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Sep 13, 2023
DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE BIG WOOD GROUND WATER MANAGEMENT AREA __________ IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN	**SURFACE WATER COALITION'S RESPONSE TO CITIES' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereafter collectively referred to as "Surface Water Coalition" or "Coalition"), by and through counsel of record, and hereby respond to the *Motion for Partial Summary Judgment* filed by the City of Pocatello et al. (hereafter collectively referred

to as "Cities") on August 30, 2023.[1] For the reasons set forth below the Hearing Officer should deny the motion and grant summary judgment in favor of the Coalition on the issue regarding: "[a]pplications for municipal use and domestic use from community water systems shall be considered fully consumptive." This response is supported by the *Declaration of Travis L. Thompson* and attached exhibits filed together herewith.

INTRODUCTION

The Cities have moved for partial summary judgment requesting the Hearing Officer to remove language in the Moratorium Orders that requires applications for municipal water use and domestic use from community water systems to be considered fully consumptive. The Cities' motion is not based upon undisputed facts and is not supported by existing Idaho law. Whereas several of the same Cities previously argued a different standard to IDWR and the District Court in the *Riverside Irrigation District v. IDWR* case ("Riverside"), they make no mention of that decision and the legal rights associated with "municipal" water rights they advocated for in that matter. As set forth below, the Hearing Officer should deny the motion and enter summary judgment on this issue for the Coalition.

The Cities first allege that the Moratorium Orders' condition regarding new municipal and domestic community water rights "has no factual basis." *Cities' Br.* at 8. Notably, the Cities' motion does not address any specific facts regarding new applications for permit, which are the subject of the Moratorium Orders. Instead, the Cities rely upon limited testimony from Department witness James Cefalo and their expert reports that evaluate various existing water rights. The Cities disregard the established right to fully consume their "municipal" water rights.

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[1] The motion was supported by the *Municipal Providers Memorandum in Support of Motion for Partial Summary Judgment* (hereafter referred to as "*Cities' Br.*") and the *Affidavit of Maximillian C. Bricker* ("Bricker Aff.") including exhibits.

Moreover, they omit the fact that several cities have indicated they are exploring reuse and future land application that would further consume their existing water rights, possibly to extinction. *See Surface Water Coalition Expert Report* (attached to the *Bricker Aff.* as Ex. 4).

Many of the municipalities in this action that are advocating against IDWR's requirement that applications for municipal use be considered fully consumptive have either taken actions, stated an intention, or both, to increase the reuse of their municipal water supply, often to the point of extinction.

The municipalities of Bellevue, Carey, Hazelton, Paul, Richfield, Rupert and Wendell each have Idaho Department of Environmental Quality (IDEQ) permits that allow them to reuse their treated municipal wastewater effluent. *See Surface Water Coalition Expert Report*, at 5 (attached to the *Bricker Aff.* as Ex. 4).

In the *Riverside* litigation, the municipalities of Idaho Falls, Jerome, Pocatello and Rupert (which, as noted above, already has an existing IDEQ reuse permit) filed a brief that stated, "Each of the Municipal Intervenors either currently discharges their own treated wastewater into facilities owned by outside parties, or may desire to do so in the future." *Municipal Intervenors' Response Brief*, pp 1-2 (attached to the *Thompson Dec.* as Ex. B). Additionally, those parties have made the following representations:

- "Idaho Falls holds NPDES Permit No. ID0021261 for wastewater discharge into the Snake River. Idaho Falls, like Nampa, is eligible to apply for a reuse permit with DEQ. Idaho Falls therefore has a direct and substantial interest in the issue of whether or not the wastewater effluent… can be reused without obtaining a water right." *City of Idaho Falls Petition to Intervene*, at 3 (see *Surface Water Coalition Expert Report* (Bricker Aff. Ex. 4) (emphasis added).

- "Jerome holds National Pollutant Discharge Elimination System ("NPDES") Permit No. ID-0020168 for waste water discharge into the Northside Canal Company's J8 Canal." *City of Jerome Petition to Intervene* (see *Surface Water Coalition Expert Report* (Bricker Aff. Ex. 4).

- "The City of Pocatello has a direct and substantial interest in whether or not the wastewater effluent associated with the discharge under the City's NPDES permit can be reused without obtaining a water right…." (see *Surface Water Coalition Expert Report* (Bricker Aff. Ex. 4) (emphasis added).

- "[T]he City [of Pocatello] anticipates that it will be faced with additional and expensive treatment requirements in the future and has begun to consider land application or other arrangements with nearby water users that would allow it to avoid expensive new treatment technologies. *Municipal Intervenors' Response to Petitioner's Opening Brief*, at 6 (see *Surface Water Coalition Expert Report* (Bricker Aff. Ex. 4) (emphasis added).

- "Rupert is located in the Magic Valley and pumps ground water from the regional Eastern Snake Plain Aquifer, as well as ground water from a shallow perched aquifer to meet the city's needs. Rupert holds DEQ Reuse Permit No. M-001-04 that allows it to safely treat and reuse waste water. Upon treatment, Rupert pipes the water approximately seven miles north of the city where the water is stored in lagoons during the winter and land applied during the growing season…. In the future, Rupert may want to exercise the flexibility that is provided to cities under Idaho law for discharge of treated waste water into a canal system." *City of Rupert Petition to Intervene*, at 3 (see *Surface Water Coalition Expert Report* (Bricker Aff. Ex. 4) (emphasis added).

According to IDEQ: "The most common form of water reuse for both municipal and industrial facilities is the irrigation of agricultural crops."[2]

But this case is not about the past, it is about the future. It is also about the Department's authority and discretion to protect limited water resources and ensure that future water rights do not deplete those resources. Given the ramifications of Idaho law and how municipal water rights can be fully consumed, the Director's orders should be upheld as a matter of law.

STANDARD OF REVIEW

A motion for summary judgment is allowed in any contested case under the Department's Rules of Procedure. IDAPA 37.01.01.220.03. Rule 56 of the Idaho Rules of Civil Procedure ("I.R.C.P.") is applicable to motions before the Department except for subsections (b) and (g).

[2] https://www.deq.idaho.gov/permits/water-quality-permits-certifications/municipal-and-industrial-permits/ (link current as of September 13, 2023).

The Department is required to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the relevant movant is entitled to a judgment as a matter of law." I.R.C.P. 56(a). The Department must "construe disputed facts in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." I.R.C.P. 56(c).

BACKGROUND OF THE MORATORIUM ORDERS

The Director issued an order in 1991 designating the Big Wood River Ground Water Management Area ("BWRGWMA"), which extends from Magic Dam up the Big Wood River and includes the Camas Prairie and upper Silver Creek. *See* BWRGWMA Designation Order at 2 (June 28, 1991) ("Designation Order"). At that same time IDWR also presented and adopted a management policy for the BWRGWMA ("1991 Management Policy"), which allowed for consumptive use applications to be approved with demonstration of no injury or with mitigation, and approval of applications for permits for non-consumptive uses, municipal uses (with irrigation of less than 0.5-acre/residence), stockwater, and domestic uses (as defined by Section 42-111 of Idaho Code). *1991 Management Policy* at 3-4.

On May 4, 2022, the Director adopted a new management plan ("2022 Management Plan") for the Big Wood River Ground Water Management Area which was separate from the 1991 Management Policy and intended "to reduce the effects of ground water pumping under existing water rights within the BWRGWMA on senior surface water rights." *See Order Establishing Moratorium* ("*BW Order*") at 5.

After the 2022 Management Plan was adopted, representatives of the 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 petitioned the

Director to issue a moratorium order specific to the BWRGWMA to replace the 1991 Management Policy. *See BW Order* at 4.

The cities of Bellevue and Hailey and the Sun Valley Company represented that they would not oppose a moratorium order if it was only for a period of three years and was consistent with the 1991 Management Policy. *Id*. at 4-5. Specifically, the 1991 Management Policy allowed 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 one-half acre associated with a dwelling, must be mitigated by the municipality.

1991 Management Policy at 4. After considering this request, the Director determined that:

> 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 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.

BW Order at 6.

Based on this analysis, the Director concluded that it was appropriate to "suspend further action on applications to appropriate water for all municipal and community water systems given the variability in consumptive use." *Id*. Accordingly, on May 17, 2022, the Director issued the *BW Order* which provided, in pertinent part:

> 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.

Id. at 8.

On October 21, 2022, the Director issued the *Amended Snake River Basin Moratorium Order* ("*SR Order*")[3] which expanded the existing Eastern Snake River Plain Moratorium "to include consumptive uses of all surface and ground water tributary to the reach of the Snake River between King Hill and Swan Falls Dam to protect existing water rights, including decreed minimum stream flow water rights." *SR Order* at 1. Consistent with the prior *BW Order*, the Director's *SR Order* also provided, in pertinent part:

> 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. Domestic, commercial, industrial, or other water uses that result in the discharge of wastewater to a municipal or publicly owned treatment works will be considered consumptive.

Id. at 28.

ARGUMENT

I. The Director Properly Exercised his Authority in Issuing the Moratorium Orders.

The Director is responsible for the administration of the appropriation and use of the waters of the state of Idaho. IDAHO CODE § 42-202. Further, with respect to groundwater, the Director has the duty "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." IDAHO CODE § 42-231. This includes issuing moratorium orders when necessary to cease the processing and approval of applications for permit in a designated geographical area. IDAPA 37.03.08.055. Specifically, the Director is authorized:

[3] The Director had previously issued an order on May 15, 1992 "establishing a moratorium on the approval of new applications to appropriate surface water or ground water in the Snake River Basin upstream from the USGS gaging station on the Snake River at Weiser to protect existing water rights." *SR Order* at 13.

> 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 the minimum flow provisions of the state water plan.

IDAHO CODE § 42-1805(7).

The Idaho Supreme Court has noted the following regarding the Director's authority and discretion:

> The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR's Director the power to make appropriation decisions in Idaho Code section 42-602 . . . This Court has also recognized the need for the Director's specialized expertise in certain areas of water law.

In re SRBA, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014).

Rather than acknowledging the Director's statutory duties and authorities, the Cities completely disregard them. The Cities do not challenge the statutory authority. Rather they complain that the Director's decision to treat new municipal and community domestic well systems as "fully consumptive" is erroneous. *See Cities' Br.* at 8-10. The Cities also completely disregard the fact that they, unlike other water right holders, can fully consume their water rights without exceeding the authorized beneficial use. *See BW Order* at 6. As such, IDWR's "fully consumptive" policy, as set forth in the Orders, is an appropriate measure to conserve limited water resources.

In fact, as explained by IDWR's Eastern Regional Manager, James Cefalo, at his deposition, this policy is necessary because it would be very difficult "to track the consumption fraction of water uses for municipalities or even subdivisions throughout the state." Deposition of James Cefalo ("Cefalo Deposition") at 71:22-72:3. He explained:

> [t]here are so many factors involved with municipal water use that are hard to predict because ultimately discharging waters, whether that be to the

> aquifer or to the river, are governed by clean water act standards. And if all of a sudden there's a contaminant that is – that the thresholds are changed in some way, the City of Idaho Falls may no longer be able to send that water to the Snake River, right? I know there are a lot of things that municipalities have to weigh out as far as costs, costs of treatment in one way versus the other.
>
> But it's so hard to predict what the future may hold, and this paragraph in particular kind of touches on this, that changes may come in the future that would cause that ratio of what is being consumed to change and could change significantly.

Id. at 63:7-22. Mr. Cefalo clarified that if the foregoing scenario occurred, the municipality would not be required to contact IDWR to change anything with its water right. *Id*. at 64:2-5.

Mr. Cefalo also testified that he has not seen any conditions on permits requiring municipalities to track or report their effluent returns or diversion data to IDWR. *Id*. at 70:15-21. He stated that even if such conditions were imposed, it would be burdensome on IDWR "because the department's enforcement options at that point would be very limited." *Id*. at 72:4-23. He explained:

> If you have a subdivision that says, well, our drinking – this is our drinking water so we're going to consider it mostly nonconsumptive, and we are recharging it through a rapid infiltration. And then all of a sudden that is not a viable option anymore that they have to land apply it and go to a mostly consumptive treatment, the department really has no enforcement ability to curtail that water use. Right? Because then you have a public health emergency. We can't shut people's drinking water off without creating problems.

Id., at 72:12-23. Given these practical implications, it was proper for the Director to exercise his authority to issue the Moratorium Orders. The Cities can point to no legal authority that would demand otherwise.

The Moratorium Orders, and the treatment of new municipal and domestic community systems as fully "consumptive", are a proper exercise of the Director's discretion and duty to protect the groundwater resources from further depletion. Requiring mitigation for the

"maximum" consumptive use of a new permit is not only authorized by law, it is sound public policy especially for areas with aquifers that are approaching a critical state. *See Order in the Matter of Designating the Big Wood River Ground Water Management Area* (June 28, 1991); *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (Nov. 2, 2016). While the Cities do not dispute that a "municipal" water right can be fully consumed, they wrongly suggest that the Director abused his discretion in the moratorium orders presuming full consumption. *See Cities' Br.* at 8. Notably, the Cities present no "undisputed" facts as to specific municipal applications for permit that would not be fully consumptive as authorized by existing state law.

Stated another way, given IDWR's treatment of the "maximum" consumptive use that is permitted, the Cities cannot explain how that is anything less than 100% if a municipality chooses to exercise its water right in a manner that would fully consume it. *See infra*, Part III. In sum, the Director had the discretion and duty to issue the Moratorium Orders with the presumptions stated and the Cities' argument should be rejected accordingly.

II. ***Riverside v. IDWR* Demonstrates Why Municipal Water Rights Should be Considered Fully Consumptive.**

The Moratorium Orders challenged by the Cities in this proceeding ordered that "[a]pplications for municipal water use and for domestic use from community water systems shall be considered fully consumptive." *BW Order* at 8; *SR Order* at 28. The Big Wood Order rested on findings and conclusions that there is little or no water available for new consumptive uses. *BW Order* at 6. The Snake River Order notes that "[n]ew consumptive uses of ground water from the ESPA and tributary aquifers will further deplete the flow in the Snake River," as well as low flows at the Murphy Gage and the potential impact of new appropriations, as well as other depleted groundwater resources in the basin. *SR Order* at 19-23. The Big Wood Order also

concludes "[a]ny 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…" *BW Order* at 6.

The Cities do not challenge either the findings of fact or conclusions of law in the Orders. Nor do they contend that a moratorium is neither appropriate nor necessary. Instead, they ask for a "free pass" asserting that not all of their existing water rights are currently fully consumptive. Yet, at the same time the Cities continue to assert that they have the right to fully consume their water rights. Under Idaho law this requested pass should not be granted. That is so because the Director and the District Court have both concluded that there is no limit on a municipality's ability to fully consume a water right once granted.

Riverside Irrigation District v. IDWR, (Canyon County Dist. Ct., Third Jud. Dist., Case No. CV14-23-05008 (December 28, 2021)) involved an appeal from an IDWR decision concluding that neither the City of Nampa nor the Pioneer Irrigation District needed a water right to apply Nampa's waste water/effluent to Pioneer Irrigation District's lands and that doing so was not an enlargement of Nampa's water rights. On appeal, the District Court addressed these issues in the context of the nature of municipal rights including the uniquely consumptive nature of municipal water rights. Important to the Court's decision was the application of section 42-201(8).[4]

Idaho Code § 42-201(8) exempts municipalities[5] from the statutory requirement to obtain a water right for the diversion and beneficial use of water when the nature of use is disposal of

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[4] This statute was added to the Idaho Code at the request of municipal water right holders, initiated by the City of McCall, for their benefit.

[5] I.C § 42-201(8) adopts the definition of "municipality" or "municipal provider" from I.C. § 42-202B and does not automatically apply to "non-community systems" which the Orders also distinguish from "municipalities."

effluent including land application of municipal waste. The Director and the Court both held in *Riverside* that under section 42-201(8) no water right is needed even when a municipality contracts with a third-party irrigation entity to land apply the municipality's effluent on land outside the municipality's service area on lands served by an irrigation district. *See Memorandum Decision and Order* at 6-11; (Ex. A to *Thompson Dec.*).

It is also notable that the facts in *Riverside* involved a reuse permit that prohibited return flows from Pioneer's irrigation practices from reaching both the surface waters and the local groundwater. *See Memorandum Decision and Order* at 8; (Ex. A to *Thompson Dec.*). The District Court also held that using Nampa's wastewater to grow crops within the Pioneer district boundary was not an enlargement of Nampa's municipal water right. *See id.* at 9-11. And the Court held that the conditions on Nampa's water rights that limited the use of water were inapplicable to land application and disposal under I.C. § 42-201(8). *See id.* at 11.

The Court's analysis in *Riverside* that led to its holdings is important in this proceeding for how the Court and the Department distinguish municipal water rights from other water rights, like irrigation water rights. The District Court, in distinguishing municipal water rights from the irrigation water rights at issue in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746 (2005), explained "[t]he 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." *Id.* at 10. The District Court then explained how irrigation rights differ in this regard:

> This is not necessarily the same with respect to an irrigation right, which is defined by different parameters. An irrigation right holder also has the right to recapture and reuse wastewater and it must also do so consistent with the elements of its water right and the beneficial use duty of water. However, irrigating additional acreage results in enlargement of the original right beyond what is authorized.

See id.

Thus, under section 42-201(8), municipalities are authorized to land apply wastewater outside of their place of use, and, according to *Riverside*, on land they do not own or serve. In other words, land application, including the application of effluent on the lawns and crops of third parties, is not an enlargement of a municipal ground water right.

On the other hand, as the District Court explained, "if quantities of irrigation waste water are such that application on additional lands is necessary for its disposal then issues can be raised regarding the duty of water and whether more efficient irrigation practices should be employed." *Memorandum Decision and Order* at 10-11. Thus, while municipal rights can be fully consumed and land applied outside the place of use, irrigation water rights by contrast are limited to historic consumptive use and a fixed place of use.

Importantly, the Court concluded that section 42-201(8) "confirms" that municipal water rights authorize the fully consumptive nature of use, rather than create such a right. *Id*. at 10. In other words, the Court's analysis suggests that the right to fully consume a water right is not or may not be limited to the circumstances described in section 42-201(8). This concern finds support in the Court's language, quoted above, that the nature of a municipal water right allows it to be fully consumed without exceeding the authorized scope of the water right.

Nampa's water rights also contained a condition stating that the groundwater right could not be used for irrigation when surface water was available. Riverside argued that ignoring the condition and allowing land application when surface water was available would amount to an enlargement of the water right. Nampa and the Municipal intervenors argued that it would be "absurd and oppressive" for the conditions on the water rights to override the cities' ability to completely dispose of their wastewater effluent under section 42-201(8). They also argued that

once the water is collected at the wastewater treatment plant the water is no longer subject to the conditions on the water right. *See Municipal Intervenors Response Brief* at 13-14 (Ex. B to *Thompson Dec.*).

The District Court agreed with the municipal providers and held that "the conditions set forth in Nampa's municipal water rights are inapplicable, as the subject water use is not occurring under those water rights, but rather is occurring under Idaho Code § 42-201(8)." Thus, the Court's holding in *Riverside* is that municipal water reuse, including the ability to fully consume the allowed quantity under a municipal water right, is not subject to the conditions on the water right, at least as long as the wastewater is being disposed of under I.C. § 42-201(8). In other words, because the municipal water users have the right to increase consumption to entirely consume the right, other water users are deprived of the right to assert that there is any enlargement of the water right when the municipality does so. Thus, the protections from enlargement recognized by the Supreme Court in *3G AG LLC v. Idaho Dep't of Water Res*., 170 Idaho 251, 509 P.3d 1180, 1195 (2022) are not available when a municipal water right holder increases consumption of the water right.

For this proceeding the import of the *Riverside* decision is undeniable. Municipal water rights can and will be fully consumed. Fully consuming those rights is not an enlargement and the conditions on the water rights do not apply to waste disposal and land application methods that fully consume the water rights. The fact that some portion of a municipal water right may not currently be fully consumed is irrelevant. There is no impediment to full consumption.

Moreover, according to the Department's Transfer Processing Memorandum No. 24, because IDWR considers municipal use to be fully consumptive, "no transfer is required for reuse of municipal water so long as the reuse occurs within the broadly-defined bounds of the

municipal water right." *See City of Nampa Response Brief* at 38; (Ex. C to *Thompson Dec.*). Significantly, the conditions on municipal water rights do not prohibit the municipalities from, or in any way allow for IDWR control over, exercising the authority granted to those water rights by section 42-201(8).

Municipal water rights do not have a fixed place of use, but rather a "service area" that may grow and change as services and uses are expanded, in contrast to irrigators and other water users who are limited to a fixed place of use. *See* I.C. § 42-202B(9). Municipal use also includes an array of uses that vary in consumption rates and can change over time. *See* I.C. § 42-202B(6). Municipalities therefore can, and do, dramatically alter the use and disposal of their water rights without any review or oversight by IDWR. For these reasons, IDWR properly considers municipal water rights to be fully consumptive. *IDWR Transfer Processing Memorandum No. 24* at page 31; (Ex. D to *Thompson Dec.*).

In summary, the results from the *Riverside* litigation support the Director's conclusions in the Moratorium Orders that consider municipal and community domestic system water rights to be "fully consumptive." The above analysis rebuts the Cities' present contention and warrants denial of their request for partial summary judgment.

III. The Moratorium Orders Treat New Municipal Water Rights Similar to Other New Proposed Water Rights.

Apart from the *Riverside* analysis, the Cities' motion fails to recognize that the Director's moratorium orders treat new applications for permit for municipal uses similar to other new water rights. The Cities complain that the orders "provide no factual basis to support imposing on municipal and domestic uses mitigation for total diversions rather than consumptive use." *Cities' Br.* at 8. However, the Cities' argument shows a fundamental misunderstanding about how IDWR approves new permits, and how the "maximum" consumptive use is authorized when

a new water right is issued. The fact that IDWR allows a "maximum" consumptive use at the time of permitting shows the orders are in line with Department policy and should be affirmed.

Idaho Code, Chapter 2, Title 42 contains the statutes that define the process for obtaining a new water right through an application for permit. The Cities note the definition of "consumptive use" (*Cities' Br.* at 8), but they conveniently omit the following key part of that definition:

> "Authorized consumptive use" means the maximum consumptive use that may be made of a water right.

Idaho Code § 42-202B(1) (emphasis added).

Moreover, "changes in consumptive use do not require a transfer…." *Id*. Applications for new water rights must list the amount of water to be diverted and used. *See* I.C. § 42-202(1)(d); IDAPA 37.03.08.35.03.iv. This requirement applies regardless of the proposed beneficial use (i.e. irrigation, municipal, etc.). When IDWR evaluates a new application and issues a permit, it will issue a quantity that corresponds to an "authorized consumptive use." This amount is the "maximum" that may be made of the water right. James Cefalo explained the process at his deposition:

> Q. [BY MR. HARRIS]: Right. And there's no qualifying language in the moratorium order that addresses that. It just say's it's assumed when it's pumped it is fully consumptive, correct?
>
> A. [BY MR. CEFALO]: Yeah, that's right, but I think that's consistent with how the department handles other applications.
> Q. What do you mean by that? What other applications?
>
> A. Well, when an applicant – if an applicant, for example, were to come in and apply for an irrigation water right, the department doesn't make some inquiry into what crops that farmer may want to grow. The permit would be issued to the full state-recognized consumptive demand of crop for that area. Right? So that allows that farmer to grow grain one year and sugar beets another year and corn another year, right, and can bump up against that maximum consumptive use.

> And I think for a municipal – a municipal water right, especially if we're just going to talk about city water right, that would the same way, right? That recognizes – the city could at some point in the future change its wastewater treatment plant and start bumping up against the full anticipated maximum consumptive use.
>
> Q. And when you use the word "could," and I'll get into this in a minute, that sounds to me more like a policy determination. I'm focused right now on the technical side, which is that – as I read this definition, it defines consumptive use as waters' that does not return to waters of the state. Using the Idaho Falls example, their treated effluent does return to waters of the state.
>
> A. But what we're dealing with in an moratorium order are applications for permit. And an application for permit is a request for a maximum amount of authority, not only to divert water but also to use that water. And so the department in reviewing an application has to look at what that maximum authority that's being granted is.
>
> Q. So how is that any different than an irrigation right? How is a municipal right different than an irrigation right in terms of your review?
>
> A. That's what I'm saying is I think that when we're looking at consumptive use, I think there's a real strong analogy there, right?
>
> When an irrigator comes in looking for a new water right, they're looking for a maximum authority to beneficially use that water. And it could be corn. It could be sugar beets. Right? So the permit is issued in a way that recognizes a 4 acre-foot per acre diversion rate – a diversion volume, annual diversion volume, 4 acre-feet per acre. And certain areas are 3.5 acre-feet per acre. And that's the maximum diversion volume that can be taken.

Cefalo Dep. Tr. at 52:23 – 55:4; (Bricker Aff. Ex. 1).

As explained above, IDWR's approval of a "maximum" consumptive use for a new application is similar regardless of the type of water right. In the case of a "municipal" water right, the applicant has the ability to use the entire quantity over time. *See supra* Part II. The Moratorium Orders consistently prohibit the issuance of new permits for "consumptive uses." Since a new water right for "municipal" purposes would be authorized to fully consume the quantity authorized under the "maximum" consumptive use, the Director's findings are supported.

Accordingly, the Cities' argument that municipal uses are not fully consumptive fails. At a minimum, the fact that a new "municipal" permit would be issued for the maximum consumptive use raises a genuine issue of material fact that warrants denial of the Cities' motion for partial summary judgment.

IV. The Hearing Officer Can Grant Summary Judgment to the Coalition.

As set forth in Part II above, municipal water rights can be fully consumed under Idaho law. Given the state of the law on that issue, the Director's presumption that municipal and community domestic water systems are fully consumptive at the time of permitting is appropriate and should be confirmed on summary judgment. *See* I.R.C.P. 56; IDAPA 37.01.01.220.03.

The Hearing Officer can and should grant summary judgment in favor of the Coalition. The Supreme Court recently explained that "the district court may grant summary judgment to the nonmoving party because a 'motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving party runs the risk that the court will find against it.' *Rowley v. Ada Cty. Highway Dis*t., 156 Idaho 275, 277-78, 322 P.3d 1008, 1010-11 (2014) (quoting *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001))" *City of Eagle v Two Rivers Subdivision Homeowners Ass'n Inc*. 167 Idaho 70, 74, 467 P.3d 434, 438 (2020); *see also*, *Woodland Furniture, LLC v. Larsen*, 142 Idaho 140, 146, 124 P.3d 10016, 1022 (2005) (summary judgment may be entered in favor of non-moving party).

All that is procedurally required is that the Cities be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered. *See id.* The Cities will have that opportunity when or if they file a reply. Consequently, the Coalition requests summary judgment that the terms of the Director's Moratorium Orders requiring that all new municipal and domestic community well uses shall be considered fully consumptive and that

such new uses fully mitigate for full consumption of that water right, is consistent with and required by Idaho law and well within the Director's discretion.

CONCLUSION

The Director's finding that new municipal and community domestic water rights shall be considered fully consumptive is supported by Idaho law. The fact that a municipal water right can be fully consumed warrants a conservative approach to such new filings in the relevant groundwater management areas covered by the Moratorium Orders. The Cities have failed to present undisputed facts or supporting legal authority that would counter the Director's decision on this issue. Given the state of the law the Hearing Officer can grant summary judgment to the Coalition.

DATED this 13th September, 2023.

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FOR

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2023, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION'S RESPONSE TO CITIES' MOTION FOR PARTIAL SUMMARY JUDGMENT** by electronic service to each of the following:

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