

Idaho Department of Water Resources' Amended Snake River Basin Moratorium Order: Survey  
of Potential Implications

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I. INTRODUCTION

In October 2022, the Director of the Idaho Department of Water Resources (the Department, or IDWR) issued a moratorium against granting any new consumptive water rights “for all surface and ground water tributary to the reach of the Snake River between King Hill and Swan Falls Dam.”<sup>1</sup> The moratorium’s purpose is to “protect existing water rights, including decreed minimum stream flow water rights.”<sup>2</sup> Though this is the most comprehensive moratorium to date, it is not a novel approach to water management on the Snake River. In fact, there has been some form of moratorium covering parts of the Snake River since 1992.<sup>3</sup>

The 2022 moratorium is unique from past moratoria in a few key ways that may raise implications for water managers. First, it encompasses the non-trust water area, which has not been covered by a moratorium since 1997. Second, it details the influence that the tributary basins have on the Eastern Snake Plain Aquifer (ESPA), potentially signaling a move toward conjunctive administration of ground and surface water outside of the ESPA. Third, it declares municipal water rights as fully consumptive. Finally, it addresses managed aquifer recharge (MAR), indicating that new MAR permits may be issued if they are non-consumptive and do not

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<sup>1</sup> *In re Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Snake River Basin 1* (IDWR Amended Snake River Basin Moratorium Order, Oct. 21, 2022) [hereinafter *IDWR 2022 Moratorium*].

<sup>2</sup> *Id.*

<sup>3</sup> *In re Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream from the USGS Gauge on the Snake River Near Weiser* (IDWR Moratorium Order, May 15, 1992) [hereinafter *IDWR 1992 Moratorium*].

injure any senior water right. This essay will briefly survey the potential implications that the moratorium will have for water managers and users.

## II. DISCUSSION

### A. Non-Trust Water Area

The 2022 moratorium closes the *non-trust water area* for the first time since 1997. The non-trust water area encompasses the main-stem Snake River and its tributaries upstream of Milner Dam; it is set forth in a map included in Appendix A of the Moratorium Order.<sup>4</sup> In contrast, the *trust water area* “is the area where ground water is presumed to be tributary to the Snake River between Milner Dam and Swan Falls Dam;”<sup>5</sup> these designations result from the Swan Falls Agreement.<sup>6</sup>

The non-trust water area was included in IDWR’s first moratorium on the Snake River in 1992.<sup>7</sup> The following year, the Director amended that moratorium to sever the non-trust area, leaving only the trust water covered by the amended moratorium.<sup>8</sup> On the same day, the Director entered a new order establishing a five year moratorium on the non-trust water area.<sup>9</sup> The purpose of the 1993 non-trust moratorium was to give the Department an opportunity to

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<sup>4</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 3, App. A; IDAHO ADMIN. CODE r.37.03.08.030.01.b (2022) (“Surface and groundwater tributary to the Snake River upstream from Milner Dam is not trust water.”).

<sup>5</sup> *IDWR 2022 Moratorium* *supra* note 1, at 3.

<sup>6</sup> “Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic region [between Swan Falls Dam and Milner Dam] that exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of the Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement.” IDAHO ADMIN. CODE r.37.03.08.030.01.c (2022).

<sup>7</sup> *IDWR 1992 Moratorium*, *supra* note 3.

<sup>8</sup> *In re Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream from the USGS Gauge on the Snake River Near Weiser 1* (IDWR Amended Moratorium Order, Jan. 6, 1993).

<sup>9</sup> *In re Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream from Milner Dam* (IDWR Moratorium Order, Jan. 6, 1993).

undertake technical studies to better understand the interaction between surface and ground water upstream of Milner Dam.<sup>10</sup>

Despite there being no moratorium in the non-trust area for over two decades, very few applications for permits were processed because an applicant must demonstrate that their diversion will not reduce the supply of water to senior users.<sup>11</sup> This is a difficult burden to meet; the Director's factual findings in the 2022 moratorium indicate that granting the current pending applications for permits would cause a steady state depletion of 184,000 acre-feet/yr<sup>12</sup> to the Snake River upstream of Milner Dam, which would materially harm senior users.<sup>13</sup> Because very few applications were being processed during the time that the non-trust area was not covered by a moratorium, this moratorium is less of a ground breaking change in the law as it is a legal recognition of the reality on the ground.

#### B. Conjunctive Administration

Conjunctive administration occurs when ground water and surface water rights are administered together due to hydraulic connectivity between the water sources.<sup>14</sup> Currently, the ESPA is the only area within Idaho designated as an area having a common ground water supply; therefore, only the ESPA is subject to IDWR's conjunctive management rules (CMR).<sup>15</sup> But the latest moratorium emphasizes the importance of tributary basins to ESPA recharge such that

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<sup>10</sup> *Id.* at 2.

<sup>11</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 19–20.

<sup>12</sup> Acre-feet (ac-ft), is the amount of water necessary to cover one acre of land in one foot of water. FRIENDS OF THE TETON RIVER, TETON BASIN AQUIFER RECHARGE FAQ'S 2, <https://www.tetonwater.org/wp-content/uploads/2020/04/Teton-Basin-Aquifer-Recharge-FAQs.pdf> (last visited Mar. 28, 2023).

<sup>13</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 19.

<sup>14</sup> IDAHO ADMIN. CODE r.37.03.11.020 (2022); *see* IDAHO DEP'T OF WATER RES., ENHANCED SNAKE PLAIN AQUIFER MODEL VERSION 2.1 FINAL REPORT 10–11 (2013).

<sup>15</sup> IDAHO ADMIN. CODE r.37.03.11.050 (2022).

conjunctive administration of the tributary basins outside of the ESPA boundary may occur in the near future.<sup>16</sup>

Conjunctive administration cannot occur outside of the ESPA because of CMR 50, which designates only the ESPA as an area sharing a common ground water supply.<sup>17</sup> The continued existence of CMR 50 hamstrings the Director in conjunctively administering the water resource and should be repealed. Even within the ESPA boundary every individual delivery call is handled on a case-by-case basis, where the Department sets a trim line based upon the scientific data available and curtails ground water users found to impact the senior water right.<sup>18</sup> In fact, the Director moved to repeal CMR 50 in 2014, stating that “in practice, the administrative proceedings for each water delivery call have identified a trim line, an area within which ground water rights have been determined to impact the rights of the calling party and are, therefore, subject to curtailment.”<sup>19</sup> However, the Idaho legislature rejected the proposed rule change due to “inadequate technical data to evaluate underground water resources and effects on various sections of the aquifer.”<sup>20</sup>

In the years since the rule change was rejected the technical data has only improved, yet the Department is still only conjunctively administering the resource based on a boundary set in 1994.<sup>21</sup> The Department is better equipped to conjunctively administer ground and surface water

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<sup>16</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 5–7.

<sup>17</sup> IDAHO ADMIN. CODE r.37.11.03.050 (2022).

<sup>18</sup> *See Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 128–29, 369 P.3d 897, 906–07 (2016) (holding that the Director has discretion to implement a trim line based on the doctrine of beneficial use).

<sup>19</sup> *In re Petition to Amend Rule 50*, 4 (IDWR Final Order, Aug. 29, 2014), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CMR50/CMR50-20140829-Final-Order.pdf>.

<sup>20</sup> *Minutes: House Resources & Conservation Committee*, 63d Leg., 1st Reg. Sess., at 1 (Idaho, Feb. 17, 2015) (statement of Rep. Raybould, Chairman, H. Res. & Conservation Comm.).

<sup>21</sup> *See David R. Tuthill et al., Conjunctive Management in Idaho*, 108 THE WATER REP. 1, 3 (2013).

on a case-by-case basis today than ever before. Therefore, the Director should again move to repeal CMR 50, and the legislature should approve the rule change.

If the conjunctive management rules were changed and conjunctive administration becomes a reality in tributary basins, then the *futile call doctrine* may become a remnant of the past. The futile call doctrine holds that a junior upstream water user will not be curtailed if curtailment will not make water available to the senior.<sup>22</sup> The doctrine is utilized by irrigators in the Teton River watershed where there are many losing reaches of river; the surface water infiltrates ground water and often does not reconnect to live surface water downstream, therefore making curtailment unhelpful for downstream senior surface water users.<sup>23</sup>

The Teton River is characterized by its interaction with an underlying shallow aquifer; water that infiltrates the aquifer in the spring causes a hydrologic response from the aquifer wherein water returns to the river in one to three months' time.<sup>24</sup> Because of the demonstrated interaction between ground and surface water in the Teton River, it may be an ideal place to implement conjunctive administration.

IDWR's administrative rules defining the applicability of futile call hold that even though a delivery call may be denied under the doctrine, "these rules may require mitigation or staged or phased curtailment of a junior-priority use if the diversion . . . causes material injury, even though not immediately measurable, to the . . . senior-priority . . . water right."<sup>25</sup> Therefore, if the conjunctive management rules become applicable outside of the ESPA, the Teton River water users that currently rely on futile call may be required to mitigate in the spring when water

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<sup>22</sup> TONY OLENICHAK, CONCEPTS, PRACTICES, AND PROCEDURES USED TO DISTRIBUTE WATER WITHIN WATER DISTRICT # 1 16 (2020); Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976).

<sup>23</sup> Liz Onufer, *Systems in Flow: Water Rights in Teton Valley*, TETON VALLEY MAGAZINE, Summer 2018, at 43–44, <https://www.tetonwater.org/wp-content/uploads/2020/05/Systems-in-Flow.pdf>.

<sup>24</sup> *How Seasonally Shifting Irrigation Practices Can Make an Impact*, TETON WATER USERS ASSOC., <https://www.tetonwaterusersassociation.org/how-water-flows> (last visited Mar. 30, 2023).

<sup>25</sup> IDAHO ADMIN CODE r.37.03.11.020.04 (2022).

is plentiful and can be applied to the land in such a way that the aquifer will have a discharge response later in the summer that satisfies senior rights.<sup>26</sup>

However, the conjunctive management rules define delivery calls and the futile call doctrine as applying only to junior *ground water* users.<sup>27</sup> IDWR should remove this restraint by amending the conjunctive management rules so that delivery calls and the futile call doctrine can be applied to both junior surface and ground water users. This would bring the rules more in line with the prior appropriation doctrine because the date of priority would determine curtailment, regardless of the water source.

### C. Municipal Use as Fully Consumptive

Perhaps the most impactful change that the 2022 moratorium affected was to classify all municipal use as fully consumptive.<sup>28</sup> Municipal water rights are not traditionally considered fully consumptive because, in addition to engaging in consumptive uses such as watering public parks and greenways, municipal rights also supply water for domestic purposes, which often return to the waters of the state after being treated at a municipal treatment plant.<sup>29</sup>

By defining municipal uses as fully consumptive and declaring a moratorium against granting any new consumptive water rights, the Department has effectively halted the issuance of any new municipal water rights. Ideally, municipalities will purchase water rights and change their beneficial use to municipal purposes to supply their constituents. However, the moratorium may have the unintended consequence of encouraging exempt well use as a work around.

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<sup>26</sup> See, e.g., FRIENDS OF THE TETON RIVER, *supra* note 12, at 1.

<sup>27</sup> *Id.*

<sup>28</sup> IDWR 2022 Moratorium, *supra* note 1, at 28.

<sup>29</sup> IDAHO CODE § 42-203B(1) (2022) (defining consumptive use); § 42-203B(6) (defining municipal purposes).

Exempt domestic wells are not subject to the permitting process and are not covered by the moratorium.<sup>30</sup> Idaho Code section 42-111 allows an exempt domestic well user to divert 13,000 gallons of water per day for use in “homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land.”<sup>31</sup> 13,000 gallons of water per day equates to 14.6 ac-ft/yr., which is not significant in its own right, but extrapolated over thousands of domestic wells can make a significant impact on the water resource. Additionally, 13,000 gallons of water per day, at least in the upper Snake River Basin, is more than enough to meet all domestic needs and irrigate one-half acre. Without proper oversight, a domestic well user could easily break out more land for irrigation as a means to utilize their full daily allotment of water. Due to these wells being exempt from the permitting process, there is no accurate accounting of the impact that they have on the State’s water resources.<sup>32</sup> If IDWR does not address the exempt domestic well issue then there is a very real possibility that well drilling will expand drastically, to the detriment of the goal of the moratorium.

One way to address this issue would be for IDWR and the legislature to reduce the amount of water a domestic well is entitled to and require metering devices on all new domestic wells. A typical homeowner would be able to satisfy their domestic needs with 5,000 gallons per day rather than 13,000 gallons. Reducing the daily allotment of water and requiring metering devices on new exempt wells would allow more people to drill exempt wells with less of an impact on the resource and would reduce the instances of misuse.

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<sup>30</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 27; IDAHO CODE §§ 42-111(a), -227 (2022).

<sup>31</sup> IDAHO CODE § 42-111(a) (2022).

<sup>32</sup> IDAHO DEP'T OF WATER RES., EXEMPT WELLS IN IDAHO 10, [https://na.eventscloud.com/file\\_uploads/c63eed855c83084cd29f5ed5d421bdca\\_Neace.pdf](https://na.eventscloud.com/file_uploads/c63eed855c83084cd29f5ed5d421bdca_Neace.pdf) (last visited Feb. 23, 2023).

Another approach that IDWR and the legislature can take to address the exempt well issue is to require people within the service area of a municipality covered by the moratorium to connect to the municipal water supply rather than allowing them to drill their own wells.<sup>33</sup> Requiring a municipality to provide municipal water to those within its service area would close the exempt well loophole and effectively require a municipality to purchase water rights already in existence. This would also leave open the option for property owners outside of the municipal service area to drill exempt wells if they are unable to connect to the municipal water supply.

The Idaho legislature should reduce the daily allotment of water allowed under Idaho Code section 42-111 from 13,000 gallons to 5,000 gallons and require metering devices on all new wells. Additionally, the legislature should require anyone residing in the service area of a municipality covered by a moratorium to connect to the municipal water system rather than drilling their own exempt well.

#### D. Managed Aquifer Recharge

Managed aquifer recharge (MAR) is the purposeful recharge of water into an aquifer.<sup>34</sup> The Idaho Water Resources Board (IWRB) is the state entity tasked with facilitating MAR for the benefit of all water users.<sup>35</sup> Private entities also engage in MAR, generally to mitigate for injury caused by their diversion. Since 2009 the IWRB has had a goal of recharging 250K ac-ft of water into the ESPA annually.<sup>36</sup> The IWRB has met or exceeded this goal in four out of the thirteen seasons on record, with a current ten year average of 201,564 ac-ft.<sup>37</sup>

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<sup>33</sup> See IDAHO CODE § 42-203B(9) (2022) (defining municipal service area).

<sup>34</sup> IDAHO ADMIN. CODE 37.03.11.010.02 (2022).

<sup>35</sup> IDAHO WATER RES. BD., EASTERN SNAKE PLAIN AQUIFER: REVIEW OF COMPREHENSIVE MANAGED AQUIFER RECHARGE PROGRAM 7 (2016) [hereinafter ESPA MAR PROGRAM].

<sup>36</sup> *Id.*

<sup>37</sup> *Historical Recharge*, IDAHO WATER RES. BD., <https://www.arcgis.com/apps/dashboards/e85a9ab5c2104b78893d7321f5d0de95> (last visited March 22, 2023).

The MAR program is hindered by some clear obstacles. The foremost being that MAR water rights are generally junior in priority to other rights on the Snake River.<sup>38</sup> IWRB holds one MAR water right with the priority date of 1980, and seven permits with the priority dates of 1998.<sup>39</sup> The moratorium addresses MAR by stating that “[a]pplications for ground water recharge shall be evaluated on a case-by-case basis to determine whether the proposed use is non-consumptive and whether it will reduce the supply of water to holders of existing water rights with priority dates senior to the priority date of the application.”<sup>40</sup> Even if the Director finds that applications for new MAR rights are non-consumptive and will not reduce the supply for existing rights, the new MAR rights would be junior to all other rights on the system.

Because any new MAR water right would be junior to current existing rights and would likely not come into priority in most years, it would be more beneficial to pursue temporary MAR permits during times when water is available for recharge. Pursuant to Idaho Code section 42-202A, any party can apply for a temporary water right to engage in a number of uses, one of which is ground water recharge.<sup>41</sup> Approval of a temporary permit does not require the Director to publish notice or make specific findings; permits only cost fifty dollars, and they do not ripen into an established water right.<sup>42</sup> Therefore, a temporary permit to engage in MAR should be

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<sup>38</sup> ESPA MAR PROGRAM, *supra* note 35, at 12.

<sup>39</sup> *Id.*; *IWRB Applications for Managed Aquifer Recharge in the Upper Snake River Basin*, IDAHO DEP’T OF WATER RES., <https://idwr.idaho.gov/legal-actions/administrative-actions/iwr-recharge-applications/> (last visited March 22, 2023); *see, e.g.*, Water Permit Report: 1-7142 (Active), <https://research.idwr.idaho.gov/apps/shared/WrExtSearch/Reports/PermitReport?basin=1&seq=7142&suffix=> (showing that water right permit 1-7142 was granted with a priority date of 1998; seven of IWRB’s water right applications with the same priority date were granted). One application, Water Application 1-10612, is still in the application phase, a permit has not been granted. Water Application Report 1-10616, <https://research.idwr.idaho.gov/apps/shared/WrExtSearch/Reports/WaterAppReport?basin=1&seq=10612&suffix=> (last visited Mar. 27, 2023).

<sup>40</sup> *IDWR 2022 Moratorium*, *supra* note 1, at 27–28.

<sup>41</sup> IDAHO CODE § 42-202A (2022).

<sup>42</sup> *Id.*

acquired anytime that there is water available for recharge beyond what is already available to fill IWRB's and private entities' recharge rights.

### III. CONCLUSION

IDWR's 2022 amended moratorium is not a novel approach to water management on the Snake River, but it is the most comprehensive moratorium to date. The moratorium creates some implications for water managers regarding conjunctive management and managed aquifer recharge, but the most significant change is that municipal water use is considered fully consumptive. IDWR and the legislature should address the exempt well issue to fully realize the goals of the moratorium.