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DEPARTMENT OF
WATER RESOURCES

Robert L. Harris (ISB No. 7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com

Attorneys for the City of Idaho Falls

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

**CITY OF IDAHO FALLS CHALLENGE
AND REQUEST FOR HEARING**

The City of Idaho Falls (“Idaho Falls” or “City”), by and through its counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., petitions for a hearing pursuant to Idaho Code § 42-1701A(3) in the above-captioned matter.

On October 21, 2022, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) issued an *Amended Snake River Basin Moratorium Order* (“Amended Moratorium Order”). This order superseded a prior moratorium order that was originally issued (and amended several times) in the 1990s, and generally speaking, seeks to accomplish three items: (1) expand the moratorium area boundary to include tributary basins to the Eastern Snake Plain Aquifer (“ESPA”); (2) expand the moratorium to surface water appropriations where the prior moratorium order only applied to ground water appropriations; and (3) declare, without any supporting findings of fact, that applications for municipal water use from community water systems are deemed to be “fully consumptive.” The City seeks a hearing to address the third item

described herein but reserves the right to address any other items contained in the *Amended Moratorium Order* as the contested case develops.

For the benefit of the Director and other parties to this contested case, and while not required at this stage of the contested case, the City offers the following preliminary statement of the matters it intends to address at the hearing on this matter. The City reserves the right to supplement and amend this statement.

The *Amended Moratorium Order* summarily concludes: “Applications for municipal water use and for domestic use from community water systems **shall be considered fully 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**.” *Amended Moratorium Order* at 28 (emphasis added). There are no findings of fact made to support the Director’s conclusory assumption that water use for municipal water systems “shall be considered fully consumptive.” The Director’s conclusion is made even though treated water for non-community water systems “shall be evaluated on a case-by-case basis to determine whether the proposed use is nonconsumptive.” *Id.* There are no findings and no legal analysis as to why the Director has decided to hold community and non-community treatment systems to different standards. And, while the plain language of the *Amended Moratorium Order* only applies to new applications for permit for municipal water use—which the City may file in the future—the establishment of such a policy will also clearly serve as a precedential basis for how the Director will account for water diverted and treated by municipal water systems under *current* perfected water rights.

The City owns and operates a community municipal water system and associated publicly owned wastewater treatment plant. See <https://www.idahofallsidaho.gov/379/Wastewater-Sewer>.

Once the City’s wastewater is treated to applicable legal requirements, it is discharged into the Snake River where it currently augments river flows and water supplies for other surface water rights. Accordingly, this water is demonstrably not “fully consumptive” under the plain language of the definition of “consumptive use” contained in Idaho Code § 42-202B(1) (“‘Consumptive use’ means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, **or otherwise does not return to the waters of the state.**”) (emphasis added). There is no intent or plans for the City to change its municipal effluent treatment facilities or methods. Consequently, as it directly relates to the *Amended Moratorium Order*, any future water right appropriations made by the City will be subject to the Director’s fully consumptive use presumption.

Information on how Idaho municipalities treat their effluent, and the extent of their consumptive use, is readily available and verifiable. Community water systems must be afforded the same case-by-case evaluation the Director has afforded to non-community water systems. The *Amended Moratorium Order* should be amended accordingly.

Additionally, on the issue of the consumptive nature of treated municipal effluent from publicly owned treatment works, the *Amended Moratorium Order* implicates provisions of the *Settlement Agreement Between the Surface Water Coalition, Participating Members of Idaho Ground Water Appropriators, Inc., and Signatory Cities* (the “*Municipal Settlement Agreement*”). See <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swc-igwa-cities-settlement/SWC-IGWA-CITIES-Settlement-20190101-Cities-Settlement-Agreement-with-signatures.pdf>. The City is one of the original “Signatory Cities” under this agreement. The Director approved the *Municipal Settlement Agreement* as an authorized mitigation plan under the Conjunctive

Management Rules (IDAPA 37.03.11). *Final Order Approving Stipulated Mitigation Plan*, April 9, 2019 (available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2019-001/CM-MP-2019-001-20190409-Final-Order-Approving-Stipulated-Mitigation-Plan.pdf>).

The *Municipal Settlement Agreement* calls for the municipal parties to this agreement to engage in certain aquifer enhancement activities in specified volumes, and the approved aquifer enhancement activities include managed aquifer recharge, subject to certain parameters. *Municipal Settlement Agreement* at 3. One such parameter is that the water to be recharged “would not otherwise incidentally recharge the ESPA, **excluding municipal wastewater.**” *Id.* (emphasis added). Accordingly, the cities retained the right to recharge municipal wastewater and receive credit for such recharge under the *Municipal Settlement Agreement*. Without amendment or clarification, the Director’s conclusion in the *Amended Moratorium Order* that diversion of municipal water is *de facto* fully consumptive upon its initial diversion deprives cities of the ability to recharge municipal effluent—water that is physically present and measurable—and receive credit for such recharge under its approved mitigation plan.

Based on the foregoing, and because the only relief allowed for in the *Amended Moratorium Order* is to contest this action by requesting a hearing, the City hereby requests a hearing in this matter pursuant to Idaho Code § 42-1701A(3). The City reserves the right to supplement this filing with a list of issues when so directed in this contested case.

Dated this 4th day of November, 2022.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2022, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed by the methods indicated.

Document Served: CITY OF IDAHO FALLS CHALLENGE AND REQUEST FOR HEARING

Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov

Via US Mail, Postage Paid
 Via Facsimile
 Hand-Delivered
 Via Efiling

Courtesy Electronic Copies To:

Candice McHugh
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cmchugh@mchughbromley.com

Sarah A. Klahn
Somach Simmons & Dunn
2033 11th Street Suite 5
Boulder, Colorado 80302
sklahn@somachlaw.com

Christopher H. Meyer
Michael P. Lawrence
Givens Pursley, LLP
PO Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com
chrismeyer@givenspursley.com

Jerry R. Rigby
Chase T. Hendricks
Rigby, Andrus & Rigby, Chartered
25 North Second East
Rexburg, ID 83440
jrigby@rex-law.com
chendricks@rex-law.com

John K. Simpson
Albert P. Barker
Travis L. Thompson
Michael A. Short
Barker Rosholt & Simpson
PO Box 63
Twin Falls, ID 83303-0063
jks@idahowaters.com
apb@idahowaters.com
tlt@idahowaters.com
mas@idahowaters.com

James R. Laski
Heather E. O'Leary
Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
jrl@lawsonlaski.com
heo@lawsonlaski.com

W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, ID 83318
wkf@pmt.org

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov

Thomas J. Budge
Racine Olson PLLP
PO Box 1391
Pocatello, ID 83204-1391
tj@racineolson.com

Norman M. Semanko
Parsons Bahle & Latimer
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.