

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

IN THE MATTER OF BIG WOOD RIVER
GROUND WATER MANAGEMENT AREA

**ORDER DENYING REQUEST FOR
CLARIFICATION AND
RECONSIDERATION; ORDER
GRANTING REQUEST FOR HEARING**

BACKGROUND

On May 17, 2022, Deputy Director Mat Weaver, while serving as acting director, issued an *Order Establishing Moratorium* (“Moratorium Order”) in the above captioned matter. The order established a moratorium on the processing and approval of new and pending applications for permits to appropriate water from surface and ground water sources within the Big Wood River Ground Water Management Area (“BWRGWMA”). *Moratorium Order* at 7.

On May 31, 2022, the Department received a *Motion for Clarification and Reconsideration and Request for Hearing* (“Motion”) filed on behalf of the City of Bellevue (“Bellevue”). Bellevue makes three requests in the Motion. Each request is addressed below.

RESPONSE TO REQUEST FOR CLARIFICATION REGARDING TYPE OF ORDER

First, Bellevue asks the Director to “clarify what type of agency action or ‘order’ the Moratorium Order is.” *Motion* at 1. Bellevue suggests the Moratorium Order is an order under the Administrative Procedures Act (Chapter 52 of Title 67, Idaho Code) (“IDAPA”) and should have been served as an order in accordance with the procedures in IDAPA. *Id.* In accordance with *City of Pocatello v. Spackman*, the Moratorium Order is an agency order under Idaho Code § 42-1701A(3), not IDAPA. *See* Order on Mot. to Determine Jurisdiction; Order Dismissing Pet. for Jud. Rev. at 6–7, *City of Pocatello v. Spackman*, No. CV01-17-00067 (Ada Cnty. Dist. Ct. Idaho Feb. 16, 2017). Additionally, notice of the Moratorium Order was correctly provided in accordance with the Department’s Water Appropriation Rule 55 (IDAPA 37.03.08.055.01.b).

In *City of Pocatello*, the city asked the court for judicial review of the Director’s administrative *Order Designating the Eastern Snake Plan Aquifer Ground Water Management Area* (“ESPA GWMA Order”) issued November 2, 2016. *Id.* at 2. The Director issued the ESPA GWMA Order as a final order under IDAPA. *Id.* at 6. The District Court voiced concern with the Director’s characterization of the ESPA GWMA Order as a final order under IDAPA; the court stated:

Issuing a document styled as an “order” or a “final order” is certainly one reasonable way the Director may go about making such a designation. However, in styling the document as a “final order” there were some assumptions various provisions and remedies in IDAPA were ostensibly triggered, such as the right to file a petition for reconsideration under Idaho Code § 67-5246(4). These assumptions were mistaken.

IDAPA and its remedies have not been implemented in this matter. First, IDAPA “controls agency decision-making procedures only in the absence of more specific statutory requirements.” Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1993). The Legislature has enacted a specific statutory scheme to provide aggrieved persons an administrative remedy where the Director takes an action without a hearing. That scheme is found in Idaho Code §§ 42-237e and 42-1701A. Since the provisions of those statutes apply to the specific facts and circumstances of this case (i.e., the Director taking action without a hearing), they control the remedies available to aggrieved persons, not IDAPA. *See also* I.C. § 42-237e.

Additionally, the Director did not initiate rulemaking or a contested case proceeding in this matter that would implicate IDAPA. IDAPA provides that “*a proceeding* by an agency . . . that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter, except as provided by other provisions of law.” I.C. § 67-5240 (emphasis added). In this case, there has been no “proceeding.” Nor were there any “parties,” as the term is defined in IDAPA, when the Director issued his *Order*. The remedy provided in Idaho Code § 67-5246(4) contemplates a “proceeding” has occurred and by its terms is limited to “parties” to that proceeding. It is not available to “aggrieved persons”....

Id. at 6–7.

Here, like in *City of Pocatello*, when the Director issued the Moratorium Order there were no parties to the matter and no contested case proceeding had been commenced, accordingly, the order does not implicate IDAPA. Therefore, in this matter the only remedy Idaho Code § 42-1701A(3) provides an aggrieved person is an administrative remedy.

Idaho Code § 42-1701A(3) states that any person aggrieved by an agency action can request a hearing on the action. The request for hearing must be filed within 15 days after receipt of written notice of the action or receipt of actual notice. I.C. § 42-1701(3). Bellevue’s request for hearing was filed with the Department on May 31, 2022, within 15 days of its receipt of the Moratorium Order and is timely. *See Motion* at 3 (“[I]ssuance’ of the Moratorium Order on May 17, 2022, with electronic ‘service’ of the Moratorium Order to the undersigned counsel on May 18, 2022....”).

Water Appropriation Rule 55.01.c governs how challenges to the issuance of a moratorium order are processed: “Objections to the Director’s action shall be considered under the Department’s adopted Rules of Procedure and applicable law.” IDAPA 37.03.08.055.01.c. The Director will treat Bellevue’s filing as an objection to the Moratorium Order. As discussed below, the Director will grant the request for hearing and consider the objection consistent with the Department’s Rules of Procedure (IDAPA 37.01.01) and applicable law.

RESPONSE TO REQUEST FOR CLARIFICATION OF FINDINGS/CONCLUSIONS IN THE MORATORIUM ORDER

Second, Bellevue seeks clarification or reconsideration regarding certain statements in the Moratorium Order. *Motion* at 3–4. Bellevue requests specific modification to a paragraph of the Moratorium Order because the “modifications are more consistent with what the reports that are referenced in the statement say.” *Id.* at 3. For ease of explanation, Bellevue’s requested changes are reflected in underline/strikethrough format using the original paragraph:

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~~ can affect 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~~ could result in less aquifer discharge to surface water. New development of consumptive ground water use ~~would~~ could reduce the quantity of water available to fill senior surface water rights during times when administration by priority is necessary.

Moratorium Order at 3 (footnote omitted).

Further, Bellevue requests that the Director include “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.” *Motion* at 4. Bellevue supports this request by asserting “municipal use is only theoretically fully consumptive.” *Id.*

The Director is not convinced by Bellevue’s *Motion* that the requested changes are warranted. However, for reasons outlined in the section above, Bellevue’s only legal remedy is to contest the Moratorium Order and request a hearing, consequently, the Director must deny Bellevue’s requests for clarification and reconsideration without consideration of the evidence or arguments put forth by Bellevue in support of its requests. The Director will consider any evidence presented during Bellevue’s requested hearing in accordance with Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department’s Rules of Procedure, IDAPA 37.01.01.

RESPONSE TO REQUEST FOR HEARING

Finally, Bellevue requests a hearing on the Moratorium Order pursuant to Idaho Code § 42-1701A(3). The Director will grant Bellevue’s request for hearing.

NOTICE IS HEREBY GIVEN that the Director will hold a prehearing conference to discuss the schedule for this contested proceeding. The prehearing conference will be held on **August 15, 2022, at 2 PM (MST)** in Conference Rooms 602C and 602D of the Department’s State Office, located at 322 E. Front Street, 6th Floor, Boise, Idaho. Interested persons may appear at the prehearing conference in person, by telephone, or by video conference.

To join the conference via computer or smartphone, please use the following Webex link, follow the prompts, and wait to be admitted by the meeting host:
<https://idahogov.webex.com/idahogov/j.php?MTID=m67743f969d93744e37854abfcc404035>.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2454 122 9431.

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for special accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

ORDER

IT IS HEREBY ORDERED that Bellevue's requests for clarification and reconsideration are DENIED.

IT IS FURTHER ORDERED that Bellevue's request for hearing is GRANTED.

Dated this 21st day of June 2022.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

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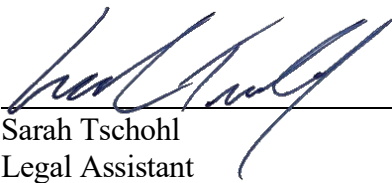
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