

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

IN THE MATTER OF BIG WOOD RIVER  
GROUND WATER MANAGEMENT AREA

IN THE MATTER OF APPLICATIONS  
FOR PERMIT FOR THE DIVERSION AND  
USE OF SURFACE AND GROUND  
WATER WITHIN THE SNAKE RIVER  
BASIN

**ORDER DENYING MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**BACKGROUND**

On May 17, 2022, then-Deputy Director Mat Weaver, while serving as acting director, issued the *Order Establishing Moratorium* for the Big Wood River Ground Water Management Area (“*Big Wood Moratorium*”). 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”). *Big Wood Moratorium* at 7.

On October 21, 2022, then-Director Gary Spackman issued the *Amended Snake River Basin Moratorium Order* (“*Snake Moratorium*”). The order established a moratorium on the processing and approval of new and pending applications for permits to appropriate water from the Snake River upstream from Swan Falls Dam and all surface and ground water sources in the trust water area and the non-trust water area, subject to certain conditions. *Snake Moratorium* at 27.

Several affected water users filed petitions challenging the two moratoriums. The petitions initiated contested case proceedings. The parties engaged in several joint, informal settlement conferences but did not reach a resolution.

The Department held a joint prehearing conference on March 10, 2023. During the joint prehearing conference, the parties agreed that language found in both moratorium orders present a common issue. Both orders state: “Applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive.” *Big Wood Moratorium* at 8; *Snake Moratorium* at 29. After discussion surrounding the additional issues for hearing, the Director noted his intention to consolidate the contested proceedings, with the understanding that each issue would be taken up separately and consecutively. The parties did not object.

Therefore, on March 31, 2023, the Director consolidated the contested proceedings for the *Big Wood Moratorium* and *Snake Moratorium* matters for hearing pursuant to IDAPA 37.01.01.555.

On August 30, 2023, certain Municipal Providers<sup>1</sup> filed a motion and memorandum in support of motion for partial summary judgment in this consolidated case. The Municipal Providers assert “[s]ummary judgment is proper in this proceeding because it is undisputed that there is no factual basis to conclude that municipal and domestic uses are always fully consumptive.” *Municipal Providers’ Mem. in Supp. of Partial Summ. J.* 6. The Municipal Providers did not request oral argument.

On September 13, 2023, the Surface Water Coalition (“SWC”) responded in opposition to the Municipal Providers’ motion. The same day, South Valley Ground Water District and Galena Ground Water District joined the SWC’s response in opposition. Similarly, the Big Wood & Little Wood Water Users Association and Big Wood Canal Company concurred with the SWC’s response in opposition and adopted and incorporated its arguments by reference. The opposition asserts that the Municipal Providers “can fully consume their water rights without exceeding the authorized beneficial use. As such IDWR’s ‘fully consumptive’ policy as set forth in the Orders, is an appropriate measure to conserve limited water resources.” *SWC’s Resp. to Cities’ Mot. for Partial Summ. J.* 8 (internal citation omitted). The SWC further urges the Department to grant summary judgment in its favor and confirm the conclusion. *Id.* at 18.

The Municipal Providers replied on September 20, 2023. They also submitted an erratum to their motion clarifying that they sought summary judgment on the language in both the *Big Wood Moratorium* and *Snake Moratorium*.

The Scheduling Orders did not set forth a deadline to file motions for summary judgment and the Department considers the Municipal Providers’ motion to be timely. Under the Department’s Rules of Procedure, the time for briefing in support and opposition has now closed and the matter is ripe for review and disposition. IDAPA 37.01.01.220.02.

## LEGAL STANDARD

The Department’s Rules of Procedure, IDAPA 37.01.01, govern the pending motion in this case. Rule of Procedure 220.03 authorizes motions for summary judgment and states that “Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency.” IDAPA 37.01.01.220.03.

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Lee v. Litster*, 161 Idaho 546, 549, 388 P.3d 61, 64 (2017) (quoting *Safaris Unlimited, LLC v. Von Jones*, 158 Idaho 846, 850, 353 P.3d 1080, 1084 (2015)). The burden of establishing the absence of a genuine issue of material fact belongs to the moving party. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

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<sup>1</sup> The moving Municipal Providers are the City of Pocatello, City of Bellevue, City of Hailey, City of Idaho Falls, City of Ammon, Falls Water Co., Inc., Veolia Water Idaho Inc. (“Veolia”), Wellsprings Group, LLC, and the Coalition of Cities. 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.

If the movant meets its burden, the movant is entitled to summary judgment unless the nonmovant presents “specific facts that demonstrate the existence of a genuine issue for trial”—a “mere scintilla of evidence” or “slightest doubt as to the facts” will not do. *Haight v. Idaho Dep’t of Transp.*, 163 Idaho 383, 387, 414 P.3d 205, 209 (2018). “Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013).

## ANALYSIS

The Municipal Providers have moved for partial summary judgment seeking that the Director enter an order making three findings. The Municipal Providers request the Director find first that “there is no genuine dispute that municipal uses are not always fully consumptive,” and second that “IDWR has no authority to require mitigation amounts in excess of the ‘depletive effect’ or ‘consumptive use’ amounts associated with a new appropriation[.]” *Municipal Providers’ Mem. in Supp. of Partial Summ. J. 2*. Third, the Municipal Providers move the Director to replace the “fully consumptive” language in the moratorium orders with the language: “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.” *Id.* at 3.

In support of their motion, the Municipal Providers submitted an affidavit of Maximilian C. Bricker. Attached to the Bricker Affidavit are: (1) the transcript of the Deposition of Department employee James Cefalo; (2) the Municipal Providers’ Expert Report, prepared by Gregory Sullivan; (3) Veolia’s Expert Report, prepared by Terry Scanlan; and (4) the SWC’s Expert Report, prepared by David Shaw.

The opposition, led by the SWC, argues that the legal nature of the municipal water right enables one to fully consume it and, therefore, the “fully consumptive” language is appropriate. *SWC’s Resp. to Cities’ Mot. for Partial Summ. J. 8*. The opposition argues that summary judgment should be granted in its favor and the Department should confirm its conclusion. *Id.* at 18. In support of its opposition, the SWC submitted a declaration of Travis L. Thompson. Attached to the Thompson Declaration are: (A) a copy of the *Memorandum Decision and Order* issued in *Riverside Irrigation District v. Idaho Department of Water Resources*, No. CV14-21-08008 (Canyon Cnty. Dist. Ct. Idaho Dec. 28, 2021); (B) a copy of the *Municipal Intervenor Response*, *Riverside Irrigation District v. Idaho Department of Water Resources*, Oct 4, 2021; (C) a copy of the *City of Nampa Response Brief*, *Riverside Irrigation District v. Idaho Department of Water Resources*, Oct. 8, 2021; and (D) a copy of excerpts of the Department’s Administrator’s Memorandum, Transfer Processing No. 24, Dec. 21, 2009.

### **1. Partial summary judgment is not warranted because whether municipal and domestic uses are always fully consumptive is not at issue.**

The Municipal Providers contend that “it is undisputed that there is no factual basis to conclude that municipal and domestic uses are always fully consumptive.” *Municipal Providers’ Mem. in Supp. of Partial Summ. J. 6*. However, whether municipal and domestic uses are always

fully consumptive is not at issue either factually or as a matter of law in this proceeding. The issue is whether it is an appropriate policy for the Department to *consider* municipal and domestic uses to be fully consumptive as set forth in the moratorium orders.

In the *Big Wood Moratorium*, the Director recognized the unique nature of municipal water rights under Idaho law:

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).

*Big Wood Moratorium* 6. The Director also discussed the potential for municipal and domestic uses to become fully consumptive in practice rather than simply theoretically or as is legally permissible.

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 nonconsumptive. 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.

*Id.* Consistent with the foregoing, the Director ordered in relevant 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.

The *Snake Moratorium* did not focus on specific uses or their consumptive natures. Rather, the *Snake Moratorium* explained broadly that:

In Surface Water Coalition delivery call proceeding, the Director determined that ground water pumping by *existing* ground water users is causing material injury to *existing* surface water users. In other words, in some years, current water supplies do not satisfy current demands. If there are insufficient water supplies to satisfy current demands, water is not available for new appropriations. Approving new applications would only add to the injury suffered by the senior surface water users.

*Snake Moratorium* 23–24 (internal citation omitted). Despite the *Snake Moratorium*'s lack of specificity regarding the consumptive nature of municipal and domestic uses, the legal reality that a water right for municipal purposes may be fully consumed without exceeding the authorized beneficial use remains. As in the *Big Wood Moratorium*, in the *Snake Moratorium*, the Director ordered:

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.

The Municipal Providers argument mischaracterizes the orders. Critically, in neither moratorium order did the Director conclude that municipal and domestic uses *are always* fully consumptive. Rather, the Director concluded municipal and domestic uses “may be rendered fully consumptive” and “ha[ve] the potential to be fully consumptive.” *Big Wood Moratorium* 6.

The Director cannot grant the Municipal Providers' motion for partial summary judgment on an issue that attacks language that isn't found in the orders.

The Municipal Providers apparently misunderstand the Director's reasoning. Because the Director concluded municipal and domestic uses "may be rendered fully consumptive," the Director adopted a policy that municipal and domestic uses "shall be considered fully consumptive" for purposes of future applications. As the Department's Eastern Regional Manager, James Cefalo, explained at his deposition, part of the rationale for the policy is that "it would be very difficult . . . to track the consumptive fraction of water uses for municipalities or even subdivisions throughout the state." *Bricker Aff.* Ex. 1, Cefalo Depo. Tr. 71:22–72:3. Mr. Cefalo also noted the policy addresses the Department's enforcement concerns should a municipality or subdivision, for example, change their effluent treatment method from a mostly nonconsumptive treatment to a mostly consumptive treatment:

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 and 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. Mr. Cefalo continued:

I would say that our enforcement options become quite limited when we're starting to deal with drinking water for subdivisions that are already in existence, right? All of these homes have been built, all these people are drinking and using that water in their homes every day, it becomes very difficult to then say, well, your mitigation is—you have not mitigated for now this consumptive use because you're land applying, but we don't really have the power to shut off your drinking water.

*Id.* at 73:1–10. Considering these challenges, the Director adopted the fully consumptive policy for future applications for municipal and domestic uses. *See Big Wood Moratorium* 6.

Therefore, the issue for hearing is whether the Director's adoption of a policy to treat municipal and domestic uses as fully consumptive, given their potential to be fully consumptive, is appropriate. Accordingly, the Director declines to decide the matter on summary judgment. The Director intends to receive and consider the evidence presented in support of and in opposition to amending the moratorium orders. The parties should expect the hearing to be an opportunity to persuade the Director to amend or retain the policy consideration that all new applications for municipal and domestic uses from community water systems shall be considered fully consumptive.

**2. The Department had the authority to issue the moratorium orders with the fully consumptive condition.**

The Municipal Providers argue that as a matter of law, the moratorium orders cannot “impose a requirement that new municipal and domestic appropriations be treated as fully consumptive (and require 100% mitigation for the diversion amount instead of the amount consumed), without any technical and factual support of such an assertion, when an applicant *can* demonstrate that the proposed municipal use will not be fully consumptive.” *Municipal Providers’ Mem. in Supp. of Partial Summ. J.* 8. In making their argument, the Municipal Providers rely on certain parts of the Department’s Water Appropriation Rules regarding mitigation conditions on applications and the Conjunctive Management Rules regarding mitigation plans. However, the Municipal Providers do not acknowledge the Director’s duty to protect the waters of the state or his authority to issue moratorium orders when necessary.

Title 42 of Idaho Code “delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state.” I.C. § 42-201(7). The Department is responsible for regulating and administering the use of public waters. I.C. § 42-231. Additionally, it is the Director’s duty to “control the appropriation and use of the ground water of this state as in this act provided and 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.” *Id.*

In this case, the Department issued the moratorium orders pursuant to Idaho Code § 42-1805(7). Section 42-1805(7) grants the Director the authority “[a]fter 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 minimum flow provisions of the state water plan.” I.C. § 42-1805(7).

Likewise, Rule 55 of the Department’s Water Appropriation Rules allows the Director discretion to “cease approval applications for permit in a designated geographic area upon finding a need to (i) protect existing water rights; (ii) insure [sic] compliance with the provisions of Chapter 2, Title 42, Idaho Code; [or]<sup>2</sup> (iii) prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law.” IDAPA 37.03.08.055.01.a.

Therefore, when the Director issued the moratorium orders, he had the authority and discretion to determine that it was necessary to include the “fully consumptive” condition to protect existing vested water rights, to ensure compliance with chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan under § 42-1805(7).

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<sup>2</sup> Rule 55 treats this list as conjunctive with the use of “and” rather than “or.” However, as the rule and the statute are in conflict the statute controls, rendering this list disjunctive.

**ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Municipal Providers' Motion for Partial Summary Judgment* is DENIED with respect to both the Municipal Providers and the opposition.

DATED this 12th day of October 2023.



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Mathew Weaver  
Director



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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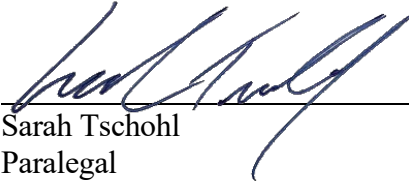
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