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

IN THE MATTER OF THE BIG WOOD
RIVER GROUND WATER
MANAGEMENT AREA

**MOTION FOR CLARIFICATION AND
RECONSIDERATION AND REQUEST
FOR HEARING**

COMES NOW the City of Bellevue (“Bellevue”) through its attorney of record, Candice McHugh of the firm McHugh Bromley, PLLC and files this *Motion for Clarification and Reconsideration and Request for Hearing* regarding the *Order Establishing Moratorium* signed by Mat Weaver for Gary Spackman as “Acting Director” dated May 17, 2022 (“Moratorium Order”). This Motion is made pursuant to Idaho Code § 42-1701A(3) and IDWR’s procedural rules IDAPA 37.01.01.710, 711, 730, 740, and 770.

I. CLARIFICATION OF THE TYPE OF ORDER

Bellevue requests that the Director clarify what type of agency action or “order” the Moratorium Order is. It is somewhat clear that the Idaho Department of Water Resources (the “agency”) through an “Acting Director” has taken an “action” that “determines the legal rights, duties privileges ... or other legal interest of one (1) or more specific persons” thus, presumably making the Moratorium Order an “order” under Idaho Code § 67-5201(12). Idaho Code § 67-

5243 states that a “presiding officer” who is not the agency head (i.e. Director in this case) must issue either a recommended or a preliminary order and that the order must state what type of order it is. In this case, the Moratorium Order is issued not by a presiding officer because there is or was no contested case, and is not issued by the “agency head.” Rather, the Moratorium Order is issued by the “Acting Director.” (Moratorium Order at 9.) Thus, it is not clear what type of order the Moratorium Order is (i.e. preliminary, recommended, final, interlocutory, or something else altogether) as there is no insert or information included with the Moratorium Order as contemplated by the rules and statutes.

Therefore, Bellevue requests that the agency clarify what type of order the Moratorium Order is and what procedure the agency is anticipating persons may take in response to the Moratorium Order.

II. CLARIFICATION OF FINDINGS/CONCLUSIONS IN THE ORDER

In an abundance of caution, Bellevue is filing this Motion within the shortest time period (14 days) that any Motion is due pursuant to IDAPA 37.01.01 and the Idaho Administrative Procedure Act (“APA”). An abundance of caution in this instance is required because the undersigned counsel’s law partner, Chris Bromley, (but not the undersigned counsel) received an electronic copy of the May 17, 2022 Moratorium Order on May 18, 2022, through an email from the agency. (Ex. A) There is no certificate of service associated with the Moratorium Order. Moreover, in a link included in the agency’s email,¹ there is another link, (among others) to a May 17, 2022 “Notice of May 17, 2022 Moratorium Order”² (attached as Ex. B) where it is

¹ “[Big Wood Ground Water Management Area Advisory Committee | Idaho Department of Water Resources \(Serve Idaho\)](https://protect-us.mimecast.com/s/NGgwCwpk4miGzrINSVnPPE?domain=idwr.idaho.gov/)” (https://protect-us.mimecast.com/s/NGgwCwpk4miGzrINSVnPPE?domain=idwr.idaho.gov/)

² “[Notice of Moratorium | Big Wood River Groundwater Management Area | May 17, 2022 \(idaho.gov\)](https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/20220517-BWRGWMA-Notice-of-Moratorium.pdf)” (https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/20220517-BWRGWMA-Notice-of-Moratorium.pdf)

stated that notice of the Moratorium Order will be published in several newspapers during the last week of May and first week of June 2022. Because of the confusion caused by the agency through “issuance” of the Moratorium Order on May 17, 2022, with electronic “service” of the Moratorium Order to the undersigned counsel on May 18, 2022, and “publication” of the Moratorium Order in newspapers of general circulation, this *Motion for Clarification and Reconsideration and Request for Hearing* is being served on the agency today, May 31, 2022, which is fourteen days after the Moratorium Order was signed on May 17, 2022.

Bellevue requests clarification or reconsideration of the following statements in the Moratorium Order for the reasons set forth below:

1. “Hydrogeologic analysis and modeling since implementation of the Management Policy confirm significant interaction between surface water and ground water in the BWRGWMA. 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. 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.” (Moratorium Order at 3.)

Bellevue requests that this statement be clarified as follows: The second sentence should be modified to state that “Pumping ground water from within the BWRGWMA can affect surface water flows” The third sentence should be modified to read “Lower ground water levels could result in less aquifer discharge” Finally the fourth sentence should be modified to state “New development of consumptive ground water use could reduce the quantity” These modifications are more consistent with what the reports that are referenced in the statement say.

2. “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.” (Moratorium Order at 6.)

3. “Applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive.” (Moratorium Order at 8, paragraph 4.)

Regarding Statements 2 and 3 above, municipal use is only theoretically fully consumptive. In practice today, a significant portion of municipal water use is non-consumptive and returns to the water system. The Moratorium Order appears to acknowledge this, saying “[a]ny new water right for municipal purposes *has the potential* to be fully consumptive, either immediately or as the city grows over time.” (Moratorium Order at 6, emphasis added) The Moratorium Order also acknowledges that a portion of municipal uses may not be fully consumptive and that is it possible, albeit difficult to “[s]eparately quantify[] the amount of water used outside [which is largely consumed] and the amount of water used inside [which is largely non-consumptive]” Id. Yet, simply because a municipal water right has the potential to be fully consumptive or that it may be difficult to quantify the non-consumptive amount, an entire application for municipal use should not be pre-determined to be fully consumptive requiring full mitigation. An applicant for municipal use should be allowed the opportunity to demonstrate that its proposed appropriation is not fully consumptive and therefore, does not require mitigation. Ground or surface water appropriations for municipal use often are not fully consumptive and thus, should not be presumed fully consumptive.

For these reasons, Bellevue requests that the Moratorium Order clarify these statements by including a finding or conclusion that provides that proposed municipal appropriations will be considered non-consumptive unless evidence to the contrary is provided, and/or in the alternative that proposed municipal uses must only be mitigated to the extent they are actually consumptively used.

Based on the foregoing, Bellevue requests that the Director clarify or reconsider the statements above as requested.

III. REQUEST FOR HEARING

Bellevue also requests a hearing in accordance with Idaho Code § 42-1701A(3).

DATED this 31st day of May, 2022



Candice M. McHugh
Attorney for City of Bellevue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2022, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

FILED:

Director Gary Spackman
Acting Director Mat Weaver
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720

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Candice McHugh

EXHIBIT A

From: C McHugh
To: C McHugh
Subject: FW: Big Wood River GWMA Moratorium Order Issued
Date: Tuesday, May 31, 2022 4:35:21 PM
Attachments: image001.png
20220517 Order Establishing Moratorium.pdf

From: Hansen, Angela <Angela.Hansen@idwr.idaho.gov>

Sent: Wednesday, May 18, 2022 10:39 AM

To: brian.yeager@haileycityhall.org; callen@sunvalley.com; cooper.brossy@gmail.com; jkmoly78@gmail.com; kaysi10@live.com; mstennett@senate.idaho.gov; nick@4lfarms.com; pat@purdyent.com; pat@svwsd.com; pendletonranch@hotmail.com; slee247@mac.com; wasimon9@gmail.com; Ashlynn Goody <ashlynn.goody@tu.org>; Barker, Albert (IWRB Member) <apb@idahowaters.com>; Bill Arkoosh <tunupabill@msn.com>; Chris Bromley <cbromley@mchughbromley.com>; Chris Johnson <cjohnson@idahoruralwater.com>; Cort Blackburn <cortblackburn@gmail.com>; Dave Shaw <dshaw@eroresources.com>; Emily Jones <ejones@mtexpress.com>; Eric Miller <Eric.Miller@yellowstoneearthscience.com>; Erika Phillips <erika.phillips@TNC.ORG>; Greg Loomis <gloomis@flywaters.com>; Heather O'Leary <heo@lawsonlaski.com>; Jim Speck <jim@speckandaanestad.com>; Judd McMahan <woodriverorganics@gmail.com>; Justin Stevenson <justinflood75@hotmail.com>; Kent Fletcher <wkf@pmt.org>; Keri York <keri@woodriverlandtrust.org>; Kira Finkler <kira.finkler@tu.org>; Larry Schoen <lschoen@naramail.net>; Lynn Tominaga <lynn_tominaga@hotmail.com>; Mary Beth Collins <marybeth@svwd.com>; Michael Lawrence <michaellawrence@givenspursley.com>; Michael Lovas <mjlovas@gmail.com>; Neil Crescenti <neil.crescenti@tnc.org>; Van Der Meulen, Peter (IWRB Member) <vandermeulenpete@yahoo.com>; Rusty Kramer <waterdistrict37b@outlook.com>; Sarah Lien <sarah@tetonwater.org>; watermanager@wd37.org; clerkfairfield@frontier.com; works1fairfield@frontier.com
Cc: Luke, Tim <Tim.Luke@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Spackman, Gary <Gary.Spackman@idwr.idaho.gov>; Skinner, Corey <Corey.Skinner@idwr.idaho.gov>
Subject: Big Wood River GWMA Moratorium Order Issued

Big Wood River GWMA Advisory Committee Members and Interested Parties,

Yesterday, the Idaho Department of Water Resources ("IDWR") issued an *Order Establishing Moratorium* for the Big Wood River Ground Water Management Area ("Moratorium Order"). The order is attached. The Moratorium Order affects applications to appropriate water in the Big Wood River Ground Water Management Area ("Big Wood River GWMA"), which consists of the Camas Creek and Big Wood River drainages upstream of Magic Dam and the upper Silver Creek drainage in the vicinity of Picabo. The moratorium applies to all surface water in, and tributary to, these drainages and all groundwater underlying these drainages. Additional information about the Big Wood River GWMA may be viewed at [Big Wood Ground Water Management Area Advisory Committee | Idaho Department of Water Resources \(Serve Idaho\)](#). You are receiving this email copy as a Big Wood River GWMA Advisory Committee member or an interested party.

Any person aggrieved by the Moratorium Order may file a written petition requesting a hearing pursuant to Idaho Code § 42-1701A(3) and IDWR's Rules of Procedure (IDAPA 37.01.01). The

petition must state the reasons for contesting the Moratorium Order and must be filed within fifteen (15) days after receipt of written notice or actual notice. Petitions for hearing can be filed with IDWR's Southern Region Office, 650 Addison Ave W., Suite 500, Twin Falls, ID 83301; or the Idaho Department of Water Resources, State Office at 322 E. Front St., 6th floor, or mailing to P.O. Box 83720, Boise, ID 83720-0098; or emailed to IDWR at file@idwr.idaho.gov; or filed with another IDWR office.

If you have questions, please contact IDWR's Southern Region Office at (208) 736-3033 or IDWR's State Office Water Rights Section at (208) 287-4800.

Regards,

Angela Hansen



IDAHO DEPARTMENT OF
WATER RESOURCES

Angela Hansen | Water Rights Section Manager

322 E Front St, PO Box 83720, Boise, ID 83720

(208) 287-4951 | www.idwr.idaho.gov

EXHIBIT B

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

NOTICE OF MORATORIUM

Notice is hereby given that pursuant to Idaho Code § 42-1805(7) on May 17, 2022, the Idaho Department of Water Resources ("IDWR") issued an order suspending further action on certain applications to appropriate water in the Big Wood River Groundwater Management Area ("BWRGWMA"). The BWRGWMA consists of the Camas Creek and Big Wood River drainages upstream of Magic Dam and the upper Silver Creek drainage extending to just downstream of Picabo. The moratorium applies to all surface water in, and tributary to, these drainages and all groundwater underlying these drainages.

A copy of the *Order Establishing Moratorium* can be viewed on IDWR's website at: <https://idwr.idaho.gov/legal-actions/orders/moratorium-orders> or by calling or visiting any IDWR office.

Any person aggrieved by the *BWRGWMA Moratorium Order* may file a written petition stating the reasons for contesting the order and requesting a hearing before the Director of IDWR. The petition must be filed within fifteen (15) days after receipt of written notice of the order or receipt of actual notice of the order. Written petitions may be filed with the Department at IDWR, Southern Region, 650 Addison Ave W, Suite 500, Twin Falls, ID 83301; or IDWR, State Office, 322 E Front Street, Suite 648, PO Box 83720, Boise, ID 83720-0098, or they may be emailed to file@idwr.idaho.gov.

GARY SPACKMAN, Director

Published in the Idaho Mountain Express, Camas Courier and Mountain Home News on May 25th, June 1st and June 8th, 2022; and Times News on May 26th, June 2nd and June 9th, 2022.