RECEIVED
SEP 02 2016
DEPARTMENT OF
WATER RESOURCES

White & Jankowski *Lawyers*

September 2, 2016

Gary Spackman, Director
Idaho Department of Water Resources
322 Front Street
Boise, ID 83720-0098

Re: City of Pocatello's comments on proposed Eastern Snake River Plain Aquifer Ground Water Management Area

Dear Director Spackman:

I am writing on behalf of the City of Pocatello to respond to Idaho Department of Water Resources' ("IDWR" or "Department") invitation to submit comments regarding the proposed Ground Water Management Area ("GWMA") for the Eastern Snake River Plain Aquifer ("ESPA" or "aquifer"). The City has significant factual, legal, and policy concerns regarding the adoption of a GWMA.[1]

I. POLICY CONCERNS WITH THE CREATION OF A GWMA

Pocatello understands the current urgency regarding the GWMA to arise from the 2015 agreement between the Idaho Ground Water Appropriators ("IGWA") and the Surface Water Coalition ("SWC") (referred to as "IGWA-SWC Agreement" or "Agreement"). Pocatello also understands there to be some interest on the part of the Department in using the SWC-IGWA Agreement as the template for the goals of a GWMA. Pocatello, as well as other municipalities, sought to participate in the IGWA-SWC negotiations and both SWC and IGWA rejected the cities' participation. This was well within the rights of SWC and IGWA as they were attempting to resolve a dispute between themselves. While Pocatello was not invited to the table in the

[1] The City also agrees with the comments expressed in the letters submitted by the City of Idaho Falls, the Coalition of Cities, and Association of Idaho Cities on the GWMA issue.

White & Jankowski, L.L.P.
Kittredge Building, 511 Sixteenth Street, Suite 500, Denver, Colorado 80202
(303) 595-9441 Fax (303) 825-5632 mail@white-jankowski.com

negotiation of this historic settlement, it was pleased to hear these two adversaries had settled their differences.

However, upon review of the SWC-IGWA Agreement, Pocatello's representatives have uniformly noted that the terms of the Agreement are not a good fit for the City. Any effort to impose the SWC-IGWA Agreement on Pocatello, whether in the context of a GWMA or otherwise, will be strongly resisted and likely is ineffective under Idaho law anyway. The perception, true or not, is that the SWC and IGWA entities reached their settlement, subsequently realized all the elements of the Agreement had not been thought through and that the goals could not be met, and then persuaded the Department to adopt a GWMA to enforce the settlement by bringing all of the ground water users under its auspices.

The SWC-IGWA Agreement resolves the dispute between SWC and IGWA by taking a step back from conjunctive management and looking at a larger picture. This is a potentially appropriate way to approach negotiated settlement of intractable disputes. However, it is a poor basis upon which to make public policy for all water users where not all water users were involved in the development of the Agreement, and no technical data has been provided to support the goals therein.

We feel as if the GWMA idea is a solution in search of a problem. The water rights owners on the ESPA have settled expectations regarding the administration of their property interests; these expectations have been confirmed by the Idaho Supreme Court on numerous occasions as being properly resolved through the Department's conjunctive administration of delivery calls. The Director of the Department ("Director") has a mandatory statutory duty to administer water rights, and the Idaho Supreme Court has interpreted this duty to administer water rights in the context of ground water and surface water users as "conjunctive management." Yet if a GWMA is ordered for the ESPA, the Director will have adopted the burden of also being the "water czar" to ensure at all times that water users in the entire aquifer have "sufficient ground water." The GWMA concept therefore will either fundamentally upend conjunctive administration, or serve as duplicative agency action with the possibility of inconsistent and potentially unlawful results.

II. LEGAL CONCERNS WITH GWMA

A. Insufficient technical basis.

Any decision by the Department to create a GWMA must consider technical questions regarding the status of the ESPA, and the Department must develop a robust administrative record including substantial evidence that creation of a GWMA is necessary and consistent with statutory standards. It is our understanding that IDWR has not undertaken or reviewed any studies for the specific purpose of determining whether the conditions required under Idaho Code ("I.C.") section 42-233b are present, what the boundaries of such a GWMA would be, or how the Director will determine if there is "sufficient ground water" under the GWMA statute. Without more technical information regarding what the Department is proposing, any comments to the Director are made in a vacuum, depriving parties of a meaningful opportunity to be heard. Further, before the Department embarks on attempting to answer such complicated and contentious questions by adopting a GWMA, the GWMA proponents should be required to

initiate a contested case, and bear the burden in establishing that conditions in the ESPA are approaching a Critical Ground Water Area ("CGWA").[2] We understand that the SWC and IGWA are proponents of a GWMA, and suggest that with the opposition expressed to a GWMA by various entities, the Department is required to initiate a contested case and urge it to do so.

1. Factual problems with the perception that the aquifer is in "crisis."

Based on conversations and communications with Spronk Water Engineers ("SWE"), we include the following discussion to challenge the apparent perception of many that the ESPA is in "crisis." To illustrate the following discussion, we have attached the IDWR slide from the GWMA informational meetings referenced within, as well as a table prepared by SWE showing the water budget for the aquifer. These two exhibits are also attached to this letter as Exhibits 1 and 2, respectively.

2. ESPA Water Budget

The ESPA can be conceptualized as a sand-filled bathtub with drain openings around the sides of the tub representing connected reaches and springs. When the inflows are stable, the water level in the tub will be stable, as will be the flow out the side drains. If the inflow increases, the water level in the tub will rise and the outflow from the drains will increase. If the inflow decreases, the water level in the tub will decline and the outflow from the drains will diminish until it matches the inflow.

The storage contents of the ESPA and the outflows from the aquifer (spring flows, reach gains, wetland ET) are directly affected by the stresses on the ESPA (inflows and withdraws). The following is a summary of the primary aquifer stresses:

<u>Aquifer Inflows</u>

- Tributary underflow
- River seepage
- Canal seepage
- Recharge from surface water irrigation
- Precipitation recharge on non-irrigation lands

<u>Aquifer Withdrawals</u>

- Irrigation Pumping
- Municipal and other pumping

Variations in the above stresses are due to, *inter alia,* weather fluctuations, changes in irrigation supply, changes in irrigation practices resulting in variations in the aquifer outflows and aquifer storage (ground water levels).

During the Department's recent GWMA informational meetings, a slide was presented that illustrated the change in ESPA ground water storage from 1912 – 2015 ("IDWR Slide").[3]

---

[2] *See* I.C. §§ 67-5240, 42-233b.

[3] *See* Exhibit 1 (IDWR Slide from ESPA informational meetings).

The IDWR Slide (Exhibit 1) shows a decline in aquifer storage of about 13 million acre-feet ("MAF") from 1952 – 2015. This equates to an average annual storage decline of 0.20 MAF/y (200,000 acre-feet/y). The IDWR Slide also shows the annual average Thousand Springs discharge, which declined from 6,800 cubic feet per second ("cfs") in 1952 to 4,500 cfs in 2015. The decline in ground water storage and the corresponding decline in spring flows were characterized as "disturbing" in the in a July 7, 2015 IDWR letter ("July IDWR Letter") promoting the GWMA informational meetings.[4] The July IDWR Letter did not elaborate why these trends were disturbing.

In order to better understand the significance of the ground water storage decline, it is helpful to place the decline into context with the overall aquifer water budget. The aquifer storage decline can be put into context by comparing it to the volume of water stored in the aquifer, and the amounts of water that flow into and out of the aquifer.[5]

Comparison to Aquifer Storage

Total ESPA aquifer storage is estimated to be 1 billion acre-feet, including 200 to 300 MAF of stored in the upper 500 feet of the aquifer.[6] The 13 MAF decline in aquifer storage from 1952 – 2015 represents about 1 percent of the total water stored in the aquifer and about 5 percent of the volume of water stored in the upper 500 feet of the aquifer.

Comparison to Average Inflows and Outflows

SWE's water budget table (Exhibit 2) summarizes the ESPA inflows and outflows during the ESPAM 2.1 calibration period from 1981 – 2008. The table shows the average annual volume of each inflow and outflow and cumulative totals over the 28-year calibration period. The table shows that the total inflows to the aquifer averaged 7.73 MAF/y and the total outflows averaged 7.99 MAF/y. The difference between the inflows and outflows represents the decrease in aquifer storage which averaged 0.26 MAF/y. The 0.26 MAF/y average decline in aquifer storage during the 1981 – 2008 calibration period is similar to the average decline of 0.20 MAF/y over the longer 1952 – 2015 period shown on the IDWR Slide.

Summary of Comparisons

The average annual change in aquifer storage during the 1981-2008 period of 0.26 MAF/y represents approximately 3 percent of the average annual aquifer inflows and aquifer outflows. The foregoing comparisons to the total volume of water stored in the aquifer and to the aquifer inflows and outflows demonstrate that the change in ESPA aquifer storage during the past decades are relatively minor in the context of the aquifer water budget.

While ground water pumping was a significant cause of decline in aquifer storage during the latter half of the 20th century, it is not currently a significant cause of the current changes in aquifer water level. The Department imposed a moratorium in 1992 on new ground water

---

[4] Gary Spackman, LETTER TO INTERESTED PARTY at 1 (July 7, 2016).
[5] *See* Exhibit 2 (SWE water budget table).
[6] The ESPAM calibration period extended from May 1980 to October 2008. Exhibit 2 summarizes annual water year (September – October) for 1981 – 2008.

development, and the effects of ground water pumping have already been expressed in prior changes in aquifer storage and spring flows. The ESPA is an aquifer responding to reduced recharge caused by the relatively dry period experienced in Idaho during recent years and by reduced recharge from surface water irrigation primarily resulting from increases in irrigation efficiency. The ESPA is not an aquifer in crisis.

B. GWMA is a duplicative administrative tool given ongoing conjunctive management in the ESPA and, given the Director's stated purpose, the GWMA is likely unlawful.

The creation of a GWMA for the entire ESPA would be unnecessarily duplicative of conjunctive administration. We reach this conclusion because the July IDWR Letter states at page 2 that senior rights involved in the ongoing delivery calls (which are all senior *surface* calls, save one) "have asserted that the ESPA presently does not have sufficient ground water to provide a reasonably safe supply." If the Department's goal in adopting a GWMA is to satisfy the senior surface rights demands for water, those demands must be understood in the context of the conjunctive management case law that has developed in recent years, including *AFRD#2 v. IDWR*[7] and *Rangen II*.[8] Under these cases, the Idaho Supreme Court has rejected "shut and fasten" administration for the ESPA, and has expressly endorsed beneficial use and maximum utilization as essential principles in the prior appropriation doctrine to be considered in administering shortages to senior surface rights due to junior ground water operations. The Director must honor these principles by considering both that the "first appropriator in time is the first in right **and** that water must be placed to a beneficial use."[9]

We are concerned, however, that the purpose of the proposed GWMA is broader than conjunctive administration to satisfy the senior's demands for beneficial uses. The July IDWR Letter suggests that the ongoing delivery calls raise the question not of satisfying the seniors requirements for beneficial use, but instead of "whether the ESPA is approaching the conditions of a critical ground water area (not having sufficient ground water to provide a reasonably safe supply)" for which a GWMA would be the only solution.[10] Further, that creating a GWMA would "focus[ ] treatment on the problem, not just the symptoms" of the ongoing delivery calls in the ESPA by looking at the aquifer as a whole.[11] We read this to imply that the Director intends to administer water rights to meet aquifer water levels, regardless of need, efficiency, and beneficial use. We question whether the focus on water levels alone, without regard to the doctrine of beneficial use, is even lawful when resorted to at the prompting of senior surface

---

[7] *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) ("*AFRD#2*").

[8] *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 369 P.3d 897 (2016), *reh'g denied* (May 9, 2016) ("*Rangen II*").

[9] *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) ("SWC case") (emphasis added) (affirming the Director's baseline methodology approach and stating that "both management and administration must be conducted in accordance with the basic tenets of the prior appropriation doctrine," including the doctrine of maximum utilization.); *see AFRD#2*, 143 Idaho at 877-78, 154 P.3d at 448-449.

[10] July IDWR Letter at 2.

[11] *Id.* at 3.

rights.[12] The *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules") and case law interpreting the CM Rules are the basis for satisfying senior surface rights; further, the provisions of the Ground Water Act are not applicable to holders of surface water rights because the Ground Water Act specifically applies only to "appropriators of ground water."[13]

C. A GWMA does not provide an end-run around the doctrine of beneficial use.

For over a decade, the seniors now asserting that ground water supplies in the ESPA are insufficient, have also sought "shut and fasten" administration via their delivery calls to return the aquifer to the halcyon status quo that existed in the 1950s–prior to any significant ground water development and when the seniors were flood irrigating. At that point, as alluded to above in paragraph II.A.2., the aquifer was at its fullest.

In *Musser v. Higginson*, the Idaho Supreme Court found that hydrologically connected surface and ground waters must be managed conjunctively, which lead to the adoption of the CM Rules that were promulgated in 1994.[14]

> These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.[15]

The CM Rules and the Department's application of the factors therein to address shortages to seniors have been upheld in various cases over the past sixteen years.[16]

Senior surface rights users challenged the CM Rules in *AFRD#2,* arguing that they were entitled to receive the amounts of water on the face of their decrees and that the Department was limited to "shut and fasten" administration. The Supreme Court rejected this argument and confirmed that the concept of "shut and fasten" administration has no place in conjunctive management unless and until the Director determines that the seniors' requirements for beneficial use are not being met.[17] Even then, "shut and fasten" curtailment of the wells arises only if ground water users have not obtained an approved mitigation plan (of the sort agreed to in the IGWA-SWC Agreement or of the sort agreed to between Southwest Irrigation District and SWC for the balance of the last few years.).

---

[12] *See Clear Springs Foods, Inc. v. Spackman,* 150 Idaho 790, 804, 252 P.3d 71, 85 (2011) (*Clear Springs Foods* put an end to the juniors' assertion that ground water levels and aquifer recharge levels form a basis to avoid the obligations of a delivery call; the same holding precludes the seniors from enhancing the benefits of a delivery call).
[13] *Rangen II*, 160 Idaho 119, 369 P.3d at 904 (citing *Clear Springs Foods*, 150 Idaho at 804, 252 P.3d at 85).
[14] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), *rev'd on other grounds by Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999).
[15] CM Rule 20.02.
[16] *AFRD#2*, 143 Idaho at 874, 154 P.3d at 445.
[17] I.C. § 42-226.

In light of the Supreme Court's imprecation against "shut and fasten" administration for purposes of conjunctive management, it is easy to see why a senior seeking "shut and fasten" administration would be inclined to seek a GWMA: if a GWMA is established for the ESPA, by statute the Director "shall" order curtailment of junior water rights not protected by a ground water management plan.[18] However, Pocatello submits that existing legal principles and Idaho Supreme Court precedent do not authorize curtailment of juniors to meet targeted water levels in any proposed ESPA GWMA, as the ESPA is currently under conjunctive management. "The policy of beneficial use serving as a limit on the prior appropriation doctrine dovetails with the prescription in CM Rule 20.03 that '[a]n 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.'"[19] The *Rangen II* Court went on to interpret the *Schodde* case to preclude senior surface rights from seeking "to assert control over practically the entire aquifer, regardless of the minimal benefit to the senior and the great detriment of the junior."[20] The *Rangen II* court also noted that the Idaho Supreme Court had "previously held that hydrologically connected surface and ground waters must be managed conjunctively."[21] Curtailment of junior ground water users to achieve particular water levels is simply inconsistent with these legal principles.

D. GWMA in the ESPA has been considered and rejected by the District Court previously.

The Department has spent over 10 years litigating the administration of water rights in the ESPA. IDWR has rejected efforts on two previous occasions to designate the entire ESPA as a GWMA. Notably, during the judicial review of the A & B Irrigation District delivery call, IDWR represented, and the District Court agreed, that "the designation of a GWMA would not confer any additional management function that is not already available in an organized water district."[22] In both the SWC and A & B delivery calls, Judge Melanson and Judge Wildman affirmed the Director's rejection of GWMA as a management tool for the ESPA because water districts had already been created.[23] The 2016 revision to the GWMA statute does not change this analysis, nor should it change the Department's decision that GWMA are not an efficacious means to manage ESPA water rights.

III. TRIBUTARY ADMINISTRATION

---

[18] I.C. § 42-233b ("[t]he director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water.").

[19] *Rangen II*, 160 Idaho 119, 369 P.3d at 909 (quoting CM Rule 20.03).

[20] *Id.* at 911; *see Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 114-15, 32 S.Ct 470, 471 (1912).

[21] *Id.* at 908.

[22] *See A & B Irrigation District Delivery Call*, Case No. 2009-00067 at 43 (May 4, 2010) (Memorandum Decision and Order on Petition for Judicial Review).

[23] *See id.*; *see also SWC Delivery Call*, Order at 31(IDWR Feb. 14, 2005) (reiterating ground water management areas are not necessary where water districts have been created); *see also SWC Delivery Call*, Case No. 2008-0551 at 4 (July 24, 2009) (Order on Petition for Judicial Review) ("because water districts were expected to be created in the ESPA . . . there was no need for the creation of a ground water management area encompassing the entire ESPA.").

The Department specifically asked whether tributaries of the ESPA should be part of any GWMA. Pocatello does not support the adoption of a GWMA, so the question of whether tributaries should be included is already answered. However, Pocatello would not resist expansion of the Area of Common Ground Water under Rule 50 to include the Portneuf and other tributaries with a known connection to the ESPA. We believe expansion of the Rule 50 ACGW is preferable to the GWMA, and a better solution to ensuring fair and effective conjunctive administration.

With warm regards,

Sarah A. Klahn, Esq.

cc: A. Dean Tranmer, Esq.

What are the hydrologic trends?

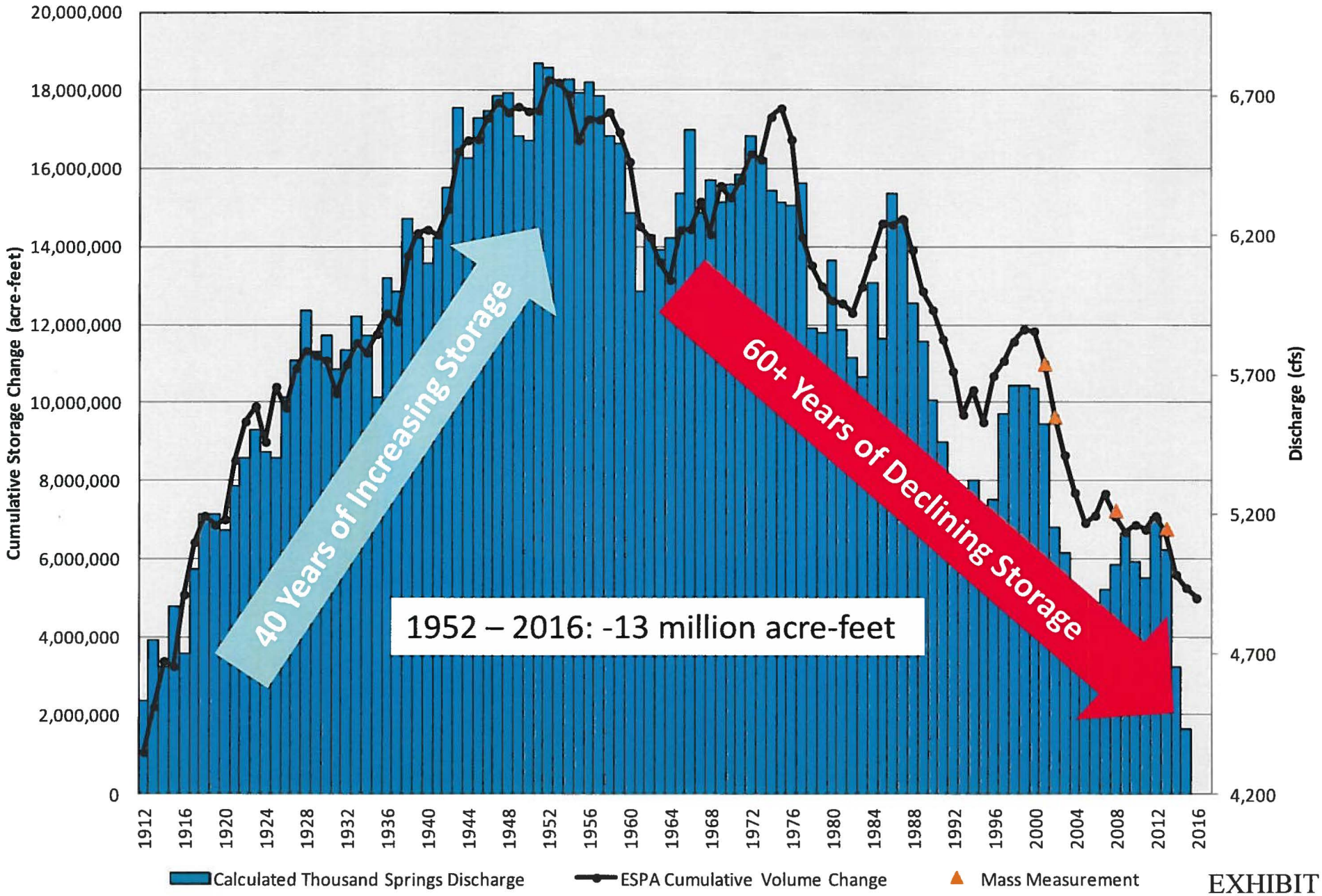

EXHIBIT 1

ESPA Water Balance Summary
From ESPAM 2.1 Water Budget
1981 - 2008 Calibration Period

Aquifer Inflows	Percent of Total (%)	Average Annual (MAF/y)	Cumulative Total (28 years) (MAF)
Non-irrigated Recharge	9.2%	0.71	19.9
Tributary Basin Underflow	14.4%	1.11	31.1
Perched River Seepage	8.3%	0.64	18.0
Recharge from SW Irrigation	31.2%	2.41	67.5
Canal Seepage	36.9%	2.85	79.8
Total Inflows	**100.0%**	**7.73**	**216.3**
Aquifer Outflows			
Net Irrigation Pumping	27.9%	-2.23	-62.5
Wetland ET	1.7%	-0.14	-3.9
Urban and Miscellaneous Pumping	3.0%	-0.24	-6.81
Reach Gains - Above Minidoka	12.8%	-1.02	-28.7
Reach Gains - Kimberly to King Hill	54.5%	-4.35	-121.9
Total Outflows	**100.0%**	**-7.99**	**-223.8**
Aquifer Storage			
Change in Storage		**-0.26**	**-7.4**
Balance			
Total Inflows		7.73	216.3
Total Outflows		-7.99	-223.8
Change in Storage		-0.26	-7.4
Balance (Inflow - Outflow - Δstorage)		**0.00**	**-0.1**

Source

Water budget output from IDWR's ground water model of the Eastern Snake Plain Aquifer (ESPAM 2.1
Units are in million acre-feet (MAF) or million acre-feet per year (MAF/y).