

**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 BWLWWUA AND  
BWCC’S REQUEST TO REMOVE ISSUE**

**BACKGROUND**

On May 17, 2022, the Idaho Department of Water Resources (“Department”) issued an *Order Establishing Moratorium* (“2022 BW Moratorium Order”). 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”). *2022 BW Moratorium Order* at 7. The 2022 BW Moratorium provided among things that:

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.

*2022 BW Moratorium Order* at 3 (citations omitted).

On May 31, 2022, the City of Bellevue (“Bellevue”) filed a *Motion for Clarification and Reconsideration and Request for Hearing* (“Motion for Clarification”), seeking to modify language in the *2022 BW Moratorium Order* pertaining to the nexus between pumping ground water and a reduction in surface water. *Motion for Clarification* at 3–4. For ease of explanation, Bellevue’s requested modifications are reflected in underline/strikethrough format using the original 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~~ can affect 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~~ could result in less aquifer discharge to surface water. New development of consumptive ground water use ~~would~~ could reduce the

quantity of water available to fill senior surface water rights during times when administration by priority is necessary.

*See Id.* at 3.

On June 21, 2022, the Director issued an order denying Bellevue's request for clarification and reconsideration but granting Bellevue's request for hearing. Order Den. Req. for Recon. & Clarification; Order Grant'g Req. for Hr'g at 4. The Director set the matter for a prehearing conference open to all interested persons on August 15, 2022. *Id.* at 3.

Prior to prehearing conference on August 15, 2022, the Department received four petitions to intervene in the above captioned matter: on July 22, 2022, the South Valley Ground Water District ("SVGWD") timely filed *South Valley Ground Water District's Petition to Intervene*; on July 28, 2022, the Big Wood & Little Wood Water Users Association ("BWLWWUA") timely filed *Big Wood & Little Wood Water Users Association's Petition to Intervene*; on August 2, 2022, the Big Wood Canal Company ("BWCC") timely filed *Big Wood Canal Company's Petition to Intervene*; and on August 12, 2022, the City of Hailey ("Hailey") timely filed *City of Hailey's Petition to Intervene*.

During the prehearing conference the Director asked if there were objections to any of the four Petitions to Intervene. No objections were offered, and the Director expressed his intention to grant the petitions. Bellevue requested the Director allow informal proceedings in accordance with IDAPA 37.01.01. All four (potential) intervenors agreed to participate in informal proceedings.

On September 12, 2022, the Director issued an *Order Granting Petitions to Intervene and Setting Scheduling Conference and Deadlines* ("Order Setting Scheduling Conference and Deadlines"). The Director also concluded that the contested case should informally move forward and set a formal continued prehearing conference for all interested persons on October 17, 2022.

During the prehearing conference on October 17, 2022, the parties agreed to a scheduling conference on December 7, 2022. Bellevue agreed to file a statement of issues for the hearing by October 31, 2022. All other parties and prospective intervenors agreed to file any responses to Bellevue's statement of the issues by November 14, 2022. All parties and prospective intervenors agreed to file objections to hearing issues by November 30, 2022.

On October 21, 2022, the Director issued his *Amended Snake River Basin Moratorium Order In The Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Snake River Basin* ("Amended SRB Moratorium Order"). On November 4, 2022, Bellevue filed an objection to the Amended SRB Moratorium Order and requested a hearing.

On October 31, 2022, Bellevue filed its *List of Issues for Hearings*. The list included thirteen issues for hearing, the first of which (hereinafter referred to as "Bellevue's Issue") reads as follows: "Whether all pumping in the BWGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek?" List of Issues for Hr'g at 1.

On November 14, 2022, BWLWWUA and BWCC filed a joint response to Bellevue’s List of Issues for Hearing (“BWLWWUA & BWCC’s Joint Response”). Of import here, BWLWWUA and BWCC argued Bellevue’s Issue—whether all pumping in the BWGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek—was beyond the scope of the Moratorium Order and barred by *res judicata*. *BWLWWUA & BWCC’s Joint Response* at 2.

On November 15, 2022, Bellevue filed a *Motion to Vacate Schedule and to Consolidate Proceedings and Request for Pre-Hearing Conference* (“Motion to Consolidate”). The crux of Bellevue’s motion was that efficiency warranted consolidation because the *Amended SRB Moratorium Order* and *Big Wood Moratorium Order* overlapped geographically and involved the same parties and issues. *Motion to Consolidate* at 2–3.

On December 6, 2022, the Director issued an *Order Appointing Department Contact for Joint Informal Proceedings and Vacating Prehearing Conference; Notice of Joint Prehearing Conference*. The order applied to both the Big Wood Moratorium and Snake River Moratorium. The parties have engaged in several informal settlement conferences but have failed to reach a formal agreement.

On March 10, 2023, the Department held a joint prehearing conference. After some discussion surrounding the issues for hearing, the parties did not oppose a proposal to consolidate the contested proceedings for hearing, with the understanding that each issue would be taken up separately and consecutively, including Bellevue’s desire to address “[w]hether all pumping in the BWGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek.” The Director also stated on the record that discovery was authorized to begin immediately.

On March 31, 2023, the Director issued an *Order Consolidating Proceedings for Hearing, Authorizing Discovery, and Scheduling; Notice of Hearing* (“Consolidation & Scheduling Order”). The Consolidation & Scheduling Order also set a hearing for October 16–19, 2023, and clarified that Bellevue’s Issue would be addressed at the conclusion of the hearing after the other matters have been addressed. *Consolidation & Scheduling Order* at 4.

On April 7, 2023, the BWLWWUA & BWCC’s filed an *Objection to Issue Contained in Order Granting Petitions to Intervene and Setting Scheduling Conference and Deadlines* (“BWLWWUA & BWCC’s Objection to Bellevue’s Issue”). The thrust of BWLWWUA & BWCC’s objection was threefold: first, Bellevue’s Issue is overly broad and beyond the scope of the *2022 BW Moratorium Order*; second, Bellevue’s Issue is “colossal” in size requiring extensive research and preparation; and third, Bellevue’s Issue is barred by *res judicata*. *BWLWWUA & BWCC’s Objection* at 2–5. BWLWWUA and BWCC request that Bellevue’s Issue “be removed as an issue for the upcoming hearing, or in the alternative be clarified so as to let the parties properly prepare for the upcoming hearing.” *Id.* at 5.

On April 13, 2023, Bellevue filed a *Response to BWLWWUA and BWCC Objection to Issue Contained in Order Granting Petitions to Intervene and Setting Scheduling Conference and Deadlines* (“Bellevue’s Response.”)

## ANALYSIS

### 1. Bellevue's Issue is not beyond the scope of the 2022 *BW Moratorium Order*.

BWLWWUA and BWCC contend Bellevue's Issue is beyond the scope of the 2022 *BW Moratorium Order*. *BWLWWUA & BWCC's Objection* at 2. Bellevue asserts its Issue is within the scope of the 2022 *BW Moratorium Order*. *Bellevue's Response* at 3. The Director agrees with Bellevue.

The 1991 Order establishing the Big Wood Water Management Area ("1991 BWWMA Order"), states:

2. 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.

*1991 BWWMA Order* at Find'g of Fact ¶¶ 1, 4 (emphasis added).

The 2022 *BW Moratorium Order* asserts that:

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.

*2022 BW Moratorium Order* at 3 (emphasis added) (citations omitted).

Bellevue's Issue is "whether all pumping in the BWRGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek." List of Issues for Hr'g at 1 (emphasis added). Bellevue's Issue can be restated as whether the information relied upon by the Department supports a change from the 1991 BWWMA Order's statement that pumping "can deplete" surface water which "could" injure senior surface water users to the statements in the 2022

BW Moratorium Order that groundwater pumping “affects” surface water and “would reduce” the quantity of water available to seniors. *Compare 1991 BWWMA Order at Find’g of Fact ¶¶ 1 & 4 with 2022 BW Moratorium Order at 3.* This issue is not outside the scope of the 2022 BW Moratorium Order.

**2. Whether Bellevue’s Issue is “colossal” is irrelevant.**

BWLWWUA and BWCC’s contend Bellevue’s Issue is “colossal” in size requiring “extensive research and preparation.” *BWLWWUA & BWCC’s Objection at 2.* Bellevue asserts whether its Issue is “colossal” has no bearing on whether it should be excluded from the hearing. *Bellevue’s Response at 2.* The Director agrees with Bellevue. The potential magnitude of Bellevue’s issue cannot be grounds for excluding it from the hearing. That said, the Director does not perceive Bellevue’s Issue to be colossal. To the contrary, the Director’s view is that Bellevue’s Issue is in effect a request to consider whether the pertinent provisions of the *2022 BW Moratorium Order* constitutes a material departure from language in the 1991 BWWMA Order and whether the change is justified.

**3. Bellevue’s Issue is not barred by *res judicata*.**

BWLWWUA and BWCC’s contend, in a single sentence citing no authority, that Bellevue’s failure to appeal the 1991 BWWMA Order renders its Issue barred by *res judicata*. *BWLWWUA & BWCC’s Objection at 3.* Bellevue asserts its Issue is not barred by *res judicata* because the findings and conclusions in the 1991 BWWMA Order are materially different than the 2022 BW Moratorium Order.

In Idaho, *res judicata* covers both claim preclusion and issue preclusion. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007) (citation omitted). Issue preclusion prohibits subsequent litigation of an identical issue decided in previous litigation. *Id.* To bar relitigation under the doctrine of issue preclusion requires, among other things, that the issue in the previous litigation be *identical* to the issue in the present case and that the issue was decided in the previous litigation. *Id.*, 144 Idaho at 124, 157 P.3d at 618.

Here, Bellevue’s Issue concerns whether all pumping in the BWGWMA has an impact on all surface water sources upstream from Magic Reservoir, including Silver Creek. Regardless of the answer, the inquiry is not bared by *res judicata* because the issue in the previous matter is not identical to the issue in the current matter. *See Id.*

**ORDER**

IT IS ORDERED that the Big Wood & Little Wood Water Users Association and Big Wood Canal Company's request to remove Bellevue's Issue as an issue for the upcoming hearing is denied.

DATED this 31<sup>st</sup> day of August 2023.

  
\_\_\_\_\_  
Gary Spackman  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31st day of August 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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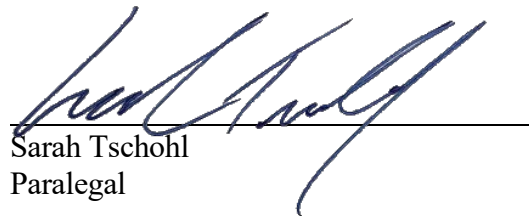
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