RECEIVED
Sep 20, 2023
DEPARTMENT OF
WATER RESOURCES

Sarah A. Klahn, ISB #7928
Maximilian C. Bricker, ISB #12283
SOMACH SIMMONS & DUNN, P.C.
1155 Canyon Blvd., Suite 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com
Attorneys for City of Pocatello

Robert L. Harris, ISB# 7018
HOLDEN KIDWELL HAHN & CRAPO, PLLC
PO Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com
efiling@holdenlegal.com
Attorneys for City of Idaho Falls, City of Ammon, and Falls Water Co., Inc.

Candice M. McHugh, ISB #5908
Chris Bromley, ISB #6530
MCHUGH BROMLEY, PLLC
380 South 4th Street, Suite 103
Boise, ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com
Attorneys for the Coalition of Cities, City of Bellevue and Wellsprings Group, LLC

Michael P. Lawrence, ISB #7288
Charlie S. Baser, ISB #10884
GIVENS PURSLEY LLP
P O Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com
csb@givenspursley.com
Attorneys for City of Hailey and Veolia Water Idaho, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF BIG WOOD RIVER GROUND WATER MANAGEMENT AREA	**MUNICIPAL PROVIDERS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN	

The City of Pocatello, City of Bellevue, City of Hailey, City of Idaho Falls, City of Ammon, Coalition of Cities[1], Falls Water Co., Inc., Veolia Water Idaho, Inc. ("Veolia"), and Wellsprings Group, LLC (collectively, the "Municipal Providers"), by and through their

[1] The Coalition of Cities is composed of the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

respective counsel of record, file this reply brief in support of their August 30, 2023 *Motion for Partial Summary Judgment* ("*Motion*")[2] and to specifically address the arguments set forth in *Surface Water Coalition's Response to Cities' Motion for Partial Summary Judgment* ("*SWC Response*")[3] dated September 13, 2023.

I. There are no disputed facts preventing summary judgment in favor of the Municipal Providers.

Surface Water Coalition ("SWC") contends that the *Motion* "is not based upon undisputed facts." *SWC Response* at 2. But there is only one fact that matters, and it is not disputed: while municipal water use can be fully consumptive, the evidence in the record shows that it is not always fully consumptive. The Director's *Moratorium Orders* consider all new municipal permit applications to be fully consumptive, thus requiring mitigation for the entire quantity to be diverted instead of the quantity actually consumed. Where municipal use can be shown to be less than fully consumptive, the Director's *Moratorium Orders* unfairly and illegally require municipal applicants to over-mitigate. *See discussion in Opening Brief* at 8-10.

The only facts in the record concerning municipal water use are in the Municipal Providers' Expert Report and Veolia's Expert Report. Both reports concluded that the Municipal Providers' and Veolia's actual consumptive use of municipal water is typically

[2] The Municipal Providers' *Motion* was supported by the *Municipal Providers' Memorandum In Support of Motion for Partial Summary Judgment* ("*Opening Brief*") and the *Affidavit of Maximillian C. Bricker in Support of Municipal Providers' Motion for Partial Summary Judgment* ("*Bricker Affidavit*"). Capitalized terms not defined herein have the same meaning as those defined in the *Opening Brief*.

[3] South Valley Ground Water District and Galena Ground Water District jointly filed a *Notice of Joinder in Surface Water Coalition's Response* dated September 13, 2023. Big Wood & Little Wood Water Users Association and Big Wood Canal Company jointly filed the *Big Wood & Little Wood Water Users Association and Big Wood Canal Company's Response to Cities' Motion for Partial Summary Judgment* dated September 13, 2023, which concurs with the *SWC Response* and raises no new arguments.

substantially less than the amounts diverted (roughly half on average). *See* Municipal Providers' Expert Report at 8; Veolia's Expert Report at 4.

SWC's Expert Report contained no facts concerning municipal diversions or consumptive use, but instead merely opined that municipal and domestic uses "can be" fully consumptive. SWC's Expert Report at 4. This is not in dispute, as SWC recognizes. *See SWC Response* at 10 ("the Cities do not dispute that a 'municipal' water right can be fully consumed"). Indeed, the Municipal Providers' expert recognized that in Idaho "a water right for municipal purposes may be fully consumed without exceeding the authorized beneficial use." Municipal Providers' Expert Report at 5 (quoted in SWC's Expert Report at 4) (emphasis added).

More importantly, however, is the undisputed fact that municipal water use is not always fully consumptive (indeed, it rarely is). Municipal Providers' Expert Report at 5 ("In my experience, the consumptive use of municipal water use is typically much less than 100%"). The Municipal Providers' *Motion* asks IDWR to revise the *Moratorium Orders* to reflect this fact and to allow new municipal applications to be reviewed on a case-by-case basis so that applicants are required to mitigate only for the consumptive use actually demonstrated.[4]

II. The *Riverside* decision supports the Municipal Providers' *Motion*.

The Municipal Providers agree that Judge Wildman's decision in *Riverside Irrigation District v. IDWR* (Canyon County Dist. Ct., Third Jud. Dist., Case No. CV-14-23-05008) (Dec. 28, 2021) ("*Riverside*") stated that "[t]he nature of the purpose of use of a municipal right is

---

[4] Contemporaneous with this reply brief, the Municipal Providers are filing an errata to the *Motion* to clarify that their requested relief applies to both the *Amended SRB Moratorium Order* and the *BWR Moratorium Order*. This clarification does not prejudice any other party to this proceeding as the Municipal Providers' *Opening Brief* and the *SWC Response* clearly addressed the "fully consumptive" language in both *Moratorium Orders*.

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." *Riverside* at 10 (emphasis added). SWC urges that this means all municipal diversions always must be treated as fully consumptive. But that is not what Judge Wildman said. All he said—which the Municipal Providers agree with—is that municipal water rights can be fully consumed. Or, as IDWR recognized in the *BWR Moratorium Order* at 6, "the entirety of the municipal use may become consumptive over time." In short, neither *Riverside* nor IDWR's own conclusions support treating all new municipal applications as *per se* fully consumptive.

The Municipal Providers are not asking for a "free pass" as alleged by SWC. *SWC Response* at 11. Rather, they are asking to be treated like all other appropriators by having their applications reviewed on a case-by-case basis to determine the amount of water to be consumed, and mitigating for only that amount. The "freebie" in this case is that sought by non-municipal appropriators under the Department's current *Moratorium Orders*, which require municipal appropriators to mitigate for more water than they consume, thereby adding water to the system for others' benefit.

SWC notes that, in *Riverside*, Judge Wildman 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)." *SWC Response* at 14. This, he explained, was because "the subject water use is not occurring under those water rights, but rather is occurring under Idaho Code § 42-201(8)." *Riverside* at 11. In other words, Nampa was not violating an element or condition of its water rights because the use was authorized by statute. Notably, Judge Wildman was not faced with and did not decide the question of whether the Department could curtail use of Nampa's municipal water rights if Nampa was in fact violating a condition of those water rights,

such as a condition limiting consumptive use to a quantity determined at the time of permitting (unless additional mitigation is provided later) or a condition requiring mitigation of the amount of water actually consumed as determined through water use accounting. The Municipal Providers would welcome these kinds of conditions rather than a blanket assumption that municipal use is fully consumptive (when it is not).

In trying to distinguish municipal use, SWC asserts that "irrigation water rights are limited to historic consumptive use." *SWC Response* at 13. This is true when an irrigation right is changed to a new purpose of use. *See IDWR Administrator's Memorandum, Transfer Processing No. 24 (Dec. 21, 2009) ("Transfer Memo")* § 5d(5) at pp. 29-30. But outside of that context, irrigation rights actually are not limited to historic consumptive use. Instead, they are entitled to divert substantially more water than consumed. *See Sixth Final Order Regarding Methodology For Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* at 15, IDWR Docket No. CM-DC-2010-001 (July 19, 2023) (showing SWC members' project efficiency, or consumptive use, rates range from 31-58%).

The same is true for municipal use, as described in the Municipal Providers' Expert Report and Veolia's Expert Report. But the *Moratorium Orders* treat municipal applications differently than irrigation or other uses[5] by requiring mitigation for all diversions on the flawed premise that because municipal uses can be fully consumptive they are always fully consumptive.[6] We further discuss this disparate treatment in Section III below.

[5] Other uses such as commercial and industrial also can be fully consumptive, but unlike municipal uses the *Moratorium Orders* do not assume they always are.

[6] It is unclear how IDWR would treat municipal uses in a transfer proceeding if they are considered fully consumptive under the *Moratorium Orders*. For example, if an applicant sought to transfer a fully mitigated municipal right to a new purpose of use, would the transferrable amount be limited to actual historical consumptive use or would the municipal right be treated as 100% consumed (even if it had not been)?

There is no support in the record (or in reality) for SWC's contention that "[m]unicipal water rights can and <u>will be</u> fully consumed." *SWC Response* at 14. The only evidence in the record of municipal water use is in the Municipal Providers' Expert Report and Veolia's Expert Report. Neither of these reports say that the municipal uses they analyze will become fully consumptive. Indeed, the undeniable fact that municipal water systems leak means that municipal diversions will never be 100% consumed. For that matter, even the most efficient land application system typically will not consume 100% of the water applied.

SWC argues that "[t]he fact that some portion of a municipal water right may not currently be fully consumed is irrelevant." *SWC Response* at 14. It is only irrelevant if you assume—as SWC does—that municipal water rights "<u>will be</u> fully consumed." *SWC Response* at 14 (emphasis added). The Municipal Providers do not deny that municipal consumption may change over time. That said, current municipal consumption is a good indicator of future municipal consumption in the short-term (*i.e.*, within the 5-year permit prove-up period). Potential future changes can be addressed by, for example, conditioning the right to a certain amount of consumptive use (or wastewater treatment and disposal methods) and then requiring monitoring and reporting by the municipal right holder. *See* Cefalo Dep. Tr. at 86:10-87:8 (confirming this is possible). If the municipal consumptive use grows beyond the amount mitigated for, IDWR could curtail that municipal use and/or require additional mitigation.[7]

SWC argues that "[t]here is no impediment to full consumption [of a municipal water right]." *SWC Response* at 14. While Judge Wildman in *Riverside* found that municipal water

[7] After decades of conjunctive administration in the ESPA which has compelled municipal providers to mitigate for their water use, the Municipal Providers are mystified by the Department's position (as stated by James Cefalo in his deposition) that "the department really has no enforcement ability to curtail that [municipal] water use. . . . Because then you have a public health emergency. We can't shut people's drinking water off without creating problems." Cefalo Dep. Tr. at 72:19-23.

rights "can be" fully consumed, there are substantial practical impediments to doing so. These include: obtaining regulatory approvals necessary to change wastewater treatment and disposal methods; financing and constructing the necessary infrastructure; and securing land necessary for siting land application areas or evaporation ponds. And a municipal water right conditioned to limit the amount of consumptive use or require additional mitigation, or to require certain wastewater treatment and disposal methods (so as to maintain a certain level of consumptive use) could deter a municipality from changing its methods. In short, while municipal consumptive use can change, it does not substantially change overnight.

III. **The *Moratorium Orders* do not treat municipal uses the same as other uses.**

SWC contends that "the Director's moratorium orders treat new applications for permit for municipal uses similar to other new water rights." *SWC Response* at 15. This is false. As stated above, the *Moratorium Orders* require municipal applicants to mitigate for their full diversions even if only a fraction is consumed, while other uses are required only to mitigate for projected consumptive use. *See Amended SRB Moratorium Order* at 29 ("The 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 terms of this moratorium if . . . [t]he 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 applicant to offset injury to other water rights."); *see also BWR Moratorium Order* at 8 (substantively identical language).

There is no rational basis for this disparate treatment. It is no more difficult to project municipal consumptive use during the 5-year prove up period than it is to project any other uses' consumption. Municipal Providers' Expert Report at 14 ("[d]etermining the consumptive use

rate for municipal water uses is no more difficult than it is for other water uses . . ."). All one has to do is look at current consumption (including wastewater treatment and disposal methods) and investigate whether it will (or can be expected to) change.

SWC's perspective on IDWR's permitting of "maximum" consumptive use is at odds with actual practice. *See SWC Response* at 16. They cite a statement in the statutory definition of "consumptive use" that says "'Authorized consumptive use' means the maximum consumptive use that may be made of a water right." I.C. § 42-202B(1). But the applicability of the term "authorized consumptive use" is unclear because, aside from this statute, it is found nowhere else in the statutes or in IDWR's Water Appropriation Rules, IDAPA 37.03.08.

SWC also incorrectly contends that "[w]hen IDWR evaluates a new application and issues a permit, it will issue a quantity that corresponds to an 'authorized consumptive use.'" *SWC Response* at 16. This is not IDWR's practice. IDWR's Water Appropriation Rules require an applicant to state "[t]he quantity of water to be diverted . . . ." IDAPA 37.03.08.035.03.a.iv (emphasis added), and this is the quantity that is permitted.

"Consumptive use is not an element of a water right." I.C. § 42-202B(1). And consumptive use limits generally are not included on water right permits. Granted, consumptive use is evaluated when mitigation is required, such as in a moratorium area. And, here, the Municipal Providers are advocating that new municipal permits can be conditioned to require mitigation of whatever water is actually consumed. But generally speaking, SWC is incorrect that the quantity authorized under an IDWR permit reflects consumptive use.

IV. SWC is not entitled to summary judgment.

SWC requests that the Department issue summary judgment confirming "the Director's presumption that municipal and community domestic water systems are fully consumptive at the

time of permitting." *SWC Response* at 18. As set forth above and in the Municipal Providers' *Opening Brief*, the Municipal Providers' *Motion* should be granted. However, if it is not, SWC's request for summary judgment should be denied.

The SWC's summary judgment request is not consistent with the record or the plain text of the *Moratorium Orders*. If the *Moratorium Orders* merely contained a presumption (*i.e.,* an assumption that can be rebutted with evidence to the contrary), this proceeding might not have been initiated. But that is not the case. The *Moratorium Orders* do not presume that municipal use is fully consumptive, but instead declare that municipal use is always fully consumptive and any new municipal appropriations must be mitigated as though they are fully consumptive even if they will not be. As explained herein and in the Municipal Providers' *Opening Brief*, there is no basis in fact or law for this blanket determination.

To the extent that SWC's request for summary judgment actually requests an order that the *Moratorium Orders* establish a mere presumption of fully consumptive municipal use (that can be rebutted with evidence to the contrary), that request is consistent with the relief sought by the Municipal Providers in their *Motion*, which asks that the language in the *Moratorium Orders* concerning municipal water use be changed to:

> Applications for municipal water use and for domestic use shall be evaluated on a case-by-case basis to determine whether the proposed use, or some portion thereof, is non-consumptive.

Motion at 3.

In conclusion, the Municipal Providers' request for summary judgment should be granted and SWC's request for summary judgment should be denied.

Respectfully submitted this 20th day of September, 2023.

SOMACH SIMMONS & DUNN, P.C.

Maximilian C. Bricker, ISB #12283
Sarah A. Klahn, ISB #7928
Attorneys for City of Pocatello

MCHUGH BROMLEY, PLLC

/s/ Candice M. McHugh
Candice M. McHugh, ISB #5908
Chris Bromley, ISB #6530
Attorneys for Coalition of Cities, City of Bellevue and Wellsprings Group, LLC

GIVENS PURSLEY LLP

Michael P. Lawrence, ISB #7288
Charlie S. Baser, ISB #10884
Attorneys for City of Hailey and Veolia Water Idaho Inc.

HOLDEN KIDWELL HAHN & CRAPO, PLLC

/s/ Robert L. Harris
Robert L. Harris, ISB# 7018
Attorneys for City of Idaho Falls, City of Ammon, and Falls Water Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, a true and correct copy of the foregoing document was served by email and addressed to the following:

Gary Spackman, Director Mat Weaver, Acting Director IDAHO DEPARTMENT OF WATER RESOURCES PO Box 83720 Boise, ID 83720-0098 Gary.Spackman@idwr.idaho.gov Mathew.weaver@idwr.idaho.gov file@idwr.idaho.gov	Garrick L. Baxter Deputy Attorney General Idaho Department of Water Resources PO Box 83720 Boise, ID 83720-0098 Garrick.baxter@idwr.idaho.gov
Norman M. Semanko Payton G. Hampton PARSONS BEHLE LATIMER 800 W. Main Street, Suite 1300 Boise, ID 83702 nsemanko@parsonsbehle.com phampton@parsonsbehle.com ecf@parsonsbehle.com	Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, PLLC P.O. Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405 rharris@holdenlegal.com
Candice McHugh Chris Bromley McHugh Bromley, PLLC 380 South 4th Street, Suite 103 Boise, ID 83702 cmchugh@mchughbromley.com cbromley@mchughbromley.com	James R. Laski Heather E. O'Leary LAWSON LASKI CLARK, PLLC PO Box 3310 Ketchum, ID 83340 jrl@lawsonlaski.com heo@lawsonlaski.com efiling@lawsonlaski.com
W. Kent Fletcher FLETCHER LAW OFFICE PO Box 248 Burley, ID 83318 wkf@pmt.org	Jerry R. Rigby Chase T. Hendricks RIGBY, ANDRUS & RIGBY, PLLC 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com chendricks@rex-law.com

Albert P. Barker Travis L. Thompson MARTEN LAW LLP PO Box 63 Twin Falls, ID 83303-0063 abarker@martenlaw.com tthompson@martenlaw.com jnielsen@martenlaw.com	Thomas J. Budge Elisheva M. Patterson RACINE OLSON, PLLP PO Box 1391 Pocatello, ID 83204 tj@racineolson.com elisheva@racineolson.com
John K. Simpson MARTEN LAW LLP PO Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com	Scott N. Pugrud IDAHO POWER COMPANY PO Box 70 Boise, ID 83707 Spugrud2@idahopower.com
Dylan B. Lawrence VARIN THOMAS LLC PO Box 1676 Boise, ID 83701-1676 dylan@varinthomas.com	Sarah A. Klahn, ISB #7928 Maximilian C. Bricker, ISB #12283 SOMACH SIMMONS & DUNN, P.C. 1155 Canyon Blvd., Suite 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com
Matthew A. Johnson Brian O'Bannon WHITE PETERSON GIGRAY & NICHOLS, P.A. 5700 E. Franklin Rd., Ste. #200 Nampa, ID 83687-7901 mjohnson@whitepeterson.com bobannon@whitepeterson.com	Evan Robertson ROBERTSON & SLETTE, PLLC PO Box 1906 Twin Falls, ID 83303-1906 erobertson@rsidaholaw.com

COURTESY COPIES SENT VIA EMAIL TO BWRGWMA Advisory Committee Members:

Corey Allen callen@sunvalley.com	Cooper Brossy Cooper.brossy@gmail.com
Rod Hubsmith Kaysi10@live.com	Sharon Lee Slee247@mac.com

Pat McMahon pat@svwsd.com	Kristy Molyneux Jkmoly78@gmail.com
Carl Pendleton pendletonranch@hotmail.com	Pat Purdy pat@purdyent.com
William Simon Wasimon9@gmail.com	Michelle Stennett mstennett@senate.idaho.gov
Nick Westendorf nick@41farms.com	Brian Yeager Brian.yeager@haileycityhall.org

Michael P. Lawrence