

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

**AMENDED ORDER ESTABLISHING
MORATORIUM**

PROCEDURAL HISTORY

On May 17, 2022, Deputy Director Mat Weaver, while serving as acting director of the Idaho Department of Water Resources (“Department”), 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, 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.

Director Spackman held a joint prehearing conference on March 10, 2023. During the joint prehearing conference, the parties agreed that language found in both moratorium orders presents 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. This issue is referred to as the “Fully Consumptive Issue” in this order.

In addition, Director Spackman agreed to hear the City of Bellevue’s issue regarding “[w]hether all pumping in the BWRGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek.” *Bellevue’s List of Issues for Hr’g* ¶ 1. This issue is referred to as the “Bellevue Issue” in this order.

Director Spackman noted his intention to consolidate the contested proceedings, with the understanding that each issue would be taken up 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 moved for partial summary judgment on the Fully Consumptive Issue. The Surface Water Coalition, South Valley Ground Water District, Galena Ground Water District, Big Wood and Little Wood Water Users Association, and Big Wood Canal Company opposed the motion.

On August 31, 2023, Director Spackman retired. Governor Little appointed Deputy Director Weaver to succeed Director Spackman as director. Director Weaver assumed the position on September 1, 2023.

On October 12, 2023, Director Weaver denied the Municipal Providers' partial summary judgment motion and clarified the Fully Consumptive Issue:

[T]he 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. . . . 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.

Order Denying Motion for Partial Summ. J., at 6.

On October 16–19, 2023, Director Weaver held a hearing on the Fully Consumptive Issue and the Bellevue Issue. The Director heard testimony and admitted exhibits in support of and in opposition to both issues. At the conclusion of the hearing, the Director authorized the parties to submit simultaneous post-hearing briefs for each issue no later than close of business November 17, 2023. The parties timely submitted their closing briefs, and the Director took the matter under advisement.

ISSUES AT HEARING

In this section, the Director reviews the issues raised at the hearing and explains the Director's response to each issue.

1. The Bellevue Issue

The *Big Wood Moratorium* included the following 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 surface water flows in the Big Wood River drainage upstream from Magic Reservoir and in Silver Creek, a key tributary of the Little Wood River. Lower ground water levels would result in less aquifer discharge to surface water. New development of consumptive ground water use would reduce the quantity of water available to fill senior surface water rights during times when administration by priority is necessary.

Big Wood Moratorium, at 3.

The cities of Bellevue and Hailey disagree with the statements in this paragraph regarding the hydrological impacts that pumping ground water from within the BWRGWMA has on Silver

Creek. The cities of Bellevue and Hailey submitted proposed alterations to this language prior to the hearing. At hearing, the cities submitted the expert report of Gregory K. Sullivan that included a proposed alteration.¹ Mr. Sullivan testified about his proposed alteration at hearing. In their closing brief, the cities proposed a different alteration.²

The language proposed by Mr. Sullivan in his expert report was the language upon which the opposing entities sought rebuttal experts and upon which they relied as the proposed altered language to develop their evidence in opposition at hearing. In their closing brief, Bellevue and Hailey appear to have abandoned Mr. Sullivan’s proposed language in favor of advancing new proposed language. As the Director ordered closing briefs to be submitted simultaneously, none of the entities in opposition have had the opportunity to respond to Bellevue and Hailey’s new proposed language. Regardless, the Director finds that the evidence presented at the hearing supports the language of this paragraph as written, particularly the testimony of Jennifer Sukow, IDWR Engineer Technical 2.

In separate proceeding in 2021, Ms. Sukow prepared a memo regarding the “predicted hydrologic response in Silver Creek and the Little Wood River to a potential curtailment of groundwater use during the 2021 irrigation season.” Hr’g Tr. Vol. III 628:11–14. *See* Ex. 202 (Jennifer Sukow Response to Request for Staff Memo Corrected) [hereinafter 2021 Sukow Report]. In the 2021 Sukow Report, Ms. Sukow “analyzed impacts of curtailment of pumping within WRV1.1³ model boundary.” Hr’g Tr. Vol. III 629:7–8. Ms. Sukow “also analyzed impacts of curtailment within a smaller boundary, which included almost all of the area south of Glendale Bridge.” *Id.* at 628:8–11. At hearing, Ms. Sukow testified that the results discussed in the 2021 Sukow Report were “limited to the results for the July 1 through September 30th impacts that were predicted to occur during 2021. So it’s not applicable outside of that time frame.” Hr’g Tr. Vol. III 631:10–13.

¹ Mr. Sullivan’s expert report proposed adding the following additional remark to the language at issue:

Silver Creek is materially impacted only by groundwater pumping within the Bellevue Triangle south of the Glendale Bridge. Absent offsets or mitigation, groundwater pumping from the alluvial aquifer of the Big Wood River and its tributaries north of the Glendale Bridge materially impacts the flow of the Big Wood River, and has no material impact on the flow of Silver Creek.

Ex. 314, at 4.

²The Cities of Bellevue and Hailey’s post hearing brief requests the relevant language be modified as follows:

Hydrogeologic analysis and modeling looking at long-term impacts since implementation of the Management Policy confirm significant interaction between surface water and ground water in the BWRGWMA. Pumping ground water every year, year in and year out, from within the BWRGWMA affects surface water flows in the Big Wood River drainage upstream from Magic Reservoir and in Silver Creek, a key tributary of the Little Wood River. The timing of impacts to Silver Creek of any pumping above Glendale Bridge would fluctuate seasonally. New development of consumptive ground water use would reduce the quantity of water available to fill senior surface water rights during certain times when administration by priority is necessary.

Bellevue/Hailey Post Hr’g Br., at 3 (emphasis in original).

³ “WRV1.1 model boundary” refers to the Wood River Valley, Version 1.1 model boundary.

Despite this limitation, Mr. Sullivan relied upon select statements in the 2021 Sukow Report to develop his expert opinion in this matter. Ex. 314, at 3. In part, Mr. Sullivan’s report concluded that “[t]he foregoing statements make it clear that pumping north of the Glendale Bridge results in insignificant hydraulic impact on the flow of Silver Creek.” Hr’g Tr. Vol. III 636:19–22. At hearing, Ms. Sukow testified that she disagreed with Mr. Sullivan’s conclusion because the statements he selected from the 2021 Sukow Report “were specific to that July 1 to September 30th curtailment scenario. And they were also looking at, you know, what was significant just within that time frame to get waters to the seniors by September 30th of that year.” *Id.* at 637:1–5.

Ms. Sukow testified that when she analyzed the long-term impact of pumping outside of the 2021 curtailment area to Silver Creek streamflow, “[t]he average impact for the areas outside of the curtailment area, which is primarily the area north of Glendale Bridge, was eight percent of the consumptive use that was modeled in that area.” *Id.* at 635:9–12. In other words, “for all the locations that have been pumped at historically, if they had not been pumping eight percent of that, approximately eight percent of that volume would have gone to Silver Creek.” *Id.* at 635:17–21.

Ms. Sukow explained that the eight percent average impact was direct impacts (i.e., “impacts to the aquifer that would lower water levels, and then directly impact flow in Silver Creek over a period of a few years.”). *Id.* at 637:21–23. Ms. Sukow testified that she also noted the indirect impacts to Silver Creek above and beyond the eight percent direct impacts

that are indirect in that there is direct impacts to the flow in the Big Wood River, and that reduces the availability of surface water diversions to irrigators that divert out of the Big Wood River onto Bellevue Triangle, and, you know, there are canal seepage losses and other losses to the groundwater that occur from that surface water. So if that surface water is not available, that reduces aquifer recharge, reduces water levels, and then reduces flow to Silver Creek.

Hr’g Tr. Vol. III 637:25–638:9.

Ms. Sukow further testified that she disagreed with Mr. Sullivan that the proposed language from his expert report should be added to the moratorium order. Ms. Sukow explained:

I think, you know, review of the longer term modeling shows that it’s the statement, the statements that he’s making are not true. That analysis shows that there is a relevant or significant impact to streamflow in Silver Creek. There is a direct impact that’s relevant for the area, for pumping in the area north of Glendale Bridge as a whole, and then, you know, specific locations with that area may have more or less impact.

Hr’g Tr. Vol. III 639:11–18.

Ms. Sukow’s testimony that groundwater pumping from the alluvial aquifer north of Glendale Bridge has an impact on streamflow in Silver Creek was supported by David Shaw and Erick Powell’s testimonies. Hr’g Tr. Vol. II 596:4–604:10 (Shaw Testimony); Hr’g Tr. Vol. III 685:20–697:13 (Powell Testimony).

In addition, when testifying in rebuttal, Mr. Sullivan confirmed Ms. Sukow’s analysis that the long-term impact to Silver Creek of curtailment upstream of the Glendale Bridge would be about 8 percent of the volume curtailed. Hr’g Tr. Vol. III 708:5–21. Mr. Sullivan also noted that the impact to Silver Creek during irrigation season months would be about 4 percent of the curtailed pumping. *Id.*

Again, the Director finds that the evidence presented at the hearing supports the language of the paragraph at issue as written. Therefore, the Director declines to modify or expand the relevant language.

2. Fully Consumptive Issue

The *Big Wood Moratorium* included the following statement: “Applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive.” 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, at 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.

Because the Director concluded municipal and domestic uses “may be rendered fully consumptive,” the Director adopted a policy in the *Big Wood Moratorium* 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. In light of these challenges, the Director adopted the fully consumptive policy for future applications for municipal and domestic uses. *See Big Wood Moratorium*, at 6.

As explained in the *Order Denying Motion for Partial Summary Judgment*, the issue at hearing was not whether municipal and domestic uses are fully consumptive but rather whether it was an appropriate policy for the Department to consider municipal and domestic uses to be fully consumptive, given their potential to be fully consumptive. *Ord. Denying Mot. for Partial Summ. J.*, at 3–4.

In opposition to the fully consumptive policy, the Municipal Providers argue in their post-hearing brief that “the evidence presented at the hearing overwhelmingly showed that (a) municipal water use rarely (if ever) is fully consumptive, and (b) the Department can condition and administer new municipal water rights to ensure depletions are fully mitigated.” *Mun. Providers’ Post-Hr’g Br.*, at 2. The Municipal Providers offer several suggestions for how the Department could condition a water right as an alternative to the fully consumptive policy. Ultimately, however, the Municipal Providers request the language concerning municipal water use be amended to provide as follows: “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 14.

In opposition to the proposal that the Department could condition permits rather than assuming consumptive use, the Surface Water Coalition argues in its post-hearing brief that additional conditions are inappropriate. *SWC Post-Hr’g Br.*, at 8–9. In support of its position, SWC offers four arguments, which are based on the hearing testimony of Mr. Cefalo:

First, IDWR does not have the ability to change the material terms of a water right based upon its conditions. Second, the burden on IDWR from water rights processing is already great and would increase with additional conditions placed on water rights that would need subsequent approval and enforcement. Third, any change to a permit would require public notice, which would likely lead to protests, hearings, appeals, and complicated and burdensome legal challenges that are expensive and time consuming for IDWR. Fourth, new applicants and permit holders already do not always comply with IDWR conditions and enforcement of existing decrees, permits, and licenses is difficult. Currently IDWR does not have the ability to properly monitor and enforce heavily conditioned municipal water rights.

Id. The SWC requests the Director maintain the fully consumptive policy.

Based on the evidence and arguments presented in support of and in opposition to the fully consumptive policy, the Director finds it is necessary and appropriate to adopt an amended fully consumptive policy. As detailed in the fourth paragraph in the Order below, the Director will presume new municipal and domestic uses to be fully consumptive but will allow an applicant to submit evidence to rebut the presumption.

3. Other Issues

At the hearing, Department Eastern Regional Manager James Cefalo explained that some water users had raised concerns regarding certain definitions in the moratorium orders. Hr’g Tr. Vol. I 35–38. Mr. Cefalo agreed that the reference to “municipal water use” in the orders should be changed to “municipal purposes.” He also agreed that the term “community water system” should be defined. He also suggested that references to “noncommunity water system” should be changed. The Director agrees that these changes should be made and will make changes to address these concerns.

4. Amended Final Order

The Director has considered the record before the Department including the testimony of the witnesses, the exhibits admitted at hearing, and the arguments of counsel. The Director agrees that certain changes to the original order are necessary. The following findings of fact and conclusions of law are mostly verbatim from the original order, with the modifications discussed above. Based on the foregoing, the Director hereby finds and concludes as follows.

BACKGROUND AND FINDINGS OF FACT

Since January 22, 1980, the Department has viewed surface water in the Big Wood River and tributaries upstream from Magic Dam to be fully appropriated.⁴ Consequently, since 1980 the Department has not approved applications to appropriate surface water for unmitigated consumptive uses from the Big Wood River and tributaries upstream from Magic Dam. For decades, surface water rights in this area have been organized into water districts and administered by priority. Currently, the watermasters of Water District 37 (Big Wood River, Little Wood River, and Silver Creek and their tributaries) and Water District 37B (Camas Creek and its tributaries) address water supply shortages by curtailing junior surface water rights to satisfy senior surface water rights. Administration of surface water deliveries by priority occurs in WD37 and WD37B every year.

On June 28, 1991, the Department issued an order designating the BWRGWMA (“*Designation Order*”).⁵ The BWRGWMA includes that portion of the Big Wood River drainage upstream from Magic Dam, including the Camas Prairie aquifer system. The BWRGWMA also

⁴ See Memorandum from C. Stephen Allred, Director, Idaho Dep’t of Water Res., to Staff (Jan. 22, 1980) (Re: Big Wood River Appropriations), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Application-Processing-Memo-20.pdf>.

⁵ See *Order, In re Designating Big Wood River Ground Water Mgmt. Area* (Idaho Dep’t of Water Res. June 28, 1991), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1991/19910628-Big-Wood-River-GWMA-Order.pdf>.

includes the upper Silver Creek drainage in the vicinity of Picabo, Idaho. A map of the geographical area of the BWRGWMA is attached to this order as Appendix 1. The *Designation Order* states the need for management of ground water use in the BWRGWMA in the following two Findings of Fact:

1. The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.

....

4. Injury could occur to prior surface and ground water rights including the storage right in Magic Reservoir if the flows of streams, rivers and ground water underflow in the Big Wood River Basin are intercepted by junior priority ground water diversions.

Designation Order, at 1 (Findings of Fact).

To address the potential for injury to prior surface and ground water rights from ground water pumping, the Department adopted a management policy for the BWRGWMA (“Management Policy”).⁶ The Management Policy includes the following directives:

Most consumptive use applications will be denied unless the applicants can demonstrate there will be no injury or can provide acceptable mitigation to prior rights.

The department will continue to consider the approval of applications for permit which propose non-consumptive uses, municipal uses, stockwater and domestic uses as defined in Section 42-111, Idaho Code.

Management Policy § III, at 3–4.

In accordance with the Management Policy, since 1991, the Department has restricted the issuance of permits for new unmitigated consumptive uses of ground water within the BWRGWMA.

In 1993, the Department established a moratorium on new appropriations of surface and ground water in an area that includes Administrative Basin 37, where the BWRGWMA is located (“*ESPA Moratorium*”).⁷ However, paragraph 8 of the order section of the *ESPA*

⁶ See Idaho Dep’t of Water Res., *Management Policy for the Big Wood River Ground Water Management Area* (June 28, 1991), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1991/19910628-Big-Wood-River-GWMA-Order.pdf>.

⁷ See Am. Moratorium Order, *In re Applications for Permits for Diversion & Use of Surface & Ground Water within E. Snake River Plain Area & Boise River Drainage Area* (Idaho Dep’t of Water Res. April 30, 1993), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/1993/19930430-Moratorium-ESA.pdf>.

Moratorium states that it “does not change or affect the administration of any area that has been previously designated as . . . a ground water management area pursuant to Section 42-233b, Idaho Code.” For the BWRGWMA, the effect of the *ESPA Moratorium* was to limit the development of new consumptive surface water and ground water rights in the portion of the BWRGWMA not limited in 1980 (i.e., the Silver Creek drainage in the vicinity of Picabo).

Since 1991, conditions creating the need to restrict new appropriations of water within the BWRGWMA have not substantially changed. Ongoing monitoring of ground water levels suggests that the 1991 Management Policy restricting new unmitigated consumptive uses of ground water has attenuated the significant long-term downward trends in ground water levels observed during the period of increasing ground water development between the 1950s and 1990.⁸ While consumptive use of ground water authorized by water rights developed prior to the 1991 Management Policy continues to exacerbate short-term water level declines during dry years, the restriction on new ground water development appears to have allowed ground water levels to recover during wet years to levels similar to those observed in the early 1990s. If new development of consumptive ground water use is allowed to resume, long-term ground water declines are also expected to resume, resulting in less recovery during wet years and even lower ground water levels in dry years.

Watermasters administer surface water rights by priority every year in the Big Wood River, Little Wood River, and Camas Creek drainages. Surface water in the Big Wood River, Little Wood River, Silver Creek, and Camas Creek is not sufficient to satisfy existing water rights. Consequently, there is little or no additional water for most new consumptive uses.

Hydrogeologic analysis and modeling since implementation of the Management Policy confirm significant interaction between surface water and ground water in the BWRGWMA.⁹ Pumping ground water from within the BWRGWMA affects surface water flows in the Big Wood River drainage upstream from Magic Reservoir and in Silver Creek, a key tributary of the Little Wood River.¹⁰ Lower ground water levels would result in less aquifer discharge to surface water. New development of consumptive ground water use would reduce the quantity of water available to fill senior surface water rights during times when administration by priority is necessary.

⁸ Allan Wylie, Idaho Dep’t of Water Res., *Summary of Ground Water Conditions in the Big Wood River Ground Water Management Area* 79 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/20190920-Summary-Groundwater-Conditions-Big-Wood-River-GWMA-2019-Update.pdf>.

⁹ See Memorandum from Jennifer Sukow, Technical Engineer 2, Idaho Dep’t of Water Res., to Gary Spackman, Director, Idaho Dep’t of Water Res. 25 (2015) (“Subject: Hydrology, hydrogeology, and hydrologic data, Big Wood & Little Wood Water Users Association delivery calls, CM-DC-2015-001 and CM-DC-2015-002”); see also Jennifer Sukow, Idaho Dep’t of Water Res., *Groundwater-Flow Model for the Wood River Valley Aquifer System, Version 1.1, Simulated Curtailment of Groundwater Use* 19 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/projects/wood-river-valley/20190731-Report-WRV-V11CurtailSim.pdf> [hereinafter *Version 1.1 Groundwater-Flow Model Simulated Curtailment*].

¹⁰ See *Version 1.1 Groundwater-Flow Model Simulated Curtailment*, at 19.

Consequently, the Department has initiated additional measures to manage the surface and ground water rights in the Wood River drainage. In 2013, the Department issued an order to include the administration of ground water rights in Water Districts 37 and 37B.¹¹

In 2016, the Department collaborated with the U. S. Geological Survey on a final report documenting version 1.0 of the Wood River Valley Groundwater-Flow Model, which enables the Department to model the impacts of ground water changes on surface water flows.¹² In 2019, the Department published a final report documenting recalibrated version 1.1 of the Wood River Groundwater-Flow Model.¹³

In 2020, the Department formed an advisory committee (“Advisory Committee”) to assist the Department in drafting a new management plan for the BWRGWMA.

In 2021, in response to severe drought conditions causing water supply shortages in the Wood River Basin, the Department curtailed junior ground water rights in the Bellevue Triangle area of the BWRGWMA to increase the supply of water to senior water right holders in the Silver Creek and Little Wood River drainages.¹⁴ The Department stayed the curtailment order in response to the ground water users’ mitigation plan.¹⁵

On May 4, 2022, the Director of the Department adopted a new management plan for the BWRGWMA (“Management Plan”).¹⁶

¹¹ See *Preliminary Order, In re Proposed Combination of Water District Nos. 37, 37A, 37C & 37M & Inclusion of Surface & Ground Water Rights in Combined Water District; & in re Abolishing Upper Wood Rivers Water Measurement Dist.* (Idaho Dep’t of Water Res. September 17, 2013), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2013/20130917-Preliminary-Order-Creating-WD37B-Camas-Creek.pdf>. While captioned as a preliminary order, the order became final and effective when no petitions for reconsideration were filed.

¹² Jason C. Fisher, James R. Bartolino, Allan H. Wylie, Jennifer Sukow & Michael McVay, U.S. Geological Survey & Idaho Dep’t of Water Res., *Sci. Investigations Rep. 2016–5080, Groundwater-flow Model of the Wood River Valley Aquifer System, South-central Idaho 71* (2016), <http://dx.doi.org/10.3133/sir20165080>.

¹³ Allan Wylie, Jennifer Sukow, Mike McVay & James Bartolino, Idaho Dep’t of Water Res., *Groundwater-Flow Model for the Wood River Valley Aquifer System, Version 1.1* 39 (2019), <https://idwr.idaho.gov/wp-content/uploads/sites/2/projects/wood-river-valley/20190627-Groundwater-Flow-Model-forthe-Wood-River-Valley-Aquifer-System.pdf>.

¹⁴ See *Final Order, In re Basin 37 Admin. Proc.*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. June 28, 2021), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/AA-WRA-2021-001/AA-WRA-2021-001-20210628-Basin-37-Final-Order.pdf>.

¹⁵ See *Final Order Approving Mitigation Plan & Staying Curtailment, In re Basin 37 Admin. Proc.*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. July 8, 2021), https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/AA-WRA-2021-001/20210708-Final-Order-Approving-Mitigation-Plan-Staying-Curtailment_with-COS.pdf.

¹⁶ The Management Plan is “attached to and incorporated into” the *Order Approving Ground Water Management Plan*. See *Order Approving Ground Water Mgmt. Plan*, at 3, *In re Mgmt. of Ground Water Within Big Wood River Ground Water Mgmt. Area* (Idaho Dep’t of Water Res. May 4, 2022), <https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/big-wood-gwma-advisory-comm/Order-Approving-BWRGWMA-Mgmt-Plan-05042022.pdf>.

The Management Plan (2022) is separate from the Management Policy (1991) and does not affect implementation of the 1991 Management Policy, which functions as a moratorium to restrict new appropriations of water. However, the Advisory Committee recommended that the Department “issue a moratorium order specific to the BWRGWMA” to replace the 1991 Management Policy.¹⁷

On March 30, 2022, the Director received a petition to establish a moratorium order for the BWRGWMA (“*Moratorium Petition*”). The *Moratorium Petition* is signed by representatives of 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. The Department also received a letter on March 5, 2022, from the City of Bellevue, the City of Hailey, and Sun Valley Co. (“*Cities*”) stating they “will not oppose” a moratorium order if it is “for a period of three years” and is consistent with the 1991 Management Policy.¹⁸ Significantly, the 1991 Management Policy allows 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 on-half acre associated with a dwelling, must be mitigated by the municipality.

Management Policy, at 4.

CONCLUSIONS OF LAW

Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* I.C. §§ 42-101, -103, -226.

The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602.

Idaho Code § 42-1805(7) authorizes the Director to suspend the issuance or further action on applications to appropriate water as necessary to protect existing water rights. Further, IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55) states that the Director may establish moratoriums, as necessary, to protect existing water rights.

¹⁷ *Id.* attach. § VIII, at 12 (Final Big Wood River Ground Water Management Area Management Plan).

¹⁸ *See* Letter from Candice M. McHugh, Attorney for City of Bellevue, Michael P. Lawrence, Attorney for City of Hailey & Chris M. Bromley, Attorney for Sun Valley Co. to Tim Luke, Water Compliance Bureau Chief, Idaho Dep’t of Water Res. (March 5, 2022) (Re: Big Wood Ground Water Management Area Management Plan and draft Petition for Water Rights Moratorium), <https://idwr.idaho.gov/wp-content/uploads/sites/2/groundwater-mgmt/big-wood-gwma-advisory-comm/Cities-Mgmt-Plan-Comments-Ltr-to-T-Luke-FINAL-w-signatures.pdf>.

By adopting a new Management Plan, the Department and the Wood River basin water users intend to reduce the effects of ground water pumping under existing water rights within the BWRGWMA on senior surface water rights. Authorizing new consumptive uses of water within the BWRGWMA will undermine actions to reduce the impact of ground water use on senior surface water rights. For that reason, a moratorium suspending processing of pending and new applications to appropriate surface water and ground water in the BWRGWMA is necessary to protect existing water rights. Such a moratorium will maintain water administration practices in place since 1980 for surface water and 1991 for ground water.

As discussed above, the Cities have requested that the Director exclude applications for new water rights for municipal purposes from this moratorium order consistent with the 1991 Management Policy. Since the Management Policy was adopted in 1991, 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).

The 1991 Management Policy also allowed for the issuance of permits for new domestic uses where each dwelling unit meets the definition of domestic purposes in Idaho Code § 42-111(1):

For purposes of this management policy, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of need to file an application for permit as described above.

Management Policy, at 4.

When community water systems¹⁹ supply water for outside use, the water used for irrigation of lawns and landscaping is largely consumed, while the indoor water use is largely non-consumptive. 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 water 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.

¹⁹ Community water system as used in this order is defined as a water system supplying water for domestic purposes that do not meet the Idaho Code § 42-111 definition of domestic purposes.

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 modifies its water use or modifies its wastewater treatment and disposal processes over time. Because the entirety of the municipal use may become consumptive, 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 necessary 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.

If the Director restricts the appropriation of water for municipal purposes and community water systems, additional appropriation of water by drilling a well for domestic purposes, as it is defined in Idaho Code § 42-111, should also be severely limited or prohibited. Potentially significant depletions to ground water sources are ignored when the appropriation of ground water for community water systems, including municipal uses, is prohibited, while at the same time, appropriation of ground water is perfected by the drilling of individual domestic wells, which may cumulatively result in as much or more consumption of ground water than a community water system.

However, the Director currently lacks the explicit authority to restrict the appropriation of ground water by the drilling of individual domestic wells. Idaho Code § 42-227 exempts the drilling of wells for domestic purposes, as defined in Idaho Code § 42-111(1), from “the permit requirement under section 42-229, Idaho Code.” Idaho Code § 42-229 prescribes “the application permit and license procedure” as the method of appropriating ground water.

Idaho Code § 42-1805 grants the Director limited authority to prohibit appropriation of water. The Director is only authorized to “suspend the issuance or further action on *permits or applications*” Idaho Code § 42-1805 (emphasis added). Because the drilling of wells for domestic purposes is exempt from the application permit and licensing procedures, the Director does not have the explicit authority to issue a moratorium order that prohibits appropriation of water for qualifying exempt domestic ground water uses under Idaho Code § 42-111(1).

When the Director has determined that water is unavailable for appropriation, the Director must have the authority to suspend appropriation of water by any means, including appropriation by beneficial use, for exempt domestic uses, for the following reasons: 1) prevent further depletion of an over-appropriated source of water; and 2) ensure that all prospective appropriators of water are treated equitably.

Until the Legislature grants explicit authority to issue moratorium orders that prohibit appropriation of water by beneficial use for exempt domestic uses, the opportunity for over-

appropriation and the inequity and inequality between domestic use in community water systems and single-family domestic uses will continue.

Regarding the Cities request to limit a moratorium on new appropriations in the BWRGWMA to three years, the Department can re-evaluate its moratorium order at any time. Rather than have the moratorium automatically expire in three years, when reviewing the Management Plan upon its expiration, the Department may consider the need to maintain, modify, or repeal a moratorium in the BWRGWMA.

ORDER

IT IS HEREBY ORDERED, pursuant to Idaho Code § 42-1805(7) and IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55), that a moratorium is established on the processing and approval of new and pending applications for permits to appropriate water from surface and ground water sources within the BWRGWMA. *See infra* Appendix 1. New and pending applications to appropriate water in the BWRGWMA shall be held without further processing unless they meet one or more of the exceptions stated in this order. The following provisions apply to the administration of the moratorium:

1. The moratorium is separate from the BWRGWMA Management Plan and shall remain in full force and effect independent of the BWRGWMA Management Plan.
2. The moratorium does not affect the authorization to continue development of any existing approved permit to appropriate water.
3. Consistent with Idaho Code § 42-227, the moratorium does not apply to any appropriation of ground water by beneficial use for domestic purposes, including livestock watering, as such term is defined in Idaho Code § 42-111.
4. The moratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Idaho Code § 42-605A. This exception to the moratorium shall not apply to applications for non-consumptive uses of water that will reduce the supply of water available to existing water rights because of the location or timing of return flows. Applications for ground water recharge shall be evaluated on a case-by-case basis to determine whether the proposed use is non-consumptive and whether it will reduce the supply of water to holders of existing water rights with priority dates senior to the priority date of the application. Applications for municipal purposes and for domestic use from community water systems shall be presumed to be fully consumptive. Applicants may rebut the presumption by providing substantial, detailed evidence that the proposed use is not fully consumptive, will not become more consumptive or fully consumptive over time, and will not injure existing vested water rights. A rebuttal of the presumption must address monitoring, reporting, and mitigation measures, to ensure that the proposed use does not become more consumptive or fully consumptive after it has been established. The Director may consider a rebutted presumption when assessing an application. Sufficiently rebutting the presumption alone shall not entitle an applicant to approval of its application. 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.

5. This moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid, existing water rights.
6. This moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights.
7. This 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 the terms of this moratorium if:
 - a. Protection and furtherance of the public interest, as determined by the Director, requires consideration and approval of the application irrespective of the general moratorium; or
 - b. The 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 application to offset injury to other rights.

IT IS FURTHER ORDERED that the 1991 *Management Policy for the Big Wood River Ground Water Management Area* is repealed.

IT IS FURTHER ORDERED that this moratorium order shall be in effect on and after its entry and shall remain in effect until it is withdrawn or modified by order of the Director.

IT IS FURTHER ORDERED that the Department shall serve a copy of this order by certified mail upon holders of applications for permits proposing appropriation of ground water or surface water within the BWRGWMA and shall publish notice of this order for three consecutive weeks as required by IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55).

Pursuant to Idaho Code § 42-1701A(3), any person aggrieved by any decision, determination, order or other action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter, shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing.

Dated this 8th day of July 2024.



MAT WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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<p>Jerry R. Rigby Chase T. Hendricks RIGBY, ANDRUS & RIGBY LAW, PLLC 25 North Second East Rexburg, ID 83440 jrigby@rex-law.com chendricks@rex-law.com</p> <p><i>Attorneys for Big Wood & Little Wood Water Users Association</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE PO Box 248 Burley, ID 83318 wkf@pmt.org</p> <p><i>Attorney for Big Wood Canal Company</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

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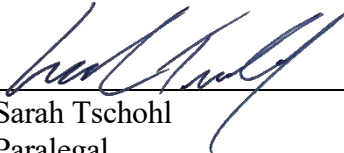
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Paralegal

**AMENDED ORDER ESTABLISHING MORATORIUM
IN THE MATTER OF THE BIG WOOD RIVER
GROUND WATER MANAGEMENT AREA**

APPENDIX 1

Map of the Big Wood River Ground Water Management Area

