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**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
PERMITS FOR THE DIVERSION AND USE
OF SURFACE AND GROUND WATER
WITHIN THE SNAKE RIVER BASIN**

**MUNICIPAL PROVIDERS'
MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

COME NOW the City of Pocatello, City of Bellevue, City of Hailey, City of Idaho Falls,
City of Ammon, Coalition of Cities¹, Falls Water Co., Inc., Veolia Water Idaho Inc. (“Veolia”),

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

and Wellsprings Group, LLC (collectively, the “Municipal Providers”), by and through their respective counsel of record, to file this *Memorandum in Support of Motion for Partial Summary Judgment* (“Memorandum”) to support a finding that the Idaho Department of Water Resources’ (“IDWR” or “Department”) limitation imposed on new appropriations in the moratorium areas that: “[a]pplications for municipal use and domestic use from community water systems shall be considered fully consumptive” is factually unsupportable and in excess of the legal authority of the Department.

BACKGROUND

A. The Big Wood River (“BWR”) Moratorium.

On June 28, 1991, the then-Director of IDWR issued an *Order*² designating the Big Wood River drainage upstream of Magic Dam, including the Camas Prairie aquifer system, as the Big Wood River Ground Water Management Area (“*BWR Designation Order*”). Attached to the *BWR Designation Order* and signed by the Director on the same day was the *Management Policy for the Big Wood River Ground Water Management Area* (“*BWR Management Policy*”) which stated that “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.” *BWR Management Policy* at 3. It further stated: “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.” *Id.* at 4.

² Order at 2, *In the Matter of Designating the Big Wood River Ground Water Management Area and Management Policy for the Big Wood River Ground Water Management Area* (Idaho Dep’t of Water Res. June 28, 1991).

On May 17, 2022, Deputy Director Mat Weaver, acting on behalf of Director Gary Spackman, issued an *Order Establishing Moratorium*³ (“*BWR Moratorium Order*”), which changed the Department’s view of municipal use from generally non-consumptive to always fully consumptive:

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.

BWR Moratorium Order at 6.

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.

B. The Snake River Basin (“SRB”) Moratorium.

On May 15, 1992, the Director issued an order establishing a moratorium for the approval of new applications to appropriate surface water or ground water in the Snake River Basin upstream from the USGS gaging station on the Snake River at Weiser.⁴

The Director’s October 21, 2022 *Amended Snake River Basin Moratorium Order* (“*Amended SRB Moratorium Order*”) superseded this and all other previous SRB moratorium

³ Order Establishing Moratorium, *In the Matter of Designating the Big Wood River Ground Water Management Area* (Idaho Dep’t of Water Res. May 17, 2022).

⁴ Am. Snake River Basin Moratorium Order at 13, *In the Matter of Applications for Permit for the Diversion and Use of Surface and Ground Water Within the Snake River Basin*, (Idaho Dep’t of Water Res. Oct. 21, 2022) (“*Amended SRB Moratorium Order*”).

orders.⁵ *Amended SRB Moratorium Order* at 27. In the “order” section of the *Amended SRB Moratorium Order*, the Director used identical language from the *BWR Moratorium Order* (collectively, the “*Moratorium Orders*”) in explaining that new applications for municipal purposes of use and domestic purposes of use from community water systems shall be considered fully consumptive:

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.

Amended SRB Moratorium Order at 28. If the new moratorium orders are confirmed, the Department will not approve applications for municipal or domestic uses (from community water systems) unless the applicant proves that it will mitigate, or replace, 100% of the diversions under the new permit, even if the applicant proves that its consumptive use rate will be significantly less than 100% (which is the norm).

C. The Instant Proceeding.

On March 31, 2023, and for purposes of hearing, the Director consolidated the BWR and SRB moratorium matters.⁶

⁵ On January 6, 1993, the Director amended the 1992 moratorium order to eliminate the area in the SRB upstream from Milner Dam (the non-trust water area) from the scope of the moratorium order. *Id.* at 13. On April 30, 1993, the Director further reduced the size of the moratorium area, limiting it to just the trust water area of the Snake Plain Aquifer (and tributary aquifers) upstream from the King Hill Gage (hereinafter Eastern Snake River Plain Area) and the Boise River Drainage Area. *Id.* On May 3, 1995, the Director removed the Boise River Drainage Area from the moratorium area. *Id.* at 14.

⁶ Order Consolidating Proceedings for Hearing, Authorizing Discovery, and Scheduling; Notice of Hearing, *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* (the “*Consolidated Proceedings*”), (Idaho Dep’t of Water Res. Mar. 31, 2023).

On April 7, 2023, the Director identified James Cefalo, IDWR Eastern Regional Manager, as the Department’s witness who “will testify as to the Director’s conclusion that applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive.”⁷

On May 11, 2023, the Municipal Providers deposed Mr. Cefalo on the topic for which he was identified as a witness by the Director. A copy of Mr. Cefalo’s deposition transcript (“Cefalo Dep. Tr.”) is attached as Exhibit 1 to the Affidavit of Maximilian C. Bricker (“Bricker Affidavit”) filed contemporaneously herewith. Among other things, Mr. Cefalo testified that a municipal provider who recharges groundwater with its treated effluent, or discharges it into a surface stream, does *not* fully consume the water that it diverts. Cefalo Dep. Tr. at 51:21-52:4, 57:11-14.

On July 11, 2023, the Municipal Providers served their expert report (“Municipal Providers’ Expert Report”), prepared by Gregory K. Sullivan, P.E., challenging the Department’s blanket assertion that municipal uses are fully consumptive. A copy of Municipal Providers’ Expert Report is attached as Exhibit 2 to the Bricker Affidavit. Among other things, Municipal Providers’ Expert Report concluded that the average consumptive use rate of the Municipal Providers’ diversions is 46%. Municipal Providers’ Expert Report at 8.

Also on July 11, 2023, Veolia served their expert report (“Veolia’s Expert Report”), prepared by Terry Scanlan, P.E., P.G., which also challenged the Department’s blanket assertion that municipal and domestic uses are fully consumptive. A copy of Veolia’s Expert Report is attached as Exhibit 3 to the Bricker Affidavit. Among other things, Veolia’s Expert Report concluded that Veolia’s municipal consumption “is not 100%.” Veolia’s Expert Report at 4.

⁷ Notice of Dep’t Witnesses for Hr’g at 1, *Consolidated Proceedings*, (Idaho Dep’t of Water Res. Apr. 7, 2023).

On August 11, 2023, the Surface Water Coalition (“SWC”) served its expert report (“SWC’s Expert Report”), prepared by David Shaw, P.E., and David Colvin, P.G., which opined that municipal and domestic uses “*can be*” fully consumptive. A copy of SWC’s Expert Report is attached as Exhibit 4 to the Bricker Affidavit.

No other expert reports that address the Department’s conclusion that “[a]pplications for municipal water use and for domestic use from community water systems shall be considered fully consumptive” have been disclosed in this proceeding.

STANDARD OF REVIEW

The Department’s Rules of Procedure authorize the filing of motions for summary judgment in any contested case. IDAPA 37.01.01.220.03. Rule 56 of the Idaho Rules of Civil Procedure (“I.R.C.P.”) applies to motions before the Department with the exception of subsections (b) and (g). *Id.*

Under the Rule 56 standard, the Department “must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party has the burden of proving the absence of material facts, and the Department “must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party.” *See Martin v. Thelma V. Garrett Living Trust*, 506 P.3d 237, 241 (Idaho 2022) (citation omitted). The Department must deny summary judgment “[i]f there are conflicting inferences contained in the record or if reasonable minds might reach different conclusions.” *Id.*

Summary 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.

UNDISPUTED FACTS

There is no dispute that the *Moratorium Orders* condition which would presume all municipal water permit applications and domestic water permit applications from community water systems to be “fully consumptive” has no factual basis.

- Consistent with Idaho Code § 42-202B(1), Mr. Cefalo testified in his deposition that the portion of water that is “consumed” is that which “does not return to the waters of the state.” Cefalo Dep. Tr. (Bricker Aff. Ex. 1) at 41:2-42:9.
- Mr. Cefalo testified that a municipal provider who recharges its treated effluent, or discharges it into a surface stream, does *not* fully consume the water that it diverts. *Id.* at 51:21-52:4, 57:11-14.
- Mr. Cefalo testified that the provision in the *Amended SRB Moratorium Order* requiring that IDWR consider a new municipal or domestic appropriation to be considered fully consumptive was based on the possibility that “[i]n the future *it may become* fully consumptive,” *id.* at 52:15-22 (emphasis added).
- The Municipal Providers’ expert witness concluded the average consumptive use rate of the Municipal Providers’ diversions is 46%. Municipal Providers’ Expert Report (Bricker Aff. Ex. 2) at 8.
- Veolia’s expert witness concluded that its “average annual consumption could be approximately 50%,” and while a more rigorous analysis could more precisely determine whether its consumptive use is closer to 45% or 55%, “the point is that consumption is not 100%.” Veolia’s Expert Report (Bricker Aff. Ex. 3) at 4.
- The SWC’s expert witnesses did not opine that municipal and domestic uses are fully consumptive; rather they stated “[t]he depletion to the source of water for a new

municipal water right *can be* the full amount of the diversion under a new water right,” *if, e.g., a city “[e]lect[s] to treat and reuse all the water diverted under a new water right.”* SWC’s Expert Report (Bricker Aff. Ex. 4) at 4 (emphasis added).⁸

ARGUMENT

“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.” Idaho Code § 42-202B(1) (emphasis added). The *Moratorium Orders* provide no factual basis to support imposing on municipal and domestic uses mitigation for total diversions rather than consumptive use. Moreover, neither testimony from Mr. Cefalo nor the disclosed expert opinions in this matter support the assertion that new municipal and domestic appropriations necessarily are fully consumptive. *See* Cefalo Dep. Tr. (Bricker Aff. Ex. 1) at 51:21-52:4, 57:11-14; Municipal Providers’ Expert Report (Bricker Aff. Ex. 2) at 14; Veolia’s Expert Report (Bricker Aff. Ex. 3) at 4; SWC’s Expert Report (Bricker Aff. Ex. 4) at 4. Thus, IDWR’s position in the *Moratorium Orders* that new municipal and domestic water uses must be considered fully consumptive can only be described as arbitrary and capricious agency action, as it “was done in disregard of the facts” and “without a rational basis.” *In re Delivery Call of A&B Irrigation Dist.*, 284 P.3d 225, 236 (Idaho 2012).

The remaining question is whether the *Moratorium Orders*, as a matter of law, can 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

⁸ It is important to note that municipal reuse would be fully consumptive only if the water was reused to extinction (an unlikely scenario in any water system).

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.

IDWR does have the authority to approve applications with conditions, *see* I.C. § 42-204(1); IDAPA 37.03.08.050.01. But the *Moratorium Orders*' blanket conclusion that new municipal and domestic-community water system appropriations are fully consumptive—applied before any factual development to support that conclusion—denies any due process for such applicants. IDWR Water Appropriation Rules require an evaluation of whether a new appropriation would injure existing water rights. IDAPA 37.03.08.045.01.a. IDWR may approve an application with conditions “which will mitigate losses of water to the holder of an existing water right” IDAPA 37.03.08.045.01.a.iv. In other words, IDWR has the authority to impose conditions on permits on a case-by-case basis to prevent injury to water rights. In the unusual case where a new municipality or community water system is fully consumptive, IDWR of course has the authority and the power to require mitigation for the entire diversion quantity. But it is arbitrary and unsupported by fact or law for IDWR to require that water users mitigate the non-consumptive component of any new appropriations and require an applicant to demonstrate full mitigation before it will accept and process (or approve) any new application.

Further, while IDWR has the authority to curtail out-of-priority pumping or allow junior pumping to continue pursuant to an approved mitigation plan, *see* IDAPA 37.03.11.40.01., the “fully consumptive” provisions in the *Moratorium Orders* would require municipal and domestic pumpers to obtain plans that mitigate 100% of their new diversions, even though IDWR's Conjunctive Management Rules, IDAPA 37.03.11, require the Director to consider the

“depletive effect,” or “consumptive use component,” of water diversions when reviewing mitigation plans to ensure injury to senior rights will be avoided. IDAPA 37.03.11.043.03.

In sum, the effect of the “fully consumptive” provisions in the *Moratorium Orders* would be to force applicants for municipal and domestic uses to not merely replace the water that is consumed out of priority or that is injurious to others, but to *add* water to the stream as a condition of obtaining a permit. This is contrary to existing IDWR rules, and there is no legal basis to impose such a condition.

WHEREFORE, the Municipal Providers request that the Director find that the “fully consumptive” standard imposed on municipal and domestic appropriators in the *Moratorium Orders* is without basis in fact or law and grant partial summary judgment to the Municipal Providers. Any final orders in this Consolidated Proceeding should include provisions to allow applicants for municipal use and domestic use from community water systems to demonstrate the extent to which such uses are not consumptive and require mitigation only for the consumptive portions of such uses.

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Respectfully submitted this 30th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, a true and correct copy of the foregoing document was served by email and addressed to the following:

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