

Candice McHugh, ISB No. 5908
McHugh Bromley, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com

Attorney for the City of Bellevue

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

IN THE MATTER OF BIG WOOD RIVER
GROUND WATER MANAGEMENT AREA

**RESPONSE TO BWLWWUA AND
BWCC OBJECTION TO ISSUE
CONTAINED IN ORDER GRANTING
PETITIONS TO INTERVENE AND
SETTING SCHEDULING
CONFERENCE AND DEADLINES**

COMES NOW the City of Bellevue (“Bellevue”) through its attorney of record, Candice McHugh of the firm McHugh Bromley, PLLC, and files this *Response To BWLWWUA And BWCC Objection To Issue Contained In Order Granting Petitions To Intervene And Setting Scheduling Conference And Deadlines* (“Response”).

The Response seeks to “remove” the issue regarding “[w]hether all pumping in the BWGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silvercreek;” even though this issue is based on a specific finding and conclusion on page 3 of the *Order Establishing Moratorium in the Matter of the Big Wood River Ground Water Management Area* (“Moratorium Order”), was timely raised and identified by Bellevue since its first filing in this matter and has been consistently raised in every other pleading and orally at the

prehearing conference. The Response claims that the issue should be removed for a few identifiable reasons:

- 1) Because it is a “colossal issue, requiring extensive research and preparation”
- 2) Because it is “well beyond the scope of the Moratorium Order, and
- 3) Because the issue has been “previously decided.”

Response at (unnumbered) p. 2.

I. DISCUSSION

A. Being A “Colossal” Issue Is Not A Basis to Eliminate the Issue From the Hearing

Because an issue is “colossal” and requires “extensive research and preparation” is not a valid basis to exclude the issue from going to hearing. The Response acknowledges that Bellevue initially raised the issue clearly although “simply” and also states that the Director found that “Bellevue’s only legal remedy is to contest the Moratorium Order and request a hearing ... [thus] the Director must deny Bellevue’s requests ... without consideration of the evidence or arguments put forth by Bellevue.” *Id.* at (unnumbered) p. 3. Thus, the Director has already acknowledged that the issue has been timely raised by Bellevue and that Bellevue’s only remedy is a hearing. Moreover, in the April 7, 2023 disclosure, the Director identified Jennifer Sukow, Engineer, Technical 2, who “will testify as to the Director’s conclusion regarding the impact of pumping on surface water sources upstream from Magic Reservoir, including Silver Creek.” *Notice of Department Witnesses for Hearing* at 4. In addition to naming Ms. Sukow, the Director provided a list of technical papers that Ms. Sukow “will rely on” in support of her testimony. *Id.* By naming Ms. Sukow as a witness and providing a list of supporting documents, the Director further acknowledges that Bellevue’s issue is ripe for hearing.

B. The Moratorium Order Makes Findings And Conclusions About the Interconnection of Water Sources Making The Issue Directly Within Its Scope

The Moratorium Order makes a specific finding and conclusion that is new and subsequent to the June 28, 1991 *Order* designating the Big Wood River Ground Water Management Area (“1991 Designation Order”). It is this factual finding and conclusion, set forth below, that Bellevue has consistently taken issue with and has timely raised:

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.

Moratorium Order at 3 (emphasis added). This finding is part of the Moratorium Order, has not previously been challenged or decided after hearing. Thus, Bellevue is entitled to a hearing on whether or not the finding and conclusion here are accurate and based on a full factual record. While the parties to the Response “objected” to Bellevue’s inclusion of this issue in its *List of Issues* filed in November, that does not mean that the issue is not within the scope of the order, nor properly or timely raised. Bellevue timely and clearly raised an objection to the specific finding and conclusion in the Moratorium Order and is entitled to a hearing on the issue.

The Response infers that Bellevue somehow waived its right to have this issue heard because it was not raised or examined during the “informal process.” However, that is not a basis to exclude the issue either, and Bellevue strongly objects to the reference to what was and was not discussed in the informal process as those were settlement negotiations, protected by the Idaho Rules of Evidence, and have no value here.

C. The Findings and Conclusions in the Moratorium Order Are Not the Same Findings and Conclusions Found in the 1991 Designation Order

The Response claims that the issue of the interconnection of water sources within the Big Wood River drainage was decided in the 1991 Designation Order, however, the Response actually makes the point that the findings and conclusions regarding interconnection of surface and groundwater sources in the basin are not the same as those originally determined in the 1991 Designation Order. The findings in the 1991 Designation Order found that diversion of groundwater can deplete surface water, and that new groundwater uses can deplete supplies for others. See Id. at (unnumbered) p. 4. This nearly mirrors what Bellevue originally requested be clarified in the Moratorium Order¹ and is supported by the references in the Moratorium Order itself as pointed out previously by Bellevue: “these requested modifications are more consisted with what the “reports that are referenced in the statement say.” Motion for Clarification at 3. But, as pointed out by the Response, the Director denied Bellevue’s request and set a hearing without consideration of Bellevue’s arguments or evidence. While the finding in the Moratorium Order is close to what was contained in the 1991 Designation Order, the differences are material and conclude that all pumping does and will affect surface water flow rather than simply that pumping could affect surface water flow. Thus, a hearing on this new conclusion is warranted.

II. CONCLUSION

The Response falsely claims that the issue regarding the findings and conclusions on extent of interconnection of sources in the Moratorium Order “made its way to hearing solely because it was included in Bellevue’s List of Issues” Response at (unnumbered) p. 4-5. Bellevue

¹ “Bellevue requests that this statement be clarified as follows: The second sentence should be modified to state that ‘Pumping ground water from within the BWRGWMA can affect surface water flows’ The third sentence should be modified to read ‘Lower ground water levels could result in less aquifer discharge’ Finally the fourth sentence should be modified to state ‘New development of consumptive ground water use could reduce the quantity’” *Bellevue’s Motion for Clarification and Reconsideration and Request for Hearing* at 3.

has consistently, clearly and timely raised an objection to this issue in its initial *Motion for Clarification and Reconsideration and Request For Hearing*, its *List of Issues for Hearing*, its *Objection and Request for Hearing* in the *Amended Snake River Basin Moratorium Order*, and orally at the prehearing conference in this matter. While the parties to the Response are concerned about the “enormous undertaking” it will be to include this issue at hearing, Bellevue is confident that the parties and the Department can address Bellevue’s concern and objection.

DATED this 13th day of April, 2023.

A handwritten signature in blue ink that reads "Candice M. McHugh". The signature is written in a cursive style.

Candice M. McHugh
Attorney for City of Bellevue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2023, I served a true and correct copy of the foregoing document by email to the person(s) whose names appear below:

Director Gary Spackman
Acting Director Mat Weaver
Idaho Department Of Water Resources
PO Box 83720
Boise, ID 83720

FILED:

- Via US Mail, Postage Paid
- Via Efiling file@idwr.idaho.gov
- Hand-Delivered
- Via Electronic Mail

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

COPIES:

Norman M. Semanko
Payton G. Hampton
Parsons Behle Latimer
800 W. Main Street, Suite 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
phampton@parsonsbehle.com

Travis L. Thompson
Albert P. Barker
MARTEN LAW LLP
P.O. Box 2139
Boise, ID 83701-2139
abarker@martenlaw.com
jsimpson@martenlaw.com
tthompson@martenlaw.com

Scott N. Pugrud
IDAHO POWER COMPANY
PO Box 70
Boise, ID 83707
Spugrud2@idahopower.com

W. Kent Fletcher
FLETCHER LAW OFFICE
P.O. Box 248
Burley, ID 83318
wkf@pmt.org

Thomas J. Budge
Elisheva M. Patterson
Racine Olson, PLLP
PO Box 1391
Pocatello, ID 83204
tj@racineolson.com
elisheva@racineolson.com

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN
1155 Canyon Blvd. Ste. 110
Boulder, CO 80302
sklahn@somachlaw.com
mbricker@somachlaw.com

James R. Laski
Heather O'Leary
LAWSON LASKI CLARK PLLC
jrl@lawsonlaski.com
heo@lawsonlaski.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

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

Chris Bromley
MCHUGH BROMLEY, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com

Matthew A. Johnson
Brian O'Bannon
WHITE PETERSON GIGRAY & NICHOLS, P.A.
Canyon Park at the Idaho Center
5700 E. Franklin Rd., Ste. #200
Nampa, ID 83687-7901
mjohnson@whitepeterson.com
bobannon@whitepeterson.com

Michael P. Lawrence
Charlie S. Baser
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
mpl@givenspursley.com
csb@givenspursley.com

Evan Robertson
Robertson & Slette, PLLC
PO Box 1906
Twin Falls, ID 83303-1906
erobertson@rsidaholaw.com

Dylan Lawrence
VARIN WARDWELL
PO Box 1676
Boise, ID 83701
dylanlawrence@varinwardwell.com



Candice McHugh