policy continues to exacerbate short-term water level declines during dry years, the restriction on new ground water development appears to have allowed ground water levels to recover during wet years to levels similar to those observed in the early 1990s. If new development of consumptive ground water use is allowed to resume, long-term ground water declines are also expected to resume, resulting in less recovery during wet years and even lower ground water levels in dry years.

Watermasters administer surface water rights by priority every year in the Big Wood River, Little Wood River, and Camas Creek drainages. Surface water in the Big Wood River, Little Wood River, Silver Creek, and Camas Creek is not sufficient to satisfy existing water rights. Consequently, there is little or no additional water for most new consumptive uses.

Hydrogeologic analysis and modeling since implementation of the Management Policy confirm significant interaction between surface water and ground water in the BWRGWMA.⁶ Pumping ground water from within the BWRGWMA affects surface water flows in the Big Wood River drainage upstream from Magic Reservoir and in Silver Creek, a key tributary of the Little Wood River.⁷ Lower ground water levels would result in less aquifer discharge to surface water. New development of consumptive ground water use would reduce the quantity of water available to fill senior surface water rights during times when administration by priority is necessary.

Consequently, the Department has initiated additional measures to manage the surface and ground water rights in the Wood River drainage. In 2013, the Department issued an order to include the administration of ground water rights in Water Districts 37 and 37B.⁸

In 2016, the Department collaborated with the U. S. Geological Survey on a final report documenting version 1.0 of the Wood River Valley Groundwater-Flow Model, which enables the Department to model the impacts of ground water changes on surface water flows.⁹ In 2019, the

⁶ See Memorandum from Jennifer Sukow, Technical Engineer 2, Idaho Dep't of Water Res., to Gary Spackman, Director, Idaho Dep't of Water Res. 25 (2015) ("Subject: Hydrology, hydrogeology, and hydrologic data, Big Wood & Little Wood Water Users Association delivery calls, CM-DC-2015-001 and CM-DC-2015-002"); see also Jennifer Sukow, Idaho Dep't of Water Res., *Groundwater-Flow Model for the Wood River Valley Aquifer System, Version 1.1, Simulated Curtailment of Groundwater Use*, 19 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/projects/wood-river-valley/20190731-Report-WRV-V11CurtailSim.pdf> [hereinafter Version 1.1 Groundwater-Flow Model Simulated Curtailment].

⁷ See *Version 1.1 Groundwater-Flow Model Simulated Curtailment* at 19.

⁸ See Preliminary Order, *In re Proposed Combination of Water District Nos. 37, 37A, 37C & 37M & Inclusion of Surface & Ground Water Rights in Combined Water District; & in re Abolishing Upper Wood Rivers Water Measurement Dist.* (Idaho Dep't of Water Res. September 17, 2013), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2013/20130917-Preliminary-Order-Creating-WD37B-Camas-Creek.pdf>. While captioned as a preliminary order, the order became final and effective when no petitions for reconsideration were filed.

⁹ Jason C. Fisher, James R. Bartolino, Allan H. Wylie, Jennifer Sukow & Michael McVay, U.S. Geological Survey

Department published a final report documenting recalibrated version 1.1 of the Wood River Groundwater-Flow Model.¹⁰

In 2020, the Department formed an advisory committee (“Advisory Committee”) to assist the Department in drafting a new management plan for the BWRGWMA.

In 2021, in response to severe drought conditions causing water supply shortages in the Wood River Basin, the Department curtailed junior ground water rights in the Bellevue Triangle area of the BWRGWMA to increase the supply of water to senior water right holders in the Silver Creek and Little Wood River drainages.¹¹ The Department stayed the curtailment order in response to the ground water users’ mitigation plan.¹²

On May 4, 2022, the Director of the Department adopted a new management plan for the BWRGWMA (“Management Plan”).¹³

The Management Plan (2022) is separate from the Management Policy (1991) and does not affect implementation of the 1991 Management Policy, which functions as a moratorium to restrict new appropriations of water. However, the Advisory Committee recommended that the Department “issue a moratorium order specific to the BWRGWMA” to replace the 1991 Management Policy.¹⁴

On March 30, 2022, the Director received a petition to establish a moratorium order for the BWRGWMA (“Moratorium Petition”). The Moratorium Petition is signed by representatives of Big Wood Canal Company, Big and Little Wood Water Users’ Association, Galena Ground Water District, South Valley Ground Water District, and Water District 37B Ground Water Association. The Department also received a letter on March 5, 2022, from the

& Idaho Dep’t of Water Res., *Sci. Investigations Rep. 2016–5080, Groundwater-flow Model of the Wood River Valley Aquifer System, South-central Idaho 71* (2016), <http://dx.doi.org/10.3133/sir20165080>.

¹⁰ Allan Wylie, Jennifer Sukow, Mike McVay & James Bartolino, Idaho Dep’t of Water Res., *Groundwater-Flow Model for the Wood River Valley Aquifer System, Version 1.1* 39 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/projects/wood-river-valley/20190627-Groundwater-Flow-Model-forthe-Wood-River-Valley-Aquifer-System.pdf>.

¹¹ See Final Order, *In re Basin 37 Admin. Proc.*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. June 28, 2021), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/AA-WRA-2021-001/AA-WRA-2021-001-20210628-Basin-37-Final-Order.pdf>.

¹² See Final Order Approving Mitigation Plan & Staying Curtailment, *In re Basin 37 Admin. Proc.*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. July 8, 2021), https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/AA-WRA-2021-001/20210708-Final-Order-Approving-Mitigation-Plan-Staying-Curtailment_with-COS.pdf.

¹³ The Management Plan is “attached to and incorporated into” the *Order Approving Ground Water Management Plan*. See Order Approving Ground Water Mgmt. Plan at 3, *In re Mgmt. of Ground Water Within Big Wood River Ground Water Mgmt. Area* (Idaho Dep’t of Water Res. May 4, 2022), <https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/big-wood-gwma-advisory-comm/Order-Approving-BWRGWMA-Mgmt-Plan-05042022.pdf>.

¹⁴ *Id.* attach. § VIII, at 12 (Final Big Wood River Ground Water Management Area Management Plan).

City of Bellevue, the City of Hailey, and Sun Valley Co. (“Cities”) stating they “will not oppose” a moratorium order if it is “for a period of three years” and is consistent with the 1991 Management Policy.¹⁵ Significantly, the 1991 Management Policy allows for the issuance of permits for new municipal water uses, with the following limitations:

While an incorporated city has wide latitude under state law to beneficially use water rights for municipal purposes, any new large consumptive use within the municipal limits, such as irrigation of lands not associated with a dwelling, or irrigation of more than on-half acre associated with a dwelling, must be mitigated by the municipality.

Management Policy at 4.

CONCLUSIONS OF LAW

Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, -103, -226.

The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602.

Idaho Code § 42-1805(7) authorizes the Director to suspend the issuance or further action on applications to appropriate water as necessary to protect existing water rights. Further, IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55) states that the Director may establish moratoriums, as necessary, to protect existing water rights.

By adopting a new Management Plan, the Department and the Wood River basin water users intend to reduce the effects of ground water pumping under existing water rights within the BWRGWMA on senior surface water rights. Authorizing new consumptive uses of water within the BWRGWMA will undermine actions to reduce the impact of ground water use on senior surface water rights. For that reason, a moratorium suspending processing of pending and new applications to appropriate surface water and ground water in the BWRGWMA is warranted to protect existing water rights. Such a moratorium will maintain water administration practices in place since 1980 for surface water and 1991 for ground water.

As discussed above, the Cities have requested that the Director exclude municipal water rights from this moratorium order consistent with the 1991 Management Policy. Since the

¹⁵ *See* Letter from Candice M. McHugh, Attorney for City of Bellevue, Michael P. Lawrence, Attorney for City of Hailey & Chris M. Bromley, Attorney for Sun Valley Co. to Tim Luke, Water Compliance Bureau Chief, Idaho Dep’t of Water Res. (March 5, 2022) (Re: Big Wood Ground Water Management Area Management Plan and draft Petition for Water Rights Moratorium), <https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/big-wood-gwma-advisory-comm/Cities-Mgmt-Plan-Comments-Ltr-to-T-Luke-FINAL-w-signatures.pdf>.

Management Policy was adopted in 1991, Idaho courts have acknowledged that a water right for municipal purposes may be fully consumed without exceeding the authorized beneficial use:

The nature of the beneficial use of a municipal right is such that the right can be fully consumed without engaging in waste or violating a beneficial use duty of water The nature of the purpose of use of a municipal right is such that the right can be fully consumed without violating a beneficial use duty of water and without exceeding the authorized scope of the water right.

Mem. Decision & Order at 10, *Riverside Irr. Dist. v. Idaho Dep't of Water Res.*, No. CV14-21-05008 (Canyon Cnty. Dist. Ct. Idaho Dec. 28, 2021).

The 1991 Management Policy also allowed for the issuance of permits for new non-municipal community water systems where each dwelling unit meets the definition of domestic purposes in Idaho Code § 42-111(1):

For purposes of this management policy, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of need to file an application for permit as described above.

Management Policy at 4.

When community systems supply water for outside use, the water used for irrigation of lawns and landscaping is largely consumed, while the indoor water use is largely non-consumptive. Separately quantifying the amount of water used outside and the amount of water used inside is usually difficult and is typically only estimated. Furthermore, a community system often discharges its unconsumed water into a municipal sewer treatment facility operated by a municipality. Sewage disposal methods may include evaporation from the retention facility, land application, or treatment and re-use. Mingling sewage from a community system into a municipal sewage facility may render the community use fully consumptive.

There is little or no additional water in the BWRGWMA for new consumptive uses. Any new water right for municipal purposes has the potential to be fully consumptive, either immediately or as the city grows over time. Because the entirety of the municipal use may become consumptive over time, the Director should not continue the 1991 policy allowing a municipal provider to appropriate water for municipal purposes by applying for a water right permit without mitigation. The same is true for new community water systems. Community water systems that include irrigation are consumptive, and even those that do not include irrigation may be rendered fully consumptive through consumptive wastewater disposal processes. Continuing to issue new municipal water rights and new water rights for community water systems within the BWRGWMA without mitigation would reduce the quantity of water available to supply existing water rights. It is appropriate for the Director to suspend further action on applications to appropriate water for all municipal and community water systems given the variability in consumptive use.

If the Director restricts the appropriation of water for municipal and community domestic use, additional appropriation of water by drilling a domestic well should also be severely limited or prohibited. Potentially significant depletions to ground water sources are ignored when the appropriation of ground water for community water systems, including municipal uses, is prohibited, while at the same time, appropriation of ground water is perfected by the drilling of individual domestic wells, which may cumulatively result in as much or more consumption of ground water than a community system.

However, the Director currently lacks the explicit authority to restrict the appropriation of ground water by the drilling of individual domestic wells. Idaho Code § 42-227 exempts the drilling of wells for domestic purposes, as defined in Idaho Code § 42-111(1), from “the permit requirement under section 42-229, Idaho Code.” Idaho Code § 42-229 prescribes “the application permit and license procedure” as the method of appropriating ground water.

Idaho Code § 42-1805 grants the Director limited authority to prohibit appropriation of water. The Director is only authorized to “suspend the issuance or further action on *permits or applications* . . .” Idaho Code § 42-1805 (emphasis added). Because the drilling of wells for domestic purposes is exempt from the application permit and licensing procedures, the Director does not have the explicit authority to issue a moratorium order that prohibits appropriation of water for qualifying exempt domestic ground water uses under Idaho Code § 42-111(1).

When the Director has determined that water is unavailable for appropriation, the Director must have the authority to suspend appropriation of water by any means, including appropriation by beneficial use, for exempt domestic uses, for the following reasons: 1) prevent further depletion of an over-appropriated source of water; and 2) ensure that all prospective appropriators of water are treated equitably.

Until the Legislature grants explicit authority to issue moratorium orders that prohibit appropriation of water by beneficial use for exempt domestic uses, the opportunity for over-appropriation and the inequity between domestic use in community water systems and single-family domestic uses will continue.

Regarding the Cities request to limit a moratorium on new appropriations in the BWRGWMA to three years, the Department can re-evaluate its moratorium order at any time. Rather than have the moratorium automatically expire in three years, when reviewing the Management Plan upon its expiration, the Department may consider the need to maintain, modify, or repeal a moratorium in the BWRGWMA.

ORDER

IT IS HEREBY ORDERED, pursuant to Idaho Code § 42-1805(7) and IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55), that a moratorium is established on the processing and approval of new and pending applications for permits to appropriate water from surface and ground water sources within the BWRGWMA. *See infra* Appendix 1. New and pending applications to appropriate water in the BWRGWMA shall be held without further processing

unless they meet one or more of the exceptions stated in this order. The following provisions apply to the administration of the moratorium:

1. The moratorium is separate from the BWRGWMA Management Plan and shall remain in full force and effect independent of the BWRGWMA Management Plan.
2. The moratorium does not affect the authorization to continue development of any existing approved permit to appropriate water.
3. Consistent with Idaho Code § 42-227, the moratorium does not apply to any appropriation of ground water by beneficial use for domestic purposes, including livestock watering, as such term is defined in Idaho Code § 42-111.
4. The moratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Idaho Code § 42-605A. Applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive. Applications for domestic purposes from non-community water systems shall be evaluated on a case-by-case basis to determine whether the proposed use is non-consumptive. Irrigation proposed in connection with a domestic use will be considered consumptive, as will discharge of wastewater to a municipal or regional sewer system.
5. This moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid, existing water rights.
6. This moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights.
7. This moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under the terms of this moratorium if:
 - a. Protection and furtherance of the public interest, as determined by the Director, requires consideration and approval of the application irrespective of the general moratorium; or
 - b. The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its timing, location, insignificant consumption of water or mitigation provided by the application to offset injury to other rights.

IT IS FURTHER ORDERED that the 1991 *Management Policy for the Big Wood River Ground Water Management Area* is repealed.

IT IS FURTHER ORDERED that the Department shall serve a copy of this order by certified mail upon holders of applications for permits proposing appropriation of ground water or surface water within the BWRGWMA and shall publish notice of this order for three consecutive weeks as required by IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55).

Pursuant to Idaho Code § 42-1701A(3), any person aggrieved by any decision, determination, order or other action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter, shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing.

Dated this 17th day of May 2022.



MAT WEAVER for GARY SPACKMAN
Acting Director

**ORDER ESTABLISHING MORATORIUM
IN THE MATTER OF THE BIG WOOD RIVER
GROUND WATER MANAGEMENT AREA**

APPENDIX 1

Map of the Big Wood River Ground Water Management Area

