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Attorneys for Rangen, Inc.

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

IN THE MATTER OF THE FOURTH
MITIGATION PLAN FILED BY THE IDAHO
GROUND WATER APPROPRIATORS FOR
THE DISTRIBUTION OF WATER TO
WATER RIGHT NOS. 36-02551 & 36-07694
IN THE NAME OF RANGEN, INC.

“MAGIC SPRINGS PROJECT”

Docket No. CM-MP-2014-006

**RANGEN, INC.’S CLOSING BRIEF
IN OPPOSITION TO IGWA’S
FOURTH MITIGATION PLAN**

Rangen, Inc., through its attorneys, submits the following Closing Brief in Opposition to IGWA’s Fourth Mitigation Plan.

I. INTRODUCTION

IGWA filed its Fourth Mitigation Plan on August 27, 2014. *See IGWA’ Fourth Mitigation Plan and Request for Expedited Hearing.* The Fourth Mitigation Plan has two components: (1) a temporary pipeline to divert .5 cfs from Magic Springs to Rangen’s Research

Hatchery from January 19, 2015 – April 1, 2015; and (2) a permanent pipeline to divert up to 9.1 cfs from Magic Springs to Rangen’s Research Hatchery beginning April 1, 2015. The Director conducted a hearing on IGWA’s Fourth Mitigation Plan on October 8, 2014. At the end of the hearing, the Director told the parties that he was inclined to deny the temporary pipeline, but approve the permanent pipeline. (Tr., p. 258, l. 5 – p. 259, l.12).

Rangen respectfully requests that the Director deny both components of the Magic Springs Project because: (1) it is inconsistent with the conservation of resources and public interests and other factors set forth in CM Rule 43.03.j.; (2) it places all risk of non-delivery on Rangen and has no contingency provisions to protect Rangen’s senior interests as required by CM Rule 43.03.c; (3) there is no way to administer the plan because IGWA has failed to provide even the most basic information as required by CM Rule 43.01.b; and (4) it will not satisfy IGWA’s current mitigation obligation. IGWA has not carried its burden of demonstrating that the Magic Springs Project will prevent, or compensate for, the material injury caused by junior-priority ground water pumping. In fact, if the Fourth Mitigation Plan is implemented, it will actually turn non-consumptive water rights into consumptive rights and allow junior-priority ground water pumping to continue unabated in the Eastern Snake Plain Aquifer (“ESPA”) despite the material injury it is causing. For these reasons, Rangen requests that IGWA’s Fourth Mitigation Plan be denied.

II. ARGUMENT

A. The Magic Springs Project is Inconsistent with the Conservation of Resources, Public Interests, and other CM Rule 43.03.j. Criteria.

The CM Rules and the doctrine of prior appropriation mandate that upon a determination of material injury, out-of-priority pumping may only be allowed pursuant to a properly approved “mitigation plan.” *In the Matter of Distribution of Water to Various Water*

Rights, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013); IDAPA 37.03.11.040.01. Mitigation Plans are governed by CM Rule 43. Subsection three of the Rule sets forth the criteria that the Director must use to evaluate whether the Magic Springs Project should be approved. Rule 43.03.j. states in relevant part:

Factors that may be considered by the director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following:

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge.

IDAPA 37.03.11.43.03.j.

The Magic Springs Project does not satisfy the 43.03.j. criteria and should be denied on that basis. The Plan is inconsistent with the conservation of water resources, will likely injure other water rights, and will allow junior-priority ground water pumping to continue at a rate that exceeds the rate of future natural recharge of the ESPA.

Frank Erwin is the water master of Water District 36A where Rangen's Research Hatchery is located. (Tr., p. 5, ll. 17-18). Rangen took Mr. Erwin's deposition on September 25, 2014, and his testimony was submitted as Exhibit 2013 at the Hearing. Mr. Erwin explained during his deposition that the Fourth Mitigation Plan involves the lease or purchase of water rights from the Magic Springs facility owned by SeaPac and the delivery of a portion of that water (up to 9.1 cfs) through a pipeline to Rangen. (Tr., p. 6, l. 17 – p. 7, l. 4). The water rights involved in the lease or purchase show "fish propagation" as the beneficial use on their partial decrees. (Tr., p. 8, l. 25 – p. 9, l. 13). "Fish propagation" rights are "non-consumptive" rights. (*Id.*).

The SeaPac facility is located close to the Snake River (Tr., p. 10, ll. 8-11). There is

no dispute that the Magic Springs water is used by SeaPac in its raceways and the water then flows to the Snake River. During his deposition, Mr. Erwin was asked to address whether the water diverted from SeaPac, if delivered through a pipeline to Rangen's Research Hatchery, would make its way to the Snake River. Mr. Erwin explained that it would not during the irrigation season:

Q. I want you to walk through with me, Frank -- and this whole discussion today is about if 10 cfs is delivered to the Rangen facility, what happens to the 10 cfs of water. Okay?

A. Okay.

Q. All right. Frank, I want you to walk through with me -- I want to get an opinion whether the delivery of this nonconsumptive water to the Rangen facility would, in fact, make its way down to the Snake River through Billingsley Creek.

A. From my standpoint, as a watermaster, I would assume that once the 10 cubic foot per second of water, or whatever quantity was provided, left the Rangen facility and entered Billingsley Creek, I would assume that that -- at that point, it would become waters of the State of Idaho, and it would be up to the watermaster to administer it by priority.

So therefore, that water would be diverted to the particular diversions that are in priority and in season with the water rights. *So part of the year, I would assume that that water would not make it to the Snake River, it would be diverted and used for either irrigation or other beneficial uses, possibly.*

Q. *So you said during a given "part of the year." I take it you mean the irrigation season?*

A. *Yes.*

(Tr., p. 10, l. 18 – p. 11, l. 19) (emphasis added).

Mr. Erwin went on to explain that where the water would actually be used depended on how much water was being delivered through the proposed pipeline and when. (Tr., p. 11, l. 20 – p. 12, l. 12). He explained that during the Spring and Fall most of the water would likely be used in the Curren Ditch after it left Rangen's Research Hatchery. (Tr., p. 12, l. 23 –

p. 13, l. 17). He explained that the water would likely be used by the Buckeye and very little of it would return to the Snake River. (Tr., p. 14, l. 23 – p. 15, l. 5).

Mr. Erwin testified that during the Summer months if the water were delivered down Billingsley Creek it would likely be consumed by irrigation before it reached the Snake River. (Tr., p. 19, l. 15 – p. 20, l. 12). He explained that the Billingsley Creek water users are short of water. (Tr., p. 22, ll. 15-18). He has been able to avoid delivery calls by Billingsley Creek water users in the past only because of agreements to rotate water use. (Tr., p. 23, ll. 9-16). Mr. Erwin testified that he has no way to ensure the delivery of the additional 10 cfs from Rangen's Research Hatchery to the Snake River. (Tr., p. 20, l. 13 – p. 21, l. 1). The bottom line of Mr. Erwin's testimony is as follows:

Q. If you were required to deliver by priority beginning 2015, do you have an opinion as to whether the 10 cfs that we're talking about of additional water from Magic Springs would ever make it to the Snake River?

A. I don't believe that it would, no.

(Tr., p. 23, l. 22 – p. 24, l. 1) (emphasis added).

Mr. Erwin's testimony makes it clear that if the Fourth Mitigation Plan is approved and actually implemented by IGWA, it will effectively turn a 10 cfs non-consumptive right that supplies the Snake River into a consumptive right that does not make its way to the river. That is an improper enlargement of the existing right that is prohibited under CM Rule 43.03.i. The impact of the enlargement is that the Snake River, which is presently flowing at historically low levels, will be short an additional 10 cfs of water and ground water users will continue to pump even though the rate of aquifer depletion exceeds the rate of natural recharge. The Director found in his *Final Order* on Rangen's Delivery Call that:

75. For the time period from October of 1980 through September of 2008, average annual discharge from the ESPA exceeded annual average recharge by

approximately 270,000 acre feet, resulting in declining aquifer water levels and declining discharge to hydraulically connected reaches of the Snake River and tributary springs.

(Exh. 2001, p. 16, ¶ 75). This means that so long as junior-priority ground water pumping is allowed to continue unabated, spring flows will continue to decline and the Snake River flows will continue to be reduced.

Minimum stream flows are guaranteed by the State of Idaho to Idaho Power Company through the Swan Falls Agreement (*see Clear Springs v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) for a discussion of the Swan Falls Agreement). The Department of Water Resources recognizes that it has an obligation to manage the ESPA-Snake River system to ensure compliance with the Swan Falls Agreement and avoid injuring trust water rights. *See IDWR Actions Related to the Swan Falls Agreement*, presented by Brian Patton on August 6, 2013 to the Legislative Natural Resources Interim Committee (attached hereto as Appendix A). The Fourth Mitigation Plan does nothing to address the injury caused by junior-priority ground water pumping within the ESPA. The Fourth Mitigation Plan runs afoul of the Department's obligation to manage and protect the ESPA and, is, therefore, contrary to public interests and the conservation of resources.

The Magic Springs Project does not add any new water to the Hagerman Valley and does not reduce ground water pumping. In fact, the Plan, if actually implemented, further exacerbates the water shortage because it takes water from an area that is already short and puts it in a Snake River tributary where it will be consumed before it reaches the river. Rather than mitigating for the impact of ground water pumping, the Fourth Mitigation Plan compounds that impact and would allow continued mining of the ESPA. The Director may not disregard the injury that continues to be done to the ESPA and allow junior ground water

pumping to continue under such a plan.

If unappropriated water were available at Magic Springs and IGWA applied for a new water right to pump water from Magic Springs to the head of Billingsley Creek for the purpose of raising fish and irrigating, such a water right would almost certainly be denied. There is currently a moratorium on such new consumptive rights. *April 30, 1993 Amended Moratorium Order*. If the Department were to approve such a new water right, it would require mitigation for the impact of the new water right.

Because the Fourth Mitigation Plan is inconsistent with public interests and the conservation of resources and allows ground water pumping in the ESPA to continue at a rate that exceeds natural recharge, the Director should deny IGWA's Fourth Mitigation Plan.

B. The Magic Springs Plan Puts All Risks on Rangen and Does Not Provide Any Contingency Provisions.

Conjunctive Management Rule 43.03.c. requires that a mitigation plan have a “**contingency provision**” to protect the senior user in the event that mitigation water becomes unavailable. See IDAPA 37.03.11.43.03.c. This is a mandatory part of any approved mitigation plan. *In the Matter of Distribution of Water to Various Water Rights*, 155 Idaho 640, 315 P.3d 828 (2013). In its September 26, 2014 Memorandum Decision and Order on Petitions for Review, the SRBA invalidated the Director's Methodology Order in the Surface Water Coalition's delivery call because the Director's decision did not have a contingency plan to protect the senior's interests. See, e.g., *Memorandum Decision and Order on Petitions for Judicial Review, In The Matter 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*, CV-2010-382, pp. 13, 15. The Director stated

during the hearing on IGWA's Fourth Mitigation Plan that given the SRBA Court's recent decision, he feels a "heightened" obligation to protect senior users such as Rangen. (Tr., p. 131, l. 18 – p. 132, l. 6).

As the proponent of the Fourth Mitigation Plan, IGWA had the burden of showing at the hearing that the Magic Springs Project satisfies the criteria of CM Rule 43.03 and should be approved so that out-of-priority ground water pumping can continue. At the close of the evidence, IGWA's proposed plan raises more questions than it answers:

* **Who is going to acquire the water rights from SeaPac and who will be the owner/holder of those rights?** The Letter of Intent specifies that IGWA is going to acquire the water rights from SeaPac (Exh. 1003 at ¶ 1). The Transfer Application shows that the applicant is "IGWA for North Snake GWD, Magic Valley GWD, and Southwest ID". Who will be shown as the owner/holder of the rights? IGWA? The Districts? This is important and needs to be the same as the party constructing and operating the proposed pipelines.

* **What are the terms of the water acquisition from Sea Pac?** The only document that IGWA submitted at the hearing was a "Letter of Intent" with SeaPac. *See* Exh. 1003. The Letter of Intent is not a contract. It does not specify whether the water will be leased or purchased and does not spell out any of the terms or conditions. Although Lynn Carlquist, the Chairman of the North Snake Ground Water District and the IGWA Board Member who testified at the hearing, offered the opinion that he expected to sign an agreement "in the near future," he acknowledged that IGWA and the Districts have not yet agreed upon a price with SeaPac. (Tr., p. 39, l. 23 – p. 40, l. 22). IGWA also presented no evidence of how long the agreement with SeaPac would last.

* **What are the terms of the lease of the Aqua Life facility from the Idaho Water Resource Board?** Part of the anticipated agreement with SeaPac also requires IGWA to obtain a long-term lease of the Aqua Life facility that it will then assign to SeaPac. (Tr., p. 41, ll. 9-13). Mr. Carlquist acknowledged that IGWA has yet to agree on a price with the Idaho Water Resource Board for the lease of the Aqua Life facility. (Tr., p. 89, l. 18 – p. 90, l. 20). No lease agreement was offered as evidence.

* **How does IGWA propose to construct the pipelines across the various parcels of land?** The Magic Springs Project involves the construction of a pipeline that is nearly two miles in length. This will require multiple easements which have not yet been secured. For example, IGWA produced two option agreements for easements signed by the Candys and Butch Morris. (Exhs. 1012 and 1013). Those option agreements, however, are specific to the Tucker Springs Mitigation Plan that IGWA submitted and do not give IGWA the option to build the Magic Springs pipeline over the property belonging to the Candys or Morris. (*See id.* at ¶¶ 1, 3 & 4 of Water Delivery Agreement).

* **Who is responsible for constructing the pipelines?** IGWA? The Districts? IGWA did not address this issue.

* **If IGWA is going to be responsible for constructing the pipelines, how will it fund construction?** No evidence was submitted. Mr. Carlquist testified that the three impacted Districts will pay for the pipelines, but who are they going to pay? The contractors? IGWA?

* **What is the agreement among the three impacted Districts for sharing those costs and how can it be enforced and by whom?** No evidence was submitted.

* **What remedy does IGWA or the Districts have if one of the Districts does not pay its share of construction?** No evidence was submitted.

* **Did the Districts approve the construction of the pipelines?** No evidence was submitted.

* **Have the Districts approved to pay for the construction of the pipelines?** No evidence was submitted. The only evidence submitted was the testimony of Lynn Carlquist that the North Snake Ground Water District has increased its assessments by approximately \$170,000 per year. (Tr., p. 111, ll. 6-8).

* **How will the funds be raised to pay for construction of the pipelines?** Mr. Carlquist's testimony that they have been discussing a loan with the Idaho Water Resource Board and are not worried about funding the project either through private or public loans is not sufficient for the Director to determine that they have the capital necessary to construct and maintain the pipelines. (See Tr., p. 108, l. 4 – p. 109, l. 13).

* **Who is going to own the pipelines?** No evidence was submitted.

* **Who is going to control the operation of the pipeline and decide how much water is delivered to Rangen and when?** No evidence was submitted.

* **Who is going to pay for the electricity to operate the pipelines?** No evidence was submitted.

* **Who is responsible for maintaining the pipelines?** No evidence was submitted.

* **Who is responsible for monitoring the pipelines?** No evidence was submitted.

* **Who is going to pay for on-going monitoring and maintenance?** No evidence was submitted.

* **Who is responsible for obtaining and paying for insurance for the pipeline?**

No evidence was submitted.

* **Who is responsible for obtaining and paying for insurance for any damages sustained by Rangen in the event of a pipeline failure of any kind?** No evidence was submitted.

* **Who is responsible for paying for damages suffered by Rangen in the event water is not delivered through the pipelines for some reason that is not covered by insurance (e.g., electricity is turned off for non-payment)?** No evidence was submitted.

Even with all of these unanswered questions, IGWA expects the Director to “conditionally” approve the Fourth Mitigation Plan. There is no provision within the Conjunctive Management Rules authorizing “conditional” approval. Even if such an approval could be given, it should not be given because the Fourth Mitigation Plan does not have any “contingency provisions” to protect Rangen’s interests as required by CM Rule 43.03.c.

Unfortunately, under the Fourth Mitigation Plan, Rangen bears all of the risk associated with non-performance, including the risk that the Magic Springs Project will not be built, that one or more components of the project will fail after construction, and that pumping will cease in the future because the proponents of the plan lose interest in the project or there are disputes among the proponents or there are financial problems. The disdain with which IGWA has treated the Director’s conditional approval of the Second Mitigation Plan illustrates the issues and risks with allowing continued pumping under a “conditionally approved” plan. According to Bob Hardgrove, IGWA abandoned the Second Mitigation Plan shortly after the hearing on the plan, maybe even before the Director issued an order approving the plan. (Tr., p. 189, l. 15 – p. 190, l. 9). Now that IGWA is willing to acknowledge the Second Mitigation Plan will never be built, Lynn Carlquist and the other irrigators are not concerned with curtailment because they have already gotten through yet another irrigation season and won’t turn on their pumps until next year. (Tr., 80, l. 23 – 81, l. 15). IGWA admitted at the beginning of the

hearing that it will not be delivering the mitigation water that it is obligated to deliver beginning January 19, 2015, and bluntly stated that it would not be surprised if a curtailment order were issued for the non-irrigation rights that are pumping at that time. IGWA is not concerned about curtailment at that time because it knows the irrigators will not be affected:

MR. RANDY BUDGE: We're not surprised. We won't be surprised if the Director has to issue a curtailment order on that date. *We don't have the ability and we're not intending to by this plan expect to fully satisfy it by the January 19th day. It's just the practical reality is that the curtailment order would affect those that could be pumping at that time.* We're attempting to provide mitigation for those that could be curtailed, which is essentially the nonirrigation rights.

(Tr., p. 15, ll. 5-14) (emphasis added).

Just like the Second Mitigation Plan that was conditionally approved, IGWA could simply decide not to implement the Fourth Mitigation Plan. They may have already done so. If IGWA decides to try to construct this project they may be unable to do so. IGWA's transfer application has not been approved and they have not obtained all of the necessary easements. Even if the project is built, IGWA could simply decide at some point in the future not to continue paying the power bill, the maintenance costs, or to pay for necessary repairs. Rangen bears all of the risks and there are no provisions in the Fourth Mitigation Plan to address these issues.

Joy Kinyon, the General Manager of Rangen's aquaculture division, testified at the hearing that Rangen will have to make significant changes to its operation to gear up for the delivery of 9.1 cfs of water. (*See* Tr., p. 238, l. 2 – p. 239, l. 9). It will have to hire additional professional and technical personnel and make capital investments in the facility itself. (*See id.*). Mr. Kinyon testified that he cannot start planning to make those changes because he has no idea when the water will be delivered, how much water will be delivered, or how long the

company can expect that water to continue. (Tr., p. 240, ll. 2-9). Mr. Kinyon explained that it would impact Rangen substantially if it made these types of investments and then the water was not delivered. (Tr., p. 239, l. 19 – p. 240, l. 1).

The Director should not simply accept the notion that IGWA will work out all of the details related to its Fourth Mitigation Plan after it is conditionally approved. Even if IGWA were prepared to answer all of the questions outlined above, the Plan is still fundamentally flawed because it does not have a contingency provision to deliver water to Rangen. Just by way of example, what remedy does Rangen have if the permanent pipeline is approved and water is delivered for a period of two years, but then there is a disagreement within IGWA or among the Districts concerning the payment of electricity and the pumps are shut off in January, 2017? Fish will be dead within a very short period of time and Rangen will be out of water because there is no backup delivery plan. Moreover, curtailment of junior-priority ground water pumping in January in this type of situation is simply inadequate to protect Rangen's interests.

The Director recognized some of the risks of the Magic Springs Project in his closing remarks:

But, Mr. Budge, in response to your suggestion that there's some parallel reasoning that I should apply to this latest proposal, I guess I would turn around and say I view it as just more of the same. And I'm not perhaps being as disparaging about it as Mr. Haemmerle is, but what I guess my problem is that I'm not certain with an April 1 deadline that Rangen will -- or that IGWA will have the pipeline half built or a third built or that any of it will be built at all.

(Tr., p. 262, ll. 16-21). Because the Fourth Mitigation Plan does not have contingency provisions to protect Rangen's interests, the Plan should be denied.

C. The Department cannot administer the Fourth Mitigation Plan because IGWA has failed to provide basic information related to who is covered.

Conjunctive Management Rule 43.01.b. provides that a mitigation plan identify the

water rights for which benefit the mitigation plan is proposed. *See* IDAPA 37.03.11.043.01.b. IGWA has not submitted any information related to the identities of those who will be covered by the Plan. This is problematic because the Plan has been submitted by IGWA “acting for and on behalf of its members and non-member participants in mitigation activities.” *See IGWA’s Fourth Mitigation Plan and Request for Expedited Hearing*, p. 1. Who are IGWA’s members and non-member participants? How can this Mitigation Plan be administered by the Department if it were approved? How does a ground water pumper who diverts under junior-priority rights, but who does not initially participate in the Fourth Mitigation Plan, participate on an equitable basis in this Plan as required by CM Rule 43.03.m? IGWA’s failure to provide this basic administrative information is grounds for denying the Plan.

D. The temporary pipeline to deliver .5 cfs beginning January 19, 2015 will not satisfy IGWA’s current mitigation obligation.

The Director recognized and commented on the obvious technical problems with IGWA’s proposed temporary pipeline (e.g., lack of security, inability to regulate temperature, etc.), and in fact, invited IGWA to convince him that his concerns were unwarranted. (Tr., p. 13, l. 23 – p. 14, l. 21). While the technical problems alone certainly justify the denial of IGWA’s plan, the proposal should also be rejected because it will not deliver the mitigation water to which Rangen is entitled.

The Director told IGWA during the hearing that the proposed temporary pipeline will not satisfy its current obligation to deliver 2.2 cfs of water to Rangen as of January 19, 2015. (Tr., p. 13, lines 8-15; p. 133, ll. 6-23; p. 258, l. 7 – p. 259, l. 13). He commented that any proposal to mitigate only for those ground water rights that are in use in January will not be approved and that he viewed the temporary pipeline “very dimly.” (Tr., p. 13, l. 8 – p. 14, l. 24; p. 259, ll. 7-14). The Director’s analysis of the proposed temporary pipeline is correct,

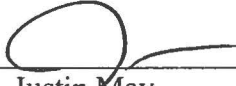
and that portion of IGWA's Fourth Mitigation Plan should be denied.

III. CONCLUSION

Backup generators may provide some insurance against a mechanical failure of the proposed pipelines, but they do not protect against a problem like a financial dispute among IGWA and/or its Districts to pay for the construction of the pipelines or the ongoing maintenance and electrical costs. The Fourth Mitigation Plan is fundamentally flawed because it fails to provide contingency provisions to protect Rangen. IGWA has failed to carry its burden of demonstrating that it satisfies the criteria set forth in CM Rule 43.03, and, for the reasons set forth above, Rangen respectfully requests that the Fourth Mitigation Plan be denied.

DATED this 15th day of October, 2014.

MAY, BROWNING & MAY, PLLC

By:  _____
J. Justin May

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 15th day of October, 2014, I caused a true and correct copy of the foregoing document to be served using the method indicated upon the following:

Director Gary Spackman Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098 Deborah.Gibson@idwr.idaho.gov	Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov kimi.white@idwr.idaho.gov	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Randall C. Budge Thomas J. Budge RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net tjb@racinelaw.net bjh@racinelaw.net	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>
Kathy McKenzie P.O. Box 109 Hagerman, ID 83332 knbmac@q.com	Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail <input checked="" type="checkbox"/>



J. Justin May

APPENDIX A

IDWR Actions Related to the Swan Falls Agreement

Water Management Implications of the Swan Falls Agreement

Brian Patton, Idaho Department of Water Resources

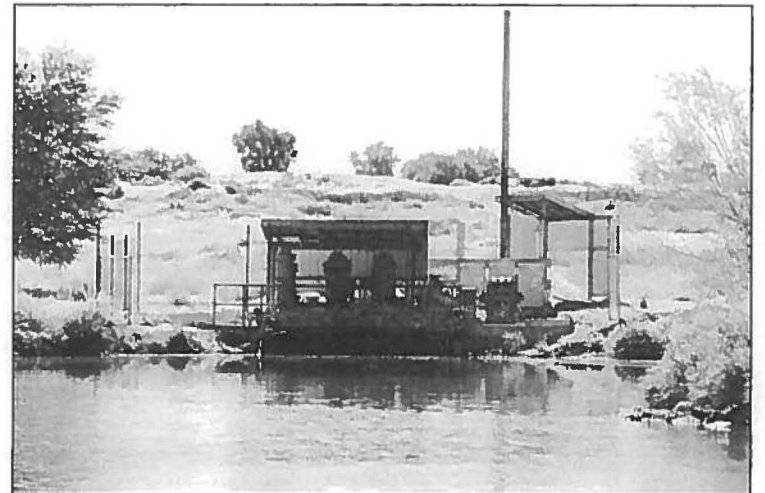
Presentation to the Legislative Natural Resources Interim Committee

August 6, 2013



IDWR Actions Related to Swan Falls Agreement - Water District 2

- Snake River from Milner Dam to Swan Falls Dam
- Created in July 2012
- Purpose is administration of water rights in this reach of river
 - ensure delivery of water according to water rights
 - Measurement and reporting of diversions
- About 150 diversions with irrigation rights totaling more than 3,000 cfs
- Phased in measurement device installation on diversions through 2016



IDWR Actions Related to Swan Falls Agreement

– Streamflow Measurement & Monitoring Plan

- Measurement & monitoring protocol for delivery of water to minimum flows at Murphy gage
- Main issue is how to adjust for effects of Idaho Power's operations on minimum flow at Murphy gage
 - Load following operations (increase or decrease flows based on power demands) can occur at Lower Salmon, Bliss, C.J. Strike, and Swan Falls
 - Requires measurement of change in storage at these reservoirs
 - Consider time lag effects on flows at Murphy gage
- Protocol being developed with together Idaho Power, water user representatives, and USGS as technical advisor



IDWR Actions related to Swan Falls Agreement

– Streamflow Measurement & Monitoring Plan

- Considerable effort on how best to measure change in storage
 - Flow method: requires many more gages than we have
 - Reservoir-Stage method: susceptible to wave and wind action; needs accurate bathymetry
- Next steps
 - Implement protocol using reservoir-stage method
 - Install several new gages
 - Implement flow method and compare with reservoir-stage method
 - Work with USGS to quantify uncertainty for both methods



Swan Falls Agreement

State obligation to ensure minimum flows at Murphy Gage just below Swan Falls Dam of:

- ✓ 3,900 cfs (4/1 through 10/31) and
- ✓ 5,600 cfs (11/1 through 3/31)

Swan Falls Dam



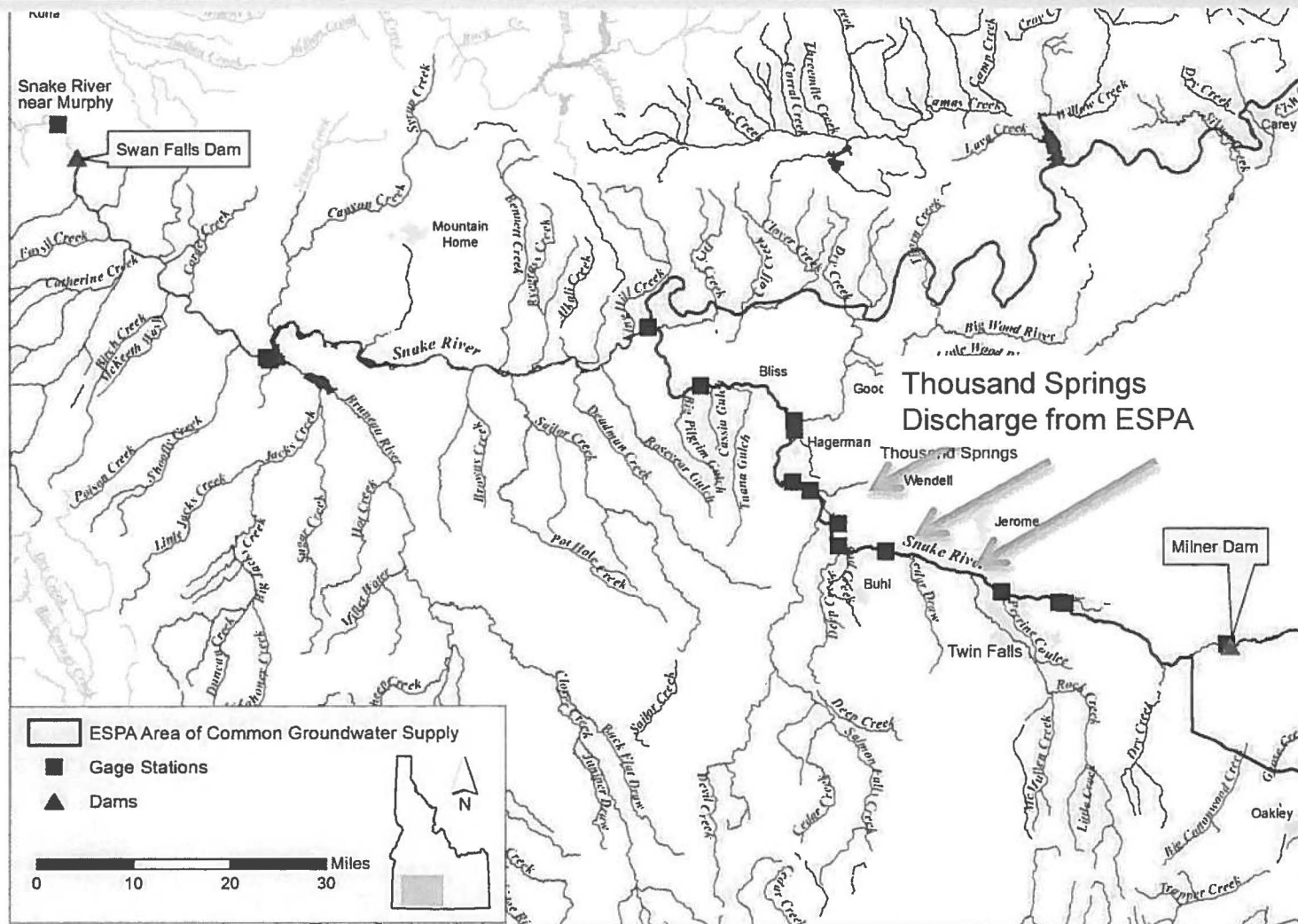
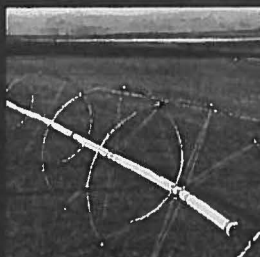
However, 180 miles Upstream at Milner Dam

- Water planning, policy, and practice provides for full development of Snake River above Milner Dam
- At times this practice reduces Snake River flow at Milner Dam to zero

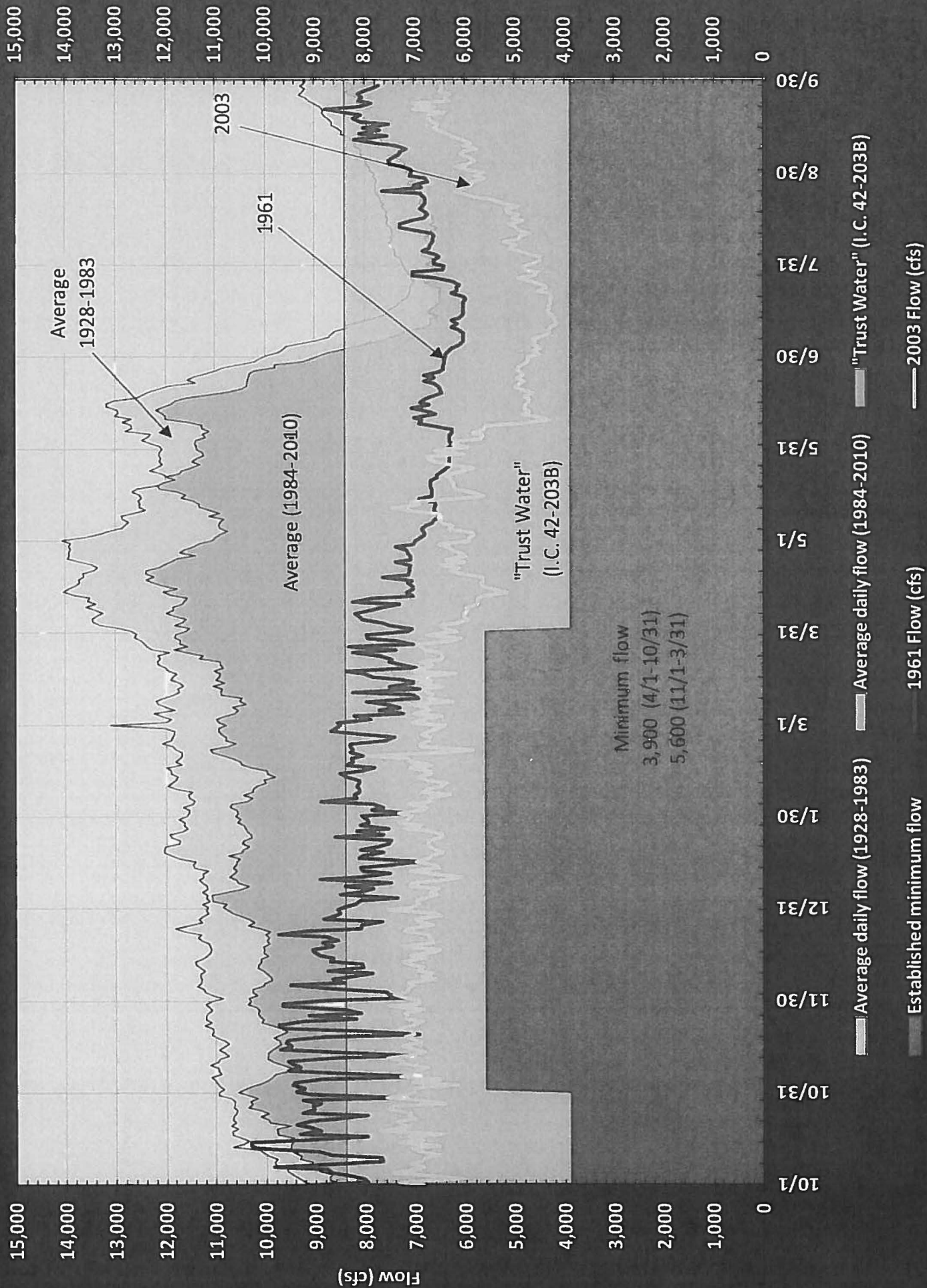


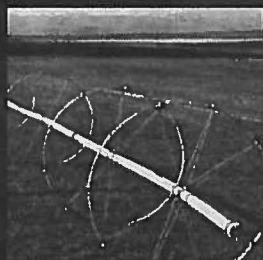
Milner Dam



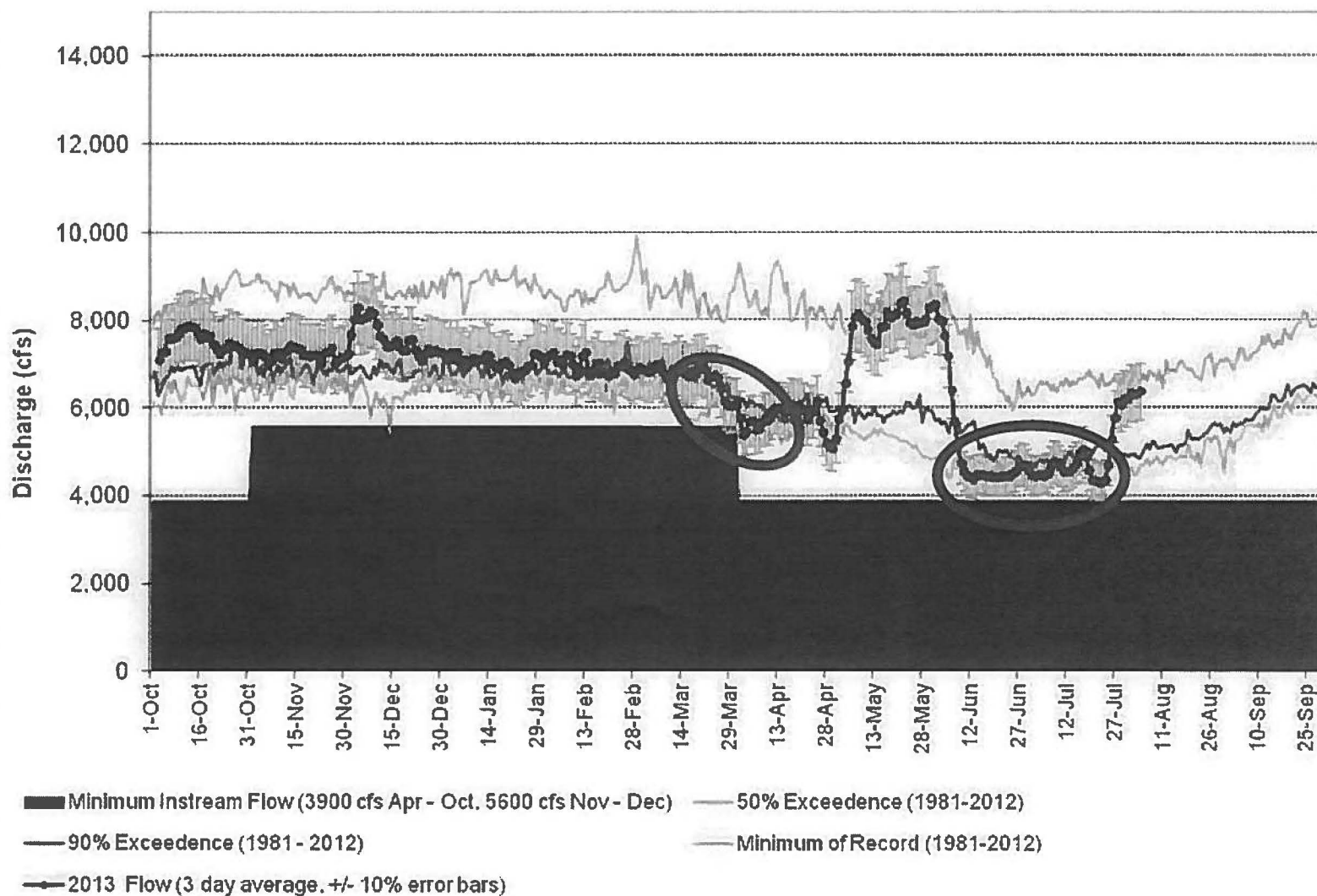


When flow is zero at Milner, flow at Swan Falls Dam is made up almost entirely of spring flows from the ESPA



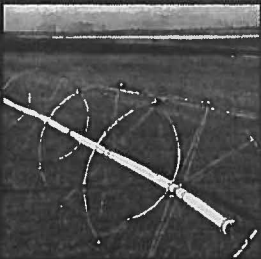


SNAKE RIVER NEAR MURPHY

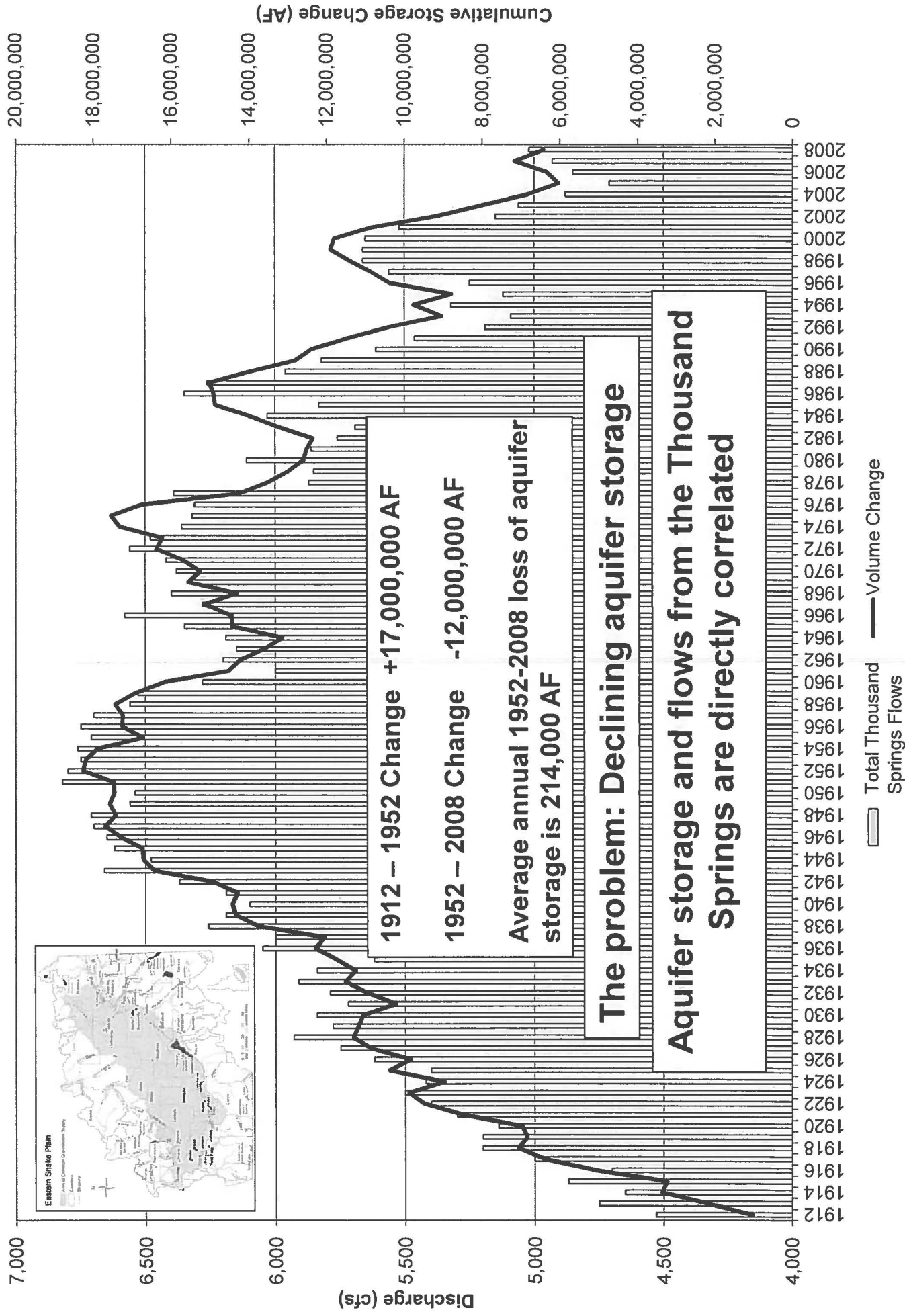


Implications of Swan Falls Agreement Combined with Milner Zero Flow Policy

- ESPA must be managed to sustain spring flows sufficient to meet the Swan Falls minimum flows
 - ✓Few junior-priority trust rights in river that could be curtailed
 - ✓Curtailement of junior trust rights in ESPA not good solution – delayed timing means effects don't reach river when needed and causes economic damage in process



Thousand Springs Discharge and Eastern Snake Plain Aquifer Cumulative Storage Change



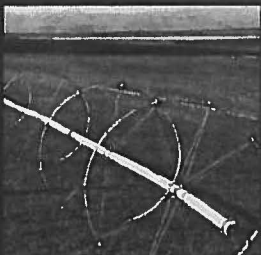
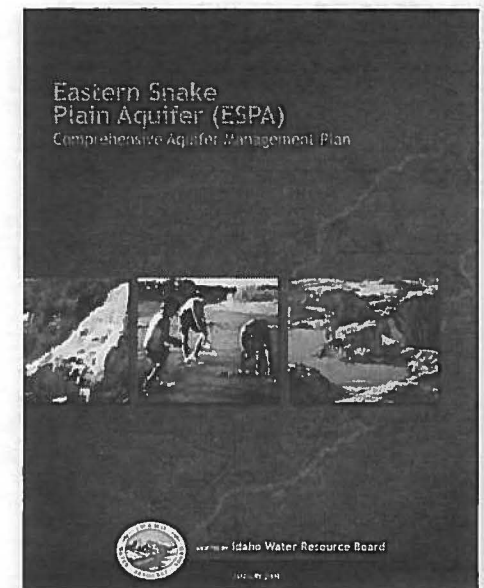
What tools are available to sustain spring flows?

- ✓ Managed aquifer recharge
- ✓ Ground water-to-surface water conversion projects
- ✓ Demand reduction (ground water use)
- ✓ Weather modification – more streamflow results in less supplemental ground water pumping



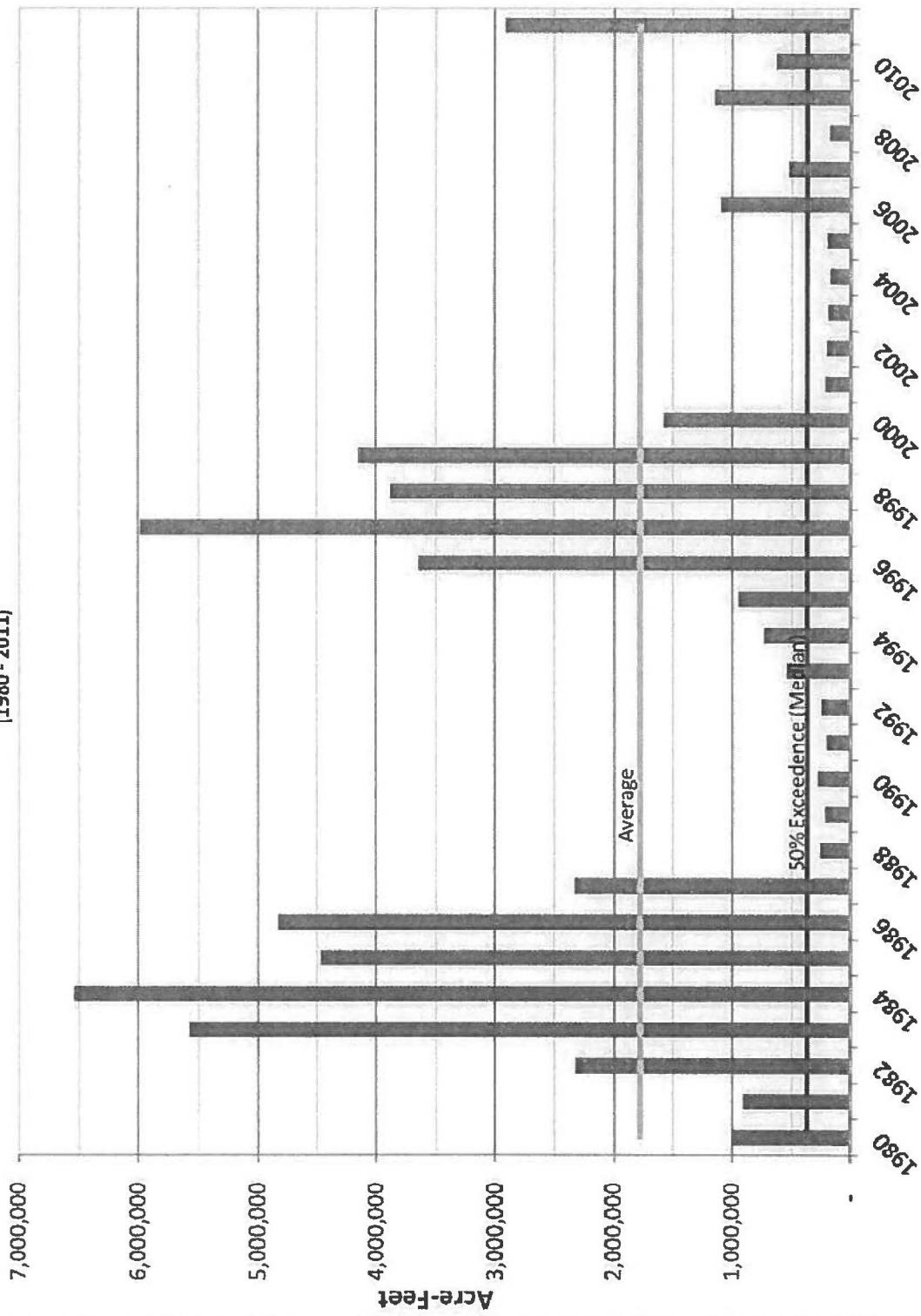
How does CAMP fit into the equation?

- ✓ CAMP lays out a goal for ESPA water budget change through a series of management actions
- ✓ Phase 1 of CAMP (200-300 KAF water budget change) is designed to stabilize aquifer storage - this should stabilize spring flows
- ✓ Phase 2 (600 KAF water budget change) is designed to recover some aquifer storage – this should recover some spring flows
- ✓ CAMP funding system not enacted
- ✓ Progress being made by using some IWRB funds to leverage water user funds and securing federal grants





Total Annual Volume of Natural Flow Passing Milner [1980 - 2011]





How does CAMP fit into the equation?

CAMP Progress:

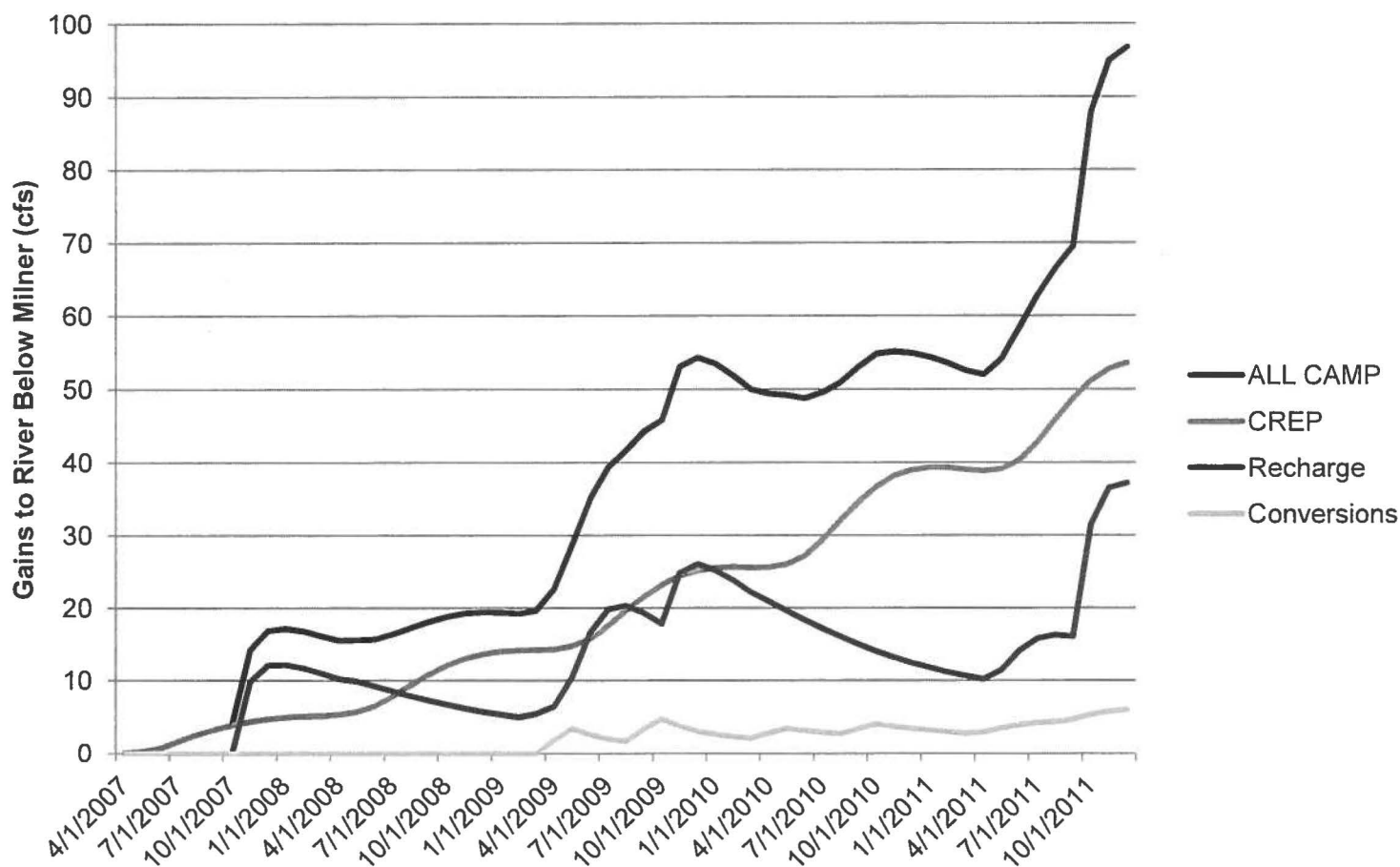
	Phase 1 CAMP Target	Progress 2009-2012
Recharge	100,000 AF/yr	117,111 AF/yr average
GW-SW Conversions	100,000 AF/yr	Projects installed on 11,612 acres. Should reduce GW pumping by 15,000 AF/yr
Demand Reduction	95,000 AF/yr	42,000 AF/yr (CREP)
Cloud Seeding	Pilot program – analyze results	19 remote-operated generators installed. IPCO estimates current operations will produce average of 124,000 AF/yr additional flow

Real test of success will be aquifer stabilization!



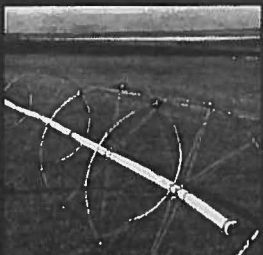
How does CAMP fit into the equation?

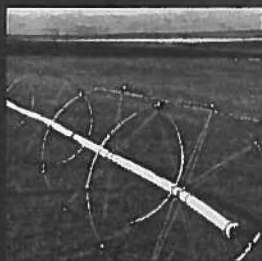
CAMP Activities: Effects on Snake River Flow Below Milner



How Does the Milner to King Hill Part B State Water Plan Fit into the Equation?

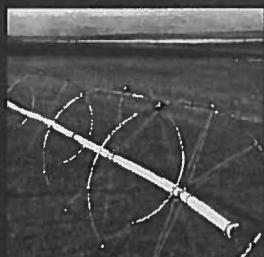
- Adopted in 1992 - focused on protected river designations for remaining free-flowing rapids
- Pressure from proposed hydropower development in reach
- Policy statement in plan calls for sending more water over Milner – does not reflect current understanding of agreements and legislation





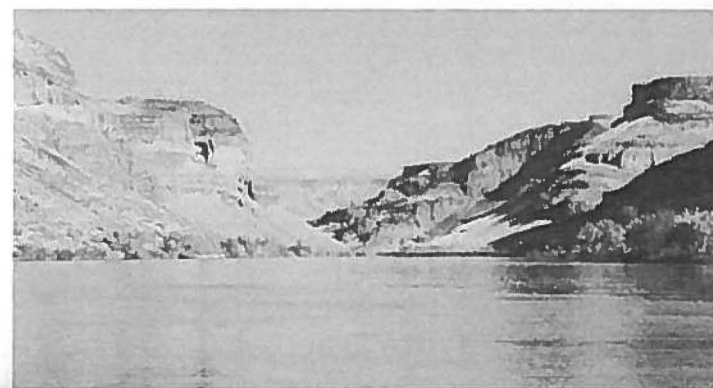
How Does the Milner to King Hill Part B State Water Plan Fit into the Equation?

- Could be revised and re-structured to lay out how state will maintain Swan Falls minimum flows:
 - ✓ Tie minimum flow obligations together with spring flow outcomes from CAMP
 - ✓ Develop predictive tools to forecast potential breaches of minimum flows
 - ✓ Use of IWRB's Palisades storage & acquisition or development of additional storage
 - ✓ Other projects that may be necessary to maintain minimum flows



How Does the Milner to King Hill Part B State Water Plan Fit into the Equation?

- Goal is to be proactive and have a unified plan for managing the combined ESPA-Snake River system to sustain multiple state objectives:
 - ✓ Stabilize ESPA
 - ✓ Milner Zero Flow (full development above Milner)
 - ✓ Swan Falls minimum flows
- Have opportunity to forestall problem



Questions?

