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RECEIVED

Nov 17, 2023

**DEPARTMENT OF
WATER RESOURCES**

**BEFORE THE DEPARTMENT OF WATER RES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE BIG WOOD 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

**SURFACE WATER
COALITION'S
POST-HEARING
MEMORANDUM**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereafter collectively referred to as the "Surface Water Coalition" or "Coalition"), by and through counsel of record, and hereby submits the following post-hearing memorandum in response to the Director's instructions and request at the close of the administrative hearing held October 16-18, 2023.

The Director of the Idaho Department of Water Resources (“IDWR”) held an administrative hearing on the Big Wood and Snake River Consolidated Moratorium matter (“Hearing”) on October 16-18, 2023. Certain parties had filed requests for a hearing and identified statements of issue to be addressed. At the Hearing, the Director heard testimony from lay and expert witnesses and admitted additional exhibits into the administrative record to assist in his review. Prior to the Hearing, the Director issued the *Order Denying Motion for Partial Summary Judgment* in which the scope of the fully consumptive use issue was narrowed 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.”

INTRODUCTION

On October 21, 2022, the Director issued the *Amended Snake River Basin Moratorium Order* (“Order”) which expanded the existing Eastern Snake River Plain Moratorium to include “consumptive uses of all surface and ground water tributary to the reach of the Snake River between King Hill and Swan Falls Dam to protect existing water rights, including decreed minimum stream flow water rights.” *Order* at 1. (Ex. 301).

The City of Pocatello et al. (hereafter collectively referred to as “Cities”) believe that the Director should amend the Order to no longer consider municipal water usage to be fully consumptive when seeking a new water right permit. However, the Cities’ statements in the *Riverside Irrigation District v. IDWR*, Canyon County Dist. Ct., Third Jud. Dist., Case No. CV14-23-05008 (December 28, 2021). (“*Riverside*”) (Ex. 218) case, and their exhibits and testimony offered at the administrative hearing, failed to demonstrate that the presumption that new municipal uses are “fully consumptive” is inappropriate. Notably, the cities of Bellevue,

Carey, Hazelton, Paul, Richfield, Rupert, and Wendell each have Idaho Department of Environmental Quality (IDEQ) permits that allow them to reuse their treated municipal wastewater effluent. *Surface Water Coalition Expert Report*, at 5. (Ex. 1). Furthermore, in *Riverside*, Idaho Falls, Pocatello, and Rupert filed a collective brief stating that, “Each of the Municipal Intervenors either currently discharges their own treated wastewater into facilities owned by outside parties or may desire to do so in the future.” *See* Ex. 1 at p.3

I. The Director Clarified that the Issue for Hearing was an Issue of Policy Persuasion, not Proof of a Right or Wrong Decision by IDWR.

Pursuant to the *Order Consolidating Proceedings for Hearing*, the first issue (“Issue 1”) for the Hearing was defined as, “whether applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive.” *Order Consolidating Proceedings for Hearing* at 1. The Director later released a denial of partial summary judgment and clarified that the issue to be heard was, “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 Summary Judgment* at 6. The Director further specified that whether municipal and domestic uses are always fully consumptive was not at issue in the hearing. *Order Denying Motion for Partial Summary Judgment* at 3-4.

II. List of Witnesses that Provided Testimony on Issue 1

Levi Adams, Superintendent, City of Pocatello, Water Pollution Control Department, Lay Witness for Cities

Mr. Adams testified that the City of Pocatello measures its diversions, and that wastewater is treated and discharged to the Portneuf River. *Transcript of Hearing* (“Tr.”) at 477,

484, 473. He admitted that Pocatello will reuse water in the future if it becomes economically lucrative. Tr. at 485.

Charles G. Brockway, Ph.D., P.E., Brockway Engineering, PLLC, Expert for Wellsprings Group

Mr. Brockway testified to Wellsprings Group's water use in the Deer Creek area in Basin 37, development of their water rights, and his experience with new permits and conditions for those permits.

James Cefalo, Eastern Regional Manager, IDWR, Expert for IDWR

Mr. Cefalo testified to the difficulty determining consumptive use of cities, and explained why tracking the consumptive use of municipalities has not been IDWR's policy. Tr. at 413. He noted that, once a water right is issued to a municipality, IDWR no longer has the power to restrain the maximum use—the water right can become as consumptive as the municipality chooses. Tr. at 377. Mr. Cefalo clarified that the Cities have the right to change their uses and fully consume their water under their water rights without IDWR supervision or further permitting, the Department has long recognized that to be the case, and it was recently confirmed by the court in *Riverside*. (Ex. 218). Further, Mr. Cefalo stated that the burden on IDWR from water rights processing, as proposed by the Cities, would be large. Tr. at 370. Any changes to permits and water use would require public notice, and many permits would include an extensive list of conditions that would be difficult to monitor. Tr. at 370. He also explained that most municipal uses change day-to-day, making them even harder to monitor. Tr. at 378. Mr. Cefalo recognized that despite the prior moratorium issued in the early 1990s, cities across Eastern Idaho have continued to grow and have been able to use their existing water supplies and rights.

When Cities' counsel pointed out a water right permit issued to the City of Rexburg (Ex. 312) and its conditions as an example of what IDWR can do with cities applications for

municipal rights, in rebuttal James Cefalo testified that the Rexburg conditions were complicated, that they place a burden on IDWR staff, that he didn't see how IDWR could adopt that template as a widespread solution to the issue, and that watermasters struggle with existing condition administration. Tr. at 370, 372.

Chris Fredericksen, P.E., Director, City of Idaho Falls, Public Works Department, Lay Witness for Cities

Mr. Fredericksen testified that the City of Idaho Falls measures its diversions, and that wastewater is treated and discharged to the Snake River. Tr. at 504-06. He stated that the City of Idaho Falls has no current plans to change their use. Tr. at 514.

Chris Johnson, Mayor, City of Bellevue, Lay Witness for Cities

Mr. Johnson testified that the City of Bellevue measures its diversions, and that the wastewater is treated and placed in rapid infiltration systems or land-applied. Tr. at 445-46. He admitted that the City of Bellevue currently has plans for new water rights, and that additional increases in water use will depend upon future land use opportunities that arise for the City of Bellevue. Tr. at 450.

Brian Yeager, P.E./P.L.S., City of Hailey Public Works Director, Lay Witness for Cities

Mr. Yeager testified that the City of Hailey measures its diversions, and that discharge is treated and returned to the Big Wood River. Tr. at 489-90. The City of Hailey currently has plans to use a membrane bioreactor to change water treatment and utilize some land application of water. Tr. at 494.

Terry Scanlan, P.G., P.E., HDR, Expert for Veolia

Mr. Scanlan testified to how Idaho may pattern itself after Colorado's system of water use oversight. However, he stated that a lot of water right monitoring "slips through the cracks." Mr. Scanlan also testified about Veolia's current water use and the City of Boise's treatment and

discharge of wastewater. Mr. Scanlan admitted that Veolia has water in its portfolio that will meet its projected needs through 2050, but that Veolia intends to shift to greater reuse. Mr. Scanlan acknowledged that the frequency of reuse is increasing and that will equate to greater consumption when the reuse is through land application.

Mr. Scanlan also testified about how difficult it is to monitor water rights with elaborate conditions. Using a Dry Creek permit (Ex. 16) as an example, Mr. Scanlan testified that the conditions on the right require the transfers of agricultural water rights to municipal rights as land is developed. When asked if the transfers have kept up to date with the development, he candidly admitted that they had not.

Greg Sullivan, P.E., Spronk Water Engineers, Expert for Cities

Mr. Sullivan testified that it would be simple for Idaho to adopt Colorado's approach of not considering municipal uses fully consumptive. Tr. at 416. Instead, Colorado closely monitors use, and requires reporting every month. Mr. Sullivan expressed that Colorado water management has evolved over time and he believes Idaho can and should. Tr. at 414. He explained that administration is becoming more difficult in Colorado, but a lot of things are hard and that should not be prohibitive. Tr. at 415. Mr. Sullivan also claimed that accounting to determine actual use by the Cities is not difficult at all. Tr. at 416.

Dave Colvin, P.G., LRE Water, Expert for Coalition

Mr. Colvin testified about the differences between Idaho and Colorado's water allocation systems, including Idaho's lack of the data collection that Colorado routinely gathers. Tr. at 341, 342. He noted that having a fully consumptive water rights policy for municipal uses is a benefit that Idaho should want to protect. Tr. at 344.

Dave Shaw, P.E., ERO Resources, Expert for the Coalition

Mr. Shaw testified about his expert report for the Coalition. (Ex. 1). The Cities told the court in *Riverside* that “Each of the Municipal Intervenors either currently discharges their own treated wastewater to facilities owned by outside parties, or may desire to do so in the future.” (Ex. 218). Mr. Shaw noted that, as wastewater treatment requirements become more stringent and expensive, discharge of wastewater back into a natural source becomes less likely. Tr. at 327.

III. The Cities’ Position Regarding Consumptive Use is Merely an Alternative to IDWR’s Longstanding Policy.

The Cities’ position is that IDWR should use an alternative method of permitting and viewing consumptive use when evaluating new applications for municipal use. The Cities allege that calculating exact consumptive use and then conditioning permits, along with mitigation, would be a better alternative to IDWR’s longstanding approach that considers municipal use to be fully consumptive.

IV. The Coalition’s Expert Testimony Regarding Issue 1 Further Supports the Prudence of IDWR’s Position on Consumptive Use.

The Coalition presented expert testimony concerning the municipal consumptive use issue. Dave Shaw testified about his expert report for the Coalition. (Ex. 1). Mr. Shaw noted that, because of the continually diminishing aquifer, and increasing stringency and expense of wastewater treatment requirements, additional or complete reuse of wastewater by cities becomes more likely. Tr. at 327. He also explained that new municipal rights should be fully mitigated and, without return flows being returned to the original source, the impact of ground water diversions will be fully consumptive to the ground water source. Tr. at 333. Most cities are

already fully consumptive to the ground water source of municipal pumping, and Mr. Shaw testified that he believes that number will only increase. Tr. at 331.

Mr. Colvin testified about the marked differences between Idaho and Colorado's water allocation system. Tr. at 342. He explained that Idaho does not have an established system to collect the data similar to what Colorado utilizes for determining the consumptive use of municipalities. Tr. at 342. Colorado's method of data collection and water distribution is simply not like Idaho's method, and changing methods would be expensive and require additional staff. Tr. at 343. Further, Mr. Colvin opined that IDWR's present policy on municipal rights is warranted in aquifers designated as groundwater management areas, like the Eastern Snake Plain Aquifer (ESPA). Tr. at 344.

ARGUMENT

The Director's Order properly assumes that new municipal water rights are fully consumptive for the purposes of new water right applications. This is not a change in IDWR policy. IDWR's policy for considering municipal uses fully consumptive is based upon many factors including the ability of cities to change the types of water uses that can be made pursuant to a municipal water right without a formal transfer, the right to change the place of use of a municipal right without a transfer so long as the use remains within the city, the interlinking of cities' water rights, and the legal right of cities to use municipal rights to extinction.

In the *Sullivan Memo* (Ex. 306), and at the Hearing, the Cities suggested that IDWR could condition permits rather than assuming consumptive use. James Cefalo, who testified for IDWR, explained why additional conditions are inappropriate. 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.

a. Idaho Code § 42-201(8) and the *Riverside* holding confirm that municipal water rights should be considered fully consumptive.

"Regional or public entities operating publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land applications, is employed in response to state or federal regulatory requirements." IDAHO CODE § 42-201(8). In other words, if a city decides to stop putting treated water into the Snake River or another source and instead applies all treated water to a new irrigation use, IDWR would not have the power to stop that change. Judge Wildman affirmed this position in the *Riverside* case. (Ex. 218).

Riverside addressed an appeal from an IDWR decision, concluding that neither the City of Nampa nor the Pioneer Irrigation District needed a water right to apply Nampa's wastewater/effluent to Pioneer Irrigation District's lands, and that to do so would not enlarge Nampa's water rights. (Ex. 218). The water right in question contained a condition: "the water right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use." Despite the condition, both the Director and the Court in

Riverside (Ex. 218) held that, under § 42-201(8), no water right is needed, even when a municipality contracts with a third-party irrigation entity to land-apply the municipality’s effluent on land outside the municipality’s service area.

The Court’s analysis in *Riverside* is significant in the present proceeding for how the Court and IDWR distinguish municipal water rights from other water rights. The Court explained “[t]hat 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.” (Ex. 218). The Court then distinguished irrigation water rights in this regard:

This is not necessarily the same with respect to an irrigation right, which is defined by different parameters. An irrigation right holder also has the right to recapture and reuse wastewater and it must also do so consistent with the elements of its water right and the beneficial use duty of water. However, irrigating additional acreage results in enlargement of the original right beyond what is authorized.

(Ex. 218).

Essentially, municipalities are authorized to land apply wastewater outside of their place of use, and, according to *Riverside*, on land they do not own or serve—land application, including application of effluent on lawns and crops of third parties, is not considered an enlargement of a municipal groundwater right. (Ex. 218). In contrast, the Court explained that, “if quantities of irrigation wastewater are such that application on additional lands is necessary for its disposal then issues can be raised regarding the duty of water and whether more efficient irrigation practices should be employed.” (Ex. 218). In sum, municipal rights can be fully consumed, and land-applied outside their place of use, while irrigation water rights are limited to historic consumptive use and a fixed place of use.

The *Riverside* holding clearly confirms that municipal water rights, in spite of restrictive conditions stated on a right, can and do change disposal practices, and may be fully consumed, all without any agency oversight. (Ex. 218). Given this legal authority, IDWR's position on treating new municipal applications for permit as fully consumptive is appropriate and should be upheld.

b. Mr. Cefalo's testimony in support IDWR's policy illustrates why considering municipal use to be fully consumptive is appropriate.

Mr. Cefalo testified that the Order treats municipal water uses very similarly to irrigation and industrial water uses. Upon permitting, no inquiries are made by IDWR into what crops a farmer grows, nor to what they may grow in the future. Tr. at 377. Instead, IDWR looks at the maximum consumptive use in that region and the farmer can use as much or as little of that maximum consumptive use that they choose. Tr. at 377. Mr. Cefalo also noted that municipal uses change day-to-day, further necessitating the need to assume potentially greater consumptive use. Tr. at 378. Mr. Cefalo observed that monitoring day-to-day changes would take a tremendous amount of oversight and staff bandwidth, while watermasters already struggle to keep up with standard conditions. Tr. at 372-73. Additionally, Mr. Cefalo acknowledged that applicants do not always comply with conditions, and IDWR would need to go back and review each condition to ensure that it is being met. Tr. at 376. Watermasters would need to first know that a condition exists, and then actually enforce that condition—both very burdensome expectations for an already taxed agency that oversees water management and administration. Tr. at 372. Having the proposed maximum use fully mitigate up front when a permit is issued not only makes sense it provides certainty for the permit holder, other water right holders, and IDWR moving forward.

c. The Coalition’s expert reports further support IDWR’s approach to municipal consumptive use.

Mr. Shaw and Mr. Colvin’s expert report describes the necessary steps to protect current water right holders. (Ex. 1). “Mitigation of the full amount of a new municipal water right must be required since the municipal water user is not under any requirement, and may not realistically be able, to return the non-consumptive portion of the water right, if any, to the original water source where it would be available for diversion by other water users with existing water rights. Without return flows, a municipal diversion depletes the original water source by the full amount of the municipal diversion...” (Ex. 1). *SWC Expert Report* at 4.

Water reuse is increasing in Idaho, and across the world. The policy is particularly warranted in aquifers approaching a critical state, like the ESPA that has been designated a groundwater management area (GWMA). Since the ESPA has continued to decline since the early 1990s when the first moratorium order was promulgated by the Director, requiring full mitigation for rights that may be fully consumed at point is an appropriate response. Given potential limited supplies in the future, additional water reuse by cities and other municipal providers has already occurred and is likely to increase. The necessity of increased reuse is a fact to which Mr. Shaw and Mr. Colvin testified, and the Cities acknowledged in *Riverside* where they stated that, “Each of the Municipal Intervenors either currently discharges their own treated wastewater to facilities owned by outside parties, or may desire to do so in the future.” (Ex. 218).

CONCLUSION

The Cities did not carry the burden necessary to show that IDWR’s policy presuming that new applications for municipal uses should be treated as wholly consumptive is not warranted in this matter. Instead, the Cities merely presented a possible alternative to IDWR’s current approach—an alternative that is unsupported by the nature of the use of municipal rights and the

existing policies concerning their consumptive use. This policy is not new. Furthermore, Idaho does not have the resources for IDWR to oversee the more complicated approach of permitting and monitoring proffered by the Cities. As shown by testimony at the hearing, there is currently insufficient staffing and data available to collect and supervise the information necessary to allow for consumptive use measurements and permit conditions. Finally, Idaho Code § 42-201(8) explicitly states that municipal uses are to be considered fully consumptive.

The Cities were unable to indicate any error in the Director’s Order, nor any legal or practical reason that the current approach should be abandoned in favor of methods used outside of the state of Idaho. For these reasons, the Coalition requests that the Director uphold his Orders and maintain IDWR’s existing approach to new applications for municipal water rights.

DATED this 17th day of November, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2023, I caused to be served a true and correct copy of the foregoing **SURFACE WATER COALITION’S POST-HEARING MEMORANDUM** by the method indicated below, and addressed to each of the following:

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