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Department of Water Resources

Attorneys for Petitioners Twin Falls Canal Company and North Side Canal Company

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF MODIFYING THE BOUNDARIES OF THE AMERICAN FALLS GROUND WATER MANAGEMENT AREA	)	PETITION TO INITIATE CONTESTED CASE

COME NOW, Petitioners, TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY (hereinafter "Canal Companies"), by and through their attorneys, BARKER ROSHOLT & SIMPSON LLP, and hereby file this petition to initiate a contested case in the above captioned matter.

INTRODUCTION

The Canal Companies seek timely agency review of the Director's *Final Order Modifying the Boundaries of the American Falls Ground Water Management Area* ("2003 Order") issued on August 29, 2003. The conditions for original designation of the American Falls Ground Water Management Area have continued, if not worsened, over the past two years. Recent ground water level measurements in the Eastern Snake Plain Aquifer ("ESPA") demonstrate significant ground water depletions over the past two years. Moreover, continued drought coupled with ground water withdrawals for irrigation and other consumptive uses, have

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resulted in inadequate water supplies to fulfill senior surface water rights. Declining spring flows and tributary reach gains continue to indicate, at the least, that the portion of the ESPA underlying the American Falls Ground Water Management Area (as defined by the Director's 2001 Order) is still "approaching the conditions of a critical ground water area." Accordingly, the Director's 2003 Order improperly modifies the boundaries of the American Falls Ground Water Management Area and should be rescinded.

FACTS

The Canal Companies are non-profit water delivery companies organized pursuant to the Carey Act (43 U.S.C. § 641) and the laws of the State of Idaho. The Canal Companies hold various natural flow water rights to the Snake River, along with irrigation storage rights in the United States Bureau of Reclamation's Minidoka Project (Jackson Lake, Palisades Reservoir, and American Falls Reservoir).

The Eastern Snake Plain Aquifer is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake Plain, Idaho." USGS Professional Paper 1408-F, 1992. The water supply in the ESPA is hydraulically connected to the Snake River and tributary water sources at various places and to varying degrees. *August 3, 2001 Order Designating the American Falls Ground Water Management Area* at 1. The Canal Companies' water rights depend upon various spring flows and reach gains to the Snake River that occur along various points of the river from Shelley, Idaho, downstream to Minidoka Dam just east of Burley, Idaho (hereinafter referred to as the "American Falls reach"). Spring flows and reach gains to the American Falls reach have been in steady decline over the past decade resulting in inadequate water supplies to satisfy the Canal Companies' water rights.

The history of various actions taken by IDWR in regard to the ESPA dates back at least to 1992 when the Director issued a *Moratorium Order* on the processing and approval of all applications for permit to appropriate water from all surface and ground water sources in the non-trust water area upstream of Milner Dam. *See May 15, 1992 Moratorium Order*; *January 6, 1993 Moratorium Order*; and *April 30, 1993 Amended Moratorium Order*. In that Order issued over ten years ago, the Director recognized that ground water levels had fallen in the ESPA due to a number of factors including the "increased volume of pumping." *See April 30, 1993 Order* at 1. The moratorium was issued, in part, to "protect existing water rights." *See id.* at 4.

Despite the moratorium, the ESPA has continued to suffer deleterious effects from drought and withdrawals of groundwater for consumptive purposes over the past decade. Recent ground water measurements performed by the United States Geological Survey detail the declining ground water levels in the ESPA, both from 1980 to 2002, including specific declines occurring from 2001 to 2002. *See* Exhibit A. On July 13, 2001, the Canal Companies requested the Director to designate a ground water management area for Basin 35 pursuant to Idaho Code § 42-233b.[1] The Director, as a result of his "independent initiative" and not in response to the Canal Companies' request, designated the American Falls Ground Water Management Area on August 3, 2001, and made the following findings of fact, among others:

> 3. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the area of the American Falls reach, cause significant reductions in the gains to this reach of the Snake River that result from hydraulic connection with the ESPA (herein termed "reach gains") within six (6) months or less from the time the withdrawals occur.
>
> 4. Although all consumptive ground water diversions from the ESPA eventually affect surface flows to varying degrees, the Department's model

[1] The Canal Companies' request, deemed by IDWR to constitute a "petition" to designate a ground water management area, was later withdrawn on August 24, 2001.

simulations and other analytical calculations demonstrate that ground water diversions occurring within a band on both sides of the American Falls reach varying in width from 1.6 kilometers to five (5) kilometers on each side of the river result in seasonal reach gain reductions equal to fifty percent (50 percent) or more of the amount of water diverted and consumptively used, and such reductions occur within six (6) months of the diversions.

* * *

7. ***The water supply available, including both natural flow and reservoir storage, for use under senior water rights that in part rely on reach gains is expected to be further diminished, should the drought continue, and inadequate to fully satisfy all senior surface water rights during the next irrigation season. This water supply is also expected to be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes that are diverted in close proximity to the area of the American Falls reach without mitigating the effects of the associated ground water depletions.***

8. ***Based upon the depletionary effects of ground water withdrawals on the reach gains and the inadequate water supply expected to be available for senior surface water rights, that portion of the ESPA along the American Falls reach may be approaching the conditions of a critical ground water area.***

2001 Order at 1-3 (emphasis added).

Several interested parties filed "responses" to the Canal Companies' "petition" or had filed other documents with IDWR requesting a hearing on the Director's August 3, 2001 Order. The formal administrative proceeding regarding the Director's 2001 Order was later stayed. *See September 17, 2001 Order.*

Apart from the formal administrative proceeding, the Canal Companies and other water users, including groundwater users in Basin 35, were actively participating in negotiations at this time to reach an agreement over the dispute about the effect of junior groundwater rights on senior surface water rights. The parties successfully negotiated an Agreement in Principle that was forwarded to the Director on August 31, 2001. Thereafter, principals to the agreement met over the course of the next five months and finalized and executed an Interim Stipulated Agreement to cover 2002 and 2003. Under the Agreement, the represented holders of senior

priority surface water rights, including the Canal Companies, agreed not to exercise their senior priorities against the represented holders of junior priority groundwater rights in exchange for commitments by the groundwater right holders to provide specific quantities of replacement water or reduce diversions. The Director later formally approved the Agreement by a final order. *See January 18, 2002 Order.*

As a result of the Agreement in Principle, and pending the drafting of the Interim Stipulated Agreement, the State of Idaho filed a motion with the Snake River Basin Adjudication (SRBA) District Court on November 19, 2001, seeking an order authorizing interim administration of water rights in Basins 35, 36, 41, and 43. On January 8, 2002, the SRBA Court issued an order authorizing interim administration of water rights by the Director in all, or parts, of basins 36 and 43 based upon a determination that such interim administration was necessary to protect senior water rights. Approximately one month later, the Director issued final orders creating Water District Nos. 120 and 130 for purposes of administration of water rights in Basins 35, 36, 41, and 43. *See February 19, 2002 Orders.*

On August 29, 2003, the Director issued a "final" order modifying the boundaries of the American Falls Ground Water Management Area, removing that portion of the ESPA north of the Snake River from the designation.

BASIS FOR PETITION

Despite the creation of Water District Nos. 120 and 130, and the effect of the Interim Stipulated Agreement between various water users, including the Canal Companies, the drought across southern and eastern Idaho has persisted into 2003.[2] In addition, ground water supplies, including spring flows and tributary reach gains have continued to decline since 2001. *See*

[2] Governor Dirk Kempthorne issued drought declarations for the following counties in 2003: Bonneville, Teton Lemhi, Jefferson, Bear Lake, Owyhee, Cassia, Madison, Blaine, Oneida, Caribou, Bannock, Bingham, Butte, Clark, Custer, Fremont, Lincoln, and Power.

Exhibits A, B. The Director's August 29, 2003 Order modifying the boundaries of the American Falls Ground Water Management Area expressly recognizes that "the severe drought conditions in 2001 . . . have continued to exist across the Snake River basin." *2003 Order* at 1. In addition, the Director's 2003 Order also expressly incorporates his earlier finding with respect to the available water supply for senior surface water rights:

> 7. ***The water supply available, including both natural flow and reservoir storage, for use under senior water rights that in part rely on reach gains is expected to be further diminished, should the drought continue, and inadequate to fully satisfy all senior surface water rights during the next irrigation season. This water supply is also expected to be reduced as a result of ground water withdrawals from the ESPA for irrigation and other consumptive purposes*** that are diverted in close proximity to the area of the American Falls reach without mitigating the effects of the associated ground water depletions.

2001 Order at 2 (incorporated by reference into 2003 Order)(emphasis added).

These findings specifically acknowledge that the bases for the designation of the American Falls Ground Water Management Area in 2001, drought and diminished water supplies available for senior surface water rights, still exist in 2003, and are further expected to exist into 2004. Despite these findings of fact, the Director's 2003 Order concludes the following:

> 3. The establishment of Water District Nos. 120 and 130, which includes the area within the boundaries of the American Falls GWMA over the ESPA located in Administrative Basins 35, 36, 41, and 43, provides the Director with the more comprehensive water administration authorities available under chapter 6, title 42, Idaho Code. These authorities together with the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) make it unnecessary to retain the current boundaries of the American Falls GWMA.
>
> 4. The Director should modify the boundaries of the American Falls GWMA area because it is no longer necessary to retain the current boundaries for water administration purposes.

2003 Order at 2.

The Director concludes that the establishment of Water District Nos. 120 and 130, along with his water administration authorities "makes it unnecessary" to retain the current boundaries of the American Falls Ground Water Management Area. Although water districts allow the Director to properly administer water rights and "distribute" water in accordance with the prior appropriation doctrine, a water district does not serve the same function as a designated ground water management area. Where a ground water source, such as the ESPA, may be "approaching the conditions of a critical ground water area," the Director is both authorized and obligated to take various actions to protect and manage that water source. I.C. § 42-233b. For example, in a ground water management area, the Director is authorized to approve a "ground water management plan." Formulating and approving a ground water management plan is not provided for in the water district statutes, or in the Director's orders creating Water District Nos. 120 and 130. Apart from having the ability to approve a ground water management plan, Idaho Code § 42-233b further gives the Director an immediate role in supervising ground water withdrawals, including ordering water right holders to "cease or reduce" withdrawals of ground water where necessary. Whereas the Director can take certain precautionary measures in a ground water management area to protect the water supply and prevent an aquifer from becoming a "critical ground water area," the water district statutes provide no such similar authority.

Consequently, although water right administration within the American Falls Ground Water Management Area is now governed by Water District No. 120, the Director's 2003 Order fails to adequately address the issue of why the ESPA along the American Falls reach (north of the Snake River) no longer continues to "approach the conditions of a critical ground water area." The 2003 Order still maintains a Ground Water Management Area designation for that

portion of the ESPA immediately south of the Snake River in the American Falls reach. Accordingly, the Director openly acknowledges that the portion of the aquifer south of the Snake River may still be "approaching the conditions of a critical ground water area." Since the portion of the ESPA north of the Snake River in the American Falls reach may have been "approaching the conditions of a critical ground water area" just two years ago, and the bases for that condition still exist today, there is no reason to modify the boundaries of the American Falls Ground Water Management Area.

The Canal Companies are entitled to hearing on this issue and others that may arise during the course of this contested case.

REQUEST FOR RELIEF

1. A hearing on the issues outlined above, including others that may arise during the course of this proceeding.

2. A stay of the Director's August 29, 2003 Order modifying the boundaries of the American Falls Ground Water Management Area pending this contested case proceeding.

3. Review and rescission of the Director's August 29, 2003 Order modifying the boundaries of the American Falls Ground Water Management Area.

4. Implementation of the authorized and required actions of the Director provided for in I.C. § 42-233b.

AUTHORITIES FOR THIS PETITION

This petition is filed pursuant to the following:

1. Idaho Code, Title 42, Chapter Two, the Director's August 3, 2001 Final Order Designating American Falls Ground Water Management Area; and the Director's August 29,

2003 Final Order Modifying the Boundaries of the American Falls Ground Water Management Area.

2. Idaho Code § 42-1701A(3).

3. IDAPA 37.01.01.104, which provides that a formal proceeding must be initiated by a pleading listed in IDWR Rules 210-280.

4. IDAPA 37.01.01.230.01(a), which provides for petitions seeking to correct, modify, amend or stay existing orders or rules.

4. IDAPA 37.01.01.230.01(c), which provides for petitions initiating contested cases.

Dated this 2nd day of October 2003.

BARKER ROSHOLT & SIMPSON LLP

John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Twin Falls Canal Company and North Side Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2nd, 2003, I served a true and correct copy of the foregoing *Petition to Initiate Contested Case* upon the following by hand delivery:

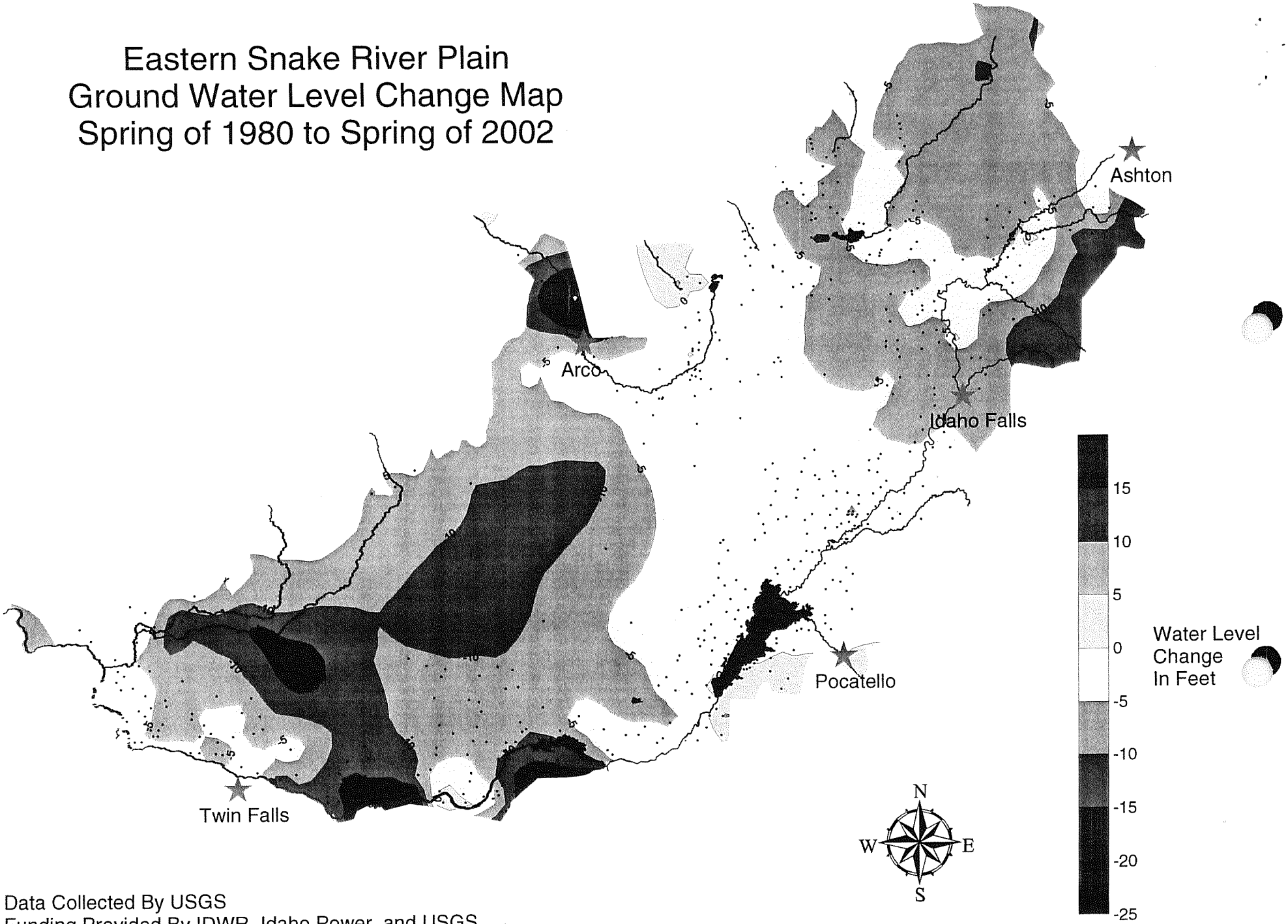
Original:

Director Karl J. Dreher
Idaho Department of Water Resources
1301 N. Orchard St.
P.O. Box 83720
Boise, Idaho 83720-0098

Travis L. Thompson

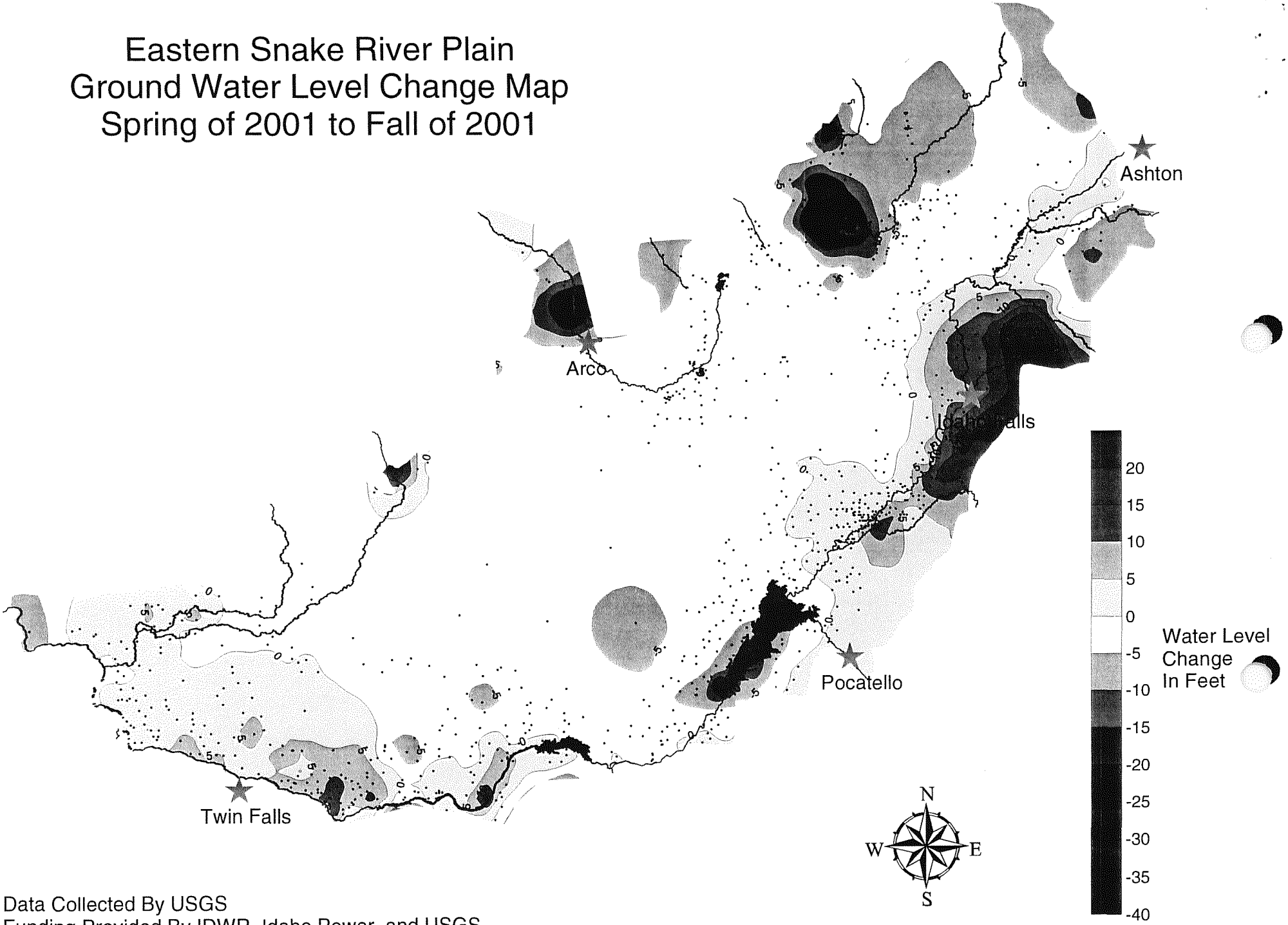
EXHIBIT A

Eastern Snake River Plain
Ground Water Level Change Map
Spring of 1980 to Spring of 2002



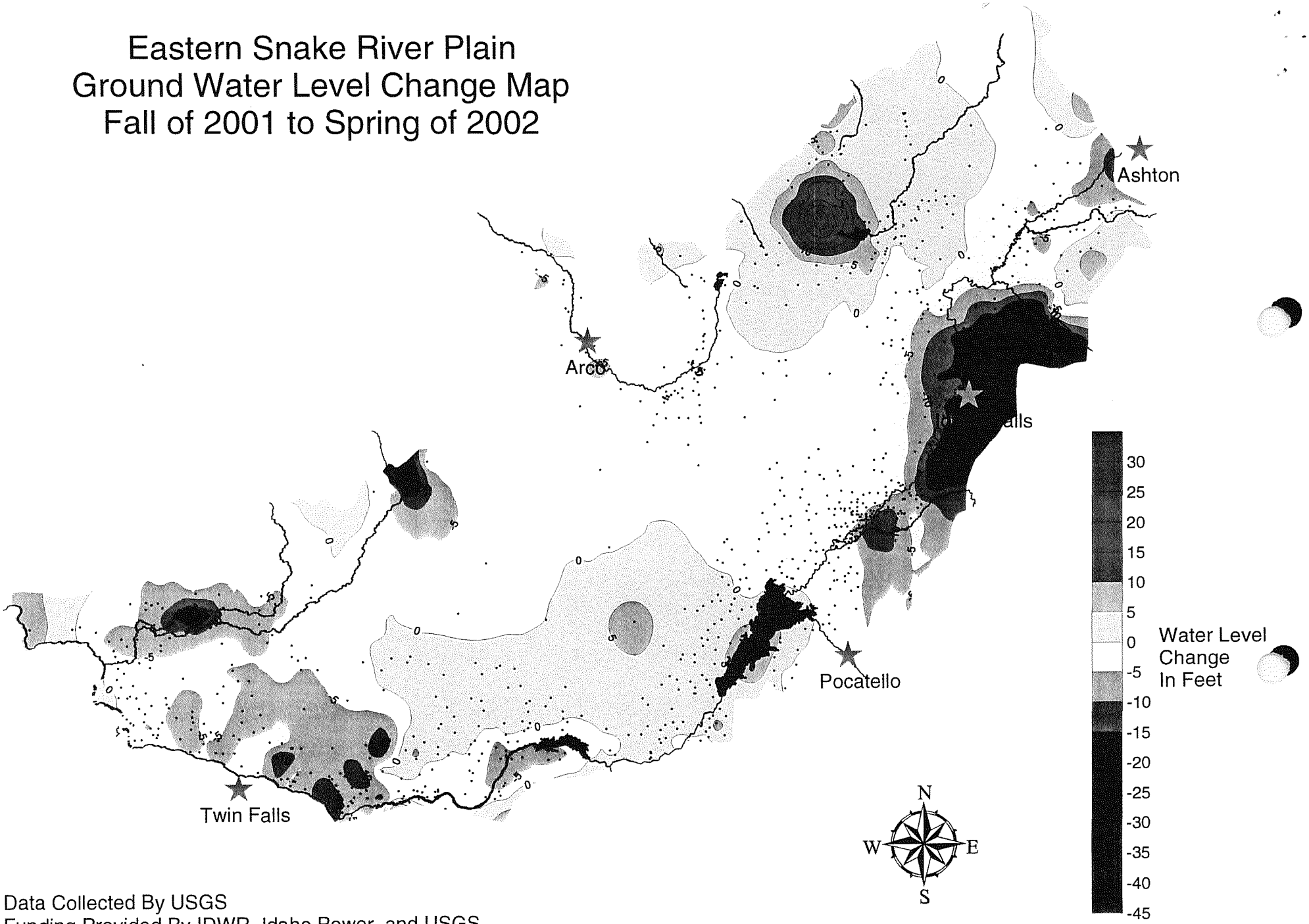
Data Collected By USGS
Funding Provided By IDWR, Idaho Power, and USGS
Maps Prepared By University of Idaho IWRRI

Eastern Snake River Plain
Ground Water Level Change Map
Spring of 2001 to Fall of 2001



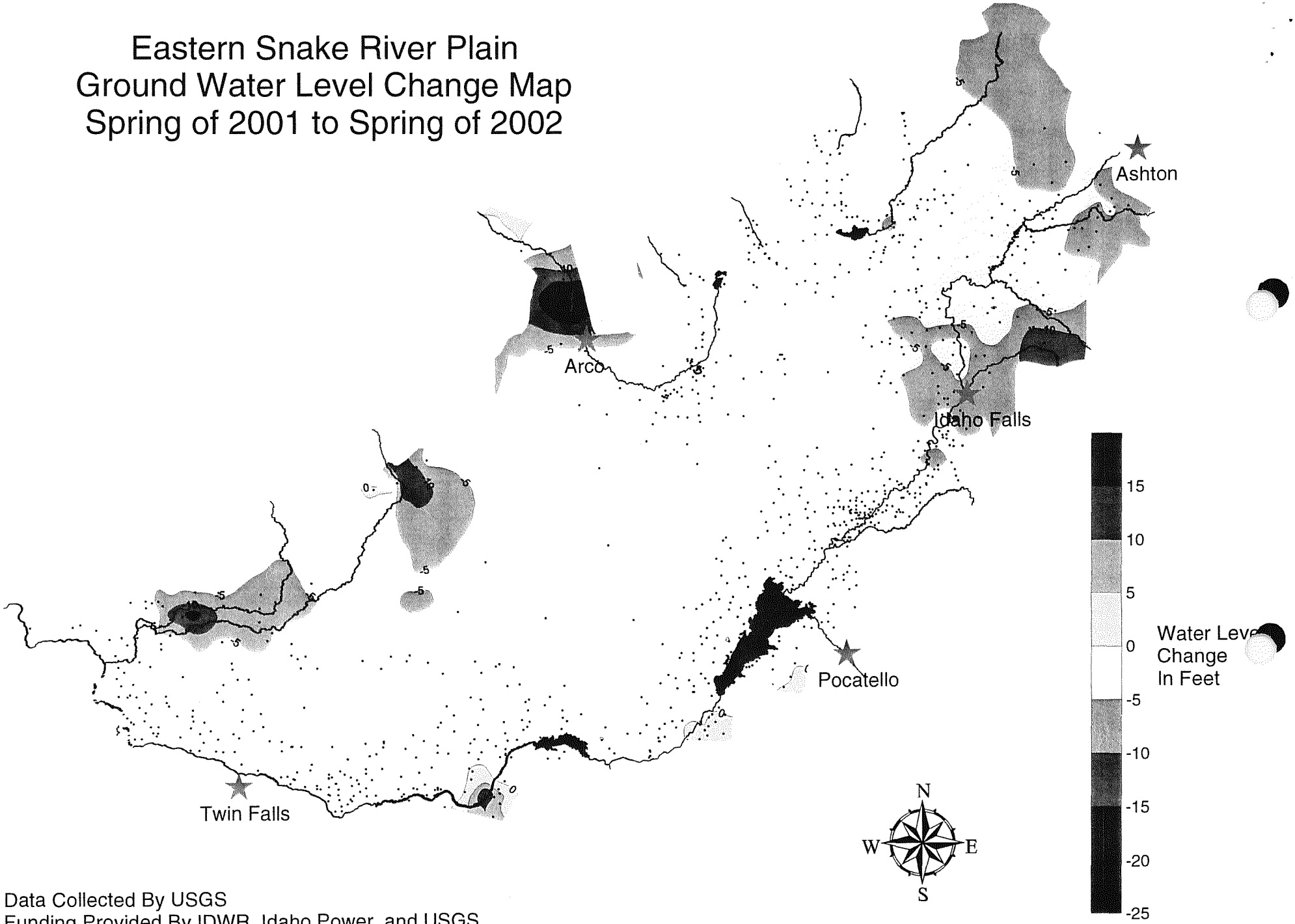
Data Collected By USGS
Funding Provided By IDWR, Idaho Power, and USGS
Maps Prepared By University of Idaho IWRRI

Eastern Snake River Plain
Ground Water Level Change Map
Fall of 2001 to Spring of 2002



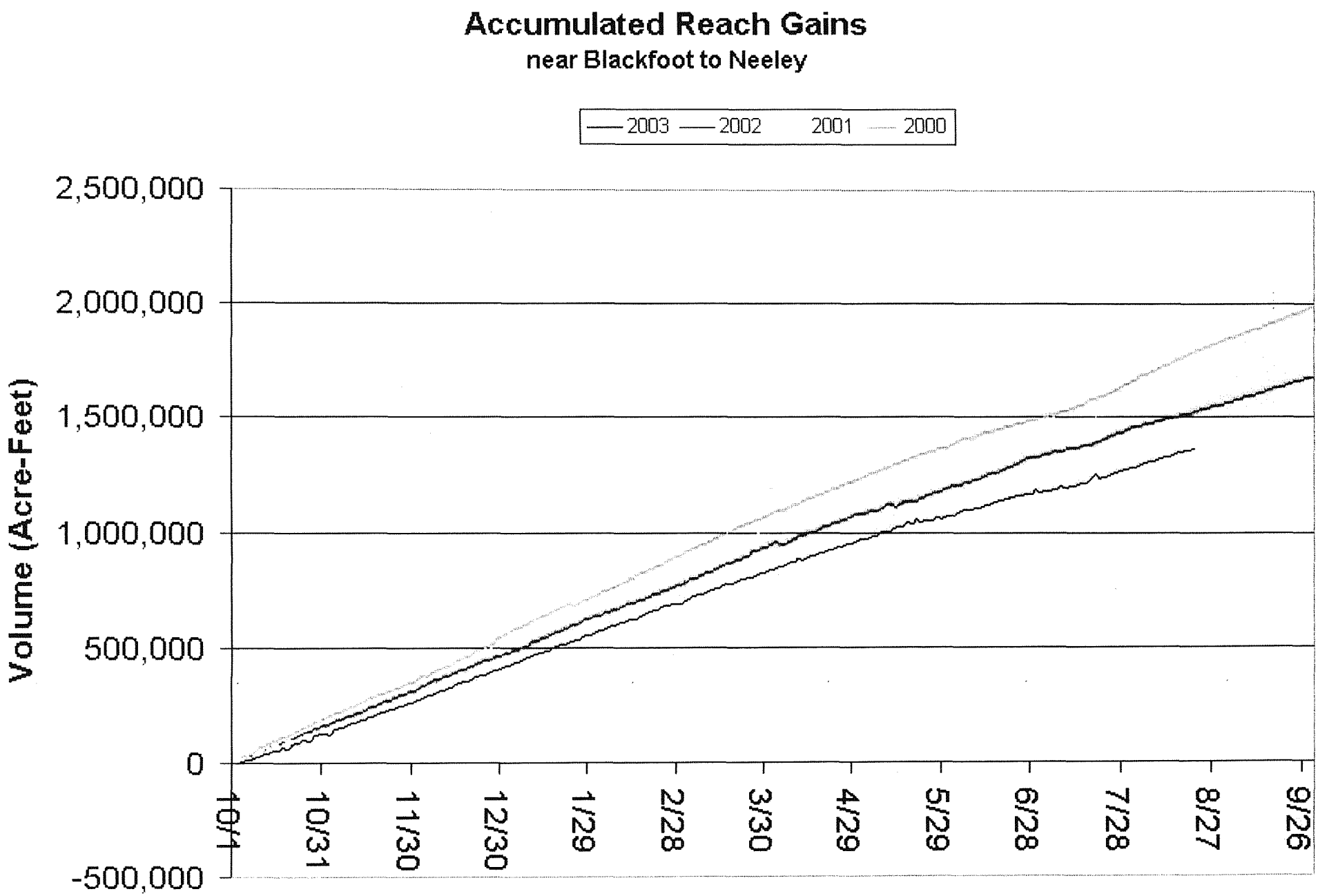
Data Collected By USGS
Funding Provided By IDWR, Idaho Power, and USGS
Maps Prepared By University of Idaho IWRRI

Eastern Snake River Plain
Ground Water Level Change Map
Spring of 2001 to Spring of 2002



Data Collected By USGS
Funding Provided By IDWR, Idaho Power, and USGS
Maps Prepared By University of Idaho IWRRI

EXHIBIT B


Accumulated Reach Gains
near Blackfoot to Neeley
2003
2002
2001
2000
Volume (Acre-Feet)
2,500,000
2,000,000
1,500,000
1,000,000
500,000
0
-500,000
10/1
10/31
11/30
12/30
1/29
2/28
3/30
4/29
5/29
6/28
7/28
8/27
9/26