



IDAHO DEPARTMENT OF
WATER RESOURCES

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Governor Brad Little

Director Mat Weaver

03/11/24

FILIPE AGUIRRE
1290 NE FRONTAGE RD
MOUNTAIN HOME ID 83647

RE: PETITION FOR RESOTRATION OF OWNERSHIP – WATER RIGHT HISTORY

Mr. Aguirre,

The Department received your letter detailing your concerns about water rights 61-7647 and 61-2033. In your letter you assert that water right 61-2033 was replaced by water right 61-7647 and ownership given to JC and Thelma Cantrell. I searched the documents available in the records for each right and found evidence contrary to this assertion. Enclosed with this letter are summaries of the history of rights 61-7647 and 61-2033 based on documents found in the water right record of each right. Please read these summaries prior to the remainder of this letter as I make reference to the history and documents described in the summaries when responding to your statements.

In your letter you write that you are the correct owner of right 61-7647. You enclosed images of the place of use of right 61-2033 and the diversion works and provide a copy of the settlement signed by Aguirre and the Cantrells as supporting evidence. However, the settlement demonstrates Aguirre agreed that the Cantrells could establish a new and junior water right for the use of water from Frazier Tunnel. Documents in the record show right 61-7647 was established through the application, permit development, and license process. Right 61-7647 has a junior priority to former right 61-2033 indicating it was established later in time, authorizes use of spring water for different beneficial uses and authorizes beneficial use at a different place of use than former right 61-2033. The evidence included with your letter and documents in the water right record do not show right 61-7647 replaced right 61-2033.

Also in your letter you write, “mr cantrell illegally went to the department of water resources and lied. He stated that my families water right 61-2033 was abandoned.” There is evidence in the record for right 61-2033 that suggests the Cantrells discussed right 61-2033 with IDWR staff. However, there is evidence in the file demonstrating IDWR staff attempted to verify the use of the right through communication with Aguirre and by site visit. The recommendation to disallow Aguirre’s claim of right 61-2033 was based on a lack of evidence of use and Aguirre was given sufficient opportunity to provide evidence.

Finally, you submitted several forms with your letter, I will address each one separately. The *Claim to a Water Right* form is the appropriate form for recording the historic use of water. However, the point of diversion is within Administrative Basin 61 within the area subject to the Snake River Basin Adjudication (SRBA). The Final Unified Decree was signed on 08/25/2014. Claims in the SRBA can

only be filed for de minimis domestic or stockwater uses. The time to file a claim with the SRBA for irrigation has passed. This form will be returned.

You also included an *Application for Permit* form. This is the appropriate form to file to establish a new water right and requires an application fee pursuant to Idaho Code § 42-221. Without the required fee the application is incomplete and therefore will be returned.

The third form you included is a *Change in Address* form requesting a change in the mailing address for rights 61-10622, 61-2033, and 61-7647. The current owner or record of right 61-10622 is Basque Ranches. According to the Idaho Secretary of State, the mailing address for Basque Ranches and the registered partners is the same as the address listed on the form. IDWR will update the mailing address for right 61-10622. Right 61-2033 is not an active record, therefore owners name and mailing address will not be changed. The Department will add an additional mailing address to this record as requested. The owner of record of right 61-7647 is not Basque Ranches and as discussed in this letter, should not be changed at this time.

If you have acquired right 61-7647 through the purchase of the right directly or the property the right is appurtenant to, please submit a complete Notice of Change in Water Right Ownership form with sufficient evidence of ownership (such as a warranty deed or other legal conveyance of ownership) and the required fee.

On 03/07/24 I spoke with Kari Sinclair and discussed the information found in the water right records. Mrs. Sinclair referenced a document titled "Permit", it can be found on page 48 of the electronic file for water right 61-7647. Mrs. Sinclair called attention to the fourth paragraph beginning at the bottom of the first page and continuing on the second page which states:

AND, WHEREAS, it is understood between the parties hereto that by using said waste water the Second Parties shall not acquire a right to continue to use the same if the First Parties should hereafter put said waste water to beneficial use,

Mrs. Sinclair asserts this document demonstrates Cantrell should not have been allowed to establish a water right for the use of water from Frasier Tunnel. I disagree. On page 1 the document states that the First Parties (Aguirre) owns water rights from the Fraiser Tunnel and other sources and that waste water flows from the Aguirre property and further that the Second Parties (Cantrells) have been using that waste water for stock watering and irrigation. Additionally, the final section of the document states the First Party grants the Second Party permission to use the waste water when available. These sections indicate this document is not related to application for permit 61-7647 which identifies the Frazier Tunnel spring as the source, but to the use of waste water. Finally, this document is not signed by either party and should be considered an executed agreement.

Mrs. Sinclair asked about the options available to acquire water rights for irrigation. The property in question is within the Mountain Home Ground Water Management Area and Snake River Basin Moratorium Area so their options are limited and complicated and will be discuss in a separate document (see enclosed).

In conclusion, the documents in the water right file demonstrate that right 61-2033 was not closed and replaced by right 61-7647 with ownership granted to the Cantrells. Aguirre's claim of right 61-2033 was disallowed by the SRBA court because there was insufficient evidence demonstrating the right was valid. The Cantrells established a new right to the use of water from the Frazier Tunnel with a junior priority pursuant to a settlement recognized and signed by Aguirre.

Respectfully,



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Enclosure: Water Right Background Summary, Incomplete Application For Permit, Incomplete Notice of Claim, Amended Snake River Basin Moratorium Order, Water Right Options Summary, Blank Application for Permit form, Application for Permit Fee Schedule

Summary of the History for Right 61-7647

Application 61-7647 (“Application”) was filed by JC and Thelma Cantrell (“Cantrells”) on 7/2/1990. On 8/3/1990 Domingo Aguirre (“Aguirre”) filed a protest of the Application. A conference was held on 4/10/1991 the result of which appears to be a signed and executed agreement between the Cantrells and Aguirre. The Department received a copy of the agreement on 5/8/1991. The agreement recognizes the existence of water license no. 8456 (later identified as no. 61-2033) authorizing the use of water from a source identified as Frazier Tunnel and that this right is senior to application 61-7647. It further recognizes that the Cantrells could make use of water not diverted and used by Aguirre. The Cantrells and Aguirre both signed the agreement. By signing the agreement Aguirre agreed to withdraw the protest filed against 61-7647. IDWR approved permit 61-7647 on 6/20/91.

On 10/8/1996 an examiner conducted an on-site examination of the use developed under permit 61-7647. The examiner found the permit was developed, making use of water from a spring that flows out of a tunnel into a ditch that conveys water to Basque Ranches and to a pond on the Cantrells property. License 61-7647 was issued on 4/6/99 with a priority date of 7/9/1990 based on the on-site examination.

Summary of the History for 61-2033

On 10/10/1921 IDWR issued license 8456 to W.L. Frazier authorizing the use of a “subterranean stream” for the purposes of irrigation and domestic use. The license would later be identified as license no. 61-2033. Then on 1/8/1990 IDWR received a notice of claim to a water right (“Claim”) from Basque Ranches. The Claim identifies the basis of the claim as license 61-2033 and lists the source as ground water, but the source is further described as a “Horizontal well into water table – Tunneling techniques used...”.

On 10/20/1994 IDWR staff conducted an on-site investigation of the tunnel and place of use claimed in an attempt to verify use of water as claimed. IDWR staff found water flowing out of a tunnel into a ditch and pond. No convincing evidence of use on Basque Ranches property was found during the site visit as evident by the photographs in the record. Then on 10/28/1994 IDWR mailed a letter to Basque Ranches informing them that they needed to submit information demonstrating that use of water as claimed had recently occurred and warned that without evidence of use IDWR would recommend the claim be disallowed. There are documents in the record that indicate IDWR staff has multiple conversations with Aguirre about the claim and how Aguirre could support their claim of right. There is no evidence in the record that IDWR received evidence of use from Aguirre. IDWR recommended the claim be disallowed and on 4/24/2001 the SRBA court issued Partial Decree of Disallowed Water Right Claims for claims of right in Basin 61. The partial decree ordered that the claims in Exhibit A were to be disallowed, 61-2033 was included in Exhibit A.

Water Right Options

Water Right 61-2033

The Final Unified Decree in the Snake River Basin Adjudication (SRBA) was signed on 08/25/2014. Claims in the SRBA can now only be filed for de minimis domestic or stockwater uses. It may be possible to file something with the SRBA court and provide evidence that 61-2033 was not forfeit. I do not know that process, the documents that should be filed, nor what evidence of use will be required. If you would like to do anything with the SRBA court, I highly recommend hiring legal counsel.

Acquiring an Existing Water Right

Idaho Code § 42-222 states that the point of diversion and place of use of existing water rights may be changed if the proposed change meets certain criteria. However, the source of water may not be changed. This means that it may be possible to acquire an existing right and move it to the Aguirre property but the right so acquired must authorize the diversion and use of water from either the Frazier Tunnel or ground water within the same aquifer to be available for transfer. The Department does not participate in any water right market places and therefore can not provide assistance in acquiring water rights. Once acquired you will need to submit an application for transfer to the Department for review. Additional information along with the appropriate form can be found on the Department's website at <https://idwr.idaho.gov/water-rights/transfers/>

The Idaho Water Resource Board operates a Water Supply Bank that accepts idled water rights and rents the same for use by entities in need of water. A rental may provide the authority to use water on the Aguirre property. Rental agreements through the Water Supply Bank typically do not exceed 5 year terms and are dependent on water availability. More information along with the appropriate forms can be found on the Department's website at <https://idwr.idaho.gov/iwrb/programs/water-supply-bank/>.

Establishing a New Right

The Frazier Tunnel and Aguirre property are within the Snake River Basin Moratorium Area. The enclosed Order provides the background information and details. The Order suspends further action on processing and approving applications for new water right for all surface water and ground water sources within the boundary (see page 30 of the Order) subject to some provisions. However, the Director is not prevented from reviewing applications on a case by case basis if the applicant can demonstrate the proposed use of water is non-consumptive, will have no effect on prior surface and ground water rights, or impacts of the new use will be fully mitigated.

To establish a new water right for use of water from the Frazier Tunnel, from a constructed ground water well, or any other source for irrigation you must submit an application for permit (form enclosed) along with the appropriate fee (see enclosed fee schedule) and demonstrate the use would not injure existing water rights. If you wish to pursue this option, I highly recommend seeking the advise of legal counsel or technical consultant firm familiar with the Snake River Basin Moratorium.

**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

**AMENDED SNAKE RIVER
BASIN MORATORIUM ORDER**

SUMMARY

This order expands the existing Eastern Snake River Plain Moratorium to include consumptive use 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. This order modifies certain exceptions related to domestic uses and clarifies the application of the non-consumptive use exception to municipal water use and domestic water use. This order also re-establishes a moratorium on the issuance of permits for new consumptive uses from surface and ground water tributary to the Snake River upstream from Milner Dam to protect existing water rights.

BACKGROUND

Snake River Downstream from Milner Dam

The Idaho Water Resource Board (“Board”) first established minimum stream flows at the USGS gaging station on the Snake River near Murphy (“Murphy Gage”) in the 1976 Idaho State Water Plan.¹ In 1986, the Board amended the Idaho State Water Plan to increase minimum stream flows at Murphy Gage.² The 1986 Idaho State Water Plan also stated, “[i]t is the policy of Idaho that the ground and surface water of the basin be managed to meet or exceed . . . the minimum stream flows at Murphy gauging station.”³ The current Idaho State Water Plan also included the policy of managing Snake River basin water resources to meet or exceed the minimum stream flows at Murphy.⁴

Minimum stream flow water rights at Murphy Gage were decreed in the Snake River Basin Adjudication to the Board and Idaho Power Company. The Board holds decreed water rights 02-201, 02-223, and 02-224 for minimum stream flows in the Snake River at the Murphy

¹ Idaho Water Res. Bd., (1976). *The State Water Plan – Part Two* (p. 116). <https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/1976/1976-State-Water-Plan-Part-2.pdf>

² Idaho Water Res. Bd., (1986). *Idaho State Water Plan* (p. 35). <https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/1986/1986-State-Water-Plan.pdf>

³ *Id.*

⁴ Idaho Water Res. Bd., (2012). *Idaho State Water Plan* (p. 43). <https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/2012/2012-State-Water-Plan.pdf>

Gage of 3,900 cfs (April 1 to October 31) and 5,600 cfs (November 1 to March 31). In parallel with the water rights of the Board, Idaho Power Company holds decreed water rights 02-100, 02-2032A, 02-4000A, and 02-4001A that recognize and protect, in priority, average daily flows in the Snake River at Murphy Gage of 3,900 cfs (April 1 to October 31) and 5,600 cfs (November 1 to March 31), subject to subordination conditions.

Idaho Code § 42-203B(2) placed previously asserted Idaho Power Company hydropower water rights in excess of the minimum stream flows in a State administered trust, subordinating those hydropower flows to future water rights known as “Trust Water Rights.”⁵ Trust Water Rights are subject to curtailment if flows in the Snake River fall below the decreed minimum stream flow water rights.⁶ Flow conditions in the Snake River have changed since 1986, reducing the availability of water for additional Trust Water Rights.

Preventing the further reduction of flows available to existing water rights—including decreed minimum stream flow water rights and Trust Water Rights—justifies the expansion of the Eastern Snake River Plain Moratorium.

Snake River Upstream from Milner Dam

Since the early 1900s, the diversion and use of waters of the Snake River and many of its tributaries above Milner Dam have been regulated because the demand for water exceeded the supply. In more recent years, the Idaho Department of Water Resources (“Department”) has created water districts for the purpose of measuring, regulating, and when necessary, curtailing diversion of junior ground water rights during times of water shortage for senior water rights holders.

Declining water supplies in the Snake River Basin above Milner Dam have prompted delivery calls and additional demands for water administration from holders of senior water rights. A variety of administrative activities and judicial decisions have resulted in (a) expanded administration of existing ground water and surface water rights, (b) the enjoinder of new water appropriations for a period of time, and (c) greater scrutiny of new water right applications resulting in near cessation of new appropriations. The need to protect existing water rights justifies the reestablishment of a moratorium upstream from Milner Dam.

Response

The Director, having responsibility for the administration of the appropriation of the waters of the State of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state, and the conservation of the water resources of the state, finds, concludes, and orders:

⁵ A “Trust Water Right” is “[a] water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower water rights held in trust by the State of Idaho.” Order Am. Final Unified Decree, at 2, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Jun. 25, 2015).

⁶ Mem. Decision and Order on Cross-Mots. for Summ. J., at 47–48, *In Re SRBA Case No. 39576*, No. 00-92023 (92-23) (Twin Falls Cnty. Dist. Ct. Idaho Apr. 18, 2008).

FINDINGS OF FACT

Reference Locations

1. The following locations on the Snake River are crucial to understanding the administration of water resources in the Snake River, the Eastern Snake Plain Aquifer (“ESPA”), and their tributaries:

- a. Milner Dam is located in south-central Idaho in Section 29, Township 10 South, Range 21 East, Boise Meridian.
- b. The USGS gauging station at King Hill (“King Hill Gage”) (USGS 13154500) is located approximately 94 miles downstream from Milner Dam in Section 7, Township 5 South, Range 11 East, Boise Meridian.
- c. Swan Falls Dam is located approximately 92 miles downstream from the King Hill Gauge in Section 18, Township 2 South, Range 1 East, Boise Meridian.
- d. The USGS gauging station near Murphy (“Murphy Gage”) (USGS 13172500) is located approximately 4 miles downstream from Swan Falls Dam in Section 35, Township 1 South, Range 1 West, Boise Meridian.

Each of these locations is shown on the map in Appendix A of this order.

2. The following areas are also crucial to understanding the administration of water resources in the Snake River, the ESPA, and their tributaries:

- a. 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. The area is discussed in Rule 30.01 and shown in Appendix A of the Water Appropriation Rules (IDAPA 37.03.08).
- b. The “non-trust water area” is defined in the January 6, 1993 *Moratorium Order in the Matter of Applications for Permits for Diversion and Use of Surface and Ground Water within the Snake River Basin Upstream from Milner Dam the Non-Trust Water Moratorium* (“Non-Trust Water Moratorium”) by depicting it on a map. The map shows the non-trust water area to be that portion of the Snake River Basin in Idaho, including tributary basins, upstream from Milner Dam and not within the trust water area.

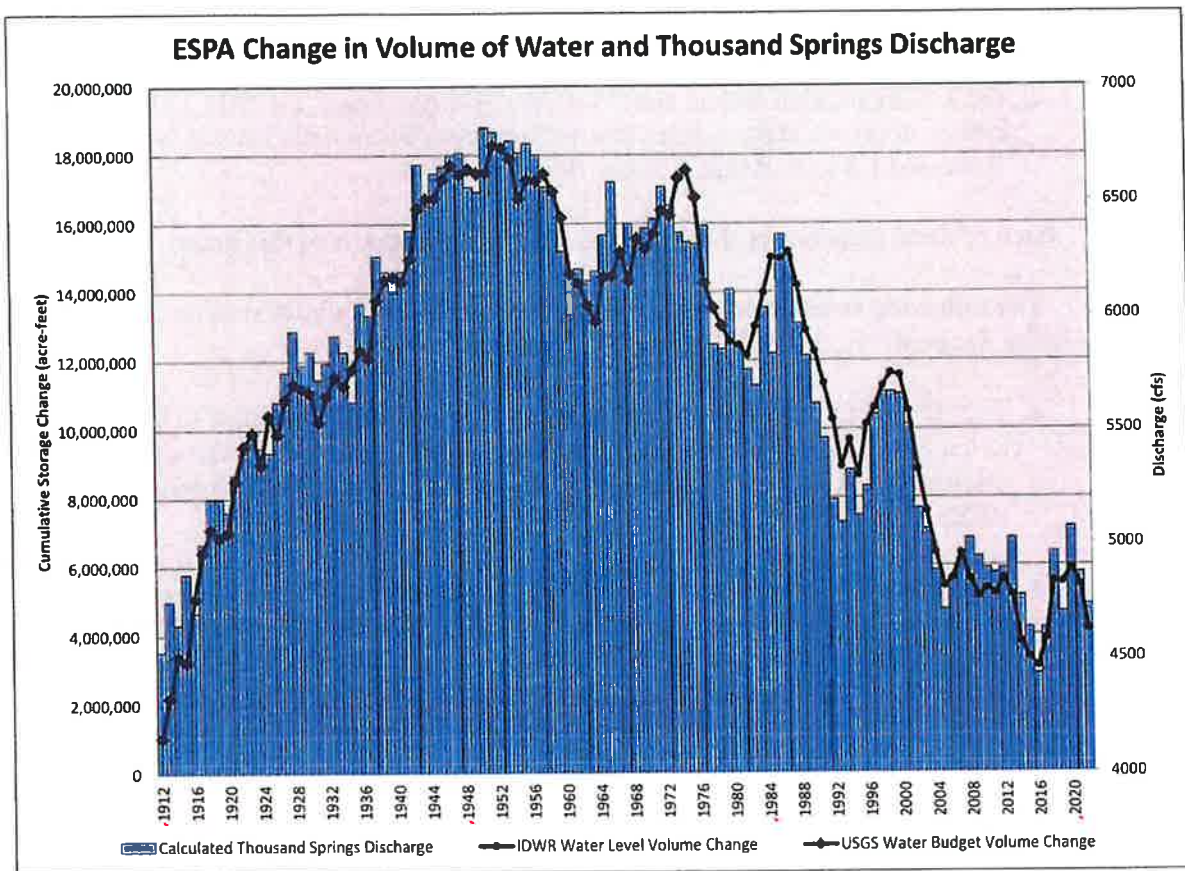
These areas are shown on the map in Appendix A of this order.

Hydrology and Hydrogeology of the Snake River, ESPA, and Tributaries

Eastern Snake Plain Aquifer

3. The ESPA underlies the Eastern Snake River Plain (“ESRP”), which encompasses an area of about 11,000 square miles from Ashton, Idaho in the northeast to King Hill, Idaho in the southwest.

4. The ESPA has been stressed by periodic drought, reduction in aquifer recharge due to changes in diversion and use of surface water throughout the basin, and by ground water pumping for irrigation and other consumptive uses. Below are two hydrographs overlaid on the same graphical image. One hydrograph plots total discharge from the ESPA through the springs along the Snake River from Milner Dam to King Hill from 1912 to the spring of 2022. The other hydrograph shows gains and losses in total aquifer storage in the ESPA during the same time period.⁷



⁷ McVay, M. (2022). *ESPA storage changes* [presentation to the Idaho Water Resources Board], Idaho Water Resource Board. <https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/1-Meetings2022/AquiferStabilizationCommittee-Meeting-2-22-Materials.pdf#page=34>

5. Since 1952, there has been a long-term declining trend in ESPA ground water levels and the volume of water in aquifer storage. These trends result largely from the combination of the decreased incidental recharge associated with diversion of surface water onto the ESRP and increased consumptive ground water pumping. The Department estimates the ESPA lost approximately 14 million acre-feet (MAF) from aquifer storage during the period 1952 to 2022, an average reduction of approximately 200 thousand acre-feet per year (KAF/yr.).⁸ Reduced aquifer storage in the ESPA and the corresponding reduction in ground water levels reduce the supply of water to senior water right holders by reducing the spring and base flow discharge needed to maintain stream flows.⁹

6. Recognizing the hydraulic connection between ground water in the ESPA and the Snake River, the Department developed a regional numerical ground water flow model (“ESPA model” or “ESPAM”) to simulate depletions to the Snake River in various reaches caused by diversion of ground water for irrigation and other consumptive uses. The current version of the model is ESPAM 2.2.

7. The ESPA model simulates how stresses applied to the ESPA affect flows in the Snake River and its tributary springs and streams. Modeled aquifer stresses include natural, incidental, and managed recharge, and withdrawal by ground water pumping. The model shows that ground water diversions from the ESPA reduce aquifer storage and reduce flows needed by senior water users.

8. Net recharge to the ESPA is derived primarily from precipitation and snowmelt in tributary basins. Based on the ESPAM 2.2 average annual water budget for water years 1981–2018, only approximately 13% (1.0 MAF/yr.) of aquifer recharge is derived from the infiltration of precipitation on the ESRP. The remaining aquifer recharge is derived from tributary underflow of ground water (approximately 16%), tributary streamflow that seeps into the aquifer via losing streams (approximately 9%), and seepage resulting from diversions of surface water from the Snake River and other streams (approximately 63%).¹⁰

Basins Tributary to ESPA

9. Streamflow originating in tributary basins recharges the ESPA through a combination of infiltration of water from losing streams and incidental recharge (canal seepage and on-farm infiltration) resulting from the diversion of surface water onto the ESRP. Consumptive use of ground water and surface water in basins tributary to the ESPA reduces inflow to the ESPA and Snake River via tributary streamflow and/or ground water underflow.

⁸ *Id.*

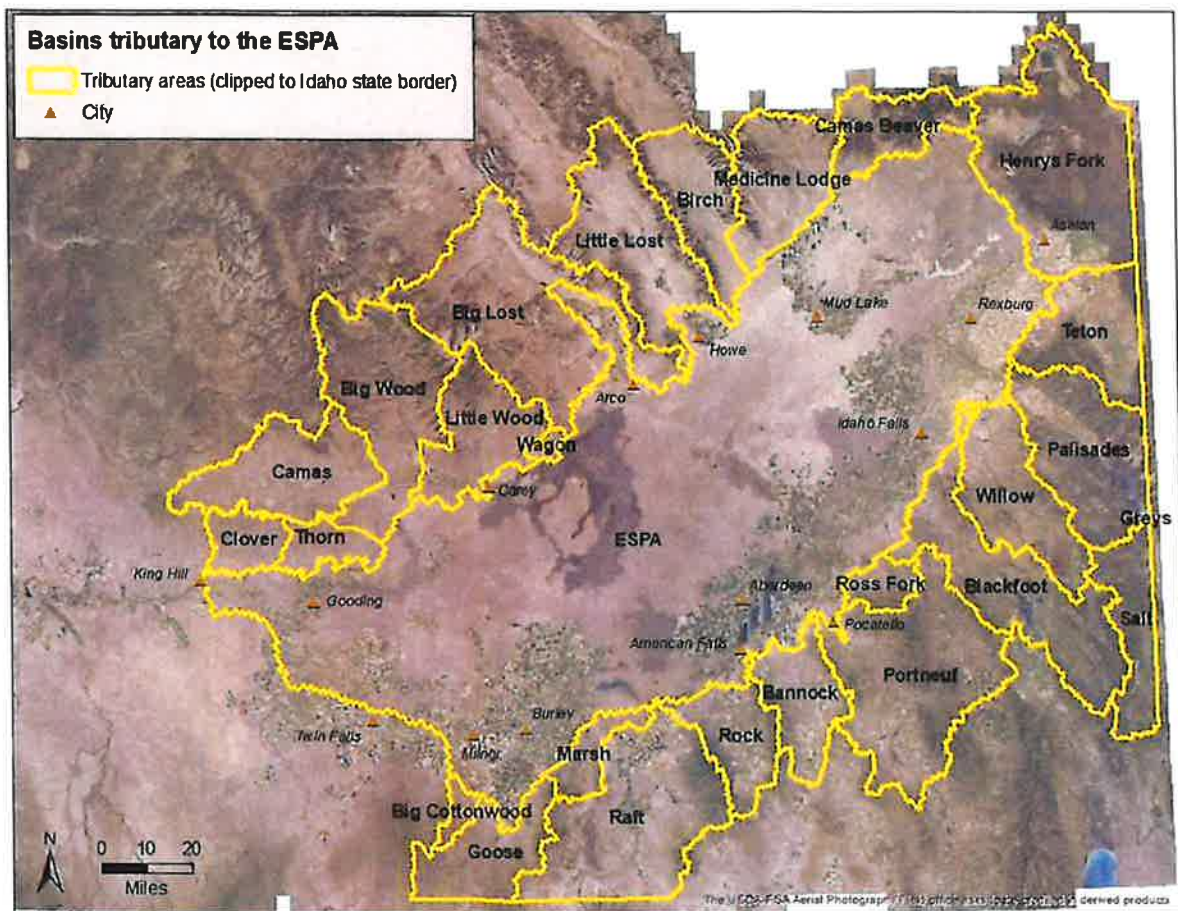
⁹ Barlow, P.M., & Leake, S.A. (2012). *Streamflow depletion by wells—Understanding and managing the effects of groundwater pumping on streamflow* (Circular 1376), U.S. Department of the Interior & U.S. Geological Survey (p. 84). https://pubs.usgs.gov/circ/1376/pdf/circ1376_barlow_report_508.pdf

¹⁰ Sukow, J. (2021). *Model calibration report: Eastern Snake Plain Aquifer model version 2.2*. Idaho Department of Water Resources (p. 19). https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/ModelCalibrationRpt/ModelCalibration22_Final.pdf

Consumptive use in the tributary basins reduces the water supply needed by senior surface water users reliant on the Snake River and springs emerging from the ESPA.

10. Collectively, the tributary basins provide an estimated 6.7 MAF/yr. of recharge to the ESPA, including approximately 1.2 MAF/yr. of ground water underflow, 0.7 MAF/yr. of infiltration of water from losing streams that flow out onto the ESRP, and 4.8 MAF/yr. of incidental recharge associated with diversion of surface water onto the ESRP. The following table shows the estimated annual average contribution of tributary basins to ESPA recharge during water years 1981 through 2018, according to ESPAM 2.2. Tributary locations are shown on the following map.

Tributary Basin	Average ground water underflow (KAF/yr)	Average perched seepage (KAF/yr)	Average recharge incidental to irrigation diversions (KAF/yr)	Average contribution to ESPA recharge (KAF/yr)
Camas Creek (Basin 31)	269	68	19	356
Beaver Creek (Basin 31)	73	21	5	98
Medicine Lodge Creek (Basin 32)	8	28	9	45
Birch Creek (Basin 32)	93	17	8	118
Little Lost River (Basin 33)	275	25	22	321
Big Lost River (Basin 34)	80	138	92	310
Silver Creek, Wagon Creek, and Little Wood River (Basin 37)	51	116	32	199
Big Wood River and Camas Creek (Basin 37)	9	78	229	316
Thorn Creek (Basin 37)	6			6
Clover Creek (Basin 37)	8			8
Henry's Fork (Basin 21)	148		944	1,091
Teton River (Basin 22)	18		345	363
Palisades (Basin 23)	6	235 (Dry Bed)	2,800	3,042
Willow Creek (Basin 25)	27		27	55
Blackfoot River (Basin 27)	12		84	96
Ross Fork (Basin 27)	4		6	9
Portneuf River (Basin 29)	22		106	128
Bannock Creek (Basin 29)	21		16	37
Rock Creek (Basin 41)	40		13	53
Raft River (Basin 43)	30			30
Marsh Creek (Basin 45)			7	7
Goose and Big Cottonwood Creeks (Basin 45)	33		27	60



11. Consumptive use of surface water in tributary basins also reduces flow in the Snake River, both upstream and downstream of Milner Dam, by either reducing tributary streamflow, reducing infiltration of streamflow to the ESPA via losing streams, or by reducing incidental recharge associated with diversions of streamflow onto the ESRP. The timing and location of impacts on surface water supply is dependent on the timing and location of the diversion.

Perched Aquifers

12. Several locally perched aquifers, often recharged largely by infiltration of irrigation water, are also tributary to the ESPA. In a study conducted during development of the Minidoka Project, perched ground water below the surface water irrigated portion of the project was observed to be an important source of recharge to the ESPA.¹¹ A more recent study on the age of irrigation water also indicates that incidental recharge from the Minidoka Irrigation District flows west and northwest in a perched aquifer before joining the ESPA, which generally flows

¹¹ Crosthwaite, E.G., & Scott, R.C. (1956). *Ground water in the North Side Pumping Division, Minidoka project, Minidoka County, Idaho* (Circular 371), U.S. Department of the Interior & U.S. Geological Survey (p. 10). <https://pubs.usgs.gov/circ/0371/report.pdf>

southwest.¹² Perched ground water beneath the Burley Irrigation District is tributary to the ESPA by downward leakage at the edges of the perching beds and also discharges directly to the Snake River by lateral flow.¹³

13. A report documenting a recharge event on the Egin Bench in 2008 includes a literature review of several studies that conclude the perched aquifer system in the Egin Bench area contributes recharge to the regional ESPA by downward seepage and also contributes some discharge directly to the surface water system.¹⁴

14. Consumptive use of water from perched aquifers reduces the water supply needed by senior surface water users on the ESPA.

Tributary Basins from Milner Dam to King Hill

15. The hydraulic connection between ground water in the Twin Falls area (south of the Snake River between Murtaugh Lake and Salmon Falls Creek) and the Snake River was documented by the Idaho Water Resources Research Institute during development of a ground water flow model on behalf of the City of Twin Falls.¹⁵ Ground water in the Twin Falls model area is recharged by incidental seepage associated with surface water diversions, infiltration of precipitation, and ground water underflow from the Murtaugh area and tributary basins south of the model boundary.¹⁶ Ground water discharge in the Twin Falls model area includes pumping withdrawals and discharge to springs and drains that are tributary to the Snake River between Milner Dam and King Hill. Ground water discharge from the Twin Falls area is approximately 10% of the ground water inflow to the Snake River between Milner Dam and King Hill.^{17,18}

¹² Plummer, L.N., Rupert, M.G., Busenburg, E., & Schlosser, C. P. (2000). Age of irrigation water in ground water from the Eastern Snake Plain Aquifer, South-Central Idaho. *Groundwater*, Vol 38, No. 2, p. 272. <https://doi.org/10.1111/j.1745-6584.2000.tb00338.x>

¹³ Crosthwaite, E.G. (1957). *Ground-water possibilities south of the Snake River between Twin Falls and Pocatello, Idaho* (Water-Supply Paper 1460-C), U.S. Department of the Interior & U.S. Geological Survey (p. 127). <https://pubs.usgs.gov/wsp/1460c/report.pdf>

¹⁴ Contor, B.A., Taylor, S.L., & Quinn, G.W. (2009). *Monitoring of Egin, Idaho recharge experiment, fall 2008* (IWRRI Technical Completion Report 2009-01), Idaho Water Resources Research Institute & Idaho Department of Water Resources (p. 37). <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/200906-OFR-Egin-Monitoring-Rpt-2008.pdf>

¹⁵ Cosgrove, D.M., Johnson, G.S., Brockway, C.E., & Robison, C.W. (1997). *Geohydrology and development of a steady state ground-water model for the Twin Falls, Idaho area*. University of Idaho & Idaho Water Resources Research Institute (p. 98). <https://cdm17254.contentdm.oclc.org/utils/getfile/collection/idahowater/id/689/filename/iwdl-199703.pdf>

¹⁶ *Id.*

¹⁷ Kjelstrom, L.C. (1995). *Streamflow gains and losses in the Snake River and ground-water budgets for the Snake River Plain, Idaho and Eastern Oregon* (Professional Paper 1408-C), U.S. Department of the Interior & U.S. Geological Survey (p. 47). <https://pubs.usgs.gov/pp/1408c/report.pdf>

¹⁸ Sukow, J. (2011). *Estimation of ground water contribution from the south side of the Snake River, Milner to King Hill: Eastern Snake Plain Aquifer model version 2*. Idaho Department of Water Resources (p. 25). https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM_2_Design_Docs/SouthSideContribution/ESPA_M2_South_GW_Contribution_Design_Doc_12282011_renum.pdf

16. New consumptive uses of ground water or surface water in the Salmon Falls Creek, Rock Creek, and other tributary drainage basins south of the Snake River between Murtaugh Lake and Salmon Falls Creek will result in reduced discharge to the Snake River between Milner and King Hill. The Department calculates that approving the approximately 63 pending applications for diversion of ground water for irrigation, commercial, municipal, or industrial use in this area would deplete south side aquifer discharge to the Snake River between Milner Dam and King Hill by up to 42,000 AF/yr. (58 cfs).

Tributary Basins from King Hill to Swan Falls

17. Aquifers tributary to the King Hill to Swan Falls Dam reach of the Snake River, both north and south of the river, are generally recharge limited. Ongoing water level declines in aquifer monitoring wells indicate that the rate of discharge exceeds the rate of recharge.

18. An early study of ground water resources in the Mountain Home Plateau, located west of King Hill, concludes that ground water is recharged mainly along the Mt. Bennett Hills.¹⁹ The water table slopes downward to the Snake River Canyon, where ground water discharges to the Snake River. Ralston supports his conclusions by plotting ground water contours that depict a steep gradient toward the Snake River. Ralston's report states, "the water-level contours indicate that the Mt. Bennett Hills are the primary source areas for ground-water recharge for the entire study area, and that the majority of the discharge is to the Snake River."

19. Ground water contours, derived by a U.S. Geological Survey, support a conclusion that the ground water and the Snake River west of King Hill are hydraulically connected.²⁰ Newton shows ground water contours parallel to the Snake River both on the north and south sides with declining elevation toward the river; this indicates that the Snake River is an area of ground water discharge. Newton estimated ground water discharge to the Snake River between King Hill and Murphy in 1980 comprised about 4% of the total discharge at Murphy.

20. Two additional studies support a conclusion that ground water and surface water are hydraulically connected west of King Hill. Welhan presents several conceptual models on perched and regional-scale flow on the Mountain Home Plateau.²¹ Tesch presents a water budget for an area of proposed housing development near the Danskin Mountains on the Mountain Home Plateau and states, "[u]nless inflow to the aquifer system in the study area is

¹⁹ Ralston, D.R., & Chapman, S.L. (1968). *Ground-water resource of the Mountain Home Area, Elmore County, Idaho* (Water Information Bulletin No. 4), Idaho Department of Reclamation (p. 48). <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/wib04-gw-res-mthome-id.pdf>.

²⁰ Newton, G.D. (1991). *Geohydrology of the regional aquifer system, Western Snake River Plain, Southwestern Idaho* (Professional Paper 1408-G), U.S. Department of the Interior & U.S. Geological Survey (figs. 3, 21). <https://pubs.usgs.gov/pp/1408g/report.pdf>

²¹ Welhan, J.A. (2012). *Preliminary hydrogeologic analysis of the Mayfield Area, Ada and Elmore Counties, Idaho* (Staff Report S-12-2), Idaho Geological Survey & University of Idaho (p.41). https://www.idahogeology.org/pub/Staff_Reports/2012/StaffReport_S-12-2.pdf.

increased, mass balance requires that increased withdrawals will decrease outflow to the Snake River by an equivalent amount at steady state.”²²

21. The regional aquifer system in the northern Owyhee County area (the Department’s Administrative Basin 51 and the southern portion of Basin 57) generally comprises deeper volcanic-rock geothermal aquifers, overlying sedimentary geothermal aquifers, and shallow cold-water aquifers. The volcanic and sedimentary geothermal aquifers serve as the primary sources for irrigation water with temperatures ranging from 85° F to more than 176° F. The cold-water aquifers are thin (less than 100 feet thick), laterally discontinuous, and provide minor volumes of water for domestic and stock uses. A representative study of ground water resources in the Bruneau Basin concludes that ground water recharges mainly via precipitation in the Jarbidge and Owyhee Mountains.²³ Ground water generally moves from south to north toward the Snake River, discharging into overlying aquifers, or directly to surface water as springs and seeps. Berenbrock supports this with ground water contours that indicate a gradient from the highlands toward the Snake River in both the volcanic and sedimentary aquifers, and states: “Natural discharge from the study area consists of spring flow and underflow to the Snake River.”

22. West of the Bruneau River Basin (Basin 57), ground water is recharged from the Owyhee Mountains, moves toward the Snake River, and discharges to overlying aquifers and surface water by springs and seeps.²⁴

23. Additional support for a ground water-surface water connection west of King Hill (south of the Snake River) can be found in four studies: Piper, *Geology and Water Resources of the Bruneau River Basin Owyhee County, Idaho*, 1924; Littleton and Crosthwaite, *Ground-water Geology of the Bruneau-Grand View Area Owyhee County, Idaho*, 1957; Young and Whitehead, *Geothermal Investigations in Idaho Part 2 an Evaluation of Thermal Water in the Bruneau-Grand View Area Southwest Idaho*, 1975; and Young and Lewis, *Hydrology and Geochemistry of Thermal Ground Water in Southwestern Idaho and North-Central Nevada*, 1982. All of the studies present similar conceptual models on regional-scale flow in the Northern Owyhee County area that describe recharge in the highlands, ground water movement toward the Snake River, and discharge to surface water through springs and seeps.

24. Additional appropriations of ground water and surface water in the tributary basins—or from the Snake River itself—between the King Hill Gage and Swan Falls Dam will reduce the flow in the Snake River at Murphy Gage.

²² Tesch, C. (2012). *Sufficiency of water supply for water right application and transfers along the I-84 Corridor* [Memorandum], Idaho Department of Water Resources (p. 20). <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/east-ada-contested-case/EADA-20120531-Consolidated-hearing-staff-memo.pdf>.

²³ Berenbrock, C. (1993). *Effects of well discharges on hydraulic heads in and spring discharges from the geothermal aquifer system in the Bruneau Area, Owyhee County, Idaho* (Water-Resources Investigations Report 93-4001), U.S. Department of the Interior & U.S. Geological Survey (p. 26). <https://pubs.usgs.gov/wri/1993/4001/report.pdf>

²⁴ Ralston, D.R., & Chapman, S.L. (1969). *Ground-water resource of Northern Owyhee County, Idaho* (Water Information Bulletin No. 14), Idaho Department of Reclamation (p. 85). <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/wib14-gw-res-owyhee-id.pdf>.

Prior Administrative Actions Affecting the Snake River, ESPA, and Tributaries

Snake River Basin Upstream from Milner Dam

25. Snake River water rights identifying points of diversion upstream from Milner Dam are administered separately from Snake River water rights identifying points of diversion downstream from Milner Dam pursuant to Idaho Code § 42-203B(2), and General Provision 4 for Basin 2 in the SRBA's *Final Unified Decree*. See also IDAPA 37.03.08.030.03.e. The median annual natural flow passing the Snake River at Milner for years 1990 to 2021 range from 0 cfs to approximately 3,500 cfs and the median annual volume is approximately 550,000 acre-feet. The flow past Milner Dam is reduced to zero during normal irrigation season operating conditions. When no Snake River flow passes Milner Dam, existing junior Snake River water rights upstream from Milner Dam are curtailed to satisfy senior Snake River water rights upstream from Milner Dam.

26. Junior surface water rights diverting water from the Snake River and tributary streams upstream from Milner Dam are curtailed every year and rely on storage water, if available, to maintain adequate supply throughout the year or irrigation season. Administration of surface water rights by priority is accomplished by Water District 1 and other water districts in the Snake River and tributary streams upstream from Milner Dam.

27. On January 6, 1993, the Director issued the Non-Trust Water Moratorium to prevent the approval of certain new applications to appropriate water in the non-trust water area. The order stated:

Ground water aquifers have been stressed by the reduction in natural recharge, from reduced recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping. As a consequence, ground water levels have fallen. The lowered water levels in the aquifers of the non-trust water area have resulted in numerous wells, often used for domestic and municipal water supply purposes, becoming unusable. Lowered ground water levels also reduce spring discharge needed to maintain stream and river flows.²⁵

28. The Non-Trust Water Moratorium order contained language that “the moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997.”²⁶

29. On August 15, 2013, the Department received a *Petition to Renew Moratorium Order for Non-Trust Water Area* from 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. The petition argued:

²⁵ Moratorium Order, at 1, *In re Applications for Permits for Diversion and Use of Surface and Ground Water within the Snake River Basin Upstream from Milner Dam* (Idaho Dep't of Water Res. Jan. 6, 1993).

²⁶ *Id.* at 5.

The same, if not worse, water supply conditions that gave rise to the 1993 moratoriums exist today. Ground water levels are stressed and lowered, and spring discharges are increasingly inadequate to maintain stream and river flows. Yet, since 1997, there has been no moratorium on new consumptive uses of water within the non-trust water area. . . . [T]he Non-trust Moratorium should be immediately renewed and should be extended indefinitely ²⁷

30. Following issuance of partial decrees of ground water rights in the ESPA, the Director established Water Districts 100, 110, and 120 to administer ground water rights by priority as needed to maintain water supplies to senior water rights.

Snake River Basin Downstream from Milner Dam

31. Partial decree nos. 02-201, 02-223 and 02-224, decreed to the Board, together confirm water rights for an irrigation season minimum stream flow of 3,900 cfs and a non-irrigation season minimum stream flow of 5,600 cfs at the Murphy Gage on the Snake River. In parallel with the water rights of the Board, Idaho Power Company holds decreed water rights 02-100, 02-2032A, 02-4000A, and 02-4001A that recognize and protect, in priority, average daily flows in the Snake River at Murphy Gage of 3,900 cfs (April 1 to October 31) and 5,600 cfs (November 1 to March 31), subject to subordination conditions.

32. Idaho Code § 42-203B(2) placed Idaho Power Company hydropower water rights in excess of the minimum stream flows into a State administered trust, subordinating those hydropower rights to future water rights established pursuant to Idaho Code § 42-203C, known as “Trust Water Rights.”²⁸ Trust Water Rights are subject to curtailment when average daily flows²⁹ at the Murphy Gage are below the decreed minimum stream flows.³⁰

²⁷ Pet. to Renew Moratorium Order for Non-Trust Water Area, at 2, *In re Applications for Permits for Diversion and Use of Surface and Ground Water within the Snake River Basin Upstream from Milner Dam* (Idaho Dep’t of Water Res. Aug. 15, 2013).

²⁸ A “Trust Water Right” is “[a] water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower water rights held in trust by the State of Idaho.” Order Am. Final Unified Decree, at 1, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Jun. 25, 2015).

²⁹ The partial decrees for Idaho Power Company’s hydropower water rights and the hydropower water rights held in trust by the State define “average daily flows” as follows:

Average daily flows shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities. Fluctuations resulting from Idaho Power’s operations are the sole exclusion to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions. Flows of water purchased, leased, owned or otherwise acquired by other entities are not considered fluctuations.

³⁰ Mem. Decision and Order on Cross-Mots. for Summ. J., at 47–48, *In Re SRBA Case No. 39576*, No. 00-92023 (92-23) (Twin Falls Cnty. Dist. Ct. Idaho Apr. 18, 2008).

33. Applications for permit to appropriate trust water, i.e., applications for Trust Water Rights, may be approved if they meet criteria in Idaho Code § 42-203A and additional criteria established for trust water, including a determination whether the proposed use will significantly reduce the availability of trust water, *see* Idaho Code § 42-203C.

34. In 1990, the Department completed studies to estimate the impact of appropriations of trust water on Snake River flows and associated hydropower generation losses. Projected appropriations of trust water were based on undeveloped permits and applications in the trust water area totaling about 196,000 irrigated acres. The IDWR/UI Ground Water Flow Model, a precursor to ESPAM, simulated depletions due to trust water diversions over 60 years.³¹ The studies resulted in a decision of the Department—*Memorandum Decision and Order*, dated November 7, 1990 (“1990 Evaluation of Significant Reduction Order”). The studies and order concluded that “[d]evelopment of 196,000 acres would reduce outflow by 87% of the new depletions in the 60th year. Other factors present in the dynamic system as large as the Snake Plain aquifer will have more effect on the discharge of the Snake River than decreases caused by this amount of new development.”³² The order concluded that the new appropriations of trust water would not cause a significant reduction in the water supply available for power production purposes.

35. After the 1990 decision, development of beneficial uses pursuant to existing undeveloped permits continued in the trust water area, and new applications for consumptive uses were processed and approved throughout the trust water area until 1992.

36. On May 15, 1992, the Director issued an order establishing a moratorium on 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 to protect existing water rights. Because Weiser is downstream from Swan Falls Dam, the moratorium included the entire trust water area. Meanwhile, development of beneficial uses pursuant to existing undeveloped permits continued in the trust water area.

37. On January 6, 1993, the Director amended the moratorium order to eliminate the area in the Snake River Basin upstream from Milner Dam (the non-trust water area) from the scope of the moratorium order.³³

38. On April 30, 1993, the Director amended the moratorium order again. The amendment 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.

³¹ The Snake River Plain Aquifer Model (“SRPAM”) preceded ESPAM. The Idaho Water Resources Research Institute published the documentation for SRPAM1.1 in 1999 and stated that prior to 1999 the model was referred to as the “IDWR/UI Ground Water Flow Model.”

³² *Memorandum Decision and Order* ¶ 3, at 4, *In re Evaluating Whether Development of New Irrigated Acreage Will Cause a Significant Reduction in Trust Water Available for Power Production* (Idaho Dep’t of Water Res. Nov. 7, 1990).

³³ On the same day, the Director issued the Non-Trust Area Water Moratorium discussed in Finding of Fact 27.

39. In November 1994, the Director issued an *Order for Temporary Stay of Development and Notice of Formal Proceedings* in connection with certain permits within the trust water area for which proof of beneficial use of water had not been filed with the Department. Some of the affected permits are currently subject to an indefinite stay in the development period or suspension of action, prohibiting development.

40. On May 3, 1995, the Director amended the moratorium order again, removing the Boise River Drainage Area from the moratorium area.³⁴

41. The April 30, 1993 amended moratorium order was issued to protect existing water rights impacted by drought, reduced recharge, and increased diversion demands in the Eastern Snake River Plain Area. The April 30, 1993 amended moratorium order is referred to as the Eastern Snake River Plain Moratorium.

42. In the 2009 Framework Reaffirming the Swan Falls Settlement, the State of Idaho and Idaho Power Company agreed to seek resolution of certain issues, including the development of means to enable the State of Idaho to ensure that the minimum flow water rights established at the Murphy Gage are maintained.³⁵

43. In 2002, the Director established Water District 2 to administer surface water rights in the Snake River from Milner Dam to the Murphy Gage.

44. After the Snake River Basin Adjudication court issued partial decrees of ground water rights in the ESPA, the Director established Water Districts 130, 140, and 37B and incorporated ground water rights into Water District 37 to administer ground water rights by priority as needed to maintain water supplies to senior water rights.

45. If future Snake River flow rates at the Murphy Gage are less than the minimum stream flow water rights, some water right permits, licenses, and decreed water rights authorizing diversion and beneficial use of trust water (Trust Water Rights) will be subject to curtailment.³⁶

³⁴ On May 3, 1995, the Director also issued a separate moratorium order exclusively for the Boise River drainage. See Amended Moratorium Order, *In re Applications for Permits for the Diversion and Use of Surface and Ground Water within the Boise River Drainage Area* (Idaho Dep't of Water Res. May 3, 1995).

³⁵ See State of Idaho & Idaho Power Company. (2009). *Framework Reaffirming the Swan Falls Settlement* (p.5). <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20090325-Framework-Reaffirming-the-Swan-Falls-Settlement.pdf>

³⁶ Mem. Decision and Order on Cross-Mots. for Summ. J., at 47–48, *In Re SRBA Case No. 39576*, No. 00-92023 (92-23) (Twin Falls Cnty. Dist. Ct. Idaho Apr. 18, 2008).

GWMA and CGWAs in the Trust Water Area and Non-Trust Water Area

46. The Department established Critical Ground Water Areas (“CGWA”) pursuant to Idaho Code § 42-233a or Ground Water Management Areas (“GWMA”) pursuant to Idaho Code § 42-233b, in areas where ground water pumping for irrigation is significant and water levels have declined.

47. In 2016, the ESPA GWMA was designated to address long-term declines in both aquifer water levels and discharge to the Snake River system. The ESPA GWMA includes most of the ESPA from the St. Anthony area in the east to King Hill in the west.

48. The Raft River Basin is tributary to the ESPA. Concerns over the potential effects of new and increased ground water use in the Raft River Basin resulted in the designation of the Raft River CGWA in 1963. Ongoing monitoring of water levels in the Raft River Basin indicate regional declining ground water level trends of 0.9 feet per year from 1966 to 1991 and 2.1 feet per year from 1991 to 2016.³⁷

49. The Goose Creek and Big Cottonwood Creek Basins are tributary to the ESPA. Observed water-level declines and concerns over the potential effects of new and increased ground water use in the Goose Creek and Big Cottonwood Creek Basins resulted in the designation of the Goose Creek-Rock Creek CGWA in 1962. The boundaries of the CGWA were modified in 1967 to create three separate CGWAs in the basin (Artesian City, Oakley-Kenyon, and Cottonwood CGWAs). A fourth CGWA (West Oakley Fan CGWA) was added in 1982, resulting in a contiguous tract of CGWAs across the basin.

50. The Big Wood, Camas Creek, and Silver Creek drainages in Administrative Basin 37 are tributary to the ESPA. Concerns about the impact of ground water pumping in these drainages on senior priority surface water rights in Administrative Basin 37 led to the designation of the Big Wood River Ground Water Management Area (“BWRGWMA”) in 1991. In May 2022, the Department established a moratorium enjoining the processing and approval of new and pending applications for permits to appropriate water from surface and ground water sources within the BWRGWMA.

51. The Blue Gulch and Cinder Cone Butte CGWAs were established for portions of aquifers that are tributary to the Snake River in the King Hill to Murphy reach. The Blue Gulch CGWA was designated in 1970 based on a report by Chapman and Ralston (1970), which stated that discharge was exceeding recharge. The Cinder Cone Butte area was declared a CGWA in 1981 because of declining ground water levels.

52. In the Milner to King Hill reach, GWMA were established for portions of two aquifers experiencing declining artesian pressures and water temperatures. The Banbury Hot Springs GWMA was established in 1983. The resource was declared a GWMA because of declining artesian pressures and concerns about potential over-utilization, and a moratorium on new ground water rights has been established. The Twin Falls GWMA was established in 1984

³⁷ Amended Final Order Re: Management Program and Curtailing Expansion Rights, at 9, *In re Expansion Ground Water Rights in the Raft River Critical Ground Water Area* (Idaho Dep’t of Water Res. Sep. 24, 2016).

based on concern that the thermal system was approaching a critical condition, and a moratorium on new water rights for use of the thermal-artesian ground water source was established. While these two aquifers are tributary to the Snake River, the extent of the connections is not well known and may be minimal compared to other aquifers tributary to the Snake River. Nevertheless, water-level declines in these aquifers negatively impact flow in the Snake River.

53. GWMA's were established for portions of two aquifers that are tributary to the Snake River in the King Hill to Murphy reach. In 1982, following the establishment of the Cinder Cone Butte CGWA, the Mountain Home GWMA (which surrounds the Cinder Cone Butte area) was designated because of declining ground water levels. The Grand View-Bruneau GWMA was designated in 1982 because of increased and projected increases in ground water withdrawal and declines in spring flows from the geothermal aquifer system. The extent of the connection between the Grandview-Bruneau GWMA geothermal aquifer and the Snake River is not well known. Nevertheless, water-level declines in these aquifers negatively impact flow in the Snake River.

Delivery Calls by Holders of Senior Priority Surface Water Rights Against Holders of Junior Priority Ground Water Rights

54. Starting in the 1990s, several water users holding water rights authorizing diversion of water from the Snake River and tributary springs filed petitions for delivery calls against junior priority water rights pumping ground water from the ESPA. Some of these petitions for delivery calls seeking curtailment of pumping by junior priority water rights have resulted in curtailment orders, mitigation plans to compensate for depletion caused by pumping, and protracted legal proceedings before the Department and in the Courts of the State of Idaho. Some of these contested cases remain pending before the Department and the Courts.

55. The surface water delivery calls can be divided into two groups: (a) holders of senior priority surface water rights authorizing diversion of water from springs emitting from the Snake River Canyon between Milner Dam and King Hill, and (2) holders of senior priority surface water rights authorizing diversion of water from the Snake River between Lake Walcott and Milner Dam.

Milner Dam to King Hill

56. The springs emitting from the Snake River Canyon walls in the Milner Dam to King Hill reach are the primary source of water for a variety of beneficial uses of water, including aquaculture, irrigation, hydropower, and other municipal, domestic, and commercial uses. The spring flows also sustain flows in the Snake River below Milner Dam and sustain the decreed minimum flow water rights at Murphy. Additional appropriation of ground water and surface water will deplete flows from the springs and reduce water available for diversion by holders of existing water rights.

57. After the delivery calls and significant litigation, ground water districts representing holders of junior ground water rights acquired title to many of the senior priority spring flow water rights and implemented innovative mitigation plans to supply adequate surface water to

other holders of senior priority water rights authorizing the diversion of spring flows in the Milner Dam to King Hill reach of the Snake River. The acquisition of the senior priority spring rights was costly.

58. Additional appropriation of ground water would deplete spring flows needed to satisfy the spring flow water rights held by the ground water districts. In addition, further depletion of spring flows will jeopardize the ability of the ground water districts to mitigate for depletions caused by existing ground water diversions.

Lake Walcott to Milner Dam

59. In 2005, a delivery call was filed by seven irrigation delivery entities holding senior priority water rights to divert surface water from the Snake River between Lake Walcott and Milner Dam. The Snake River in the Walcott to Milner reach derives a portion of its flow from springs that discharge to the Snake River and its tributary streams between the Near Blackfoot and Minidoka gaging stations. These spring flows are depleted by diversions authorized by junior priority ground water rights.

60. After protracted litigation, the Department issued a *Methodology Order* that requires an annual analysis of hydrologic conditions, prediction of water supply to the Snake River, and a corresponding prediction of whether the holders of senior priority surface water rights will suffer a demand shortfall.³⁸

61. Based on the annual predictions, and additional adjustments during the irrigation season, holders of junior priority ground water rights must mitigate for the predicted demand shortfall, or their diversion of ground water will be curtailed. The extent of curtailment is established by the severity of the predicted demand shortfall and a corresponding priority cut date.

62. In 2015, because of the specter of significant, predicted demand shortfall, and the threat of thousands of acres being curtailed resulting from an early priority cut date, the holders of senior priority surface water rights and junior priority ground water rights executed a settlement agreement (“Settlement Agreement”).³⁹

³⁸ Since the original methodology order was issued on April 7, 2010, there have been multiple revisions to this order—the current version was issued on April 19, 2016. See Final Order Regarding Methodology for Determining Material Injury to Reasonable In-season Demand and Reasonable Carryover, *In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.* (Idaho Dep’t of Water Res. April 7, 2010); Fourth Am. Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, *In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.*, No. CM-DC-2010-001 (Idaho Dep’t of Water Res. April 19, 2016).

³⁹ Surface Water Coalition & Idaho Ground Water Appropriators, Inc. (2015). *Settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swc-igwa-settlement/SWC-IGWA-Settlement-20150630-SWC-IGWA-Settlement-Agreement.pdf>

63. The Settlement Agreement required that the ground water users reduce ground water diversions by 240,000 acre-feet annually. The Settlement Agreement identified 19 wells for which ground water levels are measured annually. The measurement of ground water levels in the 19 wells are combined into a composite ground water level value referred to as the Sentinel Well Index. Target increases in the Sentinel Well Index were established for 2020, 2023, and 2026.

64. Although not a component of the Settlement Agreement, the Board committed to recharging the ESPA with an annual average of 250,000 acre-feet of surface water.

65. The following table summarizes the Board's recharge efforts, IGWA's reductions, and the corresponding Sentinel Well Index values.

Year ⁴⁰	Water Board Recharge (acre-feet)	Year	IGWA Reduction (acre-feet)	Sentinel Well Index ⁴¹
2015-2016	66,897	2015		-8.72
2016-2017	317,714	2016	104,134	-9
2017-2018	536,001	2017	259,182	-7.37
2018-2019	363,903	2018	214,126	-6.63
2019-2020	518,631	2019	268,789	-6.13
2020-2021	193,856	2020	179,829	-5.57
2021-2022	157,586	2021	66,586	-6.28
		2022		-7.62

66. During 2017 and 2019, precipitation was plentiful and spring runoff in the Snake River was substantial. In 2017, rain fell on snow across much of the ESRP, flooding fields during the spring. Much of the standing water percolated into the ground and contributed greater than average recharge to the ESPA. Infiltration of precipitation on non-irrigated lands to the ESPA in water year 2017 was estimated to be 160% of the 1981 through 2021 average. In 2019, infiltration of precipitation on non-irrigated lands to the ESPA was estimated to be 120% of average. Seepage from losing streams tributary to the ESPA also contributed approximately 170% of average in 2017 and approximately 130% of average in 2019.

67. From the spring of 2017 through the spring of 2020, ground water levels across the ESPA increased and the Sentinel Well Index correspondingly increased. In April 2020, the Sentinel Well Index was -5.57, exceeding the 2020 target of -8.72.

68. In 2020 and 2021, ground water levels across the ESPA decreased in response to lower natural recharge, lower incidental and managed recharge of surface water, increased crop irrigation demand, and increased ground water-pumping. In 2020 and 2021, recharge from infiltration of precipitation on non-irrigated lands was approximately 60% and 50%, respectively, of the 1981 through 2021 average. Seepage from losing streams tributary to the ESPA was an estimated 70% and 60% of the average in 2020 and 2021, respectively. By April

⁴⁰ Recharge volumes are reported from August 1 through July 31.

⁴¹ The Sentinel Well Index is calculated based on April 1 ground water level measurements. Increasing negative values correspond with declining water levels for the sentinel wells.

2022, the Sentinel Well Water Level Index had dropped to -7.62. Attainment of the April 2023 Sentinel Well Index target of -3.9 is now unlikely. Progress towards meeting the April 2026 Sentinel Well Index target will be dependent on future reductions in ground water consumption, as well as the future climate, which affects crop irrigation demand and the water supply available for natural, incidental, and managed aquifer recharge.

Current Conditions in the Snake River, ESPA, and Tributaries

Pending Water Right Applications

69. Ground water pumping from the ESPA, and from aquifers tributary to the ESPA, including perched aquifers, depletes the flow in the Snake River, both upstream and downstream from Milner Dam. An assessment by the Idaho Water Resources Research Institute notes: “Every acre-foot of water consumptively used in basins tributary to the Snake River ultimately reduces the flow of the Snake River.”⁴² New consumptive uses of ground water from the ESPA and tributary aquifers will further deplete the flow in the Snake River.

70. There are approximately 474 pending water rights applications proposing ground water diversions for irrigation, commercial, municipal, or industrial uses within the ESPA model boundary and in basins tributary to the ESPA. The pending applications propose irrigation of approximately 151,000 acres and diversions of approximately 79 cfs for commercial, municipal, and industrial purposes.

Snake River Basin Upstream from Milner Dam

71. As described above, the flow past Milner Dam is reduced to zero during normal irrigation season operating conditions. When no Snake River flow passes Milner Dam, existing junior Snake River water rights upstream from Milner Dam are curtailed to satisfy senior Snake River water rights upstream from Milner Dam. Curtailed surface water rights rely on storage water, if available, to maintain adequate supply throughout the year or irrigation season.

72. In July 2022, the Department performed an analysis using ESPAM 2.2 to determine the potential impacts to the Snake River of the pending water right applications for irrigation, commercial, municipal, and industrial uses of ground water within the ESPA and tributary basins. The model predicted a steady state depletion of 184,000 AF/yr (254 cfs) to the Snake River upstream from Milner Dam, including a steady state depletion of 100,000 AF/yr (138 cfs) to the Snake River between Near Blackfoot and Minidoka. The model prediction shows that granting pending applications will reduce flows to the Snake River upstream from Milner Dam, to the detriment of senior water users.

73. There is no moratorium on processing applications for new water rights in the non-trust water area. Most pending applications from the non-trust water area predate the expiration

⁴² Ralston, D. R., Broadhead, R., & Grant, D. L. (1984). *Hydrologic and legal assessment of ground water management alternatives for Idaho* (Technical Completion Report WRIP/371405), Idaho Water Resources Research Institute & University of Idaho (p. 10).
<https://cdm17254.contentdm.oclc.org/utils/getfile/collection/idahowater/id/553/filename/iwdl-198410.pdf>

of the Non-Trust Water Area Moratorium in 1997. The Department receives few new applications to appropriate water in the non-trust water area because it is difficult for applicants to demonstrate they can divert and use surface water or ground water without reducing the supply of water available to prior water rights. The few water right applications being processed in the non-trust water area are mostly for non-consumptive or mitigated water uses, or they are applications proposing to appropriate surface water from the Snake River or its tributaries upstream from Milner Dam during the limited times that unappropriated water is flowing past Milner Dam.

74. The Department has not addressed the August 15, 2013 *Petition to Renew Moratorium Order for Non-Trust Water Area* from 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.

Snake River Basin Downstream from Milner Dam

75. The Eastern Snake River Plain Moratorium remains in effect for applications to appropriate water for consumptive uses in the Snake River between Milner Dam and the King Hill Gage and tributary surface water and ground water sources in the portion of the trust water area upstream from the King Hill Gage. Most of the pending applications from the trust water area date back to the 1980s and 1990s. The Department receives few new applications to appropriate water in the moratorium area. The few water right applications being processed in the non-trust water area are mostly for non-consumptive or mitigated water uses.

76. The trust water area tributary to the Snake River downstream from the King Hill Gage is not included in the present Eastern Snake River Plain Moratorium area. The Department still receives and processes applications for trust water rights in the trust water area tributary to the Snake River downstream from King Hill Gage.

77. In some recent years, after adjusting for the impacts of Idaho Power Company reservoir operations, Snake River flows measured at the Murphy Gage have remained above but approached the decreed minimum stream flows. Measured flows at the Murphy Gage have approached the minimum flow of 5,600 cfs during the last half of March and have approached the minimum flow of 3,900 cfs from approximately the middle of June until approximately the middle of August. In March of 2015, the three-day average Adjusted Average Daily Flow of the Snake River at the Murphy Gage fell below the 5,600 cfs minimum stream flow water rights for two days.

78. During March 2015, ground water discharge from the ESPA comprised approximately 88% of the inflow to the Snake River between Milner Dam and King Hill. Ground water discharge from the south side of the Snake River provided approximately 10% of the inflow and tributary streamflow from Salmon Falls Creek and the Malad River above Malad Canyon springs provided approximately 2% of the inflow.

79. The low flows in the Snake River at Murphy Gage during the last half of March correspond to a period of seasonal low spring discharge from the ESPA to the Snake River and

the beginning of the irrigation season for water users diverting from the Snake River between Milner Dam and the Murphy Gage.⁴³

80. The low flows in the Snake River at Murphy Gage during the time period from mid-June to mid-August correspond to the time period of peak crop consumption demand across the ESRP and the Snake River tributaries.⁴⁴ Flows in the Snake River generally increase from late summer through fall as irrigation return flows increase and percolation from irrigation to ground water increases ESPA spring discharge to the Snake River.⁴⁵

81. In June 2022, the Department presented results of an evaluation of the impact of trust water rights developed for irrigation, commercial, municipal, or industrial use of ground water or surface water on the Snake River downstream of Milner Dam.⁴⁶ The estimated long-term annual average impact of trust water use is between 98 cfs and 197 cfs. The estimated long-term impact in March is between 58 cfs and 165 cfs. The estimated long-term peak summer impact is between 108 cfs and 300 cfs. The ranges reflect a lack of information on the consumptive use associated with the commercial, municipal, and industrial water rights, uncertainty in the timing of impacts from irrigation use in the Twin Falls area and Western Snake Plain, and uncertainty on surface water available to fill surface water trust rights. The majority, but not all the impacts of Trust Water Right appropriations on the Snake River, have been realized.

82. Any new appropriations of trust water for consumptive use of surface water from the Snake River and tributary springs and streams between Milner Dam and Swan Falls Dam will further reduce flows in the Snake River at the Murphy Gage. The reductions in flow will jeopardize maintenance of the minimum stream flow water rights at the Murphy Gage. The reductions in flow will also jeopardize some water right permits, licenses, and decreed water rights authorizing diversion and beneficial use of trust water.

83. In July 2022, the Department performed an analysis using ESPAM 2.2 to determine potential impacts to the Snake River of the pending water right applications for irrigation, commercial, municipal, and industrial uses of ground water within the ESPA and tributary basins. The model predicted a steady state depletion of 73,000 AF/yr (101 cfs) of ESPA discharge to the Snake River between Milner Dam and King Hill. The model prediction shows that granting pending applications in the trust water area will reduce flows to the Snake River

⁴³ Geisler, E. (2022). *Swan Falls AADF update* [presentation to Swan Falls Technical Working Group]. Idaho Department of Water Resources (p. 2-3). <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20220810-Swan-Falls-TWG-Presentation-AADFUpdate.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*; Sukow, J. (2021). *Model calibration report: Eastern Snake Plain Aquifer model version 2.2*. Idaho Department of Water Resources (p. 19). https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/ModelCalibrationRpt/ModelCalibration22_Final.pdf

⁴⁶ Sukow, J. (2022). *Preliminary evaluation of trust water use impact on Snake River below Milner Dam* [presentation to Swan Falls Technical Working Group]. Idaho Department of Water Resources. <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20220607-Swan-Falls-TWG-Presentation-Trust-Water-Impact.pdf>

from Milner Dam to the Murphy Gage, thereby jeopardizing the maintenance of the minimum stream flow water rights at the Murphy Gage and jeopardizing some water right permits, licenses, and decreed water rights authorizing diversion and beneficial use of trust water.

84. Based on the available information, further development of ground water tributary to the Snake River between King Hill and Swan Falls Dam would decrease discharge from the aquifer to the Snake River upstream from Swan Falls Dam and jeopardize the maintenance of the minimum stream flow water rights at the Murphy Gage and some water right permits, licenses, and decreed water rights authorizing diversion and beneficial use of trust water.

85. In the 2009 Framework Reaffirming the Swan Falls Settlement, the State of Idaho and Idaho Power Company agreed to seek resolution of certain issues, including the development of means to enable the State of Idaho to ensure that the minimum stream flow water rights established at the Murphy Gage are maintained.⁴⁷

CGWAs and GWMA

86. Department staff observed a regional water table decline in the Artesian City, Oakley-Kenyon, Cottonwood and West Oakley Fan CGWAs of approximately 1.9 feet per year between 1967 and 2009.⁴⁸ Implementation of mitigation activities in Water District 140 have had a positive impact on the water table but ground water declines continued at a rate of 1.0 feet per year between 2009 and 2016.⁴⁹ The Management Plan for these CGWAs acknowledged an increase in mitigation activities was needed to meet the goal of bringing withdrawals into balance with recharge.⁵⁰ In the Cottonwood CGWA, the average annual rate of aquifer withdrawals was limited to 5,500 acre-feet per year by a 1971 court order, then to 4,000 acre-feet per year by a 2004 administrative order.⁵¹ Department staff observed regional water table declines averaging 21 feet per year between 1961 and 1972, 3.35 feet per year between 1972 and 2004, and 2.98 feet per year between 2005 and 2016.⁵²

87. Ongoing monitoring of water levels in the Blue Gulch CGWA indicates an overall decreasing water level trend of approximately 1.4 feet per year since 1990.⁵³

⁴⁷ See State of Idaho & Idaho Power Company. (2009). *Framework Reaffirming the Swan Falls Settlement* (p.5). <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swan-falls-settlement/20090325-Framework-Reaffirming-the-Swan-Falls-Settlement.pdf>

⁴⁸ Final Order Re: Management Program, at 5, *In re Expansion Ground Water Rights in the Oakley Fan Critical Ground Water Areas* (Idaho Dep't of Water Res. Aug. 26, 2016).

⁴⁹ *Id.* at 6.

⁵⁰ *Id.*

⁵¹ *Id.* at 2-4

⁵² Final Order Regarding Management Program, at 4, *In re Expansion Ground Water Rights in the Cottonwood Critical Ground Water Area* (Idaho Dep't of Water Res. Aug. 26, 2016).

⁵³ Moody, A. (2020). *2020 Update of ground water conditions in the Blue Gulch Critical Ground Water Area*. Idaho Department of Water Resources (p. 22). <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/202009-cgwa-report-blue-gulch-area.pdf>

88. Ongoing monitoring of water levels in the Grand View-Bruneau GWMA indicate regional declining ground water level trends of 0.8 feet per year from 1998 to 2017 and 0.9 feet per year from 2008 to 2017.⁵⁴

89. Ongoing monitoring of water levels in the Mountain Home GWMA and Cinder Cone Butte CGWA indicate declining water levels southwest of Interstate 84, in areas where significant volumes of ground water are pumped for agricultural irrigation.⁵⁵

90. Ongoing monitoring of water levels in the Castle Creek Basin indicate a declining water level trend of 1.1 feet per year from 1968 to 2021, illustrating that water level declines are also occurring in recharge limited areas within the trust water area but outside of the designated GWMA and CGWAs.

91. Designation of GWMA and CGWAs to protect aquifers tributary to the Snake River has not arrested the declines in ground water levels and aquifer storage in those aquifers. Based on the available information, new ground water development would also decrease aquifer storage and the ground water supply for existing ground water users in recharge limited areas already experiencing declining aquifer storage.

ANALYSIS

The ESPA is a vital source of water for the State of Idaho. Approximately one million acres of land on the Snake River Plain are irrigated by ground water pumped directly from the ESPA. The ESPA is hydraulically connected to the Snake River and indirectly supports surface water irrigation of roughly another million acres. ESPA-supported agriculture is crucial to Idaho's food supply and to the economies of communities across southern Idaho. As discussed in Finding of Fact 5, there has been a long-term declining trend in ESPA ground water levels and the volume of water in aquifer storage. While there have been brief periods of recovery, the overall downward trend has continued unabated.

ESPAM 2.2 shows that the reduced aquifer storage in the ESPA—and the corresponding reduction in ground water levels—reduce the supply of water to senior water right holders. In Surface Water Coalition delivery call proceeding, the Director determined that ground water pumping by *existing* ground water users is causing material injury to *existing* surface water users.⁵⁶ In other words, in some years, current water supplies do not satisfy current demands. If

⁵⁴ McVay, M. (2017). *Summary of groundwater levels in the Grand View-Bruneau Groundwater Monitoring Network – 2017 update*. Idaho Department of Water Resources (p. 17). <https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/201706-OFR-grand-view-bruneau-gwma-water-level-update-2017.pdf>

⁵⁵ Tesch, C. (2017). *Hydrogeology of the Mountain Home Plateau* [presentation to the Idaho Water Resources Board], Idaho Department of Water Resources (p. 38). <https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/2017/20170914-IWRB-Work-Session-Materials-10-17.pdf#page=38>

⁵⁶ See Final Order Establishing 2021 Reasonable Carryover (Methodology Step 9) at 3–4, *In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.*, No. CM-DC-2010-001 (Idaho Dep't of Water Res. Dec. 21, 2021) (Finding material injury of 31,900 acre-feet to AFRD#2

there are insufficient water supplies to satisfy current demands, water is not available for new appropriations. Approving new applications would only add to the injury suffered by the senior surface water users.

For years, the State of Idaho has implemented various water management strategies to maintain water supplies in the non-trust water area and the Snake River upstream from Milner Dam. These management strategies include administration of surface water rights by priority in water districts, organization of ground water rights into water districts 100, 110, and 120 for priority administration, implementation of the mitigation measures identified in the Settlement Agreement, designation of the ESPA GWMA, and managed aquifer recharge. Despite these management strategies, declines in the aquifer portend the likelihood of even more difficulty satisfying existing Snake River water rights upstream from Milner Dam.

The Director must protect the minimum stream flows at Murphy Gage. Since 1976, each state water plan has called for the maintenance of the minimum stream flows at Murphy Gage. In the *2009 Framework Reaffirming the Swan Falls Settlement*, the State of Idaho and Idaho Power Company agreed to develop a means for the State of Idaho to ensure that the minimum flow water rights established at the Murphy Gage are maintained. Management strategies to protect the minimum stream flows and existing water rights below Milner Dam included organization of Snake River water rights into Water District 2 for measurement and administration by priority, formation of Water Districts 130, 140, and 161 for priority administration of ground water rights, designation of the ESPA GWMA and several other GWMA's and CGAs, applying the limitations of Idaho Code § 42-203C to applications for new water rights, and managed aquifer recharge. Despite these efforts to carefully administer Idaho's water, the Adjusted Average Daily Flow of the Snake River at the Murphy Gage is approaching the minimum flow rates. While the three-day average Adjusted Average Daily Flow of the Snake River at the Murphy Gage has only fallen below the minimum stream flow water rights for two days, the full impacts of the current Trust Water Right appropriations have not yet been fully realized in the Snake River.

Despite these management strategies, (1) declines in ESPA water levels, (2) ongoing declines in water level trends in aquifers tributary to the ESPA and Snake River, (3) reductions in the Adjusted Average Daily Flow of the Snake River at the Murphy Gage approaching the protected flow rates, and (4) the impacts of Trust Water Right appropriations not yet fully realized in the Snake River, all signal that new appropriations for consumptive use cannot be approved without injury to existing Snake River water rights, including the decreed minimum stream flow water rights quantified at Murphy Gage.

and 214,200 acre-feet TFCC for the 2021 irrigation season and finding carryover injury of 16,538 acre-feet to AFRD#2 and 48,108 acre-feet to TFCC.); *see also* Final Order Establishing 2016 Reasonable Carryover (Methodology Step 9) at 3–4, *In re Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.*, No. CM-DC-2010-001 (Idaho Dep't of Water Res. Nov. 29, 2016) (Finding material injury of 6,700 AF to TFCC for the 2016 irrigation season and finding carryover injury of 39,500 acre-feet to TFCC.).

CONCLUSIONS OF LAW

1. The Director is responsible for administration of the appropriation and use of the waters of the state of Idaho. Idaho Code § 42-202 reads in pertinent part:

For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. The Director is authorized under the provisions of Idaho Code § 42-1805(7) as follows:

After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of the minimum flow provisions of the state water plan.

3. Water Appropriation Rule 55 of the Department (IDAPA 37.03.08.055) provides that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director. Notice of the order shall be by certified mail to affected applicants and by publishing a legal notice in newspapers of general circulation in the area.

4. The current Idaho State Water Plan Policy 4A provides, in part, that the Snake River above Hells Canyon will be managed to meet or exceed the following minimum average daily flows at the Murphy gaging station of 3,900 cfs from April 1 through October 31, and 5,600 cfs from November 1 through March 31.

5. Idaho Code § 42-203B(2) provides in pertinent part as follows:

For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

6. General Provision 4 for Basin 2 in the SRBA Final United Decree states as follows:

The exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream

from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

7. Rule 30.03.e of the Department's Water Appropriation Rules provides that "trust water" does not include "[f]lows in the Snake River upstream from Milner Dam and all surface and ground water tributaries to that reach," and that "[s]uch flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam."

8. Delivery call decisions by the Department have held that ground water diversions from the ESPA are injuring senior water right holders.

Snake River Downstream from Milner Dam

9. During any time that flows in the Snake River at the Murphy Gage are at or below the decreed minimum stream flow water rights, any new appropriation for consumptive use of surface water in the trust water area, including surface water in or tributary to the reach of the Snake River between King Hill and Swan Falls Dam, will reduce the quantity of water available to existing surface water right holders entitled to divert water from the Snake River downstream from Milner Dam and to sustain the minimum stream flows, resulting in injury to senior water right holders.

10. To the extent ground water pumping in the trust water area, including the area tributary to the Snake River downstream from King Hill, and including perched aquifers within the trust water area, is tributary to the Snake River downstream from Milner Dam, any new appropriation for consumptive use of ground water in those areas will reduce the quantity of water available to existing surface water right holders entitled to divert water from the Snake River downstream from Milner Dam and to minimum stream flow water rights, resulting in injury to senior water right holders. The trust water area is shown in Appendix A of this order.

11. New appropriations for consumptive use of surface or ground water in the trust water area will injure the minimum stream flow water rights decreed at the Murphy Gage and violate the minimum stream flow provision of the State Water Plan.

12. The conclusions reached in the 1990 Evaluation of Significant Reduction Order are no longer justified. New appropriations for consumptive use of ground water in the trust water area will injure senior water right holders below Milner Dam, including the decreed minimum stream flow water rights at the Murphy gage.

13. The existing moratorium in the trust water area should be expanded to include consumptive use of surface water or ground water in the trust water area in and tributary to the reach of the Snake River downstream from King Hill to protect existing vested water rights and to prevent the violation of the minimum stream flow water rights at the Murphy gage.

Snake River Upstream from Milner Dam

14. During any time that water is not spilling over Milner Dam, existing junior surface water rights are being curtailed by Water District 01. The flow past Milner Dam is reduced to zero during normal irrigation season operating conditions. Because existing junior surface water users are already curtailed during normal irrigation season operations, there is no surface water available for appropriation.

15. New appropriations for consumptive use of ground water to be diverted from the non-trust water area will reduce the quantity of water available to surface water right holders entitled to divert water from the Snake River Basin upstream from Milner Dam, resulting in injury to senior water right holders. The non-trust water area is shown in Appendix A of this order.

16. A moratorium on issuance of permits to divert and use surface or ground water from the Snake River Basin upstream from Milner Dam in the non-trust water area for new consumptive uses should be established to protect existing vested water rights and to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, in the non-trust water area.

ORDER

IT IS THEREFORE HEREBY ORDERED that the Snake River Basin moratorium established by the Department by order dated May 15, 1992, as amended January 6, 1993, April 30, 1993, and May 3, 1995, is superseded by this Moratorium Order.

IT IS FURTHER ORDERED that this Moratorium Order suspends further action on the processing and approval of presently pending and new applications for permits to appropriate water from the Snake River upstream from Swan Falls Dam and all surface and ground water sources in the trust water area and the non-trust water area, subject to the following provisions:

1. The moratorium order does not change or affect the authorization to continue development of any existing approved application (permit) that is not subject to an order establishing an indefinite stay in development or suspending action and prohibiting development of any existing approved application (permit).⁵⁷

2. The moratorium does not apply to any appropriation of ground water by beneficial use pursuant to Idaho Code § 42-227 for domestic purposes, including livestock watering, as such term is defined in Idaho Code § 42-111.

3. The moratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Idaho Code § 42-605A. This exception to the moratorium shall not apply to applications for non-consumptive uses of water that will reduce the supply of water available to existing water rights because of the location or timing of return flows. Applications for ground water recharge shall be evaluated on a case-by-case basis to determine whether the

⁵⁷ See Finding of Fact 39.

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. 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.

4. The moratorium does not apply to applications for drilling permits to replace or deepen existing wells authorized by valid existing water rights.

5. The moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights.

6. The moratorium does not change or affect the designation of any critical ground water area established pursuant to Idaho Code § 42-233a or any ground water management area established pursuant to Idaho Code § 42-233b.

7. This moratorium applies to applications to appropriate water within the following established moratorium areas:

- Banbury Hot Springs Ground Water Management Area⁵⁸
- Big Wood River Ground Water Management Area⁵⁹
- Twin Falls Ground Water Management Area⁶⁰
- Water District No. 13-T⁶¹

Within the Twin Falls Ground Water Management Area, the provisions of the Twin Falls Ground Water Management Area moratorium shall apply to applications to appropriate low temperature geothermal water and to applications for drilling permits.

Within the Banbury Hot Springs Ground Water Management Area, the provisions of the Banbury Hot Springs Ground Water Management Area moratorium shall apply to applications to appropriate low temperature geothermal water, and to applications for drilling permits. For

⁵⁸ Final Order Am. Order Staying Approval of Applications and Suspending Further Development of Permits to Appropriate Ground Water, *In re Banbury Hot Springs Ground Water Management Area* (Idaho Dep't of Water Res. Aug. 4, 2011).

⁵⁹ Order Establishing Moratorium, *In re Big Wood River Ground Water Management Area* (Idaho Dep't of Water Res. May 17, 2022).

⁶⁰ Order Extending Moratorium, *In re Twin Falls Ground Water Management Area Moratorium* (Idaho Dep't of Water Res. May 1, 2018).

⁶¹ Final Moratorium Order and Final Order Dissolving the Bancroft-Lund Ground Water Management Area, *In re Dissolving the Bancroft-Lund Ground Water Management Area Designation* (Idaho Dep't of Water Res. Aug. 31, 2004).

applications to appropriate non-low temperature geothermal water within the Banbury Ground Water Management Area, the provisions of this moratorium and the Banbury Ground Water Management Area moratorium shall apply.

Within Water District No. 13-T, this moratorium order shall apply only to that portion within Administrative Basin 29.

8. The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if:

- a. Protection and furtherance of the public interest, as determined by the Director, requires consideration and approval of the application irrespective of the moratorium; or
- b. The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its timing, location, insignificant consumption of water, or mitigation provided by the applicant to offset injury to other water rights. For example, the Director may consider applications proposing to appropriate surface water from the Snake River or its surface water tributaries upstream from Milner Dam when unappropriated water is flowing past Milner Dam or from the Snake River or its surface water tributaries downstream from Milner Dam when flows at the USGS gaging station on the Snake River near Murphy exceed the decreed minimum stream flow water rights.

IT IS FURTHER ORDERED that this Moratorium Order shall be in effect on and after its entry and shall remain in effect until it is withdrawn or modified by order of the Director.

IT IS FURTHER ORDERED that the Department shall serve a copy of this order by certified mail upon holders of applications for permits proposing appropriation of ground water or surface water within the moratorium area as shown in Appendix A and shall publish notice of this order for three consecutive weeks as required by IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55).

Pursuant to Idaho Code § 42-1701A(3), any person aggrieved by any decision, determination, order or other action of the Director, and who has not previously been afforded an opportunity for a hearing on the matter, shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing.

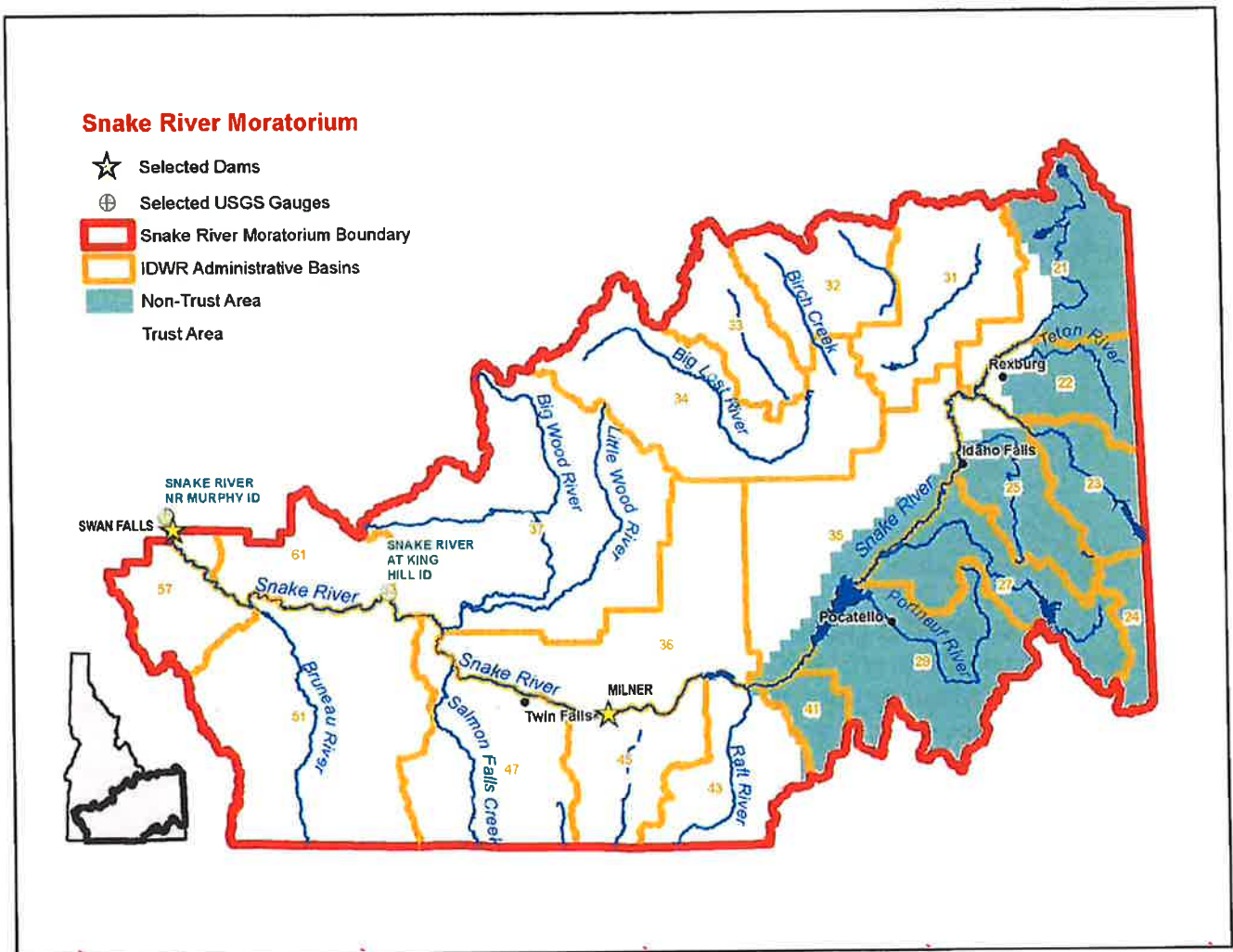
DATED this 21st day of October 2022.


Gary Spackman
Director

AMENDED MORATORIUM ORDER

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN UPSTREAM FROM SWAN FALLS DAM

APPENDIX A: Map of the Snake River Moratorium Area



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT
To appropriate the public waters of the State of Idaho

1. Name of applicant(s) _____ Phone _____

Name connector (check one): ☐ and ☐ or ☐ and/or

Mailing address _____ City _____

State _____ ZIP _____ Email _____

2. Name of representative, if any _____ Phone _____

Mailing address _____ City _____

State _____ ZIP _____ Email _____

a. ☐ Send all correspondence for this application to the representative and not to the applicant OR

☐ Send original correspondence to the applicant and copies to the representative.

b. ☐ The representative may submit information for the applicant but is not authorized to sign for the applicant OR

☐ The representative is authorized to sign for the applicant. Attach a Power of Attorney or other documentation.

3. Source of water supply _____ which is a tributary of _____

4. Location of point(s) of diversion:

Twp	Rge	Sec	Govt Lot	1/4	1/4	1/4	County	Source	Local name or tag #

5. Water will be used for the following purposes:

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per year)

6. Total quantity to be appropriated is (a) _____ cubic feet per second (cfs) and/or (b) _____ acre-feet per year (af).

7. Proposed diverting works:

a. Describe type and size of devices used to divert water from the source. _____

b. Height of storage dam _____ feet; active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet. If the reservoir will be filled more than once each year, describe the refill plan in item 12. For dams 10 feet or more in height AND having a storage capacity of 50 acre-feet or more, submit a separate [Application for Construction or Enlargement of a New or Existing Dam](#). Application required? ☐ Yes ☐ No

c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.

d. Is ground water with a temperature of greater than 85°F being sought? ☐ Yes ☐ No

e. If well is already drilled, when? _____; drilling firm _____; well was drilled for (well owner) _____; Drilling Permit No. _____.

For Department Use

Received by _____ Date _____ Time _____ Preliminary check by _____

Fee \$ _____ Received by _____ Receipt No. _____ Date _____

8. Description of proposed uses (if irrigation only, go to item 9):
- Hydropower; show total feet of head and proposed capacity in kW. _____
 - Stockwatering; list number and kind of livestock. _____
 - Municipal; must complete and attach the [Municipal Water Right Application Checklist](#).
 - Domestic; show number of households _____
 - Other; describe fully. _____
9. Description of place of use:
- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
 - If water is used for other purposes, place a symbol of the use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RGE	SEC	NE				NW				SW				SE				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

Total number of acres to be irrigated: _____

10. Describe any other water rights used for the same purposes as described above. Include water delivered by a municipality, canal company, or irrigation district. If this application is for domestic purposes, do you intend to use this water, water from another source, or both, to irrigate your lawn, garden, and/or landscaping? _____
11. a. Who owns the property at the point of diversion? _____
- b. Who owns the land to be irrigated or place of use? _____
- c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing: _____
12. Describe your proposal in narrative form and provide additional explanation for any of the items above. Attach additional pages if necessary. _____
13. Time required for completion of works and application of water to proposed beneficial use is _____ years (minimum 1 year).
14. **MAP OF PROPOSED PROJECT REQUIRED** - Attach an 8½" x 11" map or maps clearly identifying the proposed point of diversion, place of use, section #, township & range. The map scale shall not be less than two (2) inches equal to one (1) mile.

The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval.

Signature of Applicant

Signature of Applicant

Print Name (and title, if applicable)

Print Name (and title, if applicable)

Application for Permit Fee Schedule

[Per Idaho Code § 42-221](#)

The application fee is based on the proposed storage volume (acre-feet per year or AFY) or on the proposed diversion rate (cubic feet per second or CFS). For applications proposing both a diversion rate and a storage volume, determine each fee separately and pay the greater of the two.

Flow Rate (CFS)	Storage Volume (AFY)	Fee	Flow Rate (CFS)	Storage Volume (AFY)	Fee
0.00 to 0.20	0.0 to 20.0	\$100	11.01 to 12.00	1,100.1 to 1,200.0	\$690
0.21 to 1.00	20.1 to 100.0	\$250	12.01 to 13.00	1,200.1 to 1,300.0	\$730
1.01 to 2.00	100.1 to 200.0	\$290	13.01 to 14.00	1,300.1 to 1,400.0	\$770
2.01 to 3.00	200.1 to 300.0	\$330	14.01 to 15.00	1,400.1 to 1,500.0	\$810
3.01 to 4.00	300.1 to 400.0	\$370	15.01 to 16.00	1,500.1 to 1,600.0	\$850
4.01 to 5.00	400.1 to 500.0	\$410	16.01 to 17.00	1,600.1 to 1,700.0	\$890
5.01 to 6.00	500.1 to 600.0	\$450	17.01 to 18.00	1,700.1 to 1,800.0	\$930
6.01 to 7.00	600.1 to 700.0	\$490	18.01 to 19.00	1,800.1 to 1,900.0	\$970
7.01 to 8.00	700.1 to 800.0	\$530	19.01 to 20.00	1,900.1 to 2,000.0	\$1,010
8.01 to 9.00	800.1 to 900.0	\$570	20.01 to 100.00	2,000.1 to 10,000.0	*
9.01 to 10.00	900.1 to 1,000.0	\$610	100.01 to 500.00	10,000.1 to 50,000.0	**
0.01 to 11.00	1,000.1 to 1,100.0	\$650	500.01 & over	50,000.1 & over	***

* \$1,010.00 plus \$20.00 for each additional cfs or part thereof or 100 acre-feet or part thereof

** \$2,610.00 plus \$10.00 for each additional cfs or part thereof or 100 acre-feet or part thereof

*** \$6,610.00 plus \$2.00 for each additional cfs or part thereof or 100 acre-feet or part thereof

Statutory Claim Fee Schedule		Amendment of Permit	
For Domestic Use	\$100	Flat Fee	\$100
For All Other Uses	\$1,000		
After June 30, 2025	\$1,500		

[See separate fee schedule for Application for Transfer or Exchange.](#)