RESTORING THE PUBLIC INTEREST COMPONENT OF THE PRIOR APPROPRIATION DOCTRINE IN CONJUNCTIVE MANAGEMENT OF THE EASTERN SNAKE PLAIN AQUIFER

THOMAS J. BUDGE*

TABLE OF CONTENTS

I. INTRODUCTION 31
II. THE PRIOR APPROPRIATION DOCTRINE AND THE PUBLIC INTEREST IN MAXIMIZING BENEFICIAL USE OF IDAHO'S WATER RESOURCES 32
III. APPLICATION OF THE PRIOR APPROPRIATION DOCTRINE TO SURFACE WATER MANAGEMENT, GROUNDWATER MANAGEMENT, AND CONJUNCTIVE MANAGEMENT 36
A. Surface Water Management 36
B. Groundwater Management 37
C. Conjunctive Management 39
IV. THE 2024 CURTAILMENT 41
V. PATHS FORWARD 46

I. INTRODUCTION

In April 2024, Idaho made national news when the Idaho Department of Water Resources (IDWR) threatened to shut off irrigation water to nearly 700,000 acres (more than 1,000 square miles) of farmland on the Eastern Snake River Plain.[1] On May 30, IDWR partially delivered on the threat, instructing farmers to shut off water to about 330,000 acres (more than 500 square miles) of growing crops.[2] It was the largest water curtailment in Idaho history.[3]

This massive curtailment sent shock waves through the state. In arid southern Idaho, crops don't survive without water. Fear and outrage gripped farm communities. For many farmers, it meant bankruptcy. Idaho's economy stood to suffer hundreds of millions, if not billions, of dollars in economic loss.

Fortunately, the curtailment was lifted after two weeks as part of a settlement agreement that allowed farmers to continue irrigating their crops through

* Thomas J. Budge, Esq.; RACINE OLSON, PLLP; General counsel for Idaho Ground Water Appropriators, Inc.

[1] Final Order Regarding April Forecast Supply (Methodology Steps 1–3), Idaho Dep't of Water Resources Docket No. CM-DC-2010-001 (Apr. 18, 2024).

[2] Final Order Curtailing Water Rights Junior to March 31, 1954, Idaho Dep't of Water Resources Docket No. CM-DC-2010-001 (May 30, 2024).

[3] "Curtailment" refers to shutting off the diversion of water under a water right.

the 2024 season[4]. However, large-scale water curtailments are bound to be repeated unless Idaho adjusts the way it manages its vast Eastern Snake Plain Aquifer (ESPA).[5]

The curtailment was implemented under what is known as "conjunctive management" of surface water (rivers, lakes, and streams) and groundwater (aquifers) on an integrated basis.[6] IDWR ordered farmers to stop pumping groundwater from the ESPA in order to raise the groundwater table and thereby increase the amount of water that flows out of the ESPA and into the Snake River via springs in the vicinity of American Falls Reservoir.[7]

This article contends that the enormous curtailment ordered in the spring of 2024 is the result of a lack of meaningful application of the public interest component of the prior appropriation doctrine. First, this article provides an overview of the prior appropriation doctrine, which governs water distribution under Idaho law, and its public interest component. Second, it describes the different statutory frameworks enacted by the Idaho legislature to apply the doctrine to surface water versus groundwater, and the administrative rules adopted by IDWR to apply the doctrine to conjunctive management. Third, it explains the circumstances giving rise to the 2024 curtailment, and the colossal disparity between the amount of groundwater use curtailed compared to the amount of surface water gained to the Snake River. Fourth, it argues for a change of course in how Idaho implements conjunctive management, by seeking to meet the water needs of senior users in a manner that keeps as many acres of farmland in production, and as many businesses in operation, as possible.

II. THE PRIOR APPROPRIATION DOCTRINE AND THE PUBLIC INTEREST IN MAXIMIZING BENEFICIAL USE OF IDAHO'S WATER RESOURCES

As with other Western states, Idaho manages its water resources under the prior appropriation doctrine. The name "prior appropriation" denotes the principle that "first in time is first in right."[8] Every water right has an assigned "priority date" based on the date when it was first developed. During times of water scarcity, holders of older ("senior") water rights have first priority to the available water supply over

---

[4] IDWR News Release: SWC, ESPA ground water districts reach settlement agreement, avoid curtailment in 2024 (June 20, 2024) (https://idwr.idaho.gov/wp-content/uploads/sites/2/news-release/20240620-Settlement-reached-between-SWC-and-groundwater-users-FINAL-6.20.24.pdf)

[5] The ESPA underlies the Eastern Snake River Plain which spans a 10,800 square mile expanse of southeastern and southcentral Idaho, from the city of Ashton on the east to the city of Hagerman on the west. The ESPA is estimated to contain a billion acre-feet of water—enough water to cover the entire Eastern Snake River Plain with about 140 feet of water.

[6] IDAHO ADMIN. CODE r. 37.03.11.010.03.

[7] Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3), *In the Matters of Distribution of Water to Various Water Rights Held By Or For The Benefit Of 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*, IDWR Docket No. CM-DC-2010-001 (May 30, 2024).

[8] IDAHO CODE § 42-106.

holders of younger ("junior") water rights.[9] In practice, this means junior water rights get shut off when holders of senior water rights need additional water.[10]

However, the right of seniors to shut off water use by juniors "is not an absolute rule without exception."[11] Exceptions exist because Idaho's water is a public resource, and the state has a duty to manage it "for the purpose of ensuring it is used for the public benefit."[12] The public is benefitted when water is put to use to grow crops, supply drinking water, operate businesses, etc. Therefore, "[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."[13] The Idaho Constitution calls this "optimum development of water resources in the public interest."[14] It has also been referred to as the maximum use doctrine.[15]

The Idaho Supreme Court has stated that the concept that "first in time is first in right" and the concept of beneficial use are the "bedrock principles" of the prior appropriation doctrine.[16] They stand on equal footing.

Distributing water among water users based on priority (*i.e.* shutting off the diversion of water by junior rights) is relatively straight-forward. Protecting the public interest in maximizing beneficial use of Idaho's water resources is less so. The public interest component serves as a check on the distribution of water by priority, and there are myriad ways it may be implemented.

For example, the holder of a senior water right cannot curtail (shut off) junior rights unless the senior will in fact apply to beneficial use the water that could otherwise be used by the junior. This concept is codified in Idaho Code section 42-104 which reads: "[t]he appropriation must be for some useful or beneficial purpose, and

---

[9] *Id.*

[10] IDAHO CODE § 42-607.

[11] Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res. (*AFRD2*), 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

[12] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 287 (1997).

[13] Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *see also* Nettleton v. Higginson, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) ("[T]he entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.").

[14] IDAHO CONST., art. 15, § 7.

[15] Jeffrey C. Fereday & Michael C. Creamer, *The Maximum Use Doctrine and Its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin*, IDAHO L. REV. 67, 67–111 (2010).

[16] Idaho Ground Water Appropriators v. Idaho Dep't of Water Res., 160 Idaho 119, 369 P.3d 897 (2016).

when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases."

Similarly, the holder of a senior water right cannot curtail junior rights to secure more water than the senior legitimately needs to accomplish the beneficial use for which the senior's water right was issued, even though the amount needed may be less than the amount authorized under the senior's water right license or decree.[17] For instance, if the senior's water right authorizes irrigation of 100 acres but only 80 acres are currently being irrigated, the senior can call for no more water than is needed to irrigate 80 acres.[18] Likewise, if the senior's water right authorizes the diversion of water at a rate of 1 miner's inch per acre, but the senior's crops require only ¾ miner's inch per acre, the senior can call only for ¾ inch per acre. The Idaho Supreme Court has stated:

> no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration.[19]

The public interest component precludes a senior from curtailing junior water rights if it will not get additional water to the senior at the time it is needed. This is known as the "futile call doctrine," explained by the Idaho Supreme Court as follows:

> if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.[20]

The public interest component requires holders of senior rights to put forth effort to use water more efficiently and take other reasonable steps to meet their water needs with the available water supply before seeking to curtail juniors: "[a] prior appropriator is only entitled to the water to the extent that he has use for it *when economically and reasonably used*."[21]

---

[17] Stickney v. Hanrahan, 7 Idaho 424, 435, 63 P. 189 (1900);American Falls Reservoir v. Dept. of Water, 154 P.3d 433, 450, 143 Idaho 862, 879 (2007).

[18] A "call" or "delivery call" is a request by a senior user for IDWR to shut off junior-priority diversions to increase the supply of water to the senior.

[19] Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (internal citation omitted).

[20] Sylte v. Idaho Dep't of Water Res., 165 Idaho 238, 245, 443 P.3d 252, 259 (2019) (quoting Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976)).

[21] Goodrich, 27 Idaho at 26, 147 P. at 1079 (internal citation omitted; emphasis added).

Finally, the public interest component prevents a senior user from shutting off exponentially more water use by juniors than the senior can apply to beneficial use. This concept was first applied in 1907 when a senior user sought to control an entire stream, even though the senior would use only a portion of the stream to grow crops.[22] The Idaho Supreme Court refused to allow priority to be exercised in that manner, stating:

> In this arid country where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface-irrigate ten times as much by proper application.[23]

It was again applied in 1910 to accommodate the development of two large irrigation canals in the Magic Valley—the Twin Falls Canal and the Northside Canal—which happen to be key players in the 2024 curtailment. In that case, a farmer with senior water rights had constructed 11 water wheels to divert water from the Snake River to irrigate 430 acres—a large farm in those days.[24] Twin Falls Land & Water Company sought to construct the Twin Falls Canal and the North Side Canal to bring irrigation water to about 300,000 acres in the Magic Valley, but this would require damming the Snake River, rendering the senior's water wheels inoperable.[25] Despite the injury to the senior user, the court allowed development of junior-priority water rights because preserving the senior's water use would unreasonably impede full development of Idaho's water resources.[26] The Court noted that "[t]he use of water in this state is declared by the Constitution to be a public use,"[27] and "the right of appropriation must be exercised with some regard to the rights of the public,"[28] then explained:

> Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land 100 inches, can

---

[22] Van Camp v. Emery, 13 Idaho 202, 89 P. 752 (1907).

[23] *Id.* at 208, 89 P. at 754.

[24] Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 115 (1912).

[25] *Id*. at 115–116.

[26] *Id.* at 125–126.

[27] *Id*. at 121 (citing Idaho Const., Art. 3, § 15).

[28] *Id*. at 120.

> he then object to those above him and appropriating the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation.[29]

The Idaho Supreme Court reaffirmed this principle in 2007, holding that "water rights must be exercised with some regard to the rights of the public and necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."[30] The Court reaffirmed it again in 2016, holding that IDWR has authority under appropriate circumstances to decline to allow holders of senior water rights to curtail junior water rights "based on the policy of beneficial use,"[31] stating that "the policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources[] has long been the policy of Idaho."[32] The Court further explained that "[t]he policy of beneficial use serv[es] as a limit on the prior appropriation doctrine,"[33] and that "Idaho law contemplates a balance between the 'bedrock principles' of priority of right and beneficial use."[34] The Court stated that IDWR must "determine in a delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to produce a very small amount of water to the caller."[35]

III. APPLICATION OF THE PRIOR APPROPRIATION DOCTRINE TO SURFACE WATER MANAGEMENT, GROUNDWATER MANAGEMENT, AND CONJUNCTIVE MANAGEMENT

The Idaho legislature has adopted different statutory frameworks for managing surface water and groundwater under the prior appropriation doctrine. The doctrine applies in both contexts, but it functions differently due to the different hydrologic characteristics of surface water flow versus groundwater flow. Both frameworks apply the prior appropriation doctrine in a way that maximizes the beneficial use of the water resource in the public interest.

A. Surface Water Management

Idaho's supply of surface water follows a seasonal cycle. Snow falls in the mountains during winter and melts in the spring, flowing swiftly downhill through

---

[29] *Id.* at 119.

[30] American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (internal quotes omitted).

[31] Idaho Ground Water Appropriators, Inc. v. Idaho Dep't of Water Res., 160 Idaho 119, 129, 369 P.3d 897, 907 (2016).

[32] *Id.* at 31, 369 P.3d at 909.

[33] *Id.* at 131, 369 P.3d at 909.

[34] *Id.* at 134, 369 P.3d at 912.

[35] *Id.*

creeks, streams, and rivers. Surface water that is not captured in reservoirs or diverted into canals and aqueducts flows out of the state within a matter of weeks. The system resets each winter.

When the supply of surface water is inadequate to fill all surface water rights, IDWR applies the prior appropriation doctrine by opening and closing headgates to shepherd water from one point of diversion to another based on priority.[36] When a junior diversion is curtailed, the senior user receives, within a matter of hours or days, essentially 100% of the water that would have otherwise been used by the junior. Application of the prior appropriation doctrine in this manner has maximized the beneficial use of Idaho's surface water resources.

B. Groundwater Management

Groundwater flow is much different. Groundwater resides below ground in porous rock, gravel, and sand, and it generally moves very slowly through the aquifer.[37] When groundwater is pumped from a well, there is a slow drawdown of the groundwater table around the well, and when pumping ceases, the groundwater table slowly rebounds.[38] The effects of pumping water from a well emanate in all directions through the aquifer, 360 degrees, like the ripple from a pebble dropped into a pond, only much slower.[39] IDWR cannot shut off a junior-priority well and direct that water underground to a senior-priority well. If a junior groundwater well is shut off, usually only a very small percentage of the water will accrue to a senior user, and it may take years or decades to arrive.[40]

By the late 1940s, advancements in technology made it economically feasible to pump large volumes of water for irrigation, and Idaho leaders desired to grow the state economy by developing the state's underground water resources. Since pumping groundwater naturally causes the elevation of the groundwater table to drop, there was a concern that holders of senior water rights could exercise priority

---

[36] IDAHO CODE § 42-607.

[37] *Idaho's Treasure; the Eastern Snake River Plain Aquifer*, State of Idaho Oversight Monitor, Dept. of Environmental Quality (May 2005). https://idwr.idaho.gov/wp-content/uploads/sites/2/iwrb/2005/200505-ESPA-CAMP-INL-newsletter.pdf.

[38] *Water Table Drawdown and Well Pumping*, Kansas Geological Survey, R.W. Buddemeier. https://www.kgs.ku.edu/HighPlains/atlas/apdrdwn.htm, (last updated Dec. 11,2000).

[39] *Id.*

[40] *Managing the Interconnecting Waters: The Groundwater-Surface Water Dilemma*, Joe Gelt, The University of Arizona Water Resources Research Center (Dec. 1, 1994). https://wrrc.arizona.edu/publication/managing-interconnecting-waters-groundwater-surface-water-dilemma

and shut off junior rights in order to keep the groundwater table at peak elevation, which would prevent the state from realizing the economic potential of groundwater development.

To avoid this, the Idaho legislature enacted the Ground Water Act in 1951 to modify the way the prior appropriation doctrine applies to groundwater.[41] Since it is impossible to shepherd water underground between senior and junior wells, the Act implements a management framework based on the elevation of the groundwater table. The introductory section of the Act states:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.[42]

The Act does not allow holders of senior water rights to insist that the groundwater table be kept at peak elevation.[43] Rather, it allows groundwater users to draw down the water table so long as they do not withdraw water at a faster rate than the aquifer can sustain long-term.[44] In other words, Idaho's aquifers are managed to achieve maximum sustainable use of the resource.[45] If groundwater diversions outpace inflows to the aquifer, the Act authorizes curtailment of junior groundwater rights as needed to sustain maximum beneficial use. Application of the prior appropriation doctrine in this manner enables Idaho to maximize the beneficial use of its aquifers.

The Ground Water Act was very successful in encouraging development of the ESPA. From the 1940s to the 1990s, IDWR issued thousands of groundwater rights, and enterprising individuals broke out sagebrush and brought more than a million acres of farmland into production with groundwater—doubling the total amount of irrigated farmland on the Eastern Snake River Plain and fueling major growth in Idaho's economy.[46] Idaho Power Company encouraged this development with

---

[41] IDAHO CODE § 42-226 et seq.

[42] IDAHO CODE § 42-226.

[43] *Id.*

[44] IDAHO CODE §§ 42-233a, 42-233b, 42-237a(g).

[45] *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

[46] *Working Toward a Sustainable Water Supply*, Idaho Dept. of Water Resources (Aug. 2024) (https://idwr.idaho.gov/wp-content/uploads/sites/2/water-data/202408-ESPA-Modeling-and-

literature announcing: "Millions more virgin acres wait only for the magic of irrigation … accomplished only by pumping … and low cost, investor-owned power stands ready to pump it."[47]

C. Conjunctive Management

When the Ground Water Act was enacted, state leaders understood that groundwater flowed out of the ESPA and into the Snake River via springs around American Falls Reservoir and in the Thousand Springs area west of Twin Falls. And they knew that pumping water from the ESPA would cause a drop in the water table, which would reduce the amount of groundwater flowing from the springs. Nevertheless, the legislature proceeded with the Ground Water Act, and IDWR managed the ESPA and the Snake River as separate sources under the different statutory frameworks described above.

This changed in 1994 when the Idaho Supreme Court compelled IDWR to manage the state's surface water and groundwater conjunctively.[48] When that occurred, the Idaho legislature did not respond by developing a statutory framework for applying the prior appropriation doctrine to conjunctive management, as it had with surface water and groundwater. Instead, the legislature left the task of conjunctive management to the discretion of IDWR.

Conjunctive management of the ESPA and the Snake River seems simple enough, but in practice it is tremendously vexing for several reasons. First, since groundwater resides below ground and cannot be easily tracked, it is difficult to quantify the impact that a particular groundwater well has on the flow of water from a particular spring or reach of the Snake River (a discrete stretch of a river is known as a "reach"). Second, when a groundwater well is shut off, usually only a small fraction of the water that could have been diverted from the well will accrue to a particular spring or river reach. Third, when a groundwater well is shut off, it often takes years or decades to realize increased flow in a particular spring or river reach.

Water supply shortages to holders of senior-priority surface water rights from the Snake River are temporary. In years when Mother Nature provides ample snow and rain, there is no shortage of surface water. When shortages do occur, they usually occur for a period of weeks near the end of the irrigation season. However,

---

Monitoring.pdf); *The Eastern Snake Plain Aquifer*, State of Idaho Oversight Monitor, Idaho Dept. of Environmental Quality (March 2006) (https://www.nrc.gov/docs/ML1018/ML101810077.pdf)

[47] Idaho Power Co., WATER ON THE LAND: PRIVATE ENTERPRISE DEVELOPMENT OF IRRIGATION IN THE SNAKE RIVER VALLEY 1 (1965).

[48] *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994).

due to the muted and tenuous connection between groundwater wells and spring flows, shutting off groundwater wells is an extremely inefficient means of increasing surface water flows. Because only a small fraction of the groundwater that could have been pumped from a particular well will accrue to a particular spring or river reach, and given the delay in realizing that increase, an inordinate amount of groundwater use must be curtailed to offset a comparatively small shortage in surface water flows. This is the fundamental challenge of conjunctive management, since curtailing exponentially more groundwater than the senior will apply to beneficial use runs afoul of the public interest component of the prior appropriation doctrine.

After the Idaho Supreme Court required IDWR to manage the states surface water and groundwater resources conjunctively, IDWR adopted administrative rules (Conjunctive Management Rules)[49] to provide guidance when holders of senior-priority surface water rights ask IDWR to curtail junior-priority groundwater rights.[50] The rules begin with general statements of purpose and policies, several of which reflect the duty of IDWR to consider the public interest in conjunctive management, including the following:

- These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water.[51]

- The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law.[52]

- An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.[53]

- These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-

---

[49] Rules for Conjunctive Management of Surface and Ground Water Resources, IDAHO ADMIN. CODE r. 37.03.11.

[50] IDAHO ADMIN. CODE r. 37.03.11.001.

[51] IDAHO ADMIN. CODE r. 37.03.11.20.03.

[52] *Id.*

[53] *Id.*

> priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.[54]

The rules also list various factors IDWR may consider in determining "whether the holders of water rights are suffering material injury and using water efficiently and without waste."[55] These include whether the senior is "diverting and using water efficiently … in a manner consistent with the goal of reasonable use of surface and ground waters,"[56] as well as "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices,"[57] and "[t]he extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells."[58] In essence, these factors empower IDWR to pursue ways of meeting a senior's water needs with the available water supplies before resorting to curtailment of junior rights.

While the rules contain policy statements and factors that reflect the public interest in maximizing beneficial use of Idaho's water resources, they do not prescribe a pragmatic process for implementing those policies and factors. Rather, the rules leave implementation completely to the discretion of IDWR. Accordingly, the Idaho Supreme Court has held that "[s]omewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director."[59] The manner in which IDWR exercises this discretion has enormous consequences for Idaho, as a single decision can shut off water to cities, industry, and hundreds of thousands of acres of farmland, as the 2024 curtailment illustrated.

IV. THE 2024 CURTAILMENT

Conjunctive management was initiated to address the hydrologic connection between Idaho's two largest bodies of water: the Snake River and the ESPA.

---

[54] IDAHO ADMIN. CODE r. 37.03.11.020.05.

[55] IDAHO ADMIN. CODE r. 37.03.11.042.

[56] IDAHO ADMIN. CODE r. 37.03.11.040.03, 37.03.11.042.

[57] IDAHO ADMIN. CODE r. 37.03.11.042.01.g.

[58] IDAHO ADMIN. CODE r. 37.03.11.042.01.h.

[59] *AFRD2*, 143 Idaho at 880, 154 P.3d at 451.

Collectively, these water sources generate roughly a quarter of all goods and services within the state of Idaho.[60]

IDWR's threat to shut off irrigation water to nearly 700,000 acres (more than 1,000 square miles) of farmland irrigated from the ESPA may give the impression that the ESPA is running dry. Yet, every year, about 4.2 million acre-feet of water (enough water to fill Lucky Peak Reservoir nearly 16 times) leaves the ESPA via springs in the Thousand Springs area, and about 1.1 million acre-feet (enough water to fill Lucky Peak Reservoir more than four times) leaves via springs in the American Falls area.[61]

Today, the amount of groundwater that flows out of the ESPA is below the historic peak.[62] As expected, the development of groundwater wells, along with the widespread conversion of farmland from surface water irrigation to sprinkler irrigation, caused the elevation of the groundwater table to decline across the ESPA.[63] While the decline in ESPA was expected under the Ground Water Act, it has nevertheless led to conflict between users of groundwater pumped from the ESPA and users of surface water from the Snake River whose water supply derives partly from groundwater that exits the ESPA via spring flows.[64]

In the early 2000s, seven canal companies and irrigation districts in the Magic Valley, known collectively as the Surface Water Coalition, asked IDWR to shut off groundwater pumping from the ESPA so the groundwater table would rise and more water would flow out of the aquifer and into the Snake River via springs in the American Falls area[65]. The Surface Water Coalition canals were built in the early 1900s, making their water rights senior to essentially all groundwater rights from the ESPA, which were developed from the 1940s to the 1990s.[66]

---

[60] IDAHO DEP'T OF WATER RES., *Restoring the Eastern Snake Plain Aquifer, A 10-year Progress Report on Sustainability Initiatives Recommended by the ESPA Comprehensive Aquifer Management Plan*, (Dec. 10, 2019), https://idwr.idaho.gov/IWRB/.

[61] U.S. ARMY CORP OF ENG'R, WALLA WALLA DIST., *Fact Sheet - Lucky Peak Dam and Lake,* (April 2024), https://www.nww.usace.army.mil/Portals/28/LuckyPeak%2020240430.pdf. Lucky Peak Reservoir has a storage capacity of 264,400 acre-feet.

[62] *Working Toward a Sustainable Water Supply*, Idaho Dept. of Water Resources (Aug. 2024), p. 2 (https://idwr.idaho.gov/wp-content/uploads/sites/2/water-data/202408-ESPA-Modeling-and-Monitoring.pdf)

[63] *Id*.

[64] Tuthill, Rassier, Anderson, *Conjunctive Management in Idaho*, The Water Report, Issue #108 (Feb. 15, 2013)

[65] Petition for Water Rights Administration and Designation of ESPA as a Ground Water Management Area, *In the Matter of the Petition for Administration by 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*, Idaho Dept. of Water Resources (Jan. 14, 2005).

[66] *Id*.

In 2015, after several bouts of litigation, a settlement agreement was entered into between the Surface Water Coalition and nine ground water districts who represent most of the users of groundwater from the ESPA.[67] This agreement fell apart in 2022, leading IDWR to order curtailment in May of 2024.

IDWR ordered curtailment based on its forecast that the Surface Water Coalition may experience a water supply shortage later that year.[68] The curtailment was against the public interest for a few reasons. First, it occurred in a year of robust surface water supplies in southeast Idaho.[69] The winter of 2023-2024 produced above-average snowfall.[70] More than 600,000 acre-feet of excess water flowed down the Snake River unused during the spring of 2024 because Idaho had no place to use or store it.[71]

Second, IDWR calculated that the Surface Water Coalition collectively had 539,000 acre-feet *more* water than they would need in 2024.[72] However, IDWR calculated that one member of the Coalition, Twin Falls Canal Company, could experience a water supply shortage of 74,100 acre-feet.[73] Despite sufficient water to meet the needs of the Coalition collectively, IDWR ordered curtailment.

Third, there was a colossal disparity between the amount of groundwater use curtailed compared to the expected benefit to Twin Falls Canal Company. An additional 74,100 acre-feet would increase the total water supply of Twin Falls Canal

---

[67] Surface Water Coalition's and IGWA's Stipulated Mitigation Plan and Request for Order, *In the Matter of the Distribution of Water to Various Water Rights Held By and For the Benefit of A&B Irrigation Dist., Am. Falls Res. Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Company, and Twin Falls Canal Company; In the Matter of IGWA's Settlement Agreement Mitigation Plan*, IDWR Docket No. CM-MP-2016-001 (Mar. 9, 2016).

[68] Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3), *In the Matters of Distribu-tion of Water to Various Water Rights Held By Or For The Benefit Of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation Dis-trict, North Side Canal Company, and Twin Falls Canal Company*, IDWR Docket No. CM-DC-2010-001 (May 30, 2024)

[69] *Mountain Snow Water Equivalent: Annual Peak Snowpack*, Idaho Dept. of Water Res. (Apr. 15, 2024) (https://idwr.idaho.gov/wp-content/uploads/sites/2/snow-water-equivalency/2024/20240415-Weekly-Snow-Map.pdf)

[70] *Id*.

[71] Calculated using flow data published by Water District 1, Idaho Dept. of Water Res. (https://www.waterdistrict1.com/)

[72] Distribution of Water Rights to A&B Irrigation District, No. CM-DC-2010-001 at *5 (IDWR Apr. 2024)(Final Order) (539,000 acre-feet surplus calculated as cumulative "Total Forecast Supply" minus cumulative "Baseline Demand").

[73] *Id*.

Company by about 7 percent,[74] or enough water to irrigate about 13,000 acres.[75] By contrast, the curtailment threatened to dry up almost 700,000 acres, eliminating beneficial use of 1.6 million acre-feet of groundwater (enough water to fill Lucky Peak Reservoir six times), as shown in the table below.[76]

Most of the curtailed groundwater wells are located far away from the springs around American Falls Reservoir and have little impact on flows in the Snake River that supply the Surface Water Coalition. The following table shows, by county, the number of acres of groundwater irrigated farmland that would have been dried up and the amount of groundwater use shut off compared to the amount of surface water gained by the end of the 2024 irrigation season. In most counties, less than one percent of the curtailed groundwater would have accrued to the Surface Water Coalition.

[74] Twin Falls Canal Company typically diverts approximately 1.1 million acre-feet annually. 74,100 acre-feet is

[75] Twin Falls Canal Company report 194,732 irrigated acres. The diversion of 1.1 million acre-feet to irrigate 194,732 acres equals 5.6 acre-feet per acre. 74,100 acre-feet divided by 5.6 acre-feet per acre equals 13,232 acres.

[76] U.S. ARMY CORP OF ENG'R, WALLA WALLA DIST., *Fact Sheet - Lucky Peak Dam and Lake,* (April 2024), https://www.nww.usace.army.mil/Portals/28/LuckyPeak%2020240430.pdf. Lucky Peak Reservoir has a storage capacity of 264,400 acre-feet.

County	Dried up Farmland (acres)	Groundwater Curtailed (acre-feet)	Surface Water Gained (acre-feet)	Surface Water Gained as a Percentage of Groundwater Curtailed
Elmore	746	2,145	0.00	0.00%
Clark	32,437	70,896	0.13	0.00%
Gooding	45,998	126,774	0.00	0.00%
Jefferson	104,904	231,935	372.61	0.16%
Butte	6,853	15,380	6.08	0.04%
Blaine	9,601	22,052	19.50	0.09%
Lincoln	29,024	73,743	4.81	0.01%
Fremont	19,355	36,850	0.01	0.00%
Twin Falls	753	1,820	0.00	0.00%
Jerome	40,368	105,964	0.17	0.00%
Madison	2,753	6,040	0.00	0.00%
Bonneville	52,976	117,198	787.91	0.67%
Bingham	147,541	361,126	49,126.57	13.60%
Minidoka	47,375	119,465	16.89	0.01%
Power	75,905	179,445	16,806.60	9.37%
Cassia	74,719	171,435	0.74	0.00%
Bannock	4,300	9,766	6,087.08	62.33%
Total	**695,610**	**1,652,035**	**73,229**	**4.43%**

IDWR's order instructing farmers to shut off their groundwater wells was not well received by the farmers who understood that, for most farmers, less than one-tenth of one percent of their water would accrue to the Surface Water Coalition by the end of the 2024 irrigation season.[77] The prevailing view among groundwater users was that IDWR had ignored the public interest component of the prior appropriation doctrine and unnecessarily put the state at risk of social and economic catastrophe.

[77] For example, Idaho Farmers Say Water Curtailment Order Will Dry Up Land, Push Them Out of Business, Idaho Capital Sun (June 4, 2024); Idaho Farmer Sounds The Alarm Over Water Restrictions That Can Damage 500K Acres of Farmland: 'Significant', Fox Business (Jun. 13, 2024); Farmers Get on Tractors to Demonstrate Against Water Curtailment, East Idaho News (July 30, 2024).

Ironically, this curtailment was designed to modestly increase the water supply to a canal company that would not exist were it not for the public interest component of the prior appropriation doctrine being employed on its behalf when its canal was first constructed in the early twentieth century[78] As discussed above, the Court allowed construction of Twin Falls Canal to proceed even though it would prevent a senior user from diverting water, reasoning that allowing the senior to block junior appropriators from using 10 times more water than the senior needed "would be such an unreasonable use … as will not be tolerated under the law of appropriation."[79] By comparison, the 2024 curtailment would have blocked junior appropriators from using more than 20 times more water than the senior would gain.

The 2024 curtailment has drawn attention and scrutiny to conjunctive management of the ESPA and the Snake River. Defenders of the curtailment claim it was required by prior appropriation doctrine—that IDWR's hands were tied. However, curtailment was not the only option.

V. PATHS FORWARD

As discussed above, the Conjunctive Management Rules empower IDWR to pursue alternative ways of meeting a senior's water needs with the available water supplies before resorting to curtailment of junior rights. There were other, more cost-effective ways to meet the water needs of Twin Falls Canal Company, such as canal system improvements, the use of modern technology to manage water supplies more efficiently, and strategic management of storage water supplies. The problem is, IDWR has, in the exercise of discretion, declined to proactively exercise these powers, asserting it has no duty to do so. The result—curtailment of the groundwater user even when the senior surface water user would receive less than one-tenth of one percent of the curtailed groundwater—is contrary to the public interest in maximizing beneficial use of Idaho's water resources.

The 2024 curtailment will be repeated unless Idaho restores fidelity to the public interest component of the prior appropriation doctrine in conjunctive management. Fundamentally, preserving the public interest requires a commitment to meeting the needs of senior priority surface water users in a manner that keeps as many acres of farmland in production, and as many businesses in operation, as possible. In other words, it requires that reasonable alternatives be exhausted before resorting to curtailment. There are at least three pathways for achieving this.

First, the Surface Water Coalition and ESPA groundwater users could negotiate a mutually acceptable mitigation plan that establishes an alternative framework for meeting the water needs of the Coalition without curtailing groundwater use. Under the Conjunctive Management Rules, groundwater users who

---

[78] Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912).

[79] *Id.* at 119.

comply with a stipulated mitigation plan approved by IDWR are protected from curtailment.[80]

Over the summer and fall of 2024, farmers representing the Surface Water Coalition and farmers representing ESPA groundwater users engaged in a series of meetings to negotiate a new framework for managing the ESPA. After nearly four months of negotiations, the parties reached an agreement, which was submitted to IDWR for approval on November 19, 2024.[81] The agreement is designed to stabilize the ESPA and mitigate impacts to the Surface Water Coalition in a manner that keeps as many acres of farmland in production, and as many businesses in operation, as possible.[82] If the agreement is approved by IDWR, groundwater users who comply with the agreement will receive "safe harbor," meaning their water rights are protected from curtailment.[83]

Second, IDWR could change the way it manages the ESPA by adopting a groundwater management plan under the ESPA Ground Water Management Area. IDWR has statutory authority to adopt a management plan that addresses the water needs of the Surface Water Coalition in ways that do not result in mass curtailment.[84] The new mitigation agreement is expected to serve as a groundwater management plan for groundwater users who comply with the agreement. If the agreement is terminated in the future, IDWR could compel water users to comply with a separate groundwater management plan adopted under the ESPA Ground Water Management Area.

And third, the Idaho legislature could pass legislation giving direction to IDWR as to how the prior appropriation doctrine should be applied in conjunctive management, rather than leaving it entirely to the agency's discretion. Legislation could compel IDWR to proactively exhaust reasonable alternatives to meet the water needs of senior users before resorting to curtailment.

---

[80] Throughout the summer and early fall of 2024, the Surface Water Coalition and the nine ground water districts representing the larger majority of ESPA groundwater users engaged in cooperative negotiations to develop a mutually acceptable mitigation plan. At the time of submission of this article, a final agreement had not been reached but negotiations were continuing.

[81] Joint Motion for Order Approving 2024 Stipulated Mitigation Plan, IDWR Docket No. CM-MP-2024-003 (Nov. 19, 2024).

[82] *Id*. at Appendix A.

[83] *Id*. at Appendix A, § 8.

[84] IDAHO CODE § 42-233b.

Under any approach, it is expected that holders of senior-priority surface water rights will be assured sufficient water to meet their irrigation needs. It is not a matter of *whether* their water needs will be met, but *how*. Idaho has the ability to meet the water needs of senior water users without mass curtailment of groundwater use, but it will require a change of course and a commitment to meeting those needs in a manner that keeps as many acres of farmland in production, and as many businesses in operation, as possible.