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Attorneys for Idaho Ground Water Appropriators, Inc. (IGWA)

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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

Docket No. CM-MP-2016-001

**DECLARATION OF ELISHEVA M.
PATTERSON IN SUPPORT OF MOTION
TO VACATE ORDER**

IN THE MATTER OF IGWA’S
SETTLEMENT AGREEMENT
MITIGATION PLAN

1. I am one of the attorneys of record representing Idaho Ground Water Appropriators, Inc. (“IGWA”) in the above-captioned matter.
2. The above-captioned matter is a contested case of the Idaho Department of Water Resources (“Department” or “IDWR”).
3. IDWR Docket No. CM-MP-2016-001 concerns a Settlement Agreement between IGWA and the Surface Water Coalition (“SWC”) which was approved as stipulated mitigation plan by the Director of the Department (“2016 Plan”).

4. After the Director issued the *Final Order Regarding Compliance with Approved Mitigation Plan* on September 8, 2022, IGWA petitioned for reconsideration and a hearing on the matter. The petition for reconsideration was denied, but the hearing request granted and prehearing conference scheduled for November 10, 2022. Later, the hearing was scheduled for February 8, 2023.

5. On February 8, 2023, a hearing was held before the Director, regarding the interpretation and application of the 2016 Plan. Excerpts from the transcript from this hearing are attached hereto as Exhibit A. The full transcript from this hearing is attached hereto as Exhibit G, to provide a full record of the proceeding.

6. On March 14-15, 2024, a hearing was held before hearing officer Burdick regarding the alleged breach of the 2016 Plan by IGWA for the 2022 irrigation season. Excerpts from the transcript from this hearing are attached hereto as Exhibit B. The full transcript from this hearing is attached hereto as Exhibit H, to provide a full record of the proceeding.

7. On April 1, 2023, IGWA submitted its 2022 Performance Report and supporting workbook. A true and accurate copy of the 2022 Performance Report and a screenshot of the first tab from the workbook is attached hereto as Exhibit C. Both were submitted as exhibits in the March 14-15, 2024 hearing, as Exhibits 535 and 536, respectively.

8. After the February 2023 hearing the Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* on April 24, 2023. IGWA appealed the Director's Amended Final Order to the district court. The district court issued its memorandum decision and order, affirming the Amended Final Order, on November 16, 2023 in Ada County Case No. CV01-23-7893. A true and correct copy of the November *Memorandum Decision and Order* is attached hereto as Exhibit D.

9. The November *Memorandum Decision and Order* did not address IGWA's use of the 5-year baseline in the compliance method IGWA had reported to the Director. IGWA petitioned for rehearing on this issue, which the district court denied on March 5, 2024. A true and correct copy of the March *Order Denying Petition for Rehearing* is attached hereto as Exhibit E.

10. On February 22, 2024, IGWA submitted the First Addendum to 2022 Performance Report to the Steering Committee and the Department. A true and correct copy of the First Addendum is attached hereto as Exhibit F.

I, Elisheva M. Patterson, declare under the penalty of perjury pursuant to the laws of the State of Idaho that the information in this Declaration is true and correct.

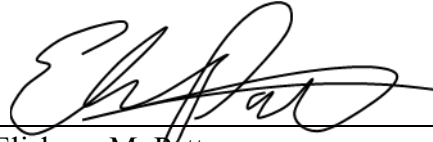
DATED this 8th day of April, 2024.



Elisheva M. Patterson
Attorneys for IGWA

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2024, I served the foregoing document on the persons below via email at the address shown:



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EXHIBIT A

Audio Transcription

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO GROUND WATER APPROPRIATORS, INC.,)

Petitioner,)

v.) Case No.

IDAHO DEPARTMENT OF WATER RESOURCES,) CV01-23-07893

and GARY SPACKMAN in his capacity as)

the Director of the Idaho Department of)

Water Resources,)

Respondents.)

_____)

TRANSCRIBER'S TRANSCRIPT ON JUDICIAL REVIEW

Appealed from the Idaho Department of Water Resources

GARY SPACKMAN, DIRECTOR

For Petitioner:

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TRANSCRIBED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

1 BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

2
3 IN THE MATTER OF THE DISTRIBUTION OF)
4 WATER TO VARIOUS WATER RIGHTS HELD BY)
5 AND FOR THE BENEFIT OF A&B IRRIGATION)
6 DISTRICT, AMERICAN FALLS RESERVOIR) IDWR DOCKET NO.
7 DISTRICT #2, BURLEY IRRIGATION) CM-DC-2010-001
8 DISTRICT, MILNER IRRIGATION DISTRICT,)
9 MINIDOKA IRRIGATION DISTRICT, NORTH)
10 SIDE CANAL COMPANY, AND TWIN FALLS)
11 CANAL COMPANY)

12 _____)
13 IN THE MATTER OF IGWA'S SETTLEMENT) IDWR DOCKET NO.
14 AGREEMENT MITIGATION PLAN) CM-MP-2016-001

15 _____)
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19 TRANSCRIBER'S TRANSCRIPT OF PROCEEDINGS

20
21
22 This hearing came on before the Idaho Department
23 of Water Resources on the 8th day of February, 2023,
24 before Director Gary Spackman.

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18 William Stoddard

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1 the objection. If you want to make an offer of proof,
2 that's fine.

3 MR. BUDGE: Fair enough. Thank you.

4 THE HEARING OFFICER: Okay. Other matters we
5 need to talk about before we start?

6 Okay. Are we ready to begin, Mr. Budge?

7 MR. BUDGE: I am. Thank you.

8 THE HEARING OFFICER: You may call your first
9 witness.

10 MR. BUDGE: IGWA will call as its first witness
11 Jaxon Higgs.

12 THE HEARING OFFICER: Mr. Higgs, come forward,
13 please. You get to be the ice breaker.

14 JAXON HIGGS: Here we go.

15 THE HEARING OFFICER: Raise your right hand,
16 please.

17

18 JAXON BRIAN HIGGS,

19 having been called as a witness by IGWA, was duly sworn

20 and testified as follows:

21

22 THE HEARING OFFICER: Do you solemnly affirm
23 that the testimony you give today will be the truth,
24 the whole truth, and nothing but the truth?

25 THE WITNESS: Yes.

1 requirement.

2 Q. Thanks. That's helpful.

3 You mentioned that they assign volumes, you
4 know, based on priority.

5 So are the districts giving their patrons
6 individual, you know, diversion limits, so to speak?

7 A. Yeah, in general. And I'll probably just
8 speak to the ones that I work for, because that's what
9 I'm familiar with. But they -- each individual, we
10 listed out their water rights that they held, what tier
11 they fell in, and then each allocation for individual
12 water rights.

13 And then that allocation for each
14 individual water right was summed up for that user.
15 And we didn't particularly care, as long as they were
16 meeting their legal requirements under their water
17 rights, we didn't care which wells that water came out
18 of, just as long as they stayed under their total
19 allocated volume.

20 Q. You mentioned that you were summing up
21 their water rights.

22 Are you saying if they had multiple water
23 rights?

24 A. Yeah.

25 Q. Explain that.

1 A. So if you have had two water rights, say,
2 in one -- and they ever they were each for 50 acres, we
3 would -- we would place them in a tier, based on their
4 priority date. And if they were both allocated 50
5 acre-feet, then that user would be able to pump 100
6 acre-feet. So essentially a sum of the allocations for
7 the individual water rights.

8 Q. Gotcha. And the tiers reflect the
9 diversion limit assigned to water rights in that
10 category within that tier?

11 A. Yeah, exactly.

12 Q. And so more senior rights get higher
13 allocations than more junior rights?

14 A. Yes, in general.

15 Q. And then if I understand the averaging,
16 you're essentially letting each patron pool their water
17 rights to get a collective diversion volume that
18 they've got to stay under?

19 A. Yes.

20 Q. Do any of the districts allow their patrons
21 to utilize averaging for purpose of compliance?

22 A. Yes.

23 Q. And why is that?

24 A. Particularly at the beginning of the
25 agreement, they were talking about crop rotations, and

1 users were worried -- users that had specific crop
2 rotations were worried about being over in certain
3 years and way under in others.

4 And if the district as a whole got -- got
5 to where all their high consumptive use crops were
6 on -- on a rotation together, then they would be over.
7 And so the districts -- most of the districts allowed
8 at least some sort of averaging, and in particular the
9 ones that started out with an averaging had at least a
10 three-year rolling average. They didn't want the users
11 to essentially get themselves in trouble and carry
12 water over forever, but they needed some sort of way to
13 account for the crop rotations.

14 And, you know, especially if there was a
15 user who wanted to, say, fallow ground in one year so
16 that he could pump more water the next year, averaging
17 is really the easiest way for the district to implement
18 those types of practices.

19 Q. If you'll turn to the small, white binder,
20 IGWA's Exhibits. I want to draw your attention to
21 Exhibit 118 and Exhibit 120. You may kind of flip back
22 and forth between them.

23 A. Okay.

24 Q. Do you recognize these charts?

25 A. Yes.

1 Q. Did you prepare them?

2 A. Yes.

3 Q. For what purpose?

4 A. We created these to describe the effect of
5 averaging versus annual caps on -- on the pumping or
6 the limit -- or the -- excuse me, on the IGWA
7 implementation of the agreement.

8 Q. So if I'm looking at Exhibit 118, and
9 there's dates along the bottom, 2010 through 2014,
10 which you testified earlier was the baseline period.

11 A. Yes.

12 Q. This predates the Settlement Agreement.

13 So why were these years selected for this
14 illustration?

15 A. These were the years that IGWA used as
16 their baseline years, the average from those years.
17 And as presented in the chart that we saw earlier,
18 their -- IGWA's final allocation was based on 2010 to
19 2014.

20 Q. And what do the blue, yellow, and green
21 bars represent on this chart?

22 A. The blue bars show the diversions that we
23 had tabulated for each one of those years. And this --
24 this was given, I'll say as an example, to show what
25 the effect of conservation during this period would

1 the motion to intervene -- or in my opposition. But if
2 that's not clear, just that Bonneville-Jefferson is
3 joining in support of the arguments raised by IGWA.

4 THE HEARING OFFICER: Sure.

5 Okay. Anything else?

6 MR. BUDGE: We had some discussion during the
7 testimony earlier about, you know, the object of this
8 proceeding and what's being asked of the Director.

9 Is that clear in your mind, or would you
10 like me to, you know, clarify exactly what it is the
11 petitioners are requesting?

12 THE HEARING OFFICER: Well, I'm not asking for
13 any additional clarification.

14 Okay. Well, we will close the record,
15 then.

16 I'm sorry, folks. You won't get your
17 complimentary bottle of Convue [phonetic] vodka.

18 (End of audio file.)

19 -oOo-

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Audio Transcription

REPORTER'S CERTIFICATE

I, JEFF LAMAR, CSR No. 640, Certified Shorthand Reporter, certify:

That the audio recording of the proceedings was transcribed by me or under my direction.

That the foregoing is a true and correct transcription of all testimony given, to the best of my ability.

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this 1st day of June, 2023.



JEFF LAMAR, CSR NO. 640
Notary Public
Post Office Box 2636
Boise, Idaho 83701-2636

My commission expires December 30, 2023

EXHIBIT B

Transcript of Recorded Hearing ~ March 15, 2024
Audio Transcription

1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION)
OF WATER TO VARIOUS WATER) IDWR DOCKET NO.
RIGHTS HELD BY OR FOR THE) CM-MP-2016-001
BENEFIT OF A&B IRRIGATION)
DISTRICT, AMERICAN FALLS)
RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,) TRANSCRIBER'S TRANSCRIPT
MINIDOKA IRRIGATION DISTRICT,) OF PROCEEDINGS
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
_____)

CAPTION CONTINUED NEXT PAGE

BEFORE

HEARING OFFICER: ROGER BURDICK

DATE: March 15, 2024

LOCATION: Idaho Department of Water Resources
Boise, Idaho

TRANSCRIBED BY:

ANDREA L. CHECK, CSR No. 748, RPR, CRR

Notary Public

Transcript of Recorded Hearing ~ March 15, 2024
Audio Transcription

1 IN THE MATTER OF IGWA'S)
2 SETTLEMENT AGREEMENT)
3 MITIGATION PLAN)
4 _____)
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Transcript of Recorded Hearing ~ March 15, 2024
Audio Transcription

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A P P E A R A N C E S

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Transcript of Recorded Hearing ~ March 15, 2024
Audio Transcription

4

1 A P P E A R A N C E (Continued)

2

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A P P E A R A N C E S (Continued)

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Transcript of Recorded Hearing ~ March 15, 2024
Audio Transcription

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I N D E X
E X H I B I T S

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E X H I B I T S (Continued)

NO.	MARKED	ADMITTED
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*** Exhibits which were previously marked

Transcript of Recorded Hearing ~ March 15, 2024
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132

1 MR. BUDGE: I think after lunch would be
2 ideal, then we don't have to break in the middle.

3 HEARING OFFICER: Mr. Fletcher, you either
4 have gas or you don't agree with that?

5 MR. FLETCHER: Oh, probably. I was hoping
6 we'd just power through. I don't know how long it's
7 going to take, though, if it's going to take over an
8 hour or whatever.

9 MR. BUDGE: So based on the hearing officer's
10 rulings this morning that limited some of the evidence,
11 I think it would be helpful if I reworked some of
12 Mr. Stoddart's testimony.

13 HEARING OFFICER: We'll go after lunch.
14 Thank you, sir.

15 MR. BUDGE: Yeah.

16 HEARING OFFICER: We'll be -- the court -- the
17 hearing is in recess. Please excuse me.

18 (Lunch break taken.)

19 HEARING OFFICER: Back on the record.

20 And as I remember, Mr. Budge, you had a
21 further witness, sir.

22 MR. BUDGE: IGWA will call Bill Stoddart.

23 HEARING OFFICER: Mr. Stoddart, please come
24 forward.

25

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1 WILLIAM STODDART,
2 called by IGWA, having been first duly sworn to tell the
3 truth relating to said cause, testified as follows:
4

5 HEARING OFFICER: Thank you, sir. Please be
6 seated.

7 MR. BUDGE: Good afternoon, Bill. Thanks for
8 being here.

9 THE WITNESS: Thank you.

10 MR. BUDGE: For the record, this is TJ Budge
11 on behalf of IGWA.
12

13 DIRECT EXAMINATION

14 QUESTIONS BY MR. BUDGE:

15 Q. Bill, to begin would you please state your
16 name and address.

17 A. My name is William Edward Stoddart, Stoddart
18 is S-t-o-d-d-a-r-t. And my address is 1849 North 800
19 East, Montevue, Idaho.

20 Q. For those who may not be familiar with
21 Montevue, where is that in Idaho?

22 A. It's east. It's about 45 miles west of
23 Rexburg, Idaho.

24 HEARING OFFICER: Is there anything else out
25 there?

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1 information the district had, they would slightly change
2 some of the diversions during those times.

3 Q. Thank you for that. Has Jefferson Clark's
4 obligation remained at that 54,373 acre-feet figure
5 since 2017?

6 A. It has.

7 Q. You testified that you're involved in
8 implementing the program that Jefferson Clark developed
9 to conserve 54,373 acre-feet annually.

10 Would you please describe the program that was
11 developed?

12 A. So in our district we do it a little different
13 than others. We take what is the 2010 to 2014 diversion
14 or average -- average of those diversion numbers across
15 all our wells for every individual, and we use that as a
16 starting point.

17 And from that we reduce based on the weighted
18 average priority dates of their water rights for those
19 individuals or combined individuals. Those reductions
20 range from 3 percent to 17 percent, based on the
21 weighted priority date. And so that's how we
22 determine --

23 HEARING OFFICER: The net percentage is the
24 percentage of 100 percent within the district; is that
25 correct.

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1 THE WITNESS: No. So we take -- so your
2 diversion baseline -- we take a baseline number, which
3 is the average of your points of diversion, what they
4 pump during those years, and then we reduce that by
5 anywhere from 3 to 17 percent based on the priority
6 dates, the weighted priority dates of those water rights
7 that are made up in those diversions.

8 HEARING OFFICER: Thank you.

9 THE WITNESS: Yes.

10 Q. (BY MR. BUDGE) So maybe just to give an
11 example: Hypothetically, if you had a patron whose
12 average diversions from 2010 to 2014 were
13 1,000 acre-feet, then Jefferson Clark would require them
14 to reduce by somewhere between 3 percent and 17 percent
15 based on the priority date of that patron's water
16 rights?

17 A. Correct. And that 3 percent goes from 1913,
18 our very earliest right, up to 2001 is the distribution
19 of that -- those percentages.

20 Q. Okay. So more junior rights have to conserve
21 more than more senior rights?

22 A. Correct.

23 Q. Does Jefferson Clark then give each patron an
24 annual pumping limit?

25 A. We do.

1 Q. And Jefferson Clark keeps track of the amount
2 of groundwater diverted by each patron?

3 A. Correct.

4 Q. What if a patron pumps less than their annual
5 limit?

6 A. Then before we used to give them credit for
7 that. We would mark it on their things, and I would,
8 every year, post it on their new water usage report as a
9 carry-forward credit.

10 Q. Okay. So you sent an annual report out to the
11 patrons that shows where they stand in water usage?

12 A. Correct.

13 Q. What if a patron pumps more than their annual
14 limit?

15 A. If they pump more than their annual limit in a
16 year, they're required to make that up. And they can do
17 that in several ways. They can -- the district would
18 buy recharge in many of those years, and they could buy
19 -- whatever our cost was, was we would sell them some of
20 those recharge credits to offset theirs, or they can buy
21 them from other individuals that have credits.

22 Q. If they had surplus in a prior year, were they
23 able to use that towards their deficit?

24 A. They were.

25 Q. Okay. You mentioned that patrons can acquire

1 recharge from the district to help them meet their
2 individual conservation obligations.

3 Can you explain Jefferson Clark's recharge
4 program?

5 A. So our main goal of our recharge problem --
6 program was to make sure we did plenty of recharge in
7 the very wet years when it was available and it was
8 beneficial, and that we would use it in the years that
9 were hot and dry where it was harder to meet the
10 obligation. We could use some of that in those years to
11 offset our pumping diversions.

12 Q. Okay. We discussed earlier the performance
13 report that IGWA submits annually to the Surface Water
14 Coalition and to the Department.

15 You're familiar with those; correct?

16 A. I am.

17 Q. And I think it's been mentioned earlier that
18 these reports are prepared during the winter following
19 the irrigation season; is that right?

20 A. Correct.

21 Q. Do you know why the reports aren't prepared
22 until the winter following the irrigation season?

23 A. Most of the time they're just waiting for the
24 sheer amount of data to come in. And our district, they
25 read flow meters at the end of the year as late as they

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1 can to make sure they get read before the snow falls.
2 So it can be October even November, at the latest.

3 But then we have a fair amount of
4 self-reporting and PCC numbers that they, a lot of
5 times, don't get the information from the power company
6 until December, late December to January. And so by the
7 time I compile all that information and make sure it's
8 correct with the members, it's February, March.

9 Q. You mentioned "PCC." What is that?

10 A. A power of coefficient. It compares when
11 IDWR, at least for our district, goes out and measures
12 nonflow meter diversions, they measure the power usage
13 to a volume over a set period of time creating a ratio.
14 That way at the end of the year they can get a power
15 reading, and that will be used to know how much volume
16 they pumped during the year.

17 Q. So some of the wells in your district have
18 meters on them that you're reading after the irrigation
19 season to see how much was pumped that year?

20 A. Yes.

21 Q. And other wells the measurement is done
22 through the power consumption coefficient?

23 A. Correct.

24 Q. And just to summarize, it takes the district
25 several months to collect all of that data so that you

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1 authorized the use of a three-year average baseline so
2 that there was precedent for it.

3 And they felt if averaging was no longer
4 allowed, that that was a more fair and equitable way to
5 achieve the objectives of the Settlement Agreement.
6 That Exhibit 131 then includes a table that shows the
7 mitigation balance for each of the districts using that
8 new method. And in that table Jefferson Clark has a
9 positive mitigation balance instead of a negative
10 mitigation balance.

11 HEARING OFFICER: Thank you.

12 MR. BUDGE: You bet.

13 HEARING OFFICER: You may proceed.

14 Q. (BY MR. BUDGE) Mr. Stoddart, this proceeding
15 is about ferreting out what a proper remedy is for the
16 alleged noncompliance of the Settlement Agreement in
17 2022. And I want to ask your perspective as a manager
18 of a groundwater district who's intimately familiar with
19 how the various remedies that are considered may work.

20 One of the proposals made by the Coalition is
21 that the Department just curtail every water right
22 within the district that has a negative mitigation
23 balance.

24 Did the districts have the ability to curtail
25 their patrons water rights?

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1 A. We do not.

2 Q. Did the districts own the water rights in
3 their district?

4 A. No, they do not.

5 Q. The patrons own those?

6 A. Yes.

7 Q. The district's job is not to curtail or
8 enforce diversion reductions by their patrons?

9 A. No.

10 Q. The district's job is to develop a mitigation
11 plan that the patrons can utilize to protect themselves
12 from curtailment; correct?

13 A. That is correct.

14 Q. And if patrons don't comply, then it's up to
15 the Department if they want to curtail people?

16 A. That is correct.

17 Q. If the Department attempted to curtail all the
18 members of your district for noncompliance in 2022, do
19 you think this would be an effective remedy?

20 A. I don't believe so. I think it would,
21 effectively, end the groundwater districts. It's -- we
22 did provide -- we provided the obligation and told them
23 that if they performed these duties and functions, they
24 would be protected under their mitigation call.

25 And they did that, they performed. And due to

1 that, they're going to have further obligations. So the
2 effectiveness of a groundwater district will cease to
3 exist. And as such, I assume most of the district
4 members will sue the groundwater district and that will
5 be the end of the Jefferson Clark.

6 Q. Let's say the Department took the 2022
7 performance report and looked strictly at the -- you
8 know, well by well which wells had a deficit that year
9 and proceeded to curtail those patrons only.

10 Do you think that would be an effective
11 remedy?

12 A. No. Because that has really no relation to
13 how well someone performed according to our distribution
14 of those mitigation obligations.

15 Q. So if the Department looked at those
16 individual wells in the 2018 performance report, that
17 would not reflect whether a patron had a surplus from a
18 prior year that they could draw on in 2022?

19 A. No.

20 Q. So if the Department did that, they would be
21 out curtailing patrons who were in compliance with the
22 district's conservation program?

23 A. Absolutely.

24 Q. As an alternative, the Coalition has proposed
25 that the Department add conservation deficits from 2022

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1 to the district's conservation obligation in 2024. And
2 I think you were here for some earlier discussion of
3 that.

4 Do you think this would be an effective remedy
5 in your district?

6 A. I don't think so. I mean, you're massively
7 increasing our obligation for 2024. And after what
8 they've done in the past to try to buffer themselves
9 against these sort of obligations, these continuous
10 obligations, they'll have no, you know, appetite for
11 continuing to do that.

12 Q. So what would happen is patrons who had
13 conserved water in reliance on the district's program
14 that said, yes, you can conserve surplus and carry it
15 forward, if you take that away and say that was all for
16 not, you see that being problematic?

17 A. Absolutely. You know, it's one of the methods
18 to ensure compliance with a -- you know, this type of
19 program is to allow carryovers, to do more in wet years
20 when it's available and, you know -- and -- but it also
21 encourages, even in the wettest of years, for those
22 people to be as conservative as they can be in hopes
23 that that will buffer them against the next year.

24 Farming is all about managing risks, and this
25 is one of many risks that farmers manage. And if you

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1 have no ability to do that, you don't leave them a whole
2 lot of options.

3 Q. What do you think would be an effective remedy
4 for mitigating the over pumping in 2022 or the
5 conservation deficit in 2022?

6 A. You know, my opinion is that it has been
7 remedied, but, you know, I -- that is kind of how I view
8 it is doing in the past is more effective than doing it
9 after the fact. You know, I guess that's where I am and
10 the view of the board of the Jefferson.

11 MR. BUDGE: Okay. Thank you, Bill. I have no
12 further questions.

13 HEARING OFFICER: Cross-Exam?

14

15 CROSS-EXAMINATION

16 QUESTIONS BY MR. THOMPSON:

17 Q. Good afternoon, Mr. Stoddart. I'm Travis
18 Thompson for A&B Irrigation District, et al.

19 You went through a number of those performance
20 reports that the groundwater district submitted to the
21 Coalition and to the Department from, I think, 2016
22 through 2022; is that correct?

23 A. Yes.

24 Q. And were you aware of the Coalition's dispute
25 that IGWA was including A&B and Southwest Irrigation

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1 District in those annual performance reports?

2 A. Was I aware?

3 Q. Yes.

4 A. Yes.

5 Q. So did counsel bring that to your attention in
6 the spring of 2017 when that dispute was raised?

7 A. I don't believe so.

8 Q. If you'd turn to Exhibit 512. That's the
9 Director's order from last summer, the August 2nd, 2003
10 [sic], order.

11 Can you turn to page 8. And do you see the
12 column in Table 2 identified as "IDWR Target
13 Conservation"?

14 A. I do.

15 Q. And do you recognize that the Director has
16 found that the annual conservation number for Jefferson
17 Clark is [unintelligible] acre feet?

18 A. Yes, then he changed it to 60 -- what did you
19 say? Could you repeat that?

20 Q. 63,530 --

21 HEARING OFFICER: Wait a second.

22 THE WITNESS: I just needed him to repeat the
23 number he said.

24 HEARING OFFICER: Oh, okay. Sorry. My fault.

25 Continue.

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1 is it shakes the hands of hardworking lawyers of a
2 hearing. I'd like to do that at this time.

3 (All simultaneously speaking.)

4 HEARING OFFICER: The hearing is concluded.

5

6 (End of audio file.)

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REPORTER'S CERTIFICATE.

I, ANDREA L. CHECK, CSR No. 748, Certified Shorthand Reporter, certify:

That the audio recording of the proceedings were transcribed by me or under my direction;

That the foregoing is a true and correct transcription of all testimony given, to the best of my ability;

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this 25th day of March, 2024.

Andrea Check



ANDREA L. CHECK, CSR No. 748, RPR, CRR
Notary Public
P.O. Box 4525
Boise, Idaho 83205
My Commission expires July 20, 2028.

EXHIBIT C

SETTLEMENT AGREEMENT PERFORMANCE REPORT

TO: IGWA-SWC Settlement Agreement Steering Committee
FROM: Ground Water Districts
DATE: April 1, 2023
RE: 2022 Performance Report

Introduction

This document reports the ground water districts' year 2022 performance under paragraph 3.a of the IGWA-SWC Settlement Agreement¹ ("Agreement") which requires a 240,000 acre-feet reduction in ESPA ground-water withdrawals or equivalent private recharge. Paragraph 2.a. of the Second Addendum to Settlement Agreement requires the districts to report to the Steering Committee by April 1 annually "their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants."

2022 Performance

The enclosed spreadsheet contains diversion and recharge data for each district. The "summary" tab shows the total volume of groundwater diverted within each district and the total volume of recharge performed by each district. The recharge column includes water delivered directly to the SWC in lieu of recharge.

Unlike IGWA's performance reports in years past, the "summary" tab shows only groundwater diversion and recharge data. It does not contain a table showing a baseline, target conservation, or mitigation balance because the Final Order Regarding Compliance with Approved Mitigation Plan ("Compliance Order") issued on September 8, 2022, necessitates that IGWA and the SWC revisit how compliance will be measured under the Agreement for 2022 and future years, as explained below.

The Agreement requires each district to conserve a proportionate share of 240,000 acre-feet, but it does not prescribe how each district's share will be calculated or how compliance will be measured. Previously, IGWA used the average volume of groundwater diverted within each district over the 5-year period 2010-2014 as the baseline against which conservation will be measured, with the expectation that compliance would likewise be based on an average. However, the Compliance Order has negated the use of averaging to measure compliance.

On July 26, 2022, the SWC filed Surface Water Coalition's Notice of Steering Committee Impasse / Request for Status Conference with the Director, challenging (a) IGWA's use of a 5-year average for measuring compliance with the Agreement, and (b) IGWA's historic practice of accounting for diversions by A&B Irrigation District and Southwest Irrigation District in calculating each district's proportionate share of the 240,000 acre-feet. The Compliance Order ruled that averaging cannot be used to measure compliance, and that diversions by A&B and Southwest cannot be considered in calculating each district's proportionate

¹ The Settlement Agreement consists of the Settlement Agreement Entered Into June 30, 2015, Between Participating Members of the Surface Water Coalition and Participating Members of Idaho Ground Water Appropriators, Inc. ("IGWA"), the Addendum Agreement between entered into October 15, 2015, the Agreement between A&B Irrigation District and participating members of IGWA dated October 2, 2016, and the Second Addendum to Settlement Agreement dated December 14, 2016.

share of the 240,000 acre-feet.

Since the Compliance Order was made without the benefit of a full evidentiary record, a hearing was held by the Director on February 8, 2022, to consider additional information relating to the manner of calculating each district's compliance with the Agreement. As of the date of this performance report, no final decision has been issued based on the evidence presented at the hearing.

The Director's final decision will in any case require a new method of measuring compliance. If the decision requires the IGWA districts alone to conserve 240,000 acre-feet, then each district's proportionate share of 240,000 acre-feet will need to be redetermined. The districts will not simply scale up their current obligations. Reallocation will require consideration of modeled impacts and other factors. When the Agreement was first entered into it took the districts more than a year to agree upon an equitable apportionment of the 240,000 acre-feet obligation. Reapportionment will likewise be a considerable undertaking.

If the Director's final decision allows averaging, then both the baseline and compliance should be measured by a corresponding average, such as a 5-year or 3-year average. If the decision does not allow averaging, then an alternative method will need to be developed to compare single-year diversions against a single-year baseline. Comparing single-year diversions against a 5-year baseline is discordant and not appropriate. Potential alternatives include a comparison of single-year diversions against pre-Agreement peak diversions, comparing single-year diversions against diversions in a prior year of similar climatic conditions, a tally system based on cumulative groundwater conservation over time, or other method.

Since the method of measuring compliance will change depending on the outcome of the Director's reconsideration of the Compliance Order, the enclosed spreadsheet does not purport to demonstrate compliance with the Agreement in 2022. However, the "usage analysis" tab on the spreadsheet does contain the same table provided in prior years that shows a baseline, target conservation, and mitigation balance. This table is provided for informational purposes and is not conclusive of each district's compliance with the Agreement because it compares single-year diversions against a 5-year average baseline. IGWA will determine a more appropriate method of measuring compliance once the Director's decision becomes final.

As with IGWA's performance report spreadsheets in prior years, the enclosed spreadsheet has individual tabs for each district that lists the diversion volume of each well by WMIS number. Where challenges or errors were encountered in the data for a particular well, the spreadsheet notes how the district addressed it. For example, diversions that could not be reliably calculated due to broken meters or other factors have been assigned an imputed value based on the power consumption coefficient or historic diversion data for the well. District consultants continue to work with district patrons and IDWR staff to address questions and correct errors as needed.

The "recharge report" tab shows the recharge data for each district, including the volume, source of water, recharge location, and date the recharge was performed. Documentation supporting the recharge data is enclosed.

Questions concerning the collection and reporting of data and compilation of this report may be directed to Jaxon Higgs as the lead consultant who will coordinate with other consultants used by the districts.

2023 Conservation Programs

Until the Director issues a final decision based on the evidence presented at the February 8, 2022, hearing,

the ground water districts' respective conservation obligations under the Agreement, and how compliance will be measured, is uncertain. Depending on the outcome of the Director's final decision, the districts may revisit their proportionate mitigation obligations, the baseline, how compliance will be measured, and whether to continue providing mitigation under the Agreement, provide mitigation under other approved mitigation plans, or accept curtailment risk under the Methodology Order.

In any case, all of the districts intend to continue their efforts to develop a ground water management plan to stabilize the ESPA, and to take additional actions to mitigate injury to the SWC. However, it has become apparent that a one-size-fits-all approach to mitigation is no longer workable. The IGWA board has voted to allow individual districts and groups of districts to work directly with the SWC to develop new mitigation agreements that are tailored to the unique characteristics of each district and its effects on Blackfoot-Minidoka reach gains. We trust the SWC will appreciate the challenges created by a one-size-fits-all approach and hope they will work with districts directly.

IDWR Review

The Second Addendum provides that the parties "will request the Department to verify each District's annual diversion volume, and other diversion reduction data (recharge, CREP, conversions, end-gun removals, etc.) to confirm the accuracy of the data." A copy of this report will be submitted to the Department with a request that it commence verification. The Department's analysis is normally provided to the Steering Committee by July 1.

Sentinel Well Report

Pursuant to section 3.e. of the Settlement Agreement and sections 1.b.i. and ii. of the Second Addendum, the parties' consultants continue to work with the Department to collect, process, archive, and submit sentinel well data to the Steering Committee within 30 days of collection using the Calculation Technique. This process is ongoing by the Department and the Technical Working Group formed under the Agreement.

2022 Performance Summary Table

	2022 Usage	Accomplished Recharge/ Direct Delivery
American Falls-Aberdeen	269,322	23,550
Bingham	269,088	516
Bonneville-Jefferson	151,245	9,249
Carey	1,889	5
Jefferson-Clark	408,112	7,647
Henry's Fork ¹	62,381	3,000
Madison ²	76,919	
Magic Valley	218,759	3,378
North Snake ³	174,838	3,395
Total:	1,632,553	50,739

*all values in acre-ft

EXHIBIT D

NOV 16 2023

TRENT TRIPPLE, Clerk
By ERIC ROWELL
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER
APPROPRIATORS, INC,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
official capacity as Director of the Idaho
Department of Water Resources,

Respondents,

and

CITY OF POCA TELLO, CITY OF BLISS,
CITY OF BURLEY, CITY OF CAREY,
CITY OF DECLO, CITY OF DIETRICH,
CITY OF GOODING, CITY OF
HAZELTON, CITY OF HEYBURN, CITY
OF JEROME, CITY OF PAUL, CITY OF
RICHFIELD, CITY OF RUPERT, CITY OF
SHOSHONE, CITY OF WENDELL, A&B
IRRIGATION DISTRICT, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS CANAL
COMPANY, AMERICAN FALLS
RESERVOIR DISTRICT #2, MINIDOKA
IRRIGATION DISTRICT, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and BINGHAM GROUNDWATER
DISTRICT

Intervenors.

) Case No. CV01-23-7893

)
) **MEMORANDUM DECISION**
) **AND ORDER**

IN THE MATTER OF THE DISTRIBUTION)
 OF WATER TO VARIOUS WATER)
 RIGHTS HELD BY AND FOR THE)
 BENEFIT OF A&B IRRIGATION)
 DISTRICT, AMERICAN FALLS)
 RESERVOIRS DISTRICT NO. 2, BURLEY)
 IRRIGATION DISTRICT, MILNER)
 IRRIGATION DISTRICT, MINIDOKA)
 IRRIGATION DISTRICT, NORTH SIDE)
 CANAL COMPANY, AND TWIN FALLS)
 CANAL COMPANY.)
 _____)
 IN THE MATTER OF IGWA'S)
 SETTLEMENT AGREEMENT)
 MITIGATION PLAN)
 _____)

I

BACKGROUND

A. Delivery call and approved mitigation plan.

In 2005, members of the Surface Water Coalition initiated a delivery call seeking curtailment of junior priority ground water rights that divert from the Eastern Snake Plain Aquifer (“ESPA”).¹ The call asserts surface and ground waters in the Snake River Basin are hydraulically connected. Further, that the ESPA discharges to the Snake River via tributary springs and that junior ground water pumping on the ESPA has decreased natural flows in the Snake River and its tributaries to the injury of senior water rights held by Coalition members. The delivery call is ongoing in nature. It has required yearly evaluation by the Director of the Idaho Department of Water Resources as to whether junior ground water pumping is causing material injury to the Coalition’s senior rights.

Beginning in 2010, the Director began using procedures set forth in his Methodology Order to conduct his yearly evaluation.² The Methodology Order contains a series of steps to be undertaken annually through which the Director determines whether the Coalition’s water rights are suffering material injury. If so, the Director will order the curtailment of junior rights unless

¹ The term “Surface Water Coalition” refers collectively to the 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.

² The Methodology Order has since been amended on several occasions since 2010.

he finds junior right holders can mitigate the material injury through an approved mitigation plan.

On June 30, 2015, a Settlement Agreement in response to the call was entered into between members of the Coalition and certain members of the Idaho Ground Water Appropriators, Inc. ("IGWA"). R., 436. All members of the Coalition except for A&B Irrigation District signed the Settlement Agreement.³ Additionally, Southwest Irrigation District, which is an IGWA member, did not sign the Settlement Agreement. R., 460. The parties entered into an Addendum to the Settlement Agreement in October 2015. R., 461. The objectives of the Settlement Agreement are as follows:

- a. Mitigate for material injury to senior surface water rights that rely upon natural flow in the Near Blackfoot to Milner reaches to provide part of the water supply for the senior surface water rights.
- b. Provide "safe harbor" from curtailment to members of ground water districts and irrigation districts that divert ground water from the Eastern Snake Plain Aquifer (ESPA) for the term of the Settlement Agreement and other ground water users that agree to the terms of this Settlement Agreement.
- c. Minimize economic impact on individual water users and the state economy arising from water supply shortages.
- d. Increase reliability and enforcement of water use, measurement, and reporting across the Eastern Snake Plain.
- e. Increase compliance with all elements and conditions of all water rights and increase enforcement when there is not compliance.
- f. Develop an adaptive groundwater management plan to stabilize and enhance ESPA levels to meet existing water right needs.

R., 436.

In furtherance of these objectives, the Settlement Agreement prescribes near term and long term practices to be undertaken by the parties. One long term practice contemplates a reduction of ground water use by junior ground water pumpers:

- a. *Consumptive Use Volume Reduction.*
 - i. Total ground water diversion shall be reduced by 240,000 ac-ft annually.

³ A&B Irrigation District subsequently entered into a separate agreement with IGWA in October 2015. R., 498. That separate agreement states in part that "A&B agrees to participate in the *Settlement Agreement* as a surface water right holder only." R., 498. Further, that the "obligations of the Ground Water Districts set forth in Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights." R., 498.

- ii. Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.

R., 437. The Settlement Agreement calls for the establishment of a steering committee to assist with the implementation of its terms. R., 439. The steering committee is comprised of a representative of each signatory party and the State. *Id.*

The parties jointly submitted the Settlement Agreement to the Director on March 9, 2016, as a proposed mitigation plan in response to the delivery call.⁴ R., 509. Under the parties' stipulation, the Coalition agrees the mitigation provided by participating IGWA members under the Settlement Agreement is "sufficient to mitigate for any material injury caused by the groundwater users who belong to, and are in good standing with, a participating IGWA member." R., 511. The parties further agree that participating IGWA members are not subject to curtailment under the ongoing call "provided actions are implemented and performed as set forth in the [Settlement Agreement]." *Id.* The Director entered a Final Order Approving Stipulated Mitigation Plan on May 2, 2016. R., 893. That Order adopts the proposed stipulated mitigation plan with some additional conditions as an approved mitigation plan under CM Rule 43.⁵ *Id.* One condition of approval is that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R., 896.

The parties entered into a Second Addendum to the Settlement Agreement on December 14, 2016. R., 477. The Second Addendum details the parties' agreement regarding the implementation of the terms of the Settlement Agreement. *Id.* With respect to the reduction of ground water use, the Second Addendum provides as follows:

Prior to April 1 annually the Districts will submit to the Steering Committee their groundwater diversion and recharge data for the prior irrigation season and their proposed actions to be taken for the upcoming irrigation season, together with supporting information compiled by the Districts' consultants.

⁴ The documents submitted to the Director included (1) the Settlement Agreement dated June 30, 2015; (2) the Addendum to the Settlement Agreement; and (3) the Agreement dated October 7, 2015 entered into between A&B Irrigation District and IGWA.

⁵ The term "CM Rule" refers to Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources.

R., 478. The Second Addendum clarifies the steering committee is charged with initially reviewing compliance issues under the approved mitigation plan:

If, based on the information reported and available, the Steering Committee finds any breach of the Long Term Practices as set forth in paragraph 3 of the Agreement, the Steering Committee shall give ninety (90) days written notice of the breach to the breaching party specifying the actions that must be taken to cure such breach. If the breaching party refuses or fails to take such actions to cure the breach, the Steering Committee shall report the breach to the Director with all supporting information, with a copy provided to the breaching party. If the Director determines based on all available information that a breach exists which has not been cured, the Steering Committee will request that the Director issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to immediate curtailment pursuant to CM 40.05.

If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

R., 479.

The parties jointly submitted the Second Addendum to the Director on February 7, 2017, as a proposed amendment to the approved mitigation plan. R., 586. On May 9, 2017, the Director entered a Final Order Approving Amendment to Stipulated Amended Mitigation Plan. R., 901. The Order adopted the Second Addendum with some additional conditions as an amendment to the approved mitigation plan. *Id.*

B. 2021 compliance issue.

On April 29, 2022, the Surface Water Coalition requested a status conference before the Director. R., 1. It asserted IGWA failed to comply with the approved mitigation plan in 2021. R., 2-3. Specifically, it argued IGWA failed to meet the requirement that total ground water diversion be reduced by 240,000 ac-ft annually:

On Friday April 1, 2022, counsel for IGWA submitted the districts' 2021 performance report. As detailed in that report, the signatory ground water districts only performed 56,953 acre-feet in diversion reductions and 65,831 acre-feet in recharge for a total of 122,784 acre-feet.

The nine signatory ground water districts' 2021 actions were approximately 117,216 acre-feet short of what is required by the stipulated mitigation plan and the Director's order approving the same. Consequently, IGWA and its junior priority ground water right members are not operating in accordance with the approved plan and are failing to mitigate the material injury to the Coalition members.

Id. The Director declined the Coalition's request for a status conference. R., 14. He directed the parties must first take the compliance issue before the steering committee as provided in the approved mitigation plan. *Id.*

The steering committee held meetings on the compliance issue in May and June of 2022. R., 21. At the meetings, IGWA denied the Coalition's allegations of non-compliance. The dispute between the parties hinged on (1) the amount of ground water reduction for which IGWA is responsible under the approved mitigation plan, and (2) whether averaging may be used to measure compliance with IGWA's reduction obligation. R., 67-68. The steering committee was unable to resolve the compliance issue, ultimately reaching an impasse. R., 22. As a result, the Surface Water Coalition brought the issue back to the Director. *Id.* It again requested a status conference be held to address the following issues regarding the approved mitigation plan:

1. IGWA's annual diversion reduction requirement (annual or average?)
2. What that requirement is (240,000 af or something less)
3. Whether IGWA complied in 2021 based upon its technical information and IDWR's review of the same (as identified in April 1 and June 30 reports)
4. Disparity in those reports (what was the actual number for both diversion reduction and recharge that occurred in 2021)
5. Director's planned action in response to IGWA's non-compliance with mitigation plan.

Id. The Director granted the request. R., 25. A status conference was held on August 5, 2022, wherein the parties argued their positions. *Id.*

After the status conference, the parties entered into a Settlement Agreement dated September 7, 2022 ("Remedy Settlement Agreement"). R., 67. In the Remedy Settlement Agreement, IGWA withheld admission of non-compliance with the approved mitigation plan. R., 68. However, to avoid potential curtailment in 2022, it agreed to the following remedy to resolve the dispute for purposes of 2021:

1. 2021 Remedy. As a compromise to resolve the parties' dispute over IGWA's compliance with the Settlement Agreement and Mitigation Plan in 2021, and not as an admission of liability, IGWA will collectively provide to the SWC an additional 30,000 acre-feet of storage water in 2023 and an additional 15,000 acre-feet of storage water in 2024 within 10 days after the Date of Allocation of such year. Such amounts will be in addition to the long-term obligations set forth in section 3 of the Settlement Agreement and approved Mitigation Plan. IGWA agrees to take all reasonable steps to lease the quantities of storage water set forth above from non-SWC spaceholders. If IGWA is unable to secure the quantities set forth above from non-SWC spaceholders by April 1 of such year, IGWA will make up the difference by either (a) leasing storage water from the SWC as described in section 2, or (b) undertaking diversion reductions in Power, Bingham, and/or Bonneville Counties at locations that have the most direct benefit to the Blackfoot to Minidoka reach of the Snake River. For example, if by April 1, 2023, IGWA has secured contracts for only 25,000 acre-feet of storage water, IGWA will either (a) lease 5,000 acre-feet of storage from the SWC, or (b) undertake 5,000 acre-feet of diversion reductions. The remedy described in this section shall satisfy IGWA's obligation under the Settlement Agreement for 2021 only.

R., 68. The parties filed the Remedy Settlement Agreement with the Director. R., 67. They agreed the Director "shall incorporate the terms of section 1 above as the remedy selected for the alleged shortfall [in 2021] in lieu of curtailment." R., 68. Furthermore, notwithstanding resolution of the compliance issue for 2021, the parties agreed that the Director "shall issue a final order regarding the interpretive issues" pertaining to the approved mitigation plan that were raised by the Coalition in its request for a status conference. *Id.*

The Director issued a Final Order Regarding Compliance with Approved Mitigation Plan on September 8, 2022. R., 71. He concluded that certain IGWA members failed to comply with the requirements of the approved mitigation plan in 2021. R., 83. He approved the remedy stipulated to by the parties as an appropriate remedy for the non-compliance. R., 91. IGWA subsequently petitioned for reconsideration of the Final Order and requested a hearing. R., 96. The Director granted the request for a hearing. R., 105. An evidentiary hearing was held on February 8, 2023. Tr., 1.

On April 24, 2023, the Director issued his Amended Final Order Regarding Compliance with Approved Mitigation Plan ("Final Order"). He found the mitigation plan unambiguously requires reduction of ground water diversion in the amount of 240,000 acre feet of water each year. R., 415. Correlated with that finding, he determined that averaging that reduction requirement over a period of years is not permitted under the plan. R., 415. He further found the

mitigation plan unambiguously prohibits IGWA from apportioning a percentage of the annual reduction requirement under the mitigation plan to A&B Irrigation District and/or Southwest Irrigation District. R., 416. IGWA subsequently filed a *Petition* seeking judicial review of the Final Order. It asserts the Director's Final Order is contrary to law and requests the Court set it aside and remand for further proceedings. The Court entered an *Order* permitting the Intervenor to participate in this proceeding. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on October 30, 2023.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.
ANALYSIS

A. The Director's Final Order is affirmed.

The approved mitigation plan requires that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” R., 437. The compliance dispute centers on two points of contention related to this requirement. The first is whether the 240,000 acre-feet reduction obligation is an annual requirement under the plan, or whether it is based on a five-year rolling average. The second centers on which ground water diverters are responsible for the 240,000 acre-feet reduction obligation. Each will be addressed in turn.

i. The Director's determination that the approved mitigation plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year is affirmed.

The Director found the approved mitigation plan unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year. R., 415-416. The approved mitigation plan is based on a settlement agreement that was jointly presented to the Director as a proposed mitigation plan under CM Rule 43.⁶ The interpretation of a settlement agreement is “governed by the same rules and principles as are applicable to contracts generally.” *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018). The interpretation of a contract begins with the language of the contract itself. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words. *Id.* A contract is ambiguous if it is reasonably subject to conflicting interpretations. *Id.* Determining whether a contract is ambiguous is a question of law over which this Court exercises free review. *Id.*

Courts must read a contract as the average person would and must not give a strained construction. *Cf., Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 175 P.3d 748 (2007). Moreover, a contract is not rendered ambiguous on its face because one of the parties thought that a word used has some meaning that differed from the ordinary meaning of that word:

⁶ CM Rule 43 governs the submissions of mitigation plans in the context of a delivery call. IDAPA 37.03.11.043.

If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, no matter what the actual or secret intentions of the parties may have been. Presumptively, the intent of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it, and such meaning cannot be perverted or destroyed by the courts through construction, for the parties are presumed to have intended what the terms clearly state. Only when the language of the contract is ambiguous may a court turn to extrinsic evidence of the contracting parties' intent.

Id. at 63-64; 175 P.3d at 752-753 (citing, 17A Am.Jur.2d, Contracts § 348 (2004)).

Section 3.a. of the Settlement Agreement provides that “[t]otal ground water diversion shall be reduced by 240,000 ac-ft annually.” R.,437. The Director found the language of this provision to be unambiguous. R., 415. The Court agrees. As the Director set forth in the Final Order, “the adverb ‘annually’ derives from the adjective ‘annual,’ which means ‘of or measured by a year’ or ‘happening or appearing once a year, yearly.” R., 415 (citing, Webster’s New World Dictionary (3d coll. Ed. 1994). The term annually does not mean a five-year average and the average person would not read it as such. Therefore, the Director did not err in determining that Section 3.a of the Settlement Agreement unambiguously requires a reduction in ground water diversions in the amount of 240,000 acre-feet each year.

Notwithstanding the plain language, IGWA asserts Section 3.a. of the Settlement Agreement is latently ambiguous. “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *Sky Cannon Properties, LLC*, 155 Idaho at 606, 315 P.3d at 794. The Court finds the plain language of Section 3.a. does not lose clarity when applied to the facts as they exist. This is not a case where the definition of the term annually is unclear and two or more possible definitions might exist. *See, Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1048-1049 (1952) (holding that a latent ambiguity arose when a writing referred to a pump and it was shown that there were two or more pumps to which it might properly apply). The term “annually” is easily defined as, and commonly understood to mean, happening yearly.

Additionally, if the Court were to hold that the term “annually” means a five-year average for purposes of Section 3.a., the Settlement Agreement would lose clarity, not gain it. Such an interpretation would cast doubt and confusion on the meaning of the terms “annually” and “annual” as used throughout the Settlement Agreement. For example, Section 2.a.i of the

Second Addendum requires IGWA to submit certain data to the Steering Committee “prior to April 1 annually.” R., 478. Section 3.b. of the Settlement Agreement requires the “annual” delivery of storage water from IGWA to the Upper Snake Reservoir system “delivered to SWC 21 days after the date of allocation.” R., 438. Likewise, Section 3.m. of the Settlement Agreement requires the Steering Committee “will meet at least once annually.” R., 439.

This is also not a case where the common definition of the term annually would lead to an illogical or absurd result. *See e.g., Mountainview Landowners Cooperative Assoc., Inc. v. Dr. James Cool, D.D.S.*, 139 Idaho 770, 86 P.3d 484 (2004) (Supreme Court found a latent ambiguity where the strict definition of a word would lead to illogical or absurd results). The delivery call is ongoing in nature and, prior to the Settlement Agreement, has required annual evaluation by the Director. In the context of an ongoing call, it is neither illogical nor absurd that Section 3.a. of the Settlement Agreement would require a reduction in ground water diversions in the amount of 240,000 acre-feet each year.

Last, IGWA relies upon certain non-contemporaneous extrinsic evidence to support its position that ambiguity exists. This includes (1) a proposed order that was submitted to the Director when the parties proffered the Settlement Agreement as a proposed mitigation plan in March 2016 (R., 516)⁷, and (2) post-Settlement Agreement evidence showing how IGWA determined to calculate the pre-2015 baseline diversion number against which the 240,000 acre-foot reduction obligation was to be measured. IGWA determined to utilize a five-year average of years 2010-2014 to determine the baseline.⁸ Averaging those five years establishes the pre-2015 baseline from which the post-2015 240,000 acre-foot reduction is compared. IGWA argues in relevant part as follows:

[i]f it is reasonable to use a 5-year average to define the baseline against which compliance is measured, it is reasonable to average post-2015 diversions to measure compliance with the annual reduction obligation.

...

It is incompatible for the Director to order that conservation be measured based on single-year diversions while using a 5-year average as the baseline.

...

If averaging is used for the baseline, averaging should be used to measure compliance.

⁷ The Director did not use, sign, or adopt the subject proposed order.

⁸ How IGWA calculates the pre-2015 baseline year was not raised as a disputed issue before the Director below and is not at issue on judicial review. *See* R., 22.

IGWA's Opening Br., p.20.

The Court finds that neither evidence of the proposed order nor evidence showing how IGWA determined to calculate the baseline can be used to create an ambiguity. As set forth above, Section 3.a.i. of the Settlement is unambiguous. Therefore, extrinsic evidence cannot be used to modify or contradict that plain language. Additionally, the Settlement Agreement contains a merger clause which provides as follows:

9. Entire Agreement.

This Agreement sets forth all understandings between the parties with respect to the SWC delivery call. There are no understandings, covenants, promises, agreements, conditions, either oral or written between the parties other than those contained herein. The parties expressly reserve all rights not settled by this Agreement.

R., 440. A written agreement containing a merger clause “is complete on its face.” *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013). Since the Settlement Agreement is complete on its face the Court need not look to extrinsic evidence. For these reasons, the Court finds IGWA’s argument’s that Section 3.a.i of the Settlement Agreement is patently ambiguous to be unavailing.

ii. The Director’s determination that the 240,000 acre-feet reduction obligation is the responsibility of the signatory IGWA members is affirmed.

The next point of contention centers on which ground water diverters are responsible for the mitigation plan’s 240,000 acre-feet reduction obligation. The Director found that the ground water diverters that are the signatory parties to the Settlement Agreement are responsible for the whole of the obligation. R., 416-417. IGWA disagrees, asserting the Director’s determination forces the signatory parties to conserve more groundwater than they agreed to. IGWA’s argument relies upon Section 3.a.ii of the Settlement Agreement, which provides as follows:

a. Consumptive Use Volume Reduction.

- i.** Total ground water diversion shall be reduced by 240,000 ac-ft annually.
- ii.** *Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction or in conducting an equivalent private recharge activity. Private recharge activities cannot rely on the Water District 01 common Rental Pool or credits acquired from third parties, unless otherwise agreed to by the parties.*

R., 437 (emphasis added).

When the parties drafted the Settlement Agreement, IGWA contends it was contemplated that all ground water and irrigation districts having members that divert from the ESPA would be signatory to the Settlement Agreement. This includes A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District, as well as the various IGWA members that actually signed the Agreement. IGWA further contends it was contemplated that the 240,000 acre-feet reduction obligation would be shared proportionately by all ground water and irrigation districts having members that divert from the ESPA.

In actuality, A&B Irrigation District, Southwest Irrigation District, and Falls Irrigation District are not signatory parties to the Settlement Agreement. Notwithstanding, it is IGWA's position the Director must still attribute a portion of the Agreement's 240,000 acre-feet reduction requirement to A&B Irrigation District and Southwest Irrigation District consistent with the intent of the Agreement.⁹ It argues the ground water diverters that are signatory parties to the Settlement Agreement are only responsible for 205,397 acre-feet of the 240,000 acre-feet obligation. It proceeds to assert that A&B Irrigation District and the Southwest Irrigation District are responsible for the remainder, relying on Section 3.a.ii of the Settlement Agreement quoted above.¹⁰

The Court finds this issue has already been decided. On May 2, 2016, the Director issued his Final Order Approving Stipulated Mitigation Plan. In that Order, the Director approved the parties' stipulated proposed mitigation plan on the condition that "[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan." R., 896. The annual reduction obligation set forth in Section 3.a. of the Settlement Agreement is an ongoing activity required under the mitigation plan. Therefore, it cannot be

⁹ For reasons that are not clear from the record, IGWA does not contend that a portion of the 240,000 acre feet reduction requirement should be attributed to Falls Irrigation District. That said, at oral argument counsel for IGWA represented that the parties have agreed that Falls Irrigation District should be exempted from this analysis by agreement of the parties.

¹⁰ As part of an ambiguity analysis, IGWA appears to argue the Settlement Agreement lacks terms that would allow the Director to (1) determine compliance with the mitigation plan's 240,000 acre-feet reduction requirement and/or (2) determine how the requirement should be allocated among the signatory ground water users. At oral argument, counsel for IGWA stated that at the time the Settlement Agreement was signed, there was no agreement between the parties as to how to calculate and/or proportion the 240,000 acre-feet reduction requirement amongst the signatory ground water users. That said, none of the parties have argued on judicial review (or before the Director) that the Settlement Agreement lacks any material terms. Therefore, the Court does not reach that issue.

attributed to Southwest Irrigation District which is neither a signatory party to the Settlement Agreement nor a party to the mitigation plan. While A&B Irrigation District is a party to the mitigation plan, the Agreement between it and IGWA dated October 7, 2015, makes clear that its participation in the Settlement Agreement and subsequent mitigation plan is as “a surface water right holder only.”¹¹ R., 498. IGWA explicitly agreed in the Agreement that “Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights.” R., 498. This includes the 240,000 acre-feet reduction requirement set forth in Section 3.a.

The Court notes the parties knew that neither A&B Irrigation District nor Southwest Irrigation District were signatory parties to the Settlement Agreement when they submitted it to the Director as a proposed mitigation plan. The Settlement Agreement was entered into on June 30, 2015. R., 436. The signatories had all signed the Settlement Agreement on or before July 29, 2015.¹² R., 446-460. The signatory parties did not submit the Settlement Agreement to the Director as a proposed mitigation plan until March 9, 2016. R., 509. By that time, the signatory parties had known that A&B Irrigation District and Southwest Irrigation District had not signed the Settlement Agreement for a considerable amount of time. Notwithstanding, the 240,000 acre-feet reduction obligation was not modified downward by the signatory parties to account for that fact. As a result, when the signatory parties submitted the Settlement Agreement to the Director as a proposed mitigation plan, it still contained the 240,000 acre-feet annual reduction requirement in Section 3.a.

When the Director approved the Settlement Agreement as a proposed mitigation plan, he did so on the explicit condition the ongoing activities required pursuant to the Mitigation Plan, including the 240,000 acre-feet reduction requirement, “are the responsibility of the parties to the Mitigation Plan.” R., 896. The Director’s Final Order dated May 2, 2016, was a final and appealable order.¹³ If IGWA disagreed with the Director’s conditional approval of the stipulated proposed mitigation plan, it was required to timely exhaust administrative remedies and seek

¹¹ Some members of A&B Irrigation District are holders of surface water rights while other members are holders of ground water rights.

¹² The Settlement Agreement had a signature deadline of August 1, 2015. R., 445.

¹³ If IGWA had a different intent regarding the application of Section 3.a. of the Settlement Agreement, at this point the Director’s conditional approval of the proposed mitigation plan plainly set forth the requirement regarding which parties were responsible for the annual 240,000 acre-feet annual reduction obligation. If IGWA had concerns with the Director’s addition of the condition for approving the Mitigation Plan, it did not raise them with the Director. Accordingly, the parties have been subject to the terms of the Mitigation Plan since its approval.

judicial review at that time. I.C. §§ 67-5271, *et. seq.* It did not, and the time for taking such actions has expired. The issue is therefore final and not proper for review in this proceeding and IGWA's attempt to raise the issue for the first time in this proceeding is an improper collateral attack on the Director's May 2, 2016, Final Order. It follows the Director's Final Order must be affirmed.

B. Substantial rights.

IGWA argues its substantial rights were prejudiced by the Final Order by "forcing them to conserve more groundwater than they agreed to when they signed the [Settlement Agreement]." IGWA Opening Br., p.23. As set forth above, IGWA has failed to establish the Final Order was made in violation of Idaho Code § 67-5279(3). Additionally, the only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021. The parties entered into a separate agreement (i.e., the Remedy Settlement Agreement) to resolve that dispute. That Agreement was entered into prior to the Director's issuance of Final Order that is the subject of this proceeding, which Final Order simply implemented the stipulated resolution. Therefore, the Final Order did not implement any remedy in relation to the 2021 compliance dispute that was not agreed to by IGWA in resolution of the dispute. It follows the Final Order did not prejudice IGWA's substantial rights. At oral argument, the parties indicated that compliance issues with the approved mitigation plan have been raised with respect to 2022 and that additional issues may potentially be raised with respect to 2023. It is the Court's understanding that no determination or final order pertaining to 2022 and 2023 has been made by the Director at this time. As a result, compliance issues related to 2022 and 2023 are not before the Court in this proceeding and cannot be used to establish prejudice to a substantial right for purposes of this case. Therefore, IGWA has not shown its substantial rights were prejudiced. It follows the Final Order must be affirmed.

C. Attorney fees.


IGWA seek an award of attorney fees under Idaho Code § 12-117(1). That code section provides for fees to the prevailing party where the Court finds "that the nonprevailing party acted without a reasonable basis in fact or law." IGWA is not the prevailing party in this proceeding. As a result, its request for attorney fees must be denied.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Final Order is hereby affirmed.

Dated November 16, 2023



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Date: 11/16/2023

Trent Tripple
Clerk of the Court

By Eric Rowell
Deputy Clerk



EXHIBIT E

IN THE MATTER OF THE DISTRIBUTION)
 OF WATER TO VARIOUS WATER)
 RIGHTS HELD BY AND FOR THE)
 BENEFIT OF A&B IRRIGATION)
 DISTRICT, AMERICAN FALLS)
 RESERVOIRS DISTRICT NO. 2, BURLEY)
 IRRIGATION DISTRICT, MILNER)
 IRRIGATION DISTRICT, MINIDOKA)
 IRRIGATION DISTRICT, NORTH SIDE)
 CANAL COMPANY, AND TWIN FALLS)
 CANAL COMPANY.)
 _____)
 IN THE MATTER OF IGWA'S)
 SETTLEMENT AGREEMENT)
 MITIGATION PLAN)
 _____)

I

BACKGROUND

This matter concerns a Petition seeking judicial review of the Director's Amended Final Order Regarding Compliance with Approved Mitigation Plan dated April 24, 2023 ("Final Order"). On November 16, 2023, the Court entered a Memorandum Decision and Order, along with a Judgment, affirming the Final Order. The background set forth in the Memorandum Decision is incorporated herein by reference. On November 29, 2023, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a Petition for Rehearing. The parties briefed the issues raised and a hearing on the Petition for Rehearing was held on February 15, 2024.

II.

ANALYSIS

In the Final Order, the Director held the mitigation plan unambiguously requires participating IGWA members to reduce ground water diversions in the amount of 240,000 acre-feet of water each year. R., 415. He further found the mitigation plan unambiguously prohibits participating IGWA members from apportioning a percentage of the annual reduction requirement to A&B Irrigation District and/or Southwest Irrigation District. R., 416. The Court affirmed the Director's holdings in these respects in the Memorandum Decision. In its Petition for Rehearing, IGWA reasserts challenges to the Director's enforcement of the approved

mitigation plan. In particular, it challenges the Director’s proportioning of the 240,000 acre-feet reduction obligation among the participating IGWA members.

A. The Director’s proportioning of the 240,000 acre-feet reduction obligation is affirmed.

With respect to the 240,000 acre-feet reduction obligation, Section 3.a.ii of the Settlement Agreement provides that “Each Ground Water and Irrigation District with members pumping from the ESPA shall be responsible for reducing their proportionate share of the total annual ground water reduction . . .” R., 437. Prior to April 1 of each year, the Settlement Agreement requires participating IGWA members to submit their ground water diversions for the prior irrigation season to the steering committee. R., 478. On April 1, 2022, participating IGWA members submitted their performance report for the 2021 irrigation season. R., 709. They also prepared and submitted a document entitled “2021 Performance Summary Table,” which included information on their ground water diversions. R., 845. It set forth the proportionate shares of the reduction obligation as follows:

American Falls-Aberdeen	33,715 acre-feet
Bingham	35,015 acre-feet
Bonneville-Jefferson	18,264 acre-feet
Carey	703 acre-feet
Jefferson-Clark	54,373 acre-feet
Henry’s Fork	5,391 acre-feet
Magic Valley	32,462 acre-feet
North Snake	25,474 acre-feet
A&B	21,660 acre-feet
Southwest ID	12,943 acre feet

TOTAL: 240,000 acre-feet

R., 845.

IGWA’s numbers attributed 34,603 acre-feet of the 240,000 acre-feet reduction obligation to A&B Irrigation District and Southwest Irrigation District. This attribution was contrary to the plain language of the mitigation plan. The Director expressly approved the mitigation plan on the condition that “[a]ll ongoing activities required pursuant to the Mitigation Plan are the responsibility of the parties to the Mitigation Plan.” R., 896. The 240,000 acre-feet reduction obligation set forth in Section 3.a. of the Settlement Agreement is an ongoing activity

required under the mitigation plan. Therefore, it cannot be attributed to Southwest Irrigation District which is neither a signatory party to the Settlement Agreement nor a party to the mitigation plan. It also cannot be attributed to A&B Irrigation District, as IGWA expressly agreed that “Paragraphs 2 – 4 of the *Settlement Agreement* do not apply to A&B and its ground water rights.” R., 498. This includes the 240,000 acre-feet reduction requirement set forth in Section 3.

Recognizing that IGWA’s inclusion of A&B Irrigation District and Southwest Irrigation District in the proportionate share numbers was contrary to the mitigation plan, the Director reapportioned IGWA’s numbers to comply with the mitigation plan. The Director did so in a purely mathematical fashion utilizing the information submitted by IGWA. The Director removed A&B Irrigation District and Southwest Irrigation District from the proportionate share numbers. R., 412. The Director then took the 34,603 acre-feet improperly attributed to those two entities and redistributed it to the participating IGWA members. R.412. In doing so, the Director utilizing the same percentages that IGWA utilized in determining each members’ share. R., 412. The Director found each participating IGWA members’ proportionate share of the reduction obligation in 2021 to be as follows:

American Falls-Aberdeen	39,395 acre-feet
Bingham	40,914 acre-feet
Bonneville-Jefferson	21,341 acre-feet
Carey	821 acre-feet
Jefferson-Clark	63,533 acre-feet
Henry’s Fork	6,299 acre-feet
Magic Valley	37,931 acre-feet
North Snake	29,765 acre-feet
A&B	0 acre-feet
Southwest ID	0 acre feet
	<hr/>
TOTAL:	240,000 acre-feet

R., 412. Based on the diversion numbers supplied by IGWA for 2021, the Director found that the following six participating IGWA members failed to satisfy their proportionate share of the 240,000 acre-feet reduction obligation in 2021: American Falls-Aberdeen, Bingham, Bonneville-Jefferson, Jefferson-Clark, Magic Valley, and North Snake. R., 412; 419. In total, participating

IGWA members were 117,216 acre-feet short of the 240,000 acre-feet reduction obligation in 2021.¹

The Director did not act contrary to law in reapportioning IGWA's numbers to comply with the mitigation plan. The Director is statutorily vested with a clear legal duty to distribute water. I.C. § 42-602. The details of how the Director chooses to distribute water are largely left to his discretion. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). The Legislature has authorized the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water, and other natural water resources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." I.C. § 42-603. The Director has done so in the CM Rules, which were approved by the Legislature and became effective on October 7, 1994.² Under the CM Rules, the Director has broad discretionary authority to administer water. *See e.g., In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013) (recognizing the Director has discretionary authority under the CM Rules to develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology). The administration of water under the CM Rules includes the discretion to approve, implement, and enforce mitigation plans in lieu of curtailment. IDAPA 37.03.11.043; IDAPA 37.03.11.042.02; *In Matter of Distribution of Water to Various Water Rights Held by or For Ben. of A&B Irr. Dist.*, 155 at 654, 315 P.3d at 842 (when material injury is found to exist in a delivery call, the Director can "either regulate and curtail the diversions causing injury or approve a mitigation plan that permits out-of-priority diversion").

The Director's reapportionment of IGWA's numbers was consistent with both his discretionary authority to approve, implement, and enforce a mitigation plan under the CM Rules and with the plain language of the Settlement Agreement. The proportionate share numbers submitted by IGWA were contrary to the plain language of the approved mitigation plan for the reasons set forth herein. The Director's reapportionment simply accounted for this and, in a

¹ It should be noted that even when IGWA improperly attributed 34,603 acre-feet of the reduction obligation to A&B Irrigation District and Southwest Irrigation District, IGWA was still 82,613 acre-feet short of the 240,000 acre-feet reduction obligation in 2021. R., 845; 412. To arrive at the 117,216 acre-feet deficiency, the Director utilized a baseline of 1,787,604 acre-feet as the starting point. This is the baseline IGWA provided in its 2021 Performance Summary Table. R., 845

² The term "CM Rule" refers to Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources.

mathematical fashion using IGWA's own percentages, redistributed the improperly attributed 34,603 acre-feet to the participating IGWA members. In fact, the terms of the Settlement Agreement contemplate that the Director has the authority to determine whether a disputed breach has occurred:

If the Surface Water Coalition and IGWA do not agree that a breach has occurred or cannot agree upon actions that must be taken by the breaching party to cure the breach, the Steering Committee will report the same to the Director and request that the Director evaluate all available information, determine if a breach has occurred, and issue an order specifying actions that must be taken by the breaching party to cure the breach or be subject to curtailment.

R., 479. The Director evaluated the information in this case, determined that IGWA's numbers were inconsistent with the mitigation plan, and redistributed the improperly attributed 34,603 acre-feet according to the percentage information submitted by IGWA. The Director did not alter the terms of the Settlement Agreement nor abuse his discretion in this respect.³

As the Director acted consistent with his authority under the CM Rules and with the terms of the Settlement Agreement, the Final Order must be affirmed. It follows that IGWA's petition for reconsideration on this issue is denied.

B. Substantial rights.

In the Memorandum Decision, the Court utilized Idaho Code § 67-5279(4) as one basis on which to affirm the Director's Final Order, finding that IGWA failed to establish prejudice to its substantial rights. The Court held in part as follows:

[T]he only issues before the Court pertain to the dispute over compliance with the approved mitigation plan in 2021. The parties entered into a separate agreement (i.e., the Remedy Settlement Agreement) to resolve that dispute. That Agreement was entered into prior to the Director's issuance of Final Order that is the subject of this proceeding, which Final Order simply implemented the stipulated resolution. Therefore, the Final Order did not implement any remedy in relation to the 2021 compliance dispute that was not agreed to by IGWA in resolution of the dispute. It follows the Final Order did not prejudiced IGWA's substantial rights.

³ IGWA asserts the Settlement Agreement fails to specify a formula to determine each participating IGWA members' proportionate share of the reduction obligation. It also asserts the Settlement Agreement fails to define a baseline against which the 240,000 acre-feet reduction obligation will be measured. Counsel for IGWA represented at the hearing that parties did not reach any agreement on either of these terms at the time of contracting. IGWA couches its argument in this respect in terms of ambiguity, but it appears to the Court the argument is one of contract formation. That said, none of the parties have argued on judicial review that no enforceable contract came into being in this matter, or that the approved mitigation plan is legally unenforceable. Nor were such argument presented to the Director below. Therefore, the Court does not reach that issue.

Memorandum Decision and Order, p.15.

IGWA requests the Court reconsider its ruling on rehearing. It asserts “the Remedy Settlement Agreement was entered into under duress after the Director communicated to IGWA through back channels that he was planning to declare a breach and shut off the ground water districts’ members water rights” *IGWA Brief in Support of Petition for Rehearing*, p.7. IGWA’s assertion is conclusory and lacks any supporting citation to the evidentiary record. As a result, IGWA’s petition on this issue must be denied. See e.g., *Woods v. Sanders*, 150 Idaho 53, 59, 244 P.3d 197, 203 (2010) (“Conclusory allegations and assertions of fact contained in the brief without citation to the record below are not sufficient to support an argument on appeal”).


III.

ORDER

Therefore, based on the foregoing, IT IS ORDERED the Petition for Rehearing is hereby denied.

Dated

3/5/2024



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Trent Tripple
Clerk of the Court

By Eric Rowell
Deputy Clerk



EXHIBIT F

**FIRST ADDENDUM TO 2022
SETTLEMENT AGREEMENT PERFORMANCE REPORT**

TO: IGWA-SWC Settlement Agreement Steering Committee
FROM: Ground Water Districts
DATE: February 22, 2024
RE: First Addendum to 2022 Performance Report

Introduction

On April 1, 2023, the ground water districts submitted a report (“Initial 2022 Report”) of its year 2022 performance under section 3.a. of the IGWA-SWC Settlement Agreement (“Agreement”) which requires each district to conserve a proportionate share of 240,000 acre-feet of groundwater. Unlike the performance reports submitted in prior years, the Initial 2022 Report did not purport to demonstrate compliance with section 3.a in 2022 due to uncertainty over the districts’ obligations under section 3.a, which was then and continues to be mired in litigation.

As noted in the Initial Report, the Agreement does not prescribe how each district’s proportionate share of 240,000 acre-feet will be calculated under section 3.a, nor does it prescribe the baseline from which ground-water conservation will be measured. In 2016, the districts agreed upon (i) a method for calculating their respective shares of 240,000, and (ii) a method for measuring compliance with their respective obligations. From 2016-2022, the districts measured compliance by comparing post-Agreement diversions against average pre-Agreement diversions over the five-year period 2010-2014. The districts adopted a five-year average as the baseline in part based on their expectation that averaging would likewise be allowed to measure post-Agreement compliance. From 2016-2022, the ground water districts conserved a total of 2,189,531 acre-feet of groundwater—312,790 acre-feet per year on average—using this method.

In the Spring of 2022, the Surface Water Coalition (“SWC”) asserted that the method the ground water districts had used since 2016 to calculate their proportionate conservation obligations was improper, and that averaging should not be allowed to measure compliance. After a brief effort to resolve the matter cooperatively, the SWC commenced litigation and asked the Director to adopt its interpretation of section 3.a and find certain districts in breach of the Agreement. On September 8, 2022, former IDWR Director Spackman issued the *Final Order Regarding Compliance with Approved Mitigation Plan*, ruling that the methods used by ground water districts from 2016-2022 to calculate each district’s proportionate share of 240,000 acre-feet and to measure compliance with section 3.a. are not permitted. The districts challenged that ruling, and a hearing was held February 8, 2023.

At the time the districts submitted their Initial Report on April 1, 2023, a final decision had not been entered from the February 8 hearing. Therefore, the Initial Report states: “Since the method of measuring compliance will change depending on the outcome of the Director’s reconsideration of the Compliance Order, the enclosed spreadsheet does not purport to demonstrate compliance with the Agreement in 2022,” and “IGWA will determine a more appropriate method of measuring compliance once the Director’s decision becomes final.” The Initial Report further states that if the Director’s final decision does not allow averaging, “then an alternative method will need to be developed.”

On April 24, 2023, the Director issued the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* which affirmed the Director’s prior ruling. This has forced the districts to reevaluate the method used to calculate each district’s proportionate share of 240,000 acre-feet, and the method used to measure compliance with section 3.a.

The districts have selected a new baseline from which groundwater conservation will be measured. Instead of comparing post-Agreement diversions against average diversions over the five-year period immediately preceding the Agreement (2010-2014), post-Agreement diversions will be compared against average diversions over the three-year period immediately preceding the Agreement (2012-2014). A three-year average has been selected in part based on the Surface Water Coalition’s agreement that compliance would be based on a 3-year average, as stated in the *Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order* filed March 9, 2016. As litigation concerning the Agreement is ongoing, and as additional data and analyses become available, the ground water districts reserve the right to further refine or amend the method used to measure groundwater conservation under section 3.a of the Agreement.

With regard to the method by which each district’s proportionate conservation obligation is calculated, the Initial Report states: “If the decision requires the IGWA Districts alone to conserve 240,000 acre-feet, then each District’s proportionate share of 240,000 acre-feet will need to be redetermined.” The districts have not at this time determined a new method of calculating each district’s proportionate share of 240,000 acre-feet. As litigation concerning the Agreement is ongoing, and as additional data and analyses become available, the ground water districts reserve the right to make that determination and amend its performance report accordingly.

2022 Performance

A spreadsheet detailing the amount of groundwater diverted in each district in the year 2022, along with the amount of managed aquifer recharge performed by each district, was submitted with the Initial Report. Groundwater diversion and aquifer recharge volumes have not changed; therefore, a new spreadsheet is not included with this addendum. The table below shows each district’s performance in 2022 based on the three-year average baseline and the target conservation figures assumed in the *Amended Final Order Regarding Compliance with Approved Mitigation Plan* issued April 24, 2023. Based on this method, the ground water districts collectively conserved 288,031 acre-feet in 2022. On an individual level, using this method only one district did not achieve the conservation targets assigned in the *Amended Final Order Regarding Compliance with Approved Mitigation Plan*. This may change if districts select an alternate method for calculating each district’s proportionate share of 240,000 acre-feet, districts reimburse and re-appportion recharge, or if the judiciary reverses the *Amended Final Order Regarding Compliance with Approved Mitigation Plan*.

2022 Usage Analysis: 3-Year Average Baseline							
all values in acre-ft							
	IDWR Target Conservation	3 yr Baseline	2022 Usage	Diversions Reduction	Accomplished Recharge/ Direct Delivery	Total Conservation	2022 Mitigation Balance
American Falls-Aberdeen	39,395	294,807	269,322	25,485	26,254	51,739	12,343
Bingham	40,914	296,003	269,088	26,915	516	27,431	-13,484
Bonneville-Jefferson	21,341	166,100	151,245	14,855	9,249	24,104	2,763
Carey	821	5,671	1,889	3,782	5	3,787	2,966
Jefferson-Clark	63,533	478,162	408,112	70,050	7,647	77,697	14,164
Henry's Fork	6,299	70,813	65,177	5,636	3,000	11,459	5,160
Madison		79,742	76,919	2,823			
Magic Valley	37,931	269,152	218,759	50,392	3,378	53,770	15,840
North Snake	29,765	209,487	174,838	34,649	3,395	38,044	8,278
Total:	240,000	1,869,936	1,635,349	234,588	53,443	288,031	48,031
Notes:							
(1) Includes mitigation for Freemont- Madison Irrigation District, Madison Ground Water District and WD100. Mitigating by alternative means.							
(2) Madison baseline is preliminary estimate, see note on district breakdown.							
(3) North Snake GWD baseline includes annual average of 21,305 acre-feet of conversions.							

EXHIBIT G

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER APPROPRIATORS,
INC.,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN in his
capacity as the Director of the Idaho Department
of Water Resources.

Respondents.

Case No. CV01-23-07893

IN THE MATTER OF THE DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS HELD
BY AND 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

IN THE MATTER OF IGWA'S SETTLEMENT
AGREEMENT MITIGATION PLAN

AGENCY HEARING TRANSCRIPT ON APPEAL

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Director, Presiding

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Audio Transcription

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO GROUND WATER APPROPRIATORS, INC.,)

Petitioner,)

v.) Case No.

IDAHO DEPARTMENT OF WATER RESOURCES,) CV01-23-07893

and GARY SPACKMAN in his capacity as)

the Director of the Idaho Department of)

Water Resources,)

Respondents.)

_____)

TRANSCRIBER'S TRANSCRIPT ON JUDICIAL REVIEW

Appealed from the Idaho Department of Water Resources

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1 (Beginning of audio file.)

2 THE HEARING OFFICER: The appointed hour has
3 arrived.

4 Shall we start the recording, Sarah?

5 SARAH TSCHOHL: We've started.

6 THE HEARING OFFICER: Okay. We are recording.
7 Thank you, everyone, for your patience and the late
8 start.

9 My name is --

10 MR. BAXTER: The microphone.

11 THE HEARING OFFICER: Oh, boy.

12 Okay. My name -- I'm sorry for the late
13 start. And I'll remind everybody, since I'm already
14 delinquent, you have microphones in front of you. When
15 you're speaking, please turn them on. And I'll try to
16 remind you.

17 And, Sarah, will you watch as well?

18 SARAH TSCHOHL: Yes.

19 THE HEARING OFFICER: Because I think we have
20 people participating remotely, and they'll depend on
21 the microphones and the amplification. And it will
22 help perhaps even here in the audible. I think there's
23 some projection that comes, amplification.

24 Okay. My name is Gary Spackman. I'm the
25 Director of the Idaho Department of Water Resources.

1 And I want to welcome everybody here today. This is
2 the time and place appointed for a hearing regarding a
3 determination of a breach regarding a 2006 Mitigation
4 Plan and an underlying agreement that was struck by the
5 parties in 2015.

6 And I know that the parties are interested
7 in expediting this hearing, as am I. And I don't want
8 to --

9 MR. BAXTER: Director, I'm sorry. It looks like
10 we just went mute again.

11 Sarah.

12 THE HEARING OFFICER: Thanks. Yeah, mine went
13 red. There, it's green again.

14 MR. BAXTER: And if everybody could just click
15 yours off to -- whenever we go off mute, it unmutes
16 them all, and then we got to -- maybe it would be good
17 to confirm that those that are listening in on Zoom can
18 hear us.

19 THE HEARING OFFICER: Good. Well, I thought the
20 first exercise that we'd engage in is calling roll.
21 And maybe what we ought to do is call roll for those
22 who are online. We usually go the other direction, but
23 let's see who's online. We have several people.

24 Let me just call people out as I see them.
25 And if you'd respond, please, in the affirmative that

1 you can hear us, and we'll -- if we can't hear you,
2 we'll let you know.

3 So I have John Simpson. Are you there,
4 John?

5 MR. SIMPSON: Morning, Director. Yeah, I'm
6 on -- I couldn't get on the computer audio, so I'm on
7 my cell -- or my office phone, as well as the WebEx.
8 So you may have two locations for me.

9 THE HEARING OFFICER: Okay. But you're able to
10 see as well as hear?

11 MR. SIMPSON: I am, sir. Thank you.

12 THE HEARING OFFICER: Thank you, John.

13 Candice?

14 MS. MCHUGH: Yes, I'm here.

15 And just as a troubleshoot, John, the WebEx
16 was set automatically to have no audio output or no
17 audio input. So if you go to the audio settings, I
18 think if you turn them up, you'll be able to do it
19 through the computer, because it was automatically
20 muted entirely, if you care. But I just wanted to let
21 you know that that's what I had to do.

22 I can hear and see. Thank you.

23 MR. SIMPSON: Okay. Thank you.

24 THE HEARING OFFICER: John, your
25 technology-challenged age is showing, probably, so...

1 MR. SIMPSON: Well, either that or it's obvious
2 that most people would like me muted all the time.

3 THE HEARING OFFICER: All right. Next.

4 And I'm sorry, Elisheva; is that correct?

5 MS. PATTERSON: Yes, I'm right here.

6 THE HEARING OFFICER: Oh, okay.

7 MS. PATTERSON: I'm logged in so I can that I
8 can project images on the screen in case we need them.

9 THE HEARING OFFICER: Okay. Great. And did I
10 pronounce your first name?

11 MS. PATTERSON: It's Elisheva.

12 THE HEARING OFFICER: Elisheva. Okay. Thank
13 you. So Elisheva is here.

14 Rob Harris.

15 MR. HARRIS: I'm here. And I can see, Director.
16 Thank you.

17 THE HEARING OFFICER: Thank you, Rob.

18 And let's see. Is the telephone number I
19 have ending in zero zero, is that you, John?

20 MR. SIMPSON: I believe so, yes.

21 THE HEARING OFFICER: All right.

22 MR. SIMPSON: Thanks.

23 THE HEARING OFFICER: And William Stoddard.

24 SARAH TSCHOHL: Bill Stoddard.

25 THE HEARING OFFICER: Pardon me.

1 SARAH TSCHOHL: It's Bill Stoddard from
2 Jefferson Clark.

3 THE HEARING OFFICER: Well, I show him at least
4 on.

5 Bill, are you there?

6 SARAH TSCHOHL: They're trying to do their
7 annual meeting at the same time, so maybe he'll be in
8 and out.

9 THE HEARING OFFICER: Oh, okay. Well, we know
10 that Bill at least has the ability hopefully to listen.

11 And then I was hoping that Sarah Klahn
12 would be on.

13 Sarah, are you there?

14 MS. MCHUGH: Mr. Director, this is Candice.

15 Sarah had a conflict first thing this
16 morning. She's planning to join within the next half
17 hour to an hour.

18 THE HEARING OFFICER: Okay. All right. Great.
19 Now, have I missed anybody online?

20 Okay. Let's call roll for everybody else
21 here. So -- and I'll do this by entity. So I want to
22 start with the petitioners.

23 So the Idaho Ground Water Appropriators,
24 Inc.

25 MR. BUDGE: Good morning, Director. This is TJ

1 Budge on behalf of IGWA.

2 MS. PATTERSON: Elisheva Patterson on behalf of
3 IGWA.

4 THE HEARING OFFICER: Great. And then I have
5 the Surface Water Coalition.

6 Travis or Kent, introduce yourself, or
7 both, please.

8 MR. THOMPSON: Yes. Travis Thompson for our
9 clients, A & B Irrigation District, et al.

10 MR. FLETCHER: Kent Fletcher for MID and AFRD2.

11 THE HEARING OFFICER: And I'm assuming, John
12 Simpson, that you're also participating representing
13 the Surface Water Coalition? Are you there, John? I
14 think he is.

15 MR. THOMPSON: He's just listening, yeah.

16 THE HEARING OFFICER: All right. And then I
17 have -- I have the City of Pocatello. And that's Sarah
18 Klahn. She'll be listening or observing, but not
19 participating directly.

20 Coalition of Cities? Candice? I hope
21 people are still there.

22 MS. MCHUGH: I'm here.

23 THE HEARING OFFICER: Okay.

24 MS. MCHUGH: I am still here. It's just hard to
25 unmute.

1 THE HEARING OFFICER: Yeah.

2 MS. MCHUGH: Sorry about that. Thank you.

3 THE HEARING OFFICER: All right. Thank you,
4 Candice.

5 And I also have Rob Williams representing
6 the Coalition of Cities.

7 Candice, I assume he's not planning to
8 participate?

9 MS. MCHUGH: He is not. Rob Williams is
10 retired. He --

11 THE HEARING OFFICER: Okay.

12 MS. MCHUGH: That's on the pleading. It's just
13 a remnant.

14 THE HEARING OFFICER: City of Idaho Falls? Rob?

15 MR. HARRIS: Rob Harris on behalf of the City of
16 Idaho Falls observing today, Director. Thank you.

17 THE HEARING OFFICER: Thanks, Rob.

18 And then Bonneville-Jefferson Groundwater
19 District.

20 MR. JOHNS: Skyler Johns for the
21 Bonneville-Jefferson Groundwater District.

22 THE HEARING OFFICER: All right. Thanks,
23 Skyler.

24 And then we sent notices to a few other
25 attorneys, but they have not been participating. There

1 are a couple of attorneys from the federal government,
2 Kathleen Carr and David Gehlert, but I wouldn't expect
3 them to be participating today.

4 And let's see if I have anybody else.

5 Is there anybody I missed today? And I
6 could go around and have the gallery introduce
7 themselves, but you'd probably just as soon remain
8 anonymous; right? So thanks for being here today, and
9 thank you for your interest.

10 Okay. Let's just talk a little bit about
11 procedure, at least as I understand it. So I've
12 reviewed the files. I understand that there have been
13 underlying discussions by the parties and that there
14 are stipulations both to exhibit numbering. Is that
15 correct --

16 MR. BUDGE: Yes, Director.

17 THE HEARING OFFICER: -- TJ and others?

18 Unless somebody doesn't agree, I'll just go
19 on. And we'll just follow that numbering stipulation.

20 And then I understand, too, that there may
21 be a stipulation related to admission of common
22 exhibits. And perhaps somebody can give me a little
23 more information about this. I found at least one list
24 of some common exhibits in one of the documents. But I
25 don't know that I have a final list that's been

1 submitted to me.

2 Am I missing something?

3 MR. BUDGE: Yes, your Honor. So on your -- on
4 your desk there is a binder of common exhibits. These
5 are pleadings that have been filed in this matter, as
6 well as the performance reports that IGWA has submitted
7 to the Department since the subject settlement
8 agreement was signed. And those are numbered in the
9 zero to 99, but I think it goes through 22 or something
10 like that.

11 MS. PATTERSON: 39.

12 MR. BUDGE: 31?

13 MS. PATTERSON: 39.

14 THE HEARING OFFICER: This is the larger binder?

15 MR. BUDGE: That's correct.

16 THE HEARING OFFICER: And I show numbering on
17 the pages through 39.

18 MR. BUDGE: I believe that's correct.

19 THE HEARING OFFICER: And that's consistent, at
20 least generally, with the list that I saw, although
21 there may be -- I thought maybe it was through 37 or
22 something, but there may have been a couple added.

23 MR. BUDGE: There were two pleadings that the
24 Coalition requested we add that were added yesterday or
25 the day before. But they were pleadings that have been

1 filed in this case.

2 THE HEARING OFFICER: Okay. And may I just ask
3 of the parties that are participating, Surface Water
4 Coalition, at least the Coalition of Cities, and you,
5 Mr. Johns, representing Bonneville-Jefferson, has
6 counsel reviewed these common exhibits and is there
7 agreement that these -- these will come into evidence
8 as stipulated without objection?

9 Travis?

10 MR. THOMPSON: Yes, Director.

11 THE HEARING OFFICER: Okay. Skyler?

12 MR. JOHNS: Yes, Director.

13 THE HEARING OFFICER: Okay. All right. That
14 will speed things up, and I really appreciate the
15 assistance of counsel in identifying those exhibits
16 that were common, and that they can be admitted without
17 going through the process of admission.

18 Okay. I need to talk about the order of
19 presenting testimony. And I haven't seen anything
20 related to the order of testimony.

21 I assume, Mr. Budge, that because the Idaho
22 Ground Water Appropriators filed the petition that --
23 and requested the hearing that IGWA would want to go
24 forward presenting evidence and would at least carry
25 that initial burden of presenting evidence, Mr. Budge.

1 MR. BUDGE: That's correct. And counsel have
2 discussed and agreed upon that.

3 THE HEARING OFFICER: Okay. And then has there
4 been some discussion about the presentation of evidence
5 from, for instance, Bonneville-Jefferson and the order
6 of that presentation, whether it can be presented along
7 with IGWA's or whether it's brought in separately? And
8 I don't know how the parties want to do this.

9 And I want to make sure both Mr. Johns and
10 the Surface Water Coalition have a full opportunity to
11 present their evidence and cross-examine if necessary.
12 I don't want to mix it up if folks feel strongly.

13 But on the other hand, if we're able to
14 present like testimony to start with, and then
15 somebody -- from one witness, we don't have to recall
16 them, it may expedite the hearing. So I don't know
17 what the parties think about the order of presentation
18 and examination.

19 MR. JOHNS: Your Honor, I can -- just to clarify
20 the -- I think this might help speed things along.

21 The purpose in Bonneville-Jefferson
22 intervening in this case was stated in its opposition
23 and -- to summary judgment and also its memorandum in
24 support of its motion to intervene. It was based
25 primarily on as contingently if the Director was to

1 construe this or any issues arising from a breach of
2 contract.

3 I believe the Director settled that issue,
4 at least in part, for us. So I don't anticipate that
5 we will be able to raise some of those arguments at
6 this hearing as pursuant to that order.

7 I do believe that in consulting with
8 Mr. Budge and his witnesses that -- that he plans to
9 call that we will be fine if IGWA leads on this and
10 then just reserve the right for any rebuttal witnesses.

11 I do -- would like to acknowledge I have
12 two witnesses here: Kirt Schwieder from
13 Bonneville-Jefferson on the board, he was disclosed as
14 a potential witness, and Representative Stephanie
15 Mickelsen, who's the chair of the Bonneville-Jefferson
16 Ground Water District.

17 She has a few duties that she needs to take
18 care of today, and so I'd just like to ask that if
19 we -- that we excuse her briefly, but if we need to
20 call her back, she would probably be available this
21 afternoon. But I don't -- again, it would probably be
22 on a rebuttal basis.

23 So if the parties have any issue with that,
24 we can discuss.

25 MR. BUDGE: No objection from IGWA.

1 THE HEARING OFFICER: Kent and Travis, what are
2 your thoughts about the order of examination?

3 MR. THOMPSON: Yes. I anticipated IGWA's
4 witnesses first, Bonneville-Jefferson second. And then
5 we have one witness, Brian Olmstead, we would call, I
6 guess, after those presentations. And then any
7 rebuttal, certainly, after that.

8 THE HEARING OFFICER: Okay. Do you have
9 thoughts, Kent, as far as the way --

10 MR. FLETCHER: No. I just want to make it
11 clear, then, it's my understanding Bonneville is not
12 presenting any witnesses in their case-in-chief and
13 only intends to call witnesses for rebuttal. That's
14 what I understand is being said.

15 MR. JOHNS: To clarify, I think we'll join in
16 support of IGWA. As a member of IGWA we still -- I
17 think will rely on their case-in-chief. And at this
18 stage I think the witnesses that would need to be
19 called would need to be called by way of rebuttal. So
20 yes, I think that's correct.

21 Thank you.

22 THE HEARING OFFICER: Skyler, will you be
23 wanting to examine the IGWA witnesses that are called?

24 MR. JOHNS: I'd like to reserve the right to
25 examine any witnesses. I guess I'll allow Mr. Budge to

1 proceed with examination, and then just depending on
2 how that goes, if I could reserve the right to examine
3 those witnesses or cross-examine witnesses.

4 THE HEARING OFFICER: Yeah, thank you. So I
5 just want to come back to the question.

6 Does it mix the testimony up significantly
7 if Mr. Budge examines to begin with and then Mr. Johns
8 follows up with questions, then at least all of that
9 direct testimony comes in at the same time? And then
10 that witness would be subject to cross-examination
11 by --

12 MR. THOMPSON: I think that's the way it should
13 be, your Honor.

14 MR. FLETCHER: Or Mr. Director.

15 THE HEARING OFFICER: I didn't want to -- yeah.
16 Yeah, your Honor is not a title I aspire to.

17 MR. FLETCHER: Utmost respect.

18 THE HEARING OFFICER: Yeah. Well, thanks.

19 Anyway, well, let's follow that course. I
20 just didn't want to mix testimony up in some way. But
21 I think it will expedite the hearing as we move along.

22 Okay. And then -- and then once we finish,
23 then of course the Surface Water Coalition will call
24 witnesses to the extent they want to, and then there
25 will be an opportunity for calling -- or on redirect.

1 So anyway, and then I guess what is called surrebuttal.
2 I don't know.

3 So any more -- any more discussion about
4 how the witness' will be examined? Mr. Budge?

5 MR. BUDGE: Yeah, Mr. Director, just a few
6 housekeeping items.

7 And one that you mentioned that the counsel
8 for the parties did stipulate to premarked exhibits.
9 And we have four sets of numbers that we agreed to. So
10 the common exhibits, which were discussed previously,
11 are zero to 99, the 100 exhibits are IGWA's premarked
12 exhibits, the 200s are the Surface Water Coalition's
13 premarked exhibits.

14 And are yours 300, Skyler?

15 Okay. Skyler doesn't have any.

16 So those have been premarked for ease of
17 reference during the hearing. The common exhibits have
18 been admitted to the record by stipulation. IGWA and
19 the Coalition will seek to admit exhibits as they go
20 along and may not admit all of their exhibits into the
21 record.

22 There are hard copies of the premarked
23 exhibits that have been provided to the Director and to
24 the witness. And I anticipate using those primarily.
25 We do have the ability to project onto the screen

1 digital copies of any exhibit. And if anybody would
2 like that to be done, Elisheva Patterson has the
3 ability to do that, so just let us know.

4 THE HEARING OFFICER: All right. Thank you.

5 MR. JOHNS: Director, I have just one matter I
6 think I need to get into the record before we proceed
7 with presenting evidence or anything.

8 It had come to my understanding about
9 January 30th that there was some settlement talks that
10 occurred that involved members of the Department of
11 Water and a couple of members, I understand, from IGWA.

12 Counsel for Bonneville-Jefferson, however,
13 was not permitted into that meeting. And I just wanted
14 to note for the record that any settlement talks or
15 anything that will be going on between the parties we
16 request from here on forth that Bonneville-Jefferson
17 be -- counsel for Bonneville-Jefferson be invited to
18 those meetings.

19 THE HEARING OFFICER: So noted, Mr. Johns. And
20 I'll pass that on to Department staff.

21 I want to make it clear, however, that I
22 have not been participating in those discussions,
23 because it was my responsibility to hold this hearing,
24 and I may be responsible for issuing -- well, I will be
25 responsible for issuing an order after this hearing.

1 And maybe also I may be issuing additional orders, and
2 consequently I'm a nonparticipant in those discussions.

3 MR. JOHNS: Okay. Thank you for that
4 clarification.

5 Again, it occurred, and I just -- I felt
6 like I needed to -- to state that my clients were a
7 little uncomfortable with how that had come forward.
8 And so I thank you, Director. If you could please
9 instruct your staff, I'd appreciate that.

10 THE HEARING OFFICER: Yeah. And just on a
11 personal note, it's sometimes disconcerting to have all
12 those discussions going on outside of what I know and
13 where I'm the Director. But nonetheless where I have a
14 responsibility as Hearing Officer and as a person
15 that's issuing the decision, it's imperative that I try
16 to maintain my distance and do it as best I can.

17 There's one other matter I just wanted to
18 discuss briefly.

19 And that is, Ms. McHugh, you're
20 participating remotely. And so based on the
21 pre-hearing -- I'm sorry, the notice of hearing, your
22 participation will be one of observation, not intending
23 to call witnesses; is that correct? Are you there,
24 Candice?

25 MS. MCHUGH: Yes. Sorry. Unmuting just takes a

1 minute. That is correct, just observing and not
2 calling witnesses. Thank you.

3 THE HEARING OFFICER: Okay. I wanted to ensure
4 that you didn't have an expectation of calling
5 witnesses.

6 And -- okay. Other preliminary matters?

7 Well, there's one other one I need to talk
8 about. So let's talk about scope of the hearing
9 briefly.

10 So my understanding is that this particular
11 hearing is to address a broad issue of whether the 2015
12 settlement agreement and subsequent addendums approved
13 as a Mitigation Plan under the Conjunctive Management
14 Rules was breached in 2021. And there's two subissues
15 that I've identified.

16 And those subissues are the averaging of
17 annual obligation of -- I'm sorry. The issue of
18 whether 240,000 acre-feet annually is a fixed
19 obligation or whether there's some averaging that was
20 intended by the agreement.

21 And the second issue is what the quantity
22 of obligation is for IGWA. And the numbers I've
23 written down are either 240,000 acre-feet or
24 approximately 205,000 acre-feet. And those are the two
25 issues that I've identified that are the subject of a

1 fact-finding hearing today.

2 I also want to mention that because this is
3 a hearing regarding the Mitigation Plan and not a
4 hearing regarding a full interpretation of a contract,
5 that we are not taking evidence on subjects of unjust
6 enrichment, legal impracticality, unclean hands, or
7 lack of damages. And there may be others.

8 So I want to ensure that the scope of this
9 hearing is clear to the participants today.

10 Now, I'll just ask IGWA and you, Mr. Budge,
11 as well as you, Mr. Johns, are there other issues that
12 you intend to explore in presenting facts today?

13 MR. BUDGE: I might frame the issues a little
14 differently, but they encompass the issues that we --
15 that IGWA intends to address today. There are no other
16 issues that we plan on exploring at this hearing.

17 THE HEARING OFFICER: Mr. Johns.

18 MR. JOHNS: The issues we intend to explore are
19 those that are consistent with your summary judgment
20 order. And I think similar to what Mr. Budge had said,
21 I'd characterize them a little bit differently, but I
22 think they're encompassed in what the Director has
23 stated.

24 THE HEARING OFFICER: Any further input from
25 Surface Water Coalition? Mr. Thompson? Mr. Fletcher?

1 MR. FLETCHER: Yeah, preliminarily, when we talk
2 about the scope, I -- I've been uncertain as to what
3 the scope of the evidence can be in this type of
4 hearing when the Director's interpreting his own order.

5 And unfortunately, there's very little
6 guidance given in the summary judgment order that was
7 issued concerning the legal standards or factual
8 standards that should be applied in this situation.

9 And the reason I say that, and I'm trying
10 to short-circuit the -- loading this record with
11 objections, but I'm afraid that's what we're going to
12 end up with, is that the initial interpretation of
13 whether -- whether this -- these decrees, these orders,
14 were ambiguous is a legal issue, not a factual issue.

15 And so the Director's already ruled that
16 it's not ambiguous as a matter of law. And so here we
17 are today apparently talking about admitting a bunch of
18 evidence into the record about either settlement
19 negotiations or individual's interpretation of the
20 agreement.

21 And I can understand as far as the breach
22 issue goes that evidence should be allowed concerning
23 implementation of the order, but I'm struggling with
24 allowing any evidence into this record concerning
25 settlement discussions, which under this Department's

1 own rules of procedure you are authorized to preclude
2 from this hearing.

3 And with the idea being that we want to
4 encourage settlement discussions, we have to remember
5 that Mr. Johns mentioned this settlement meeting. It
6 had nothing to do with this hearing, so hopefully
7 Mr. Johns understands that, but I don't understand why
8 Mr. Johns would be excluded from any settlement
9 discussions if he's representing Bonneville. So the
10 other -- the settlement discussions that are going on
11 deal with a different matter, and obviously he should
12 be included in that.

13 But the bottom line is we want to encourage
14 settlement discussions. And if we come into a hearing,
15 you know, seven years after we've negotiated an
16 agreement and allow a bunch of testimony about what
17 people thought that they signed on to and thought the
18 order meant, that's going to have a chilling effect on
19 these settlement discussions that are occurring right
20 now and future settlement discussions.

21 The rules are pretty clear. Settlement
22 discussions should not be allowed in a hearing.

23 And so for that purpose I'd make a motion
24 that the Director exclude any settlement discussions
25 from this hearing and enter a protective order stating

1 that none of the witnesses can testify as to settlement
2 discussions. That's one aspect of it.

3 The second aspect of it is parol evidence.
4 And since you've already ruled as a matter of law that
5 this agreement is unambiguous, I would move that all
6 evidence concerning people's interpretation of the
7 agreements or what was said or what people think about
8 it should be excluded as well.

9 How it's implemented can be discussed. But
10 for people to be testifying that this is how we
11 interpreted it and this is how we agreed to it, knowing
12 that they were doing that internally without any input
13 from the Surface Water Coalition, without any agreement
14 from the Surface Water Coalition, is just improper.
15 And there's case law on this issue stating you cannot
16 be admitting these kinds of things into the record
17 because that creates error.

18 And finally, when folks are trying to --
19 I'm not sure what the remedy is here. Are we trying to
20 reform a final order that there was no appeal taken
21 from, there was no judicial review, there was no motion
22 to reconsider the two final orders that we're dealing
23 with here.

24 And so in the end, are we trying to put new
25 terms into an agreement that aren't stated in the

1 agreement? Is that the goal?

2 And if that's the goal, that's completely
3 improper. This -- this administrative hearing, nor can
4 a court turn around and attempt to reform an agreement
5 if the agreement's unambiguous by putting terms into
6 the agreement that aren't there.

7 And so I'm raising these issues now because
8 you're going to hear these same discussions all through
9 today if this evidence is allowed to come in.

10 And I'm very concerned that the Director's
11 already ruled that this is an unambiguous agreement and
12 now we're going to hear a bunch of factual evidence
13 about an agreement that's unambiguous, and I believe
14 that creates error. And I also believe it creates
15 error to allow settlement discussions into this
16 proceeding.

17 Thank you.

18 THE HEARING OFFICER: Thank you.

19 Mr. Thompson.

20 MR. THOMPSON: Yeah, I just agree with what Kent
21 was saying. And as a threshold matter, I think that's
22 what we tried to address in our motion, the two issues
23 you identified, the obligation of IGWA each year and
24 then this averaging issue.

25 And we think those are both answered by the

1 plain terms of the settlement agreement, which was then
2 a stipulated Mitigation Plan that was approved.

3 Thank you.

4 THE HEARING OFFICER: Response?

5 MR. BUDGE: Yes. Thank you, Mr. Director. This
6 is TJ Budge on behalf of IGWA.

7 I appreciate the comments that Mr. Fletcher
8 and Mr. Thompson have raised, and I agree that if a
9 contract is unambiguous, then the interpretation of
10 that contract is confined to the words within the
11 contract.

12 Unfortunately, despite the best efforts of
13 attorneys, and sometimes unique circumstances, not
14 every contract is unambiguous. And the case law is
15 very clear that if a contract is un- -- or is
16 ambiguous, then the fact finder has to look outside the
17 terms of contract to find out what the parties intended
18 when they contracted.

19 Now, as Mr. Fletcher pointed out, the
20 Director did issue an order last September finding the
21 settlement agreement to be patently unambiguous,
22 meaning on the face of it there was no ambiguity to be
23 found.

24 But Idaho law recognizes two types of
25 ambiguity. There's a patent ambiguity. There's also

1 what's known as a latent ambiguity. And this was
2 discussed in IGWA's summary judgment response brief.
3 And I'll just, you know, briefly review for the
4 Director and those in attendance some key laws related
5 to latent ambiguities.

6 First, the Idaho Supreme Court explained in
7 Swanson v. Beco Construction -- the citation for that
8 is 145 Idaho 59. It's a 2007 decision. They defined a
9 latent ambiguity as such. Quote, "A latent ambiguity
10 is not evident on the face of the instrument alone, but
11 becomes apparent when applying the instrument to the
12 facts as they exist."

13 They also state in -- in another more
14 recent decision Sommer v. Misty Valley, LLC, 170 Idaho
15 413. That's a 2021 decision. The Court explained its
16 analysis in approaching latent ambiguity claims.
17 Quote, "First we examine the language of the
18 instrument, including other writings incorporated into
19 the instrument; and second, we examine the reasonable
20 alternative meanings suggested by the parties as to
21 language within the instrument," end quote.

22 The Court further explained that the fact
23 finder, quote, "may consider extrinsic evidence of the
24 structure of the instrument, the parties' relative
25 positions and bargaining power, the parties' bargaining

1 history, the party drafting the instrument, and any
2 conduct of the parties which reflects their
3 understanding of the contract's meaning to determine
4 whether the language of any instrument is reasonably
5 susceptible to more than one meaning," end quote.

6 IGWA's asserted that there is a latent
7 ambiguity in the settlement agreement because it does
8 not explain how to calculate each district's
9 proportionate share of the 240,000 acre-feet, and it
10 does not explain how to implement diversion reductions.

11 And we'll put on evidence to demonstrate
12 that there are multiple ways that could have been done.
13 It's not clear from the face of the instrument. And
14 that was left for IGWA to figure out.

15 That evidence will demonstrate the latent
16 ambiguity that exists, which then allows the Director
17 to consider the parties' conduct and intentions,
18 which -- which includes evidence outside the four
19 corners of the settlement agreement.

20 And so for that reason, we'd ask the
21 Director to deny the motion.

22 THE HEARING OFFICER: Mr. Johns.

23 MR. JOHNS: Thank you, Mr. Director.

24 I would join in support of what -- the
25 arguments that IGWA raised. And I would just point out

1 as well that my understanding is that prior to issuing
2 that final order, which is the question, which is the
3 subject today, there was not an opportunity for IGWA to
4 present the type of evidence it intends to put on
5 today.

6 And so this is requesting, in a way, for
7 the Department to reconsider its decision. And for
8 that reason IGWA should -- is not necessarily bound by
9 the findings of that order, where we are in fact saying
10 we were supposed to be granted a hearing, we want to
11 present arguments in support.

12 And so for that reason I believe that
13 evidence should be permitted to be able to show the
14 latent ambiguities, but also to show custom and
15 practices that show that there was a reading of this
16 agreement that supports that averaging was considered
17 and that the proportionate share of it was 205, not
18 240.

19 Thank you.

20 THE HEARING OFFICER: Brief rebuttal,
21 Mr. Fletcher?

22 MR. FLETCHER: Yes. You know, it's interesting
23 because the Director's already ruled in the motion for
24 summary judgment order that this matter deals with a
25 decree and order, not a contract. And yet all of the

1 authority that IGWA relies upon is contractual
2 authority.

3 If we look at a case dealing with a decree,
4 and there are some in Idaho. One is McKoon versus
5 Hathaway, 146 Idaho 106, a 2008 case dealing with
6 interpretation of a divorce decree. The court citing
7 multiple cases. In fact, this case has been cited over
8 30 times in various forms. "If the language of the
9 decree is unambiguous, the determination of its meaning
10 and legal effect is a question of law, and matters
11 outside the record should not be used to construe it."
12 That's what the Supreme -- or the Court of Appeals
13 held.

14 "If the language is reasonably susceptible
15 to differing meanings, however, it is deemed ambiguous
16 and determination of its meaning is a question of fact.
17 The determination of whether a provision is ambiguous
18 is itself a matter of law."

19 So it's only if you find this decree
20 ambiguous, then you can refer to the circumstances
21 surrounding the making of the judgment in interpreting
22 it, and they refer to the pleadings and other parts of
23 the record in the earlier case.

24 So we have a situation where IGWA's
25 basically arguing this agreement's ambiguous because of

1 our actions that occurred after the signing of the
2 agreement, that we made decisions, and those decisions
3 created an ambiguity. That's really what they're
4 telling you today.

5 They're not telling you the SWC agreed to
6 any of these things that IGWA is claiming are
7 ambiguous. All of the acts taken after as far as
8 determining the averaging and the baseline were made
9 solely by IGWA. SWC had nothing to do with it.

10 And I might also mention that in the
11 original settlement agreement, the first amendment to
12 the settlement agreement, and in the second amendment
13 to the settlement agreement, all of those agreements
14 have integration clauses saying there are no other
15 agreements or other matters to be considered that are
16 outside of this agreement.

17 And so IGWA's trying to come in here today
18 and say, "Well, oh, yeah, but we want you to consider
19 all this other stuff that occurred that was outside the
20 agreement but we did by ourselves that SWC was not
21 asked to participate in, that creates an ambiguity, and
22 therefore we want the Director to" -- and again, I
23 don't know what the remedy is.

24 What remedy is IGWA asking for? That the
25 Director change the number 240 -- 240,000 that's in the

1 agreement to some other number? Are they asking the
2 Director to state -- you know, the agreement itself
3 says "IGWA will take these actions to make these
4 determinations."

5 And so now IGWA is saying, "Well, that
6 creates an ambiguity because we went about it this way,
7 and we could have done it lots of different ways."

8 That doesn't create an ambiguity. They
9 were enforced with doing those things. And they did
10 them. And as far as creating a baseline, there was
11 never any objection to how they did it by anybody.

12 And so I -- I just am sitting here
13 wondering what is this all about today? What can the
14 Director do? Are we trying to set aside a final order
15 that was issued seven, eight years ago? I don't know.
16 I don't know what -- I would like -- I would like to
17 hear what IGWA thinks the remedy would be. To insert
18 terms into the agreement and the order that aren't
19 there? Is that the remedy?

20 THE HEARING OFFICER: Well, Mr. Fletcher, if
21 you're asking me -- and I'll opine here after all of
22 this is finished, but I appreciate the question, at
23 least right now. Perhaps it's tendered to IGWA and not
24 to me, at least initially.

25 So do you have anything further,

1 Mr. Thompson?

2 MR. THOMPSON: No.

3 THE HEARING OFFICER: Anything further,
4 Mr. Budge?

5 MR. BUDGE: Yeah. And maybe this will help.

6 IGWA's not asking to amend an order.
7 IGWA's asking the Director to interpret a settlement
8 agreement that the parties entered into. And in terms
9 of ambiguity, IGWA has argued that there's actually a
10 patent ambiguity in the agreement. Section 3(a)(1),
11 which refers to the 240,000 acre-feet figure, it says,
12 "Total groundwater diversions shall be reduced by
13 240,000 acre-feet annually."

14 So in terms of patent ambiguity, that term
15 is ambiguous because it's susceptible to two
16 reasonable, possible interpretations. One of those is
17 that IGWA's members must conserve 240,000 acre-feet
18 annually. Of course that's not what it says.

19 There's lots of terms in this agreement
20 that say IGWA must do this, IGWA must do that,
21 groundwater districts must do this, groundwater
22 districts must do that. This provision is unique in
23 that it does not assign responsibility to IGWA or
24 groundwater districts. It simply says "total
25 groundwater diversions."

1 And so a patent ambiguity exists because
2 that could be read as total groundwater diversions
3 among all pumpers, or it could be read as IGWA's
4 members alone must reduce by 240.

5 And so we contend there's a patent
6 ambiguity. And as Mr. Fletcher pointed out, when
7 there's a patent ambiguity, the Director must look
8 outside to understand what did that mean. And so
9 that's my first point.

10 My second point to help Mr. Fletcher is
11 3(a)(2) explains that each district is responsible for
12 reducing their proportionate share of the total. It
13 does not explain how that's done.

14 So this isn't a circumstance where IGWA is
15 asking to rewrite the agreement. IGWA is asking the
16 Department to interpret it the way that IGWA understood
17 it to be interpreted.

18 Now, the Coalition may have understood it
19 differently. And we'll let them put that evidence on
20 if they would like.

21 But if there's ambiguity here as we
22 contend, the responsibility for that lies equally with
23 the contracting parties. And the attorneys can share
24 in that responsibility. This is not a nefarious act by
25 IGWA to try to change the agreement, to remake it into

1 something different than IGWA thought it was.

2 It's an attempt by IGWA to enforce the deal
3 that it thought it had made. And the law allows us to
4 put on evidence in light of the patent and latent
5 ambiguity arguments that we've made.

6 THE HEARING OFFICER: And, Mr. Budge, before we
7 leave you, I want to -- if I may, ask a question or
8 re-ask the question Mr. Fletcher asked.

9 What does IGWA intend or want to accomplish
10 in conducting this hearing today? What is the remedy
11 that IGWA is seeking?

12 MR. BUDGE: IGWA seeks a ruling from the
13 Director that the provision 3(a)(2), "total groundwater
14 diversion shall be reduced by 240,000 acre-feet," that
15 that figure was based on an aquifer-wide effort to
16 conserve groundwater, and that the proportionate share
17 of IGWA's members of that 240 is in proportion to
18 pumping among all groundwater districts and irrigation
19 districts. And it's not theirs solely alone. And
20 that's what we seek.

21 THE HEARING OFFICER: And the change in the
22 order that you're seeking will accomplish what?

23 MR. BUDGE: It will change the magnitude of the
24 conservation volume that IGWA's members are each
25 responsible for. And it will allow them to utilize

1 averaging for purposes of compliance.

2 The Director's current order does not allow
3 averaging for purposes of compliance, and it holds
4 IGWA's members alone for the full 240 instead of their
5 proportionate share as we've understood it.

6 THE HEARING OFFICER: So the remedy that you're
7 looking for, if I can restate, is an amendment to the
8 order that may reduce the obligation of IGWA itself in
9 the future?

10 MR. BUDGE: In the future and in the past,
11 correct, yes.

12 THE HEARING OFFICER: All right. Anything
13 further, Mr. Johns?

14 MR. JOHNS: Thank you, Mr. Director.

15 I would join in support with IGWA's
16 statement.

17 But I would also just state that I think
18 that the ultimate outcome would be that it would show
19 there wasn't a breach by IGWA in 2021, if the Director
20 is to reconsider its decision in how it interpreted the
21 matter that IGWA's explained.

22 THE HEARING OFFICER: Okay. Well, and I'll just
23 briefly talk about the arguments and what I've heard.
24 And I appreciate the arguments, and I think they create
25 a -- really focus on what we need to present evidence

1 about.

2 So I am persuaded by Mr. Fletcher's
3 argument that evidence regarding settlement
4 negotiations should not be admissible. And I think
5 that's a very bright line that we need to establish.
6 And I think Mr. Fletcher correctly stated that the
7 purpose of that rule is to encourage settlement
8 negotiations.

9 And so as a preliminary matter, I don't
10 want evidence coming into the record regarding
11 discussions that occurred during settlement
12 negotiations. And so at least with respect to his
13 first argument, again, I don't want evidence presented
14 regarding settlement.

15 The second issue about parol evidence is a
16 more difficult one for me. And I interpret the
17 Department's responsibility in holding this hearing
18 granted under 42-1701(a) of the Idaho Code as being an
19 obligation of the Director to hold a hearing or the
20 Department when anyone is grieved by an action of the
21 Director or the Department. And so it's a very broad
22 grant of the opportunity to have a hearing and to put
23 evidence on.

24 And this hearing, in my opinion, although
25 there is an underlying settlement agreement that is in

1 the form of a contract, which was adopted as a
2 Mitigation Plan, really my obligation is to determine
3 whether the Mitigation Plan was violated and whether,
4 as a result of that violation, that the alternative to
5 the Mitigation Plan should be implemented or not.

6 And as I understand Judge Wildman's
7 decisions that have been handed down, that alternative
8 is curtailment. And if the Mitigation Plan has not
9 been satisfied, and there has to be, as best as the
10 Department can work through it, a timely and expedited
11 determination of whether it's been violated or not, and
12 then -- and then the subsequent activity, which is
13 curtailment.

14 And so this is an interpretation of a
15 Mitigation Plan. And all of the strict rules of
16 contract, including those that were raised by
17 Mr. Johns, I'm -- I'm not going to apply.

18 So I want the evidence to come in. And I
19 want to know whether there's any additional evidence
20 that I didn't have in front of me when that rapid and
21 expedited determination of a breach was issued.

22 And so I'll listen to that evidence,
23 Mr. Fletcher, and I appreciate your arguments.

24 I'm ready to go forward with the evidence
25 at this point.

1 MR. JOHNS: Mr. Director, can I just seek a
2 clarification.

3 THE HEARING OFFICER: Mr. Johns.

4 MR. JOHNS: Yeah, Mr. Johns for
5 Bonneville-Jefferson Ground Water District.

6 So with regard to the settlement
7 negotiations, is that just any and all settlement
8 negotiations between the parties, or are we just
9 talking about a particular time frame? And is it any
10 and all conversations, not limited in any way? Just
11 know if there was something talked about in a
12 settlement, regardless of its content, there's no
13 admission of that? Is that the order you issued there?

14 THE HEARING OFFICER: I've always -- I've always
15 read the rule to be a very broad rule that applied to
16 all settlement negotiations, that they're not to be
17 presented, and evidence of those negotiations are not
18 to be presented in a hearing regarding a dispute.

19 MR. JOHNS: Okay. Thank you.

20 THE HEARING OFFICER: Yeah.

21 MR. BUDGE: Mr. Director.

22 THE HEARING OFFICER: Yeah.

23 MR. BUDGE: Further on the point of
24 clarification, I would note that the Supreme Court
25 precedent is that evidence of the parties' bargaining

1 history can be submitted to demonstrate a latent
2 ambiguity. But respecting your decision and, you know,
3 may make an offer of proof if needed.

4 Just for clarification purpose, there were
5 meetings held not between the parties but among IGWA
6 members concerning the settlement agreement prior to it
7 being executed.

8 Would that type of evidence be permissible?

9 THE HEARING OFFICER: Well, Mr. Budge, I guess
10 I'm not sure I even know how relevant discussions
11 between IGWA members are to this particular hearing.
12 It seems to me that those discussions internally by
13 IGWA really have no bearing or no obligation effect on
14 the ultimate settlement that was struck.

15 Why would it even be relevant?

16 MR. BUDGE: Because if an ambiguity exists, the
17 fact finder has to evaluate the intent of the parties,
18 and the parties have to testify as to their intent.
19 And in offering that testimony, they can explain why
20 that intent and how that intent was created.

21 THE HEARING OFFICER: Well, Mr. Budge, I will
22 strictly interpret the rule. If you want to present
23 something, you attempt to present it. It will be
24 subject to objection, I'm sure. And if you want to
25 make an offer of proof, I likely will rule in favor of

1 the objection. If you want to make an offer of proof,
2 that's fine.

3 MR. BUDGE: Fair enough. Thank you.

4 THE HEARING OFFICER: Okay. Other matters we
5 need to talk about before we start?

6 Okay. Are we ready to begin, Mr. Budge?

7 MR. BUDGE: I am. Thank you.

8 THE HEARING OFFICER: You may call your first
9 witness.

10 MR. BUDGE: IGWA will call as its first witness
11 Jaxon Higgs.

12 THE HEARING OFFICER: Mr. Higgs, come forward,
13 please. You get to be the ice breaker.

14 JAXON HIGGS: Here we go.

15 THE HEARING OFFICER: Raise your right hand,
16 please.

17

18 JAXON BRIAN HIGGS,
19 having been called as a witness by IGWA, was duly sworn
20 and testified as follows:

21

22 THE HEARING OFFICER: Do you solemnly affirm
23 that the testimony you give today will be the truth,
24 the whole truth, and nothing but the truth?

25 THE WITNESS: Yes.

1 THE HEARING OFFICER: Thank you. Please be
2 seated.

3 And, Mr. Budge, you may examine. Have
4 Mr. Higgs identify himself for the record, if you
5 would.

6 MR. BUDGE: Yes.

7
8 DIRECT EXAMINATION

9 BY MR. BUDGE:

10 Q. Jaxon, thank you for being here. I know
11 there's no place you'd rather be today.

12 A. Of course not.

13 Q. To begin, Jaxon, please state your name and
14 address for the record, and just briefly explain your
15 educational background.

16 A. My name is Jaxon Brian Higgs. I live at
17 355 West 500 South in Burley, Idaho. I own and operate
18 Water Well Consultants, Incorporated. I have a
19 bachelor's degree in geology from Brigham Young
20 University Idaho and a master's in hydrology from the
21 University of Idaho.

22 Q. Thank you.

23 What's your position with Water Well
24 Consultants?

25 A. I'm owner and the lead hydrogeologist.

1 Q. What type of work does Water Well
2 Consultants do?

3 A. We do all kinds of groundwater consulting,
4 geologic consulting dealing with wells. Aquifer
5 management is a big component of what we do. We spend
6 a lot of time measuring, reporting groundwater
7 diversions, and just analyzing impacts on aquifer and
8 general management of aquifer.

9 Q. How long has Water Well Consultants been in
10 operation?

11 A. Since 1996.

12 Q. And how long have you been employed by the
13 company?

14 A. Full time since 2012. And I collected
15 groundwater data prior to that for quite a while.

16 Q. Thank you.

17 Does the work of Water Well Consultants
18 primarily involve the Eastern Snake Plain Aquifer?

19 A. Yes.

20 Q. I understand you're a consultant for IGWA.
21 Is that right?

22 A. Yes.

23 Q. How long have you consulted for IGWA?

24 A. Since 2016, beginning of 2016 officially.

25 Q. And what type of work do you do for IGWA?

1 A. General consulting, with a focus on the
2 implementation of the settlement agreement. Mainly
3 compiling groundwater usage data, recharge data, laying
4 it out in a manner that's interpretable. So generally
5 with the Surface Water Coalition agreement.

6 Q. Thank you.

7 I understand you also provide services for
8 some groundwater districts?

9 A. Yes.

10 Q. Which of the groundwater districts do you
11 work for?

12 A. In varying degrees, I work for North Snake
13 Groundwater District, Magic Valley Groundwater
14 District, American Falls-Aberdeen Ground Water
15 District, Bingham Groundwater District,
16 Bonneville-Jefferson Ground Water District, and
17 Southwest Irrigation District, who's not a member of
18 this -- or not participating in this agreement, but I
19 do work for them as well.

20 Q. Okay. What type of work do you do for the
21 districts?

22 A. Again, general consulting, anything that
23 has to do with aquifer management, monitoring of the
24 aquifer, and monitoring and reporting their usage.

25 Q. Very good. If you'll look in front of you,

1 there's a large black binder. It's labeled "Common
2 Exhibits." I would like you to just take a moment to
3 look at Exhibits 1, 2, and 3 and make sure you
4 recognize those documents.

5 A. Yes, I do recognize them.

6 Q. For the record, Exhibit 1 is titled
7 "Settlement agreement entered into June 30, 2015,
8 between participating members of the Surface Water
9 Coalition and participating members of the Idaho Ground
10 Water Appropriators, Inc."

11 This is what we commonly refer to as the
12 IGWA-SWC settlement agreement or the 2015 settlement
13 agreement; is that correct, Mr. Higgs?

14 A. Yes.

15 Q. Also for the record, Exhibit 2 is titled
16 "Addendum to Settlement Agreement."

17 Is it your understanding that this is the
18 first addendum to the IGWA-SWC settlement agreement?

19 A. Yes.

20 Q. And also for the record, Exhibit 3 is
21 titled "Second Addendum to Settlement Agreement."

22 And do you understand this to be a second
23 addendum to the 2015 settlement agreement just
24 discussed?

25 A. Yes.

1 Q. During our discussions today I'll refer to
2 these documents collectively as the "Settlement
3 Agreement" unless I'm referring to a specific provision
4 specifically.

5 Does that sound okay?

6 A. Yes.

7 Q. Jaxon, why don't you explain what your
8 involvement with the Settlement Agreement has been on
9 behalf of IGWA?

10 A. Okay.

11 MR. FLETCHER: Before we go any further, I just
12 want to make sure, did -- did we get these formally
13 admitted into the record? Did the Director admit them?
14 I know we stipulated to the admission, but...

15 THE HEARING OFFICER: Yeah. Thank you,
16 Mr. Fletcher. And maybe we should start there, and I
17 neglected to --

18 MR. FLETCHER: I think it will just save us time
19 as we go through this if we just admit all the common
20 exhibits.

21 MR. BUDGE: Yeah, my understanding is the common
22 exhibits have been admitted by stipulation. And if
23 not, I'll make that stipulation now on behalf of IGWA.

24 THE HEARING OFFICER: Any objection from the
25 parties?

1 MR. JOHNS: No objection.

2 MR. FLETCHER: No. Thank you.

3 THE HEARING OFFICER: Mr. Fletcher?

4 MR. FLETCHER: No objection.

5 THE HEARING OFFICER: Mr. Thompson?

6 MR. THOMPSON: No.

7 THE HEARING OFFICER: Okay. The documents
8 marked as Exhibits 1 through 39 are received into
9 evidence.

10 (Exhibits 1-39 received.)

11 THE HEARING OFFICER: Thank you, Mr. Fletcher,
12 for the clarification.

13 Mr. Budge.

14 Q. (BY MR. BUDGE): Thank you, Mr. Higgs.

15 Before the break I had asked you to explain
16 what work you've done for IGWA related to the
17 Settlement Agreement.

18 A. Yeah. In 2015 many of the groundwater
19 districts were discussing a settlement agreement and
20 ways to implement it. I discussed with them options
21 and was invited to participate in some IGWA board
22 meetings discussing this implementation.

23 And so I -- having familiarity with the
24 data that was available for the ESPA associated with
25 groundwater pumping and other data, I began presenting

1 to them the data and the options to implement the
2 Settlement Agreement.

3 Q. Very good. And since then have you
4 continued to be involved?

5 A. Yes.

6 Q. In what ways?

7 A. I participate in all of the IGWA board
8 meetings and discussions on -- on continued
9 implementation of the agreement.

10 And I also annually gather the data that is
11 collected by various entities regarding the groundwater
12 usage and recharge to prepare an annual report of that
13 year's conservation efforts in regards to the
14 Settlement Agreement.

15 Q. If you'll look in that common exhibits
16 binder at Exhibits 29 -- excuse me. Correction -- 16
17 through 20. Those are a series of what are called
18 Settlement Agreement Performance Reports.

19 You mentioned a moment ago that you're
20 involved in implementation -- or are you involved in
21 preparing these performance reports?

22 A. Yes. I review the letter, if that's what
23 you call it, but I create the charts. You'll see, for
24 example, on Exhibit 16, page -- or page 6, excuse me, I
25 create that chart and the background data associated

1 with it that shows the baseline usage and that year's
2 pumping and recharge usage.

3 Q. Okay. Thank you. We'll come back to those
4 a little later.

5 You also participate in the IGWA-Surface
6 Water Coalition technical working group involving
7 implementation of the Settlement Agreement?

8 A. Yes.

9 Q. Do you have any involvement with Department
10 staff related to the Settlement Agreement?

11 A. Yes. And so if I can expound.

12 Q. Sure.

13 A. The -- while we are collecting the usage
14 data and recharge data, there's constant interaction
15 with the Department staff to ensure that we're on the
16 same page, that the quality of the data is good.

17 We also -- there is part of the Settlement
18 Agreement that talks about flow meter compliance, and I
19 regularly communicate with them regarding flow meter
20 compliance. So I do have quite a bit of communication
21 with the Department on things related to this
22 Settlement Agreement.

23 Q. Very good. Were you involved in
24 negotiating the agreement?

25 A. No.

1 Q. At what point did you become involved with
2 the agreement?

3 A. In 2015 in the spring when -- when the
4 Department of Water Resources was presenting
5 information to water users, I attended those meetings,
6 I attended the groundwater district meetings where they
7 talked about those, and then I started attending IGWA
8 meetings sometime in the middle to -- well, the middle
9 of the summer to the beginning of the fall I started
10 attending IGWA meetings.

11 Q. Your involvement, then, has primarily been
12 with implementation?

13 A. Yeah.

14 Q. Let me have you turn to Exhibit 1 in that
15 black binder. This is the original 2015 Settlement
16 Agreement that we reviewed just a moment ago. And when
17 you get there, turn to page 2 of that exhibit.

18 A. Okay.

19 Q. On page 2, section 3(a)(2) reads, "Each
20 groundwater and irrigation district with members
21 pumping from the ESPA shall be responsible for reducing
22 their proportionate share of the total annual
23 groundwater reduction or in conducting an equivalent
24 private recharge activity."

25 Were you involved in the calculation of

1 each of IGWA's District's proportionate shares of the
2 240,000 acre-feet?

3 A. Yes.

4 Q. Does this agreement explain how that
5 calculation should be done?

6 A. No.

7 Q. Is there more than one way that it could
8 have been calculated?

9 A. Yes.

10 Q. Please explain some of the different ways
11 it could have been done.

12 A. Since we were given a volume to reduce by,
13 there's different ways that you can -- you can look at
14 proportionate -- or splitting up that volume. And you
15 can do it by water right acres. You could do it by
16 irrigated acres. You could do it by water right cfs,
17 you could do it by historically -- historic pumping
18 flow rates in the form of cfs. You could do it by the
19 volume pumped, by the water right volume. You can --
20 you can incorporate location into that and impact. You
21 can look at consumptive use. You can look at
22 evapotranspiration data. So there's many different
23 ways that you could go about splitting up that -- that
24 obligation.

25 Q. And the agreement does not specify which of

1 those methods should be used?

2 A. No.

3 Q. You testified that your involvement was
4 primarily in implementation after the Settlement
5 Agreement was signed.

6 Had IGWA figured out how to calculate each
7 district's proportionate share at the time you became
8 involved?

9 A. No.

10 Q. What's your understanding as to why this
11 was not figured out before the agreement was signed?

12 MR. THOMPSON: I'll lodge -- I guess I'll lodge
13 an objection to any sort of discussions regarding
14 settlement negotiations prior to the execution and
15 effective date of the Settlement Agreement.

16 THE HEARING OFFICER: Mr. Budge.

17 MR. BUDGE: Yes, I maybe can clarify.

18 Q. Mr. Higgs, I'm not asking you to testify as
19 to settlement negotiations between the parties, just
20 your understanding as to why IGWA had not figured out
21 how to calculate the proportionate shares before you
22 became involved.

23 THE HEARING OFFICER: Okay. Is the objection
24 still standing, Mr. Thompson?

25 MR. THOMPSON: I think the way he phrased that

1 corrected what I heard the first time.

2 THE HEARING OFFICER: So I understand the
3 objection is withdrawn.

4 Is that correct, Mr. Thompson?

5 MR. THOMPSON: Yes.

6 THE HEARING OFFICER: Okay. So, Mr. Higgs, you
7 may answer the question.

8 THE WITNESS: Thank you.

9 When I originally became involved with the
10 implementation, there was a pretty large lack of
11 understanding of what data was available and what that
12 data actually showed.

13 And so my understanding was that in an
14 effort to move things along and start to
15 implementation, the agreement needed to be signed to
16 avoid curtailment, and IGWA had to assume that they
17 would be able to come up with a way to proportion that
18 before the following irrigation season began.

19 Q. (BY MR. BUDGE): Okay. Explain what --
20 what process transpired after you became involved to
21 figure that out.

22 A. There were some meetings in the springtime
23 of 2015 where various data was -- or various options
24 were provided, but nothing in detail. And so in the
25 summer of 2015, one of the groundwater districts

1 suggested that I present to the IGWA board the data
2 that I knew was available and potential options to
3 proportioning the obligation.

4 So I -- being most familiar with the usage
5 data, pumping data that I'd been participating in
6 collecting since the mid-'90s, I immediately put as
7 much data together as I could, brought it to IGWA to
8 show them, at least so they could know what volume they
9 were pumping. All that -- those numbers were
10 preliminary.

11 But I presented that to IGWA so that they
12 could see -- just have a general idea of what we were
13 talking about and potentially what their individual
14 obligations could be.

15 Q. Thank you.

16 If you'll turn in the white binder, which
17 is the binder of IGWA's exhibits.

18 A. Oh, this one?

19 Q. To tab 7. That will bring up Exhibit 107.
20 Take a moment to review that exhibit.

21 A. Okay.

22 Q. Do you recognize that document?

23 A. Yes.

24 Q. What is it?

25 A. It's a PowerPoint presentation that I put

1 together for the IGWA board of directors.

2 Q. Do you recall about when you put this
3 together?

4 A. The middle of 2015. So I guess I'll
5 clarify that. Somewhere in July, August of 2015.

6 Q. The front page is titled "Surface Water
7 Coalition Agreement, District Reduction Apportionment."

8 Please explain why you prepared this for
9 the IGWA board.

10 A. I was -- I was asked to come present
11 options for how to apportion the reduction obligation
12 from the Settlement Agreement. So how would we measure
13 and apportion the 240,000 acre-feet that was stipulated
14 in the agreement.

15 Q. When you say "apportion" it, you're
16 referring to how you calculate each district's
17 proportionate share of that 240,000?

18 A. Yeah, how you split up the volume.
19 Assigning a volume of reduction requirement to each
20 district.

21 Q. Okay. Please turn to page 2 of that
22 exhibit.

23 A. Okay.

24 Q. Did you prepare the table shown on page 2?

25 A. No. This chart was taken from -- and

1 obviously improperly, cited here. Taken from a
2 presentation that was given by, I believe, the
3 Department of Water Resources in the spring of 2015.

4 Q. And what does it show?

5 A. It shows --

6 MR. FLETCHER: Your Honor -- Director, there's
7 no source to this table and he doesn't know the source.
8 I'm going to object to this testimony. Lack of
9 foundation.

10 THE HEARING OFFICER: Mr. Budge.

11 MR. BUDGE: I'll ask some foundational
12 questions.

13 THE HEARING OFFICER: Sure.

14 Q. (BY MR. BUDGE): Mr. Higgs, did you attend
15 any meetings during that 2015 time period where the
16 Department presented data involving the allocation of
17 the 240,000 acre-feet among the districts?

18 A. Yes.

19 Q. Just briefly, which meetings did you
20 attend, as you recall?

21 A. I recall two meetings -- one in the Lower
22 Valley in Burley, one in the upper valley in Idaho
23 Falls -- to present to the groundwater users, not just
24 those who participated in negotiations, but all of the
25 groundwater users, information about the Settlement

1 Agreement and some general possibilities for
2 apportioning the share, the obligation.

3 Q. Did anyone attend those meetings besides
4 members of the district?

5 A. I remember there being -- well, there was
6 Department staff. There was consultants. And I
7 believe in the one in Burley there were some surface
8 water water right holders and potentially some of their
9 consultants, but...

10 Q. Who do you recall participating on behalf
11 of the Department?

12 A. I recall the presentation was given by Mat
13 Weaver.

14 Q. And this chart, is it your understanding
15 this came from one of those presentations?

16 A. Yes.

17 Q. What's your understanding of the contents
18 of this chart?

19 MR. FLETCHER: Again, I'm going to object. If
20 this is part of the chart, if -- are you saying this
21 was pulled out of a document produced by Mat Weaver?

22 THE WITNESS: It was a chart taken from a
23 presentation, yeah, given --

24 MR. FLETCHER: And wasn't that entire
25 presentation marked settlement discussions?

1 THE WITNESS: I don't recall.

2 MR. FLETCHER: What's the exhibit number on it?

3 MR. BUDGE: This is 107, page 2.

4 MR. FLETCHER: You still don't know the source
5 of who created this chart?

6 THE WITNESS: I believe it was Mat Weaver.

7 MR. FLETCHER: I guess I'm not sure the time's
8 right for this objection, but -- well, may I ask a few
9 questions in aid of objection.

10 THE HEARING OFFICER: Sure.

11

12 VOIR DIRE EXAMINATION

13 BY MR. FLETCHER:

14 Q. Did the Surface Water Coalition have
15 anything to do with preparing this document?

16 A. Not that I'm aware of.

17 Q. 107, the whole exhibit, 107.

18 A. 107?

19 Q. Yeah, didn't you --

20 A. No. 7?

21 Q. Yeah, the one that says "Surface Water
22 Coalition Agreement."

23 A. Yes, I created this PowerPoint.

24 Q. You created that?

25 A. Yes.

1 Q. And you created it for the purposes of
2 presenting it to the groundwater districts; correct?

3 A. To the IGWA board.

4 Q. Right. And the Surface Water Coalition
5 never signed off on this document; isn't that correct?

6 A. It was never presented to them.

7 Q. Okay. So they never agreed to what this
8 document says; correct?

9 MR. BUDGE: Objection. This line of questioning
10 goes well beyond the scope of the objection.

11 THE HEARING OFFICER: Well, at least overruled
12 right now.

13 Go ahead, Mr. Fletcher.

14 MR. FLETCHER: Yeah. Well, the Director earlier
15 had stated that internal discussions of IGWA were not
16 relevant to this inquiry. And this exhibit goes
17 exactly to that. This is an internal discussion
18 occurring with IGWA, not the Surface Water Coalition.

19 And I have to also put this in the context
20 of these Settlement Agreements, because all three of
21 them state that there are no agreements between the
22 parties, other than what's set forth in the Settlement
23 Agreements.

24 And so now apparently IGWA's trying to
25 present evidence of third-party sources -- we don't

1 even really know what the sources are -- in an attempt
2 to argue that the Settlement Agreement doesn't mean
3 what it says.

4 So I'm going to object on the grounds it's
5 not relevant, it's self-serving, and it doesn't lead --
6 it doesn't help with the inquiry on whether this
7 document is unambiguous.

8 THE HEARING OFFICER: Okay.

9 MR. THOMPSON: Well, Director, I might offer
10 another basis.

11 Idaho Rule of Evidence 408, any materials,
12 information prepared by the Department or presented at
13 meetings prior to the execution of the Settlement
14 Agreement, and ultimately its effective date, should be
15 excluded on that ground as well.

16 THE HEARING OFFICER: Okay. Do you have any
17 more foundational questions, Mr. Budge?

18 MR. BUDGE: The objections go well beyond
19 foundation. They go to the Director's prior ruling.

20 And I would respond by making a motion that
21 the Director make a finding that a latent ambiguity
22 exists as to how you calculate each district's
23 proportionate share of the 240,000 acre-feet.

24 As I mentioned before, the law in Idaho is
25 that a latent ambiguity is not evident on the face of

1 the instrument alone, but becomes apparent when
2 applying the instrument to the facts as they exist.

3 Mr. Higgs has testified that the agreement
4 does not explain how to calculate each district's
5 proportionate share of the 240. We can't answer that
6 question from the face of the instrument. The only way
7 to answer that question is to go outside of the face of
8 the instrument.

9 And this -- this exhibit is presented so
10 that Mr. Higgs can explain how they calculated it and
11 what was considered.

12 THE HEARING OFFICER: Okay. Well, Mr. Budge, I
13 will not issue a ruling right now related to whether
14 the agreement has latent ambiguity or not. I think
15 perhaps what's relevant in this whole discussion is --
16 so I'll ask a question or two of Mr. Higgs.

17
18 EXAMINATION

19 BY THE HEARING OFFICER:

20 Q. Mr. Higgs, many of these documents, as I
21 look at them, are strangely familiar to a format that
22 would at least indicate that the Department of Water
23 Resources prepared the page or the slide.

24 A. Hmm.

25 Q. And so I'm looking at page 2, page 3,

1 page 4, perhaps page 5 and 6, discussion of WMIS,
2 page 7, and I come to page 8. So at least with respect
3 to those pages, it appears that those were extracted
4 directly from some source of information prepared by
5 the Department.

6 A. Can I comment on that?

7 Q. Sure.

8 A. Yeah, so the -- the presentations that were
9 given by the Department staff to the groundwater users
10 included page 2, page 3 with, I believe, some of my
11 edits, page 4, but then page 5, 6, 7, 8, 9, 10, 11, 12,
12 those were all created by me.

13 So what I was asked to do was to come to
14 the IGWA board to review what had been said at the
15 meetings and explain in detail and answer questions
16 from my perspective regarding some of what was
17 provided.

18 Q. Okay. Well, we need to determine what's
19 admissible and what's not here.

20 So I will extract out of this pages 2 through -- 2, 3,
21 and 4.

22 Mr. Higgs, you testified that you prepared
23 pages 5 through 12 yourself?

24 A. Yes.

25 Q. Including mapping of points of diversion?

1 A. Yes.

2 Q. On page 11 -- or just a minute. I'm sorry.

3 Page 12 --

4 A. Yeah, if you look --

5 Q. -- or it's 11?

6 A. If you look down on the very bottom left of
7 page 11, you can see "Created by Jaxon Higgs WWC, Inc."
8 on the map.

9 THE HEARING OFFICER: Okay. Well, at least in
10 response to the objection.

11 Of course there's not yet been a motion to
12 receive this into evidence. But at least in response
13 to the objection, I'll exclude pages 2 through 4.

14 And you may continue, Mr. Budge.

15 MR. BUDGE: Director, is the basis of that
16 ruling that Mr. Higgs does not have foundation to
17 testify of the contents of those pages, or that
18 anything that the Department prepared is irrelevant?

19 THE HEARING OFFICER: The second isn't the
20 ruling that I would make, that everything prepared by
21 the Department is irrelevant. It's just that Mr. Higgs
22 doesn't have the necessary background to testify about
23 the numbers that are included there. So it's
24 foundation.

25 MR. BUDGE: Let me ask the Director to

1 reconsider that, that ruling.

2 THE HEARING OFFICER: And I'll ask you to not
3 ask me to reconsider, and let's move on.

4 MR. BUDGE: Okay. I must offer -- make an offer
5 of proof because the law requires it.

6 As I mentioned, this Idaho Supreme Court's
7 recent decision just last year in Sommer v. Misty
8 Valley, LLC, said that the fact finder may consider,
9 among other things, any conduct of the parties which
10 reflects their understanding of the contract's meaning.

11 And these documents, regardless of who
12 prepared them, inform the understanding of IGWA. And
13 the reason I'm putting them on is to demonstrate IGWA's
14 understanding of the agreement. And that is well
15 within our prerogative, and it's our obligation to
16 prove our case.

17 THE HEARING OFFICER: Make your offer of proof.

18 MR. BUDGE: Okay.

19
20 CONTINUED DIRECT EXAMINATION

21 BY MR. BUDGE:

22 Q. Mr. Higgs, please turn again to
23 Exhibit 107.

24 A. Okay.

25 Q. What's your understanding of the content in

1 that table on page 2 of 107?

2 A. This lists the groundwater districts on the
3 ESPA and one -- well, two irrigation districts, what at
4 the time was the current consumptive irrigation
5 requirement within those districts over the acres
6 listed in the next column, and calculates out the total
7 acre-feet based on the consumptive irrigation
8 requirement for each one of those districts.

9 And then the next column proportions the
10 share of 240,000 acre-feet based on the percentage
11 of -- or the amount of total consumptive irrigation
12 requirement.

13 It then has another option for
14 apportionment based on a flat percentage reduction of
15 that total acre-foot pumping number.

16 So it was -- it was an attempt to -- as I
17 understand it, an attempt to describe to the districts
18 that could potentially participate in this agreement
19 how they could apportion that 240,000 acre-feet.

20 Q. So just to make that -- make sure I
21 understand, this just shows one potential method of
22 calculating each district's proportionate share of the
23 240,000 acre-feet?

24 A. Yes.

25 Q. And this method is based on crop irrigation

1 requirement?

2 A. Yes.

3 Q. What is that? What's crop irrigation
4 requirement?

5 A. It's the water required to grow a healthy
6 crop.

7 Q. It's not based on measured diversions?

8 A. No.

9 Q. Okay. If you'll flip to pages 3 and 4, the
10 title of these pages refer to crop irrigation
11 requirement.

12 Am I understanding correctly that these
13 pages simply describe how crop irrigation requirement's
14 calculated?

15 A. Yes.

16 Q. If you turn to page 5, it's titled "Issues
17 with Crop Irrigation Requirement" or with CIR.

18 A. Uh-huh.

19 Q. Is this a page you prepared?

20 A. Yes.

21 Q. For what purpose?

22 A. To show the groundwater districts the
23 potential positives and negatives of using crop
24 irrigation requirement as a -- as a measurement or
25 [unintelligible].

1 THE HEARING OFFICER: So, Mr. Budge, you have
2 completed your offer of proof, then, related to pages 2
3 through 4?

4 MR. BUDGE: Correct.

5 THE HEARING OFFICER: And now you're pursuing
6 additional examination?

7 MR. BUDGE: Correct.

8 THE HEARING OFFICER: Okay. I just want to
9 distinguish and set the markers or the boundaries of
10 that offer of proof.

11 So the ruling stands still after the offer
12 of proof, pages 2 through 4 are excluded.

13 You may examine regarding any additional or
14 the remaining pages, Mr. Budge.

15 Q. (BY MR. BUDGE): Okay. Mr. Higgs, the
16 Director's ruling essentially has removed your ability
17 to consider pages 1 through 4 of Exhibit 7. So we're
18 going to act as if page 5 is the first page of
19 Exhibit 107.

20 A. Okay.

21 Q. Can you explain what page 5 of Exhibit 107
22 addresses.

23 A. One of the methods to potentially determine
24 apportionment of -- of the obligation of the Settlement
25 Agreement, and to also measure progress or efforts is

1 consumptive irrigation requirement. And it was being
2 proposed as an option by the Department of Water
3 Resources. And I wanted to present to the IGWA board
4 some of the issues with that and also some of the
5 benefits of that.

6 And so I created this PowerPoint slide to
7 provide those -- that information to them.

8 Q. You testified earlier that there are
9 multiple ways in which the -- each district's
10 proportionate share of the 240 could be calculated; is
11 that right?

12 A. Yes.

13 Q. And this was just one method under
14 consideration at that time?

15 A. Yes.

16 Q. And if I understood your testimony, you
17 were just pointing out there were some pros and cons of
18 this method?

19 A. Yep.

20 Q. If you'll turn to page 6 of that exhibit.
21 It's titled "WMIS, Water Measurement Information
22 System."

23 Did you create this page of the exhibit?

24 A. Yes.

25 Q. For what purpose?

1 A. To describe to the -- the IGWA board the
2 water measurement information system, the database
3 that's housed by the Department of Water Resources, and
4 the data that is -- that is in that database.

5 Q. Is this database used to determine crop
6 irrigation requirement?

7 A. No.

8 Q. Is this a different method for potentially
9 calculating each district's proportionate share of the
10 240?

11 A. The data in there could be used, yes, to
12 proportion the 240,000-acre foot obligation.

13 Q. Okay. Turn to page 7.

14 A. Yes.

15 Q. What does this map of Idaho with all the
16 yellow dots show?

17 A. This is a map presenting the ESPA in red,
18 the area of common groundwater supply. And the dots on
19 there, the points, are points of diversion, or in this
20 case the yellow would be groundwater wells that are in
21 the WMIS database.

22 Q. Why was this included in your presentation
23 to the IGWA board?

24 A. To show them that the extent of water
25 measurement was large and covered the entire ESPA.

1 Q. Okay. Turn to the next page.

2 What does this show?

3 A. This is a snapshot from the -- the Water
4 Measurement -- the Water Management Information System
5 database, the WMIS database, used to show them the --
6 the board of IGWA how water use is calculated and the
7 information -- the extent of the information that's
8 provided in that database.

9 Q. And this relates to the use of water
10 measurements as one potential method for implementation
11 of the Settlement Agreement?

12 A. Yes. My familiarity with this database is
13 great. And I wanted to present to them that we had
14 been collecting data for a long time and there was data
15 there and that it should be and could be used.

16 Q. Okay. Turn to page 9. It's titled "Issues
17 with Water Measurement."

18 A. Uh-huh.

19 Q. Why was this included in your presentation?

20 A. I wanted to show them the pros and cons of
21 using the water measurement data and that database as a
22 method to apportion and to measure progress and related
23 to the Settlement Agreement, and especially to compare
24 it against the currently proposed -- or at that time
25 the proposed method of using irrigation requirement.

1 Q. So there were at least two methods under
2 consideration at that time, the crop irrigation
3 requirement and the water measurement method?

4 A. Yes. At least.

5 Q. Okay. Had IGWA at that time determined how
6 to calculate each district's proportionate share of the
7 240?

8 A. No.

9 Q. Turn to page 10.

10 Did you prepare this?

11 A. Yes.

12 Q. What does this show?

13 A. This shows each groundwater district and
14 also those non -- not participating in a groundwater
15 district. Essentially the usage housed in the WMIS
16 database by district with a percentage of the total
17 pumping assigned for each district and an apportionment
18 option for the 240,000 acre-foot obligation, and the
19 subsequent percentage reduction that each district
20 would have if we used this method. That's under
21 "Current."

22 Under "Applied" is where I took the -- I
23 mean it's essentially some -- it's essentially the same
24 data with some -- some corrections in it. Just another
25 method to be able to apportion it and the difference

1 between them.

2 Q. And -- and this method, is this the water
3 measurement method?

4 A. Yes. I -- I called it the reduction by
5 usage, which means the pumping out of each -- each well
6 essentially or how much water each district used,
7 pumped out of their wells.

8 Q. Okay. So this was just one of the methods
9 under consideration at that time?

10 A. Uh-huh.

11 Q. There's a row on the bottom labeled "Out of
12 District."

13 A. Yes.

14 Q. What does that refer to?

15 A. Those are points of diversions that are
16 outside the boundaries of each district. And I will
17 note, if I can, that next line up says "In District,
18 Not Reported by District."

19 These are points of diversions within
20 district boundaries that were not participants in the
21 district, not assessed members. And we assumed that
22 many of those members would end up -- or many of those
23 individuals or points of diversions would end up
24 joining the districts.

25 And that is one of the differences between

1 the first chart, the current and applied, is that I
2 took those in districts, not reported by the district,
3 and attached them to the district that they fell within
4 and reapportioned, but kept those outside of the
5 district separate. So hopefully that was clear.

6 Q. Yeah. So if I understand, as part of
7 evaluating this method, you were considering how to
8 treat wells that are either out of the district or
9 inside, but not a member of the district?

10 A. Yes.

11 Q. I see this chart also includes A & B, Raft
12 River, and Southwest.

13 I assume that refers to A & B Irrigation
14 District, Raft River Groundwater District, and
15 Southwest Irrigation District?

16 A. Yes.

17 Q. Why were they included in this chart?

18 A. They were included in charts that I had
19 seen from the Department of Water Resources. And
20 because we -- the 240,000 acre-foot obligation was
21 presented to the groundwater users as a number that
22 would be required to potentially stabilize the aquifer.

23 And so we included in this chart every
24 acre-foot of pumping that was included in the ESPA
25 because all of that has an impact.

1 Q. Okay. If you'll turn to the next page.
2 This is obviously an aerial image of the ESPA with the
3 various districts and some yellow and red dots.

4 What does -- why was this included in your
5 presentation?

6 A. This is a visual representation of what we
7 talked about in the previous chart, in district but not
8 reported by the district, and the outside of district.
9 The yellow dots are within district boundaries, but not
10 reported by or not assessed by the groundwater
11 districts or irrigation districts.

12 And then the red dots are the points of
13 diversion where usage occurs that is not inside of any
14 groundwater district where measurement and reporting is
15 carried out by those districts.

16 Q. So not -- so IGWA's members did not
17 represent all of the pumping from the ESPA; is that
18 correct?

19 A. Correct.

20 Q. And as part of your analysis, you were
21 evaluating how to create pumpers who are not members of
22 IGWA?

23 A. Yeah, it was -- it was generally to make an
24 accounting of the usage within the ESPA and all of
25 those that could potentially be subject to the water

1 call, but -- but those that had an impact on the
2 aquifer by pumping since that 240,000 acre-foot was --
3 feet was presented as a budget deficit, we wanted to
4 make sure we were accounting for all usage on the ESPA,
5 not just those within the IGWA groundwater districts.

6 Q. Okay. If you'll flip to the last page of
7 that exhibit, page 12.

8 Explain this part of your presentation.

9 A. This was very preliminary. This was the --
10 I believe the first time I presented to the IGWA board,
11 and I wanted to try and give them an idea of what they
12 needed to do to continue determining how to proportion
13 that and to measure their success.

14 So it describes here that just because I
15 have this data in this presentation did not mean that
16 it was complete. We needed to go through every water
17 right within every district and within the ESPA, we
18 needed to make sure that all of those water rights were
19 correlated properly with the wells, which the
20 Department of Water Resources does a fairly good job of
21 that, but there have never been so much scrutiny on
22 these water rights and well combinations.

23 I suggested that we meet with the
24 Department staff to that we could all be on the same
25 page and make sure that we were going in the right

1 direction as far as accounting for this data properly.

2 And then I recommended them that for
3 practicality and other reasons that we use the usage
4 data where available to proportion the 240,000
5 acre-feet and to measure the efforts and potentially
6 use the irrigation requirement or evapotranspiration
7 where the data was not available or incomplete or
8 incorrect.

9 Q. Was the Department collecting groundwater
10 diversion data previous to 2015?

11 A. Yes, the Department of Water Resources has
12 had reporting requirements since, I believe, the
13 mid-'90s. The Department itself as under contract as
14 watermasters for some of the water districts collects
15 some of this data, and then in some districts there are
16 consultants that are privately contracted to collect
17 this data and report to the Department through the WMIS
18 database.

19 Q. That's helpful. Your testimony a moment
20 ago about needing to confirm with Department staff and
21 gather data, you know, gave the impression that the
22 historic pumping records were incomplete or imperfect.

23 A. Yeah, they were definitely imperfect. This
24 data had been required to be collected. But as far as
25 I know, it was not really used for anything. It -- it

1 seemed to be just a requirement to fill.

2 So in general, I -- starting in 1995, '96,
3 we started collecting -- my company, Water Well
4 Consultants, started collecting data for a few of these
5 groundwater districts through private contracts. And
6 we would always provide usage reports to the
7 groundwater users before we finalized the data
8 submitted to the Department. That gave the users a
9 chance to look at it and protest if they would like.

10 But there was no -- this data wasn't being
11 used for any sort of compliance. And so the -- the
12 limited -- there was limited participation on the
13 users' behalf to review that data.

14 So there was occasionally data gaps where,
15 you know, power data or flow meter data wasn't
16 available, and there were incorrect values in there,
17 just because from -- from the '96 on, things were
18 improving, but there was no -- there was really no
19 scrutiny of the data. And so it was there, but it
20 needed -- it needed review.

21 Q. So additional work was needed for IGWA to
22 figure out how to accurately calculate each district's
23 proportionate share of the 240?

24 A. Yeah. I suggested to IGWA that we review
25 all of this data and present it to the water users so

1 that they could compare it to their irrigation
2 practices and that we could true-up and make this data
3 as accurate as possible before we decided who -- before
4 we decided how it would affect those districts. In
5 these types of cases, the more accurate the data, the
6 less argument there is.

7 MR. BUDGE: I would move that pages 5 through 12
8 of Exhibit 107 be admitted to evidence.

9 THE HEARING OFFICER: Mr. Fletcher.

10 MR. FLETCHER: Yeah. May I ask some questions
11 in aid of objection?

12 THE HEARING OFFICER: Yes.

13

14 VOIR DIRE EXAMINATION

15 BY MR. FLETCHER:

16 Q. I'm not sure you stated when you prepared
17 Exhibit 107.

18 A. Exhibit 107? The .pdf document that was
19 saved and delivered to IGWA was in July of 2015, I
20 believe.

21 Q. Okay. And would you acknowledge that the
22 first final order in this matter was entered in May of
23 2015?

24 A. I don't know that.

25 Q. Okay. And when you prepared this document,

1 I don't see any reference to the order's requirements.

2 Did you review the order when preparing
3 your information?

4 A. I don't recall.

5 Q. I'd ask that you look at Exhibit -- what's
6 the final order?

7 MR. BUDGE: Mr. Director.

8 MR. FLETCHER: Oh, excuse me. Let me back up.

9 MR. BUDGE: Mr. Director.

10 MR. FLETCHER: Yeah.

11 MR. BUDGE: Mr. Director.

12 THE HEARING OFFICER: Yes.

13 MR. BUDGE: I would ask that Mr. Fletcher state
14 the objection so that I can evaluate whether his
15 questions are truly in aid of objection and not
16 cross-examination.

17 MR. FLETCHER: Yeah. The objection is that
18 based upon the Director's ruling these matters are
19 irrelevant and are occurring before entry of the final
20 order in this action.

21 The Director already ruled that internal
22 discussions of IGWA are not relevant to this
23 proceeding. And the -- I was trying to put a time
24 frame on this because the -- you know, subsequent to
25 these discussions the record shows, because the records

1 are in evidence, that the A & B agreement was entered,
2 the final order was entered, and the 2017 order was
3 entered. So this -- this -- what they did in 2015
4 really has nothing to do with the issue at hand, is the
5 order ambiguous.

6 THE HEARING OFFICER: Well, let me rule.

7 You've moved to have this exhibit --

8 SARAH TSCHOHL: Director, can you turn your mic
9 on, please.

10 THE HEARING OFFICER: I'm sorry. Thank you.

11 You've moved, Mr. Budge, for admission of
12 this document into the record.

13 There's an objection, I guess,
14 Mr. Fletcher, or --

15 MR. FLETCHER: Yes.

16 THE HEARING OFFICER: And so based on the motion
17 for admission of this document and the objection, I'll
18 receive it into evidence, excluding pages 2 through 4.
19 But I will observe that I think the document has
20 marginal relevance to the issue that I'm considering
21 today.

22 (Exhibit 107 received.)

23 THE HEARING OFFICER: Thank you, Mr. Budge. You
24 may go on.

25 ///

1 CONTINUED DIRECT EXAMINATION

2 BY MR. BUDGE:

3 Q. Jaxon, let me have you turn to page 109 --
4 or excuse me, Exhibit 109. That's under tab 9 in the
5 white binder.

6 A. Uh-huh.

7 Q. Do you recognize this document?

8 A. Yes.

9 Q. What is this?

10 A. It's an agenda for an implementation
11 meeting sponsored by the Department of Water Resources
12 in Burley, Idaho, in 2015, end of -- or fall of 2015.

13 Q. Did you attend this meeting?

14 A. Yes.

15 Q. The agenda item lists a number of names:
16 Mat Weaver, Randy Budge, and so on.

17 Do you recognize those people or do you
18 recall who they were?

19 A. Yes, I recognize all of them, I believe.

20 All of these people, from my understanding, are
21 Department of Water Resources staff members that came
22 to provide information to IGWA to help determine how to
23 implement the Settlement Agreement.

24 Q. At the time of this meeting, had IGWA
25 figured out how to calculate each district's

1 proportionate share of the 240?

2 A. No.

3 Q. If you look at agenda item 3, it's titled
4 "Review of Diversion Data," then there's some subparts,
5 "Review of WMIS database and records," "Review of 2015
6 WMIS QA effort," and then "Review PCC methods and
7 data."

8 What's your recollection of the discussion
9 of reviewing diversion data at that meeting?

10 A. Like I had presented to the IGWA board, I
11 believe this was an attempt by Department staff to
12 describe one of the options to apportion and measure
13 the -- the implementation of the Settlement Agreement.

14 And the names listed there, Cindy Yenter
15 and Corbin Knowles, were probably the most familiar
16 with the usage data and the WMIS database, and they
17 were presenting similar type -- similar to what I did
18 to IGWA, potential issues with the data and what they
19 were doing to -- to clean it up.

20 And you can see there in item D that Corbin
21 Knowles presented an analysis of the difference between
22 the power-consumption data collected in the --
23 power-consumption coefficient data that is used to
24 calculate usage volumes, compared to the METRIC, which
25 is an evapotranspiration related to irrigation

1 requirement.

2 Q. So at this time IGWA was still considering
3 using water measurements as the method for calculating
4 implementation?

5 A. Yeah. They hadn't, to my knowledge,
6 decided on any method at this point. And it was one of
7 the options.

8 Q. And if you look at agenda item 2, it's
9 labeled "Review of Department water right data,
10 consumptive use basics, METRIC, and NDVI."

11 Does that relate to a different potential
12 method of measuring compliance?

13 A. Yes. And also a different method for
14 apportioning the obligation.

15 Q. Okay. Explain that -- the different method
16 that's referenced in agenda item 2.

17 A. Essentially they get -- they get to the
18 same purpose, which is measuring how much water is
19 used. The -- the METRIC and NDVI consumptive use data
20 is a remote method of determining how much water was
21 used, and typically used on basin-wide studies.

22 Then the diversion data is another method
23 to calculate out how much water has been and
24 potentially will be used, by -- by field measurements
25 and measurements through flow meters. More of a

1 physical, on-the -- on-the-ground measurement of how
2 much water is used.

3 Q. So the one method, the water measurement
4 data, uses, you know, physical measurements of water
5 diverted from the well.

6 METRIC is not based on a measurement of
7 water diverted from the well?

8 A. Correct.

9 Q. Explain again. I may have missed this.

10 A. Yes.

11 Q. I apologize. What's METRIC?

12 A. So METRIC is a method of using Landsat
13 imagery technology to -- and it's correlated with
14 ground stations. They're essentially using a heat
15 comparison or measurement from satellite instruments to
16 record, calculate how much water is being evaporated
17 through -- or off the -- off the land and transpired
18 through the plants.

19 Q. Okay. If you'll turn to page 2.

20 Do you recognize that page of the document?

21 A. Yes.

22 Q. Was that also part of the agenda for that
23 meeting?

24 A. Yes.

25 Q. And objective 1 says, "Discuss and

1 reconcile the inconsistent usage of diversion
2 reduction, consumptive reduction, and demand reduction
3 language by the term sheet."

4 Was this part of the IGWA figuring out how
5 to implement the Settlement Agreement?

6 A. Yes. Yeah, there was different -- from
7 what I understand, there was different language that
8 was used in the agreement in different parts that mean
9 different things to a technical person but maybe not
10 for nontechnical people. So for example, when you talk
11 about diversion reductions, that is just diverting less
12 water out of, in this case, a well.

13 Consumptive reduction is -- is different in
14 that there are specific cases where you can pump water
15 out of a well, and some of that water actually returns
16 to the aquifer. And so there's a nonconsumptive
17 element to what you're pumping.

18 Then the next item there that says "demand
19 reduction," the demand doesn't necessarily correlate
20 exactly with what is pumped out of a well. It is what
21 either a user or potentially a plant requires.

22 And so there's, in this case, three
23 different -- three completely different methods of --
24 of looking at usage within the ESPA, which potentially
25 affects how you proportion and how you measure success.

1 Q. Thanks. That's helpful.

2 As I kind of scroll through those
3 objectives, you see that several of them refer to
4 developing a clear understanding of different methods
5 and challenges. And then -- and then objective 6 talks
6 about determining which method, you know, diversion
7 reduction, consumptive use will be the standard.

8 It seems clear from this that IGWA had not
9 at that time yet figured out how to -- which method to
10 use for implementation of the Settlement Agreement?

11 A. Yeah, that's correct.

12 Q. And agenda item 7 says, "Determine the data
13 and methods that will be used to proportionately split
14 the 240,000 acre-feet obligation up amongst all the
15 parties."

16 IGWA had not yet figured out how to do that
17 as well?

18 A. Correct.

19 Q. That item refers to groundwater districts,
20 A & B, Southwest, and others.

21 What's your understanding of why they were
22 included?

23 A. To my understanding, the 240,000 acre-feet
24 like I said before, was presented to us in an aquifer
25 deficit in more of what could potentially balance the

1 aquifer. And I see this as a recognition that -- that
2 there are more than just IGWA members impacting the
3 aquifer.

4 Q. Okay. Thank you.

5 Objective 8 says, "Determine the data and
6 method that will be used to establish the baseline
7 condition."

8 What does "baseline condition" refer to?

9 A. When you're asked to cut back a certain
10 amount, in this case water, you have to have a starting
11 point. So when it says "baseline," baseline is that
12 starting point.

13 Q. Does the agreement specify how the baseline
14 should be calculated?

15 A. No.

16 Q. So this also is something that had to be
17 done after the fact?

18 A. Yep.

19 Q. Are there multiple ways that the baseline
20 could be calculated?

21 A. Yes.

22 Q. Give me some examples.

23 A. Amongst some of the things that we
24 discussed at the time was using the consumptive
25 irrigation, the METRIC data, over the entire ESPA as a

1 baseline. We talked about how many -- we talked about
2 the usage data and whether or not you should use a
3 single year or multiple years and how many years you
4 should use. You could use the entire historical
5 record. You could use one year. You could use two
6 years. You could use five.

7 And that timing element also is applicable
8 to the METRIC data. So you have to -- you have to
9 determine what data source you're going to use, and
10 then you have to determine what span of years you're
11 going to use as a baseline.

12 MR. BUDGE: Mr. Director, I'd move to admit
13 Exhibit 109 into evidence.

14 THE HEARING OFFICER: Mr. Fletcher.

15 MR. FLETCHER: Well, the only objection I would
16 have, your Honor, is that this is before the orders
17 were entered. And again, the Director's already ruled
18 that their internal discussions aren't really relevant
19 to the issues at hand.

20 THE HEARING OFFICER: Mr. Thompson.

21 MR. THOMPSON: Nothing further to add.

22 MR. BUDGE: Mr. Director, for clarification,
23 Mr. Fletcher has characterized your ruling differently
24 than I understood it. He said that you ruled that
25 nothing prior to the entry of the order approving the

1 Mitigation Plan can be considered.

2 What I understood is that you said the
3 negotiations between the parties in negotiating the
4 terms would not be considered.

5 MR. FLETCHER: That's a mischaracterization of
6 what I said and what I believe the Director said. The
7 Director said the settlement negotiations were not
8 admissible. But in addition to that, the Director
9 stated internal discussions of IGWA are not relevant to
10 this proceeding.

11 MR. BUDGE: Yeah, I don't remember that ruling,
12 so that clarification, I think, is very important.

13 THE HEARING OFFICER: Well, first of all -- and
14 we could go back and read what I said. But I think
15 related to the relevancy issue, I think I said that
16 they would be at least marginally relevant and perhaps
17 irrelevant.

18 And I don't -- I don't know whether
19 these -- this document would represent a meeting that
20 would be characterized as settlement negotiations. It
21 certainly postdates the dating of the original
22 Settlement Agreement, which was, as I look at it, July
23 of 2015. And this meeting was in September.

24 And I don't know whether any of these
25 subjects were addressed by any of the subsequent

1 addendums. I don't think they were.

2 So I guess as I consider your motion,
3 Mr. Budge, and the objections, I'll receive this
4 document into evidence as just an agenda of items that
5 were being discussed in a meeting probably sponsored,
6 at least in part, by the Department of Water Resources.

7 I'll receive what's been marked as
8 Exhibit 109 into evidence.

9 (Exhibit 109 received.)

10 THE HEARING OFFICER: Thank you, Mr. Budge.

11 MR. BUDGE: Thank you.

12 And just one comment, you know, the
13 statement about marginal relevance is a bit shocking to
14 me. To me this is perhaps the most relevant, or one of
15 the most relevant documents and discussions.

16 In determining whether there's a latent
17 ambiguity, you have to evaluate whether there's more
18 than one reasonable interpretation of the agreement.
19 And understanding that there are multiple methods for
20 implementing the agreement goes to the very heart of
21 that issue.

22 And so I think this discussion and these
23 documents are supremely relevant. And, you know, I
24 won't make any more argument, but I think that's
25 important to explain for the record.

1 THE HEARING OFFICER: I'm sorry to have shocked
2 you, Mr. Budge.

3 MR. BUDGE: Uh-huh.

4 THE HEARING OFFICER: But your document has been
5 received into evidence.

6 MR. BUDGE: Thank you.

7 THE HEARING OFFICER: Next.

8 Q. (BY MR. BUDGE): Mr. Higgs, which of these
9 methods did IGWA ultimately elect to utilize?

10 A. Ultimately we -- or IGWA, excuse me, chose
11 to use the pumping data from the WMIS database with
12 corrections to split up the 240,000 acre-foot
13 obligation.

14 Q. And why did they use that method, to your
15 understanding?

16 A. There was various reasons. But my
17 understanding was the most compelling reason was that
18 the data was available immediately, it was applicable
19 by diversion and water user, and it was one of the
20 quickest ways that we could proportion that obligation
21 so that implementation could continue in the short time
22 scale that was available.

23 Q. Thank you.

24 If you'll turn to Exhibit 114.

25 A. Okay.

1 Q. Do you recognize that document?

2 A. Yes.

3 Q. What is that?

4 A. It is the -- listed as the final settlement
5 allocation for IGWA.

6 Q. Did you prepare this?

7 A. Yes.

8 Q. And what does it show?

9 A. It shows the volume, the historic volume
10 pumped by each groundwater district, their percentage
11 of total. And then the "Acre-foot reduction" column
12 shows how much of the 240,000 acre-feet each district
13 would get based on that percentage and the overall
14 percentage reduction that was equal across all of the
15 districts.

16 Q. This is the allocation that IGWA finally
17 settled on, then?

18 A. Yes.

19 Q. I see it's dated November of 2016.

20 Is that your recollection as to when this
21 was finalized?

22 A. Yes. We may have -- we may have finalized
23 this prior to the irrigation season in 2016, but this
24 is the first official document that I have available
25 that shows this final allocation.

1 Q. Okay. And what had to be done between that
2 September workshop in Burley and the preparation of
3 this spreadsheet to finalize that allocation?

4 A. We spent a lot of time, groundwater
5 district staff, Department of Water Resources, and
6 myself, spent a lot of time reviewing all of the usage
7 data. We were at this time looking at the data that
8 was the most recent data. And in general, it was from
9 2010 to 2014, because the 2015 data wasn't available
10 until the spring of 2016.

11 But we reviewed all of the anomalies. We
12 reviewed all of the null values where data wasn't
13 available. We talked about how to average over the
14 span of years that we were talking, at that time the
15 2010 to 2014, and whether you would average each
16 diversion and then sum those averages or whether you
17 would average -- or whether you would sum each year's
18 total and then average.

19 That turns out to make a big difference
20 when you're talking about null values, which are blanks
21 in the data. So there was -- there was all kinds of
22 review. We looked at water rights. There were wells
23 that weren't properly accounted for. We spent -- we
24 spent a lot of time reviewing this data and trying to
25 make it as accurate as possible so that the allocation

1 would be as accurate as possible.

2 MR. BUDGE: Thank you.

3 I'd move to admit Exhibit 114 into the
4 record.

5 THE HEARING OFFICER: Mr. Fletcher.

6 MR. FLETCHER: Again -- well, in aid of
7 objection, may I ask a question?

8 THE HEARING OFFICER: Yes.

9

10 VOIR DIRE EXAMINATION

11 BY MR. FLETCHER:

12 Q. Did the Surface Water Coalition agree to
13 the terms of this exhibit?

14 A. No.

15 MR. FLETCHER: Again, I'd renew my objection
16 that this matter is not relevant. It's an internal
17 agreement among the IGWA users.

18 THE HEARING OFFICER: Mr. Thompson.

19 MR. THOMPSON: I'd just join in that. Nothing
20 further to add.

21 THE HEARING OFFICER: Okay. I'll receive
22 Exhibit 114 into evidence.

23 (Exhibit 114 received.)

24 THE HEARING OFFICER: Next.

25 ///

1 CONTINUED DIRECT EXAMINATION

2 BY MR. BUDGE:

3 Q. Mr. Higgs, you mentioned previously that
4 you had to figure out the baseline condition, or that
5 was one of the factors that had to be considered.

6 Is the baseline condition reflected in the
7 chart shown on Exhibit 114?

8 A. Can you say that one more time, please?

9 Q. Previously when we were discussing the
10 workshop held in Burley in September of 2015, one of
11 the objectives was to determine the baseline condition.
12 And you mentioned that was the starting point for
13 measuring how conservation would be calculated.

14 Does this chart show the baseline condition
15 that you mentioned?

16 A. Yeah. That "Acre-foot per year" column
17 would represent according to how we allocated the
18 baseline.

19 Q. And how did you determine the baseline
20 condition?

21 A. We took the -- the usage from each well --
22 well, the average usage from each well from 2010 to
23 2014 and summed that average for each individual
24 district.

25 Q. Do the terms of the Settlement Agreement

1 instruct you to use the average from 2010 to 2014 as
2 the baseline?

3 A. No.

4 Q. Are there multiple ways that the baseline
5 could have been calculated?

6 A. Yes. Yeah, we talked before about
7 potentially using any number of years from the
8 beginning of the historic record to -- to a single
9 year.

10 Q. If you'll turn to Exhibit 119 in that
11 binder.

12 MR. THOMPSON: 119?

13 MR. BUDGE: 119, correct.

14 THE WITNESS: Okay.

15 Q. (BY MR. BUDGE): Do you recognize this
16 document?

17 A. Yes.

18 Q. Is this something you prepared?

19 A. Yes.

20 Q. What does this illustrate?

21 A. This illustrates the potential differences
22 between using different years for a baseline condition.
23 So it shows the total pumping from 2010 to 2014 from
24 the IGWA districts, then it shows the average -- the
25 five-year average. It shows a three-year average. And

1 it shows the peak diversions, which occurred in 2012.

2 The chart below it shows the difference in
3 each year of pumping. It shows a green line for what
4 the five-year average would be, which was selected by
5 IGWA, and the -- the three-year average, which is the
6 yellow, dotted line, and the peak pumping, which was in
7 2012.

8 So it was used to illustrate the difference
9 between different method -- or different methodologies
10 of choosing a baseline focused on the years used.

11 Q. And if I look at that table at the top, it
12 has columns for five-year average, three-year average,
13 and peak diversions.

14 Do the figures in those columns show what
15 the baseline would be under those -- those three
16 different alternatives?

17 A. Yes, with the included diversions.

18 Q. What is do you mean "the included
19 diversions"?

20 A. So this -- this doesn't include diversions
21 that are outside of the ESPA, and there were some
22 assumptions made in the individual years based on the
23 null values. We talked about the averaging individual
24 wells versus averaging -- a summing and then averaging.

25 So there are -- these numbers will not line

1 up exactly with the average that was presented in the
2 previous chart, but it was used as an example to show
3 the differences between using different time spans for
4 an average or a baseline.

5 Q. And so I see that the -- in those three
6 columns, five-year average, three-year average, and
7 peak diversions, the -- the largest number is in the
8 "Peak diversions" column, and the smallest number is in
9 the "Five-year average" column.

10 Am I understanding correctly that -- that a
11 higher baseline would ultimately allow a greater volume
12 of pumping for IGWA than a lower baseline?

13 A. Yes.

14 Q. So wouldn't it have been to IGWA's
15 advantage to choose the peak diversion year as the
16 baseline?

17 A. Yes.

18 Q. It would be easier for them to comply with
19 the -- their shares of the 240; correct?

20 A. Definitely.

21 Q. Why did they select the five-year average,
22 which would have made it more difficult to comply?

23 MR. THOMPSON: I guess I'll object to that
24 question. Sorry. Object to that question on the
25 grounds that Mr. Higgs does not represent IGWA, and I

1 guess going to IGWA's state of mind of what they did or
2 didn't choose. I'd object to that testimony.

3 THE HEARING OFFICER: Overruled.

4 Mr. Higgs, you may answer the question.

5 THE WITNESS: Can you state it again, TJ,
6 please?

7 Q. (BY MR. BUDGE): If it would have been to
8 IGWA's advantage to select the peak year, the peak
9 diversion year, what's your understanding as to why the
10 five-year average was selected?

11 A. We had discussions about this. There was,
12 of course, members of IGWA that said that we should
13 pick the peak diversions because then it's easier to
14 meet the obligation.

15 But in good faith we all agreed that
16 choosing a five-year average would be the most
17 representative of what historic pumping was and would
18 provide us with a good accounting of what efforts were
19 accomplished over the span of years that the agreement
20 was to be implemented.

21 MR. BUDGE: I'd offer Exhibit 119 into the
22 record.

23 THE HEARING OFFICER: Mr. Fletcher.

24 MR. FLETCHER: No objection.

25 THE HEARING OFFICER: Mr. Thompson.

1 MR. THOMPSON: None. Thank you.

2 THE HEARING OFFICER: The document marked as
3 Exhibit 119 is received into evidence.

4 (Exhibit 119 received.)

5 THE HEARING OFFICER: Mr. Budge.

6 MR. BUDGE: Mr. Director, I'd note that we're
7 after the noon hour. I think if we took a break, if
8 this is a good time, I could organize my remaining
9 questions during that period and be able to expedite
10 the remainder of Mr. Higgs' testimony after lunch.

11 THE HEARING OFFICER: Okay. Is that agreeable
12 to everybody? Lunchtime?

13 How long do we need? An hour?

14 MR. BUDGE: Yeah, that's plenty.

15 Does that work for you guys?

16 MR. FLETCHER: 1:15?

17 THE HEARING OFFICER: 1:15.

18 MR. BUDGE: 1:15 it is. Thank you.

19 (Lunch recess.)

20 THE HEARING OFFICER: Are we recording?

21 Okay. We are starting again after the
22 lunch break.

23 Mr. Budge, further questions?

24 MR. BUDGE: Thank you, Director. I do have a
25 few more questions for Mr. Higgs.

1 Q. Jaxon, if you'll turn to Exhibit 107. And
2 to page 10. I just want to follow up on some
3 discussion we had before lunch.

4 A. Okay.

5 Q. This is the chart of your preliminary
6 analysis. And you testified earlier that A & B, Raft
7 River, and Southwest were included because the 240,000
8 acre-feet, if I recall, you said was an aquifer-wide
9 number; is that right?

10 A. Yes.

11 Q. Okay.

12 A. It was presented in that manner, I'll say.

13 Q. Yes. Okay. Will you turn to Exhibit 101
14 and find page 14.

15 A. Okay.

16 Q. Do you recognize this chart?

17 A. Yes.

18 Q. Does this chart relate to your prior
19 testimony about the 240,000 acre-feet being an
20 aquifer-wide figure?

21 MR. FLETCHER: Your Honor, I'm going to object
22 to this. This document on its face is labeled
23 "Settlement document subject to Idaho Rule of Evidence
24 408."

25 THE HEARING OFFICER: Mr. Budge.

1 MR. BUDGE: Yeah, two responses.

2 Just for the record, Idaho Rule of Evidence
3 408 does not exclude consideration of settlement
4 negotiations. But it's not necessary to address that
5 issue right now, because this document was utilized by
6 Mr. Higgs in implementing the Settlement Agreement.
7 And it's for that purpose that I would like to ask him
8 questions.

9 THE HEARING OFFICER: What -- at a minimum I
10 think you should establish some foundation about what
11 this document is. So let's start there. I'm sorry.

12 Q. (BY MR. BUDGE): Mr. Higgs, have you seen
13 this document before?

14 A. Yes.

15 Q. More than once?

16 A. I don't know.

17 Q. Not the whole document, just page 14.

18 A. Oh, yes.

19 Q. Page 14 only.

20 A. Page 14, yeah, multiple times.

21 Q. In what contexts have you seen page 14?

22 A. I've seen it presented in a few
23 presentations by the Department of Water Resources.
24 I've seen it used in IGWA board meetings. And then I'm
25 sure I have a copy of it somewhere on my computer,

1 because it's kind of made the rounds.

2 Q. Previously we discussed the different
3 methods that were considered in calculating each
4 district's proportionate share of the 240,000 acre-feet
5 figure that's referenced in the Settlement Agreement.

6 Is this document something that you
7 referenced in connection with those efforts?

8 A. Yes. I remember seeing this presentation.
9 I don't recall what meeting it was at. And I made
10 notes based on the numbers here. My understanding was
11 that we were looking at the change in aquifer from the
12 1950s to the current time, and a trend line was drawn
13 on there. And the average decline based on that trend
14 was 216,000 acre-feet.

15 There was a little bit added to that, a
16 10 percent added to that to ensure success, I -- I
17 guess, and then rounded up to 240,000 acre-foot --
18 feet, and was used as, I'll say, a justification for
19 the 240,000 acre-foot reduction requirement.

20 Q. So what does this have to do with your
21 inclusion of A & B and Southwest in the calculation --

22 MR. FLETCHER: Director, I'm going to ask for a
23 ruling on my objection.

24 THE HEARING OFFICER: Okay. So -- and I'm still
25 uncertain as I listen to the questions. You're only

1 referring to page 14, not the entire document?

2 MR. BUDGE: Correct. And I don't have any other
3 parts of this document that I intend to ask questions
4 about or to admit into evidence. It would be only this
5 page 14.

6 THE HEARING OFFICER: Okay. And I guess one of
7 my other questions is, this document as a whole was
8 presented to who?

9 MR. BUDGE: So my -- my purpose is not
10 referenced to the entire PowerPoint presentation. But
11 as Mr. Higgs explained, this diagram, this component of
12 it, was presented at multiple meetings, including
13 during that period of time after the Settlement
14 Agreement was signed when they were trying to figure
15 out how to implement it. And it's for that purpose
16 that I seek to ask questions.

17 THE HEARING OFFICER: Well, certainly the draft
18 is familiar to me. The numbers inside the text box are
19 not. The inserted numbers are not.

20 Whose numbers are they? Does Mr. Higgs
21 know?

22 MR. BUDGE: So -- so he's testifying as to his
23 understanding as IGWA's consultant as to what numbers
24 those numbers represent. If the Coalition wants to
25 present, you know, alternate testimony as to what they

1 represent, that's fine.

2 But for the purpose of interpreting the
3 contract, you have to understand IGWA's understanding
4 of the 240 and why that influenced their inclusion of
5 Southwest and A & B in their allocation.

6 THE HEARING OFFICER: Okay. Well, the document
7 is familiar enough to me that I'll allow it into
8 evidence, just page 14 of Exhibit 101.

9 (Exhibit 101 received.)

10 MR. BUDGE: Thank you.

11 Q. Mr. Higgs, where we left off, how did this
12 influence your decision to include A & B and Southwest
13 in your allocation of the 240,000 acre-feet?

14 A. The numbers represented on this chart
15 include impacts from all pumping in the ESPA, and the
16 declines can be in part attributed to all of that
17 pumping. And since A & B and Southwest Irrigation
18 District are -- pump water from the ESPA, it was
19 assumed that that 240,000 acre-foot obligation also
20 pertained to their pumping.

21 Q. Okay.

22 MR. FLETCHER: I'm going to object on the
23 assumption. The assumption -- there's no foundation
24 for who's making that assumption. I'm going to object
25 for lack of foundation for that statement.

1 THE HEARING OFFICER: Overruled.

2 Q. (BY MR. BUDGE): Okay. Jaxon, if you'll
3 turn to Exhibit 1 of the combined exhibits. That's the
4 black binder. And Exhibit 1 is the Settlement
5 Agreement, the 2015 agreement.

6 A. Okay.

7 Q. On page 1 of that agreement, the very top,
8 in the title of the agreement or "First participating
9 members of the Surface Water Coalition and
10 participating members of IGWA."

11 Do you see that?

12 A. In the title?

13 Q. Correct.

14 A. Yes.

15 Q. And there are footnotes after "Surface
16 Water Coalition" and a footnote after "Idaho Ground
17 Water Appropriators."

18 You can see that?

19 A. Uh-huh.

20 Q. Footnote 2 after "Idaho Ground Water
21 Appropriators" is also shown on page 1 of Exhibit 1.
22 And if you scan through that list, you'll see on line 5
23 a reference to Southwest Irrigation District.

24 A. Yes.

25 Q. I believe you testified earlier that you

1 provide consulting services for Southwest?

2 A. Yes.

3 Q. How long have you done work for Southwest?

4 A. My company has been working for Southwest
5 since about 2002.

6 Q. If you turn to page 22 of this exhibit.

7 A. Okay.

8 Q. That's the wrong page. Page 25. Excuse
9 me.

10 THE HEARING OFFICER: Okay.

11 THE WITNESS: Yes.

12 Q. (BY MR. BUDGE): There is a signature line
13 for Southwest Irrigation District, and the name of the
14 chairman is Randy Brown.

15 Do you know Randy?

16 A. Yes.

17 Q. Was he the chairman of Southwest at that
18 time?

19 A. Yes.

20 Q. To your knowledge, why did Southwest not
21 sign the Settlement Agreement?

22 A. Southwest Irrigation District had
23 previously had an agreement with the Surface Water
24 Coalition to avoid the curtailment under the water
25 call, and they were -- they had, I believe, a

1 stipulated agreement -- or an interim agreement at the
2 time and were waiting to finalize a longer term
3 agreement once the Settlement Agreement was made with
4 IGWA.

5 Q. When Southwest declined to sign the
6 Settlement Agreement, why did the 240,000 acre-foot
7 figure have to be adjusted downward to reflect their
8 nonparticipation?

9 A. The way we were thinking of it at the time
10 as an entire aquifer deficit, Southwest was going to do
11 aquifer enhancement activities anyway as part of their
12 agreement. And so their efforts could be included in
13 the -- in the obligation of 240,000 acre-feet, which
14 was presented as an aquifer deficit number.

15 So any -- any efforts that outside users
16 would do would be going towards balancing the aquifer,
17 which was the 240,000 acre-foot number that was
18 presented.

19 Q. So was Southwest declining to sign the IGWA
20 agreement, did that shift its share of the 240 onto the
21 districts that did sign?

22 A. Not in the allocation that IGWA made.

23 Q. Why not?

24 A. Because they -- they had an agreement that
25 was meant to -- to conserve water, and they did it via

1 recharge and soft conversions. And what they were
2 doing at the time was greater than what their
3 obligation would be under the apportionment that IGWA
4 had. And so it was left there and assumed that they
5 would meet that -- their portion of the 240,000
6 acre-feet.

7 Q. Has Southwest continued to provide
8 mitigation to the Coalition under its settlement
9 agreement with the Coalition?

10 A. Yes, they've been performing under their
11 agreement.

12 Q. Okay. Flip back to page 2 of Exhibit 1.

13 A. Page 2 of it.

14 Q. We've talked a fair about section 3(a)(2)
15 and each district being responsible for reducing their
16 proportionate share of the total annual reduction. And
17 so far we've talked about, you know, how that's
18 allocated and calculated. I want to ask you -- you
19 testified earlier about consulting for various
20 groundwater districts.

21 Have you assisted any of the groundwater
22 districts in developing programs to reduce their
23 groundwater pumping and conduct recharge so they could
24 comply with this section of the Settlement Agreement?

25 A. Yes.

1 Q. Which districts have you provided
2 assistance to?

3 A. I provided -- so I provided assistance for
4 creation of their reduction plan, we call them
5 reduction plans, for the North Snake Groundwater
6 District, Magic Valley Groundwater District, American
7 Falls-Aberdeen Ground Water District, and
8 Bonneville-Jefferson Groundwater Districts, and then I
9 had interactions with the other groundwater districts
10 about their plans. And we bounced ideas back and
11 forth, but I didn't create their plans or help
12 implement them.

13 Q. Does the Settlement Agreement instruct how
14 each district is supposed to develop their reduction
15 plan?

16 A. No.

17 Q. Are there more than one ways -- more than
18 one way that that can be done?

19 A. Yeah. In fact, all of the groundwater
20 districts have -- I mean their plans have similarities,
21 but they're all different. There's not one plan that
22 is alike.

23 Q. Explain some similarities between the
24 plans.

25 A. In general, most of them are taking into

1 account priority and allocating water to water rights
2 and water users based on that priority. The amount
3 of -- the amount of -- the amount that they take
4 priority into account varies.

5 There are districts that have -- we call
6 them tiers, which is a date range that determines a
7 specific allocation. There are districts that have a
8 tier for every priority date they have. There's some
9 that have as little as three.

10 And they all allocate different amounts of
11 water. Even if they have the same number of tiers,
12 they're allocating different amounts of water. Some of
13 them have minimum reduction requirements based -- so
14 that would weigh heavily on those -- on the historic
15 usage. Some of them have maximums so that people don't
16 have to cut more than say 20 or 30 percent.

17 So they -- they vary greatly. Each
18 district has different circumstances, different
19 geographical circumstances, well soil types, and
20 even -- even delivery types. You know, some are wells
21 that pump straight into pivots or irrigation systems,
22 some of them pump into canals and deliver from there.

23 So really it was a very mixed bag. And it
24 took a long time for them to determine how to implement
25 their individual proportion of the reduction

1 requirement.

2 Q. Thanks. That's helpful.

3 You mentioned that they assign volumes, you
4 know, based on priority.

5 So are the districts giving their patrons
6 individual, you know, diversion limits, so to speak?

7 A. Yeah, in general. And I'll probably just
8 speak to the ones that I work for, because that's what
9 I'm familiar with. But they -- each individual, we
10 listed out their water rights that they held, what tier
11 they fell in, and then each allocation for individual
12 water rights.

13 And then that allocation for each
14 individual water right was summed up for that user.
15 And we didn't particularly care, as long as they were
16 meeting their legal requirements under their water
17 rights, we didn't care which wells that water came out
18 of, just as long as they stayed under their total
19 allocated volume.

20 Q. You mentioned that you were summing up
21 their water rights.

22 Are you saying if they had multiple water
23 rights?

24 A. Yeah.

25 Q. Explain that.

1 A. So if you have had two water rights, say,
2 in one -- and they ever they were each for 50 acres, we
3 would -- we would place them in a tier, based on their
4 priority date. And if they were both allocated 50
5 acre-feet, then that user would be able to pump 100
6 acre-feet. So essentially a sum of the allocations for
7 the individual water rights.

8 Q. Gotcha. And the tiers reflect the
9 diversion limit assigned to water rights in that
10 category within that tier?

11 A. Yeah, exactly.

12 Q. And so more senior rights get higher
13 allocations than more junior rights?

14 A. Yes, in general.

15 Q. And then if I understand the averaging,
16 you're essentially letting each patron pool their water
17 rights to get a collective diversion volume that
18 they've got to stay under?

19 A. Yes.

20 Q. Do any of the districts allow their patrons
21 to utilize averaging for purpose of compliance?

22 A. Yes.

23 Q. And why is that?

24 A. Particularly at the beginning of the
25 agreement, they were talking about crop rotations, and

1 users were worried -- users that had specific crop
2 rotations were worried about being over in certain
3 years and way under in others.

4 And if the district as a whole got -- got
5 to where all their high consumptive use crops were
6 on -- on a rotation together, then they would be over.
7 And so the districts -- most of the districts allowed
8 at least some sort of averaging, and in particular the
9 ones that started out with an averaging had at least a
10 three-year rolling average. They didn't want the users
11 to essentially get themselves in trouble and carry
12 water over forever, but they needed some sort of way to
13 account for the crop rotations.

14 And, you know, especially if there was a
15 user who wanted to, say, fallow ground in one year so
16 that he could pump more water the next year, averaging
17 is really the easiest way for the district to implement
18 those types of practices.

19 Q. If you'll turn to the small, white binder,
20 IGWA's Exhibits. I want to draw your attention to
21 Exhibit 118 and Exhibit 120. You may kind of flip back
22 and forth between them.

23 A. Okay.

24 Q. Do you recognize these charts?

25 A. Yes.

1 Q. Did you prepare them?

2 A. Yes.

3 Q. For what purpose?

4 A. We created these to describe the effect of
5 averaging versus annual caps on -- on the pumping or
6 the limit -- or the -- excuse me, on the IGWA
7 implementation of the agreement.

8 Q. So if I'm looking at Exhibit 118, and
9 there's dates along the bottom, 2010 through 2014,
10 which you testified earlier was the baseline period.

11 A. Yes.

12 Q. This predates the Settlement Agreement.

13 So why were these years selected for this
14 illustration?

15 A. These were the years that IGWA used as
16 their baseline years, the average from those years.
17 And as presented in the chart that we saw earlier,
18 their -- IGWA's final allocation was based on 2010 to
19 2014.

20 Q. And what do the blue, yellow, and green
21 bars represent on this chart?

22 A. The blue bars show the diversions that we
23 had tabulated for each one of those years. And this --
24 this was given, I'll say as an example, to show what
25 the effect of conservation during this period would

1 have been.

2 So the yellow is the annual diversion with
3 240,000 acre-feet less than what they pumped -- what
4 they actually pumped in that year. So you can see that
5 it mirrors the diversions without conservation, which
6 was the actual pumping. It mirrors it exactly with
7 240,000 acre-feet less.

8 And then the green bar there is to show
9 that 240,000 acre-feet is accomplished every year, but
10 it's accomplished from what -- what they actually
11 pumped, versus some sort of average.

12 Q. So let me make sure I understand this.

13 So the blue bars represent measured pumping
14 during the baseline period?

15 A. Yes.

16 Q. And the yellow bars represent how much
17 would have been pumped by saving 240,000 acre-feet
18 every year?

19 A. Yes. From that number, yeah. From the
20 pumped number.

21 Q. And -- and so the yellow bars don't all
22 show the same volume each year.

23 Explain why that is.

24 A. Well, in this case, if we were -- you're
25 essentially saying you're cutting back 240,000

1 acre-feet from what you would have pumped, and what you
2 would have pumped or what in this case they did pump
3 was based on the season, the -- the requirement for the
4 year, the precipitation.

5 So there's years where users pump more and
6 where they pump less. And if we're -- if we say -- for
7 example, picked a single year as our baseline, if it
8 was 2012, like we talked about earlier, cutting 240,000
9 acre-feet from 2012 would still be pumping greater than
10 some of the actual years, namely 2010 and 2011.

11 So the determination of a baseline year or
12 set of years really can limit you in the dry years and
13 not require as much in the wet years. So it's kind of
14 an example of different ways that things could have
15 played out if we had chosen different baselines.

16 Q. So if IGWA was -- you know, had the ability
17 to go redo 2010 through 2014 and conserve 240,000
18 acre-feet every year, their total diversions are what's
19 reflected by the yellow bars?

20 A. Yes.

21 Q. Now, if you flip to Exhibit 120, it's
22 similar in many ways, but it's -- but the yellow bars
23 and the green bars are different.

24 Explain what this shows.

25 A. This shows -- the blue bars are the same as

1 the other chart, which would be the actual pumping
2 during those years.

3 The yellow bars show the total amount that
4 was allowed to be pumped based on the average of those
5 blue years.

6 And then the green would be how much
7 conserve -- annual conservation there would be compared
8 to what normally would have been pumped. So in other
9 words, when you -- when you cut based on an average,
10 your reduction requirement is greater in the years
11 where more water is required for the crops than it is
12 in the years where less water is required for the
13 crops.

14 Q. And the red, dotted line reflects the five
15 year baseline minus 240,000 acre-feet?

16 A. Yes.

17 Q. Okay. Now, this is -- you know, in
18 hindsight, or we can, you know, imagine what may have
19 been, how -- how did the districts accommodate this or
20 respond to this challenge of what we're going to call
21 looking prospectively?

22 A. Well, one of the reasons -- I mean this is
23 also one of the reasons why they implemented averaging,
24 because if you're averaging on your baseline, then in
25 my mind it makes sense to average on your actual

1 pumping, because you will have these large fluctuations
2 in crop water requirement. And it doesn't necessarily
3 mean that you're not performing, but it makes -- it
4 makes sense to average if your baseline is an average.

5 And we -- we did -- we talked about this
6 with most of the IGWA districts and at the board
7 meetings, and it's kind of again one of those
8 good-faith things where we were trying to find out
9 something that would work.

10 And so we were looking at the baseline as
11 an average and expected there -- and assumed there
12 would be averaging in the implementation.

13 MR. BUDGE: I'd offer Exhibits 118 and 120.

14 THE HEARING OFFICER: Mr. Fletcher.

15 MR. FLETCHER: I have no -- no objection, so
16 long as they're offered to illustrate the witness'
17 testimony.

18 THE HEARING OFFICER: Mr. Thompson.

19 The documents labeled as Exhibits 118 and
20 120 are received into evidence.

21 (Exhibits 118 and 120 received.)

22 Q. (BY MR. BUDGE): Jaxon, please turn to the
23 common exhibits binder and just briefly review
24 Exhibits 15 through 20.

25 A. Okay.

1 Q. These are IGWA's performance reports for
2 2016 through 2021, I believe. And they've been
3 admitted in the record by a stipulation.

4 You testified earlier that you prepared the
5 spreadsheets that are attached to each of these
6 reports; is that right?

7 A. Yeah, just the last -- well, for example,
8 on the -- on Exhibit 15, the last page. They're all --
9 I believe they're all called performance summary
10 tables. I prepared those tables.

11 Q. Will you just explain briefly how you
12 compiled the data that's represented in those tables.

13 A. Sure. At the outset of this agreement,
14 especially when we decided to use the diversion
15 volumes, measured diversion volumes from the WMIS
16 database as the metric for this -- the performance, I
17 was very aware that we wanted to present the data as
18 transparently as possible.

19 And so the best way to do that, in my mind,
20 was to list every diversion in -- within IGWA and list
21 the baseline for each diversion and then list the --
22 that current year's pumping. You subtract the two and
23 that's -- that's the performance. Some of them would
24 be negative and some of them would be positive.
25 Negative meaning that they pumped more than their

1 five-year average. Positive meaning that they pumped
2 less, or vice versa.

3 And so that was all laid out. And then the
4 individual sheets that comprise the spreadsheet that
5 accompanies this included the totals for reach
6 district, and they were compiled in this chart at the
7 end.

8 I will note that the data provided there
9 had -- it doesn't specify which users are in compliance
10 or out. We talked about how the district summed up
11 individual allocations for water rights. It doesn't
12 specify in there individuals who are in or out of
13 compliance. That wasn't the purpose.

14 The purpose was to just lay out all of the
15 data and present it by district so that we could see
16 how much they pumped, how much their baseline was, and
17 essentially what their conservation activities were.

18 Q. So you mentioned several tabs.

19 And I think, so the record's clear, these
20 Exhibits 20 -- or excuse me, 15 through 20, the hard
21 copies contain a printout of only the first page of the
22 spreadsheet that Mr. Higgs submits annually.

23 The actual spreadsheets I think are what we
24 want in the agency record. And -- is that the right
25 numbers? I think that's right. 15 through 19 -- or

1 through 20.

2 MS. PATTERSON: 21 through --

3 MR. BUDGE: One moment, Director.

4 Okay. So the record is clear, Exhibits 15
5 through 20 are copies of the annual performance reports
6 that IGWA submits to the Coalition and to the
7 Department. And in each of those reports attached is a
8 summary table which Mr. Higgs has been discussing.

9 We also have in the common exhibits
10 admitted by stipulation Exhibits 22 through 27, which
11 are the actual Excel spreadsheets and contain the
12 various tabs and supporting data that go into the
13 summary table.

14 And we've projected to the screen one of
15 those spreadsheets to use as an example. It's the 2016
16 performance summary table.

17 Q. And I don't want to spend a lot of time on
18 it, Jaxon, but I do just want you to explain what data
19 is contained in that that's used to generate the
20 summary.

21 A. Okay. If you want to click on the recharge
22 report there, this is where we house all of the
23 recharge that occurs by district. You know, at the
24 beginning of the Settlement Agreement, we -- we laid it
25 out as in depth as possible, but we have worked on

1 improving our reporting of recharge over time. But
2 it's broken down by districts and how much recharge
3 occurred there.

4 And if you want to just go to the
5 American -- AFA GWD tab there. All of the rest of the
6 tabs look the same. On the far left is the WMIS
7 diversion number. So that's the identification number
8 for each well that the Department places on that well
9 for their database, the baseline acre-feet for each
10 well, and the annual usage for that well, and then the
11 difference, which would be your increase or decrease in
12 pumping based on the average.

13 And I -- in an effort to make sure that we
14 were all on the same page with the data, because my
15 opinion is that the data should be the thing that we
16 least argue about, anywhere that diversion record was
17 different from what was in the WMIS database, I noted.
18 And there's various reasons why that would happen. I
19 don't think we need to go into it.

20 But the goal of these reports was to -- I
21 really wasn't asked to provide any sort of analysis of
22 what -- of compliance or anything like that. I really
23 was just presenting the data to show what was recharged
24 and what water was saved or potentially the lack
25 thereof, so...

1 Q. So if you look at the summary table tab, I
2 note that there's not anything there that shows like a
3 three or five-year average.

4 Why does -- why does your table not include
5 that?

6 A. I -- I would -- like I said, I was just
7 asked to present the annual -- the annual pumping data
8 versus the baseline and the recharge that occurred. I
9 was not asked to analyze any sort of compliance with
10 the -- with the Settlement Agreement or anything like
11 that. I guess you could call me the data guy.

12 MR. BUDGE: Okay. I have no further questions.

13 I do have one housekeeping item just for
14 preparation of the record.

15 Sarah, the parties stipulated to the actual
16 Excel spreadsheets, but I don't know that we've
17 submitted those by e-mail or otherwise to the
18 Department.

19 Do you have those?

20 MR. BAXTER: I don't know if we received those
21 TJ, but maybe you can [unintelligible] --

22 MR. BUDGE: Okay.

23 MR. BAXTER: -- [unintelligible] they've been
24 included as part of the record.

25 SARAH TSCHOHL: [Unintelligible.]

1 MR. BUDGE: Well, they were admitted by
2 stipulation. We just failed to submit them in advance
3 electronically. And we'll e-mail, you know, tonight or
4 tomorrow those to Sarah and copy all of the counsel so
5 that those Excel files can be included in the record.

6 THE HEARING OFFICER: And may I ask what
7 spreadsheets you're talking about.

8 MR. BUDGE: The -- they're common Exhibit Nos.
9 22 through 27.

10 THE HEARING OFFICER: Right.

11 MR. BUDGE: They're the annual performance
12 reports that Jaxon was just discussing.

13 THE HEARING OFFICER: But they're summary
14 spreadsheets; right?

15 MR. BUDGE: So in the hard copies, in the paper
16 copies, all you have is the summary page. But the
17 exhibits that the parties stipulated to are the actual
18 Excel files, which include the other data that --

19 THE WITNESS: Yeah, so --

20 MR. BUDGE: -- Jaxon was explaining.

21 THE WITNESS: I don't know if I'm supposed to
22 comment on this, but the -- what would be included in
23 those table is the data that goes into creating that
24 table and it's all laid out in these spreadsheets, so
25 for each individual diversion.

1 THE HEARING OFFICER: Let me just inquire
2 further, then.

3 I have hard copies of only a portion of the
4 exhibits. And you're representing to me that there's
5 more to the exhibit than what I have a paper copy of,
6 those were distributed to the parties, the Surface
7 Water Coalition, and those extended documents or
8 spreadsheets or books in Excel have been reviewed by
9 the parties and everyone has stipulated to the
10 admission of that additional data and information?

11 MR. BUDGE: Correct.

12 THE HEARING OFFICER: Is that correct, Surface
13 Water Coalition?

14 MR. FLETCHER: Yes.

15 THE HEARING OFFICER: Okay.

16 MR. THOMPSON: Yes. And, Director, I think,
17 maybe back to your order in August, I think all that
18 stuff was -- you took official notice of that. The
19 Department received all this over time.

20 THE HEARING OFFICER: Okay. I just wanted to
21 clarify what was in the record and what had been
22 stipulated to. And I didn't want to be receiving more
23 than what I had to look at in the binder itself.

24 MR. BUDGE: And the other -- I mean it's not
25 that significant, you know, I don't anticipate, but

1 that's what has been filed with the Department and
2 stipulated among the parties, so I wanted to make the
3 record clear that way.

4 THE HEARING OFFICER: Okay. No further
5 questions, Mr. Budge?

6 MR. BUDGE: No further questions.

7 MR. JOHNS: I have just a couple of questions,
8 Mr. Director, if that's okay.

9 THE HEARING OFFICER: You may ask.

10 MR. JOHNS: Okay.

11
12 DIRECT EXAMINATION

13 BY MR. JOHNS:

14 Q. And I apologize if some of this was asked
15 and answered. You've been testifying for some while
16 now. So just some of this is just to be brief and just
17 for some points of clarification. So if you've
18 answered it already, I by no means mean to be
19 redundant.

20 Could you just remind me how many years
21 you've been with Water Well Consultants in performing
22 the type of work that you performed for IGWA.

23 A. Officially out of school since 2012.

24 Q. Okay. And during your professional --
25 sorry, we're getting some echo. Excuse me. During

1 your professional career have you ever seen a
2 mitigation plan that encompassed as much or was really
3 the size and the scope of this? Could you comment on
4 that.

5 A. Yeah, the -- I have seen mitigation plans.
6 Nothing included as many water users and as many
7 diversions as this one did. And it presented a
8 particular difficulty because it was a short time span
9 in order to implement the elements of the Mitigation
10 Plan and it included a lot of users and a lot of
11 groundwater districts and a lot of different types of
12 irrigation systems. And I guess to be short, it was
13 complicated to implement.

14 Q. Okay. In your experience, would you have
15 expected more language in the Mitigation Plan that
16 directed you how, for example, to calculate the
17 baseline, in other words, where you would be reducing
18 from, how you would allocate that among so many
19 different members, and then finally how that would be
20 implemented over time?

21 A. That's a good question. I don't have
22 extensive experience with mitigation plans. So I -- I
23 can't really say whether or not I would expect all of
24 those things to be laid out. Certainly it would be
25 less contentious to implement if it was spelled out

1 properly.

2 Q. All right. Do you feel like when you were
3 reviewing and you were preparing these mitigations
4 plans for IGWA that the Mitigation Plan that was
5 approved to -- gave you much direction on those points
6 about calculation, implementation, and allocation?

7 A. No. One of the reasons I got involved is
8 because there were so many questions about how it
9 should be done. And so I was asked of potential ways
10 for it to be accomplished, and I provided a lot of
11 opinions on what I thought might work.

12 Q. Right. And just -- I believe this has been
13 testified to, but just in summary, there were many
14 different ways this could have been accomplished;
15 correct?

16 A. Yeah. And we -- I presented quite a few
17 different ways. Certainly not all of the possible
18 ways.

19 MR. JOHNS: No further questions.

20 THE HEARING OFFICER: Thank you, Mr. Johns.

21 Cross-examination, Mr. Fletcher or
22 Mr. Thompson. Do you have a preference as to order of
23 examination?

24 MR. FLETCHER: Yeah, I'll start, if that's okay.

25 THE HEARING OFFICER: Thank you, Mr. Fletcher.

CROSS-EXAMINATION

1
2 BY MR. FLETCHER:

3 Q. Mr. Higgs, most of your testimony concerns
4 matters that occurred prior to the entry of the order,
5 the first order in this action; is that correct? I'll
6 give you a date for that.

7 A. Yes, I was going to ask for a date.

8 Q. The first order in this action was entered
9 May 2nd, 2016.

10 A. The first order May 2nd, 2016. I don't
11 know how to put numbers on that. There were certainly
12 some or quite a bit that was prior to that.

13 A lot of the finalization of that occurred
14 during the beginning of that irrigation season. So I'm
15 not sure how this put a number to that, but...

16 Q. After the final order was entered, did you
17 review it?

18 A. I'm sure I read it.

19 Q. And did you make any adjustments to IGWA's
20 obligations as a result of what the final order said?

21 A. No.

22 Q. Okay.

23 A. I don't think so.

24 Q. I'm going to ask you to turn to Exhibit --
25 I believe it's 38.

1 A. In the black book?

2 Q. Yeah, in the big, thick book.

3 A. Okay.

4 Q. Excuse me, it's Exhibit 36.

5 A. 36. Okay.

6 Q. And this has been stipulated into evidence.
7 And I will represent that it was entered on May 2nd,
8 2016.

9 Now, by May 2nd, 2016, had you already
10 prepared your allocation tables for the IGWA members?

11 A. I don't remember if the final one was done
12 by that point or not.

13 Q. Okay. I draw your attention to paragraph 5
14 on page 2.

15 A. Okay.

16 Q. And can you read the very first part of
17 that sentence in paragraph 5 down to where it says
18 sub (b).

19 A. Sub (b). Okay. "Through the Mitigation
20 Plan, the SWC and IGWA members agreed to (a) a total
21 groundwater diversion reduction of 240,000 acre-feet
22 annually."

23 Q. Okay. Now, that's the Director's findings
24 of facts that are set forth in the order.

25 Does that state anybody else is agreeing to

1 that reduction?

2 A. It says Surface Water Coalition and IGWA.

3 Q. Okay. When you reviewed the order, did
4 that give you pause about the allocations you'd been
5 making?

6 A. I don't recall reading the order. And I
7 really don't recall having -- it having an influence on
8 the allocation.

9 Q. Okay. I ask that you turn to page 4.

10 A. Oh, same document. Page 4.

11 Q. Same document.

12 A. Okay.

13 Q. And under the word "Order," can you read
14 paragraph A into the record.

15 A. "All ongoing activities required pursuant
16 to the Mitigation Plan are the responsibilities of the
17 parties to the Mitigation Plan."

18 Q. Okay. When you read that, did it give you
19 any pause concerning the allocations that IGWA was
20 making?

21 A. I don't remember.

22 Q. Okay. Was A & B Irrigation District a
23 party to the Mitigation Plan?

24 A. Are they a signator? Is that what you're
25 asking?

1 Q. Yes.

2 A. Let's see. Well, they are a signator for
3 the Surface Water Coalition.

4 Q. Well, I'll get to the A & B agreement in
5 just a second to clarify that.

6 You already testified Southwest Irrigation
7 District did not sign this Mitigation Plan; correct?

8 A. Yeah, according to the documents that were
9 shown.

10 Q. Okay. And so despite what your
11 interpretation of the Settlement Agreement was, your
12 review of the order did not give you any pause about
13 the allocations being made by IGWA?

14 A. I don't -- I don't recall reading it, so...

15 Q. Okay. And in the Settlement Agreement
16 you -- first of all, did the Surface Water Coalition
17 ever agree to these allocations that IGWA was making?

18 A. Can you elaborate a little bit on what
19 "agree" means?

20 Q. Well, didn't the Surface Water Coalition in
21 fact object to the allocations that IGWA was making?

22 A. I -- I don't know. That's a good question.

23 Q. I'd like you to look at Exhibit 201. That
24 should be separate here. I'm sorry. The?

25 UNIDENTIFIED SPEAKER: Director, they're on the

1 right corner of the desk.

2 THE HEARING OFFICER: Thank you.

3 MR. BUDGE: Objection.

4 THE HEARING OFFICER: What's the objection?

5 MR. BUDGE: Exhibit 201 relates to settlement
6 negotiations between the parties, and the Surface Water
7 Coalition has successfully obtained an order that those
8 are not admissible into evidence. It's a letter from
9 IGWA's legal counsel to the Coalition's legal counsel
10 concerning the terms of the agreement.

11 THE HEARING OFFICER: Well, I don't know the
12 answer to that question yet.

13 MR. FLETCHER: I might have had him look --

14 THE HEARING OFFICER: Let's lay some foundation.
15 I don't -- I see a letter, but I don't know what it is.

16 MR. FLETCHER: Okay. Maybe it's marked 200.

17 UNIDENTIFIED SPEAKER: Yeah. There's a 200 and
18 a 201.

19 Q. (BY MR. FLETCHER): Describe -- what is
20 Exhibit 200?

21 A. Via e-mail and U.S. mail from Randy Budge
22 regarding Ground Water District's 2016 implementation
23 report.

24 Q. Is that from Travis Thompson?

25 A. Yes. Sorry. To Randy Budge, yes.

1 Q. Have you seen this letter before?

2 A. I -- yes, I believe I have.

3 Q. Okay. And can you summarize your
4 understanding of that letter?

5 MR. BUDGE: Objection.

6 THE HEARING OFFICER: Same objection and basis
7 for the objection?

8 MR. BUDGE: Yeah. So this letter reflects
9 negotiations between the parties. And as Mr. Fletcher
10 has pointed out, the Director has ruled that that's not
11 admissible.

12 THE HEARING OFFICER: Well, I've just -- we've
13 just covered and received into evidence by stipulation
14 all of the implementation reports. And those reports
15 were -- at least my understanding, were presented to an
16 implementation committee or a group comprised of IGWA
17 and Surface Water Coalition members. And this may be a
18 reaction to that report. I don't see that -- yet that
19 this is related to settlement negotiations.

20 So overruled, at least at this point,
21 Mr. Budge.

22 Q. (BY MR. FLETCHER): Can you state the date
23 on that letter?

24 A. April 14th, 2017.

25 Q. Okay. And again, I would draw your

1 attention that the final order was entered in 2016.

2 So you said you have seen this letter;
3 correct?

4 A. Yes, I believe so.

5 Q. And I believe you -- I'd asked you what was
6 your understanding of what that letter says.

7 A. And that's what you want me to answer now?

8 Q. Yeah.

9 A. Okay. Let me look at it real quick.

10 Okay. Yes.

11 Q. Just to save a little time, in a nutshell,
12 the Surface Water Coalition was objecting to IGWA's
13 allocation among its groundwater districts; correct?

14 A. Yes. In particular, A & B it says here.
15 Let's see. I'm seeing A & B. Yes. So yep.

16 MR. FLETCHER: Okay. So I'd move for the
17 admission of Exhibit 200.

18 THE HEARING OFFICER: Mr. Budge.

19 MR. BUDGE: No objection.

20 THE HEARING OFFICER: Mr. Johns.

21 MR. JOHNS: I don't have any objection.

22 THE HEARING OFFICER: Okay. The document marked
23 as Exhibit 200 is received into evidence.

24 (Exhibit 200 received.)

25 Q. (BY MR. FLETCHER): After receiving this

1 letter, did IGWA make any adjustments to its
2 allocations?

3 A. No. I will note, too, now that I have both
4 of these in front of me, I haven't seen Exhibit 200. I
5 have seen Exhibit 201 --

6 Q. Okay.

7 A. -- previously.

8 Q. And what is Exhibit 201?

9 A. Exhibit 201, I believe, is the reply
10 from -- was it TJ or Randy -- Randy Budge, to this
11 letter that I hadn't seen, Exhibit 2.

12 Sorry, if that's me.

13 Q. Okay. In fact, IGWA objected in effect to
14 what the Surface Water Coalition was stating in its
15 letter, Exhibit 200; correct?

16 A. Yes, from my understanding.

17 MR. FLETCHER: And I'd move to the -- for the
18 admission of Exhibit 201.

19 THE HEARING OFFICER: Mr. Budge.

20 MR. BUDGE: I believe that was admitted
21 previously.

22 Are you referring to 202, Kent?

23 MR. FLETCHER: No, 201.

24 UNIDENTIFIED SPEAKER: 201.

25 MR. FLETCHER: There's just 200 and 201.

1 MR. BUDGE: No objection.

2 THE HEARING OFFICER: Mr. Johns.

3 MR. JOHNS: No objection.

4 THE HEARING OFFICER: The document marked as
5 Exhibit 201 is received into evidence.

6 (Exhibit 201 received.)

7 Q. (BY MR. FLETCHER): So based upon
8 Exhibit 200, it's fair to say the Surface Water
9 Coalition never agreed to the allocation IGWA made
10 among its groundwater districts?

11 MR. BUDGE: Objection. Foundation.

12 MR. FLETCHER: Well, based --

13 THE HEARING OFFICER: This is cross-examination.
14 Overruled.

15 THE WITNESS: Can you repeat the question one
16 more time? Sorry.

17 Q. (BY MR. FLETCHER): Based upon Exhibit 200,
18 it's fair to say the Surface Water Coalition never
19 agreed to the allocation IGWA made; correct?

20 MR. BUDGE: Objection. Foundation.

21 May I inquire of the witness in further aid
22 of objection?

23 THE HEARING OFFICER: Yes.

24 ///

25 ///

1 VOIR DIRE EXAMINATION

2 BY MR. BUDGE:

3 Q. Mr. Higgs, do you consult for the Surface
4 Water Coalition?

5 A. No.

6 Q. Do you attend their board meetings?

7 A. No.

8 Q. Did you participate in negotiating the
9 Settlement Agreement on their behalf?

10 A. No.

11 Q. Do you have any idea what the Surface Water
12 Coalition may or may not have agreed to with respect to
13 IGWA's allocation of the 240?

14 A. No.

15 THE HEARING OFFICER: And you still object?

16 MR. BUDGE: Yeah. Object to foundation.

17 THE HEARING OFFICER: Overruled. He can answer
18 whether he knows or not. I --

19 MR. FLETCHER: Yeah, I'll -- I'll clean that up.
20

21 CONTINUED CROSS-EXAMINATION

22 BY MR. FLETCHER:

23 Q. To your knowledge, did the Surface Water
24 Coalition ever agree to the allocation that IGWA was
25 making among its groundwater districts?

1 A. Not to my knowledge.

2 Q. Now, as far as the baseline that you've
3 testified to, again, IGWA was basically charged with
4 figuring out how to allocate among the groundwater
5 districts pursuant to the agreement; correct?

6 A. Yes.

7 Q. And you created the baseline or IGWA
8 created the baseline that would be used; correct?

9 A. Yes.

10 Q. IGWA agreed to use that baseline; correct?

11 A. Yes. It was -- internally we agreed to
12 measure our performance on -- against that baseline.

13 Q. Okay. And when you prepared the annual
14 reports that you've testified to, there was no
15 objection made to the fact that you had used a
16 five-year baseline, average baseline; is that correct?

17 A. In those first meetings I can't remember
18 how much we talked about it. And I don't recall any
19 objections.

20 Q. Okay. And you've testified that the
21 agreement specifically doesn't say how that's to be
22 done.

23 IGWA figured that out; correct?

24 A. Yes.

25 Q. Okay. So are you familiar with the

1 agreement that IGWA signed with A & B Irrigation
2 District?

3 A. I have probably read it before. I can't
4 say I'm familiar with it, but...

5 Q. Okay. Can you look at Exhibit 4.

6 A. Yes.

7 Q. I'm drawing your attention to paragraph 2.

8 A. Okay.

9 Q. And can you read the first two sentences of
10 paragraph 2.

11 A. "A & B agrees to participate in the
12 Settlement Agreement as a surface water right holder
13 only. The obligations of the groundwater districts set
14 forth in paragraphs 2 through 4 of the Settlement
15 Agreement do not apply to A & B and its groundwater
16 rights. A & B agrees to not make a surface water" --
17 am I reading too far? Did you say the first two
18 sentences? Sorry.

19 Q. Yeah, that's fine. Let's end it right
20 there for now, and I'll ask you about the rest in a
21 minute.

22 But what's your understanding of those two
23 sentences?

24 A. So I'm assuming the Settlement Agreement is
25 the IGWA-Surface Water Coalition Settlement Agreement.

1 Q. Yeah. Look up in the recitals, first
2 paragraph.

3 Do you see the first "Whereas"?

4 A. Yes. That says August 1st, 2015. I
5 thought it was May.

6 Q. So let's get back to my question.

7 What's your understanding of paragraphs --
8 paragraph -- those to first two sentences of
9 paragraph 2?

10 A. So in the agreement they would be a surface
11 water right holder only. Whatever obligations are
12 lined out in 2 through 4 doesn't apply to A & B and its
13 groundwater rights.

14 Q. Okay. So once this agreement was executed,
15 did you go back and adjust the allocations made between
16 the various groundwater districts?

17 A. We looked at that every year. This was
18 signed in October 2015. Well, we hadn't made the final
19 allocation yet, so it can't be adjusted if it's not
20 finalized yet.

21 Q. Okay. But you included A & B on your
22 annual reports and have included them every year;
23 correct?

24 A. Yes.

25 Q. And this specifically states, and IGWA

1 agreed, that A & B would not be subject to those
2 requirements?

3 MR. BUDGE: Objection.

4 MR. JOHNS: Objection.

5 MR. BUDGE: Objection. Mischaracterizes the
6 testimony of the witness.

7 THE HEARING OFFICER: Overruled. This is
8 cross-examination.

9 THE WITNESS: One more time. Sorry.

10 Q. (BY MR. FLETCHER): This agreement that
11 IGWA entered into with A & B specifically says A & B is
12 not subject to paragraphs 2 through 4 of the Settlement
13 Agreement; correct.

14 A. You said that IGWA agreed to it. I don't
15 know if they did. I mean --

16 Q. Okay. Look at the top paragraph.

17 A. Okay.

18 Q. And who are the parties to this agreement?

19 A. A & B, Idaho Ground Water Appropriators.
20 Okay. So they are on there.

21 Q. Okay. And you can turn the page, all the
22 pages at the end of the exhibit, and see who signed it.

23 A. All the signatures. Okay.

24 MR. BUDGE: Objection, director. The agreement
25 speaks for itself. And to the extent Mr. Fletcher

1 wants Mr. Higgs to opine as to its legal effect, that
2 calls for a legal conclusion.

3 THE HEARING OFFICER: Overruled.

4 Q. (BY MR. FLETCHER): You said you didn't
5 know who entered into the agreement.

6 Do you agree now that IGWA entered into the
7 agreement?

8 A. Yes. By this text it appears that IGWA's
9 on there.

10 Q. Okay. So let's look back at the Settlement
11 Agreement, Exhibit 1.

12 A. Okay.

13 Q. So paragraph 2 on page 2 are the near-term
14 practices.

15 Those were the short-term practices that
16 took place immediately after the agreement was signed;
17 correct?

18 A. Okay.

19 Q. Paragraph 3 were the long-term practices,
20 which included 3(1) and 3(2) talking about the 240,000
21 acre-feet annually?

22 A. 3(1) -- 3(a) -- (a)(1)?

23 Q. 3(a)(1).

24 A. 3(a)(1) and (2)?

25 Yes.

1 Q. So IGWA agreed that A & B would not be
2 subject to those provisions; correct?

3 A. Let's see. And that's what was on -- it
4 was 3 and 4; right? Sorry, I haven't delved into these
5 in detail, so you're putting me in new -- what was
6 the -- what was the exhibit number?

7 Q. I'll represent to you that the A & B
8 agreement says that A & B is not subject to provisions
9 2, 3, and 4 of the Settlement Agreement.

10 A. Okay. I'll take your word for it.

11 Q. Okay. And I just wanted to point out
12 3(a)(1) includes the 240,000 feet annually; correct?

13 A. Yep, that's what 3(a)(1) says.

14 Q. And then paragraph 4 deals -- which is on
15 page 4, deals with the adaptive water measures;
16 correct?

17 A. Yep, that's the title.

18 Q. Okay. So I'm going to ask you the question
19 again.

20 After A & B signed this agreement and IGWA
21 agreed that they wouldn't be subject to those
22 provisions of the agreement, you never adjusted the
23 allocation and took A & B off the allocation; correct?

24 A. Yes. And we also didn't hold A & B to
25 their obligation.

1 Q. But you included a number for A & B on your
2 allocation; correct?

3 A. Yes, because of the 240,000 acre-foot
4 aquifer deficit.

5 Q. I think it's fair to say, based upon your
6 testimony, that you really can't take into account the
7 wording of the final order when making your
8 adjustments; correct?

9 A. My adjustments?

10 Q. I mean your allocations. I'm sorry.

11 A. No, I was -- we were -- I was not tasked
12 with reading through the agreement and incorporating
13 that. I was given a number and allocated based on --

14 Q. And the number that you allocated in total
15 to the groundwater districts that belonged to IGWA was
16 a 205,000 acre-feet annual obligation; correct?

17 A. Somewhere around there.

18 Q. Okay. And is there anything in the final
19 order or the agreement that references 205,000
20 acre-feet?

21 A. Not that I'm aware of.

22 Q. Is there anything in the final order or the
23 agreement that references averaging the obligation?

24 A. The text of the agreement?

25 Q. The annual obligation.

1 A. In the text of the agreement?

2 Q. Yes.

3 A. None of that is spelled out, no.

4 Q. Okay. Exhibit 3 -- or excuse me. Let me
5 make sure I get this right.

6 In Exhibit 2, which is an addendum to the
7 Settlement Agreement, there is no reference to 205,000
8 acre-feet or averaging the annual obligation, is there?

9 A. I haven't read through it.

10 Do you want me to read it?

11 Q. You haven't -- you didn't review this as
12 part of your duties?

13 A. As my duties?

14 Q. Yeah, in assigning the allocation. This is
15 part of the Settlement Agreement.

16 A. I was tasked with presenting data, not
17 assigning anything.

18 Q. Okay. So I'd like you to look at
19 Exhibit 27.

20 A. Okay.

21 Q. You prepared this exhibit; correct?

22 A. This chart, yes.

23 Q. And this was the chart presented to the
24 steering committee?

25 A. In -- yes.

1 Q. And this chart sets forth 2021 performance?

2 A. Yes.

3 Q. Have you done any math to take out the
4 obligations of A & B and Southwest that are set forth
5 on that chart?

6 A. What do you mean by "take out"?

7 Q. Okay. Well, let's look over to your "Total
8 conservation" column.

9 A. "Total conservation." Okay, uh-huh. On
10 the far -- on the right-hand side.

11 Q. Yeah.

12 A. Okay.

13 Q. And if you look down there, you have a row
14 assigned to A & B; correct?

15 A. Uh-huh.

16 Q. Of 21,660?

17 A. Uh-huh.

18 Q. And you have a row assigned to Southwest
19 Irrigation District of 12,943?

20 A. Yes.

21 Q. If you take out those two obligations, do
22 you know what the total conservation was in 2021?

23 A. No, I can't do that quick enough in my head
24 to --

25 Q. Okay. Well, I'll represent to you that it

1 was 122,784.

2 Now, if that's in fact the case of what the
3 total conservation should have been in 2021, that would
4 also change your last column, which is the mitigation
5 balance; correct?

6 A. Let's see. If -- you're asking me to
7 assume that if they were taken out --

8 Q. Right.

9 A. -- that the mitigation balance would
10 change?

11 Q. Right.

12 A. Let's see. Well, the mitigation balance
13 sum at the bottom is 82,000, and it's a sum of all the
14 groundwater districts. And I see A & B and Southwest
15 are zero. So if I take them out, there's no change in
16 that number at the bottom.

17 Q. Okay. And this shows that on an annual
18 basis anyway, this report reflects that American
19 Falls-Aberdeen, Bingham, Bonneville-Jefferson, and
20 Jefferson-Clark ran negative mitigation balances;
21 correct?

22 A. Yes.

23 Q. What does that mean?

24 A. That means that compared to what they were
25 allocated, they -- they -- they performed less than

1 that allocation or they -- in this case, if you look at
2 all those, they pumped more than what their allocation
3 was.

4 Q. Okay. And that's based upon your
5 allocation of 205,000 acre-feet; correct?

6 A. No. That's based on 240 to all of the
7 districts listed.

8 Q. Well, that would include A & B and
9 Southwest; correct?

10 A. Yes. On this chart, yes.

11 Q. Okay. In your meetings with IGWA dealing
12 with these performance -- in preparation of these
13 performance reports you did, did you express concerns
14 to the groundwater districts concerning their
15 performance?

16 A. For this year? For --

17 Q. Yeah, let's talk about 2021.

18 A. 2021?

19 Q. Yes.

20 A. Yes. Yeah, there was some concerns that
21 some of the districts didn't meet their obligation.

22 Q. What did you -- what did you say about the
23 nonperformance?

24 A. Oh, I don't remember.

25 Q. Okay. Were you concerned that districts

1 were relying too heavily on recharge to meet their
2 obligations?

3 A. In 2021, no.

4 Q. How about in prior years?

5 A. In prior years there was recharge
6 available. I encouraged them to do as much recharge as
7 possible.

8 Q. Did you also encourage them to reduce
9 groundwater pumping?

10 A. Yes. A combination of the two, yes.

11 Q. During these discussions was there any
12 discussion of the goal of the agreement, the Settlement
13 Agreement?

14 A. Yeah. IGWA would -- we constantly talked
15 about improving reach gains and benefit -- net benefits
16 to the aquifer.

17 Q. And as a consultant to the groundwater
18 districts that you consult with, did you express
19 concern to them that they were not going to be able to
20 achieve the goals of the Settlement Agreement?

21 A. Oh, in 2021 we were concerned about the
22 future and the lack of surface water supply. And yeah,
23 there were -- there's always a concern, I should say.

24 MR. FLETCHER: I think I'm done. Thank you.

25 THE WITNESS: Thank you.

1 THE HEARING OFFICER: Mr. Thompson, do you have
2 any further questions?

3 MR. THOMPSON: I just have a few.
4

5 CROSS-EXAMINATION

6 BY MR. THOMPSON:

7 Q. Mr. Higgs, Travis Thompson for members of
8 the Surface Water Coalition. I just want to clear up a
9 couple dates and things.

10 I guess going back to Exhibit 4 --

11 A. Four. Okay.

12 Q. -- which is the --

13 A. In the black book.

14 Q. -- A & B Settlement Agreement.

15 A. Okay.

16 Q. And what is the date of that agreement?

17 A. The top says 7th of October, 2015.

18 Q. And through that agreement A & B basically
19 agreed to participate in the Settlement Agreement as a
20 surface water right holder only; is that your
21 understanding?

22 A. Yeah. In No. 2, that's what it appears to
23 say.

24 Q. And did they make an additional promise not
25 to make a groundwater call against members of IGWA as

1 well?

2 A. I recall that potentially being in here,
3 but I don't -- I'm not 100 percent sure of that.

4 Q. It's the same paragraph.

5 A. Same paragraph?

6 Q. Yeah, I'll just direct your attention to
7 paragraph 3.

8 A. Okay. Okay. Yes, it says there that
9 they'll agree not to make a groundwater delivery call.

10 Q. So would you agree that's a different
11 provision, a different promise, separate from the
12 Surface Water Coalition members, what they agreed to
13 do?

14 A. Can you restate that? Sorry.

15 Q. Yeah. Their -- A & B's agreement not to
16 make a delivery call against junior-priority
17 groundwater rights, would you agree that's a different
18 promise than what the surface water members agreed to
19 do in their Settlement Agreement?

20 A. A different promise? I don't know if I can
21 answer that question.

22 Q. I guess to your knowledge, did any --

23 MR. BUDGE: Objection. Calls for a legal
24 conclusion.

25 THE HEARING OFFICER: Well, I'll allow

1 follow-up.

2 Overruled.

3 Q. (BY MR. THOMPSON): To your knowledge, in
4 the Settlement Agreement in Exhibit 1, did any surface
5 water member make any agreement not to make a
6 groundwater call against IGWA's members?

7 A. I don't know off the top of my head. I
8 don't know. If you could maybe point it to me.

9 Q. Let's turn to Exhibit 114.

10 A. 114, you say?

11 Q. Yes.

12 A. Okay. In the right book? Oh, no, you're
13 in the big book. Excuse me.

14 Q. Yeah, the big book.

15 A. I'm in the wrong --

16 Q. Oh, I'm sorry. It's --

17 MR. BUDGE: 14 or 114?

18 MR. THOMPSON: Yeah, 114.

19 Q. I think that's IGWA's exhibit. It should
20 be the small --

21 A. It is this one. Okay. Sorry. Because the
22 one hundreds are this book?

23 Okay. Yes.

24 Q. And that's a table that you created; is
25 that correct?

1 A. Yes.

2 Q. And so what is the date of this final
3 allocation table?

4 A. The date on this printing was 11/3/2016.

5 Q. So do you agree that was finalized after
6 IGWA signed this agreement with A & B?

7 A. Yes.

8 Q. And would you agree this table doesn't take
9 into account priority of groundwater rights in any way?

10 A. Does it not take into priority groundwater
11 rights? Yeah, I think that's fair to say.

12 Q. And so this -- this apportionment, this
13 table you created, was irrespective of any past injury
14 finding or curtailment date or --

15 A. Yes, it was --

16 Q. -- priority?

17 A. -- volume pumped.

18 Q. And I think you testified earlier that
19 graph that the Department created that showed kind of
20 that total decline in the aquifer that came up with
21 that 240 number.

22 A. Oh, uh-huh.

23 Q. But that table didn't reflect all pumping
24 from the aquifer; is that correct?

25 A. The -- excuse me. Say that again. The

1 table -- which table are we talking about again real
2 quick?

3 Q. I'll go back to -- I'm sorry, the graph
4 that the Department created, the one we're all familiar
5 with.

6 A. The storage change graph with the 216 --

7 Q. Yes.

8 A. -- plus sum to 240? Yeah. That one?

9 Q. It just shows an annual volume; is that --

10 A. A storage change in the aquifer, yes.

11 Q. Okay. And then your table, you list a
12 number of parties.

13 But that doesn't take into account every
14 pumper on the aquifer; is that --

15 A. That is true.

16 Q. And this table does list Falls Irrigation
17 District.

18 Are you familiar with that district?

19 A. Yes.

20 Q. And are they a party to the Surface Water
21 Coalition agreement?

22 A. No.

23 Q. And so this table, would you agree,
24 reflects some non-parties, but not all non-parties that
25 pump from the ESPA?

1 A. Yeah, if we're talking pumpers from the
2 ESPA, yes, it doesn't include all pumpers from the
3 USA -- or ESPA, excuse me.

4 Q. And after 2016, Falls was removed from your
5 annual report that you compiled every year --

6 A. Yes.

7 Q. -- true?

8 But A & B and Southwest were left on; is
9 that correct?

10 A. Correct.

11 Q. Let's go to 119.

12 A. Okay.

13 Q. Just a quick question. So Mr. Budge asked
14 you about the differences in this exhibit, and you
15 identified there's a five-year average, there's a
16 three-year average, and then a peak diversion year --

17 A. Yes.

18 Q. -- is that true for the --

19 A. On this chart, yes.

20 Q. And would you agree that IGWA did not use a
21 three-year average or a peak diversion for purposes of
22 its performance reports?

23 A. Yes, we represented the five-year average.

24 Q. So as far as actual performance and what
25 was done every year that was submitted to the

1 Department, it was that five-year average, it wasn't
2 one of these other numbers?

3 A. That's correct.

4 Q. If you could just one final question.

5 A. Sure.

6 Q. Can you turn to the performance reports. I
7 think they're in the common exhibits.

8 A. Do you remember which numbers those are?

9 20 --

10 Q. We can look at Exhibit 22.

11 A. 22, okay.

12 Q. I think that's the first one.

13 A. Sure.

14 Q. 2016.

15 A. Okay.

16 Q. And the far right column of this report
17 shows a mitigation balance?

18 A. Yes.

19 Q. And is that just the difference between
20 actions that were taken that year compared to their
21 identified obligation, this table?

22 A. Yeah, that -- that would be their diversion
23 baseline, minus their pumping, plus recharge.

24 Q. And would you agree that I guess going
25 forward from 2016 to I'll say at least 2022 -- or 2021

1 was the last report we had.

2 A. Yeah, uh-huh.

3 Q. -- IGWA never attempted to use this
4 mitigation balance from a prior year as part of its
5 conservation obligation the following year?

6 A. I can't answer that. As I stated
7 previously, I was tasked with presenting what happened
8 in that year, and I was not asked to pontificate on the
9 compliance of the plan.

10 Q. Okay. So at least for your purposes for
11 creating all these charts, you were never instructed to
12 apply that balance to the total conservation the
13 following year?

14 A. No.

15 Q. Is that true?

16 A. I -- we never talked about that.

17 MR. THOMPSON: That's all the questions I have.

18 Thank you.

19 THE HEARING OFFICER: All right. Thank you.

20 Redirect, Mr. Budge?

21 MR. BUDGE: Thank you, Director.

22

23 REDIRECT EXAMINATION

24 BY MR. BUDGE:

25 Q. I want to ask a few follow-up questions,

1 Jaxon, about some of the exhibits that you were asked
2 about by Mr. Fletcher and Mr. Thompson.

3 A. Okay.

4 Q. The first one is Exhibit 30 -- my
5 spelling's bad. I think it's 36. Yeah, it's 36.

6 THE HEARING OFFICER: What exhibit are we
7 referring to?

8 MR. BUDGE: Exhibit 36, Director.

9 THE HEARING OFFICER: Thank you.

10 MR. BUDGE: It's the Final Order Approving
11 Stipulated Mitigation Plan.

12 Q. Do you see that, Jaxon?

13 A. Yes.

14 Q. Mr. Fletcher had you read the first few
15 lines, and subpart (a) states that "The Surface Water
16 Coalition and IGWA members agreed to a total
17 groundwater diversion reduction of 240,000 acre-feet
18 annually."

19 Do you see that?

20 A. I might be on the wrong...

21 Q. Oh, I'm on page 2, paragraph 5.

22 A. Oh.

23 Q. I think I failed to --

24 A. 5. There we go. Okay. Yes.

25 Can you ask that one more time, TJ?

1 Q. That first couple lines, it says that "SWC
2 and IGWA agree to a total groundwater diversion
3 reduction of 240,000 acre-feet annually."

4 Do you see that?

5 A. Yes.

6 Q. Your understanding is that that objective
7 was an aquifer-wide number?

8 A. Yes.

9 Q. And it doesn't say that IGWA's members will
10 reduce 240; correct?

11 A. Correct.

12 Q. And it doesn't state how to calculate each
13 district's proportionate share; is that correct?

14 A. Correct.

15 Q. It doesn't state how to calculate the
16 baseline; correct?

17 A. Correct.

18 Q. Let me have you turn to Exhibit 1.

19 A. Okay.

20 Q. Please turn to page 5.

21 A. Okay.

22 Q. If you look at paragraph 6, it's titled
23 "Nonparticipants." And it states, "Any groundwater
24 user not participating in this Settlement Agreement or
25 otherwise having another approved Mitigation Plan will

1 be subject to administration."

2 What's your understanding of the purpose of
3 that provision?

4 A. My understanding was that the goal was to
5 have curtailment or force into some sort of
6 administration those who are not participating in
7 mitigating the -- under the Settlement Agreement.

8 Q. Did IGWA agree to mitigate for pumping by
9 non-IGWA members?

10 A. No. We talked about that a lot. And they
11 were all fairly adamant that they didn't want to
12 mitigate for those who were not members and not part of
13 the agreement.

14 Q. And you testified earlier that Southwest
15 does in fact mitigate on its own?

16 A. Yeah, they mitigate through another -- a
17 separate Mitigation Plan.

18 Q. Yeah. Different terms?

19 A. Yes.

20 Q. Does A & B also provide mitigation to the
21 Coalition?

22 A. I believe they have a Mitigation Plan.
23 Whether or not it's carried out, I -- I don't know.

24 Q. Let me have you turn to Exhibit 202.

25 A. 2 --

1 Q. I think the numbers actually got changed.
2 It's 201, I think, in your binder.

3 MR. THOMPSON: It should be that one there.

4 THE WITNESS: Oh, it's this one here? Okay.

5 Q. (BY MR. BUDGE): Yeah.

6 A. Yeah. Sorry.

7 Q. Let me know if you recognize that?

8 A. Yes, I have seen this one, 201.

9 Q. You were earlier --

10 A. Are you looking at 201?

11 Q. Yeah.

12 A. Sorry.

13 Q. You were earlier asked questions about
14 Exhibit 200, which was a letter from Travis Thompson to
15 Randy Budge, dated April 14th, 2017.

16 A. Yes.

17 Q. And you'll see Exhibit 201 is a letter from
18 Randy Budge back to Travis Thompson, dated April 20th
19 of that same year.

20 Do you see that?

21 A. Yes.

22 Q. Do you understand that to be IGWA's
23 response to Mr. Thompson?

24 A. Yes.

25 Q. Did you remove A & B or Southwest from your

1 allocation after April 20th, 2017?

2 A. No.

3 MR. BUDGE: Move to admit Exhibit 201.

4 MR. FLETCHER: We already admitted it.

5 SARAH TSCHOHL: It's already...

6 MR. BUDGE: Both of them are?

7 MR. FLETCHER: Yeah.

8 MR. BUDGE: Okay. I apologize. I had a mistake
9 on the numbering. So Exhibit 201 was admitted
10 previously.

11 Q. Jaxon, let's turn next to Exhibit 4.

12 A. Okay. In the big book?

13 Q. Correct.

14 A. Yeah. Okay. Okay.

15 Q. This is the -- what we refer to as the
16 A & B agreement. Mr. Fletcher and Mr. Thompson asked
17 you questions about this.

18 Do you recall that?

19 A. Yes.

20 Q. It's dated October 7th, 2015?

21 A. Uh-huh.

22 Q. After that date did you remove A & B from
23 the allocation of the 240?

24 A. No.

25 Q. Let me have you turn to Exhibit 27.

1 A. 27. Okay.

2 Q. This is the 2021 performance summary table
3 you were asked questions about.

4 And if I understood your testimony, in the
5 bottom right-hand corner there's a negative number of
6 negative 82,613 acre-feet?

7 A. Yes.

8 Q. Is it -- am I understanding correctly that
9 in that year the total conservation by IGWA's members
10 was 82,000 acre-feet less than their proportionate
11 share of the 240,000 acre-feet?

12 A. Yes.

13 Q. Please turn ahead to Exhibit 26.

14 A. 26. Okay.

15 Q. In the bottom right-hand cell of that
16 table, which is the 2020 performance summary table --

17 A. Uh-huh.

18 Q. -- it shows a positive balance of 102,803
19 acre-feet.

20 Does that mean that IGWA's members
21 collectively conserved 102,000 acre-feet more than
22 their proportionate share of the 240?

23 A. Yes.

24 Q. Turn to Exhibit 25.

25 A. Okay.

1 Q. This is a table of IGWA's performance in
2 2019; correct?

3 A. Yes.

4 Q. And do I understand correctly that IGWA's
5 members conserved 221,000 acre-feet more than their
6 proportionate share of the 240,000 acre-feet?

7 A. Yes. As listed here, yes.

8 Q. Please turn to Exhibit 24.

9 A. Okay. Okay.

10 Q. This is the 2018 performance summary table.
11 If you look in that same bottom right-hand
12 cell, do I understand correctly that IGWA's members
13 conserved 182,000 acre-feet more than their
14 proportionate share of the 240?

15 A. Yes, as represented.

16 Q. Turn to Exhibit 23.

17 A. Okay.

18 Q. This shows that IGWA collectively conserved
19 2,000 acre-feet more than its proportionate share -- or
20 excuse me.

21 A. Yeah.

22 Q. 289,000 acre-feet more than its
23 proportionate share in that year; is that correct?

24 A. Yes, as represented.

25 Q. And then if you turn to Exhibit 22.

1 A. Okay.

2 Q. This shows that IGWA's members collectively
3 conserved 274,000 -- or excuse me, 34,000 acre-feet
4 more than their proportionate share that year?

5 A. That would be over that number, yes.

6 Q. Yeah. Do you know what the average
7 conservation, annual conservation has been among IGWA
8 members during this time period?

9 A. I don't know the actual number. We have
10 looked at that in the past.

11 Q. Ballpark?

12 A. Average conservation total?

13 Q. Average annual.

14 A. Average annual? I should know this, but I
15 don't. Sorry.

16 Q. That's okay. Suffice it to say that on
17 average they've conserved far more than their share of
18 the 240,000 acre-feet?

19 A. Yes. From 2016 to 2021 that is the case.

20 Q. In those prior years when IGWA conserved,
21 you know, at times more than 200,000 acre-feet more
22 than their share, would that have benefited the
23 Coalition in subsequent years?

24 A. Yes, I believe it would.

25 Q. How so?

1 A. All of these actions are reductions in
2 pumping or recharge into the ground. And so all net
3 gains -- well, net gains to the aquifer, in turn,
4 provide additional water that will be discharged in the
5 springs either -- or the river reaches, the Surface
6 Water Coalition spring -- or the springs that
7 contribute to those reaches, or the springs in
8 Hagerman.

9 Q. Okay. Thank you.

10 Last question. If you'll turn to
11 Exhibit 114.

12 A. Okay.

13 Q. Mr. Thompson -- oh, excuse me.
14 Are you there.

15 A. Yep, I'm there.

16 Q. This is the final SWC-IGWA settlement
17 allocation 2016. Mr. Thompson asked you questions
18 about that.

19 And do you recall he noted that it does not
20 include all pumping from the ESPA? Is that right?

21 A. Yes.

22 Q. Does it include all of the irrigation
23 districts and groundwater districts that pump from the
24 ESPA?

25 A. Let's see. Area of common groundwater

1 supply. There are -- there is actually a few wells in
2 the Big Lost River Valley, but in this chart they are
3 included in Magic Valley Groundwater District. So in
4 essence, yes, but not -- I mean there are a couple of
5 diversions that are in other entities that are not
6 listed here but are included.

7 Q. Okay. And if you turn last back to
8 Exhibit 1. I know we've been here a lot. That's the
9 Settlement Agreement.

10 A. The one in the black book. Okay.

11 Q. And when you get there, turn to page 2.

12 A. Sorry. I'm getting this all turned around
13 here.

14 No. 1, Exhibit 1?

15 Q. Yeah. Exhibit 1, page 2.

16 A. Okay. Page 2. Okay.

17 Q. You'll see a section 3(a)(2) we talked a
18 lot about. It reads, "Each groundwater district and
19 irrigation district with members pumping from the ESPA
20 shall be responsible for reducing their proportionate
21 share of the total."

22 Is that why you didn't include the cities
23 or other non-irrigators in that table?

24 A. That table actually includes quite a few of
25 the cities. We didn't review this, but there are

1 multiple cities that are members of groundwater
2 districts. And -- and so it includes some, but not all
3 cities.

4 Q. I'll ask it this way.

5 A. Okay.

6 Q. Is that why the table doesn't include
7 people who divert groundwater who are not within an
8 irrigation district or a groundwater district?

9 A. Yes, that's -- that's -- that could be one
10 of the reasons, yes.

11 MR. BUDGE: No further questions.

12 THE HEARING OFFICER: Okay. Mr. Johns.

13 MR. JOHNS: Yes, if I -- yes, if I may briefly,
14 Mr. Director. Let me pull this up here.

15
16 REDIRECT EXAMINATION

17 BY MR. JOHNS:

18 Q. Mr. Jaxon, you were asked a couple of
19 questions with regard to Exhibit marked No. 200.

20 And the date on that was, I believe,
21 April 14th, 2017; is that -- is that correct?

22 A. Yes.

23 Q. Are you aware of any litigation that arose
24 from this agreement between -- from April 2017?

25 A. I'm not aware of any.

1 Q. Were you ever asked to testify about the
2 240 obligation or ever in a contested hearing over that
3 either in front of a District Court or in front of the
4 Director?

5 A. No.

6 Q. Okay. Are you aware of any other written
7 objections that arose --

8 A. I'm not, no.

9 Q. -- from -- sorry. Let me finish my
10 question.

11 Are you aware of any other written
12 objections from SWC with regard to the 240 following
13 their April 14, 2017 order?

14 A. No.

15 MR. JOHNS: No more questions.

16 THE HEARING OFFICER: Thank you.

17 Recross?

18 MR. FLETCHER: Thank you. I have a few things,
19 and I think Mr. Thompson has one or two.

20
21 RE-CROSS-EXAMINATION

22 BY MR. FLETCHER:

23 Q. But just following up on what Mr. Johns
24 said, do you remember receiving -- hearing oral
25 objections made at the steering committee meetings

1 about the allocation table --

2 A. I --

3 Q. -- from the Surface Water Coalition?

4 A. It was mentioned, and I think it was
5 Mr. Thompson. I don't know when or what years, but it
6 was mentioned.

7 Q. Yeah. It was mentioned almost every year,
8 wasn't it?

9 A. I don't know about every, but --

10 Q. You don't remember that?

11 A. I do remember at least one.

12 Q. Okay. And then I'd like you to go back to
13 Exhibit 27, because I think we need to be a little
14 clearer.

15 A. Okay.

16 Q. All of these calculations that you've done
17 over all these years concerning both total conservation
18 and the mitigation balance is -- you're only assigning
19 an obligation to the IGWA members of 205,000 acre-feet,
20 correct, annual obligation?

21 A. Southwest is an IGWA member.

22 Q. I'm talking about the members that are
23 parties to the agreement.

24 A. Oh, to the Settlement Agreement? Yeah, I
25 believe it's somewhere around 205,000.

1 Q. Okay. And so if you reassigned this so
2 that the actual obligation was 240,000 to the members
3 who signed the agreement, that would change all of
4 these tables; correct?

5 A. It would change some of the numbers in the
6 tables.

7 Q. Yeah. It would increase the annual
8 obligation for each groundwater district; correct?

9 A. Potentially. It depends on how we decided
10 to allocate it to [unintelligible] --

11 Q. Well, if you allocated it in the same
12 manner, but just include --

13 A. If it was decided that they would allocate
14 it in the same manner, then yes.

15 Q. And that would also increase -- or in this
16 case increase the negative mitigation balance; correct?

17 A. Potentially, yes.

18 Q. Yeah. So basically these numbers and all
19 these tables are skewed by the fact that Southwest and
20 A & B is included in all these tables; correct?

21 A. Saying that they're skewed sounds like an
22 opinion to me, but --

23 Q. Okay. Well, let me rephrase it.

24 The agreement says 240,000 annually.

25 If you use that number, all of these

1 numbers on these tables would change?

2 A. Unless you allocate some to A & B and
3 Southwest.

4 Q. Right. Isn't that correct?

5 A. Yes.

6 MR. FLETCHER: Okay. Thank you.

7 THE HEARING OFFICER: Any further recross,
8 Mr. Thompson?

9 MR. THOMPSON: Just a couple.

10

11

RECROSS-EXAMINATION

12 BY MR. THOMPSON:

13 Q. Jaxon --

14 A. Yes, sir.

15 Q. -- TJ asked you about nonparticipants. And
16 the agreement states, "Any groundwater user not
17 participating in the Settlement Agreement or otherwise
18 have an approved Mitigation Plan will be subject to
19 administration."

20 And it was your testimony that IGWA was
21 not -- did not intend to mitigate for non-IGWA members;
22 is that right?

23 A. Yes.

24 Q. Were there groundwater users that joined
25 groundwater districts after 2015?

1 A. Yes.

2 Q. And do you have a rough idea, like how many
3 acres?

4 A. I don't.

5 Q. So would it be safe to say that between
6 2015 and 2021 various nonmembers of Ground Water
7 District joined at various times?

8 A. Became members.

9 Q. Is that true?

10 A. Yes.

11 Q. Did that happen every year?

12 A. Probably not every year.

13 Q. So that was additional pumping that was
14 factored into that Ground Water District's baseline or
15 its obligation?

16 A. Yes, into the baseline. Yes.

17 Q. So those numbers changed every year?

18 A. The baseline numbers, yes.

19 Q. And that's reflected in your --

20 A. In the reports, yeah.

21 Q. Okay.

22 A. So you'll see that those numbers -- the
23 baseline numbers do change in those reports.

24 Q. Okay. So anybody that was added between
25 2015 and 2021, whatever their proportionate share by

1 district would have gone up?

2 A. No. The proportionate shares were not --
3 we did not reallocate since the 2016.

4 Q. Okay. So the obligation didn't change?

5 A. No.

6 Q. So in effect, IGWA would have been
7 mitigating for people that eventually signed up, but
8 that was never factored in later?

9 A. They would -- can you restate so that --

10 Q. Yeah.

11 A. Restate that one more -- sorry, one more
12 time?

13 Q. I guess I got the sense that the obligation
14 didn't go up.

15 Is that true?

16 A. The obligation was not rearranged.

17 Q. But with each individual groundwater
18 district, that additional pumping did join that
19 district; is that true?

20 A. Didn't join -- didn't what? Didn't join
21 the district?

22 Q. They stayed the same way, yeah. So I'm a
23 groundwater user, I wasn't part of the Ground Water
24 District, but then I joined, how did my pumping get
25 factored into those numbers?

1 A. The baseline pumping would be factored in,
2 and then we would report the baseline versus what their
3 usage was. So if they saved water, it was reported as
4 savings. If they didn't, then it would be reported as
5 an increase.

6 Q. But as far as that obligation, that
7 apportionment, that did not go up?

8 A. For each individual district?

9 Q. Correct.

10 A. No, we -- no, we did not reallocate the --
11 or rearrange or reallocate the obligation.

12 Q. And Mr. Budge asked you about the
13 performance reports and that certain years there was
14 overmitigation; is that correct?

15 A. Yeah, I guess you could -- if you were
16 looking at it annually, you could say there was an
17 overage of mitigation or --

18 Q. And would that have been reductions or
19 additional recharge conducted throughout the aquifer?

20 A. Yes.

21 Q. And has IGWA or the Department, to your
22 knowledge, analyzed that overmitigation and the actual
23 benefit to the Near Blackfoot to Minidoka reach?

24 A. Yes, we've done -- we've had the modeling
25 consultant do some analysis of what that -- I guess it

1 was more the total amount, not necessarily the extra,
2 but...

3 MR. THOMPSON: Okay. That's all the questions I
4 have. Thanks.

5 THE HEARING OFFICER: Okay. Well, Mr. Higgs,
6 before you exhale a sigh of relief, I have a few
7 questions for you.

8 THE WITNESS: Okay.

9

10 FURTHER EXAMINATION

11 BY THE HEARING OFFICER:

12 Q. So, Mr. Higgs, you testified about various
13 methods or possible methods of computing satisfaction
14 of the 240,000 acre-feet of reductions --

15 A. Yes.

16 Q. -- referred to in the agreement.

17 A. Yes.

18 Q. And there are two of those that I want you
19 to explain in greater detail.

20 A. Okay.

21 Q. That would be the consumptive irrigation
22 requirement and diversions.

23 A. Okay.

24 Q. And can you distinguish for me and for the
25 record the difference between those two methods.

1 A. Between consumptive use and pumping?

2 Q. Yeah.

3 A. Okay. Consumptive use is the net decrease
4 in effect -- or the net effect on the aquifer. So for
5 example, there are a few areas in the ESPA where you
6 can pump water out of the ground. And say you put it
7 into a ditch, if you put it into a ditch and there's
8 losses in that ditch, then there's -- some of that
9 water goes down into the aquifer. And so you're
10 showing a larger pumping amount than is actually a
11 detriment to the aquifer, we'll say. So some -- the
12 amount that's actually consumptively used by the crop
13 and by evaporation is less than the amount pumped.

14 As far as the pumping diversions goes, it's
15 simple. Whatever comes out of the well you measure,
16 and that's how much you pumped. So they don't always
17 equate.

18 In theory, the -- the consumptive use will
19 always be less than the pumped data, or should be. But
20 when we were reviewing all of this data, there were
21 many cases where the consumptive use was higher than
22 what the pumping data was, which makes no sense.

23 Q. Well, but there is a difference between
24 consumptive use and consumptive irrigation requirement;
25 right?

1 A. So a consumptive irrigation requirement is
2 what it takes to -- to grow the crop with evaporation
3 and transpiration, yeah. And then consumptive use is
4 related, but yeah, not exactly the same.

5 Q. And consumptive use would be a higher value
6 than the consumptive irrigation requirement; right?

7 A. Technically when we're -- in all the stuff
8 that we've been talking about, the consumptive use
9 is -- is equivalent to the evapotranspiration and
10 evaporation. So it's a balance. The water can go
11 three places. In all the stuff that we've been talking
12 about, it can go three places. It can go up into the
13 sky or down into the ground.

14 Q. But consumptive use doesn't take into
15 account rainfall -- or I'm sorry, consumptive
16 irrigation.

17 A. Oh, excuse me. Yes, you're right. You
18 have to -- you have to subtract the precipitation.
19 You're right. I failed to mention that.

20 Q. So I want to turn to page 2 of Exhibit 1
21 under "Long-term practices." And that's 2016.

22 A. Page 2, Exhibit 1.

23 Q. And I want to you read subparagraph (a) for
24 me.

25 What is the title?

1 A. Page 2(a) --

2 Q. Well, it's --

3 A. Or page 2, No. 2(a)?

4 Q. No. Page 2 of Exhibit 1.

5 A. Okay.

6 Q. Paragraph 3, titled "Long-term practices"

7 commencing 2016.

8 A. Okay.

9 Q. And then I want you to read the title in

10 italics --

11 A. Yes.

12 Q. -- of subparagraph (a). It says?

13 A. "Consumptive use volume reduction."

14 Q. And then I want you to read the next

15 subparagraph, small ruminal -- I'm sorry, small Roman

16 numeral i.

17 A. "Total groundwater diversion shall be

18 reduced by 240,000 acre-feet annually."

19 Q. Do you find some conflict in those two?

20 A. Yes. I mean I guess you could construe it

21 to not be conflicting, but I -- as I read this with you

22 here, it seems to conflict slightly.

23 Q. So if there were any ambiguity in this

24 agreement, at least in the language, wouldn't you at

25 least interpret this as an ambiguity?

1 A. Yes. I -- personally, yes, I would think
2 that those two were ambiguous because they conflict.

3 Q. And so with this ambiguity apparent, which
4 alternative, then, did IGWA choose?

5 A. We -- we used the diversion reductions,
6 talked about consumptive use measurements, but I don't
7 recall ever analyzing it like you and I are right now
8 when we were trying to determine how to implement.

9 Q. And in -- and I'll just ask you this in one
10 question.

11 In your experience in the field that you
12 work, can people increase their efficiency?

13 A. Can you explain "efficiency"?

14 Q. Well, on-field application of irrigation
15 water, can they be more efficient in that application?

16 A. Oh, yes.

17 Q. And how do they become more efficient?

18 A. Various methods. But they essentially are
19 applying more accurately the crop water requirement.

20 Q. And so can they divert less water and
21 consume the same amount of water?

22 A. It is -- okay. One more time. So can
23 they -- can they divert less water --

24 Q. Less water.

25 A. -- and consume -- yes, that is possible.

1 Q. So they, in theory, might be able to grow
2 the same crops and consume the same amount of water but
3 divert less water?

4 A. It is possible, yes.

5 Q. Okay. And knowing that difference, IGWA,
6 at least in its analysis, chose diversion over
7 consumption?

8 A. Yes. And the reason was because their --
9 in my analyzing of most of the areas where this pumping
10 occurs, that -- that difference is not great. There
11 are a few areas, I will admit, where consumptive use is
12 less than -- than diversion volumes, but in most
13 cases -- take, for example, the Magic Valley
14 Groundwater District. That's all out on the desert.
15 There's something called a hardpan down below the
16 surface, which is the definition of water does not get
17 past that point.

18 And so those users typically are consuming
19 everything that they divert. So -- and in general, I
20 would say the majority of the ESPA is -- of the
21 groundwater pumping in the ESPA is in that -- in that
22 case, but certainly not 100 percent.

23 THE HEARING OFFICER: Okay. That's all the
24 questions I have.

25 Further questions --

1 MR. FLETCHER: Yeah, I have --

2 THE HEARING OFFICER: -- related to my inquiry?

3 MR. FLETCHER: Unless TJ has some.

4 THE HEARING OFFICER: Let's start with
5 Mr. Budge. Follow the same pattern we have.

6 MR. BUDGE: Yeah, you bet.

7

8 FURTHER REDIRECT EXAMINATION

9 BY MR. BUDGE:

10 Q. Just where we left off, so Jaxon, on
11 Exhibit 1, page 2, the Director had you read that
12 subpart (a), 3(a) says "consumptive use volume
13 reduction."

14 A. Yes.

15 Q. And then -- and then subparagraph little
16 Roman numeral i says "total groundwater diversion shall
17 be reduced by 240,000 acre-feet annually."

18 A. Yes.

19 Q. If I understood you in your last testimony
20 about, you know, crop irrigation requirement versus
21 diversion, that across most of the ESPA those are
22 comparable?

23 A. In my opinion, yes.

24 Q. And so --

25 A. For groundwater wells, I mean.

1 Q. So if groundwater diversions were
2 collectively across the ESPA decreased by 240,000
3 acre-feet, do you expect there to be a comparable
4 reduction in consumptive use?

5 A. In my opinion, it would be pretty close.

6 MR. BUDGE: That's all I've got.

7 THE HEARING OFFICER: Mr. Johns?

8 MR. JOHNS: Nothing.

9 THE HEARING OFFICER: Mr. Fletcher,
10 cross-examine?

11 MR. FLETCHER: Yeah.

12
13 FURTHER RE-CROSS-EXAMINATION

14 BY MR. FLETCHER:

15 Q. Just a comment -- a question dealing with
16 this 3(a).

17 3(a) -- 3(a) itself, the words "consumptive
18 use volume reduction," that doesn't require anybody to
19 do anything, right, those words themselves?

20 A. I'm not sure what you mean.

21 Q. Well, there's no -- there's no obligation
22 on anybody based upon 3(a); correct? Just that wording
23 under (a) itself?

24 A. I don't know.

25 Q. Well, let's look at 3(a)(1).

1 There is a requirement set forth in
2 3(a)(1); correct?

3 A. There is a statement that says that
4 groundwater will be reduced.

5 Q. Okay. And if you look at paragraph 10 of
6 this agreement, when you're interpreting the agreement,
7 what does it say?

8 A. Oh, paragraph 10? Excuse me. I must have
9 looked --

10 Q. On page 5.

11 A. Page 5. 10. "The effects of headings."

12 Q. Yeah. Can you read this that, please.

13 A. "Headings appear in this agreement --
14 appearing in this agreement are inserted for
15 convenience and reference and shall not be construed as
16 interpretations of the text."

17 MR. FLETCHER: Thank you. That's all I have.

18 THE HEARING OFFICER: Mr. Thompson?

19 MR. THOMPSON: None.

20 THE HEARING OFFICER: Do you have more?

21 MR. BUDGE: Just one follow-up question to
22 Mr. Fletcher's question.

23 ///

24 ///

25 ///

1 FURTHER REDIRECT EXAMINATION

2 BY MR. BUDGE:

3 Q. He said there's no -- no obligation, and
4 you testified that, you know, the pumping reductions
5 are comparable or close to the savings in consumptive
6 use.

7 So if that's happened, what have the
8 pumpers actually done to accomplish decreased
9 diversions? Is it just more efficiencies, or is it
10 more meaningful than that?

11 A. There is some of that. But where I see the
12 largest reductions in groundwater pumping, most of it
13 is because of end-guns being removed and -- which
14 qualifies as an efficiency, but not necessarily the
15 same as, you know, application amounts. There has been
16 some land fallowing, crop rotation changes.

17 So it's -- it varies. I wouldn't say -- I
18 couldn't -- I couldn't put a percentage on it. I don't
19 know how to say how much has been done by guys just
20 paying more attention and applying less water and what
21 locations that happened in. I don't have numbers for
22 that.

23 Q. But you're aware of actual land being taken
24 out of production --

25 A. Yes.

1 Q. -- and crops being changed to comply with
2 the Settlement Agreement?

3 A. Yes.

4 MR. BUDGE: That's it.

5 THE HEARING OFFICER: Mr. Johns, anything
6 further?

7 MR. JOHNS: No, not at this time.

8 THE HEARING OFFICER: Thank you, Mr. Higgs.

9 THE WITNESS: Okay. Thank you.

10 THE HEARING OFFICER: We're at three o'clock, or
11 shortly after.

12 Anybody need a break, or should we forge
13 ahead? Break for ten?

14 MR. THOMPSON: Yeah.

15 THE HEARING OFFICER: All right. Let's come
16 back at 3:15.

17 (Recess.)

18 THE HEARING OFFICER: We're reconvened after a
19 brief recess.

20 Next witness, Mr. Budge.

21 MR. BUDGE: IGWA will call Tim Deeg.

22 THE HEARING OFFICER: Mr. Deeg, raise your right
23 hand please.

24 ///

25 ///

1 TIMOTHY P. DEEG,
2 having been called as a witness by IGWA, was duly sworn
3 and testified as follows:
4

5 THE HEARING OFFICER: Do you solemnly affirm
6 that the testimony you give today will be the truth,
7 the whole truth, and nothing but the truth?

8 THE WITNESS: Yes.

9 THE HEARING OFFICER: Thank you. Please be
10 seated.

11
12 DIRECT EXAMINATION

13 BY MR. BUDGE:

14 Q. Tim, thank you for being here today.

15 We might be able to expedite some of your
16 testimony since you've been here to listen to Jaxon
17 Higgs. So hopefully we can make this as quick and
18 painless as possible.

19 To begin, please state your name and
20 address for the record.

21 A. I'm Timothy P. Deeg. I reside at 2957 Deeg
22 Road, American Falls, Idaho.

23 Q. Tim, how long have you been involved with
24 IGWA?

25 A. I've been involved since about '94 on the

1 inception of IGWA, served on the board for 20-plus
2 years. Served as chairman of the board for a long
3 time, so...

4 Q. What's your current position?

5 A. I am the treasurer of IGWA.

6 Q. And how long did you serve as the chairman?

7 A. I served as chairman, I believe, 22 years.

8 Q. From approximately when till when?

9 A. '96 till 2020.

10 Q. You were the chairman of IGWA, then, during
11 the time that the IGWA-Surface Water Coalition
12 Settlement Agreement was negotiated and implemented?

13 A. Yes.

14 Q. I understand you're also a member of
15 American Falls-Aberdeen Ground Water District?

16 A. Yes, I've been there since the inception of
17 that district.

18 Q. Are you also a director of that district?

19 A. I am a director as well as chairman of the
20 board.

21 Q. Okay. Very good. Were you involved in
22 negotiating the Settlement Agreement on behalf of IGWA?

23 A. Yes, I was.

24 Q. And in what capacity?

25 A. As the chairman of IGWA.

1 Q. We have a ruling from the Director that --
2 that the substance of the settlement discussions are
3 not going to be admitted in this proceeding, but I want
4 to just ask you to explain generally when the -- the
5 period of time when the negotiations occurred and how
6 that process played out.

7 A. There were ongoing negotiations early in
8 that year, 2015. They were going very well, but it was
9 a year that looked like it was going to be very dry.
10 We did have an order coming out from the Department
11 that showed curtailment was going to take place that
12 year. And during that time frame we were trying to get
13 an agreement put together so we could go ahead and
14 operate.

15 The amount of water that would have been
16 required for us to mitigate was quite large, and we
17 probably couldn't fulfill that water, as we had done in
18 the past years. We couldn't find that water to provide
19 mitigation to the surface users.

20 So we needed an agreement. And I think all
21 parties wanted some long-term agreement, rather than on
22 a year-to-year basis. And so that's why the agreement
23 came about that year. And Speaker Bedke was
24 instrumental in getting us as parties together to do
25 that.

1 Q. Very good. That's helpful.

2 With that context I want you to open the
3 big, black binder, which are the common exhibits, and
4 turn to Exhibit 1.

5 Do you recognize that as the Settlement
6 Agreement entered in 2015?

7 A. The first one?

8 Q. It's Exhibit 1.

9 A. Okay.

10 Yes.

11 Q. On page 1 you'll see that it's titled
12 "Settlement Agreement entered into June 30, 2015." And
13 then I want you to turn to page 2, section 2(d). It
14 says, "This Settlement Agreement is conditional upon
15 approval and submission by the respective boards of
16 IGWA and the SWC to the Director by August 1."

17 Can you explain your understanding of the
18 effect of that provision.

19 A. We got the Settlement Agreement put
20 together, and we needed the respective groundwater
21 district boards to accept it and the membership to
22 accept it in general. So during that time frame a lot
23 of us travel to a lot of different groundwater
24 districts, put on our show, and told them the reason we
25 needed an agreement.

1 And we did get them to all collectively
2 sign on to that. And we had to do it by August 1st or
3 there would have been curtailment that would have been
4 issued.

5 Q. Okay. So the agreement was put together,
6 and then there was approximately a month time for
7 the -- for both parties to take it to their patrons and
8 sign the agreement; is that correct?

9 A. Yes, that's correct.

10 Q. If you look at that same page on section 3,
11 there's been a lot of discussion about the section
12 3(a), the total groundwater diversion and how that's
13 calculated.

14 Were you here for the testimony of Jaxon
15 Higgs where that was discussed?

16 A. Yes.

17 Q. You'll recall that Jaxon talked about
18 calculating each participating district's proportionate
19 share relative to pumping from all groundwater
20 irrigation districts in the ESPA.

21 Do you remember that testimony?

22 A. Yes.

23 Q. And is that your -- is that consistent with
24 your understanding of this provision of the agreement?

25 A. Yes.

1 MR. FLETCHER: I'm going to object to him
2 testifying as to his understanding of the agreement.
3 Either the agreement speaks for itself or it doesn't.
4 I'm not -- you've already ruled this agreement's
5 unambiguous. He's testifying as to his interpretation
6 of the agreement? I --

7 THE HEARING OFFICER: Perhaps I misunderstood
8 the question. I thought it was somewhat preliminary in
9 nature, but --

10 MR. BUDGE: Yeah. It's really an effort to
11 expedite the testimony and not have to walk through the
12 same testimony we had with Mr. Higgs where there's
13 different methodologies that were considered and
14 multiple meetings where they were evaluated, but we can
15 do that if needed.

16 THE HEARING OFFICER: Re-ask the question, if
17 you would, Mr. Budge.

18 Q. (BY MR. BUDGE): Mr. Deeg, you were present
19 during the testimony of Jaxon Higgs where he explained
20 that the agreement does not explain how the 240,000
21 acre-feet is to be allocated and the process that he
22 went through with the IGWA board to evaluate various
23 methods that could have been used and ultimately settle
24 on a method and an allocation.

25 Is his testimony consistent with your

1 recollection of the events that took course -- took
2 place after the Settlement Agreement was signed?

3 A. Yes.

4 Q. Okay. Mr. Higgs testified that he
5 understood the 240,000 acre-feet to be based on an
6 aquifer-wide water budget deficit attributable to all
7 pumping from the ESPA and not just IGWA members.

8 Was that your understanding as well?

9 A. Yes, that was.

10 I might add that was a real sore spot with
11 a number of the groundwater districts, that some might
12 be outside and not --

13 MR. FLETCHER: Okay. Mr. Director, I'm going
14 to -- this is parol evidence. I'm going to object,
15 just even if you allow it in, just so it's in the
16 record, that there's -- there's no reason to be
17 receiving parol evidence concerning this agreement.

18 THE HEARING OFFICER: Well, thank you,
19 Mr. Fletcher.

20 And at least as I understand the line of
21 questioning, the question of what the Surface Water
22 Coalition agreed to or what its understanding is not
23 part of this question. The question is just what is
24 the understanding of the districts themselves. And so
25 whatever their understanding might be, again, I don't

1 know that it bears significantly on the ultimate
2 questions that are in front of me.

3 So I'll allow it into evidence, Mr. Budge.

4 Q. (BY MR. BUDGE): Just to confirm, so you
5 understood that the 240,000 acre-feet was an
6 aquifer-wide figure and you were testifying about this
7 being a point of concern among many of the districts.

8 A. Yes, because they didn't want to have to
9 mitigate for members -- or not members, but really
10 other individuals that may be outside their district.

11 Q. So if you'll turn in that Exhibit 1 to
12 page 5. This is page 5 of the Settlement Agreement.
13 And you'll see section 6 there. It's titled
14 "Nonparticipants." And it reads, "Any groundwater user
15 not participating in the Settlement Agreement or
16 otherwise have another approved Mitigation Plan will be
17 subject to administration."

18 What was your understanding of this
19 provision of the agreement?

20 A. Well, that helped bring in those folks that
21 did not participate in the Ground Water District. And
22 it did to a certain extent, but in 19 -- or 2021, when
23 there was a delivery call or there was an order out
24 there, we had a lot more come in that year. That was
25 really a trigger year in terms of participation.

1 Q. And you commented on this: Mr. Higgs
2 testified that it was important within IGWA that they
3 mitigate for their members' pumping, but not for
4 pumping of non-IGWA members.

5 Is that your recollection as well? And
6 please elaborate, if you'd like.

7 A. That's -- that's my understanding, yes.

8 Q. Do you remember discussions within IGWA or
9 the districts about that topic?

10 MR. FLETCHER: Same objection, your Honor. This
11 is parol evidence, trying to --

12 THE HEARING OFFICER: Okay. Overruled.

13 THE WITNESS: It was always a concern. And even
14 today it's still a concern, because we are only using
15 water users that are inside the ESPA. There are a lot
16 of other water users outside the ESPA, outside Rule 50
17 boundary.

18 And we -- and I'm going to say mainly --
19 most much us feel that they all ought to have to
20 contribute to solve the problem.

21 Q. (BY MR. BUDGE): Very good. Let me have
22 you turn to Exhibit 102, I believe. It's in the small,
23 white binder. It's going to be under tab 2.

24 Do you recognize this document?

25 A. Yes, I do.

1 Q. It's titled "Question and Answers." It's
2 addressed to IGWA members from Randy Budge and TJ
3 Budge, dated July 2nd, 2015, regarding the SWC-IGWA
4 Settlement Agreement, dated June 30, 2015.

5 What is this document?

6 A. When we started into the agreement, it
7 really had raised a lot of questions with a lot of our
8 members. And we tried to answer those in a format here
9 that people could go to and look at and read, because
10 we were getting bombarded with a lot of questions about
11 what this agreement was about. And so that's really
12 the nutshell of it all.

13 Q. So this was provided to IGWA members during
14 that roughly month-long period where they were
15 deciding, the districts, whether they would sign on to
16 the agreement?

17 A. Correct.

18 Q. And if you look at item No. 4, it reads,
19 "How will the 240,000-acre foot reduction in
20 groundwater withdrawals be allocated between the
21 districts?"

22 And the answer is, "Each of the 12
23 groundwater irrigation districts that divert water from
24 the ESPA will be allocated their proportionate share of
25 the total annual groundwater reduction based on the

1 number of cfs and/or irrigated acres within each
2 district."

3 That references 12 districts. Do you
4 recall how many districts were members of IGWA at that
5 time?

6 A. Well, I don't. But, you know, there were
7 quite a number of us. There's been some newly formed
8 districts. But for the most part, 12 represent --
9 represented here, I think we're 14 now.

10 Q. So let me -- let me just have you turn in
11 the big one back to Exhibit 1, the Settlement
12 Agreement. And I'm going to have you flip back to the
13 signature pages, which begin on page 6.

14 MR. THOMPSON: Which exhibit are you looking at?

15 MR. BUDGE: Exhibit 1.

16 MR. THOMPSON: Thanks.

17 MR. BUDGE: Yeah.

18 Q. Up in the right-hand corner there's page
19 numbers.

20 A. Yeah.

21 Q. Page 6 has the signature page for Randall
22 C. Budge.

23 A. These pages are with like Minidoka
24 Irrigation District, North Side Canal Company.

25 Q. Yeah, go back earlier.

1 Can you see in the right-hand corn corner
2 where there's page numbers? See if you can find
3 page 6.

4 A. Okay.

5 Q. You could see Randy's signature there --

6 A. Yes.

7 Q. -- on July 1st, and then the next page is
8 your signature on July 1st?

9 A. Yes.

10 Q. I believe that's consistent with your
11 testimony that the agreement was put together, you
12 know, by end of June or first of July and then went out
13 to the districts; correct?

14 A. Correct.

15 Q. And then if you flip forward a few pages to
16 page 10.

17 Do you see that page?

18 A. Yeah.

19 Q. Page 10 states, "The following signature
20 pages are for the August 1 deadline," and following
21 that page are the signatures for the individual members
22 of the Coalition and IGWA.

23 If you flip to page 11, do you see those
24 signatures on behalf of Minidoka Irrigation District
25 and American Falls Reservoir District No. 2?

1 A. Yes, I do.

2 Q. Those are Coalition members; correct?

3 A. Yes.

4 Q. The following page is Burley Irrigation
5 District.

6 That's a Coalition member?

7 A. Yes.

8 Q. The next is Milner.

9 Also a Coalition member?

10 A. Correct.

11 Q. Page 14 is North Side Canal Company.

12 A Coalition member?

13 A. Okay.

14 Q. And page 15 is Twin Falls Canal Company.

15 A Coalition member?

16 A. Yes.

17 Q. Okay. Turning to page 16, we get to IGWA
18 members, beginning with American Falls --
19 Aberdeen-American Falls Ground Water District?

20 A. Yes. Nick Behrend.

21 Q. Yep. And I want to count how many
22 districts participate on behalf of IGWA. So we've got
23 Aberdeen-American Falls. That's one. The next page is
24 Bingham.

25 That's an IGWA member; correct?

1 A. Correct.

2 Q. That's two. Bonneville-Jefferson is a
3 third; correct?

4 A. Yes.

5 Q. Carey Valley is a fourth?

6 A. Yes.

7 Q. Jefferson-Clark is No. 5?

8 A. Yes.

9 Q. Madison No. 6?

10 A. Yes.

11 Q. Magic Valley seven?

12 A. Yes.

13 Q. North Snake eight?

14 A. Yes.

15 Q. Fremont-Madison nine?

16 A. Correct.

17 Q. And then Southwest was an IGWA member but
18 did not sign; correct?

19 A. That's correct.

20 Q. So we had the nine signatory districts.
21 And then going back to that Q&A from Randy
22 and I to IGWA, it refers to 12, because that would
23 include A & B, Southwest, and Falls; is that correct?

24 A. Yes.

25 Q. And does that No. 4 reflect your

1 understanding that the 240, that allocation would be
2 shared by all of the groundwater irrigation districts,
3 including A & B, Southwest, and Falls?

4 A. Yes.

5 MR. BUDGE: I'd move to admit Exhibit 102.

6 THE HEARING OFFICER: Mr. Fletcher.

7 MR. FLETCHER: With the understanding it was a
8 document prepared by IGWA for IGWA members and not
9 agreed to by the Surface Water Coalition, I have no
10 objection.

11 THE HEARING OFFICER: That's the way I view the
12 document. In fact, it predates the agreement itself
13 from the signing of it by at least in my reading of
14 anybody, it's dated June 30th. The agreement was
15 executed subsequent.

16 MR. FLETCHER: And it predates the order, pre --

17 THE HEARING OFFICER: Yeah. So the document
18 marked as Exhibit 102 is received into evidence with
19 the qualifications stated.

20 (Exhibit 102 received.)

21 MR. BUDGE: Thanks.

22 Q. Mr. Deeg, I just have a couple follow-up --
23 a couple final questions.

24 There was some discussion earlier with
25 Mr. Higgs about groundwater districts utilizing

1 averaging for purposes of compliance within their
2 district.

3 Does American Falls-Aberdeen Groundwater
4 District utilize averaging?

5 A. Yes. Members can grow various row crop,
6 and that way it allows them to be out of compliance a
7 year and then come back in, provided they save water.

8 MR. BUDGE: Okay. I think that answered my
9 question. Very good.

10 I have no further questions.

11 THE HEARING OFFICER: Thank you.

12 Mr. Johns, questions?

13 MR. JOHNS: Yes. Just -- sorry, let me get my
14 mic on here.

15 THE HEARING OFFICER: Thank you.

16 MR. JOHNS: Yes, Mr. Director, I just have a
17 couple. Mr. Budge just asked one of them I was going
18 to ask, so that takes care of that.

19
20 DIRECT EXAMINATION

21 BY MR. JOHNS:

22 Q. But, Mr. Deeg, you were present while
23 Mr. Higgs was up on the stand, and there were a couple
24 of questions that I had asked him. And I'm just going
25 to refer back to those.

1 I'd asked -- I'll represent that I asked
2 him about the agreement's terms and whether or not he
3 felt that -- well, whether or not the agreement was
4 clear on how he was to calculate, allocate, and
5 implement the Settlement Agreement.

6 Do you recall that brief --

7 A. Yes, I do.

8 Q. Okay. I want to just ask you the same
9 question.

10 What was your -- was it your understanding
11 that the absence of the clear terms in the agreement
12 regarding calculation, how allocation and
13 implementation was to occur was a built-in flexibility
14 for the groundwater districts to be able to figure that
15 out on their own?

16 MR. FLETCHER: Your Honor -- or, Director,
17 that's a leading question. I'm not quite sure how to
18 treat Bonneville. But also he's asking for a witness'
19 impression of a document that's in writing. So I
20 object on those grounds.

21 THE HEARING OFFICER: Yeah, sustained,
22 Mr. Johns. If you'll rephrase.

23 Q. (BY MR. JOHNS): Was it your understanding
24 that the document -- or the Settlement Agreement set
25 forth how the -- to calculate the reductions, the

1 allocation, and the implementation was specifically to
2 occur amongst IGWA members?

3 A. No. That was for us to determine how to do
4 that. Yeah. It took a lot of work to get to where we
5 are today.

6 Q. And you had indicated that this -- in
7 your -- kind of your brief overview of the history that
8 2015 was going to look like a pretty rough year, and it
9 looks like folks had to get on this pretty quickly; is
10 that correct?

11 A. That is correct.

12 Q. Did you feel some pressure to try and get
13 something together quickly?

14 A. Yes.

15 Q. Okay.

16 A. We had a curtailment order looming.

17 Q. Okay. Let me be careful how I ask this.

18 Is it possible -- do you feel like because
19 everyone was trying to work together and get this
20 together there may have been some terms that were left
21 out that should have been in the agreement regarding
22 calculation, allocation, and implementation?

23 MR. FLETCHER: Your Honor, I'm going to object.
24 That's speculation. And he's -- the document's in
25 writing. And how it ended up there, I don't -- I don't

1 think that's relevant.

2 The question before the Director, as I
3 understand it, is the agreement ambiguous or not, and
4 how -- I'm not sure what the purpose of this question
5 is.

6 So I object on the grounds it's not
7 relevant and it's speculative.

8 THE HEARING OFFICER: Well, I think your
9 objection is well taken, Mr. Fletcher. However, I'll
10 let the witness answer the question.

11 THE WITNESS: Please restate.

12 Q. (BY MR. JOHNS): I knew you were going to
13 ask me to restate after I was being so careful to craft
14 it.

15 In light of how quickly things were moving
16 and the pressure that was there to reach some sort of
17 agreement, is -- is it your opinion that some
18 provisions may have been left out of the agreement with
19 specifying how calculation, allocation, or
20 implementation was to occur? Just -- and again, I
21 apologize, but that's as close as I could do to the --

22 MR. FLETCHER: I'm not going to apologize. I'm
23 going to object.

24 THE HEARING OFFICER: I'll sustain that
25 objection. That question is different from the first

1 question.

2 MR. JOHNS: Okay. Okay.

3 Q. Well, that's -- I'm going to get there, I
4 promise.

5 The question that I'm trying to ask is that
6 because there was -- things were moving quickly, is it
7 your opinion or is it fair to say that there were
8 certain things that may have been left out of the
9 agreement because we were trying -- because you were
10 moving quickly and trying to get things done?

11 MR. FLETCHER: Again, I'm going to object as
12 speculative.

13 THE HEARING OFFICER: I'll sustain the
14 objection.

15 MR. JOHNS: Okay. I think I...

16 THE HEARING OFFICER: Let me just opine here
17 just for a minute.

18 Your first question, Mr. Johns, was whether
19 it would have been helpful to have a further
20 explanation in the -- I think in the agreement.

21 MR. JOHNS: Okay. I'll ask --

22 THE HEARING OFFICER: Your second one had to do
23 with terms being left out of the agreement.

24 MR. JOHNS: Okay.

25 THE HEARING OFFICER: Which I think then goes to

1 whether the agreement is complete or not. And
2 that's -- I think that's one that I'll sustain the
3 objection for.

4 MR. JOHNS: Okay. And in that one, I'd like to
5 ask the way -- thank you, Mr. Director.

6 THE HEARING OFFICER: Okay.

7 Q. (BY MR. JOHNS): Would it have been helpful
8 to have terms speaking to calculation, implementation,
9 and allocation in the -- specifying how that was to
10 occur in the agreement?

11 A. Yes. However, districts are very unique.
12 One size shoe doesn't fit everyone. And so there has
13 to be some ability to adjust how you're going to do
14 that.

15 MR. JOHNS: And I think that covers everything.

16 THE HEARING OFFICER: Thank you, Mr. Johns.

17 Cross-examination, Mr. Fletcher.

18
19 CROSS-EXAMINATION

20 BY MR. FLETCHER:

21 Q. Concerning Exhibit 2 that was admitted into
22 evidence. I think it's 102, actually. I'm sorry. The
23 questions and answers.

24 A. Yes.

25 Q. The Surface Water Coalition did not

1 participate in the production of that exhibit, did it?

2 A. No, they did not.

3 Q. And to your knowledge, was the Surface
4 Water Coalition ever present when that exhibit was
5 presented?

6 A. I don't know if they were or not. Probably
7 not.

8 Q. And that document was prepared before the
9 A & B agreement was signed; is that correct?

10 A. Yes.

11 Q. And that document was prepared before the
12 order that was entered in 2016 was entered?

13 A. Yes.

14 Q. And that document was prepared before
15 Southwest Irrigation District did not sign the
16 Settlement Agreement; correct?

17 A. Yes, correct.

18 Q. I just want to follow up with one question
19 dealing with averaging. You mentioned that you
20 allow -- you, meaning your groundwater districts --

21 A. Yes.

22 Q. -- allows individual users to average
23 usage.

24 Over how many years do they allow
25 averaging?

1 A. We allow four-year averaging.

2 Q. Okay. Four-year averaging?

3 A. And then on the fifth year we need to know
4 what's going to happen. Either that, or I'm going to
5 turn them over to the Department.

6 Q. Fifth year you lower the boom?

7 A. That's right.

8 Q. But what does that have to do with the
9 district as a whole, the district's obligation as a
10 whole? You don't average that, do you?

11 A. No.

12 Q. So internally as a management practice your
13 groundwater districts allowed various water users to
14 average what -- how much water they use over I guess
15 you say a five-year period, is it?

16 A. Well, it's a four-year period. End of
17 the -- end of the fourth year we turn them over to the
18 Department for collection.

19 Q. But each year your district is supposed to
20 meet its allocated diversion reduction; correct?

21 A. Yes.

22 Q. And as far as the uncertainties of the
23 agreement that have been mentioned by counsel, IGWA
24 didn't want Surface Water Coalition in its business on
25 how this was managed; correct?

1 A. We were very open with the surface water
2 users on how we accounted for things.

3 Q. IGWA -- IGWA wanted to control how the
4 obligation was being allocated, correct, among the
5 districts?

6 A. Yes.

7 Q. And each district wanted to determine its
8 own management practices as to how to handle each
9 district's allocation; correct?

10 A. Correct.

11 Q. And the Surface Water Coalition did not
12 participate in the broad allocation or the internal
13 allocation of any groundwater district; correct?

14 A. Correct.

15 MR. FLETCHER: I have no further questions.
16 Thank you.

17 THE HEARING OFFICER: Mr. Thompson.

18
19 CROSS-EXAMINATION

20 BY MR. THOMPSON:

21 Q. Good afternoon, Mr. Deeg. Travis Thompson
22 for other members of the Coalition. Just a couple
23 questions.

24 So you agree that A & B Irrigation District
25 cannot sign the original Settlement Agreement that's

1 been marked Exhibit 1?

2 A. I agree. Yes, they did not.

3 Q. And A & B and IGWA executed a separate
4 agreement that's been identified as Exhibit 4; is that
5 correct?

6 A. Yes, I believe so. That's the number.

7 Q. And pursuant to that agreement IGWA agreed
8 that the long-term practices identified in the surface
9 water agreement did not apply to A & B's groundwater
10 rights; is that true?

11 A. I don't know if we did or not. I can't
12 tell you that.

13 Q. Okay. We could just turn to that exhibit
14 real quick.

15 A. Okay.

16 Q. It's Exhibit 4 in the big binder.

17 A. Little binder?

18 Q. The big, the big one.

19 MR. FLETCHER: The big one.

20 Q. (BY MR. THOMPSON): I guess what's your
21 understanding with respect to paragraph 2 of that
22 agreement?

23 A. It just says that "A & B agrees to
24 participate in the Settlement Agreement as a surface
25 water right holder only. The obligations of the

1 groundwater districts set forth in paragraph 2 through
2 4 of the Settlement Agreement do not apply to A & B and
3 its groundwater rights. A & B agrees to not make a
4 surface water delivery call against junior-priority
5 groundwater rights held by participating members of the
6 groundwater districts as set forth in paragraph 6 of
7 the Settlement Agreement."

8 Is that what you're referring to?

9 Q. Yes.

10 A. Okay.

11 Q. I guess based on that agreement, would you
12 agree that those long-term practices identified in the
13 surface water agreement did not apply to A & B and its
14 groundwater rights?

15 A. True. There are also other pumpers who
16 pump that don't provide mitigation either outside the
17 ESPA.

18 Q. Fair to say that there are other
19 groundwater users in the ESPA that are not parties to
20 the agreement?

21 A. Correct.

22 SARAH TSCHOHL: I apologize. Mr. Deeg, can you
23 please speak up?

24 THE WITNESS: Okay. I'm sorry.

25 SARAH TSCHOHL: Thank you. No, you're fine.

1 THE WITNESS: Okay.

2 Q. (BY MR. THOMPSON): To your knowledge, did
3 the Surface Water Coalition ever sign off on any
4 conservation number other than 240,000 acre-feet?

5 A. Not that I'm aware of.

6 Q. Did the Settlement Agreement allow for
7 future participation of groundwater users who were not
8 members of a groundwater district?

9 A. To some extent, yes.

10 Q. And to your knowledge, did any groundwater
11 users eventually join groundwater districts?

12 A. Yes.

13 Q. Did that occur in Aberdeen-American Falls?

14 A. Yes.

15 Q. Do you have an idea of how many?

16 A. Probably close to 15 smaller users.

17 Q. Did that change Aberdeen's conservation
18 obligation?

19 A. Probably a little bit, but not much.

20 Q. Do you have any idea of acreage number?

21 A. Probably less than 200 acres at this point.

22 Q. How about other districts, any idea of
23 how --

24 A. I don't have any idea.

25 Q. Okay. But those juniors that did join were

1 granted that safe harbor, too, under the agreement?

2 A. Yes.

3 Q. Turn to Exhibit 1. That's the Settlement
4 Agreement. If you can turn to page 5 of that.

5 A. Okay.

6 Q. And paragraph 9 says, "This is an entire
7 agreement."

8 I guess what does that paragraph mean to
9 you?

10 MR. BUDGE: Objection. Calls for a legal
11 conclusion.

12 THE HEARING OFFICER: Overruled.

13 THE WITNESS: I think it says that this
14 agreement that we just entered into is in fact a
15 binding agreement that we're going to fulfill.

16 THE HEARING OFFICER: Let me follow up with
17 Sarah's admonition, if I can.

18 If both of you could speak up, it would
19 help all of us. You're involved, honestly, in almost a
20 private colloquy, and we're not as a group able to
21 hear.

22 THE WITNESS: Okay. I'm sorry.

23 THE HEARING OFFICER: No, both of you need to
24 speak up. Thank you.

25 Q. (BY MR. THOMPSON): I think I heard your

1 answer. I don't know if the Director did, but --

2 A. I believe it was an agreement that both
3 parties entered into. And there were going to be other
4 agreements made, and this is how we were going to move
5 forward.

6 Q. And Exhibit 2 and 3 are addendums to that
7 Settlement Agreement.

8 Do you recognize those documents?

9 A. Yes, I do.

10 Q. And besides those two agreements, are there
11 any other written agreements, to your knowledge,
12 between IGWA and the Surface Water Coalition on this
13 subject?

14 A. No.

15 MR. THOMPSON: I think that's all I have.

16 THE HEARING OFFICER: Thank you, Mr. Thompson.

17 Redirect.

18 MR. BUDGE: Thank you, Director. Just a few
19 items.

20
21 REDIRECT EXAMINATION

22 BY MR. BUDGE:

23 Q. Tim, Mr. Fletcher asked you some questions
24 about your district's conservation program, and there
25 was a statement he made about your district having to

1 meet its allocation annually. And I want to just make
2 sure the record is clear about that.

3 When your district designs its conservation
4 program, it's designed to meet your district's
5 proportionate share of the 240 each year; correct?

6 A. Yes, that is correct.

7 Q. But there's some years where your district
8 has performed a whole lot of excess conservation; is
9 that right?

10 A. Yes.

11 Q. On what magnitude?

12 A. Over the six-year period we've done 170,000
13 acre-feet of additional recharge.

14 Q. And you expect in those years where you do
15 excess conservation that that would provide a benefit
16 in future years?

17 MR. FLETCHER: I'm going to object to that.
18 There's nothing in the agreement concerning that. So
19 his expectation is not material or relevant to this.

20 THE HEARING OFFICER: Overruled.

21 You may answer the question, Mr. Deeg.

22 THE WITNESS: Would you restate?

23 Q. (BY MR. BUDGE): Is it your expectation
24 that excess conservation will carry forward into future
25 years?

1 A. Yes.

2 Q. And is that part of the reason why
3 averaging is important to your district?

4 A. Yes, that is correct.

5 MR. BUDGE: No further questions.

6 THE HEARING OFFICER: Mr. Johns?

7 MR. JOHNS: No further questions.

8 THE HEARING OFFICER: All right. Any recross,
9 Mr. Fletcher?

10 MR. FLETCHER: No.

11 THE HEARING OFFICER: Mr. Thompson?

12 MR. THOMPSON: Speak up here. Sorry. That's
13 better.

14 THE HEARING OFFICER: Thank you.

15

16 RECCROSS-EXAMINATION

17 BY MR. THOMPSON:

18 Q. Mr. Deeg, on that last question, could you
19 just briefly refer to I believe it's Exhibits 22
20 through 28 -- 27. Sorry. I'll give you a minute to
21 look at those.

22 A. Both of them, 22 and 27?

23 Q. Yeah. I'll just go through each of them.

24 A. Okay. That's the performance table, that's
25 correct.

1 Q. Yes. And you recognize these documents?

2 A. Yes.

3 Q. And I believe they were prepared by
4 Mr. Higgs.

5 And I guess what's your understanding of
6 that "Mitigation balance" column?

7 A. That's the annual conservation that took
8 place that day -- that year, agreement.

9 Yes. We -- and the balance of that year.

10 Q. So --

11 A. Like Aberdeen-American Falls, that's our
12 balance carrying forward that year.

13 Q. Well, we'll look at that question real
14 quick.

15 So Aberdeen under this table, target
16 conservation 33,595, is that your understanding in
17 2016?

18 A. Yes.

19 Q. And that actual reduction and recharge
20 accomplished 37,959; is that what --

21 A. Yes.

22 Q. So that balance would be that difference
23 between those two numbers?

24 A. Yes.

25 Q. And I guess, to your knowledge, did

1 Aberdeen or any other groundwater district with a
2 balance in one year attempt to carry that over the next
3 year as a part of their conservation in that following
4 year?

5 A. Did anyone try to carry it over is what
6 you're asking me?

7 Q. Yes. And use it as part of their
8 obligation the following year?

9 A. No, they have not.

10 MR. THOMPSON: Okay. That's all I have. Thank
11 you.

12 THE HEARING OFFICER: Okay. Well, we've been
13 through twice, Mr. Budge.

14 MR. BUDGE: Yes.

15 THE HEARING OFFICER: I -- I don't know that I
16 want to allow any more redirect, Mr. Budge.

17 MR. BUDGE: Okay.

18 THE HEARING OFFICER: So with that, Mr. Deeg,
19 you're excused -- well at least you're off the stand.
20 I won't tell you you're excused.

21 THE WITNESS: Thank you.

22 THE HEARING OFFICER: Okay. Thank you.

23 Let's talk for a minute about the remaining
24 witnesses that we have. I know there's a goal, at
25 least by some, to finish tonight, but I don't know

1 whether that's a reasonable goal. I don't know how
2 many more witnesses we have. I'm willing to stay late.
3 I have some experience of staying late at hearings.

4 What do the parties want to do? Maybe --
5 maybe the attorneys can tell me how much more time.

6 Let's go off the record just for a minute.
7 Off the record.

8 (Recess.)

9 THE HEARING OFFICER: Okay. We are recording
10 again after a brief recess.

11 And during the recess there was some
12 discussion about the time that may be necessary to
13 finish today. There were discussions by the parties.

14 And as Mr. Johns represented earlier, he
15 has no witnesses to call for case-in-chief.

16 Mr. Fletcher, Mr. Travis -- or I'm sorry,
17 Mr. Thompson, excuse me --

18 MR. THOMPSON: It's okay.

19 THE HEARING OFFICER: -- do you have witnesses
20 that you wish to call?

21 MR. FLETCHER: We don't intend on calling any
22 witnesses. Thank you.

23 THE HEARING OFFICER: Okay. And because the
24 Surface Water Coalition is not calling witnesses, then
25 from my perspective there's no need for rebuttal

1 witnesses. And at least from my perspective the
2 presentation of testimony is finished.

3 Now, let's talk about what we have for
4 exhibits.

5 Have you been recording those Sarah? And
6 maybe you want to give it to me to read the screen.

7 SARAH TSCHOHL: Yeah. So I didn't get the
8 descriptions. All the numbers are right here, because
9 I don't have a binder.

10 THE HEARING OFFICER: Okay. Let me see if I can
11 interpret this, and you may need to help me, Sarah.

12 So I have an electronic listing of
13 exhibits, an exhibit description, and whether they were
14 admitted or denied. So let me confirm with the
15 attorneys.

16 I have Exhibits 1 through 39, which are the
17 common exhibits, and they were received into evidence.

18 Exhibit 107 is described as the Higgs
19 presentation to the IGWA board, and the exhibit was
20 admitted with the exclusion of pages 2, 3, and 4.

21 SARAH TSCHOHL: Yes.

22 THE HEARING OFFICER: That's the way I read what
23 you have.

24 SARAH TSCHOHL: Yes.

25 THE HEARING OFFICER: And then I have

1 Exhibit 107. And --

2 MR. FLETCHER: That was 107.

3 THE HEARING OFFICER: 1-0 -- oh. Oh. I've got
4 two 107s. Okay. I'm sorry.

5 SARAH TSCHOHL: It's split into 2, 3, 4; and 1
6 and 5 through 12. So 2 through 4 is denied.

7 THE HEARING OFFICER: Right. 1, 5 through 12 is
8 admitted.

9 Okay. I understand your table.

10 Okay. And then Exhibit 109, which is
11 titled "Term sheet implementation agenda," that was
12 received into evidence.

13 Exhibit 114 titled "Final -- Final
14 allocation 2016," received into evidence.

15 119, "Baseline option example," received
16 into of evidence.

17 I think there's one more document that I
18 recall that I don't see listed, which was a single
19 page.

20 SARAH TSCHOHL: That's right here. So this is
21 101.

22 THE HEARING OFFICER: Oh.

23 SARAH TSCHOHL: I just didn't have a binder, so
24 the titles are going to correspond with the titles
25 right there.

1 THE HEARING OFFICER: Okay. So I have, I
2 understand again, Exhibit 101, and just page 14, is
3 received into evidence.

4 And then I have Exhibits 118, 120, 200,
5 201, and 102 admitted into evidence; correct?

6 SARAH TSCHOHL: Yep, that was all. Correct.

7 THE HEARING OFFICER: Okay. Is my recitation,
8 is that consistent with the notes of the parties?

9 MR. FLETCHER: After -- you said 118, 120, and
10 what was the next one after that?

11 MR. THOMPSON: 102.

12 THE HEARING OFFICER: 200.

13 MR. FLETCHER: Okay.

14 THE HEARING OFFICER: 201.

15 MR. FLETCHER: Okay.

16 THE HEARING OFFICER: And then 102.

17 MR. BUDGE: That's consistent with IGWA's notes.

18 THE HEARING OFFICER: Any additions?

19 MR. JOHNS: Director.

20 THE HEARING OFFICER: Yeah.

21 MR. JOHNS: Did you say 102?

22 THE HEARING OFFICER: Yes. 102 was the last
23 exhibit that we identified.

24 MR. FLETCHER: What was 102?

25 MR. THOMPSON: The memo.

1 MR. FLETCHER: Oh, the memo? Yeah.

2 UNIDENTIFIED SPEAKER: [Unintelligible.]

3 THE HEARING OFFICER: Okay. Well, so let's talk
4 about the -- anything that you may want to do. I am
5 not in favor of oral arguments.

6 Do the parties want to submit anything in
7 briefing? Nobody acts too anxious about that.

8 MR. FLETCHER: Well, we briefed the legal issues
9 already. I mean I think our brief would be very
10 similar to what we've already filed, but --

11 THE HEARING OFFICER: I'm happy to suspend
12 briefing and not receive it. I don't want to tell you
13 you can't.

14 MR. BUDGE: I'm comfortable with that.

15 THE HEARING OFFICER: Okay. So no briefing.
16 And I'll issue a decision, then, based on the record.

17 Is there additional information that needs
18 to come in?

19 MR. JOHNS: I just want to make a note.

20 THE HEARING OFFICER: Yeah.

21 MR. JOHNS: And I think I did this at the
22 beginning, Mr. Director.

23 Just that Bonneville-Jefferson would like
24 to join and be clear that we were joining in our
25 support of IGWA's position. And I think I did that in

1 the motion to intervene -- or in my opposition. But if
2 that's not clear, just that Bonneville-Jefferson is
3 joining in support of the arguments raised by IGWA.

4 THE HEARING OFFICER: Sure.

5 Okay. Anything else?

6 MR. BUDGE: We had some discussion during the
7 testimony earlier about, you know, the object of this
8 proceeding and what's being asked of the Director.

9 Is that clear in your mind, or would you
10 like me to, you know, clarify exactly what it is the
11 petitioners are requesting?

12 THE HEARING OFFICER: Well, I'm not asking for
13 any additional clarification.

14 Okay. Well, we will close the record,
15 then.

16 I'm sorry, folks. You won't get your
17 complimentary bottle of Convue [phonetic] vodka.

18 (End of audio file.)

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JEFF LAMAR, CSR NO. 640
Notary Public
Post Office Box 2636
Boise, Idaho 83701-2636

My commission expires December 30, 2023

EXHIBIT H

Transcript of Recorded Hearing ~ March 14, 2024
Audio Transcription

1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION)
OF WATER TO VARIOUS WATER) IDWR DOCKET NO.
RIGHTS HELD BY OR FOR THE) CM-MP-2016-001
BENEFIT OF A&B IRRIGATION)
DISTRICT, AMERICAN FALLS)
RESERVOIR DISTRICT #2,)
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MINIDOKA IRRIGATION DISTRICT,) OF PROCEEDINGS
NORTH SIDE CANAL COMPANY,)
AND TWIN FALLS CANAL COMPANY)
_____)

CAPTION CONTINUED NEXT PAGE

BEFORE

HEARING OFFICER: ROGER BURDICK

DATE: March 14, 2024

LOCATION: Idaho Department of Water Resources
Boise, Idaho

TRANSCRIBED BY:

BROOKE SIMMS, CSR No. 1174, RPR, CCR

Notary Public

Transcript of Recorded Hearing ~ March 14, 2024
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2	1 IN THE MATTER OF IGWA'S) 2 SETTLEMENT AGREEMENT) 3 MITIGATION PLAN) 4 _____) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	3	1 A P P E A R A N C E S 2 3 For the Department of Water Resources: 4 Office of the Attorney General 5 Idaho Department of Water Resources 6 BY MR. KAYLEEN R. RICHTER, ESQ. 7 322 East Front Street, Suite 648 8 Boise, Idaho 83720-0098 9 kayleen.richter@idwr.idaho.gov 10 For the Minidoka Irrigation District, AFRD#2, SWC: 11 Fletcher Law Office 12 BY MR. W. KENT FLETCHER, ESQ. 13 1200 Overland Avenue 14 Burley, Idaho 83318-0248 15 wkf@pmt.org 16 For A&B Irrigation District, Burley Irrigation District, 17 Milner Irrigation District, North Side Canal Company, 18 Surface Water Coalition, and Twin Falls Canal Company: 19 Marten Law 20 BY MR. TRAVIS L. THOMPSON, ESQ. 21 163 2nd Avenue West 22 Twin Falls, Idaho 83301 23 tthompson@martenlaw.com 24 25
4	1 A P P E A R A N C E (Continued) 2 3 For Idaho Ground Water Appropriators, Inc.: 4 Racine Olson, PLLP 5 BY MR. THOMAS J. BUDGE, ESQ. 6 & MS. ELISHEVA M. PATTERSON, ESQ. 7 201 East Center Street 8 Pocatello, Idaho 83201 9 tj@racineolson.com 10 elisheva@racineolson.com 11 For Bonneville-Jefferson Ground Water District: 12 Olsen Taggart, PLLC 13 BY MR. SKYLER C. JOHNS, ESQ. 14 P.O. Box 3005 15 Idaho Falls, Idaho 83403 16 sjohns@olsentaggart.com 17 For Bingham Ground Water District: 18 Dylan Anderson Law 19 BY MR. DYLAN K. ANDERSON, ESQ. 20 P.O. Box 35 21 Rexburg, Idaho 83440 22 dylan@dylanandersonlaw.com 23 24 25	5	1 A P P E A R A N C E S (Continued) 2 3 4 For American Falls-Aberdeen Ground Water District: 5 Somach Simmons & Dunn, P.C. 6 BY MR. MAXIMILIAN C. BRICKER, ESQ. 7 1155 Canyon Boulevard, Suite 110 8 Boulder, Colorado 80302 9 mbricker@somachlaw.com 10 11 Also Present: 12 Sara Tschohl 13 14 15 16 17 18 19 20 21 22 23 24 25

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<p style="text-align: right;">8</p> <p>1 (Beginning of audio.)</p> <p>2 HEARING OFFICER: -- a whole bunch of cases.</p> <p>3 I'm going to say the case is CM-MP-2016-001. I'm Roger</p> <p>4 Burdick. I'm the hearing officer for same.</p> <p>5 We have a room full of attorneys, some who I</p> <p>6 have allowed to intervene, some who are here only as</p> <p>7 observers. As such, I will indicate to all the parties,</p> <p>8 because I may not as familiar with you as I should be,</p> <p>9 that as you address the court, the first time at least,</p> <p>10 indicate your name and who you represent, and then we</p> <p>11 will proceed from there.</p> <p>12 It's been indicated to me that we have a</p> <p>13 couple of motions, and before we start today, the</p> <p>14 petitioners are SWC and A&B, and they have a motion.</p> <p>15 Who wishes to put that on the record?</p> <p>16 MR. FLETCHER: Your Honor, this is Kent</p> <p>17 Fletcher. I represent Minidoka Irrigation District and</p> <p>18 American Falls Reservoir District Number 2.</p> <p>19 HEARING OFFICER: Excuse me. I -- I</p> <p>20 misidentified you, Mr. Fletcher. So --</p> <p>21 MR. FLETCHER: You did?</p> <p>22 HEARING OFFICER: Yes. I said A&B, and it's</p> <p>23 actually Minidoka.</p> <p>24 MR. FLETCHER: Oh, oh. A&B is sitting next to</p> <p>25 me.</p>	<p style="text-align: right;">9</p> <p>1 HEARING OFFICER: Okay.</p> <p>2 MR. FLETCHER: So we're close. But I'm making</p> <p>3 this motion on behalf of the Surface Water Coalition.</p> <p>4 We read your order on IGWA's motion seeking an</p> <p>5 order in limine. So that provides us some guidance, but</p> <p>6 in light of the many developments that have occurred in</p> <p>7 this case in the last two or three weeks, we would move</p> <p>8 the hearing officer and request that the hearing officer</p> <p>9 order that all testimony in evidence -- that this</p> <p>10 hearing be limited to issue four in the hearing</p> <p>11 officer's order setting the hearing. That issue is what</p> <p>12 action must be taken by ground water districts to secure</p> <p>13 the 2022 breach of the 2016 mitigation plan.</p> <p>14 This motion is based on, one, the summary</p> <p>15 judgment that has been entered on all the other issues.</p> <p>16 Number two, the district court has now entered a</p> <p>17 judgment in favor of and denying reconsideration of the</p> <p>18 director's determination that the signature ground water</p> <p>19 districts are required to reduce 240,000 acre-feet per</p> <p>20 year. The 240,000 must be done annually. Averaging is</p> <p>21 not allowed.</p> <p>22 And the district -- the breaching districts</p> <p>23 involved in this proceeding have the following annual</p> <p>24 reduction obligations: Bingham is forty thousand nine</p> <p>25 hundred fourteen thousand [sic] acre-feet. Bonneville</p>																																																																																																								

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<p style="text-align: right;">10</p> <p>1 Jefferson, 21,341 acre-feet. Jefferson Clark, 63,533 2 acre-feet. 3 In your summary judgment order, you stated, 4 "The district court issued a decision reaffirming the 5 director's actions and interpretations in its March 5, 6 2024, order denying petition for rehearing. This 7 hearing officer will not second guess a district court's 8 decisions regarding the proper interpretation of the 9 terms of the 2016 mitigation plan. Additionally, no 10 party has requested the stay of the district court's 11 decisions. Therefore, this hearing officer will treat 12 those issues as decided and will not revisit them here." 13 In the director's final order regarding IGWA's 14 2022 mitigation plan compliance, the director found that 15 the districts named above breached the agreement by 16 failing to reduce in the following amounts: Bingham, 17 32,476 acre-feet; Bonneville-Jefferson, 5,204 acre feet; 18 Jefferson-Clark, 18,605 acre-feet. 19 Whether there was a breach is not at issue in 20 this hearing. It is not one of the listed issues. The 21 amount of the breach is not at issue. It is not one of 22 the listed issues. The actions taken before 2022 are 23 not at issue. 24 Almost all, if not all, of the witnesses 25 listed by the ground water districts want to talk about</p>	<p style="text-align: right;">11</p> <p>1 alternative ways to calculate the annual obligation, 2 averaging, credit for past actions, past actions that 3 have been taken on similar topics. None of those are 4 relevant to the sole remaining issue, and much of this 5 testimony is directly contrary to the district court's 6 findings and the decision this hearing officer entered 7 in the summary judgment matter. 8 We request that the hearing officer restrict 9 testimony in evidence to the sole remaining issue and 10 prohibit testimony that attacks or attempts to change 11 the director's findings of breach in 2022 and the 12 judgment of the district court upholding the director's 13 determinations of annual reduction requirements, 14 prohibition of averaging, and allocation among 15 districts. 16 Thank you. 17 HEARING OFFICER: Response, Mr. Budge? 18 MR. BUDGE: Yes. Thank you, Mr. Hearing 19 Officer. My name is TJ Budge. I'm the attorney for 20 Idaho Ground Water Appropriators commonly known by its 21 acronym I-G-W-A or IGWA. 22 I recognize that the hearing officer's summary 23 judgment rulings do dispose of issues one through three 24 that are identified for this proceeding, and so I don't 25 object to that recognition on the record. I would note</p>
<p style="text-align: right;">12</p> <p>1 that those orders are interlocutory orders, and under 2 the department's rules of procedure, the hearing officer 3 can change those based on evidence presented, but we 4 don't intend today to challenge issues one through three 5 or address issues one through three as a result of the 6 summary judgment rulings that were made. 7 As to issue four, that is the primary issue to 8 be addressed in this proceeding, and we'd agree with the 9 Surface Water Coalition in that regard but would 10 vehemently disagree with the characterization of the 11 prior rulings concerning that issue. 12 Mr. Fletcher has asked the hearing officer to 13 rule that the -- each district has a specific prescribed 14 the version reduction volume that it must comply with. 15 That request goes too far for a couple of reasons. 16 One of the reasons is that issue number four 17 is asking what the appropriate remedy is, and the 18 director did not increase the district's conservation 19 obligations until the very end of the 2022 irrigation 20 season. And so it is relevant in considering the 21 equities of a remedy to consider what were the practices 22 in effect during the 2022 irrigation season. And -- and 23 so that would be the first reason to not preclude 24 evidence as to each district's mitigation obligation 25 during the 2022 irrigation season.</p>	<p style="text-align: right;">13</p> <p>1 The second reason is that the numbers that the 2 director used in what we call his compliance order 3 ruling where he increased the obligations -- those 4 aren't set in stone, and when we took that issue up to 5 Judge Wildman, what Judge Wildman said is that was 6 actually beyond the scope of the director's decision, 7 that -- that he simply used the performance report that 8 IGWA had submitted and scaled up the numbers, and Judge 9 Wildman recognized that IGWA may change the method it 10 uses to measure performance. 11 At the oral argument we had considerable 12 discussion about this, and Judge Wildman very clearly 13 acknowledged that as a result of the director's decision 14 concerning averaging and -- and the word "annual," that 15 he recognized IGWA was going to change the method it 16 used to measure compliance. 17 The third reason is that when we talk about 18 IGWA's 2022 performance, the report that was submitted 19 acknowledged that if the director eliminated averaging 20 and -- and reallocated the 240, that IGWA would be 21 compelled to change the method it uses to measure 22 compliance. IGWA has, in fact, done that, and today 23 there will be -- and tomorrow, will be putting evidence 24 in the record to show the new method used to measure 25 compliance. So that's certainly a live issue, and it</p>

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<p style="text-align: right;">14</p> <p>1 would be improper to exclude evidence to that effect 2 today. 3 HEARING OFFICER: Further argument by the 4 parties who intervene? 5 MR. JOHNS: Mr. Burdick, this is Skyler Johns 6 with Bonneville-Jefferson Ground Water District. 7 HEARING OFFICER: Very good. 8 MR. JOHNS: I would just reiterate some of the 9 arguments raised by counsel for IGWA. Some of these 10 issues, although there have been prior decisions, they 11 do provide some relevant context. Certainly, I think it 12 would have been in front of Director Spackman when he 13 issued his decision. Certainly it would be useful for 14 the hearing officer here to be able to at least provide 15 some context of some of the practices that were going on 16 at the time rather than just [unintelligible] you this 17 issue in a very, very narrow time frame. 18 I think, from a technical standpoint, which 19 will be shown in some of the expert reports and some of 20 the rebuttal reports that the practices that were being 21 implemented by some of the ground water districts are 22 relevant to determining the injury aspect. And so for 23 that reason, I think that the motion raised by the 24 Surface Water Coalition should be denied. 25 HEARING OFFICER: You -- you indicate injury</p>	<p style="text-align: right;">15</p> <p>1 aspect. Where in the settlement is that dependent? 2 Where is injury the keystone in the settlement 3 agreement? 4 MR. JOHNS: So for determining what the remedy 5 will be -- 6 HEARING OFFICER: So you're indicating 7 deviations from the 240 as the injury? 8 MR. JOHNS: Correct. 9 HEARING OFFICER: But not injury in terms of 10 the CMRs, et cetera? 11 MR. JOHNS: No. The injury -- to the extent 12 that the experts are determining what the remedy should 13 be. So in the expert reports. 14 HEARING OFFICER: Okay. I understand. 15 MR. JOHNS: They're -- they're calculating 16 what the effect of the overconsumption that's been 17 alleged has been throughout time, which is going to be 18 arguments offsetting that injury and that that will help 19 the hearing officer determine what the resolution would 20 be. 21 HEARING OFFICER: Thank you, sir. 22 Sir, you wish to address the court -- or 23 excuse me -- the -- address the hearing, please. I'm 24 sorry. 25 MR. BRICKER: Thank you. I'm Max Bricker</p>
<p style="text-align: right;">16</p> <p>1 appearing on behalf of the American Falls-Aberdeen 2 Ground Water District, and I would merely state that 3 Aberdeen -- American Falls-Aberdeen support a narrow 4 scope of this hearing. 5 HEARING OFFICER: I didn't hear you, sir. 6 MR. BRICKER: We would support a narrow scope 7 of this hearing. 8 HEARING OFFICER: Very good. 9 Mr. Fletcher, on -- any response, sir? 10 MR. FLETCHER: Yes, Mr. Hearing Officer. This 11 is exactly what we were afraid was going to happen 12 today. What we have found historically is that the 13 ground water districts don't really abide by necessarily 14 what the director orders. They don't really care what 15 the district court has said. They're going to come back 16 and make the same arguments before you that they've been 17 making in front of these tribunals for years. 18 And I would like to point out specific wording 19 in the order that we're here on. It's paragraph 13 on 20 page 8, and it states, "The director further finds, as 21 outlined in Table 3 printed below, four IGWA ground 22 water districts failed to satisfy their proportionate 23 share of IGWA's 240,000 acre-feet conservation 24 obligation in 2022. Table 3 also lists the deficiency 25 volume for each of the four IGWA members who failed to</p>	<p style="text-align: right;">17</p> <p>1 satisfy the respective mitigation obligations in 2022." 2 And then Table 3 sets out Aberdeen falls -- 3 excuse me -- American Falls-Aberdeen, 1,352. And they 4 did enter into an agreement with us to satisfy that 5 breach by recharging in their district last year, which 6 they did, and we filed documentation on that. 7 Bingham, 32,476. Bonneville-Jefferson, 5,204. 8 Jefferson-Clark, 18,605. Total 57,637. None of the 9 ground water districts asked for reconsideration of that 10 determination. The hearing officer did not list that 11 determination as an issue to be determined. There is no 12 question that that is the -- sets up the framework for 13 this hearing. And the issue, as framed by the hearing 14 officer says, what can they do to cure this breach? 15 So to get into all of these collateral 16 issues -- and their expert reports are full of them -- 17 is way beyond the scope of the hearing as set out on the 18 issue before the hearing officer. In your scheduling 19 order, you -- you specifically stated how to cure this 20 breach is the only issue to be heard. 21 HEARING OFFICER: Thank you. At this point in 22 time that motion is under advisement, and I will take 23 some time this morning before we proceed to answer those 24 questions. 25 Mr. Budge, you had a motion also, sir?</p>

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<p style="text-align: right;">18</p> <p>1 MR. BUDGE: Yes. Thank you, Mr. Hearing 2 Officer. Yesterday, the hearing officer issued an order 3 denying IGWA's motion to take official notice of certain 4 agency orders. I would respectfully ask the hearing 5 officer to reconsider that in part and -- and explain 6 why. 7 HEARING OFFICER: I'll do it right now. The 8 issue is you gave me -- you told me to take judicial 9 notice of about 50 records, and I'm not going to do 10 that, because I don't know if they're even relevant. By 11 taking judicial notice, they could become a part of the 12 evidentiary base work in this matter. If you want me to 13 take judicial notice or if anyone wishes me to take 14 judicial notice of any document, you're going to have 15 to, number one, tell me why and, number two, the 16 foundation for same. 17 So that's why I said, no, I'm not going to 18 sift through the entire four or five years of -- of 19 documentation in this matter and pick out things that 20 help you or help them because I'm not the lawyers for 21 you or them. 22 Is that consistent with what you needed in 23 terms of direction? 24 MR. BUDGE: It is. And I'm prepared to 25 address specific documents and why I think judicial</p>	<p style="text-align: right;">19</p> <p>1 notice should be taken. 2 HEARING OFFICER: Okay. 3 MR. BUDGE: And I prefer to do that at this 4 time, if we could. 5 HEARING OFFICER: Sure. 6 MR. BUDGE: The motion that we filed did have 7 a long list of agency orders. It's on pages 3 through 5 8 of that motion. And, Kayleen, I don't know if you've 9 got a copy of that motion. 10 HEARING OFFICER: I've got the copy of the 11 motion and looked at it and looked at the documents. I 12 didn't look at it -- I did not look at the substance. I 13 looked at the numbers. 14 MR. BUDGE: So on pages 4 and 5 -- so this is 15 about two-thirds of the documents, these are all orders 16 that are issued in the Surface Water Coalition delivery 17 call case. We call them [unintelligible] orders. It's 18 the application of the methodology order each year. I'm 19 not concerned about those. So my motion for 20 reconsideration does not include the documents 21 identified on pages 4 and 5 of that motion. 22 I'm primarily concerned with the documents 23 identified on page 3 of that motion, and I will explain 24 why I think it's appropriate to take judicial notice of 25 those.</p>
<p style="text-align: right;">20</p> <p>1 HEARING OFFICER: Very well. 2 MR. BUDGE: Just to review what documents are 3 on page 3 and how they pertain to this case, the first 4 five documents are orders issued in this particular 5 administrative case. 6 And so the first one is the Surface Water 7 Coalition and IGWA's stipulated mitigation plan and 8 request for order. We're referring to this as the 2016 9 plan. This was the pleading by which that plan was 10 filed with the Department. 11 The second document is the Surface Water 12 Coalition's and IGWA's stipulated amended mitigation 13 plan. That was filed in 2017 in this action, and that 14 was the submission of the first and second addendums to 15 the Department. 16 The third document is the Department's final 17 order of proving the stipulated mitigation plan in 2016. 18 The fourth is the final order approving the amendment to 19 it. And then the fifth is the final order regarding 20 IGWA's 2022 mitigation plan compliance that was issued 21 last August. 22 So these documents are really at the heart of 23 this action and referenced by the parties and the 24 hearing officer in the summary judgment briefing and 25 decisions.</p>	<p style="text-align: right;">21</p> <p>1 The sixth and seventh document listed on 2 page 3 are the Department's orders approving what has 3 been referred to as the 2009 mitigation plans. IGWA 4 distinguishes between these as a storage water plan and 5 an aquifer enhancement plan. Those plans are referenced 6 in the issues for the hearing, and they've been argued 7 in summary judgment briefing and in the hearing 8 officer's rulings. And so I think if on appeal a judge 9 is going to kind of understand the basis for the 10 decision, he needs to have access to those decisions. 11 HEARING OFFICER: You think this will be 12 appealed? 13 MR. BUDGE: I wish it wasn't, but yes. 14 The next set of documents which are on rows 8 15 through 11 -- these are other mitigation plans that have 16 been approved in the Surface Water Coalition delivery 17 call case. These were cited -- these and then the next 18 set of documents, which are on rows 12 through 23 -- 19 these are other mitigation plans the Department has 20 approved in other conjunctive [unintelligible] delivery 21 call cases. So there's three of them that were approved 22 in the Blue Lakes delivery call -- or excuse me -- four 23 in the Blue Lakes delivery call. Two of them were 24 approved in the Clear Springs delivery call, and then 25 there were six approved mitigation plans in the Rangen</p>

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7 (Pages 22 to 25)

<p style="text-align: right;">22</p> <p>1 delivery call. 2 And the reason we asked to have these in the 3 agency record is simply because they reflected precedent 4 of the agency. So we're not submitting them to try to 5 establish some fact that's in dispute in this case. 6 It's simply to add for the record the precedent of the 7 Department in approving mitigation plans. 8 What's kind of unique in a agency proceeding 9 is that prior decisions are not published in a recorder. 10 So we can't simply go to the, you know, the Pacific 11 Reporter and cite prior decisions. Because of that, 12 it's been my practice to try to add to the agency of 13 record the prior decisions that we think have 14 precedential value, and that's the only reason that I've 15 asked to include these, is that they do serve as 16 precedent for the agency. 17 And we did cite these decisions in our summary 18 judgment brief, and so we think it's important that 19 the -- the record and any appellate court have access to 20 those decisions that we cited in our summary judgment 21 brief just as precedent, not to try to establish some 22 fact that's in dispute. 23 And then the last four are -- 24 HEARING OFFICER: 11 through 15? 25 MR. BUDGE: What's that?</p>	<p style="text-align: right;">23</p> <p>1 HEARING OFFICER: 11 through 15 -- is that 2 what it is? 3 MR. BUDGE: So the -- the orders that serves 4 precedent -- those are on rows 8 through -- 5 HEARING OFFICER: 11. 6 MR. BUDGE: 8 through 23, actually. 7 HEARING OFFICER: Oh, okay. 8 MR. BUDGE: Yeah. 9 HEARING OFFICER: I'm sorry. 10 MR. BUDGE: I think I wasn't clear on that. 11 So -- 12 HEARING OFFICER: Very good. 13 MR. BUDGE: So those were 8 through 23. And 14 then the last four rows on page 3 -- those are orders 15 dismissing mitigation plans that the Department has 16 issued in the Surface Water Coalition delivery call 17 case. Those are also provided just because they serve 18 as precedent for the agency, not to try to establish a 19 fact that's in dispute in this proceeding. 20 And so we just wanted to be in a position that 21 if the case is appealed that we're able to cite the 22 agency orders that were referenced in our summary 23 judgment brief to the hearing officer and that we think 24 do have value as precedent. 25 And it is customary for the Department to take</p>
<p style="text-align: right;">24</p> <p>1 official notice of its prior decisions. As the hearing 2 officer is aware, the rules of evidence are somewhat 3 relaxed in agency proceedings, and the Department's Rule 4 600 says that evidence should be taken by the agency to 5 assist the parties developing a record, not to exclude 6 or frustrate that development. 7 And I also think it's important that nobody 8 opposed the motion. So this is customary and there's no 9 opposition. 10 If the motion for reconsideration is not 11 granted, it would force us to call a witness to go 12 testify about prior actions and decisions -- 13 [Unintelligible cross-talk.] 14 HEARING OFFICER: I understand. 15 MR. BUDGE: Yeah, which we'd rather not spend 16 time doing, but we can if needed. 17 HEARING OFFICER: That's fine. 18 UNIDENTIFIED SPEAKER: Can I clarify something 19 real quick? 20 HEARING OFFICER: Please. 21 UNIDENTIFIED SPEAKER: TJ, were you including 22 six and seven in this [unintelligible]? 23 HEARING OFFICER: They are the Department 24 orders allowing the 2009 plan -- is my understanding. 25 UNIDENTIFIED SPEAKER: Okay. Sorry. I</p>	<p style="text-align: right;">25</p> <p>1 [unintelligible]. 2 HEARING OFFICER: Yes. Am I correct in that 3 regard? 4 MR. BUDGE: That's correct. 5 HEARING OFFICER: All right. 6 MR. BUDGE: And -- and Elisheva just let me 7 know that the first four are already listed as exhibits, 8 but -- but they are -- those are [unintelligible] issued 9 in the proceeding -- 10 HEARING OFFICER: Sure. 11 MR. BUDGE: -- that are the substance of it. 12 HEARING OFFICER: All right. And I appreciate 13 the explanation. That obviously will help me understand 14 the motions. So thank you. 15 Response, if any, sir, by opposing parties? 16 MR. FLETCHER: The only issue we really have 17 with this at this point, considering what's -- now where 18 we sit, is how are these relevant to the only issues 19 before this hearing, which is how do they cure a breach? 20 It kind of goes back to our first motion in limine, and 21 most of these documents are irrelevant to that. 22 HEARING OFFICER: One of the cornerstones of 23 IGWA's argument in summary judgment was the fact that 24 the Department had not dismissed 2009, and, as a result, 25 the director, under 2016, have no power to do anything</p>

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8 (Pages 26 to 29)

<p style="text-align: right;">26</p> <p>1 but follow 29 -- 2009, and I'm sure that 2 [unintelligible] our further argument as to the -- to 3 support that argument. 4 Am I correct in that regard, Mr. Budge? 5 MR. BUDGE: No. We -- we accept the hearing 6 officer's ruling, but -- but after the final decision 7 comes out of this proceeding, there will be a chance to 8 file exceptions with the director, and then if there's 9 an appeal -- so we need to be in a position that when we 10 go to the director -- 11 [Unintelligible cross-talk.] 12 HEARING OFFICER: -- that 2009 is still 13 effective? 14 MR. BUDGE: Yes. 15 HEARING OFFICER: Because the Department has a 16 procedure, these are still in -- in -- these are still 17 in force, and the ripple effect of this decision will 18 affect those. Is that the argument? 19 MR. BUDGE: That's correct. So we're not 20 [unintelligible] this today. We recognize the hearing 21 officer's decision and respect that, but -- but the 22 director and appellate judge needs to have the same 23 information the hearing officer considered, and so 24 that's why it needs to be in the agency record. 25 HEARING OFFICER: Very good.</p>	<p style="text-align: right;">27</p> <p>1 Anything further, Mr. Fletcher? 2 All right. I'm going to take a recess so that 3 I can review the arguments because I don't want to 4 proceed without a clear understanding of how we're going 5 to proceed. 6 Thank you. The hearing will be in recess. 7 (Recess taken.) 8 HEARING OFFICER: Back on record, and I've 9 taken two motions under advisement. Had a long recess, 10 and I apologize for the time taken from your busy days, 11 but the first is the motion on behalf of SWC, and I will 12 answer it first. And I will be referring to the final 13 order of 8/2/23 as well as Judge Wildman's opinion 14 concerning the 2022 breach and the motion for 15 reconsideration opinion in that regard. 16 The director on page 6 of the 8/2/23 opinion 17 defined what is contained in the 2016 settlement 18 mitigation plan, and I believe those are basically the 19 documents one through seven that Mr. Budge asked the 20 court to take judicial notice of and will do so; is that 21 correct, sir? 22 MR. BUDGE: Could you repeat the question? 23 HEARING OFFICER: Okay. One through seven of 24 your list -- 25 MR. BUDGE: So --</p>
<p style="text-align: right;">28</p> <p>1 HEARING OFFICER: Oh, you're right. You're 2 right. Let's -- let's just do it this way. One through 3 seven I'm taking judicial notice of. Okay? And I will 4 explain the other documents as I go through them. 5 On 8/2/23, the director's order, which spawned 6 the motion for reconsideration and request for the 7 hearing here today as well as all the interim hearings 8 that we've had. The reconsideration requested four 9 in -- inquiries by the hearing officer. The parties had 10 input in the same, and I ordered those four issues to be 11 the parameters of today's hearing. 12 By summary judgment order, I have ruled three 13 of those four issues are decided as a matter of law, 14 interpreting the document for the 2016 settlement 15 mitigation order and all the documents contained in that 16 series of documents indicated on page 3 of 8/2/23 17 director's order. 18 Additionally, I've found, because of the 19 unique and comprehensive nature of 2016 settlement 20 mitigation plan, the 2009 mitigation plan cannot be used 21 to cure the 2022 breach. 22 Judge Wildman addressed performance in the 23 2021 breach, and he also succinctly stated the -- in 24 the -- what the 2016 settlement mitigation plan says. 25 Importantly, Judge Wildman allowed and agreed with the</p>	<p style="text-align: right;">29</p> <p>1 director that the director did not err in apportioning 2 the -- the breach in the same way as the director 3 apportioned the breach in the 8/2/23 director's order. 4 I have read and referred to those proceedings 5 leading to the 8/2/23 order in my summary judgment 6 order. For the reasons stated in the summary judgment 7 order and here today, I find that the director's 8 findings in Tables 2 and 3 of the 8/2/23 order as well 9 as the findings of breach to be conclusive, and, 10 therefore, not an issue today. 11 To clarify, I adopt the findings of the 8/2/23 12 director's order of breach and Tables 2 and 3 in the 13 director's 8/2/23 order. In doing so, I adopt his 14 previous methodology to arrive at those numbers. I will 15 hear evidence as to how to cure those mentions in this 16 hearing. 17 As concerns the issue on judicial notice 18 brought by Mr. Budge, I have already indicated I would 19 grant his motion on numbers 1 through 7. 8 through 27, 20 I believe, are irrelevant, and I will not take judicial 21 notice of same. Number one, they were never argued in 22 the summary judgment proceedings before today. I 23 believe the arguments before this contested case 24 concerned the 2016 settlement and mitigation plan and 25 the use of 2009 mitigation plan to cure same. Never</p>

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9 (Pages 30 to 33)

<p style="text-align: right;">30</p> <p>1 heard of these mitigation plans before. 2 It was argued that the Department had certain 3 procedures to dismiss mitigation and to stack mitigation 4 in the summary judgment arguments of Mr. Budge or other 5 signatories. In fact, 2016 and 2009 were argued to have 6 been stacked mitigation plans. I've addressed this 7 argument in the summary judgment order indicating the 8 settlement agreement is an independent contract between 9 SWC and the signatories in addition to any other 10 mitigation issues. 11 That has called for, and I've referred to in 12 my summary judgment, a different procedure outside of 13 the usual Department handling. That does not mean that 14 we throw everything out. It just means this is a very 15 unique document to -- to try to stay away from 16 litigation and has many agreements between the 17 signatories and SWC. When I say signatories, I mean 18 IGWA and the numerous signatories to the settlement 19 portion of the 2016 mitigation plan. 20 So we are here today on the two documents -- 21 on the two documents, 2016 and the arguments concerning 22 2009, but we are basically here for the 2016 settlement 23 mitigation plan and how to cure the breach. And as 24 such, the motion is denied as to 8 through 27. I think 25 I was correct in Mr. -- in commenting to Mr. Budge that</p>	<p style="text-align: right;">31</p> <p>1 the relevance of those would be the precedents, how the 2 Department handles other mitigation plans, et cetera, 3 concerning dismissal or stacking, et cetera. But in 4 this matter, because of the settlement and mitigation 5 plan, it is a unique creature, and those are irrelevant. 6 As a result, I am sure that the parties -- 7 what time is it? 8 UNIDENTIFIED SPEAKER: 10:43. 9 HEARING OFFICER: Okay. I am sure the parties 10 wish to discuss this -- these rulings with themselves, 11 and, therefore, I will take at least a half hour break 12 for the parties to discuss among themselves this ruling, 13 and then we will proceed as the parties wish in that 14 regard. 15 Thank you. We're in recess. 16 (Recess taken.) 17 HEARING OFFICER: Roger Burdick presiding. 18 Any other issues before the presentation of 19 the parties? Mr. Budge? 20 MR. BUDGE: Thank you, Mr. Burdick. I just 21 would like to request clarification on the hearing 22 officer's recent decision on IGWA's motion to take 23 official notice. As I understand the decision, the 24 hearing officer has agreed to take official notice of 25 the documents listed on lines 1 through 7 of IGWA's</p>
<p style="text-align: right;">32</p> <p>1 motion; is that correct? 2 HEARING OFFICER: Yes, sir. 3 MR. BUDGE: And as to the documents listed on 4 items -- or excuse me -- on lines 8 through 27, the 5 hearing officer has made a conclusive ruling that those 6 documents are not relevant in this proceeding? 7 HEARING OFFICER: Yes. And that I will not 8 take judicial notice of same as a result. 9 MR. BUDGE: Okay. Does that mean that IGWA 10 should not call a witness to testify of those documents 11 because they've been deemed irrelevant? 12 HEARING OFFICER: Yes. 13 MR. BUDGE: Okay. 14 HEARING OFFICER: Please. I don't need that 15 authentication. 16 MR. BUDGE: Okay. I appreciate that. In 17 light of that ruling, I would like to make an offer of 18 proof concerning those documents. 19 HEARING OFFICER: Yes, sir. 20 MR. BUDGE: The Department's Rule of Procedure 21 603 states that an offer of proof for the record consist 22 of a statement of the substance of the excluded 23 evidence. 24 HEARING OFFICER: I agree, and you can do so, 25 sir.</p>	<p style="text-align: right;">33</p> <p>1 MR. BUDGE: Thank you. 2 HEARING OFFICER: It's different than in the 3 district court. So go ahead. 4 MR. BUDGE: Thank you. I'm going to cite or 5 reference pages 10 and 11 of the Memorandum in Support 6 of IGWA's Motion for Summary Judgment -- 7 HEARING OFFICER: Okay. 8 MR. BUDGE: -- which illustrates the relevance 9 of the documents as we see them, and I'll just read this 10 and correlate the documents referenced in the brief with 11 the documents identified in the motion to take judicial 12 notice. 13 HEARING OFFICER: Perfect. Thank you. 14 MR. BUDGE: Beginning on page 10 of the 15 Memorandum in Support of IGWA's Motion for Summary 16 Judgment, the third -- second full paragraph down 17 begins, "In practice, the Department has approved 18 multiple mitigation plans in response to various 19 delivery calls. In the SWC delivery call case, the 20 Department has approved seven different mitigation 21 plans -- three for IGWA (Order Approving Mitigation Plan 22 dated May 14, 2010, in Docket Number CM-MP-2009-006)." 23 That is the document identified on lines 7 that was 24 mentioned. 25 "Order Approving Mitigation Plan dated</p>

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<p style="text-align: right;">34</p> <p>1 June 3rd, 2010, in Docket Number CM-MP-2009-007." 2 That's the document identified on my 6th of IGWA's 3 motion. Those two have been accepted by official 4 notice. "Final Order Approving Amendment to Stipulated 5 Mitigation Plan dated May 9th, 2017, Docket Number 6 CM-MP-2016-001." That document has been accepted by 7 official notice. It's identified in line 3 of IGWA's 8 motion. 9 The memo continues, "One for the Coalition of 10 Cities, citing Final Order Approving Stipulated 11 Mitigation Plan dated April 9th, 2019." That's the 12 document identified on line 8 of IGWA's motion. "One 13 for Southwest Irrigation District (Final Order Approving 14 Mitigation Plan and Dismissing Contested Case dated 15 March 26, 2018)." That is identified on line I -- line 16 9 of IGWA's motion. 17 "One for several food processors known 18 collectively as the 'Water Mitigation Coalition' (Final 19 Order Approving Mitigation Plan dated October 25th, 20 2021)." That document is identified on line 10 of 21 IGWA's motion. "And one for A&B Irrigation District 22 (Final Order Approving Mitigation Plan dated 23 December 16th, 2015)." That's identified on line 11 of 24 IGWA's motion. 25 The next paragraph reads, "In connection with</p>	<p style="text-align: right;">35</p> <p>1 the delivery call filed by Blue Lakes Trout Farm, the 2 Department approved four mitigation plans, (Docket 3 Numbers CM-MP-2009-001, 002, 003 and 006)." Those 4 documents are listed on lines 12 through 15 of IGWA's 5 motion. 6 Next sentence, "In connection -- in connection 7 with the Clear Springs Foods delivery call, the 8 Department approved two mitigation plans, citing Docket 9 Number CM-MP-2009-004 and 2009-005." Those are listed 10 on lines 16 and 17 of IGWA's motion. 11 Next sentence, "And in connection with the 12 Rangen delivery call, the Department approved six 13 mitigation plans." Those six mitigation plans 14 referenced in IGWA's Memorandum in Support of Motion for 15 Summary Judgment are identified on lines 18 through 23 16 of IGWA's motion to take official notice. 17 Turning to page 11, under Section 2.2, 18 beginning on the third paragraph down, it states, "The 19 Aquifer Enhancement Plan and the Storage Water Plan were 20 approved by final orders issued by the Department under 21 the Idaho Administrative Procedures Act, Chapter 52, 22 Title 57, Idaho Code. The Department has not issued an 23 order terminating or vacating the approval orders. 24 "By contrast, the Department has previously 25 issued an order in the SWC delivery call case that</p>
<p style="text-align: right;">36</p> <p>1 terminated three mitigation plans that had been 2 superseded by a subsequent mitigation plan. The 3 Coalition of Cities and the cities of Pocatello and 4 Idaho Falls each filed mitigation plans that were later 5 superseded by a joint mitigation plan. When that 6 happened, the director issued an order terminating the 7 prior plans, citing Order Dismissing Mitigation Plans in 8 Docket Numbers CM-MP-2015-001, CM-MP-2015-004, 9 CM-MP-2015-005, and CM-MP-2016-002." 10 Those orders are identified in IGWA's motion 11 on lines 4 through 27, and I have copies of them here 12 with me that I can submit to Sarah or Kayleen. 13 HEARING OFFICER: Those will be marked not as 14 admitted but as offered only. You may approach, sir. 15 Offered and not admitted, please. 16 UNIDENTIFIED SPEAKER: I also had a comment on 17 the motion limiting the scope of the hearing. 18 HEARING OFFICER: Yes, sir. 19 UNIDENTIFIED SPEAKER: I'm not asking the 20 hearing officer to reconsider that ruling at this time, 21 but I want to point out offers of proof that may be made 22 later and explain the basis so you can prepare for them. 23 HEARING OFFICER: Wait a second. I need to 24 have those in order based upon what has been presented 25 before. Why would you do this at this time, sir? If</p>	<p style="text-align: right;">37</p> <p>1 you could explain that to me. 2 UNIDENTIFIED SPEAKER: Yes. Thank you. So 3 this just provides some -- some foundation as to some of 4 the evidence that has been excluded by the ruling, as I 5 understand it. And we will make offers of proof at the 6 time we present the evidence, but I do think some 7 context may be helpful to -- for the hearing officer to 8 be prepared for that. 9 HEARING OFFICER: At that point in time, we'll 10 deal with those. As I indicated, and I thought I 11 indicated in the order on the motion in limine, we will 12 do those -- we will respond to those as they come up. 13 UNIDENTIFIED SPEAKER: Okay. Fair enough. 14 HEARING OFFICER: Thank you, sir. 15 Is there a response in that regard, sir? 16 MR. FLETCHER: Very briefly. I'm a little 17 unclear exactly what was being requested because it 18 sounded like a reconsideration on the summary judgment 19 decision, but the bottom line is, you know, what is 20 relevant to this hearing, whether those documents have 21 to do with the issue, what action must be taken to cure 22 the 2022 breach of the 2016 mitigation plan. And we 23 have to remember that IGWA admitted in its filings that 24 it wasn't relying on the 2009 plan to cure the 2022 25 breach. It admitted that in the pleading.</p>

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11 (Pages 38 to 41)

<p style="text-align: right;">38</p> <p>1 So all of this evidence about other mitigation 2 plans has nothing to do with how do they cure the breach 3 of the 2016 plan resulting from their actions of 2022. 4 HEARING OFFICER: At this point in time, I'm 5 going to further explain my ruling. You indicated at 6 page 10, the second paragraph, the introductory 7 paragraph in that regard says, "In paragraph, the 8 Department has approved multiple mitigation plans in 9 response to various delivery calls." 10 And that was indicated when I, maybe rudely, 11 interrupted you. I said I understand the reason you 12 were bringing these to me to show that the Department 13 handles stacked mitigation plans or can dismiss 14 mitigation plans or other mitigation plans refer to 15 other mitigation plans that dismiss same, which is one 16 of your arguments in the summary judgment. And I think 17 I understand that [unintelligible]. 18 But as I said, none of those were an issue in 19 the director's original proceeding which resulted in 20 8/2/23 opinion of the director, and they show the 21 Department's procedures historically, et cetera, that 22 don't apply to the specific 2016 settlement mitigation 23 plan, which I tried to point out in my summary judgment 24 order, that it is a unique mitigation plan. 25 So for those reasons, I will, again, deny the</p>	<p style="text-align: right;">39</p> <p>1 offer of proof and, quite frankly, I need to look -- as 2 you went through those, I may have made a mistake and 3 thought that 6, 7, and 8 were documents that had 4 previously been admitted. I will revisit that if 5 necessary and -- and indicate to you, Mr. Budge, if I'm 6 going to change that -- that -- that ruling and a reason 7 why later so we can proceed, sir. 8 On behalf of the -- are there any other 9 comments or orders or argument or motions? 10 Mr. Fletcher? 11 Mr. Budge? 12 Any other party? 13 Very well. Mr. Fletcher, you are the party 14 who has brought this matter. You're the petitioner. 15 You may proceed. 16 MR. FLETCHER: Yes. Mr. Travis Thompson will 17 handle the questioning [unintelligible]. 18 HEARING OFFICER: Very well, sir. 19 MR. THOMPSON: [Unintelligible.] 20 HEARING OFFICER: Whom? 21 MR. THOMPSON: David Colvin. 22 HEARING OFFICER: Okay. Mr. Colvin, please 23 come forward and be sworn. 24 UNIDENTIFIED SPEAKER: I do this, I guess? 25 DAVID COLVIN</p>
<p style="text-align: right;">40</p> <p>1 called by SWC, having been first duly sworn to tell the 2 truth relating to said cause, testified as follows: 3 HEARING OFFICER: Okay. Very good, sir. 4 Please be seated. 5 MR. THOMPSON: For the record, Travis Thompson 6 with Marten Law representing A&B Irrigation District, et 7 al. in this matter. 8 DIRECT EXAMINATION 9 BY MR. THOMPSON: 10 Q. David, could you please state and spell your 11 name for the record. 12 A. My name is David Colvin, D-a-v-i-d 13 C-o-l-v-i-n. 14 Q. And where do you currently work? 15 A. LRE water in Denver, Colorado. 16 Q. What's your current occupation? 17 A. I'm the ground water team leader. 18 Q. And I believe in front of you -- probably that 19 binder on the far corner, your right -- left -- yeah. 20 It should be labeled the SWC Exhibits; is that correct? 21 A. Yes. 22 Q. And is your CV attached to Exhibit 1? 23 A. Yes. 24 Q. And does that generally describe your 25 education and work history?</p>	<p style="text-align: right;">41</p> <p>1 A. It does. 2 Q. And could you generally describe the 3 experience you have with ground water matters in Idaho? 4 A. Yes. So in 2010, I started working on the 5 Rangen call and worked through a number of hearings 6 associated with that call for two or three years, and 7 then got reinvolved with the Surface Water Coalition in 8 2019. When I started with the Rangen call, I joined the 9 Eastern Snake Hydrologic Modeling Committee and was 10 involved in review of the development and calibration of 11 the ESPAM model. 12 HEARING OFFICER: Excuse me? Which one? 13 THE WITNESS: The Eastern Snake Plain Aquifer 14 Model, ESPAM. 15 Q. (BY MR. THOMPSON) And you said you joined 16 that technical committee back in 2010; is that correct? 17 A. I think I actually joined the committee in 18 2011, but at that time frame. 19 Q. And that committee is undertaking refinements, 20 I guess, improvements to that -- that model over time; 21 is that correct? 22 A. That's right. 23 Q. And how about any other ground water cases, 24 allocations for permit or transfer? Anything else? 25 A. Yes. So for the Surface Water Coalition, I've</p>

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12 (Pages 42 to 45)

<p style="text-align: right;">42</p> <p>1 reviewed several transfer cases, or transfer 2 applications, rather, and have been active on the 3 Sentinel Well Technical Working Group associated with 4 the Surface Water Coalition-IGWA agreement and 5 monitoring the annual actions that it takes under the 6 agreement. 7 Q. And during your time that you've worked on the 8 aquifer, have you become familiar with Department 9 reports and information regarding the ESPA on an annual 10 basis? 11 A. Yes, I have. 12 Q. Reviewed that data, as far as ground water 13 levels, changes, and aquifer levels? 14 A. Yes, that's greatly part of my duties. 15 Q. And have you been qualified as an expert 16 witness before the Department in prior cases? 17 A. I have, several cases. 18 Q. Can you just generally describe what Exhibit 1 19 is for the record? 20 A. Exhibit 1 is my expert report that I prepared 21 in response to this -- this hearing, in preparation for 22 this hearing. And so it addresses the 2022 breach and, 23 to some extent, the four issues that were specified for 24 this case, but focusing on the fourth issue, which is a 25 cure or remedy that could be done under the 2016</p>	<p style="text-align: right;">43</p> <p>1 navigation plan to cure the 2022 breach. 2 Q. And I'll direct your attention to page 4 of 3 that exhibit. You have what's listed at the top 4 Table 1. Can you describe where you obtained that 5 information for that table? 6 A. Yes. This was in the director's order on the 7 2022 breach, and it was the director's apportionment of 8 the breach amounts for the three listed ground water 9 districts, Bingham, Bonneville-Jefferson, and 10 Jefferson-Clark. 11 Q. And some of those quantities were directly 12 taken from the director's order; is that correct? 13 A. That's right. 14 Q. If you could turn over to page 5, could you 15 generally describe Figure 1 and what that represents? 16 A. Yeah. So this is a graph showing the sentinel 17 well index which was established to monitor aquifer 18 conditions and has -- in the gray background are all the 19 individual well measurements over the years from 20 approximately 1981 to 2023. And the blue line is the 21 calculated sentinel wealth index, which is a measure 22 that's in the 2016 mitigation plan intended to represent 23 aquifer conditions, and it also includes the three 24 targets or goals for 2020, 2023, and 2026. 25 Q. And who are you aware -- are you aware who</p>
<p style="text-align: right;">44</p> <p>1 developed that index? 2 A. To some extent. I wasn't involved back then 3 with the Surface Water Coalition negotiations with IGWA, 4 but from what I understand there were Surface Water 5 Coalition and IGWA experts involved in picking out the 6 wells and establishing the targets that are listed. 7 Q. And since your time as a consultant for the 8 Surface Water Coalition, have you evaluated those 9 individual wells on an annual basis? 10 A. Yes. Every year we get data from IDWR and run 11 through a calculation kind of parallel with IGWA's 12 experts, and we come up with a sentinel well index 13 calculation and then crosscheck that with IDWR. 14 Q. And that index is a compilation of those 15 various well levels set to a certain standard. Is that 16 how you would describe that? 17 A. Yeah, that's right. It basically takes the 18 multiple measurements from many wells and rolls it into 19 one number that can be compared against the historical 20 data and also the targets. 21 Q. And that number is reported to the department? 22 A. That's right. 23 Q. And I'm just going to generally refer you to 24 pages 5 and 6, and can you describe your opinion offered 25 in what I'll call part 2.3?</p>	<p style="text-align: right;">45</p> <p>1 A. Yeah. So basically we took the numbers for -- 2 the breach numbers that the director specified in Table 3 1 in my report there and put them into the ESPAM model 4 to calculate the impacts on the sentinel well index and 5 came up with, from the 2022 breach numbers distributed 6 amongst the associated ground water districts, an impact 7 of a .29 foot decline in the sentinel well index. 8 We also evaluated the impact to the -- the 9 reach gains of the Snake River and typically focusing on 10 the reach gains important to the Surface Water Coalition 11 supplies, which would be basically from Blackfoot to 12 Milner. 13 HEARING OFFICER: Sir, would you please give 14 me a definition of reach gain impacts? 15 THE WITNESS: Yes. So those parts of the 16 Snake River between those USGS stream gauges, the 17 upstream gauge being the Blackfoot gauge and downstream 18 all the way to Milner. There's a great deal of ground 19 water that gains to the river in that area. And so 20 those gains to the river show up as supplies for the 21 Surface Water Coalition. And so the changes to those 22 reach gains are what we use the model to calculate. And 23 so in this case -- 24 HEARING OFFICER: To calculate? 25 THE WITNESS: The changes in those reach</p>

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<p style="text-align: right;">46</p> <p>1 gains. And so in this case, the -- the extra 2 groundwater pumping reduces the amount of water that 3 moves from the aquifer into the Snake River, and that's 4 what we were quantifying here. 5 HEARING OFFICER: Okay. I just needed that 6 info. Thank you, sir. 7 THE WITNESS: No problem. 8 Q. (BY MR. THOMPSON) And so is it fair to say 9 that the -- the breach number in '22 -- that what -- 10 what you identified and offered here were just some 11 examples of hydrologic impact resulting from the -- that 12 breach? 13 A. That's right. 14 Q. Can you describe your opinions offered on 15 pages 7 and 8? Or were you done with -- 16 A. Yeah, I think -- well, the -- just to clarify 17 on the reach gain impacts, there was -- basically we 18 entered the 2022 pumping into the model but then looked 19 at the -- the model of impact in future years as well, 20 so all the way out through 2072. And the point there 21 was just that the 2022 pumping has a long-term future 22 impact and Table 2 goes through the impact in each year 23 leading up to 2026 for Bingham, Bonneville, and 24 Jefferson-Clark and then the decades that follow there. 25 So it was just to show the long-term impacts.</p>	<p style="text-align: right;">47</p> <p>1 That -- that stretches onto page 7 but is 2 basically quantified in Table 2. And then Section 3 3 begins on page 7, and essentially what I was trying to 4 do there was describe what could be done within the 5 framework of the 2016 mitigation plan to cure the -- the 6 breach in 2022. 7 And so the 2016 mitigation plan has 8 measurement requirements, and in Section 3.1, I was 9 making the point that measurement can be paired with 10 reporting, and, right now, that reporting happens on a 11 somewhat annual basis. We're here at this hearing 12 obviously discussing 2022 breach numbers, and, you know, 13 it's a year and a half, two years later, and we're still 14 talking about those numbers, but we still don't know 15 what was pumped in 2023. And so that sort of delay 16 is -- is important to keep in mind as I say what I'm 17 about to say for potential cures here. 18 In a best case scenario, there would be 19 measurement in place, as specified in the 2016 20 mitigation plan, that would then lead to, essentially, 21 real time reporting, where even if it's on a monthly 22 basis or down to a daily basis, IDWR could administer 23 the allocated amount for ground water pumping. 24 Essentially a real time basis that would actually 25 prevent a breach from happening or at least minimize the</p>
<p style="text-align: right;">48</p> <p>1 amount of the breach to a much smaller amount that could 2 be dealt with in the future. And so that -- that 3 Section 3.1 is basically setting up that kind of ideal 4 condition. 5 In Section 3.2, I was trying to make it more 6 realistic for the current situation, given the lag in 7 reporting on pumping numbers, and because 2022, 8 obviously, happened in the past, we can't go back and 9 change that. So in Section 3.2, I was trying to come up 10 with a remedy that would be within the framework of the 11 2016 mitigation plan applicable to the 2022 breach. 12 And so -- unfortunately, because the timing is 13 off, we have to deal with the -- the delay, but there's 14 really no way to do that in the 2016 mitigation plan. 15 So the next best thing is to basically reduce the 16 upcoming ground water diversions in the location where 17 the 2022 breach happened. So the -- the 2016 mitigation 18 plan is structured such that the -- the spatial coverage 19 is basically no more detailed than a ground water 20 district. And so in our analysis and in our proposed 21 remedy, we basically didn't get any more detailed than a 22 ground water district. 23 So, in essence, what that leads us to is a -- 24 a remedy could be fashioned for the 2024 irrigation 25 season where essentially each of the ground water</p>	<p style="text-align: right;">49</p> <p>1 districts that breached in 2022 could reduce their 2 pumping by an equal amount that they breached in -- they 3 could reduce their 2024 pumping by an equal amount to 4 what the breach was in 2022. And that's basically a 5 summary of Section 3 there. 6 Q. And I guess the recommendation of the opinion 7 that that remedy occur in the location where the breach 8 occurred -- can you discuss the importance of that? 9 A. Yeah. So, ideally, if -- if these things 10 could happen in real time, that would be ideal. The -- 11 the location of the breach and the remedy is important 12 because there is basically a different response -- 13 different temporal response across the aquifer, and it 14 can vary by years and even decades. 15 And so because of the structure of the 2016 16 mitigation plan, the ideal location of a remedy would be 17 at the location where the breach occurred. And so with 18 the 2016 mitigation plan being structured around ground 19 water districts, that's kind of why the -- the proposed 20 remedy is in the same location, the same ground water 21 districts as the breach itself. 22 Q. And if this remedy were to be recommended and 23 ultimately adopted, could that be measured and monitored 24 in this upcoming season? 25 A. Yeah --</p>

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14 (Pages 50 to 53)

<p style="text-align: right;">50</p> <p>1 HEARING OFFICER: Excuse me. I didn't hear 2 the last part of that question, sir. 3 Q. (BY MR. THOMPSON) I would say if the proposed 4 remedy offered in your report is ultimately recommended 5 and adopted, could that be measured and monitored this 6 upcoming season, assuming it's implemented for 2024? 7 HEARING OFFICER: Did you indicate what year? 8 MR. THOMPSON: 2024. 9 HEARING OFFICER: Very good. 10 A. Yes. So the measurement that's in place and 11 reported annually is basically the same measurement and 12 reporting that would be reflected in this remedy. If 13 it's applied, it would basically be a reduction in the 14 amount of pumping already reported under the 2016 15 mitigation plan. 16 Q. (BY MR. THOMPSON) Any further comments on 17 your opening report or opinions off of there? 18 UNIDENTIFIED SPEAKER: Objection. Calls for a 19 narrative response. 20 HEARING OFFICER: What? Are you done in that 21 regard? Did somebody say something? 22 UNIDENTIFIED SPEAKER: I didn't have my 23 speaker on. I apologize. But I objected that it calls 24 for a narrative response. 25 HEARING OFFICER: Restate the -- the question.</p>	<p style="text-align: right;">51</p> <p>1 MR. THOMPSON: I just asked if he had any 2 other further comments on his opening report or any 3 opinions offered. 4 HEARING OFFICER: That's fine. Overruled. 5 You may proceed. 6 A. No, I think that covers sufficiently the item 7 four topic for the hearing today. 8 Q. (BY MR. THOMPSON) If you could turn to 9 Exhibit 2, Mr. Colvin. Please identify that for the 10 record. 11 A. This would be my rebuttal report for this 2022 12 breach issue. 13 Q. And what did you review for purposes of this 14 report? 15 A. For the rebuttal, this was primarily in 16 response to IGWA's expert reports which was -- 17 HEARING OFFICER: Could I -- could I interject 18 here? I don't know that the IGWA report or that 19 testimony is in, and I would rather have any rebuttal 20 after that. It would make more sense to me and probably 21 allow IGWA to present a full panoply of evidence in that 22 regard, unless there is some significant reason why we 23 would go out of order in that regard. Can you help in 24 that regard, sir? 25 MR. THOMPSON: No. Mr. Burdick, we -- we can</p>
<p style="text-align: right;">52</p> <p>1 recall Mr. Colvin if necessary to discuss that exhibit 2 and I guess any other further opinions after we hear 3 what the other side presents. That's fine. 4 HEARING OFFICER: Any objection in that 5 regard, Mr. Budge? 6 MR. BUDGE: No. 7 HEARING OFFICER: Thank you. Why don't we do 8 it that way just because I'm old and don't understand a 9 lot. 10 MR. THOMPSON: No, that's -- that's fine. We 11 would offer Mr. Colvin as an expert on the matters 12 testified to in his report, namely ground water 13 hydrology, particularly to the Eastern Snake Plain 14 Aquifer in tender and for cross-examination. 15 HEARING OFFICER: Very well. 16 Objection in that regard, sir? 17 Hearing no objection, the Court will indicate 18 that admission of Exhibit 2 -- admission of Exhibit 2, 19 sir? 20 UNIDENTIFIED SPEAKER: [Unintelligible]. 21 HEARING OFFICER: Oh, Exhibit 1. 22 UNIDENTIFIED SPEAKER: Exhibit 1. 23 HEARING OFFICER: I'm sorry. Okay. Exhibit 1 24 is hereby admitted. You're qualified as an expert. 25 (Exhibit 1 admitted.)</p>	<p style="text-align: right;">53</p> <p>1 HEARING OFFICER: Cross in this regard? 2 CROSS-EXAMINATION 3 BY MR. BUDGE: 4 Q. Good morning, Mr. Colvin. How are you today? 5 A. Good. 6 Q. For the record, I am TJ Budge representing 7 IGWA in this proceeding. 8 Mr. Colvin, I do want to ask you a few 9 questions about your report. If you will first turn to 10 page -- or to Section 2.2, Exhibit 1, which is your 11 expert report. 12 A. Yes, sir. 13 Q. Looking at the third paragraph under 14 Section -- excuse me -- fourth paragraph under Section 15 2.2, the first sentence states, "The primary measure of 16 2016 mitigation plan activities impact on aquifer 17 conditions is through the sentinel well index." And I 18 just want to clarify for the hearing officer, if we turn 19 to the next page of your report, you've got a Figure 1? 20 A. Yes. 21 Q. I don't know that this was explained much in 22 your initial examination, but I just wanted to clarify 23 that Figure 1 represents the sentinel well index? 24 A. Yes, it does. 25 Q. I think there's 19 or 20 wells that make up</p>

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15 (Pages 54 to 57)

<p style="text-align: right;">54</p> <p>1 the index; is that correct? 2 A. That sounds about right. I'm not sure on the 3 exact number. 4 Q. And the light gray lines are the gone water 5 levels in each of those wells within the index; is that 6 right? 7 A. That's right. 8 Q. And then the dark line is the index or, I 9 guess -- would you consider that the average of all 10 those wells? 11 A. It's -- it's not quite. It's a little 12 complicated because the wells change by different 13 amounts, but the index is intended to basically come up 14 with sort of an equal contribution of each well, if you 15 will. It's essentially the -- the index is supposed to 16 represent the change in all of those wells, not 17 necessarily the average. 18 Q. Okay. That makes sense. And then your Figure 19 1 does have some diamond marks on it with some numbers 20 attached to those. There's a negative 8.72, a negative 21 3.9, and a 0.93. Could you explain what those are? 22 A. Those are the -- those are the sentinel well 23 index targets that the 2016 mitigation plan set forth. 24 And so the point was that the -- the sentinel well index 25 was going to be measured against those three levels as</p>	<p style="text-align: right;">55</p> <p>1 an indication of aquifer conditions and the impact of 2 IGWA's actions related to the mitigation plan. 3 Q. Yeah. So the anticipation at the time the 4 parties signed the agreement is that if they -- the 5 ground water districts conserved the 240,000 acre-feet 6 that the water level in the aquifer would increase and 7 reach or exceed those benchmarks and -- and the ultimate 8 goal, the diamonds that you just described? 9 A. That's right. That would indicate basically 10 the aquifer recovering. 11 Q. Okay. And if we look at the index, it 12 increased for a few years after 2015, and it's decreased 13 the last few years. And so it looks that in 2023, it's 14 considerably below that -- what we called benchmark, the 15 negative 3.9 foot level? 16 A. Yes. 17 Q. You discussed the sentinel well index and the 18 benchmarks in your report, but you understand that if 19 the ground water level does not reach the benchmark, 20 that negative 3.9, that does not result in a breach of 21 the settlement agreement? 22 A. That's right. That would just implement -- I 23 don't exactly know the procedure, but adaptive 24 management was I think supposed to be the response to 25 not meeting these goals.</p>
<p style="text-align: right;">56</p> <p>1 Q. And that's not at issue in today's proceeding? 2 A. It is not. 3 Q. So your report isn't purporting to designate 4 adaptive management procedures or anything to that 5 effect? 6 A. No. 7 Q. It's limited simply to your opinion as to an 8 appropriate remedy for the excess pumping that allegedly 9 occurred in 2022? 10 A. That's right. Cure for the breach. 11 Q. Okay. Turning back to that Figure 1 in your 12 report, are you aware that when the party signed the 13 settlement agreement that the ground water model, the 14 ESPA model, was used to predict what would happen to 15 ground water levels if the 240,000 acre-feet of 16 conservation was implemented annually? 17 A. Yes, I heard about that. 18 Q. You've seen that chart or graph? 19 A. Yes. 20 Q. And 2015, the model showed that if the ground 21 water districts did their 240, that the -- assuming 22 average hydrologic conditions -- that the index would 23 have surpassed the benchmark and goal that you have 24 marked on Figure 1? 25 A. Yes, I'm aware of that.</p>	<p style="text-align: right;">57</p> <p>1 Q. And that analysis was done under Version 2.1 2 of the ESPA model? 3 A. Yes. 4 Q. And you understand that led the parties to 5 believe that as long as they did this that the aquifer 6 would recover to the levels that they anticipated? 7 A. Yes. 8 Q. You understand the Department has subsequently 9 changed the model and issued a new Version 2.2? 10 A. Yes. 11 Q. And -- and you understand that Version 2 made 12 some significant changes in the -- what I call storage 13 capacity of the aquifer? 14 HEARING OFFICER: What's the date of the 15 revision, please? And I'm sorry to interrupt you, 16 Mr. Budge. 17 THE WITNESS: 2021 or 2022, somewhere in that 18 time frame. 19 HEARING OFFICER: So the new Version 2.2 was 20 put in in 2022, sir. 21 MR. BUDGE: That sounds about right. It was a 22 couple years ago. 23 THE WITNESS: Yeah. 24 MR. BUDGE: '21, '22. 25 [Unintelligible cross-talk.]</p>

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<p style="text-align: right;">58</p> <p>1 THE WITNESS: -- process that stretched over 2 the calendar year. So 2021 or 2022. 3 MR. BUDGE: Sounds about right. 4 HEARING OFFICER: We'll use 2022. 5 Q. (BY MR. BUDGE) And in '22, they made a 6 significant change to the storage capacity in the model 7 cells? 8 A. Yes. The -- the term of the storativity, yes. 9 That's -- that's right. There was a change to that 10 input for the model. 11 Q. And as I understand it, what that change did 12 is it -- it -- it told the model that each model cell 13 can hold more water than Version 2.1? 14 A. It's hard to simplify it down to that 15 statement because it varies across the whole model, and 16 so each cell changed differently. If I remember 17 correctly, there were actually model cells where the 18 change -- the opposite change happened, but, in general, 19 when you look at the model, it -- for the most part, the 20 amount of store -- the storativity value went up. 21 Q. Yeah. 22 A. Representing, like you said, that basically a 23 given volume of the aquifer could hold more water. 24 Q. Yeah. And when they made that change, the 25 effect of that is that as you add water to the aquifer,</p>	<p style="text-align: right;">59</p> <p>1 you get less of a rise in the water table? 2 A. Again, it's a very complicated set of 3 variables, but if you isolate just those two variables, 4 the water coming in and the storativity, that's right. 5 So the water level would not rise as much with the same 6 amount of water coming into that cell. 7 Q. So I mentioned a moment ago, and you agreed, 8 that in 2015 the parties used the model to predict what 9 would happen if there was a 240,000 acre-foot water 10 budget change, and Version 2.1 of the model showed that 11 the ground water level would increase significantly and 12 would have surpassed the benchmark and goal that -- that 13 you've shown on Figure 1; correct? 14 A. Yes. 15 Q. Have you also seen the modeling of Version 2.2 16 which did the same analysis? 17 A. Yes. 18 Q. And under Version 2.2, the water level rises 19 at a much lower rate than Version 2.1? 20 A. A lower rate, yes. 21 Q. And if -- and if you run the same analysis in 22 Version 2.2, I think it takes 20 or 30 years before the 23 water table will rise to the benchmark shown in Figure 24 1; is that right? 25 A. Yeah. I don't have those figures in front of</p>
<p style="text-align: right;">60</p> <p>1 me, but it does take longer. 2 Q. Okay. 3 A. And none of the data shown on Figure 1 is -- 4 is basically associated with the model. These are all 5 measurements of actual water levels in the aquifer. 6 Q. But you do make it a point in your report to 7 note that the water level in the sentinel well index is 8 below the 2023 benchmark? 9 A. That's right. 10 Q. And, in fact, given the change to the model, 11 the Version 2.1 misled the parties into thinking that 12 they would achieve the 2023 benchmark, when, in reality, 13 the 240,000 acre-feet would not have even achieved it 14 from the get-go? 15 A. I can't speak to who was misled because I 16 wasn't part of all of that, but the model did show a 17 faster response -- a fast water level response to 18 conservation of 240,000 acre-feet in a year. 19 Q. Okay. Let me have you turn to Section 2.3.1 20 of your report. 21 A. Okay. 22 Q. That section has got a heading "Sentinel Well 23 Index Impacts," and the first paragraph states that 24 ESPAM results show that the 2022 underperformance by 25 Bingham, Bonneville-Jefferson, and Jefferson-Clark</p>	<p style="text-align: right;">61</p> <p>1 ground water districts will cause a total of a 0.29 foot 2 decline in the sentinel well index. 3 I want to make sure I understand what you've 4 done to calculate that 0.29 foot decline figure. I 5 couldn't understand that from -- from the report, but my 6 assumption is that you took the figures from Table 1 of 7 your report, which is the deficit, the conservation 8 deficit for those three ground water districts in 2022, 9 and you modeled what effect that deficit would have on 10 the sentinel well index and that's what generated the 11 0.29 foot decline? 12 A. That's right. We took the 2022 breach 13 numbers, distributed the amount in Table 1 throughout 14 the entire district as a stress in the model and then 15 calculated the total reduction in the sentinel well 16 index value, and that was 0.29. 17 Q. Okay. So if I go back to Figure 1 and I look 18 at the sentinel well index, you've got an annotation 19 there that says 2023 SWI negative 8.97? 20 A. Yes. 21 Q. That -- that -- as I understand it, that was 22 the spring sentinel well index for 2023; is that right? 23 A. Yes. The IDWR measures the sentinel wells 24 ideally in April or March and reports those values, and 25 the 2023 calculated value for those observations was</p>

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17 (Pages 62 to 65)

<p style="text-align: right;">62</p> <p>1 negative 8.97. 2 Q. Okay. And so just to clarify, your analysis 3 is that had there been no deficit in ground water 4 conservation in 2022, that the sentinel well index would 5 have been negative 8.68 feet instead of negative 6 8.97 feet? 7 A. Yes. 8 Q. I understand. And that analysis is based on 9 the figures in Table 1 of your report -- I believe is 10 what you testified? 11 A. Yes. 12 Q. Did you assign -- so if I look at Table 1, 13 we've got these deficit figures for each ground water 14 district. If you take Bingham, for example, the 32,476 15 acre-feet, did you assign that to specific wells within 16 the ground water district? 17 A. No. We chose to distribute it across the 18 entire ground water district because my read of the 2016 19 mitigation plan is that the Surface Water Coalition 20 basically agreed to district-wide management, and so the 21 annual reporting is actually on a well-by-well basis. 22 And so we could have done that, distributing the 23 overpumping to specific wells, but I felt to be 24 consistent with the 2016 mitigation plan, we should 25 distribute it across the districts.</p>	<p style="text-align: right;">63</p> <p>1 Q. Okay. So had you looked at the specific wells 2 that had pumping deficits in that year, would the 3 analysis potentially have generated a different result? 4 A. Possibly. I haven't done that analysis 5 though. 6 Q. Okay. If the conservation deficit figures of 7 Table 1 were to change, that would also cause your 8 calculation of the 0.29 acre-foot decline to also 9 change? 10 A. It would depend how much they change. So it 11 could. 12 Q. So let's just -- hypothetically, if those 13 numbers were cut in half, then the effect on the 14 sentinel well index would have been decreased by some 15 amount, half presumably? 16 A. I don't know if it would be half, but, yes, it 17 would be reduced. 18 Q. Okay. Okay. Let me have you turn to Section 19 2.3.2 of your report. This is where you discuss reach 20 gain impacts which you testified on direct examination 21 as being the impacts to the Snake River reach from 22 Blackfoot to Mini- -- to Milner, I believe; is that 23 right? 24 A. Yes. 25 Q. Was it Blackfoot to Milner or Blackfoot to</p>
<p style="text-align: right;">64</p> <p>1 Minidoka? 2 A. Well, in the model it's Blackfoot to Minidoka. 3 So that's what we calculated. 4 Q. Okay. And just so I understand this, you took 5 the conservation deficit figures from Table 1 and 6 modeled what effect those would have on the 7 Blackfoot-Minidoka reach gains over time? 8 A. Yes. 9 Q. So if I look at Table 1, there's a total 10 [unintelligible] deficit of 56,285 feet? 11 A. Yes. 12 Q. And then if you look at the -- at Table 2, the 13 total impact to the near Blackfoot to Minidoka reach is 14 26,143 acre-feet? 15 A. Yes. 16 Q. So between those three districts, you know, a 17 little under 50 percent of the conservation deficit 18 accrues at the reach over time? 19 A. Yes. 20 Q. And just to be clear, you calculated in 2022 21 the total reach gain deficit was 4,245 acre-feet? 22 A. Yes. 23 Q. And -- and that number is -- 24 HEARING OFFICER: Wait a second. Do we have 25 any water? [unintelligible] not alcohol.</p>	<p style="text-align: right;">65</p> <p>1 UNIDENTIFIED SPEAKER: We can take a short 2 recess if you like. 3 HEARING OFFICER: Oh, it is alcohol. Thank 4 you. And I apologize, sir. 5 MR. BUDGE: Okay. No apology. No problem. 6 Q. (BY MR. BUDGE) So retrieving my prior 7 question, on Table 2, you've got on the left column the 8 calendar year. So that's showing, as a result of the 9 roughly 56,000 conservation deficit in 2022, there was 10 an impact in that year of 4,245 acre-feet to the reach? 11 A. That's right. And I just want to point out 12 that Table 2 only goes through 2072. So there would be 13 additional impacts after that time frame -- 14 Q. Okay. 15 A. -- that we did not model. 16 Q. So you modeled 50 years. In over 50 years, 17 how much impact would there be? 18 A. That's right. 19 Q. And -- and I assume you've captured about 20 90 -- 99 percent of the impact within that 50 years? 21 A. I'm not sure. 22 HEARING OFFICER: Thank you, sir. 23 UNIDENTIFIED SPEAKER: We want this counted 24 towards our [unintelligible]. 25 HEARING OFFICER: Okay. I'm sorry. Excuse</p>

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<p style="text-align: right;">66</p> <p>1 me. 2 [Unintelligible conversation.] 3 HEARING OFFICER: Mr. Budge, how much more 4 time do you have? 5 MR. BUDGE: Probably about 15 minutes -- 6 HEARING OFFICER: Okay. That's fine. 7 MR. BUDGE: -- and I would be fine to take a 8 break if you would like. 9 HEARING OFFICER: No, no. Finish that up. 10 MR. BUDGE: Okay. 11 HEARING OFFICER: And then we'll break for 12 lunch or take a break. 13 MR. BUDGE: Okay. 14 Q. (BY MR. BUDGE) Mr. Colvin, we were discussing 15 Table 2 of your report, and it shows the impacts to the 16 reach over the next 50-year period. You had testified 17 that there may be some impacts that extend beyond 18 50 years? 19 A. Yes. 20 Q. What percentage of the impacts do you 21 anticipate would be manifested within the first 22 50 years? 23 A. I don't know. But I didn't do that analysis. 24 Q. Close to 100 percent? 25 A. Like close if you mean more than 50 percent?</p>	<p style="text-align: right;">67</p> <p>1 Yes. I don't know what the actual number would be. 2 Q. Well, I'm just looking here. In the first 3 50 years, you've got 26,143 acre-feet, and of that 4 amount, only 787 accrued from 2047 to 2072. So over the 5 last half of that, you've only got a really small 6 percentage -- 7 A. Yeah. 8 Q. -- of the accrual. So for pragmatic purposes, 9 this table -- 10 A. [Unintelligible] be more than 90 percent, that 11 those tails -- meaning the -- the small numbers -- they 12 tend to stretch out for a very long time. 13 Q. Okay. If we look at 2022, what you're saying 14 is the deficit conservation of 56,000 acre-feet caused 15 an actual impact to the reach gains of 4,245 acre-feet 16 in that year? 17 A. That's the model calculation [unintelligible]. 18 Q. And in 2023, it's 6,850 feet? 19 A. Yes. 20 Q. And if the Department were to impose a remedy, 21 wouldn't it make sense to require conservation 22 equivalent to the reach gains -- or excuse me -- require 23 the delivery of water equivalent to the reach gains? 24 A. My understanding of the 2016 mitigation plan 25 is that's not how it's structured.</p>
<p style="text-align: right;">68</p> <p>1 Q. So you're not -- by putting this information, 2 you're not suggesting that this would be a potential 3 remedy the Department could use? 4 A. Not under the 2016 mitigation plan. 5 Q. Okay. Your -- your opinion is that the impact 6 should be remedied solely by excess -- or additional 7 ground water conservation? 8 A. Under the 2016 mitigation plan, that seems 9 like the most effective remedy. 10 Q. Okay. You mentioned during your testimony 11 that the effect of the reach -- excuse me -- the effect 12 of the deficit conservation from 2022 would stand 13 multiple years as we've just discussed? 14 A. Yes. 15 Q. And just for reference, on -- in Section 2.2 16 of your report, paragraph 3, you state, "Excess pumping 17 by these ground water districts has long-term effects 18 that outlast any one irrigation season." And then in 19 Section 2.3.1, paragraph 3, the second sentence, you 20 state, "These impacts propagate into the future." And I 21 just -- to be clear, Table 2 is -- is representing those 22 statements that the impacts accrue over the years? 23 A. Yes. 24 Q. So your point is that assuming a ground water 25 district pumped more ground water than they should have</p>	<p style="text-align: right;">69</p> <p>1 in 2022, that additional withdrawal from the aquifer 2 will propagate for years in the future? 3 A. I'm sorry. Can you restate that? 4 Q. Assuming a ground water district pumps more 5 water than they should have in 2022, the effect of that 6 additional withdrawal from the aquifer will propagate 7 many years into the future? 8 A. Yes. 9 Q. And you would agree that the opposite is also 10 true. If a ground water district conserved more water 11 than was required in 2022, the addition -- the effects 12 of that additional conservation would propagate for many 13 years into the future? 14 A. Yes. 15 Q. You're aware that the ground water districts 16 conserve much more than 240,000 acre-feet from 2016 to 17 2020? 18 A. Yes. 19 Q. You're familiar with the performance report 20 [unintelligible] every year that shows conservation by 21 ground water district? 22 A. I am, yes. 23 Q. Have you ever modeled the effect of the 24 surplus conservation on either the sentinel well index 25 or Snake River reach gains?</p>

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<p style="text-align: right;">70</p> <p>1 A. Yes. 2 Q. And you understand that the surplus 3 conservation that the districts performed from 2016 to 4 2020 had a positive effect on the sentinel well index 5 and a positive effect on Snake River reach gains that is 6 greater than the deficits you've reported in your 7 report? 8 A. I had not done that analysis, and it's my 9 understanding that the 2016 mitigation plan is basically 10 an aquifer recovery plan that is intended to deal with 11 historical pumping in the -- the historical pumping that 12 predates the 2015 agreement and the 2016 mitigation plan 13 so that it -- it's basically actions intended to recover 14 the historical impacts of junior ground water pumping, 15 as opposed to mitigating future impacts or allowing 16 future impacts. 17 Q. Okay. Let me -- let me ask it this way. If 18 you'll open your binder that lists IGWA's exhibits. 19 Excuse me. We're going to use the common exhibits. 20 A. Okay. 21 MR. BUDGE: Hearing officer, I've got a lot of 22 paper on a small podium. Do you mind if I sit down -- 23 HEARING OFFICER: No. 24 MR. BUDGE: -- for this next line of 25 questions?</p>	<p style="text-align: right;">71</p> <p>1 HEARING OFFICER: Go right ahead. Turn that 2 mic off, and then turn that one on, please. 3 MR. BUDGE: Thank you. 4 Q. (BY MR. BUDGE) David -- or, Mr. Colvin, if 5 you'll turn to Exhibit 518. 6 A. Okay. 7 Q. I'm actually going to have you turn one page 8 forward to 517. 9 A. Okay. I'm there. 10 Q. There's a document labeled "Settlement 11 Agreement Implementation Report to the Steering 12 Committee from the Ground Water Districts dated April 1, 13 2017, Regarding 2016 Ground Water Diversion and Recharge 14 Report." 15 Have you seen this before? 16 A. I have. 17 Q. You're aware that IGWA submits this type of 18 report every year to the Steering Committee? 19 A. Yes. 20 Q. And if you'll turn to page -- excuse me -- 21 Exhibit 518. 22 A. Okay. 23 Q. Do you recognize that table? 24 A. I do. 25 Q. And that table or something like it is</p>
<p style="text-align: right;">72</p> <p>1 submitted every year with the performance report that 2 goes to the Steering Committee? 3 A. That's right. 4 Q. And the data in this table is -- is the data 5 that you have -- these tables have provided some of the 6 data you've used for your modeling in this proceeding? 7 A. Not really because all we did for this 8 proceeding was to take the Table 1 in my report, which 9 came from the director's ruling. So we didn't actually 10 reference the performance summary tables. 11 Q. Understood. Yes. Okay. You -- you utilized 12 the numbers from the director's August 2nd, 2023, order? 13 A. Yes. 14 Q. And you understand that those numbers were 15 derived from IGWA's 2021 performance report? 16 A. 2022 performance report. 17 Q. 2021, actually, but I can strike that 18 question. It's not essential. 19 A. Okay. I don't -- 20 Q. I'm going to ask you this. 21 A. [Unintelligible.] 22 Q. Do you generally understand the data that's 23 represented in Exhibit 518? 24 A. I do. 25 Q. And if we look on the left side of that,</p>	<p style="text-align: right;">73</p> <p>1 there's a row for each ground water district, and then 2 there's a column labeled "Diversion Baseline," and then 3 there's a column labeled "Target Conservation." 4 Do you understand that the target conservation 5 column shows the conservation obligations that IGWA had 6 assigned to each district for that year 2016? 7 A. Yes. And it also includes A&B Irrigation 8 District and the Southwest Irrigation District, but, 9 yes, I see that IGWA assigned target conservation. 10 Q. Okay. And then if you go to the second column 11 from the right, there's a column, like, of total 12 conservation? 13 A. Yes. 14 Q. And that's the sum of the conservation 15 actually performed by each ground water district, 16 meaning their diversion reductions plus their recharge. 17 Do you understand that? 18 A. Yes. 19 Q. And the mitigation balance column is the 20 difference between the target conservation and the total 21 conservation. Do you see that? 22 A. I do. 23 Q. And so you understand that if the mitigation 24 balance column has a positive number, that means a 25 district's total conservation exceeded its target</p>

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20 (Pages 74 to 77)

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1 conservation, and if the mitigation balance column has a
2 negative number, that means the district's total
3 conservation was less than its target -- target
4 conservation. Do you understand that?
5 A. Yes.
6 Q. And if we look at the bottom row, we have --
7 UNIDENTIFIED SPEAKER: Hearing Officer, I'm
8 just going to object to this line of questioning. I
9 think it goes beyond the scope of his direct. I guess,
10 you know, what happened in those prior years IGWA
11 contends it did or didn't do -- that's not at issue in
12 this hearing.
13 HEARING OFFICER: Sir?
14 MR. BUDGE: Yeah. This is foundation for the
15 remedy, some questions about the remedy that Mr. Colvin
16 has recommended.
17 HEARING OFFICER: So total conservation is
18 based on what, sir?
19 MR. BUDGE: So the -- and I -- and I can ask a
20 witness to explain this further.
21 HEARING OFFICER: In your estimation, it's a
22 document, as I understand it, given by IGWA to the
23 Department; correct?
24 MR. BUDGE: Correct.
25 HEARING OFFICER: And I'm going to ask you in

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1 HEARING OFFICER: All right.
2 MR. BUDGE: And then the diversion reduction
3 is the -- is the baseline less the usage. So it shows
4 how much less water that district pumped in 2016. So
5 for American Falls-Aberdeen, it was 21,836 acre-feet.
6 And how much recharge that district performed and the
7 diverse reduction plus the recharge gets you to the
8 total conservation.
9 HEARING OFFICER: All right. I'm going to let
10 it in, and it's obvious cross-examination and/or
11 further -- further questions of this witness may help
12 clear up as to whether or not it's within the parameters
13 of my previous ruling.
14 MR. BUDGE: Okay.
15 HEARING OFFICER: I'll make that decision
16 based upon the evidence presented.
17 MR. BUDGE: Thank you.
18 Q. (BY MR. BUDGE) Mr. Colvin, if you look at the
19 bottom right hand cell, it has the total mitigation
20 balance for 2016.
21 A. Yes.
22 Q. And you can see that that figure does not
23 include Southwest or Falls or A&B Irrigation District;
24 correct?
25 A. That's right.

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1 that regard.
2 MR. BUDGE: Yes. So the total conservation is
3 the sum of diversion reductions plus recharge.
4 HEARING OFFICER: Diversion reductions consist
5 of --
6 MR. BUDGE: If you look at the second column
7 from the left, there's diversion baseline, and during
8 this period, this was based on pre-agreement average
9 diversions within each district. And so this was viewed
10 as the -- the number from which conservation pumping
11 reductions will be measured.
12 So these -- these numbers reflect average
13 diversions -- the baseline reflects average diversions
14 within each ground water district for the period
15 2010-2014. That became the baseline. And then each
16 year, there's a usage column. So if we look at American
17 Falls -- Aberdeen-American Falls, they had a diversion
18 baseline of 271,989 acre feet. There were --
19 HEARING OFFICER: Okay.
20 MR. BUDGE: Yeah.
21 HEARING OFFICER: We're getting too far. I'm
22 sorry, Mr. Budge, [unintelligible].
23 MR. BUDGE: That's okay. And I'll just finish
24 that 2016 usage is the -- the volume actually pumped
25 that year.

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1 Q. So that 34,923 acre-feet figure -- that shows
2 that among the signatory ground water districts, they
3 had collectively conserved 34,923 acre-feet more than
4 the target that had been assigned to them?
5 A. That's what's reported here.
6 Q. Okay. And if you'll turn next to Exhibit 521.
7 A. Okay.
8 HEARING OFFICER: Let me clarify one question.
9 Did you -- documents 517 and 518 -- did you use those
10 documents as part of your expert opinion?
11 THE WITNESS: I did not.
12 HEARING OFFICER: All right. Thank you. You
13 may proceed.
14 MR. BUDGE: Yes. Thank you.
15 Q. (BY MR. BUDGE) Exhibit 521 is a similar table
16 for the year 2017 labeled "2017 Performance Summary
17 Table." Do you see that?
18 A. Yes.
19 Q. And that shows that in 2017, the mitigation
20 balance among those districts was 289,987 acre-feet. Do
21 you see that?
22 A. Yes.
23 Q. And that would reflect that the signatory
24 districts conserved 289,987 acre-feet more than the
25 target conservation that had been assigned that year?

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21 (Pages 78 to 81)

<p style="text-align: right;">78</p> <p>1 A. That's what's reported here. 2 [Unintelligible cross-talk.] 3 HEARING OFFICER: -- this document your expert 4 opinion? 5 THE WITNESS: I did not. 6 HEARING OFFICER: Very well. 7 Q. (BY MR. BUDGE) And your prior testimony was 8 that if a ground water district had conserved more water 9 than was required that the effect of it would propagate 10 into future years? 11 A. Yes. 12 Q. Did you have the ability to model the effect 13 of the surplus conservation in prior years on the 14 sentinel well index or -- or Snake River reach gains? 15 A. Yes, but I didn't do that because I didn't 16 feel it relevant to this hearing. 17 Q. Okay. And I won't walk through the other 18 performance tables, but you understand that, from 2016 19 through 2020, every year the ground water districts did 20 more conservation than had been assigned those years? 21 A. I haven't reviewed that; so I can't speak 22 specifically to that. 23 Q. Okay. Let me have you turn back to your 24 expert report. That's Exhibit 1. 25 A. Okay.</p>	<p style="text-align: right;">79</p> <p>1 MR. BUDGE: And I'm getting near the end here, 2 Hearing Officer. 3 HEARING OFFICER: That's fine. 4 Q. (BY MR. BUDGE) If you'll look at Section 3. 5 A. Okay. 6 Q. The paragraph right under that heading, the 7 second sentence reads, "An appropriate remedy should 8 mitigate all impacts of IGWA's excessive junior ground 9 water pumping, including longterm impacts that happen 10 over many years." 11 And then I'll have you scroll down to 3.2, 12 which is on the same page, where you talk about the 2022 13 breach remedy. And the second paragraph begins with 14 this sentence. "An effective remedy to the 2022 breach 15 could include reducing 2024 pumping at the locations 16 where the excessive pumping occurred." 17 So as I understand your recommendation, it's 18 that these -- the districts that had a deficit in their 19 conservation in 2022 be required to make up that deficit 20 in 2024. 21 A. Under the 2016 mitigation plan, yes. 22 Q. That's your recommendation? Wouldn't it have 23 been better if they had done surplus conservation in 24 advance instead of doing it in arrears? 25 A. Well, under -- the issue here for the '22 --</p>
<p style="text-align: right;">80</p> <p>1 2022 breach hearing, it would have been better if they 2 didn't over pump in 2022. And so anything that happened 3 before 2022, in my mind, is -- this is still -- the 2016 4 mitigation plan is an aquifer recovery plan that 5 specifies longterm actions that the district should take 6 to recover impacts from junior ground water pumping for 7 many decades. 8 Q. Yeah, I agree with that. If we look back to 9 your Table 2 in your report. 10 A. Yes. 11 Q. This is where you show the impacts to the 12 Snake River reach gain, and you're showing, you know, 13 over 4,000 acre-feet of impact in '22 and another 6,800 14 acre-feet of impact in '24 -- or excuse me -- in '23. 15 And if the districts do additional conservation in '24, 16 that won't offset the impacts that were realized in '22 17 or '23; right? 18 A. Can you restate that question? 19 Q. If the districts do what you've suggested, 20 which is to do additional conservation in '24 -- 21 A. Yes. 22 Q. -- to offset the deficit from '22, that will 23 not mitigate the reach gain impacts that were realized 24 in '22 or '23, because those are, you know, water under 25 the bridge, so to speak; right?</p>	<p style="text-align: right;">81</p> <p>1 A. And likely some of 2024 would be unrealized 2 because the -- the time it takes for these impacts to 3 propagate through the aquifer and get it to the 4 [unintelligible]. 5 Q. Yeah. So wouldn't it have been better if the 6 districts would have done surplus conservation prior to 7 '22 so that it did offset the impacts? 8 A. Well, again, my understanding of the topic of 9 this hearing and the structure of the 2016 mitigation 10 plan is not that IGWA's actions are intended to cure 11 future impacts or [unintelligible]. It's to recover the 12 aquifer. And so the excess conservation was helpful in 13 recovering the aquifer, but I'm not -- I wouldn't say 14 that it should be applied to future impacts. 15 Q. Okay. So let's -- let's say we -- we talk 16 about the sentinel well impacts instead of the reach 17 gains. So you've calculated a 0.29 foot decline in the 18 sentinel well index? 19 A. Yes. 20 Q. And your recommendation is that the Department 21 require the districts to do additional conservation to 22 offset that. Wouldn't it have been better if they had 23 done additional conservation in advance rather than in 24 arrears? 25 A. Better than the remedy I propose? Yeah. Yes,</p>

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22 (Pages 82 to 85)

<p style="text-align: right;">82</p> <p>1 but we can't go back in time and change what was done in 2 the past. 3 Q. Okay. 4 A. And that's why I structured the remedy, 5 because it is intended to be within the framework of the 6 2016 mitigation plan, which really kind of puts some 7 constraints on what a remedy can look like because 8 there's specific actions that are outlined in the 2016 9 mitigation plan. And recovering a 2022 breach, I think 10 that the best remedy is the one that I've put forward. 11 Q. Okay. But, hydrologically speaking, you would 12 agree that if a district is going to perform surplus 13 conservation to offset the impacts of deficit 14 conservation, it would be better for that to be 15 performed in advance instead of in arrears? 16 A. In general, doing things in the past at a time 17 that we can realize the benefits now would be better. 18 And so if that's what you're saying, in broad terms, 19 outside of the 2016 mitigation plan, then, yes, I would 20 agree with that. 21 MR. BUDGE: Okay. No further questions. 22 HEARING OFFICER: Redirect, Mr. Thompson? 23 MR. THOMPSON: [Unintelligible.] 24 HEARING OFFICER: Thank you, sir. 25 UNIDENTIFIED SPEAKER: [Unintelligible.]</p>	<p style="text-align: right;">83</p> <p>1 HEARING OFFICER: Oh, sir. I'm sorry. Go 2 right ahead. 3 UNIDENTIFIED SPEAKER: It's okay. I'm really 4 quiet over here. 5 HEARING OFFICER: Not to worry. 6 UNIDENTIFIED SPEAKER: [Unintelligible.] 7 HEARING OFFICER: There you go. 8 UNIDENTIFIED SPEAKER: Is it okay if I just -- 9 HEARING OFFICER: Please. 10 UNIDENTIFIED SPEAKER: -- ask here just a 11 couple questions. 12 CROSS-EXAMINATION 13 BY UNIDENTIFIED SPEAKER: 14 Q. Mr. Colvin, I just wanted to ask a question. 15 Mr. Budge was asking you a series of questions about 16 whether or not your analysis had looked at conservation 17 that exceeded the obligation by ground water districts 18 in the past. Do you recall that line of questioning? 19 A. I do. 20 Q. I just want to ask a couple questions. It's 21 my understanding that you -- the reason you didn't look 22 at that was based off your understanding of the 2016 23 settlement agreement; is that correct? 24 A. And the context of this hearing -- 25 Q. Okay.</p>
<p style="text-align: right;">84</p> <p>1 A. -- and the issues specified. 2 Q. Okay. So was your analysis purely technical, 3 or did it include legal analysis of -- 4 A. I tried to stick to the technical issues. 5 Q. Okay. Did -- so what provisions of the 6 settlement agreement were you looking at that 7 determined -- made you come to the conclusion that you 8 shouldn't look at those past years? 9 A. Basically the -- the longterm actions listed 10 in the 2016 mitigation plan. 11 Q. Okay. Does the 2016 agreement give you any 12 direction, or are there any specific provisions that 13 specifically state that you can't look at the past years 14 when you're trying to determine what injury in 2022 15 looked like for -- as you model it into the future? 16 A. Well, there is the annual requirement of 17 240,000 acre-feet per year, and so that kind of narrowly 18 defined my analysis. 19 Q. Okay. Any other provisions? 20 A. Any other provision -- 21 Q. Provisions in the agreement that you were 22 looking at that narrowed your analysis to just looking 23 at 2022 and then into the future? 24 A. I would probably have to review the provisions 25 and remind myself of what they were, but that was the</p>	<p style="text-align: right;">85</p> <p>1 main reason. The crux was that 240,000 acre-feet a year 2 was the requirement. 3 Q. Okay. From purely a technical standpoint, 4 though, if you were to look at injury that occurred in 5 2022, do you have any concerns with overstating that 6 injury? Purely from a technical standpoint, ignoring 7 the 2016 and what you believed you were limited to, do 8 you have concerns that if you don't factor in prior 9 conservation efforts from the past that it's going to 10 overstate the injury by just looking at 2022 and moving 11 forward? 12 UNIDENTIFIED SPEAKER: I'll object to the form 13 of this question. The -- the issue of 2022, and I guess 14 the breach that was found, has been determined -- has 15 been judicially [unintelligible] -- 16 HEARING OFFICER: That's sustained. 17 UNIDENTIFIED SPEAKER: -- what that injury is 18 [unintelligible]. 19 HEARING OFFICER: Ask the next question. 20 UNIDENTIFIED SPEAKER: Okay. I don't have 21 anything further. Thanks. 22 HEARING OFFICER: Excuse me, sir? 23 UNIDENTIFIED SPEAKER: Nothing further. 24 HEARING OFFICER: Okay. Very good. 25 Anyone?</p>

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23 (Pages 86 to 89)

<p style="text-align: right;">86</p> <p>1 MR. ANDERSON: Just briefly. 2 HEARING OFFICER: Your name, sir? 3 MR. ANDERSON: Dylan Anderson with Bingham 4 Ground Water District. 5 HEARING OFFICER: Very good. Thank you. 6 CROSS-EXAMINATION 7 BY MR. ANDERSON: 8 Q. I just have a quick question in regards to -- 9 let me get back into your report. You modeled out an 10 injury impact of roughly 56,285 acre-feet? 11 A. Yeah. Not to quibble over nomenclature, but 12 it was actually a breach amount that I was modeling. 13 Q. Okay. 14 A. So -- 15 Q. In the -- the report on Table 2 -- or I'm 16 sorry -- in the -- in the order on Table 2 that is the 17 subject of this hearing, it -- the Department found that 18 the -- I'm sorry. What was the term you used? You said 19 a breaching number? 20 A. A breach amount. 21 Q. Of the breach amount? 22 A. Breach amount. 23 Q. Okay. The Department found the breach amount 24 to be 38,734. In Table 2 -- I -- do you remember which 25 exhibit is the order? I'm -- I've got it in front of</p>	<p style="text-align: right;">87</p> <p>1 me. I can't remember which. 2 UNIDENTIFIED SPEAKER: [Unintelligible.] 3 MR. ANDERSON: Yeah. Order. 4 HEARING OFFICER: And, again, make sure 5 you're -- as you talk among yourselves, your mics are 6 off, please. 7 MR. ANDERSON: I'm sorry. I just -- I'm 8 trying to find the -- 511 -- Exhibit 511. I'm sorry. 9 I've got it open here. I just didn't give him the 10 proper exhibit. 11 THE WITNESS: Okay. I'm on 511. What page? 12 MR. ANDERSON: Table 2 on page 8. 13 UNIDENTIFIED SPEAKER: 512. 14 MR. ANDERSON: Oh, I'm sorry. 512. 15 UNIDENTIFIED SPEAKER: 512. 16 MR. ANDERSON: Yeah. 17 THE WITNESS: Okay. So you want Table 2? 18 Q. (BY MR. ANDERSON) Table 2 -- it shows that 19 the total number there as 38,734? 20 A. Yes, that was the amount reported by IGWA. 21 Q. Okay. And -- and the Table -- what -- 3 -- 22 can you see how that -- those numbers were obtained? 23 A. Not as I sit here today, but my -- I -- I 24 wouldn't want to hazard a guess. 25 Q. Okay. If --</p>
<p style="text-align: right;">88</p> <p>1 A. Those are the numbers that should be 2 consistent with what we model. 3 Q. Would you agree that those numbers down there 4 in Table 3 were extracted from Table 2? 5 HEARING OFFICER: Okay. Table 3 and 5 and 6 12 -- 7 MR. ANDERSON: Yes. 8 HEARING OFFICER: -- [Unintelligible]? 9 MR. ANDERSON: Yes. They're on the same page. 10 I'm sorry. 11 HEARING OFFICER: Very good. Just for the 12 record. 13 A. I'm not sure if those values in Table 3 are 14 actually in Table 2. 15 Q. (BY MR. ANDERSON) Could -- could I direct 16 you, please, to the last column, mitigation balance? 17 A. Yeah, Table 2? 18 Q. Yes. 19 A. Yeah. 20 Q. Do you see those numbers reflected in Table 3? 21 A. Yes. The Table 3 is a positive value compared 22 to Table 2 as a negative value, but the -- the numbers 23 are the same. 24 Q. Correct. Okay. So you can see there from -- 25 from Table 2, those negative balances basically -- you</p>	<p style="text-align: right;">89</p> <p>1 called them breach numbers. I'll use your term without 2 necessarily agreeing to it -- to it, but you labeled 3 them as -- as breach deficits numbers, and then they're 4 just outlined as a positive number here in Table 3; 5 correct? 6 A. Yes. 7 Q. So if you look at that Table 2, the total 8 number there from IGWA of -- of these breach deficits 9 is -- is 38,734. Is there a reason why you didn't use 10 that number instead of the 57,637 plus Aberdeen-American 11 Falls? 12 A. Yes, because the model run we did was to 13 evaluate the impact of each ground water district's 14 breach number. And so I see now that this column -- the 15 far right column on Table 2 is IDWR's calculation of 16 the, quote/unquote, mitigation balance. And so those 17 numbers are -- the negative numbers are essentially the 18 breach numbers, and that was what is at issue here 19 today -- are the breach numbers. 20 Q. So just to be clear, IGWA -- the balance 21 there -- the 38,734 -- what's your understanding of that 22 number? 23 A. That includes credit for the additional 24 conservation measures in those districts that did not 25 breach.</p>

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24 (Pages 90 to 93)

<p style="text-align: right;">90</p> <p>1 Q. Okay. Is there a reason why those weren't 2 included in your modeling? 3 A. Yes, because the issue here today is the 2012 4 breach. 5 Q. Okay. As far as remedy goes for -- for -- for 6 curing any potential breach, did you find those 7 irrelevant or -- 8 A. I don't know if irrelevant's the right word, 9 but the location of pumping is very important to 10 understand the impacts, and so crediting those 11 conservation measures is very complicated. And, again, 12 the issue was the districts that breached, and so my 13 analysis was limited to the breach amounts. 14 Q. Okay. But IGWA as a -- as a whole, the breach 15 amount is different than the individual districts added 16 up. You would agree to that; correct? 17 A. Yes. 18 Q. Okay. And that IGWA, as a whole, it's the -- 19 the 38,000 less, obviously, now the American 20 Falls-Aberdeen amount; correct? Which was -- 21 A. Yeah, yeah. 22 Q. -- 1,300? 23 A. Yes. 24 Q. Can I draw your attention back to an exhibit 25 that TJ asked you to look at, Number 518?</p>	<p style="text-align: right;">91</p> <p>1 A. Okay. 2 Q. Okay. Was there a breach in 2016? Was IGWA 3 in breach? 4 A. There were districts that did not meet their 5 conservation targets. 6 Q. But was IGWA ever in breach in 2016, to your 7 knowledge? 8 A. I don't remember if a specific district is the 9 level of measurement of the 2016 mitigation plan 10 compliance. So I don't know. I would have to look at 11 that in detail. 12 Q. From your understanding that -- the -- the 13 agreement sets amount of -- you know, we argue 205, 240, 14 whatever it is -- it sets an amount. And from your 15 understanding, has IGWA always been free to allocate 16 that reduction amongst IGWA? Has the Surface Water 17 Coalition or IDWR ever been involved in that? 18 A. I'm not sure how IGWA distributes that 19 requirement. 20 Q. But it is IGWA that does distribute that; 21 correct? 22 A. I don't know that. 23 Q. Okay. But you don't know of any breach in 24 2016? 25 A. Again, there are districts that did not need</p>
<p style="text-align: right;">92</p> <p>1 their target conservation, and so they possibly were in 2 breach as a district. So based on my limited 3 understanding of how the conservation volumes are 4 allocated, it's possible that there was a breach in 5 2016. 6 Q. Even though the Surface Water got its full 7 amount of reductions as required by IGWA, you would 8 contend that there would still be -- 9 A. I just don't understand how each district is 10 apportioned their obligation under the 2016 mitigation 11 plan. 12 Q. Okay. I understand. 13 MR. ANDERSON: I have no further questions. 14 [Unintelligible.] 15 HEARING OFFICER: Very well. Sir? Thompson? 16 I'm sorry. 17 MR. THOMPSON: Thank you. Travis Thompson 18 again. 19 REDIRECT EXAMINATION 20 BY MR. THOMPSON: 21 Q. Just a couple questions on redirect, 22 Mr. Colvin. Mr. Budge asked you quite a few questions 23 about the district's over-performance in prior years, I 24 guess going above and beyond the 240. Do you recall 25 those?</p>	<p style="text-align: right;">93</p> <p>1 A. Yes. 2 Q. And to your knowledge, has the director 3 authorized IGWA or the district to frontload obligations 4 for future years? 5 A. My understanding is that he has not authorized 6 that. 7 UNIDENTIFIED SPEAKER: Objection. Calls for a 8 legal conclusion. 9 HEARING OFFICER: Well, I think it's in the 10 director's report that I previously allowed. It's 11 overruled. 12 MR. THOMPSON: That's all the questions I had. 13 Thank you. 14 HEARING OFFICER: Anything? Please be seated. 15 At this point in time the Court -- or excuse 16 me -- the hearing will be in recess. 17 What is the usual recess for lunch, and what 18 do you folks need? 19 (Recess taken.) 20 MS. PATTERSON: So, yeah, right there. Yes. 21 Sophia, can you turn on your camera? 22 MS. SIGSTEDT: It should -- it should be on. 23 MS. PATTERSON: Oh, there it is. Perfect. 24 Are you able to see me okay? 25 MS. SIGSTEDT: The picture is really small,</p>

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<p style="text-align: right;">94</p> <p>1 but I can hear you. 2 MS. PATTERSON: Okay. Good. All right. 3 Thank you for being here with us today. 4 HEARING OFFICER: For the record, she's 5 appearing remotely. You may proceed, and I'm sorry to 6 interrupt. 7 MS. PATTERSON: No. I was gonna mention that 8 she's [unintelligible]. 9 So Mr. Burdick explained you are appearing 10 remotely here by permission of the hearing officer. 11 I'll be sharing my screen for some of the exhibits since 12 you don't have the hard copies in front of you. 13 Do you have your expert report available, 14 though? 15 MS. SIGSTEDT: I do. I have all the expert 16 reports on my screen that I should be able to see. 17 MS. PATTERSON: Okay. Perfect. And then, 18 Hearing Officer, did you want to swear her in? 19 HEARING OFFICER: Which exhibit -- excuse me? 20 UNIDENTIFIED SPEAKER: [Unintelligible.] 21 HEARING OFFICER: Oh, gosh. Yeah. 22 Madam, please raise your right hand. 23 SOPHIA SIGSTEDT 24 called by IGWA, having been first duly sworn to tell the 25 truth relating to said cause, testified as follows:</p>	<p style="text-align: right;">95</p> <p>1 HEARING OFFICER: Thank you. 2 DIRECT EXAMINATION 3 BY MS. PATTERSON: 4 Q. All right. I'll ask for you to start with 5 your name and the name of the business -- or your 6 business. 7 A. My name is Sophia Sigstedt, and I work for 8 Lynker. 9 Q. And Miss Sigstedt, may I call you Sophia 10 today? 11 A. Yes. 12 Q. I want to go through a little bit of your 13 background. Can you tell me about your educational 14 background? 15 A. I have a master's in hydrology from the New 16 Mexico Institute of Mining and Technology. 17 Q. And what is your position with Lynker? 18 A. I'm a senior hydrologist. 19 Q. What's your area of expertise? 20 A. My area of expertise is in water resources and 21 hydrogeology. I'm a certified professional hydrologist 22 by the American Institute of Hydrology with a specialty 23 in ground water. 24 Q. And do you have expertise in modeling of 25 ground water.</p>
<p style="text-align: right;">96</p> <p>1 A. Yes. I've been doing numerical ground water 2 modeling for over 15 years. I specialize primarily in 3 basin scale water resource management in conjunctive 4 use. Particularly, I do modeling around the timing of 5 pumping impacts on depletions or accretions to surface 6 water systems, either in a conjunctive use context or in 7 planning around feasibility or environmental impact 8 analysis. 9 Q. And are you familiar with the -- what we call 10 the ESPAM, or the Eastern Snake Plain Aquifer Model? 11 A. Yes. I've been using the ESPAM model for over 12 ten years. Similarly, I've been on the Eastern Snake 13 Hydrologic Modeling Committee for over ten years. And I 14 think as was previously discussed, that committee is 15 involved in both the development and the use of the 16 ESPAM model. 17 Q. And are you a consultant for IGWA? 18 A. Yes. I've been a consultant for IGWA at least 19 since 2012, and I might have started work for them in 20 2010. 21 Q. Mr. Colvin testified earlier about working 22 with some of IGWA's consultants on the sentinel well 23 index. Are you that consultant that works with him? 24 A. Yes, I am. In that capacity, we work on the 25 IGWA-SWC Technical Working Group Committee related to</p>	<p style="text-align: right;">97</p> <p>1 the sentinel wells. 2 Q. Okay. Beyond the sentinel wells, what other 3 type of work do you do for IGWA? 4 A. I do just generally expert support in the 5 evaluation of the conjunctive administration of ground 6 water rights, looking at modeling of aquifer management, 7 mitigation plans, consumptive use analysis, analysis of 8 historical water use, things like that. 9 Q. Have you ever testified as an expert witness 10 before? 11 A. I have. 12 Q. In which cases? 13 A. I was part of some of the expert reports and 14 proceedings in the Rangen case around water trans- -- 15 water right transfers and mitigation. Recently I 16 testified in the Surface Water Coalition call related to 17 the methodology order. I've done some testimony around 18 the rest of the country related to ground water 19 modeling, aquifer budgets, looking at permit 20 applications, as well as expert support in Colorado 21 around conjunctive use administration with stream 22 depletion modeling. 23 Q. And I should have asked you this when we 24 discussed the ESPAM, but are you familiar with both 25 versions -- the Department's prior Version 2.1 and the</p>

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<p style="text-align: right;">98</p> <p>1 current 2.2? 2 A. Yes. ESPAM Version 2.1 was released pretty 3 recently from when I first began working with IGWA. So 4 I worked with that model for, you know, most of this 5 time, and then, as was discussed, ESPAM 2.2 came out 6 around 2021. And so I've had a few years of working 7 with that model. 8 Q. Okay. Thank you. Let's turn now to the 9 matter at hand. This hearing involves a settlement 10 agreement between IGWA and the Surface Water Coalition 11 which was entered into in 2015. Are you familiar with, 12 generally, the documents that make up this, well, 13 mitigation plan -- those being the 2015 settlement 14 agreement, the first addendum, second addendum, and the 15 A&B agreement? 16 A. Yes. 17 Q. Okay. And if I refer to these agreements in 18 that term or collectively as "the settlement agreement" 19 or "agreement," you'll understand what I mean? 20 A. Yes. 21 Q. Okay. So you can do the same also. If you 22 want to refer to it as the "settlement agreement" or the 23 "agreement," I think we'll understand what you're 24 referring to. 25 Let's start with what you were asked to do in</p>	<p style="text-align: right;">99</p> <p>1 this case. 2 A. Essentially, I was asked to quantify what the 3 Surface Water Coalition reach gain benefits in the near 4 Blackfoot to Minidoka reach would be resulting from 5 IGWA's conservation activities over the historical 6 period of the settlement agreement. So 2016 through 7 2022 is what I analyzed. 8 Q. And you submitted an expert report in this 9 case? 10 A. Yes. 11 Q. I'll have you open up that expert report, and 12 I'll refer the hearing officer to Exhibit 142 -- IGWA 13 Exhibit 142. Sorry. The binders are kind of tightly 14 packed. 15 HEARING OFFICER: Thank you. 16 MS. PATTERSON: Okay. Thank you. 17 Q. (BY MS. PATTERSON) Looking here at the 18 introduction, is it correct to say that the first page 19 that we're looking at here is just some background on 20 the settlement agreement? 21 A. Yeah. I think that's fair. 22 Q. Okay. And you're discussing here some of 23 IGWA's historical understanding; is that correct? 24 A. That's correct. 25 Q. And that's the matter that was addressed in</p>
<p style="text-align: right;">100</p> <p>1 what we call the '21 breach case; is that correct? 2 A. I believe so. 3 Q. And I just want to make clear that while we -- 4 you may be testifying to, you know, IGWA's understanding 5 on some of those items, are we attempting to re-litigate 6 what those terms are here? 7 A. No. They're just reference for context. 8 Q. Okay. Thank you. 9 Moving on to the second page, you give a 10 little bit of a summary of the report. Can you describe 11 to us what this report shows, generally? 12 A. Yeah. So, essentially, I developed modeling 13 where I developed three model runs -- one that looks at 14 what IGWA's actual conservation activities were as 15 reported under the settlement or -- or the summary 16 performance report that IGWA submits to the Department 17 and the Surface Water Coalition annually. 18 And then I compared -- with -- with that 19 analysis, I'm, again, looking at primarily the near 20 Blackfoot to Minidoka reach gains, impacts from those 21 conservation activities from IGWA, and I compare what 22 IGWA's actual activities were through 2016 through 2022 23 to what the benefits to that reach would have been had 24 IGWA done either the bare minimum under their 25 understanding of the 205,000 acre-foot obligation and</p>	<p style="text-align: right;">101</p> <p>1 its allocation or the more recently ordered 240,000 2 acre-foot allocation and obligation under the director's 3 order. 4 Q. Okay. And so you ran these three models. You 5 got reach gain results from them, and then you were able 6 to subtract IGWA's actual conservation from, you know, 7 what the modeled results would be for the -- the bare 8 minimal amounts; is that a correct synopsis? 9 A. Yeah, that's right. So, essentially, the 10 difference between those runs gives you what the benefit 11 from just the excess activities or the surplus 12 conservation from IGWA on its own would have been to 13 those reaches. 14 MR. FLETCHER: Excuse me. I have a question 15 objection. This report, for the most part, is outside 16 the scope of what the hearing officer ordered. Part of 17 the motion was that passed actions should not be 18 considered. Averaging should not be considered, and 19 this is a backward attempt to do exactly that. 20 They're trying to introduce this evidence, 21 according to the charge that she was given by her 22 counsel, the historical actions that were taken by IGWA 23 since 2016. That is not the issue before this hearing 24 officer. And it's just a backdoor attempt to try to get 25 back to averaging, which the district court has already</p>

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<p style="text-align: right;">102</p> <p>1 determined. The director was correct when he said 2 averaging is not authorized. 3 MS. PATTERSON: Thank you. As the Coalition 4 and the hearing officer has stated, the settlement 5 agreement is viewed as a contract agreement. They are 6 alleging breach of that agreement, and you should be 7 able to argue, just like in any other contract case, 8 what other activities we have done to mitigate any sort 9 of harm or damages. 10 This is not a backdoor way of getting in 11 averaging. As Miss Sigstedt will explain, we're using 12 the Department's model, the same model that Mr. Colvin 13 utilized to estimate what his damages are, and we are 14 simply accounting for actual conservation activities 15 that IGWA had performed and their impact on the results 16 of the 2022 breach. 17 TJ, [unintelligible]. 18 HEARING OFFICER: Anything further? 19 MR. FLETCHER: Yeah. This is exactly what was 20 litigated in 2021, the same type of argument, that the 21 past action should be counted toward annual actions. 22 The director specifically held it could not be. It went 23 to the district court, and the district court held the 24 director's actions. 25 They're just trying to come back a different</p>	<p style="text-align: right;">103</p> <p>1 way and say, "You should give us credit or average" or 2 however they want to argue it, "for what we did in the 3 past," when the agreement was ignored by some -- not 4 ignored -- it's not the proper wording -- but breached 5 in 2022 by some of the districts. 6 That's already been litigated, and the 7 district court's already said, "No, you look at what was 8 done that year. You are not entitled to credit or 9 averaging from prior year's actions. That's what the 10 whole motion in limine was about. I was afraid that 11 that's where this hearing would evolve -- is back into 12 the very same issues we litigated in 2021. 13 HEARING OFFICER: I'm going to sustain this 14 objection. Although there was no objection when Mr. 15 Budge included it in with the cross-examination of the 16 previous witness. 17 It has been my understanding [unintelligible]. 18 Judge Wildman did it in his [unintelligible]. And it 19 has always been my understanding that there was no 20 carryover. That, in fact, this was a finite examination 21 of one year, and what was the deficiency, and how do we 22 cure it? That's how the 8/2/23 opinion reads, and I'm 23 going to sustain the objection. 24 Mr. Budge? 25 MR. BUDGE: Mr. Hearing Officer, the last case</p>
<p style="text-align: right;">104</p> <p>1 dealt with determining whether a breach occurs, and in 2 determining whether a breach occurs, the director ruled 3 you can't use averaging, and he reallocated the 240. 4 This case is different. We're addressing 5 today what do you do to remedy a breach? We're not 6 challenging the director's decision. We're talking 7 about a different issue. What is the proper remedy? 8 And the Coalition -- they presented the evidence that 9 the proper remedy is to do additional conservation in a 10 year that is different than when the breach occurred. 11 They opened that door, and now what we're 12 saying is we have already done that. We mitigated our 13 damages in advance, and that is clearly relevant to the 14 proper remedy. And if we're not allowed to put in our 15 evidence of an appropriate remedy, we're severely 16 prejudiced in this case. You may -- you may redact our 17 evidence. We accept that, but we have to be able to 18 explain our basis for an appropriate remedy, and that is 19 squarely before the agency today. We're not 20 re-litigating what happened in the past. We're talking 21 about how do you quantify the remedy? 22 We have a proposal as to what should be 23 considered, and that's relevant, and it has to be 24 accepted today. 25 HEARING OFFICER: I -- I struggle with the</p>	<p style="text-align: right;">105</p> <p>1 issue of past actions prior to an agreement that found 2 certain breaches and deficiencies that is of a certain 3 date that because it's taken us so long to get to this 4 point of how much damage there was and how do we remedy 5 it and how much, that's taken us two years, you argue 6 that that is in fact opening the door to previous 7 conduct on behalf of IGWA and the signatories as opposed 8 to nothing more than finally getting to the brass tacks 9 of a breach in 20 -- 2022 under this agreement. 10 I understand your argument, Mr. Budge, but the 11 agreement -- the agreement doesn't seem to allow -- and 12 the director never found when he found the breach -- to 13 allow any sort of previous conservation attempts in my 14 mind. 15 MR. BUDGE: Yeah. We -- we accept the 16 director's ruling. We understand it. I don't agree 17 with it, but we understand his ruling. He said, "You 18 have breached the agreement." Now, what is the remedy? 19 We have a right to mitigate our damages. 20 I'll give an example -- hypothetical. If I'm 21 a tenant and I'm renting some commercial property, I can 22 put down a security deposit that's going to be available 23 to remedy damages that may exist at the end of the term. 24 So with a fundamental contract right and obligation to 25 mitigate one's damages in the event of a breach. We are</p>

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<p style="text-align: right;">106</p> <p>1 going to put on evidence that we have, in fact, 2 mitigated our damages. 3 And I understand that this agreement has 4 authority in some ways. It doesn't spell out a remedy. 5 It doesn't spell out a baseline. It doesn't spell out a 6 method of conservation, and that has largely fed the 7 litigation that's been going on for a year, and that's 8 unfortunate. 9 But when it comes to the Department saying, 10 "We have discretion to fashion a remedy," the Department 11 must consider what has been done to mitigate the 12 damages, and we have done things, in fact, to mitigate 13 our damages, and we have a right to present that and put 14 it in the record. You can treat it how you will. You 15 may reject it, but we have a right to put into the 16 record what we've done to mitigate our damages. 17 HEARING OFFICER: [unintelligible] further 18 argument? Do you have any comments to add? 19 UNIDENTIFIED SPEAKER: I'm sorry. May we -- 20 HEARING OFFICER: No. I haven't made a 21 decision yet. Do you have any comments on the 22 objection, please? 23 UNIDENTIFIED SPEAKER: No, Your Honor. 24 HEARING OFFICER: That's fine. 25 Anything further on behalf of SWC?</p>	<p style="text-align: right;">107</p> <p>1 MR. FLETCHER: This -- Hearing Officer, it's 2 illogical to stand here and say you can't use averaging 3 in order to determine compliance, but if you breach you 4 can then use averaging to determine mitigation for the 5 breach. 6 The whole goal of this agreement, as was 7 pointed out by Mr. Colvin, is to reach certain 8 benchmarks and certain goals. These annual actions have 9 to be taken every year in order -- in an attempt to 10 reach those benchmarks and goals. I mean, that's what 11 people lose sight of when they're making these 12 arguments. When they -- when they start saying, "Well, 13 we can do a whole bunch one year and then slack off 14 another year, and that'll average out. It's what the 15 annual action should be." 16 The real question becomes is that marching 17 forward toward the goals? That's the purpose of the 18 agreement. So I -- I don't understand this argument, 19 and I don't understand how anybody is mitigated by 20 something that was done in 2016 to '20 for nonaction 21 that occurred in 2022. We're not trying to mitigate 22 injury. It's not an injury-based plan. It's a plan 23 that requires annual actions in order to restore an 24 aquifer. 25 So they're kind of convoluting these two</p>
<p style="text-align: right;">108</p> <p>1 principles and talking about injury to the reach or 2 whatever they want to talk about, but the bottom line is 3 the plan says this is what you have to do every year, 4 and they didn't do it in 2022. That's not disputed. 5 The director found it. They didn't ask for a rehearing 6 on that issue. The director said this is how much. 7 They didn't dispute it. They didn't ask for 8 reconsideration on that issue. So those issues aren't 9 even before you today. 10 The only issue is what can they do now going 11 forward to make up for what they didn't do in 2022? 12 HEARING OFFICER: I'm going to sustain the 13 objection, and I'm going to try to tell you why. 14 First of all, this agreement from 2015, again, 15 looked at a yearly examination, and I'm not parroting 16 what he said. This is my true understanding -- what 17 Mr. Fletcher said. This is my true understanding of the 18 document. 19 The document said that we will measure these 20 yearly. We will go to the Steering Committee, figure 21 out who's over-appropriated within the different 22 districts, and then we will present that to the director 23 to implement. City committee in this case could not 24 come to that agreement; so you went -- you went to the 25 director.</p>	<p style="text-align: right;">109</p> <p>1 I believe that this agreement cannot be 2 mitigated by previous actions. It is a year-to-year 3 analysis of the sentinel wells and where they are at 4 this time. Does that mean that subjectively you thought 5 you could use the mitigation? As I indicated in my 6 opinion, subjective intent is not an issue when you look 7 at a document's four corners. 8 I understand your argument, sir, that you have 9 the right in a damage case to do so, but that's not what 10 the contract says between SWC and IGWA, in my 11 estimation. It is a yearly analysis. Are you -- are 12 the sentiment wells in good order? If not, we go to the 13 Steering Committee and we do the following. 14 Now, that has to be a horrible decision on 15 behalf of IGWA, and I understand the importance of it. 16 Don't get me wrong, and I -- I understand that. But 17 that -- that's truly how I felt about the disagreement. 18 It is a year-to-year analysis, and the sentiment wells, 19 when you entered into this agreement, said X. And you 20 were to keep them at that level by aquifer recharge or 21 reduction in your -- your drilling, and it was found 22 that you weren't. 23 It would seem to me, again, that these prior 24 years are irrelevant because, number one, they don't -- 25 they don't look to the sentinel well -- sentinel wells.</p>

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<p style="text-align: right;">110</p> <p>1 There's no -- nothing in the agreement in that regard. 2 And, therefore, I'm going to sustain the 3 objection. 4 Having done so, Mr. Budge, I'm going to allow 5 significant time for you to respond to that, based upon 6 the decision of the Court. And if you have further 7 argument, let me know about it now. I was going to 8 maybe even recess for the day or for most of the 9 afternoon so you can discuss that. 10 MR. BUDGE: Yeah. It -- it is a vexing 11 decision. If we're looking at it in one year, there's 12 nothing that can be done. We can't accept the 13 Coalition's remedy because it didn't happen in '22. If 14 this is so isolated that all we consider -- 15 [Unintelligible cross-talk.] 16 HEARING OFFICER: -- sentinel wells and the 17 determination of the damage is in one year, and you go 18 forward. As was indicated by Mr. Colvin, the best thing 19 that could happen is if telemetry was on the wells 20 immediately and we could know what the numbers are 21 immediately, et cetera, but that's not the system we 22 have. The reason we're here two years later is 23 litigation. And if that's -- that's -- 24 MR. BUDGE: It's -- it's just we are here to 25 decide what is an appropriate remedy, and before we even</p>	<p style="text-align: right;">111</p> <p>1 presented our evidence, before we explained "this is an 2 appropriate remedy and this is why it is," we've got a 3 ruling that says, "That can't be considered. We're not 4 going to consider any remedy based on what you did in 5 advance." 6 And -- and I understand Mr. Fletcher's 7 frustration, and it stems from this agreement not having 8 the level of specificity that, in hindsight, we wish it 9 did, and it doesn't. It doesn't prescribe a remedy. It 10 doesn't prescribe a baseline. We did something for six 11 years, and the director said, "You can't do it that way 12 anymore." So we have all kinds of -- of -- of 13 shortcomings that we're struggling with that's caused a 14 lot of litigation that's going to continue for a long 15 time, I assume, unfortunately. 16 But today we're here to decide one issue -- 17 what is an appropriate remedy? And we have evidence of 18 an appropriate remedy. Is that relevant? Yes. So I 19 don't -- I don't understand the basis for excluding 20 relevant evidence. 21 HEARING OFFICER: Sir, excuse me. You used 22 the -- the -- you used the example of renting an area 23 and returning it to the owner and you have damages and 24 here's how I mitigate those damages. But that's not 25 what the rental agreement says. The rental agreement,</p>
<p style="text-align: right;">112</p> <p>1 in this situation, says we're going to look at this 2 year's sentinel wells, and there's going to be either an 3 over -- they're going to be fine or they're going to be 4 under. 5 And as a result, you then have to -- and the 6 director did this in August -- how much is what they 7 were under? 8 MR. BUDGE: No. There's some confusion going 9 on. The sentinel well index and the benchmarks are not 10 at issue in this proceeding. If we don't hit the 11 benchmarks, that's not a breach. That triggers adaptive 12 measures, but that's not at issue in this proceeding. 13 Mr. Colvin went into that, and my attempt at 14 cross-examining was to say that's not even an issue with 15 this proceeding. It is part of the agreement, but it's 16 not what we're here today to talk about. We're here 17 today only to address what is the remedy if the 18 districts don't conserve 240. 19 And back to the rental hypothetical. If the 20 rent that's owed every month is \$240 and one month I pay 21 300, one month I pay 350, one month I pay 275, and I 22 accumulate excess rent, and then one month I pay 200, 23 there's a pool of excess rent that was not obligated. 24 It was not required. It was surplus. And what we're 25 saying is in the year that our -- in the month that our</p>	<p style="text-align: right;">113</p> <p>1 rent was deficient, we had accumulated a surplus in 2 advance to offset that. 3 Now, Mr. Colvin said, "Well, you shouldn't 4 have given us a surplus. You should have paid us 5 exactly 240, then fallen behind, and then caught up in 6 the arrears by doing more after the fact." I don't know 7 how it's not relevant that we gave more than we were 8 required to under the terms of the agreement. We did 9 more -- more than our obligation, and that more than 10 offset the deficit. And I don't -- I don't know how 11 that's not relevant to a remedy. 12 And -- and if the hearing officer wants to 13 reject that for whatever reason after we present the 14 evidence, so be it, but this is our case to show what we 15 think is an appropriate remedy. That is the issue. So 16 it's relevant. It's material. It's not barred by the 17 terms of the agreement. The agreement doesn't say what 18 a remedy is. It doesn't say, "A remedy can't be 19 provided in advance or after." It says none of that. 20 All of that is within what we're talking about today. 21 So I would ask the hearing officer to 22 reconsider the decision. Let us put our evidence on of 23 our remedy. You can decide if you agree with it or not, 24 but let us present our evidence of what we think an 25 appropriate remedy is.</p>

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<p style="text-align: right;">114</p> <p>1 MR. FLETCHER: May I address? 2 HEARING OFFICER: Sure, Mr. Fletcher. 3 MR. FLETCHER: Yeah. These analogies are -- 4 are missing one thing, you know. When -- when you enter 5 into a real estate contract, for example -- that's what 6 we seem to be talking about here -- if you want to look 7 at this as like a promissory note; right? IGWA's making 8 a promise, "We're going to restore the aquifer level to 9 pass by 2026 -- or the sentinel well level"; right? 10 That's what their promise is. 11 But the agreement says, you know, along the 12 way, you're going, every year, do these certain things, 13 and it's -- it's -- it's like having a promissory note 14 that says prepayment is allowed. You can do more in any 15 one year, if you want, because we're trying to get to 16 this goal, but prepayment does not excuse the regular 17 installment payments that are required under the note. 18 And that is a more apt analogy to what our agreement is. 19 Our agreement deals with them agreeing to 20 reach a goal and doing certain annual actions every year 21 to get to that goal. If they prepay in certain years, 22 they're trying to get to the goal too. There's benefits 23 to them under the agreement to get to that goal, but 24 that doesn't mean that they can avoid obligations every 25 year that are set out in the agreement. The agreement</p>	<p style="text-align: right;">115</p> <p>1 says you have to do these things annually. 2 And this is exactly the issue we litigated in 3 the 2021 breach, and now we're trying to say, well, 4 yeah, the courts have held back, but now we want to use 5 averaging and prior actions to -- to -- to fashion a 6 remedy, when the effect would be the same. You know, 7 you're not going to get to your goal by doing it that 8 way. 9 So I -- if you want to use real estate 10 analogy, I think it's much better to say this contract 11 says you have to do certain things annually, and it 12 doesn't allow you to excuse those actions. There's 13 nothing in this contract that says if you did a whole 14 bunch last year, then -- then you don't have to do it 15 this year. That's basically what they are arguing. 16 Thank you. 17 MR. BUDGE: If you prepay the promissory note, 18 the principal goes down. The lender doesn't just get to 19 keep it as a windfall. The principal goes down. 20 And analyses aside, the fact is we're deciding 21 what's the remedy, and the agreement does not prescribe 22 anything or prohibit anything. It just says the 23 director shall consider all available information and 24 fashion a remedy. We're here to present available 25 information for the judge to consider under the terms of</p>
<p style="text-align: right;">116</p> <p>1 the agreement. They may not like it, but it's relevant, 2 and it's not prohibited by the terms of the agreement. 3 So how do we not get to present relevant 4 evidence as to the remedy? Under the terms of the 5 agreement, the director shall consider all available 6 information. 7 Sorry to belabor the issue, Mr. Hearing 8 Officer. 9 HEARING OFFICER: No. That's fine. As I've 10 mentioned to you guys before, every case, no matter how 11 complex, has a linchpin, and this has been the linchpin 12 in this case from day one. 13 Well, [unintelligible]. At this point in 14 time, I think it would be more expeditious for -- to 15 allow further questioning of this witness. I will 16 overrule my previous opinion, no matter what my previous 17 comments meant. I'll overrule that objection based upon 18 the arguments of counsel Mr. Budge I received. 19 MS. PATTERSON: Thank you. 20 Q. (BY MS. PATTERSON) Sophia -- 21 A. Yes. 22 Q. So I'll try to give a quick recap. I asked 23 you to describe what your report showed generally, and I 24 believe I was going to go into next having you explain 25 some of the general assumptions of the -- the modeling</p>	<p style="text-align: right;">117</p> <p>1 that you did. 2 A. Sure. So some of the basics about the 3 modeling are that I used ESPAM 2.2 for all of these 4 model runs. All of the inputs for these model runs are 5 based on IGWA's performance summary reports and 6 spreadsheets that -- as they submitted 2016 to 2022 7 without any modifications. 8 And I think maybe at this point it's important 9 for me to say that this doesn't have anything to do with 10 averaging. This will just be looking at the difference 11 between what activities and where the aquifer levels and 12 reach gains would be without or with the additional 13 activities that IGWA did over those years. 14 Q. Okay. I'm gonna share my screen, and you 15 mentioned that -- the inputs here for IGWA's actual 16 activities for the performance summary reports and the 17 spreadsheets that accompany them. I'm going to show 18 you, first, exhibit -- common Exhibit 518. So in the 19 hard copies, I'll represent that the first tab on the 20 cell spreadsheet, which is the actual exhibit, is 21 printed off, but -- 22 Are you able to see my screen, Sophia? 23 A. I'm -- I'm not. 24 Q. Okay. Is anything showing up? 25 UNIDENTIFIED SPEAKER: I don't see</p>

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<p style="text-align: right;">118</p> <p>1 [unintelligible]. 2 A. Although I am familiar, generally, with those 3 spreadsheets. 4 Q. (BY MS. PATTERSON) No? 5 MS. PATTERSON: Sorry. Can we -- can we go 6 off the record for a moment? 7 HEARING OFFICER: Yes. 8 (Recess taken.) 9 Q. (BY MS. PATTERSON) All right. So we were 10 looking at the performance summary table for 2016. I 11 just want to walk through and confirm that the numbers 12 that you used in your model include both the diversion 13 reduction and the recharge; is that correct? 14 A. That's correct. 15 Q. And here in Column F, that would be the 16 diversion reduction, and then the recharge here is in 17 Column G? 18 A. That's correct. But in my model, I model them 19 by locations. So the location that each diversion 20 reduction or recharge takes place is allocated according 21 to those next tabs by district and by well location or 22 by recharge sites specifically. 23 Q. Okay. And so you've pointed out that in this 24 spreadsheet, or the workbook that accompanies these 25 performance reports, there is recharge report, there is</p>	<p style="text-align: right;">119</p> <p>1 the actual diversion data here by well, and these are 2 the inputs that you use in the model? 3 A. That's correct. 4 Q. And then in terms of diversion reduction, how 5 does -- do you know, from the spreadsheet, how IGWA 6 calculates that? 7 A. The diversion reduction, again, is by well 8 location, where each well is assigned a baseline number, 9 and then the annual usage from that baseline number is 10 deducted to determine whether there's a surplus or a 11 deficit or a zero at that well location, and that's 12 exactly how I've input it into my model. 13 Q. Okay. So, generally, on this spreadsheet 14 though, we've got a usage column, which is the wells 15 actual usage or -- by district, and then we have the 16 baseline diversion, which is the average of 17 pre-agreement from 2010 to 2015 or '14 diversions. 18 A. Correct. 19 Q. And the two are subtracted in order to come up 20 with the diversion reduction; is that correct? 21 A. That's correct. 22 Q. And here at the mitigation balance, I believe 23 we had some testimony about that, but where there is a 24 positive number, that means that there was more 25 conservation than required; is that correct?</p>
<p style="text-align: right;">120</p> <p>1 A. That's correct. 2 Q. But it -- okay. Did your inputs include data 3 from the 2021 irrigation season? 4 A. No. I used just null values in 2021. So 5 no -- no surplus, no deficit, based on my understanding 6 that the 2021 breach had been settled by agreement, and 7 I didn't know the terms of that to implement into a 8 model. 9 Q. Let's have you turn now to page 5 of your 10 report. I believe -- it is marked on our exhibits as 11 page 5. I believe in your report it's page 3. 12 A. Okay. 13 Q. I'm sorry. Actually, can you turn to the next 14 page, page 6? It's a -- has Figure 1 on there. 15 A. Sure. 16 Q. And so you discussed using the summary 17 reports, that actual data, the recharge, and the 18 diversion data at the well location. Is this what this 19 figure is showing in your model? 20 HEARING OFFICER: When you say well location, 21 you mean sentinel well? 22 MS. PATTERSON: No. The actual wells that are 23 diverting ground water. 24 HEARING OFFICER: The -- all of the wells in 25 the district?</p>	<p style="text-align: right;">121</p> <p>1 MS. PATTERSON: Yes. 2 HEARING OFFICER: Okay. 3 A. Yeah. So, generally, that's what this map is 4 showing. This shows the ESPAM, the model boundary in 5 gray as the background. That's all the model cells and 6 all the area within the Eastern Snake Plain that are 7 represented by the model. And then the colored areas 8 that I have over that generally represent the ground 9 water districts. 10 And then within those ground water districts, 11 you can see that there's a series of black dots. So 12 those are all of the well locations where the ground 13 water districts make their actual pumping diversions, 14 and these are accumulative of all the points that are; 15 used throughout all of the years as reported in the 16 summary performance reports that either have a positive 17 or a negative balance that nets out to be what the total 18 conservation is in terms of pumping reductions. 19 And then I've got sort of a series of 20 highlighted blue model cells, and these are where I've 21 overlapped the recharge sites and what model cells they 22 align with, and that's where I'm inputting the recharge 23 volumes in the model. So everything is site specific by 24 year for all of these con -- what I'm calling 25 conservation activities, which is the total of both the</p>

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<p style="text-align: right;">122</p> <p>1 ground water pumping reduction and the recharge. 2 Q. Okay. And this data is, again, available in 3 the reports that are provided to the SWC and the 4 Department? 5 A. Correct. 6 Q. And there's, in your modeling, therefore, is 7 spatial and a temporal component to this? 8 A. That's correct. I'm using the transient 9 model, which is -- has monthly inputs. So the ground 10 water pumping reduction which are reported annually are 11 evenly distributed over the irrigation season from April 12 through October. And, similarly, the recharge volumes 13 are evenly distributed either annually over the 14 irrigation season if it's an annual volume reported, or 15 if they have monthly volumes reported, then I'm evenly 16 distributing it over the months referenced for that 17 recharge. 18 Q. And were you present this morning when 19 Mr. Colvin testified? 20 A. Yes, I was. 21 Q. Can you just contrast kind of the modeling 22 that you performed with, you know, some of the 23 assumptions that Mr. Colvin did in terms of this spatial 24 and temporal aspect? 25 A. Sure. So I think my understanding of how</p>	<p style="text-align: right;">123</p> <p>1 Mr. Colvin described his modeling this morning is -- if 2 you look at Bingham Ground Water District, for example, 3 which is highlighted in sort of that gold-yellow color 4 on my Figure 1, you can see that what I've modeled 5 within Bingham are these specific well locations as 6 designated by those black dots, and that's where all the 7 stress is applied to the model. 8 What Mr. Colvin did is he basically took all 9 of the model cells within that entire gold area, and he 10 evenly distributed what he is using as -- as the deficit 11 volume in his model across all of those model cells to 12 get what the stresses and -- and the reach gain 13 benefits. And we're looking at the same reach gain 14 benefits from his model results and my model results. 15 We're looking at the same output. 16 Q. Okay. And then did you attempt to retain this 17 spatial and temporal component when you were modeling 18 kind of the bare minimum model runs both for the 205,000 19 and the 240,000? 20 A. Yes. So when I'm developing the contrasting 21 run to show what would have been the effect if IGWA had 22 just done, for example, just the 240,000 acre-foot bare 23 minimum target allocation, is I'm taking the same 24 locations by year within the model, and I'm comparing 25 the volume that they actually recharged to what their</p>
<p style="text-align: right;">124</p> <p>1 target -- or conserved to what their target conservation 2 would have been. 3 And I'm multiplying all of those locations by 4 a uniform factor either up, if the ground water district 5 did less than their target, or down, if the ground water 6 district did more than their target, so that in the 7 contrasting run, the total volume for each district will 8 be equal to whatever its allocation would have been 9 under, for example, the 240,000 acre-foot, but it occurs 10 at all the same locations that IGWA actually did its 11 conservation activities. 12 Q. Okay. And then, as you said, you take the 13 reach gain either -- you take the reach gain results, 14 and then you subtract IGWA's actual reach gain from, you 15 know, the bare minimum model runs in order to come up 16 with either a surplus or a deficit number; is that 17 correct? 18 A. That's correct. So in that way, we can look 19 at what the water level change would have been across 20 the sentinel wells, or we can look at what the reach 21 gain at the near Blackfoot to Minidoka reach would have 22 been with or without the surplus activities by IGWA, 23 based on, for example, the 240,000 acre-foot allocation 24 by the director. 25 Q. [Unintelligible] turn to page 7, which is</p>	<p style="text-align: right;">125</p> <p>1 the -- the next page. And, again, these are your inputs 2 that come from the performance summary reports? 3 A. Correct. So in this table, I've sort of got a 4 block of data going through each year in the settlement 5 agreement -- so 2016, 2017, all the way through 2022 -- 6 where I'm showing by district what the total diversion 7 reduction was for their district, which is kind of the 8 light gray line at the top of the block of data. And 9 then I'm showing what each district did in terms of the 10 recharge volumes that they applied at the various 11 recharge sites. 12 And this is probably one of the more 13 significant differences between what I did and what Dave 14 did -- is that many of the districts perform recharge at 15 locations that are outside their district boundaries. 16 So if you really want to get into the complex -- as -- 17 as Mr. Colvin referred to it -- the complex modeling of 18 timing, how things offset the deficits versus the 19 credits, it's really important to be location specific. 20 And so here I'm honoring where the recharge actually 21 occurs throughout, based on the performance reports. 22 Q. Okay. And just to verify, I'm going to share 23 my screen again and take you to Exhibit 521. This is 24 the 2017 performance summary table. These are the 25 inputs that you used?</p>

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<p style="text-align: right;">126</p> <p>1 A. That's correct. 2 Q. And all reflected in these tables on page 7 of 3 your report? 4 A. Right. Yep. So the diversion reduction 5 volumes will match from these, and then the total 6 recharge, if you add it up for each district across 7 these specific sites that I am tabulating, will match 8 these reports. 9 Q. And then moving on to the next page, page 8 of 10 your report for 2018, I'm going to show you that 11 spreadsheet. And I'll take you to Exhibit 524. 12 And are these the values that you used for the 13 inputs for the 2018 table? 14 A. That's correct. 15 Q. Okay. 16 A. Although I should note that I'm not using any 17 of the A&B or Southwest Irrigation District -- 18 Q. Thank you. 19 A. -- [unintelligible]. 20 Q. And this here is Exhibit 527. These match the 21 inputs that you used in your expert report? 22 A. That's correct. 23 Q. Okay. Just a few more. And this is Exhibit 24 530. These are the inputs that you used for 2020? 25 A. Correct.</p>	<p style="text-align: right;">127</p> <p>1 Q. And I will skip over -- well, this here is the 2 performance summary table for 2021. As you explained 3 previously, you did not include any of these volumes? 4 A. That's correct. So in the -- the way that 5 I've developed the -- the model, it's basically assuming 6 that the target allocation was met based on the 7 settlement agreement. So there would be no difference 8 between the model, the two model versions. 9 Q. Okay. And then, finally, this is the report 10 for Exhibit 536, and this is the report for the 2022 11 performance summary; is that correct? 12 A. That's correct. 13 Q. Okay. And these are the inputs and the 14 associated tabs contained in this report that went into 15 your table? 16 A. Exactly. In all of these cases, the inputs 17 match the recharge report or the individual ground water 18 district net volume and well tabs. 19 Q. All right. And then I believe that we 20 discussed in your report Section 2.2. This is titled 21 "Modeling Approach." Have we covered most of the 22 material that is contained in this section? 23 A. Yeah, I think we did. Just essentially that I 24 did it specific to each ground water district and then I 25 used that scaling approach to make sure that the</p>
<p style="text-align: right;">128</p> <p>1 comparison was at the same locations when I am 2 calculating the difference between the models. 3 Q. Does this explain -- and let's go, then, to 4 results, please, which is on page 11 of your report of 5 this exhibit. 6 A. Okay. 7 Q. Actually, I will take you down to the kind of 8 last page of this table. It's going to be page 13 of 9 Exhibit 142. That's page 11 of your report. Can you 10 explain to me for this total IGWA table here what -- you 11 know, what this is showing? 12 A. Sure. So the table is set up where there's 13 two blocks of data -- one where I'm either comparing 14 IGWA's actual conservation activities compared to the 15 allocation under the 205,000 acre-foot target or I'm 16 comparing it to the 240,000 acre-foot allocation 17 targets. And in each case, let's take the bottom block 18 of the 240,000 acre-foot conservation target. 19 The first line in this table in that block 20 shows the actual conservation volume by IGWA. So you'll 21 see that purple data blocks. That's the exact same 22 number. It's just what IGWA actually conserved based on 23 the ground water pumping reduction or the recharge 24 volumes in each year. 25 And then the next line is essentially</p>	<p style="text-align: right;">129</p> <p>1 calculating what the surplus or deficit would be, 2 either -- so in this case we're looking at the 240,000 3 acre-foot reduction. So I'm simply reducing -- I'm -- 4 I'm simply deducting that number from what IGWA actually 5 did. So in 2016, you're looking at them doing actually 6 about 255,000 acre-feet of reductions, and then you're 7 subtracting the 240. So the surplus in that case is 8 about 15,000 acre-feet. 9 So I'm doing that across all the years. Same 10 thing for a 2017. You can see that the surplus is about 11 255,000 acre-feet. 12 And then the bottom column in this block 13 calculates the difference or what the net reach gain at 14 the near Blackfoot to Minidoka would be when you compare 15 the actual activities minus the allocated targets -- so 16 essentially what is the net reach gain based on either 17 the surplus or the depth -- the deficit. And so you can 18 go through for each year, and these are cumulative. So 19 your activities in 2016 are going to result in benefits 20 in 2016, 2017, 2018 and so on. 21 And then same thing for 2017. It'll start 22 accruing benefits in 2017, and those -- in this bottom 23 line, those are being added together. So you're seeing 24 the total benefits of the reach gains from the surplus 25 or deficit depending on whether -- what it was through</p>

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<p style="text-align: right;">130</p> <p>1 this time series, just looking at 2016 through 2022. 2 And we're focusing here on 2022 and whether 3 these excess or deficit volumes either result in a net 4 increase or a net decrease in the reach gain in 2022. 5 And so what we see is that when we're looking at IGWA as 6 a whole, even when you're taking the 240,000 acre-foot 7 conservation target allocations into account, all of the 8 excess or surplus conservation activities, 2016 through 9 2020, results in over 30,000 acre-feet of net gain in 10 the reach, even with the 2022 deficit in 2022. 11 Q. And these two columns that you discussed 12 initially, the actual conservation volume and the 13 240,000 acre-foot conservation target surplus/deficit -- 14 these could be calculated from those performance summary 15 reports that we just discussed -- Exhibits 518, 521, 16 524, 527, 530, and 536? 17 A. That's correct. 18 Q. Okay. And then the tables above that are 19 separated out by ground water districts -- that would be 20 on page 13, 12 and bottom part of page 11 -- do these 21 tables all show the same thing except by district? 22 A. They do. 23 Q. And then you've got a column for if IGWA was 24 only determined to have to do their -- their share of 25 the total of 240, which is 205,000 acre-feet. Why did</p>	<p style="text-align: right;">131</p> <p>1 you include that in here? 2 A. I included it because the district -- the 3 districts -- in 2022 irrigation season, the order from 4 the director hadn't come out yet. So they were -- 5 that -- they were just under the understanding that 6 those were the target allocations by district that they 7 were trying to meet. And -- and that that was their 8 understanding going into the 2022 irrigation season. 9 Q. And then you talked about how, you know, 10 excess conservation in 2016 will carry forward into 11 future years, and that is cumulative, where, you know, 12 if you're getting a benefit from surplus conservation 13 activities in 2016, that will show up in 2017 and 14 onward. The same thing for '17. 15 Is there a time or a point when these volumes 16 are going to drop off? 17 A. Yeah. Each location within the ESPAM model is 18 going to have a different response time in terms of when 19 it shows up at the near Blackfoot to Minidoka reach. 20 And so some of them -- for instance, the activities that 21 take place in the districts that are very close to that 22 river -- they're going to peak very quickly, and the 23 benefits from those activities are going to drop off 24 fairly quickly, in just a few years. Whereas, locations 25 that are more distant from that river reach are going to</p>
<p style="text-align: right;">132</p> <p>1 peak more slowly, and so some of their benefits are 2 going to come in much greater in later years, and -- and 3 will have a longer tail in terms of how long the 4 benefits will last when you look at the accretions to 5 the river. 6 Q. So, in 2016, for example, where IGWA conserved 7 15,000 acre-feet more than required by the agreement, 8 all of those benefits aren't showing up immediately in 9 the reach gains? 10 A. No. It's similar to, you know, the analysis 11 that Mr. Colvin showed where you can plot out these 12 reach gain benefits all the way out to 50 years. I 13 mean, you'll still see some amount of benefits coming 14 in. And, in fact, I -- I did that analysis in my 15 rebuttal report. 16 Q. Which we will go to next in just a moment. 17 Page 14 is your summary of conclusions. Is 18 there anything in here that we haven't addressed? 19 A. No. I think that -- that we've addressed 20 these. I think, you know, one point that I have in here 21 that I think everybody understands is that the way that 22 we're calculating the credit to the near Blackfoot to 23 Minidoka reach gain is really common in mitigation plans 24 for different conjunctive use cases in the ESPAM where 25 activities on the plain are accounted for using the</p>	<p style="text-align: right;">133</p> <p>1 ESPAM model based on changes that either a surface water 2 reach or a spring reach to determine what the benefits 3 from those activities are. And -- and they're used in 4 mitigation amount -- for the mitigation amount. 5 MS. PATTERSON: Mr. Hearing Officer, I'm just 6 going to have Miss Sophia -- or Miss Sigstedt go through 7 her rebuttal report. Do you want to allow for 8 cross-examination first on her direct or -- 9 HEARING OFFICER: I'm going to ask counsel for 10 SWC what you think in that regard because it would 11 affect you, if anyone. I understand that this witness 12 is now testifying remotely and could not be recalled, 13 but if you feel that the rebuttal opinion should be like 14 I ruled previously, that's fine too. 15 UNIDENTIFIED SPEAKER: I think it'd be fine 16 for her to go through her rebuttal right now. 17 HEARING OFFICER: All right. 18 MS. PATTERSON: Thank you. 19 Q. (BY MS. PATTERSON) Okay. Sophia, we're going 20 to move to Exhibit 143, which is your rebuttal report. 21 A. Okay. 22 Q. And then we'll just start on page 3, which is 23 the introduction, and I'll just ask you to walk me 24 through Section 2 of this report. 25 A. Sure. So this essentially responds to a claim</p>

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<p style="text-align: right;">134</p> <p>1 in the SWC report that deficit pumping in 2022 results 2 in a deficit near Blackfoot to Minidoka reach gains and 3 a lower sentinel well target when you model those 4 activities. And -- and in that report, they look at 5 how -- how all of -- how that 2022 deficit propagates 6 into the future, looking at those same outputs every 7 year over a 50-year horizon. 8 And so mainly what I'm pointing out here in 9 this section is that I agree with that, but the same is 10 true for the benefits from the surplus conservation 11 activities over the target allocations. Those near 12 Blackfoot to Minidoka reach gains and the increase in 13 water levels to the sentinel wells also propagate into 14 the future over those same years. 15 And when you do the specific modeling, 16 spatially and temporally, what you see is that they do 17 cancel out the deficits on a IGWA-wide basis from the 18 2022 breach, both when you look at the near Blackfoot to 19 Minidoka reach gains, there's more reach gains in the 20 river than if IGWA had every single year done its 21 240,000 acre-foot allocation. And when you look at the 22 sentinel wells similarly, there's a net gain in what the 23 water level across those wells would have been. 24 Q. When Mr. Colvin testified this morning about 25 the sentinel well index not meeting the 2026 target and</p>	<p style="text-align: right;">135</p> <p>1 the other benchmarks that are prescribed by the 2 agreement, is that due to the 2022 breach entirely, or 3 are there other factors in there? 4 A. No. And I think even in Dave -- or 5 Mr. Colvin's report, what you see is he -- he modeled -- 6 and it sounded like from his direct testimony -- the 2.9 7 acre-foot -- or the 2.9 foot difference in the sentinel 8 well from the deficit was calculated in 2023. 9 And so I similarly looked at what the effect 10 of the surplus in what conservation activities would 11 have been on the sentinel well in 2023. And what I see 12 is that there -- with those activities, there would have 13 been a net increase. 14 And, in fact, I think, based on my experience 15 doing the modeling for the original settlement agreement 16 in 2015 and knowing how ESPAM 2.1 and ESPAM 2.2 compare, 17 that, in fact, one of the major reasons that we're far 18 below what the 2023 target value is, is just that the 19 model projection is significantly different with the 20 improved model and that when we look at what -- and that 21 when you look at what the activities were, even if they 22 had been implemented at 240,000 acre-feet every single 23 year and with the board's recharge, we wouldn't -- we 24 still would be very far below what that 2023 target 25 would be.</p>
<p style="text-align: right;">136</p> <p>1 So it's really -- the reason we're really far 2 below that target isn't because of the deficit pumping 3 in 2022, but it's much more a function of the model we 4 used to set that target. The version is very different 5 compared to the more recent and adopted ESPAM 2.2 6 version. 7 And then I think I can similarly show you, if 8 we look at some of these figures in the report, that 9 extreme dry years also impacted where we were, where we 10 are in the sentinel well index as much as, you know, a 11 deficit in the pump. 12 Q. Okay. So along that line, let's go to -- some 13 of what you just discussed here -- is that addressed on 14 page 3 and 4 of your report -- or rebuttal report 15 Section 2.1? 16 A. Yeah. So can we look at Figure 1, and I 17 can -- I can kind of go through what that's showing? 18 Q. All right. Let's look at page 5 of Exhibit 19 143, Figure 1. 20 A. So Figure 1 shows the historical sentinel well 21 index in the black line with the black points marking 22 the historical sentinel well values. And that goes from 23 1981 through 2016. 24 And then leading up to developing that 25 settlement agreement, before the settlement agreement</p>	<p style="text-align: right;">137</p> <p>1 was signed, one thing that we did was we modeled using 2 the current version of ESPAM at that time, ESPAM Version 3 2.1. We modeled what the effect of the districts or -- 4 more like an aquifer-wide reduction at the time the 5 Department was giving us a percentage of the total 6 irrigated acres that resulted in 240,000 acre-feet of 7 reduction. 8 So this modeling assumed across all of ESPAM 9 ground water irrigated lands, a uniform reduction that 10 resulted in 240,000 acre-feet of conservation in ground 11 water activities and then 250,000 acre-feet of board 12 recharge, either in the upper basin and the lower basin, 13 distributed based on the typical water rights window 14 when that recharge opens up. And what we see from the 15 modeling using ESPAM 2.1 is shown in the blue dashed 16 line with the blue points. 17 And across this -- horizontally across this 18 figure, I've got three gray lines which represent the 19 different settlement agreement targets. So the first 20 gray line is equivalent to that 20 -- I think it was 21 2015 value of where the historical sentinel well is, and 22 then that 2023 target is shown in the slightly more bold 23 gray line at sort of that negative four number. And 24 then the ultimate agreement target for 2026 is shown in 25 the green line.</p>

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<p style="text-align: right;">138</p> <p>1 And so you can see that when we originally did 2 that modeling, the projection was that we would hit the 3 targets ahead of time, based on -- in 2023 and 2026. I 4 redid that modeling, not changing anything except for 5 the version of the model, and that's what's shown in the 6 orange dashed line with the orange points. 7 And what we see there is that the change in 8 model version, as was discussed in TJ's cross with 9 Mr. Colvin, is that the water level rises is predicted 10 to rise much more slowly, and it takes much longer to 11 reach the targets, and that it would not reach the 2023 12 target in 2023, and that it takes almost to 2020 -- '48 13 for it to reach the ultimate target goal shown in that 14 green line. 15 And if you just directly compare the two model 16 versions, ESPAM 2.1 and ESPAM 2.2, over the original 17 10-year period of the model, what you see is that it's 18 more than 50 percent. It predicts that the water level 19 rise will be 50 percent less than what it would have 20 been under the ESPAM 2.1 version of the model using 21 ESPAM 2.2. So it's really that the targets were set 22 unrealistically using basically an outdated, incorrect 23 version of the model based on what we know now. 24 And the other thing that I'm plotting here is, 25 following 2016, I've got a series of pink X's, and these</p>	<p style="text-align: right;">139</p> <p>1 are the sentinel -- these are the observed sentinel well 2 water levels post-settlement agreement. And so what you 3 see is that they rise much more in line with the new 4 ESPAM 2.2 prediction until we [unintelligible] extremely 5 dry years, which I can discuss in the next figure, in 6 2021 and 2022, where we see an additional drop off from 7 that modeling. Which, the modeling -- a basic 8 assumption in it is that it's average hydraulic 9 conditions. So it's not wet or dry based on the model 10 period or the model projection. 11 Q. Thank you. And you said Figure 2-point -- or 12 Figure 2 on page 6 discusses the impact of the -- the 13 weather? 14 A. Well, this -- I've got -- I guess it's my 15 Figure 2 and 3 kind of get into that. And so in 16 Figure 2, what I'm showing is this is modeling by IDWR 17 that was presented to the Eastern Snake Plain Hydrologic 18 Modeling Committee in August 2021, and I think it was 19 also presented at the following Steering Committee 20 meeting. 21 But what IDWR did is they modeled the 22 implementation of the settlement agreement terms very 23 similar to what I showed you with my modeling in this 24 analysis. They did it point by point location based on 25 the summary performance reports and then the recharge</p>
<p style="text-align: right;">140</p> <p>1 locations, and then they also included the impacts of 2 the board's -- IWRB's recharge. And so what you see 3 here is historical sentinel well index in blue. It's 4 the same as what I showed you in the Figure 1 above. 5 And then following that, they show three 6 lines. One is what the actual observed sentinel well 7 index did. That's the upper blue line. So that -- 8 that's just observed values. And then they did a 9 middle -- the middle blue line shows you what the 10 sentinel well would have done without the board's 11 recharge, and then what the sentinel well would have 12 done without the board's recharge and without IGWA's 13 conservation activities. 14 And so what I want to point out from this 15 figure is, one, that the board's recharge and IGWA's 16 conservation activities -- and this was in the 17 Department's conclusions -- have significantly improved 18 what the sentinel well water levels would have been. 19 But what I also want to show you is that when 20 you just look at the green line, without any of the 21 aquifer management activities, what you see is that it 22 would have gone up because of the wet year that we had 23 in 2017 with or without those activities, but not as 24 much. So -- so a wet year can significantly increase 25 the sentinel well with or without the activities.</p>	<p style="text-align: right;">141</p> <p>1 And, similarly, a dry year, like occurs in 2 2021, can dip down the sentinel well with or without the 3 activities taking place. And in some cases, the 4 increase or the drop can be even more than what the 5 modeled activities on their own would have been. 6 Q. Okay. Let's go to the next page, page 7 of 7 Exhibit 143 and discuss here, please. 8 A. So this gets at a similar point where, again, 9 in the black line with black dots, I'm plotting the 10 historical sentinel well values before the settlement 11 agreement, and then the pink X's are the observed 12 sentinel well values following the settlement agreement 13 activities. 14 And in the background, what I'm showing is 15 what's called the Palmer Drought Severity Index. And so 16 this is an index developed for monitoring drought 17 conditions. It's used really prominently throughout 18 the -- the US, and this is showing what the conditions 19 specific to the Eastern Snake Plain are. 20 And so the way the Palmer Drought Severity 21 Index works is that positive values on this are 22 representative of wet years, and negative values are 23 representative of dry years. And in their definition of 24 the Palmer Drought Index, above a three, a positive 25 three, is an extremely wet year, and below a negative</p>

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<p style="text-align: right;">142</p> <p>1 three is an extremely dry year. 2 And so what you can see here is that even 3 before, you know, the settlement agreement came into 4 place, the sentinel wells fluctuate very strongly away 5 from the average condition of 0 following either 6 severely wet years, like you see in the 1980s or the 7 1990s, and then it drops severely down from average, 8 that 0 value, following severely dry conditions, like 9 the 2000s or the 2010s. 10 And then -- so what I'm showing here is that 11 this drop that we see in 2021, 2022, and 2023 is really 12 more a function of the extreme drought conditions that 13 we had, and you can see that defined by the Palmer 14 Drought Index. 15 And so, you know, a point that I want to make 16 here is that when we look at the modeling projections 17 using the ESPAM model, we're modeling those under 18 average hydrologic conditions, and, over time, we expect 19 that these climactic conditions, in terms of wet or dry 20 years, are going to average out in the long term and 21 that the activities that we're taking from the 22 conservation activities are going to produce significant 23 benefits to the well index over time. But in the short 24 term, any significantly severely dry or severely wet 25 year is going to cause a deviation up or down from sort</p>	<p style="text-align: right;">143</p> <p>1 of those average -- average conditions that the model 2 projection predicts. 3 Q. Okay. I'm gonna take you to the next page, 4 Table 1 here. Can you describe what this is? 5 A. So this uses the same modeling that I 6 described in my expert report, but I'm just sort of 7 laying it out in the same way that Dave Colvin laid out 8 his reach gain results in the Surface Water Coalition 9 expert report. So we're looking at -- for each 10 district, either based on the 205,000 allocation or the 11 200 and -- I've got two tables. 12 So Table 1 is looking at the 205,000 13 allocation by district, and it's summing up what the net 14 reach gain benefit or deficit would have been resulting 15 from all of IGWA's actual activities versus what if they 16 had just done the bare minimum 205 every -- every year. 17 And it's showing it in the same framework that Dave 18 looks at. So we've got just the cumulative over 2016 to 19 2021, and then we look at 2022, the individual years 20 through 2026, and then the cumulative of some of these 21 later years going out all the way to 50 years to just 22 show that the surplus activities by IGWA that were 23 undertaken in those early years continue to have 24 benefits that come into the reach and that benefit the 25 sentinel well, you know, going out 50 years -- the same</p>
<p style="text-align: right;">144</p> <p>1 way you can look at an individual deficit out that 2 way -- out to those years. 3 Q. And then on the next table -- or next page, 4 page 9 of Exhibit 143, Table 2 shows the same, but -- 5 [Unintelligible cross-talk.] 6 A. Yes. 7 Q. Go ahead. 8 A. Yeah. This looks at the same -- the same -- 9 it's developed in the same framework and in the same 10 format, but here we're just doing the comparison to the 11 240,000 acre-foot obligation. And so what you can see 12 is that in some years, you know, there are deficits for 13 some districts, but that IGWA, overall, you know, more 14 or less, with the exception of 2023, has positive values 15 through all of this. 16 And at the end of the day, you're looking at, 17 you know -- over the 70-year period, you're looking at 18 almost 200,000 acre-feet of additional reach gains that 19 are coming in because of those surplus activities 20 through time. 21 Q. And, finally, do you have any additional 22 conclusions? 23 A. Yeah. I think -- I'm just finishing here just 24 sort of saying that I -- that what you can see from this 25 is that it really is accomplishing the same remedy that</p>	<p style="text-align: right;">145</p> <p>1 the Surface Water Coalition report is proposing in terms 2 of taking additional activities at the specific location 3 where the deficits occur to benefit the aquifer, you 4 know, to -- to make sure that we're accumulating 5 benefits to both the aquifer levels and the reach gains. 6 And, you know, really what this modeling 7 analysis shows you is that if you do the complex 8 modeling at each location and really check on whether -- 9 how the timing works out, what you see is that there -- 10 in -- in all of these years, there's this net increase 11 in -- when you look at sentinel well index in 2023 or if 12 you look at the reach gains over this 50-year horizon, 13 the -- the surplus any given year should be taken into 14 account in terms of a revenue or a deficit. 15 And that's something in the -- in the modeling 16 that I showed from IDWR when they gave us that 17 presentation. In their conclusions -- and it's a direct 18 quote -- is basically that -- let me look at it here. 19 So a direct quote from them is that there will be 20 droughts when [unintelligible] management will be 21 limited. And during wet periods, it's important to 22 capture as much water into the aquifer for later use. 23 So I think it's a really smart way to take 24 advantage of how the natural hydrology of the Eastern 25 Snake Plain aquifer works to get as much water into the</p>

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<p style="text-align: right;">146</p> <p>1 ground as you can during wet years and to allow that to 2 be a buffer to get through the dry years and just make 3 sure that, at the end of the day, the sentinel well 4 levels and the reach gains are increasing, at least as 5 much as they would have under the target allocations. 6 Q. I think that's all I have for you, Sophia. 7 MS. PATTERSON: I would like -- or I'm going 8 to move to admit Exhibit 143 and 142, your expert 9 reports, and I would also move to admit the workbooks 10 for the summary performance reports, which are 11 exhibits -- common Exhibit 518, 521, 524, 527, 530, and 12 536 -- and 533 also. 13 UNIDENTIFIED SPEAKER: Yeah. I -- I would 14 object to the admission of the expert reports on the 15 same premises we've been talking about. They rely 16 solely upon past actions to try to overcome a 2022 17 breach, and, in effect, what is being argued is that the 18 agreement should be changed to accommodate this expert's 19 opinion about a better way to manage things, but that's 20 not what this hearing is about. 21 And so I'm not going to restate all of the 22 things we've said, but since this relies solely upon 23 past actions to accomplish whatever they're trying to 24 accomplish, we would object. 25 HEARING OFFICER: For the same reason, I will</p>	<p style="text-align: right;">147</p> <p>1 overrule the objection and take this under advisement as 2 to whether or not it does form the basis of mitigation 3 pursuant to the agreement. They will be marked as 4 admitted. 5 (Exhibits 142, 143, 518, 521, 524, 527, 6 530, 533, and 536 were admitted.) 7 HEARING OFFICER: Further evidence in this 8 regard? 9 At this time, does SWC wish to put on their 10 rebuttal? 11 UNIDENTIFIED SPEAKER: I think I would like a 12 cross-examination. 13 HEARING OFFICER: Oh, cross. Yes, sir. 14 Excuse me. 15 UNIDENTIFIED SPEAKER: [Unintelligible] 16 five-minute break. 17 HEARING OFFICER: Yeah, please. Go ahead. 18 (Recess taken.) 19 HEARING OFFICER: And Kayleen will be here in 20 a minute. There he is. We'll be on record. 21 And you may proceed, Mr. Thompson, with your 22 cross examination of the witness. 23 MR. THOMPSON: Thank you. Travis Thompson for 24 A&B Irrigation District. 25 CROSS-EXAMINATION</p>
<p style="text-align: right;">148</p> <p>1 BY MR. THOMPSON: 2 Q. And I'll -- Miss Sigstedt, can you hear me 3 okay? 4 A. Yes, I can. Thank you. 5 Q. Okay. Great. I guess going back to 6 Ms. Patterson's question, was it -- I guess I was 7 curious. Were you asked to provide a report that 8 addressed any of the hearing officer's four issues 9 identified in his December 29th order. 10 A. They wanted me to calculate what the near 11 Blackfoot to Minidoka reach gains would be from the 12 surplus of IGWA's activities 2016 through 2020. 13 Q. Okay. As far as issue four -- and I'll -- 14 I'll read it to you, quote, "What action must be taken 15 by the ground water districts to cure their 2022 breach 16 of the 2016 mitigation plan," I -- I guess based upon 17 your analysis, your opinion would be they would have to 18 take no further action; is that correct? 19 A. I think that now and in the future they could 20 look at the mitigation based on aquifer credits as 21 calculated using the ESPAM model the same way mitigation 22 is accounted for in the other cases that I'm familiar 23 with. 24 Q. Okay. As far as this case and the -- the 25 director's finding from August of 2023 where he found</p>	<p style="text-align: right;">149</p> <p>1 certain districts in breach in 2022, you're not 2 recommending any additional actions by those districts 3 going forward; is that correct? 4 A. So I'm not totally familiar with how the 5 individual districts are in breach. I -- my 6 understanding was that the -- IGWA's allocation was 7 allocated internally and that you looked at IGWA's total 8 numbers. But -- but I'm honestly not familiar with how 9 things have progressed on that. 10 Q. Okay. And I'll -- if you have Exhibit 512 11 handy, is that something you can review? 12 A. Which exhibit is that? 13 Q. It is the director's final order dated August 14 2nd, 2023. 15 A. I think I have an order that outlines four 16 issues. Is that what you want me to look at? 17 Q. No. It's just common Exhibit 512. 18 A. I don't have it in front of me. 19 UNIDENTIFIED SPEAKER: [Unintelligible.] 20 MR. THOMPSON: If you could share it, that'd 21 be great, yeah. Page 8. That's what I'm going to ask 22 about. 23 UNIDENTIFIED SPEAKER: [Unintelligible.] 24 Q. (BY MR. THOMPSON) Can you see the shared 25 screen yet?</p>

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<p style="text-align: right;">150</p> <p>1 A. Yes. 2 Q. And I'll just refer you to that paragraph 13 3 where the director identifies Table 3, and that order 4 reads, "Table 3 also lists the deficiency volume for 5 each of the four IGWA members that failed to satisfy 6 their respective mitigation obligations in 2022." 7 Do you see that? 8 A. Yes. 9 Q. And the settlement was reached with American 10 Falls-Aberdeen, but the other three -- that's, I guess, 11 the reason why we're here today. Bingham, 32,476; 12 Bonneville-Jefferson, 5,204; Jefferson-Clark, 18,605. 13 Do you see that? 14 A. Yes. 15 Q. And my question is you're not recommending 16 that any of those districts undertake any action going 17 forward to remedy that deficiency volume; is that 18 correct? 19 A. I mean, I think that that would be dependent 20 on whether you're looking at the obligation IGWA-wide or 21 by district. And -- because I -- I think my analysis 22 does show still that, at least Bingham, I think, has a 23 deficit that would need to be mitigated in some way if 24 you're looking at it by district. 25 But if you're looking at the total IGWA</p>	<p style="text-align: right;">151</p> <p>1 contribution, then at least if you're accepting my 2 analysis based on the mitigation credit and looking at 3 the reach gain, then there would not be action needed to 4 be taken when you look at the sentinel wells or the 5 reach gain in terms of there being a net gain. 6 Q. And so do you know what -- how much water 7 IGWA's members typically divert in a year? 8 A. I mean, no. I -- I have a rough figure in my 9 head, but I think I'd be embarrassed to throw it out 10 without looking at the settlement reports. 11 Q. Guess how many acres do IGWA's members 12 irrigate annually? 13 A. I think that they have more than a million 14 acres, around a million. 15 Q. So fair to say their diversions are probably 16 excess 2 million acre-feet a year? 17 A. Yeah. That's how I would get at the rough 18 number, something like 2 -- 2 acre-foot -- 2 -- 2 feet 19 per acre. 20 Q. And have you modeled that impact on the reach 21 of the river we're talking about today, near Blackfoot 22 to Minidoka? 23 A. No. 24 Q. And that diversion impact can be modeled for 25 each district; is that correct?</p>
<p style="text-align: right;">152</p> <p>1 A. I mean, I guess in -- in the superposition 2 mode alone, you could just model, yeah, what the 3 districts pump. 4 Q. So your analysis looks at it -- a hydraulic 5 impact of the conservation obligations, the -- the 6 benefit you say that occurred over time, but it doesn't 7 look at the impact of divergence; is that correct? 8 A. It's simply relative to what the benefits 9 would have been just under -- just meeting the 10 allocation of the districts under the settlement 11 agreement. 12 Q. And you would agree that ground water users 13 are not administered based upon that impact to the 14 river? 15 A. I mean, yeah. My understanding is that 16 they're currently -- you know, there's the Surface Water 17 Coalition call, and then they have a settlement 18 agreement that gives them safe harbor under the terms of 19 the settlement, if the terms of the settlement agreement 20 are met. 21 Q. So the longterm actions under the 2016 plan, 22 as you understand them -- would you agree that it was a 23 50,000 acre-foot storage delivery each year and then a 24 240,000 acre-foot conservation obligation? 25 A. Yes.</p>	<p style="text-align: right;">153</p> <p>1 Q. And -- 2 A. I mean -- 3 Q. So I just want to clarify that the references 4 in your reports to 205,000 are not, I guess, what was 5 ordered by the director? 6 A. No. I mean, that's not what was ordered by 7 the director, but I will say, from my experience in the 8 settlement negoti- -- like my experience, for example, 9 doing that original modeling for the settlement 10 agreement negotiations, the 240,000 acre-foot reduction 11 was applied evenly across all of ground water -- all 12 ground water irrigated acres on ESPAM, not just the IGWA 13 members. 14 So I do understand where they're thinking on 15 the 205 number comes from based on presentations I saw 16 from the Department then. And, like I said, you know, 17 you can see it in the modeling that I did at that time. 18 Q. But you agree, based upon the director's 19 decisions, as far as evaluating compliance with the 20 agreement, whether it's a breach, or in this case 21 identifying a proposed remedy, that 205,000 acre-feet 22 has not been recognized as what their annual obligation 23 is? Would you agree with that? 24 A. Today in -- yeah. Today in this hearing was 25 actually the first time that I heard that that decision,</p>

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<p style="text-align: right;">154</p> <p>1 I guess based on the appeal, had been made. So based on 2 my understanding from what I heard in this hearing 3 today. 4 Q. Okay. So on page 4 of your report -- I think 5 that's Exhibit 142 -- your second paragraph, you -- you 6 end that paragraph with the sentence, "The director's 7 ruling is currently on appeal." So that was your 8 understanding at the time of the report? 9 A. That's right. 10 Q. And that was the reason for including the 11 additional 205,000 acre-foot analysis? 12 A. And, like I testified, just that, you know, 13 the districts wouldn't have had that understanding going 14 into the 2022 irrigation season. 15 Q. The bottom of that page, the second to last 16 paragraph, you talk about -- you state that this report 17 presents the Snake River reach gains that accrued to the 18 SWC from years of excess conservation by IGWA members 19 from 2016 to 2022. And going through your testimony 20 with Miss Patterson, that's what you looked at. You 21 looked at each year, what was undertaken by each 22 district, and then you looked at that compared to what 23 impact that had on the -- on the reach gains; is that -- 24 is that correct? 25 A. That sounds correct.</p>	<p style="text-align: right;">155</p> <p>1 Q. And is it -- is it your contention that those 2 reach gain numbers were utilized solely by the Surface 3 Water Coalition? 4 A. No. I mean, I don't know. I -- I'm just 5 thinking about how mitigation is calculated in past 6 cases, and -- and that's how it's calculated -- is it -- 7 you take the actions on the plain, and you model it with 8 the ESPAM model, and you look at the reach gain output 9 to -- to what -- either -- you know. So that would be 10 just typically how it's done. 11 Q. As far as what's required under the 2016 12 mitigation plan, that type of analysis is not undertaken 13 each year, is it? 14 A. No. I think this is more in response to a 15 remedy for the breach -- would be my understanding. 16 Q. And would some of those reach gains accrue to 17 American Falls Reservoir? 18 A. Yes. I think that is part of that -- that 19 reach gain. 20 Q. And do you have an understanding of the number 21 of space holders in that reservoir? 22 A. I mean, I understand that there's multiple 23 space holders in the reservoir. 24 Q. Entities besides the Surface Water Coalition. 25 Would you accept that?</p>
<p style="text-align: right;">156</p> <p>1 A. Yes. 2 Q. So it's fair to say that any -- any accruals 3 or benefits to the Snake River reached gains, based upon 4 your analysis, may not completely accrue to the Surface 5 Water Coalition's benefit? 6 A. Like I said, I'm just familiar with mitigation 7 plans that look at this in terms of benefits to the SWC 8 reach in -- in other mitigation plans in that call. 9 Q. Okay. So would you agree that the director 10 has not recognized excess conservation and prior orders 11 in this case? 12 A. I -- not that I'm aware of. 13 Q. Looking at page 5 of your initial report, you 14 have Table 1 included in there, IGWA conservation 15 summary based upon 2022 summit performance report and 16 2023 IDWR ruling. Do you see that? 17 A. I'm sorry. Can you say the page again? 18 Q. It's page 5. 19 A. Oh, yeah. 20 Q. I'm sorry. 21 A. Sorry. Is it Table 1? 22 Q. Table 1 under [unintelligible]. 23 A. Yes, I see that. 24 Q. And, again, that appears to match up with 25 Exhibit 512, page 8. I was just curious where you</p>	<p style="text-align: right;">157</p> <p>1 retrieved that information from. 2 A. Yes. So I think the IGWA conservation targets 3 that's like IGWA's -- that can be pulled straight from 4 the settlement performance reports. The column that's 5 to the left of that, IGWA proportioning, is just 6 calculating, by district, what that proportion would be 7 then. 8 My understanding is that the IDWR target to 9 get each ground water districts allocation under that, 10 you're just taking the 240 and using the same 11 percentage -- you're taking that 240 and kind of 12 weighting it the same as the previous proportionment, 13 and so that gives you that. So -- so some of these are 14 calculated by me, and some of them are just straight out 15 of the performance reports. 16 Q. And looking at that far column where it has 17 that IDWR 2022 mitigation balance -- do you see that? 18 A. Yes. 19 Q. And it does show certain districts with a 20 deficiency volume -- I'll call it -- and some that have 21 excess surplus conservation; is that correct? 22 A. Can you say that again? 23 Q. The -- the column shows certain districts with 24 a negative balance. So that would be a deficiency 25 volume.</p>

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<p style="text-align: right;">158</p> <p>1 A. Yes. 2 Q. And then the -- some districts have a positive 3 balance. Is that -- 4 A. That's right. 5 Q. So that would be above their individual 6 proportionate share of the 240 that year; is that 7 correct? 8 A. Correct. 9 Q. And the director, in his August 2023 order, 10 did not apply that balance or that positive balance to 11 any of those districts with a negative deficiency 12 volume; is that true? 13 A. Based on that table that I saw, it seems like 14 he's just looking at the districts separately. 15 Q. So looking at those examples -- and then I 16 think your spreadsheets in pages 7 through 9 identify 17 the various years. And I guess I just want to talk 18 generally -- if we go back to that 2022 column, we have 19 an entity like North Snake with a -- a mitigation 20 balance of 7,586; is that correct? 21 A. I see that. 22 HEARING OFFICER: On what page, sir? 23 MR. THOMPSON: I'm on page 5 of Exhibit 142. 24 THE WITNESS: Table 1 again. 25 HEARING OFFICER: Okay. Thank you.</p>	<p style="text-align: right;">159</p> <p>1 Q. (BY MR. THOMPSON) So you're generally 2 familiar with where the North Snake Ground Water 3 District's located; correct? 4 A. Yes. 5 Q. The far western edge of the ESPA? 6 A. That's correct. 7 Q. I guess, hydrologically, wouldn't you agree 8 with me that a benefit there would not offset a 9 deficiency in the Bingham Ground Water District located 10 close to the Snake River on the eastern side? 11 A. Well, it -- it does, depending how you look at 12 the timing. So, I mean, that -- that's really exactly 13 what my analysis gets at, is that when you input all of 14 the deficits and surpluses exactly as they took place in 15 their exact locations, you come up with either a net 16 positive or a net negative. 17 Q. But as far as 2022, I guess additional actions 18 in North Snake are not going to offset -- I'll call it 19 overpumping in Bingham. Would that be true? 20 A. It's true that for the majority of their 21 actions in 2022, that's not going to offset Bingham's 22 2022 deficit. But when you look at their past 23 activities, which take place years ago, that is when the 24 timing of their excess or surplus conservation does -- 25 can offset it in that year, because it -- it takes it</p>
<p style="text-align: right;">160</p> <p>1 longer to get there. 2 So it's all dependent on the time frame that 3 you're looking at, but specifically the way you frame 4 that question, does their activities in 2022 offset very 5 much of Bingham's 2022 deficit? No. I would agree with 6 that. It's a very small percentage. 7 Q. So if we're looking at a proposed remedy going 8 forward and we're looking at a one-year time frame to 9 implement that, would you agree that taking some action 10 in North Snake in 2024 wouldn't remedy Bingham's breach 11 in 2022? 12 A. You know, I mean, the way I'm looking at this, 13 none of them offset the breach in 2022, except for the 14 activities that were taken prior to 2022. You know, 15 nothing in 2024 is going to offset 2022 unless you're 16 looking at 2022's effect on all of those future years, 17 which, you know, I do look at in my analysis, and it 18 varies in terms of how they get offset or not. 19 But I think the only way to offset the actual 20 deficit on the reach in 2022 is if you're accounting for 21 the activities that took place prior to 2022. Actions 22 in 2024 don't affect the reach gain in 2022. 23 Q. And getting back to what you've looked at -- 24 you know, if we're looking at everything, you're just 25 looking at the impacts of those additional actions they</p>	<p style="text-align: right;">161</p> <p>1 took from '16 to '22; correct? 2 A. I'm comparing them to what -- yeah. I mean, 3 I'm looking at just the difference. So what would have 4 taken place if they hadn't done those activities and 5 they had just done 240 every single year or in the 6 analysis where I look at 205 if they had just done 205 7 every single year versus what they actually did, which 8 was either more or less than those depending in -- 9 depending on the year. So I'm looking at the difference 10 between those. 11 I'm not -- I'm not just looking at here's 12 these excess credits, what are the reach gain effects of 13 that? I'm looking at the -- the difference, so -- so 14 the net gain. 15 Q. And I think I understand that. You're not 16 looking at the -- the 240, you're looking at anything 17 beyond the 240 that was done? 18 A. Yes. 19 Q. And you would agree that that excess or 20 surplus conservation would -- would not exceed the 21 modeled impacts of those ground water diversions on the 22 river that year? 23 HEARING OFFICER: I didn't hear the last 24 portion of that, sir. 25 MR. THOMPSON: The modeled impacts of the</p>

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<p style="text-align: right;">162</p> <p>1 ground water diversions on the river that year. 2 HEARING OFFICER: Which year? 3 MR. THOMPSON: Any year. We'll -- we'll say 4 2022. 5 HEARING OFFICER: Very well. 6 A. I -- I mean, you're saying just the ground 7 water diversions, not like ground water diversions in 8 those years minus the ground water diversions that took 9 place -- like you're saying if you just isolate a single 10 year's of ground water diversions, would that have more 11 of an impact than just the excess percentage? 12 Q. Correct. 13 A. Yeah. I mean, I haven't done that analysis, 14 but it seems like that is fair. 15 Q. Turn to page 10 of your report. Exhibit -- 16 page 10. 17 A. Is that Table 3? 18 Q. No. It's a problem. We have different page 19 numbers. 20 Page 8 of your report, Sophia, that -- it's 21 Exhibit 142, page 10. 22 A. Okay. So it's just paragraphs? 23 Q. Yeah. That first paragraph you talk about 24 special and temporal -- spatial and temporal information 25 where that was available. And how much of that did you</p>	<p style="text-align: right;">163</p> <p>1 have -- as far as the version reduction or recharge 2 activity, was that for everything? 3 A. In terms of diversion reduction, it's for 4 everything. In terms of recharge, it's -- you -- you 5 can see it from the settlement report. I mean, it's 6 just based on how much information there is in the 7 settlement reports. And then for -- yeah. So I -- I'm 8 not sure what percentage it would be. I didn't 9 calculate that. But it's only a factor for the recharge 10 locations. 11 Q. And you talked about -- 12 [Unintelligible cross-talk.] 13 Q. (BY MR. THOMPSON) Excuse me. Recharge 14 locations and dates were estimated, and I guess what 15 data were you basing that on? 16 A. That was in consultation with Jaxon Higgs, who 17 works with the districts. I gave him the -- a list from 18 the settlement reports, which he puts together. I gave 19 him a list of recharge that I based on the information 20 that I was provided in those reports that I couldn't 21 locate myself and asked him for his best estimate in 22 terms of where to put that. 23 Q. And if you could turn over a couple pages 24 to -- I believe pages 11 through 13 -- those tables 25 showing your conservation model analysis.</p>
<p style="text-align: right;">164</p> <p>1 A. Okay. 2 Q. You have that? 3 A. Yes. 4 Q. And would you agree that those gains in those 5 tables would be higher had the districts fully performed 6 in 2022? 7 A. Yes, but not if they had performed at just -- 8 I mean, obviously, that's what the analysis shows, that 9 these are the increases if they had just performed 10 204 -- 240 every single year. So I don't -- you know, I 11 don't get the point of it, I guess -- of the question. 12 Q. In looking at 2021, you said you didn't 13 include the -- the deficits from those years -- from 14 that year; is that true? 15 A. That's right. 16 Q. But there was a pretty significant deficit 17 from that year; isn't that right? 18 A. Yes. 19 Q. So would that change your carryover -- I guess 20 your actual conservation volume in that 2022 column had 21 you included that? 22 A. Yes, but I would have also included, you know, 23 whatever direct delivery of water or -- you know, I 24 didn't know how to deal with the terms of that 25 settlement agreement, but my -- and I -- I only know</p>	<p style="text-align: right;">165</p> <p>1 parts of it. So I -- I don't even know the whole -- all 2 of the terms, but my understanding were that some of the 3 terms were direct delivery. 4 And so when I thought about including it, I 5 thought I could include it and then offset those future 6 years with direct delivery, but then aspects of the 7 settlement agreement that aren't direct delivery, that 8 are some -- you know, I -- I just didn't know how to 9 implement that in the model. So based on there being an 10 agreement that shared the breach, it made the most sense 11 to me to just say there's no deficit. There's no 12 surplus in 2021. 13 Q. From an actual remedy standpoint, I -- I 14 agree. Setting aside the 2022 agreement that settled 15 that breach, hydrologically, what you're evaluating, 16 that would change what actually shows up in the river 17 given what was done in 2021? 18 A. But like I said, for -- for -- like -- like I 19 said, direct deliveries would also have changed it. So, 20 you know, for example, in 2022, there were direct 21 deliveries of water, which I included as direct reach 22 gains in this analysis that I'm showing. So I -- you 23 know, I think that's the only way to make sense of that 24 as well, would be to -- to account for those direct 25 deliveries as supplies to the reach as well.</p>

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<p style="text-align: right;">166</p> <p>1 Q. And are you talking about the direct delivery 2 of additional storage in 2022 beyond the 50,000? 3 A. I'm referring -- yes. I mean, I'm not -- I 4 don't know exactly what you're referring to there, but 5 I'm referring to the direct deliveries as they're 6 reported in the summary performance report for 2022. So 7 to keep the volumes consistent with that, I accounted 8 for those direct deliveries at the river. 9 Q. So the storage deliveries were separate and 10 apart from the 240,000 acre-foot ground water reduction 11 recharge obligation. Do you recognize that? 12 A. Yes. So those are not included in any of my 13 modeling. 14 Q. So any additional water that was part of 15 the -- the 240 and 2 -- 2022 was not included? 16 A. I'm just including the water as it's reported 17 in the recharge tab of the performance agreement for 18 2022. I don't know how to just -- I -- I'm not sure if 19 I'm distinguishing that correctly from the water you're 20 talking about. 21 Q. If we could turn to Exhibit 143, your rebuttal 22 report. I guess would you agree that a district's 23 annual longterm conservation obligations and the 24 sentinel well measurements and analysis are separate 25 components of the mitigation plan?</p>	<p style="text-align: right;">167</p> <p>1 A. Can you say that again? 2 Q. So would you agree that the district's annual 3 longterm conservation obligations and the sentinel well 4 measurements and analysis are separate components of the 5 mitigation plan? 6 A. So you mean, like, the 240 acre-feet versus 7 the sentinel well targets are -- are separate? 8 Q. Yes. 9 A. The sentinel well targets were negotiated 10 numbers in my view, from my understanding. But I think 11 we did the modeling that I show in my rebuttal report 12 prior to the settlement agreement being signed, 13 implementing what 240,000 acre-feet of ground water 14 reductions across the Eastern Snake Plain looked like 15 relative to those sentinel well targets for a reason. 16 So in that way, just from my view, having done 17 that modeling, I see a connection. But I'm not sure, 18 technically, legally. I don't know how to answer that 19 [unintelligible]. 20 Q. Yeah. And I'll -- I'll try to break it down. 21 I guess as far as reporting and analyzing the annual 22 activities that the districts do, that's done every 23 year; correct? 24 A. Right. 25 Q. That's reported. That's evaluated. The</p>
<p style="text-align: right;">168</p> <p>1 director evaluates whether that's been complied with or 2 not. Would you agree with that? 3 A. Yes. 4 Q. And then the sentinel well benchmarks and the 5 ultimate goal -- those were to be looked at at three 6 points -- 2020, 2023, and 2026? 7 A. That's correct. 8 Q. And if a benchmark was not achieved like the 9 2023 benchmark, you agree in your report that that could 10 trigger adaptive management? 11 A. That's the way I see it written in the 12 settlement agreement. 13 Q. So would you agree that if excess conservation 14 was done, even though it was not required under the 15 longterm annual 240,000 acre-feet obligation every year, 16 that could still help the districts achieve reaching 17 those benchmarks and goals of the sentinel wells? 18 A. Yes. I agree. And in some ways, that's 19 always been sort of a complication of the agreement, 20 that IGWA wants to raise the water levels in the well -- 21 in the wells, but the Surface Water Coalition is 22 interested in the increased reach gains. And sometimes 23 developing the timing between what benefits the sentinel 24 wells versus what benefits the reach gains -- that can 25 be a tricky balance, in terms of where to prioritize</p>	<p style="text-align: right;">169</p> <p>1 recharge, for example. 2 Q. And if we look at your Figure 1 on page 5. 3 A. Yes. 4 Q. You talked about what was done with each of 5 those modeling exercises -- the blue line representing 6 the 240 and 250 with ESPAM 2.1; is that correct? 7 A. That's correct. 8 Q. And then the orange line with two-point -- 9 ESPAM 2.2? 10 A. Correct. 11 Q. And it's -- it's your contention that the -- 12 the district surplus conservation between 2016 and 2020 13 helped increase the sentinel well index in those years? 14 Would you agree with that? 15 A. Based on the modeling which I looked at -- 16 specifically the net change in 2023, I see a net 17 increase when you take into account IGWA's conservation 18 over those years versus if they had just done 240 or 205 19 every year. 20 Q. So even though that wasn't required under the 21 agreement or the mitigation plan, that had the benefit 22 of helping achieve that -- the benchmark? 23 A. I see that that's a benefit. 24 Q. And the first benchmark was exceeded -- do you 25 agree with that -- in 2020?</p>

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<p style="text-align: right;">170</p> <p>1 A. Yes. The first -- I remember people talking 2 about how increasing the water level was like turning 3 the Titanic. So they set the first benchmark equivalent 4 to where we were, thinking that it was going to take 5 longer to kind of overcome the past depletions. And 6 then we had, you know, a really wet year to start the 7 agreement off. And so in some ways, mother nature kind 8 of kickstarted and helped us get above that benchmark in 9 addition to the conservation activities. 10 Q. So the districts had an incentive to perform 11 these additional actions when they could, when there was 12 water available and there were good hydrologic 13 conditions to take advantage of that? 14 A. Yes, but, I mean, you can also see, I believe, 15 if you just look at the districts' plans, that a lot of 16 the districts implemented averaging in their individual 17 mitigation. So I can't say that that was their whole 18 impetus -- was hopefully increasing just the sentinel 19 wells in doing their excess conservation in those years. 20 Q. You talked about the differences in the -- the 21 two models, and then you state that the -- the sentinel 22 well levels are below 2016 mitigation plan targets 23 because those targets were established partly on 24 modeling using ESPAM version 2.1. Can you explain that? 25 A. So I kind of alluded to that in my earlier</p>	<p style="text-align: right;">171</p> <p>1 answer that I think, in a lot of ways, these targets are 2 negotiated values, but I think we looked at the modeling 3 to see is it even feasible to achieve these targets? 4 And I think if the modeling -- if we had been modeling 5 back then with ESPAM 2.2 and it had showed, no, there's 6 no way within these ten years that you're going to meet 7 those targets, I don't know for sure, but I think it's 8 possible different targets would have been set at that 9 time. 10 So I think the fact that the modeling showed 11 that -- may have influenced how the targets were 12 negotiated. It was harder to argue for lower targets if 13 they could be met that way. 14 Q. And based on your analysis, the -- the index 15 was trending along the orange line, the ESPAM 2.2 line, 16 for at least the first five years; is that correct? 17 A. That's what it looks like, but it -- you know, 18 it's not just because the model is that much better. 19 There's other influences. Like I said, the climate 20 impacted the trajectory of that actual observed in that 21 case in some ways. 22 Q. And then we had some different climatic 23 conditions in '21 and '22 -- warmer, dryer conditions? 24 A. Correct. 25 Q. And we had breaches by the districts in those</p>
<p style="text-align: right;">172</p> <p>1 two years as well. Do you agree with that? 2 A. Yes. They're -- the director determined -- I 3 mean, I'm not sure how the settled 2021 gets defined, if 4 the settlement came before a breach determination. And 5 then, like I said, for 2022, I heard in this hearing. 6 So I'm a little foggy on exactly how that is -- 7 [Unintelligible cross-talk.] 8 Q. (BY MR. THOMPSON) And I'll phrase -- I'll 9 phrase it differently. I'll -- in those years leading 10 up to 2021, we had the districts taking actions in 11 excess of 240,000 acre-feet per year. That's true. And 12 then in '21 -- 13 A. Right. 14 Q. -- and '22, the districts did not perform 15 240,000 feet -- 16 A. That's fair. 17 Q. -- both years? 18 And, coincidentally, the index declined in 19 those years as well -- the sentinel well index? 20 A. Yes, but obviously in my report I'm -- I'm 21 showing the severe drought years and how the historical 22 index has responded to severe drought years for a 23 reason. I think they are a factor. 24 Q. And based upon your review of the -- the 25 sentinel wells, the data that goes into the index, is it</p>	<p style="text-align: right;">173</p> <p>1 fair to say that the reading from 2016 -- the spring of 2 2016 and the spring of 2023 are two of the lowest that 3 we've seen in history? 4 A. I think that's fair. They're very close. 5 Q. And regardless of which model we employ, 2.1 6 or 2.2, the 2023 sentinel well index is below what the 7 agreement and mitigation plan call for, for purposes of 8 the benchmark? 9 A. Yes. 10 Q. So you state -- make this quote "Over time, as 11 climatic influences average out. However, the ground 12 water districts' conservation efforts make a significant 13 difference in ground water levels." Is that true since 14 2016? 15 A. Well, I mean, hydrologically, unfortunately, I 16 think that that is still a short time frame, and so, you 17 know, my point there is that, in the short term, those 18 drought years are going to cause the index to deviate 19 drastically, but the same happens if we have a wet year. 20 It's going to deviate drastically in the opposite 21 direction. 22 So if you make the evaluation right in two -- 23 following two dry years, which is what we're -- you 24 know, a series of dry years, if you look at the Palmer 25 Drought Severity Index in both those cases, yes, those</p>

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<p style="text-align: right;">174</p> <p>1 are going to be the low points when it deviates off of 2 it. So, I mean, that's kind of the point -- is that you 3 need to look at it long term before it's going to look 4 anything like the projected model under average 5 hydraulic conditions. 6 Q. And it -- and, at least in the short term, you 7 were relying upon the Department's modeling in that 8 Figure 2 on page 6, which shows projections with -- with 9 or without recharge and without ground water mitigation? 10 A. I mean, I think part of the conclusion from 11 that analysis is that the sentinel well would be lower, 12 much lower, if the activities hadn't taken place. And, 13 obviously, that doesn't show out to 2023. So we're just 14 looking at until 2021. But if you look at 2021, which 15 was, you know, starting that dry year, we would have 16 been in a much worse place to then drop off additionally 17 from -- if the terms of the settlement agreement and the 18 board's recharge hadn't been accomplished. 19 Q. So carrying out that figure to 2023, we're 20 kind of back where we started in 2016, essentially, on 21 that Department graph? 22 A. But I think if you extended the Department's 23 analysis, what they would -- what it would show is that 24 we would be much lower without those activities than we 25 are today. And, again, you should -- we should do the</p>	<p style="text-align: right;">175</p> <p>1 analysis. [Unintelligible.] 2 Q. So would greater conservation efforts by the 3 ground water districts increase sentinel well levels 4 moving forward? 5 A. I think that's fair. 6 Q. And that would assist with the adaptive 7 management under the mitigation plan? 8 A. I mean, I -- I don't what it lays out in terms 9 of specifics for adaptive management. It's -- so that 10 could be a possibility for an adaptive management 11 technique, but I don't think it's in the settlement 12 agreement -- I don't think. 13 Q. I'm going to turn over to your page 9, that 14 Table 2. 15 A. Is this in my expert report? 16 Q. This would be your rebuttal still, yep. 17 A. I'm sorry. I'm sorry. Can you -- you're 18 looking at Table 2, you said? 19 Q. Yes, yes. 20 A. [Unintelligible.] 21 Q. [Unintelligible] it's titled "2016 to 2022 22 IGWA Conservation Model Analysis." 23 A. Got it. 24 Q. And that shows the estimated impacts on the 25 near Blackfoot to Minidoka reach resulting from the</p>
<p style="text-align: right;">176</p> <p>1 districts that underperformed in 2022. No. I'm sorry. 2 That's -- I'm going back to Dave Coleman's 3 Table 2. That -- previous page 8. That's -- that's his 4 Table 2; correct? 5 A. I -- oh, yeah. Yeah. Table 2. Yep. Sorry. 6 Yes. 7 Q. And do you disagree with any of the modeling 8 set forth in that table? 9 A. Well, I -- I mean, Dave did do a more 10 simplified version of the modeling. That's not 11 incorrect. We simplify modeling all the time. But, you 12 know, if you were going to compare and contrast what the 13 actual deficits or accruals were at the reach, I think 14 it's more appropriate to have done the modeling by 15 location than to have applied it across the district 16 uniformly. 17 Q. So the actual well location that you've 18 identified where that underperformance occurred -- that 19 could be modeled? That could be incorporated? 20 A. That's how I modeled it. 21 Q. Rather than just district-wide assigning it to 22 each cell whether there's pumping? 23 A. Correct. 24 Q. And when you take those totals, would they 25 change a whole lot, or do you know?</p>	<p style="text-align: right;">177</p> <p>1 A. I -- I don't know, actually. 2 Q. And then looking on at your analysis over the 3 next two pages, you used the 205. And then the second 4 table, your Table 2 on page 9, looks at the 240; 5 correct? The surplus conservation? 6 A. Correct, correct. 7 Q. And you're just looking at it -- IGWA, as a 8 whole, even though you've got it broken down by 9 district; is that correct? 10 A. I mean, correct, but you can look at it by 11 district. I mean, there was a reason I was asked to 12 break it down. 13 Q. And would you agree that those to-reach gains 14 would have been higher had the breaches in '22 not 15 occurred? 16 A. Yes, but not higher than if 240 had been done 17 every single year, except for the cases where there's 18 negatives. 19 Q. Yeah. If we went back in time and the 20 districts just did 240 every year, we probably wouldn't 21 be here, would we? 22 So if the hearing officer accepted your 23 conclusion about the '22 breach -- or accepted your 24 conclusion that the past performance has remedied the 25 '22 breach, it would never be completely remedied, would</p>


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<p style="text-align: right;">178</p> <p>1 it?</p> <p>2 A. In -- in what way?</p> <p>3 Q. Looking at what happened in '22 and that</p> <p>4 underperformance of what was required.</p> <p>5 A. Well, I think if you look at IGWA-wide -- I</p> <p>6 mean, I think it depends on how you're looking at it,</p> <p>7 whether you're looking at it by district or IGWA-wide,</p> <p>8 and I would say that that for sure same conclusion</p> <p>9 applies to the remedy that is in the Surface Water</p> <p>10 Coalition report with just increased diversion</p> <p>11 reductions in 2024, if I'm understanding the question.</p> <p>12 Q. Your conclusion relies upon a multiyear</p> <p>13 evaluation of what's been done in the past; is that</p> <p>14 true?</p> <p>15 A. Yes. My -- my conclusion is taking excess</p> <p>16 pumping that was not needed under the terms of the</p> <p>17 settlement agreement and looking at what that results,</p> <p>18 in terms of mitigation, potential mitigation, to a</p> <p>19 breach at the near Blackfoot to Minidoka -- in terms of</p> <p>20 the near Blackfoot to Minidoka reach gains.</p> <p>21 Q. So you're crediting past performance against</p> <p>22 future obligations; is that correct?</p> <p>23 A. I don't know about future obligations. I'm</p> <p>24 just -- I'm just looking at the net effect on the river</p> <p>25 as a way to -- you know, to see how to best remedy the</p>	<p style="text-align: right;">179</p> <p>1 breach.</p> <p>2 Q. And in looking at your Table 2, you have these</p> <p>3 numbers that extend out into the future, that far right</p> <p>4 table, and all those positive numbers. Are you</p> <p>5 advocating that the ground water districts could produce</p> <p>6 less than 240 based upon those numbers?</p> <p>7 A. Well, it -- it's separate from the 240</p> <p>8 accounting. You would -- essentially, to adopt this,</p> <p>9 you would have then to look at the -- the reach</p> <p>10 accounting, if there's a breach, and have remedy the</p> <p>11 breach. So -- so if there's a breach, then to determine</p> <p>12 how much it needs to be remedied, you would do this</p> <p>13 analysis. But --</p> <p>14 [Unintelligible cross-talk.]</p> <p>15 Q. (BY MR. THOMPSON) And under your analysis,</p> <p>16 you're only looking at conservation actions. You're not</p> <p>17 looking at impacts from the ground water diversions; is</p> <p>18 that correct?</p> <p>19 A. Correct. I'm just looking at the difference</p> <p>20 between the 240 allocation target being met every year</p> <p>21 and what is gained by doing more than that in terms of</p> <p>22 the net effect on the reach gain.</p> <p>23 [Unintelligible cross-talk.]</p> <p>24 HEARING OFFICER: Thank you. Further</p> <p>25 questions?</p>
<p style="text-align: right;">180</p> <p>1 MR. ANDERSON: Yes, just -- just quickly.</p> <p>2 CROSS-EXAMINATION</p> <p>3 BY MR. ANDERSON:</p> <p>4 Q. How you doing, Sophia?</p> <p>5 A. Good.</p> <p>6 HEARING OFFICER: [Unintelligible.]</p> <p>7 MR. ANDERSON: This is Dylan Anderson with</p> <p>8 Bingham Ground Water District.</p> <p>9 Q. (BY MR. ANDERSON) I just want to clarify</p> <p>10 something that you just talked about. When you were</p> <p>11 being asked about past performance or past conservation,</p> <p>12 when you do that, you're not adding up a cumulative</p> <p>13 effect from all those previous years. You're looking at</p> <p>14 just 2022 and the benefit that previous performance has</p> <p>15 in that year; right? Is that correct to say?</p> <p>16 A. Yes. So, yeah, if you look at my table for</p> <p>17 each year, it's just the net effect in that year of the</p> <p>18 cumulative activities that have taken place prior to it.</p> <p>19 So --</p> <p>20 Q. So you're not asking --</p> <p>21 [Unintelligible cross-talk.]</p> <p>22 Q. (BY MR. ANDERSON) Yes. You're not modeling a</p> <p>23 benefit or effect that took place, whether it was 5</p> <p>24 years ago or 100 years ago. You're looking at an actual</p> <p>25 benefit that -- that is in the reach gain for 2022;</p>	<p style="text-align: right;">181</p> <p>1 correct?</p> <p>2 A. Correct.</p> <p>3 MR. ANDERSON: That's all I have.</p> <p>4 HEARING OFFICER: Thank you. May the witness</p> <p>5 be excused?</p> <p>6 Madam, thank you very much for appearing by</p> <p>7 Zoom, or whatever electronic marvel, and we appreciate</p> <p>8 your appearance here today. You are excused.</p> <p>9 THE WITNESS: Thank you so much for allowing</p> <p>10 me to appear remotely. It's really helpful.</p> <p>11 HEARING OFFICER: No problem.</p> <p>12 So the next witness would be?</p> <p>13 UNIDENTIFIED SPEAKER: Our next witness is</p> <p>14 Jaxon Higgs. It may be better if we start him fresh</p> <p>15 first thing in the morning.</p> <p>16 HEARING OFFICER: Okay.</p> <p>17 UNIDENTIFIED SPEAKER: If --</p> <p>18 HEARING OFFICER: Do you have anybody that</p> <p>19 would take 40 minutes, or is this kind of the subject</p> <p>20 matter that everything is very long?</p> <p>21 UNIDENTIFIED SPEAKER: Unfortunately, it is.</p> <p>22 HEARING OFFICER: I guess. All right. Any</p> <p>23 issues by SWC in that regard?</p> <p>24 UNIDENTIFIED SPEAKER: We only have one more</p> <p>25 day for this hearing. So I guess we get a little more</p>

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<p style="text-align: right;">182</p> <p>1 information about how many witnesses [unintelligible]. 2 Based upon the order that was entered at the 3 beginning of the hearing, I thought a lot of this would 4 go faster, but if everyone can testify to everything 5 that's in all these expert reports, then it's going to 6 take a while. So I don't know [unintelligible]. 7 UNIDENTIFIED SPEAKER: So we started at, I 8 think, 11:00 today and got through two experts with the 9 most voluminous and complex reports. From here on 10 forward, we got Jaxon Higgs, who I think will be shorter 11 than Ms. Sigstedt and Mr. Colvin. I understand Bryce 12 Contor is going to be quite short, and then we have a 13 lay witness Bill Stoddart, and I don't expect his to be 14 especially lengthy. So -- and then we have David 15 Colvin's rebuttal, if -- if any. 16 I don't foresee much difficulty getting 17 through all of those tomorrow, but I'm happy to hear 18 from others. This is just my suggestion. 19 [Unintelligible cross-talk.] 20 HEARING OFFICER: -- strikes me is because of 21 our time limitations, a calling of -- of repetition 22 would be very helpful. The evidence is already in. 23 Maybe some of the future evidence can be called back 24 some, rather than lots of repetition of the same things. 25 On -- on the one hand, I don't necessarily</p>	<p style="text-align: right;">183</p> <p>1 want to interfere, but on the other hand, that might be 2 one way to help. 3 UNIDENTIFIED SPEAKER: I think if -- if those 4 are all the witnesses that will be called, we probably 5 can [unintelligible]. 6 HEARING OFFICER: Okay. Should we start at 7 9:00, then? 8 UNIDENTIFIED SPEAKER: I think we're okay. 9 HEARING OFFICER: All right. We're -- we'll 10 reconvene here at 9:00 o'clock. Mr. Higgs will be the 11 next witness. 12 UNIDENTIFIED SPEAKER: Thank you. 13 HEARING OFFICER: Mr. Higgs previously -- 14 15 (End of audio file.) 16 * * * * * 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">184</p> <p>1 TRANSCRIBER'S CERTIFICATE 2 I, BROOKE SIMMS, an Idaho Certified Shorthand 3 Reporter, Utah State Certified Court Reporter, and 4 Registered Professional Reporter, hereby certify: 5 That the audio recording of the proceedings 6 were transcribed by me or under my direction; 7 That the foregoing is a true and correct 8 transcription of all testimony given, to the best of my 9 ability; 10 I further certify that I am not a relative or 11 employee of any attorney or party, nor am I financially 12 interested in the action. 13 14 15 IN WITNESS WHEREOF, I set my hand and seal 16 this 25th day of March, 2024. 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;"> <i>Brooke Simms</i> _____ Brooke Simms, RPR, CCR, CSR Idaho CSR No. 1174 Utah CCR No. 12335391-780 Notary Public My commission expires 4/27/27</p>	

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<p style="text-align: center;">A</p> <p>A&B 1:7 3:16 8:14,22,24 34:21 40:6 73:7 76:23 98:15 126:17 147:24 Aberdeen 16:3 17:2 Aberdeen-Ame... 75:17 89:10 abide 16:13 ability 78:12 184:9 able 14:14 23:21 93:24 94:16 101:5 102:7 104:17 117:22 accept 26:5 104:17 105:15 110:12 155:25 accepted 34:3,6 104:24 177:22 177:23 accepting 151:1 access 21:10 22:19 accommodate 146:18 accompanies 118:24 accompany 117:17 accomplish 146:23,24 accomplished 174:18 accomplishing 144:25 account 130:7 145:14 165:24 169:17 accounted 132:25 148:22 166:7 accounting</p>	<p>102:14 160:20 179:8,10 accretions 96:5 132:4 accrual 67:8 accruals 156:2 176:13 accrue 68:22 155:16 156:4 accrued 67:4 154:17 accrues 64:18 accruing 129:22 accumulate 112:22 accumulated 113:1 accumulating 145:4 accumulative 121:14 achieve 60:12 168:16 169:22 171:3 achieved 60:13 168:8 acknowledged 13:13,19 acre 10:17 75:18 151:19 acre-feet 9:19,25 10:1,2,17,18 16:23 55:5 56:15 60:13,18 62:15 64:14,21 65:10 67:3,14 67:15 69:16 76:5 77:1,3,20 77:24 80:13,14 84:17 85:1 86:10 129:6,8 129:11 130:9,25 132:7 135:22 137:6,10,11</p>	<p>144:18 151:16 153:21 167:6,13 168:15 172:11 acre-foot 59:9 63:8 100:25 101:2 123:22 124:9,23 128:15 128:16,18 129:3 130:6,13 134:21 135:7 144:11 151:18 152:23 152:24 153:10 154:11 166:10 acres 137:6 151:11,14 153:12 acronym 11:21 Act 35:21 action 9:12 20:13 20:23 37:21 102:21 107:15 148:14,18 150:16 151:3 160:9 184:12 actions 10:5,22 11:2,2 24:12 38:3 42:5 55:2 70:13 80:5 81:10 82:8 84:9 101:17,22 102:21,24 103:9 105:1 107:8,23 109:2 114:20 115:5,12 146:16 146:23 149:2 152:21 155:7 159:17,21 160:21,25 170:11 172:10 179:16 active 42:2 activities 53:16 99:5 100:14,21 100:22 101:11</p>	<p>102:8,14 117:11 117:13,16 121:25 124:11 124:22 128:14 129:15,19 130:8 131:13,20,23 132:25 133:3 134:4,11 135:10 135:12,21 137:11 140:13 140:16,21,23,25 141:3,5,13 142:21,22 143:15,22 144:19 145:2 148:12 159:23 160:4,14,21 161:4 167:22 170:9 174:12,24 180:18 activity 163:2 actual 60:5 67:1 67:15 100:14,22 101:6 102:14 117:15,20 119:1 119:15 120:17 120:22 121:13 124:14 128:14 128:20 129:15 130:12 140:6 143:15 160:19 164:20 165:13 171:20 176:13 176:17 180:24 adaptive 55:23 56:4 112:11 168:10 175:6,9 175:10 add 22:6,12 58:25 106:18 126:6 added 90:15 129:23 addendum 98:14</p>	<p>98:14 addendums 20:14 adding 180:12 addition 30:9 69:11 170:9 additional 65:13 68:6 69:1,6,12 80:15,20 81:21 81:23 89:23 104:9 117:12 139:6 144:18,21 145:2 149:2 154:11 159:17 160:25 166:2,14 170:11 additionally 10:9 28:18 174:16 address 8:9 12:5 15:22,23 18:25 112:17 114:1 addressed 12:8 28:22 30:6 99:25 132:18,19 136:13 148:8 addresses 42:22 addressing 104:4 administer 47:22 administered 152:13 administration 97:5,21 administrative 20:5 35:21 admission 52:18 52:18 146:14 admit 146:8,9 admitted 7:3 36:14,15 37:23 37:25 39:4 52:24,25 147:4 147:6 adopt 29:11,13 179:8</p>
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1

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION)
OF WATER TO VARIOUS WATER) IDWR DOCKET NO.
RIGHTS HELD BY OR FOR THE) CM-MP-2016-001
BENEFIT OF A&B IRRIGATION)
DISTRICT, AMERICAN FALLS)
RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,) TRANSCRIBER'S TRANSCRIPT
MINIDOKA IRRIGATION DISTRICT,) OF PROCEEDINGS
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
_____)

CAPTION CONTINUED NEXT PAGE

BEFORE

HEARING OFFICER: ROGER BURDICK

DATE: March 15, 2024

LOCATION: Idaho Department of Water Resources
Boise, Idaho

TRANSCRIBED BY:

ANDREA L. CHECK, CSR No. 748, RPR, CRR

Notary Public

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Audio Transcription

<p style="text-align: right;">2</p> <p>1 IN THE MATTER OF IGWA'S) 2 SETTLEMENT AGREEMENT) 3 MITIGATION PLAN) 4 _____) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">3</p> <p>1 A P P E A R A N C E S 2 3 for the Department of Water Resources: 4 Office of the Attorney General 5 Idaho Department of Water Resources 6 BY MR. KAYLEEN R. RICHTER, ESQ. 7 322 East Front Street, Suite 648 8 Boise, Idaho 83720-0098 9 kayleen.richter@idwr.idaho.gov 10 For the Minidoka Irrigation District, AFRD#2, SWC: 11 Fletcher Law Office 12 BY MR. W. KENT FLETCHER, ESQ. 13 1200 Overland Avenue 14 Burley, Idaho 83318-0248 15 wkf@pmt.org 16 For A&B Irrigation District, Burley Irrigation District, 17 Milner Irrigation District, North Side Canal Company, 18 Surface Water Coalition, and Twin Falls Canal Company: 19 Marten Law, LLP 20 BY MR. TRAVIS L. THOMPSON, ESQ. 21 163 2nd Avenue West 22 Twin Falls, Idaho 83301 23 tthompson@martenlaw.com 24 25</p>
<p style="text-align: right;">4</p> <p>1 A P P E A R A N C E (Continued) 2 3 For Idaho Ground Water Appropriators, Inc.: 4 Racine Olson, PLLP 5 BY MR. THOMAS J. BUDGE, ESQ. 6 & MS. ELISHEVA M. PATTERSON, ESQ. 7 201 East Center Street 8 Pocatello, Idaho 83201 9 tj@racineolson.com 10 elisheva@racineolson.com 11 For Bonneville-Jefferson Ground Water District: 12 Olsen Taggart, PLLC 13 BY MR. SKYLER C. JOHNS, ESQ. 14 P.O. Box 3005 15 Idaho Falls, Idaho 83403 16 sjohns@olsentaggart.com 17 For Bingham Ground Water District: 18 Dylan Anderson Law 19 BY MR. DYLAN K. ANDERSON, ESQ. 20 P.O. Box 35 21 Rexburg, Idaho 83440 22 dylan@dylanandersonlaw.com 23 24 25</p>	<p style="text-align: right;">5</p> <p>1 A P P E A R A N C E S (Continued) 2 3 4 For American Falls-Aberdeen Ground Water District: 5 Somach Simmons & Dunn, P.C. 6 BY MR. MAXIMILIAN C. BRICKER, ESQ. 7 1155 Canyon Boulevard, Suite 110 8 Boulder, Colorado 80302 9 mbricker@somachlaw.com 10 11 Also Present: 12 Sarah Tschohl 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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<p style="text-align: right;">6</p> <p style="text-align: center;">INDEX WITNESSES</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 80%;"></th> <th style="width: 20%; text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td colspan="2">TESTIMONY OF JAXON HIGGS</td> </tr> <tr> <td>Direct Examination By Ms. Patterson</td> <td style="text-align: right;">10</td> </tr> <tr> <td>Voir Dire Examination By Mr. Fletcher</td> <td style="text-align: right;">14</td> </tr> <tr> <td>Continued Direct Examination By Ms. Patterson</td> <td style="text-align: right;">34</td> </tr> <tr> <td colspan="2">REBUTTAL TESTIMONY OF BRYCE CONTOR</td> </tr> <tr> <td>Direct Examination By Mr. Johns</td> <td style="text-align: right;">50</td> </tr> <tr> <td>Cross-Examination By Mr. Fletcher</td> <td style="text-align: right;">79</td> </tr> <tr> <td>Cross-Examination By Mr. Anderson</td> <td style="text-align: right;">97</td> </tr> <tr> <td>Redirect Examination By Mr. Johns</td> <td style="text-align: right;">102</td> </tr> <tr> <td colspan="2">REBUTTAL TESTIMONY OF DAVID COLVIN</td> </tr> <tr> <td>Direct Examination By Mr. Thompson</td> <td style="text-align: right;">106</td> </tr> <tr> <td>Cross-Examination By Mr. Budge</td> <td style="text-align: right;">114</td> </tr> <tr> <td>Cross-Examination By Mr. Johns</td> <td style="text-align: right;">125</td> </tr> <tr> <td>Redirect Examination By Mr. Thompson</td> <td style="text-align: right;">130</td> </tr> <tr> <td colspan="2">TESTIMONY OF WILLIAM STODDART</td> </tr> <tr> <td>Direct Examination By Mr. Budge</td> <td style="text-align: right;">133</td> </tr> <tr> <td>Cross-Examination By Mr. Thompson</td> <td style="text-align: right;">169</td> </tr> <tr> <td>Examination By the Hearing Officer</td> <td style="text-align: right;">177</td> </tr> <tr> <td>Cross-Examination By Mr. Anderson</td> <td style="text-align: right;">179</td> </tr> <tr> <td>Redirect Examination By Mr. Budge</td> <td style="text-align: right;">181</td> </tr> </tbody> </table>		PAGE	TESTIMONY OF JAXON HIGGS		Direct Examination By Ms. Patterson	10	Voir Dire Examination By Mr. Fletcher	14	Continued Direct Examination By Ms. Patterson	34	REBUTTAL TESTIMONY OF BRYCE CONTOR		Direct Examination By Mr. Johns	50	Cross-Examination By Mr. Fletcher	79	Cross-Examination By Mr. Anderson	97	Redirect Examination By Mr. Johns	102	REBUTTAL TESTIMONY OF DAVID COLVIN		Direct Examination By Mr. Thompson	106	Cross-Examination By Mr. Budge	114	Cross-Examination By Mr. Johns	125	Redirect Examination By Mr. Thompson	130	TESTIMONY OF WILLIAM STODDART		Direct Examination By Mr. Budge	133	Cross-Examination By Mr. Thompson	169	Examination By the Hearing Officer	177	Cross-Examination By Mr. Anderson	179	Redirect Examination By Mr. Budge	181	<p style="text-align: right;">7</p> <p style="text-align: center;">INDEX EXHIBITS</p> <table style="width: 100%; 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4 (Pages 10 to 13)

<p style="text-align: right;">10</p> <p>1 DIRECT EXAMINATION 2 QUESTIONS BY MS. PATTERSON: 3 Q. All right. Good morning, Mr. Higgs. 4 A. Good morning. 5 Q. May I call you "Jaxon"? 6 A. Yeah. 7 Q. Okay. Let's start with your name and your 8 business. 9 A. I'm Jaxon Higgs. I work for Water Well 10 Consultants. I am a hydrogeologist and owner of that 11 company. 12 Q. And what's your educational background? 13 A. I have a degree in geology and a master's 14 degree in hydrology. 15 Q. And do you have any professional licenses? 16 A. Yeah. I'm a licensed professional geologist 17 in Idaho. 18 Q. And what's your position again with Water Well 19 Consultants? 20 A. I'm an owner and the lead hydrologist. 21 HEARING OFFICER: Can the parties stipulate to 22 his expertise having previously testified before the 23 Director as an expert? 24 MR. FLETCHER: I don't have an objection 25 [unintelligible].</p>	<p style="text-align: right;">11</p> <p>1 Q. (BY MS. PATTERSON) And I understand that you 2 read the transcript from the 2021 -- 3 A. Yeah. 4 Q. -- hearing? 5 Okay. That's fine. Why don't we move on into 6 the type of work that you do for IGWA. I do want to 7 discuss a little the work that he does as a groundwater 8 consultant. 9 HEARING OFFICER: We just need to conserve 10 time where we can. 11 MS. PATTERSON: Yes, I understand. 12 Q. (BY MS. PATTERSON) Can you tell me about the 13 work that you do for IGWA and also the work that you do 14 for the groundwater districts? 15 A. Uh-huh. Yeah. So IGWA had hired me to help 16 keep track of the usage numbers that are associated with 17 the Settlement Agreement. So I compile the -- all the 18 usage information and put it in report form so that it 19 can be presented to IDWR and the Surface Water 20 Coalition. 21 And then I just help with general consulting 22 things with IGWA, including serving on technical working 23 groups, filling in for the other expert, Sophia 24 Sigstedt, that was here yesterday, and I attend the 25 meetings, things like that.</p>
<p style="text-align: right;">12</p> <p>1 Q. And then do you also work with some of the 2 groundwater districts that are members of IGWA? 3 A. Yeah, I work -- specifically, I contract with 4 some of the groundwater districts in IGWA, not all of 5 them, but I do aquifer management stuff for them. 6 Q. Did you assist those groundwater districts in 7 developing their [unintelligible]? 8 A. Yes, all but one of the ones that I work for 9 privately, I help them put together that plan -- those 10 plans, those -- we call them reduction plans. 11 Q. Okay. Thank you. 12 A lot of your work has dealt with the 13 Settlement Agreements. You understand that the 2016 14 mitigation plan is comprised of four documents, 15 Exhibit 500, the 2015 Settlement Agreement; Exhibit 105, 16 the first addendum; Exhibit 502 -- sorry. I might need 17 to correct that -- the first addendum is 501, and the 18 second addendum 502, and the A&B agreement, which is 19 Exhibit 503. 20 Are you familiar with these documents? 21 A. Yeah, I'm fairly familiar. I've read them all 22 before. 23 Q. Okay. And if I refer to these as 24 the "Settlement Agreement" or the "Agreement," you'll 25 understand what I'm saying?</p>	<p style="text-align: right;">13</p> <p>1 A. Yeah. 2 Q. Okay. So you can do that also. 3 Were you involved in negotiating the 4 agreement? 5 A. No. 6 Q. At what point did you become involved with the 7 agreement? 8 A. Through the groundwater districts that I 9 privately work for, I was aware of the negotiations and 10 kind of what was going on. And we had started looking 11 at some of the impacts of the agreement on the 12 individual groundwater districts, but for IGWA, I really 13 only became involved when they started trying to figure 14 out how to implement the agreement, so it was late 2015, 15 early 2016. 16 Q. Okay. Thank you. 17 And what were you asked to do in connection 18 with this case? 19 A. In this case, I was asked to discuss the -- 20 some specific information about the report that was 21 filed for the 2022 season, it was filed in 2023. 22 Q. Okay. So you assisted in IGWA compiling the 23 information and putting together the 2022 performance 24 report -- 25 A. Yes.</p>

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5 (Pages 14 to 17)

<p style="text-align: right;">14</p> <p>1 Q. -- which was submitted in 2023, given that the 2 agreement has reporting [unintelligible]?</p> <p>3 A. Yes. Yep.</p> <p>4 Q. You were here yesterday when we talked through 5 the performance report workbooks with Ms. Sigstedt?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. So we don't need to revisit all of 8 them. I'll have you go only to Exhibit 530, which is 9 the 2020 performance for the court workbook.</p> <p>10 MR. FLETCHER: Hearing Officer, may I ask a 11 few questions in aid of objection?</p> <p>12 I don't think this witness is going to testify 13 to anything that should be before this hearing. 14 Especially the issue framed by the hearing officer. And 15 I think I can establish that with just a few 16 questions --</p> <p>17 HEARING OFFICER: I will allow you to make a 18 few questions in aid of objection.</p> <p>19 MR. FLETCHER: Thank you.</p> <p>20 HEARING OFFICER: But it's not 21 cross-examination.</p> <p>22 MR. FLETCHER: No, I understand.</p> <p>23 VOIR DIRE EXAMINATION 24 QUESTIONS BY MR. FLETCHER: 25 Q. Mr. Higgs, you're aware that the Director</p>	<p style="text-align: right;">15</p> <p>1 determined that four districts breached the agreement in 2 2022; correct?</p> <p>3 A. Yes, I've read that order.</p> <p>4 Q. And you're aware that the Director determined 5 the amount of the breach for each of those districts; 6 correct?</p> <p>7 A. Yes.</p> <p>8 Q. And isn't the purpose of your report and your 9 testimony in this case to change the Director's 10 determination of a breach or the amount of the breach?</p> <p>11 A. Well, I don't claim to change anything the 12 Director did.</p> <p>13 Q. Well, how does your report address the only 14 issue that's before this hearing, "What action must be 15 taken by the groundwater districts to cure the 2022 16 breach of the 2016 mitigation agreement?"</p> <p>17 A. Which report are you talking about?</p> <p>18 Q. Your report.</p> <p>19 A. The expert report that I wrote for this case?</p> <p>20 Q. Yes.</p> <p>21 A. I'm not talking about that today.</p> <p>22 Q. So you're not here today to testify about 23 "What action must be taken by the groundwater districts 24 to cure the 2022 breach of the 2016 mitigation 25 agreement"?</p>
<p style="text-align: right;">16</p> <p>1 A. And then that's the No. 4, the issue No. 4?</p> <p>2 Q. Yes.</p> <p>3 A. I believe that some of the things that I'm 4 testifying about have relevance there.</p> <p>5 Q. Can you explain what those are?</p> <p>6 HEARING OFFICER: That's cross-examination. 7 Do you have an objection, sir?</p> <p>8 Q. (BY MR. FLETCHER) Did you disclose any 9 opinion concerning what action must be taken by the 10 groundwater districts to cure the 2022 breach?</p> <p>11 A. When and where?</p> <p>12 Q. In your report.</p> <p>13 A. No.</p> <p>14 MR. FLETCHER: You know, we -- what's going on 15 is these folks want this hearing officer to revisit the 16 same issues we went through in the 2021 breach, which 17 was how do you calculate their report and all of those 18 things.</p> <p>19 His report has nothing to do with the issue 20 framed by the hearing officer. I think he's just 21 admitted that. He's not rendered one opinion anywhere 22 in this report about what groundwater districts can do 23 to cure their breach in 2022. So we'd ask that his 24 testimony be excluded and the report be not allowed into 25 evidence.</p>	<p style="text-align: right;">17</p> <p>1 HEARING OFFICER: Your response?</p> <p>2 MS. PATTERSON: Thank you, Hearing Officer. 3 Respectfully, I believe this objection is 4 premature. We are discussing the 2022 report, which is 5 highly relevant here, given that it is the basis for 6 this entire hearing.</p> <p>7 This is -- Mr. Higgs does provide relevant 8 information that impacts what the possible remedy would 9 be and any sort of posturing or argument by the counsel 10 that the Director's decision has addressed this issue is 11 unfounded. And we are willing to walk you through that 12 at this time, but we believe it's premature.</p> <p>13 We would respectfully ask that we be 14 allowed -- or Mr. Higgs be allowed to continue to 15 testify, and if they want to raise their objection once 16 more information comes in, they could do so.</p> <p>17 HEARING OFFICER: What's his testimony going 18 to do from the '92 -- from the 2021 hearing where he has 19 previously testified as to how he could -- how you could 20 implement this agreement?</p> <p>21 MS. PATTERSON: Well, the Director, in his 22 2021 decision, adopted the performance report that IGWA 23 had submitted. They modified the numbers in order to 24 address the inconsistencies or the dispute that is in 25 the agreement. He did not address the baseline year</p>

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<p style="text-align: right;">18</p> <p>1 metric. And he based all of these findings on the 2021 2 performance report that was submitted. 3 Here in 2023, April 1, we submitted the 2022 4 performance report. It is remarkably different from 5 what was submitted in 2021. The Director has not issued 6 his final decision on that matter yet. He issued that 7 in August -- or in April of 2022, did not find breach 8 until August of 2023. And -- 9 HEARING OFFICER: But the evidence he made his 10 decision on was set. 11 MS. PATTERSON: No, Your Honor -- well, 12 Hearing Officer, as we attempted to explain just now, 13 IGWA reserved the right to change their 2022 performance 14 report. It states that in their 2022 performance 15 report, which is Exhibit 545 -- 16 HEARING OFFICER: [Unintelligible] to the 17 Director. 18 MS. PATTERSON: Yes. This was admitted to the 19 Department. 20 HEARING OFFICER: In the hearing in 2021, did 21 you preserve the right to change the testimony the 22 Director made his decision on? 23 MS. PATTERSON: We are not seeking to change 24 Mr. Higgs' testimony. Testimony was given about the 25 baseline year not being prescribed in the Settlement</p>	<p style="text-align: right;">19</p> <p>1 Agreement. 2 HEARING OFFICER: Right. 3 MS. PATTERSON: Perhaps I'm not understanding 4 your question. 5 MR. FLETCHER: May I address those arguments? 6 HEARING OFFICER: Yes, I need further 7 arguments. 8 MR. FLETCHER: Yeah. Basically, this is an 9 ambush going on. They're trying to present evidence of 10 how the breach should have been calculated and/or there 11 should be no breach if you used a different calculation. 12 But that's not what's before us today. 13 I mean, we were told the hearing before us 14 today was how do you cure the 2022 breach. And you 15 ruled at the beginning of this hearing that was the only 16 evidence that could come in. 17 That is not what Mr. Higgs states -- he did 18 not state anything in this report about how to cure a 19 2022 breach, and he admitted that. And for them to try 20 to offer anything into evidence today on how the breach 21 is calculated, whether there was a breach, all those 22 issues, the hearing officer has ruled those aren't at 23 issue. 24 HEARING OFFICER: Madam? 25 MS. PATTERSON: Mr. Higgs will testify about</p>
<p style="text-align: right;">20</p> <p>1 the first addendum to the 2022 performance report, which 2 was submitted to the Steering Committee, to SWC -- or 3 SWC and the Department in this matter. 4 It does not purport to address the issue of 5 breach. It will mitigate some of the breach damages. 6 And his expert report discusses the different methods 7 that IGWA used and considered before supplying that 8 amended performance report. 9 MR. FLETCHER: What they're saying is we're 10 going to record it in a different way because they show 11 different numbers to reduce a breach after the 12 Director's already made a determination there's the 13 breach and what the amount of breach is. That's what 14 they're saying right now. I'm at a loss. 15 We were told -- it's not fair to our client -- 16 we were told the hearing before this hearing officer 17 dealt with how do you cure the breach found by the 18 Director, not how do we calculate the breach, are there 19 other ways to calculate it. You know, we didn't prepare 20 for any of that. That wasn't the issue that was laid 21 out by the hearing officer. 22 And this testimony's already been restricted 23 by the order entered at the beginning of the hearing, I 24 believe. But our position is the same, this will be a 25 total surprise if he comes in here and tries to testify</p>	<p style="text-align: right;">21</p> <p>1 as to how do you cure a 2022 breach as his opinions in 2 this report have nothing to do with that. 3 HEARING OFFICER: [Unintelligible]10:05:03. 4 MS. PATTERSON: Respectfully, how a 5 [unintelligible] its numbers is highly relevant here. 6 It is the foundation of what the Director based his 7 decision on in 2021. He used that method -- in 2022 8 when he found breach, that was based off of the 9 information that IGWA had provided at that point. The 10 matter was still being actively litigated. 11 After we had decisions, we submitted the 12 amended performance report as we had preserved the right 13 to do so in the April 21, 2023, report, which was 14 submitted for the 2022 report. 15 HEARING OFFICER: Do you feel the order in any 16 way tried to attack the Director's August 2nd, 2023, 17 opinion? Did you submit any other evidence other than 18 the hearing that was previously held? 19 MS. PATTERSON: No, Your Honor, because we had 20 not had a decision yet from Judge Wildman on that very 21 issue, the compliance method. So the Director issued 22 his decision in August of 2023. Judge Wildman did not 23 enter his memorandum decision and order until November 24 11th of the same year. 25 And so we had no cause to raise this issue.</p>

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<p style="text-align: right;">22</p> <p>1 We had reserved the right to amend the performance 2 report. The Director had used the information he had 3 available at the time, but now -- 4 HEARING OFFICER: Has anybody used that report 5 for anything, that amended report? 6 MS. PATTERSON: No, Your Honor. It was 7 submitted in February of this year, only after Judge 8 Wildman -- well, after Judge Wildman's initial decision. 9 HEARING OFFICER: I don't see any relevance of 10 this report. Do you wish to address the Court, 11 Mr. Budge? 12 MR. BUDGE: Thank you, Hearing Officer. 13 MS. TSCHOL: Microphone, please. 14 MR. BUDGE: Thanks, Sarah. 15 The purpose of the experience to decide what a 16 corporate remedy is for the breach that allegedly 17 occurred in 2022, Mr. Higgs is prepared to discuss the 18 performance report that IGWA submitted on April 1st 19 2022. 20 The Coalition says they're being ambushed by 21 the performance report we submitted on April 1, 2022. 22 His assignment is to explain that report, which serves 23 as the foundation for today's hearing and the remedy. 24 There's no ambush. Mr. Higgs did not admit -- 25 HEARING OFFICER: I'll agree [unintelligible]</p>	<p style="text-align: right;">23</p> <p>1 for the performance report. I just don't understand the 2 relevance of that performance report and how it is 3 within the confines [unintelligible]. 4 MR. BUDGE: Let him explain the relevance of 5 the performance report. They're trying to keep you from 6 hearing what we actually submitted in 2022. When we 7 reported our performance, what did we give to the 8 Department. They don't want you to hear that. They're 9 saying you're being ambushed. 10 HEARING OFFICER: I heard that through 11 Sophia's testimony. 12 MR. BUDGE: She didn't explain it like 13 Mr. Higgs prepared to. That's what he's here to do, to 14 explain the 2022 performance report and why it differed 15 from the prior reports. 16 Now, a year ago Mr. Higgs testified about 17 different things. He talked about how you calculate the 18 baseline, why we use averaging historically, what the 19 interpretation of the agreement meant, how you 20 determined breach. 21 Today he's talking about what did we submit in 22 2022, and why is that different than 2021. The Director 23 has never considered or ruled on what we submitted in 24 2022 or heard the information that you're about to hear 25 today.</p>
<p style="text-align: right;">24</p> <p>1 HEARING OFFICER: [Unintelligible] argument, 2 Mr. Fletcher. 3 MR. FLETCHER: Well, this just goes back to 4 the very issue we're talking about, whether there was a 5 breach in 2022 is not at issue today. You know, the 6 performance report was the foundation for the finding of 7 breach. The Director found breach. The Director found 8 the amounts. This hearing officer has already ruled 9 those are not at issue. 10 The only reason to potentially open up this 11 stuff again is to attempt to change the amounts the 12 Director found. That's the only reason. They did not 13 ask for reconsideration of the finding of breach. They 14 did not ask for reconsideration of the amounts. And, 15 yet, they're here today to try to put on evidence 16 clouding this record talking about those very issues. 17 That's the only purpose of this testimony is 18 to deal with there shouldn't be a breach or the amount 19 should be different. This has nothing to do with what 20 they can do to cure the breach that was found by the 21 Director. 22 MR. BUDGE: Can I make one argument? 23 The Director's decision was issued without a 24 hearing. He didn't have Mr. Higgs' testimony before 25 him. It was a prehearing decision, and due process</p>	<p style="text-align: right;">25</p> <p>1 entitles the parties to a hearing to challenge the 2 decision. A hearing was requested. 3 HEARING OFFICER: Is there a time period which 4 was lined up? 5 MR. BUDGE: Yeah, it was done by the 6 Coalition. That's why we're here. Today is the 7 after-the-fact hearing. 8 HEARING OFFICER: If you have a problem with 9 those documents -- with those findings, you have not 10 indicated that by any filing in this case. 11 MR. BUDGE: Oh, yes, we have. 12 HEARING OFFICER: What? 13 MR. BUDGE: The April 1st, 2022, 14 performance -- or the 2022 performance report. 15 Mr. Higgs is going to explain what was -- 16 HEARING OFFICER: You did not ask the Director 17 to change anything, did you? 18 MR. BUDGE: Well, the hearing was requested by 19 the Coalition, and our -- 20 HEARING OFFICER: I understand that. 21 MR. BUDGE: Yeah. No, we didn't, because we 22 had not, at that time, completed or supplemented our 23 2022 performance report. So at the time 24 [unintelligible] decision, this issue over averaging and 25 how you allocate the 240 was not appealed to Judge</p>

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<p style="text-align: right;">26</p> <p>1 Wildman. And rather than, you know, jump to litigation 2 before the Director, we thought, let's let Judge Wildman 3 make his decision, and then we'll see where we stand. 4 And if you'll actually listen to what we've 5 submitted in 2022, you'll see this is relevant. If what 6 we report in 2022 is not relevant to this case, then I 7 don't know what else is. We're here to talk about our 8 performance in 2022. Mr. Higgs needs to be able to 9 explain what we did in 2022 and how we reported that. 10 Judge Wildman's decision said that the 11 Director did not error because he relied upon IGWA's 12 2021 performance report. Now, in this case the Director 13 must also consider IGWA's 2022 performance report. 14 Ms. Sigstedt did not -- 15 HEARING OFFICER: Was that argued to the 16 Director at any time? 17 MR. BUDGE: We haven't had a hearing yet. 18 This is it. We have not had an after-the-fact hearing 19 yet. This is a hearing on the decision that was issued 20 without a hearing. 21 Part of the problem we have with all of this 22 litigation before the Department is the Director makes 23 hearings -- decisions first and then gives parties 24 after-the-fact hearings. So we have to come in after 25 the fact and say this is what, you know, should have</p>	<p style="text-align: right;">27</p> <p>1 been done, try to convince him that he had done 2 something wrong the first time. 3 And so here we are. We're here after the 4 fact. They've raised an issue as to what the remedy is. 5 You know the Director ruled is that he wasn't going to 6 impose a remedy, they challenged that, so now here we 7 have the after-the-fact hearing, and we're going to talk 8 about the remedy. And relevant to the remedy is what we 9 did in 2022. 10 So they're the ones that requested the 11 hearing, made an issue of the remedy. And if we're 12 going to consider that issue, we've got to consider what 13 did we do in 2022. Do you want to find out what we did 14 in 2022, or do you want to just assume it was what we 15 did in '21? 16 So if Mr. Higgs can't testify to what we did 17 in 2022, it's not going to be in the record. You're not 18 going to know why we did things different -- 19 HEARING OFFICER: [Unintelligible] in the 20 record will be an offer of proof that concerns his 21 expert opinion. 22 MR. BUDGE: If you hear what we did and you 23 don't like it, that's okay. 24 HEARING OFFICER: I understand that. That was 25 your argument yesterday. Anything further?</p>
<p style="text-align: right;">28</p> <p>1 MR. BUDGE: Thank you for the opportunity. I 2 appreciate it. 3 MR. FLETCHER: Mr. Budge ignores continually 4 in his arguments the issue framed by this hearing 5 officer and the findings of this hearing officer on 6 summary judgment. The only issue is what should be done 7 to cure the breaches found by the Director, that's it. 8 Now, we would stipulate, if they want to 9 stipulate today to the 2022 performance report that was 10 submitted to the Director before he made his findings in 11 2023 in the record, that's not the issue. And he knows 12 that's not the issue. 13 They want to change all of that. They want to 14 present evidence about other ways to do it. They want 15 to present all this other stuff that is outside the 16 scope of this hearing. And they -- how they can get 17 that into evidence under the one issue that's remaining 18 to be heard, I have no idea. 19 So that's why -- I'm not trying to waste time 20 by objecting to this stuff. This -- once the summary 21 judgment decision came down and once Wildman's decision 22 came down, it was pretty clear that we -- the hearing 23 officer framed the one issue remaining to be what should 24 be done to cure the breach. That was it. All this 25 other stuff is superfluous.</p>	<p style="text-align: right;">29</p> <p>1 HEARING OFFICER: I'm going to sustain this 2 objection. You may put in the report and/or make an 3 offer of proof concerning the performance evaluation as 4 well as the report indicated by Mr. Higgs. 5 MS. PATTERSON: Thank you, Hearing Officer. 6 So I may proceed with testimony regarding the 7 2022 report that was submitted on April 1 of 2023, is 8 that my understanding? 9 HEARING OFFICER: No. 10 MS. PATTERSON: That was -- 11 HEARING OFFICER: I thought I sustained the 12 objection. And so what evidence -- what is the 13 relevance of the performance report in 2022? Was that 14 before the Director prior to August 2, 2023? 15 MS. PATTERSON: Yes. 16 HEARING OFFICER: Did he mention it? Was that 17 part of a hearing? 18 MS. PATTERSON: There was no hearing. That 19 was provided to the parties before he issued -- 20 HEARING OFFICER: Okay. So it was informal 21 information given to the Director after the original 22 hearing in this -- or during -- before the hearing; is 23 that correct? 24 MS. PATTERSON: Yes, Your Honor -- 25 HEARING OFFICER: So it was available to you</p>

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<p style="text-align: right;">30</p> <p>1 to present to the Director? 2 MS. PATTERSON: It was presented to -- it was 3 provided to the Department and the Director. 4 HEARING OFFICER: In the hearing? 5 MS. PATTERSON: In the 2021 hearing? 6 HEARING OFFICER: Yeah. 7 MS. PATTERSON: No, Your Honor, because we had 8 not -- 9 HEARING OFFICER: At any other time did you 10 bring this to the attention of the Director in a formal 11 hearing or other setting? 12 MS. PATTERSON: Let me explain the timeline. 13 HEARING OFFICER: Please do. 14 MS. PATTERSON: The Director issued his 15 initial order finding breach in the 2021 case that he 16 issued without hearing in -- excuse me -- September of 17 2022. So that would be the final order regarding 18 compliance with [unintelligible] mitigation plan. 19 That was issued again in September of 2022. 20 IGWA petitioned for rehearing on that matter. 21 The hearing was held in February of 2023, and August 1 22 of 2023 we submitted the performance report, the 2022 23 performance report -- 24 MR. BUDGE: April 1. 25 MS. PATTERSON: On April 1. On April 24th,</p>	<p style="text-align: right;">31</p> <p>1 that is when the Director issued his amended final order 2 regarding compliance with the 2021 order. 3 HEARING OFFICER: How is that brought to the 4 attention of the Director, then, as evidence? 5 MS. PATTERSON: There would be no opportunity 6 to provide that to him. The hearing for the 2021 matter 7 had passed, and it was under consideration by the 8 Director, and we submitted this performance report as we 9 do every single year. 10 So, no, this was not a live issue before the 11 Director. He was addressing the issue of the 2021 12 breach in February of 2023. In April of 2023 -- April 1 13 of 2023, this is when we submitted this performance 14 report to account for the 2022 usage. 15 So this was -- it is impossible that this was 16 before the Director before he -- you know, during the 17 hearing that we had on the 2021 matter. It is -- and we 18 haven't had a hearing on the 2022 breach until today. 19 But this was before him before he made his August 2023 20 decision. 21 MR. BUDGE: It was submitted to the parties 22 and Department, but it was not submitted to the Director 23 formally. 24 MR. FLETCHER: Just to avoid confusion, is 25 that I think -- if the court -- or the hearing officer</p>
<p style="text-align: right;">32</p> <p>1 looks at the final order regarding 2022 mitigation plan 2 compliance. 3 HEARING OFFICER: The order is dated, what? 4 UNIDENTIFIED SPEAKER: August -- 5 MR. FLETCHER: August. I think it's 6 submitted, I think -- 7 HEARING OFFICER: August 2nd 2023? 8 MR. FLETCHER: Yes. 9 HEARING OFFICER: Okay. 10 MR. FLETCHER: Okay. The performance report 11 that they're referring to is referenced in that report 12 in that quarter by the Director. The Director 13 considered their 2022 performance report when he 14 determined there was a breach, and then he determined 15 the amounts of the breach for the various districts. 16 HEARING OFFICER: Why is this not a collateral 17 attack on that, Madam? 18 MR. FLETCHER: That's our issue. 19 MS. PATTERSON: I'm sorry, why is this? 20 HEARING OFFICER: If he considered that 21 already in his 8-2-23 opinion, why is this not a 22 collateral attack on that evidence? 23 MS. PATTERSON: Well, as this report shows, we 24 reserved the right to amend the performance report. 25 Whether or not the Director took notice of that or not,</p>	<p style="text-align: right;">33</p> <p>1 we do not know. He didn't address it in this. We are 2 addressing it here at the hearing that we're having on 3 the -- 4 MR. FLETCHER: How can you have a hearing 5 where you present evidence and then say, hold it, we're 6 going to be able to change this in the future and it 7 will be binding on future proceedings in this matter? 8 Explain that to me, please. 9 MS. PATTERSON: That we are going to be -- I 10 don't view this as binding, but this is relevant 11 information that impacts whether or not -- or what the 12 remedy will be for the 2022 breach. 13 HEARING OFFICER: Out of caution, I'm going to 14 allow the presentation of this witness that will go to 15 the weight that I give it. I'm still -- this is an 16 issue which I understand what IGWA and its signatories 17 are saying. I have great trepidation allowing this 18 witness to testify, however... 19 I'm going to allow the testimony at this time 20 and give it the weight that it deserves based upon the 21 previous proceedings before the Director. And if you 22 can find some way to expedite the basis for the 23 admission of his report, I would appreciate it. 24 MS. PATTERSON: Thank you, Hearing Officer. 25 HEARING OFFICER: They've already stipulated</p>

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<p style="text-align: right;">34</p> <p>1 to the performance report of 2022, is that correct, 2 Mr. Fletcher? 3 MR. FLETCHER: Yes, the original report that 4 was filed in April of 2023. 5 HEARING OFFICER: Is that an exhibit? 6 MR. FLETCHER: That's Exhibit No. -- 7 MS. PATTERSON: Yes, 535. 8 HEARING OFFICER: Okay. 9 MR. FLETCHER: 535. 10 (Exhibit 535 admitted.) 11 HEARING OFFICER: Then that's admitted, 12 therefore, I don't think we need any further foundation 13 in that regard. 14 MS. PATTERSON: Okay. Thank you. 15 16 CONTINUED DIRECT EXAMINATION 17 QUESTIONS BY MS. PATTERSON: 18 Q. Jaxon, regarding the prior performance 19 reports, was there a standard format that IGWA would 20 submit those to the Department and to the Steering 21 Committee? 22 A. Yeah. We submitted -- there was always a 23 summary that was created by the attorneys and -- with my 24 review. And then the performance report included all of 25 the usage information for all the groundwater districts.</p>	<p style="text-align: right;">35</p> <p>1 We went over this yesterday. There has been a few 2 slight changes over the years. None of them were 3 substantial until 2022. 4 HEARING OFFICER: Those are already in the 5 record in Sophia's testimony; correct? 6 MS. PATTERSON: That is correct. 7 HEARING OFFICER: Very well. 8 Q. (BY MS. PATTERSON) Regarding those 9 performance reports, however, prior to 2022, did IGWA 10 report the mitigation balance column? 11 A. Yeah, there was a column that was to provide 12 to the Department and to the Surface Water Coalition on 13 an individual district basis whether or not they met 14 their obligation. 15 Q. And then on Exhibit 536, which was previously 16 admitted, that shows the -- what we provided to the 17 Department in 2022? 18 A. Yeah. So 2022 was submitted a little bit 19 differently -- 20 Q. Okay. 21 A. -- due to uncertainty. 22 Q. And then going back to Exhibit 535, please 23 read, starting on page 1, the third paragraph, which 24 starts: "Unlike IGWA's performance reports in years 25 past," please --</p>
<p style="text-align: right;">36</p> <p>1 A. Okay. 2 Q. -- read that. 3 A. "Unlike IGWA's performance report in years 4 past, the summary tab shows only groundwater diversion 5 and recharge data. It does not contain a table showing 6 a baseline target conservation or mitigation balance 7 because the final order regarding compliance with 8 approved mitigation plan compliance order issued on 9 September 8th, 2022, necessitates that IGWA and the 10 Surface Water Coalition revisit how compliance will be 11 measured under the agreement for 2022 in future years as 12 explained below." 13 Q. Please read the next. 14 A. "The agreement requires each district conserve 15 a" -- 16 HEARING OFFICER: I can read it. Why don't 17 you ask questions concerning the impact of same. 18 MS. PATTERSON: Okay. 19 Q. (BY MS. PATTERSON) Jaxon, you're familiar 20 with the Settlement Agreement. 21 Do you know whether it prescribes a five-year 22 baseline, a three-year baseline, any sort of baseline 23 metric? 24 MR. FLETCHER: Again, I'm going to object for 25 the record. I'd prefer this be a continuing objection.</p>	<p style="text-align: right;">37</p> <p>1 He's getting into how the 2022 report is calculated, 2 which is not relevant to this hearing under the issue 3 before this -- 4 HEARING OFFICER: There will be a 5 continuing -- you can just indicate you object, and it 6 will be a continuing objection based upon that. 7 MR. FLETCHER: Yeah, and I -- 8 HEARING OFFICER: And there may be some 9 testimony that is admissible, but you may object on an 10 individual question basis. It will be the same 11 objection, but I understand the objection. But I think 12 for clarity of the record, we'll proceed that way, 13 Mr. Fletcher. 14 MR. FLETCHER: The grounds for this will be 15 that it's not relevant based upon the issue framed by 16 the Hearing Officer. 17 HEARING OFFICER: Very good. Thank you. 18 Q. (BY MS. PATTERSON) Mr. Higgs, you can answer. 19 HEARING OFFICER: I can take notice of that. 20 It doesn't have any information in that regard. 21 MS. PATTERSON: Okay. Thank you. 22 THE WITNESS: Can you ask that question again? 23 Sorry. 24 Q. (BY MS. PATTERSON) Well, does the performance 25 report discuss that the agreement does not prescribe how</p>

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11 (Pages 38 to 41)

<p style="text-align: right;">38</p> <p>1 groundwater users are to measure compliance? 2 A. Yes. 3 Q. And then I'll take you to page 2 of the 4 report. 5 A. Okay. 6 Q. The -- 7 HEARING OFFICER: And when you say "report," 8 performance report of -- 9 MS. PATTERSON: Yes. 10 HEARING OFFICER: -- 2022? 11 MS. PATTERSON: I apologize, yes. This is 12 Exhibit 535. This is the 2022 -- 13 HEARING OFFICER: Very good. 14 MS. PATTERSON: -- performance report. 15 Q. (BY MS. PATTERSON) On page 2 of that 16 performance report, can you please go to the fourth 17 paragraph, the last line, and read that. 18 A. Yes. "IGWA will determine a more appropriate 19 method of measuring compliance once the Director's 20 decision becomes final." 21 Q. And had the decision -- or Director rendered a 22 decision in this matter yet, a final decision? 23 A. Not until after this report was submitted. 24 Q. And did IGWA do just that? 25 A. Submit a report?</p>	<p style="text-align: right;">39</p> <p>1 Q. Did they look into a more appropriate method 2 of measuring compliance? 3 A. Oh, yes. 4 Q. And did you assist them in that? 5 A. Yes. 6 Q. Is that the subject of your expert report? 7 A. That's a portion of it, yes. 8 Q. Let's please move to your expert report, then, 9 which is Exhibit 142. 10 I'm actually going to take you to Exhibit 131, 11 please. 12 Can you please explain to me what this is? 13 A. Yeah. This was an addendum to the Settlement 14 Agreement performance report that we were just looking 15 at that was submitted by IGWA in February after the 16 decisions from the Director and the district court. 17 Q. Okay. And does it adopt a different method of 18 compliance? 19 A. I don't know if you want to say that, but it 20 does adopt a different metric for evaluating the 21 baseline. 22 Q. And the baseline affects how much -- 23 MR. FLETCHER: We have an objection. This was 24 submitted after the order entered in this case that's 25 before the hearing officer today. It's totally</p>
<p style="text-align: right;">40</p> <p>1 irrelevant to this proceeding. 2 MS. PATTERSON: Respectfully, we have 3 discussed just now how the 2022 performance report that 4 was submitted in April of '23 specifically said that 5 IGWA will be looking to alternate means of compliance 6 and the Director's order which had not yet been 7 submitted. This is just what IGWA did. So we believe 8 it's relevant. 9 HEARING OFFICER: The objection is noted. I'm 10 going to let it in and give it the weight it needs. I 11 can't -- well, okay. 12 You may proceed. Thank you, sir. 13 Q. (BY MS. PATTERSON) Can you explain to me how 14 the baseline method adopted here factors into IGWA's 15 reporting? 16 A. Uh-huh. Since the beginning of the agreement, 17 there was no -- there was really never a stipulated way 18 to determine what we were measuring against, and that 19 would be the baseline. 20 And due to the, I don't know, I guess for lack 21 of a better term, shake up of all of the orders that 22 were made and the method that the Department used to -- 23 that they extrapolated from our reports and determined 24 what their opinion of the overages were or the breaches 25 were, IGWA felt that it was more appropriate, given the</p>	<p style="text-align: right;">41</p> <p>1 circumstances, to use a three-year baseline portion of 2 the same five years just shortening it to three. And 3 that baseline was used as a metric to compare against 4 the current year's usage. 5 Q. And on page 3 of the first addendum to the 6 2022 Settlement Agreement performance report, 7 Exhibit 131, does that provide an updated table? 8 A. Yeah. So everything on that table will be the 9 same except for the baseline numbers. We also, due to 10 the Director's order, removed Southwest Irrigation 11 District and A&B Irrigation District. So this was an 12 attempt to -- after the orders were all made -- to come 13 into better compliance on a reporting with what the 14 Director had ordered. 15 And so the first column there, the IDWR target 16 conservation, was a change based off of what the 17 Director ordered. The three-year baseline is the method 18 that IGWA adopted as the -- as the baseline measurement 19 to compare annual usage against. 20 And then all of the numbers will be the same 21 until you get back to that '22 mitigation balance where 22 those numbers would differ because IDWR's order required 23 us to change the target conservation. And then we 24 changed the three-year baseline, so you can see there 25 that those -- that mitigation balance will have changed</p>

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12 (Pages 42 to 45)

<p style="text-align: right;">42</p> <p>1 and the total conservation numbers. So those would be 2 the changes that were made in this addendum. 3 Q. Thank you. 4 MR. THOMPSON: Hearing Officer, can I make a 5 point on this exhibit? 6 This is Travis Thompson for the record. 7 So IGWA did submit their '22 performance 8 report as required by the agreement in the addendums by 9 April 1st, 2023. That was submitted, the Director made 10 his order August 2nd finding a breach. Hand reviewed by 11 the Department, the Department submitted its review by 12 July 1st, as provided by the mitigation plan Director's 13 orders approving it. 14 They submitted this to the Director like three 15 weeks ago. What the Director thinks of this we don't 16 know. We're not here to litigate this addendum, whether 17 they can file an addendum, whether they can change how 18 they measure compliance, but that's all this does. 19 And so we'd object to this coming in on this 20 hearing for the reason Mr. Fletcher stated. But they're 21 just trying to rewrite history. The fact that they were 22 out of compliance, the Director found that, this 23 attempts to show that they were in compliance based upon 24 the revised theory that they have that was rejected by 25 the Director, rejected by the district court.</p>	<p style="text-align: right;">43</p> <p>1 Thank you. 2 HEARING OFFICER: I'm going to sustain the 3 objection. 4 Q. (BY MS. PATTERSON) Mr. Higgs, I would like to 5 direct you to -- well, switch gears a little bit and 6 talk about the groundwater districts that you assist and 7 how you consulted with them and implemented the 8 Settlement Agreement. 9 First, is there a uniform program that the 10 groundwater districts use to produce groundwater pumping 11 and conduct recharge to comply with the agreement? 12 A. No. 13 Q. Does the agreement explain how this should be 14 done? 15 A. No. 16 Q. How long did it take the districts to develop 17 its reduction programs? 18 A. It depends on the district. Some of them 19 started to attempt it as the negotiations were 20 occurring. All of them had something, even if it was 21 just a skeleton, in place by the beginning of the 2016 22 season. 23 Q. Okay. 24 A. So from, you know, eight, nine months to three 25 or four months. Some of them were cramming at the end</p>
<p style="text-align: right;">44</p> <p>1 of it. 2 Q. Okay. And in rolling out these programs, does 3 it take some education for the groundwater districts, 4 you know, with their men first? 5 A. Yeah, so the districts created the framework 6 for these plans internally but actual implementation of 7 it, especially on a grower level, took quite a bit 8 longer. 9 In fact, the first year, 2016, was really just 10 kind of a guessing year where everybody was trying to 11 figure out what was going on. We didn't have flow 12 meters in place, and so it's very difficult to implement 13 down to the grower level something like this. And the 14 magnitude of what happened was pretty amazing in that 15 short period of time. 16 Q. And I'm talking about at the grower level. 17 You know, how quickly do you think growers can change 18 their usage? 19 You know, if they have selected a crop, if 20 there's crops in the ground, how quickly can they 21 inhibit? 22 A. It depends on the grower, obviously. But 23 later in the season there's just a lot less flexibility. 24 If it's at the beginning of seasons, sometimes they can, 25 you know, turn their hay off early, or they can chop</p>	<p style="text-align: right;">45</p> <p>1 their grain instead of harvesting it, you know, with a 2 combine. And so there are some things they can do, but 3 the later in the season, the more difficult it is. 4 Q. Okay. And which districts did you assist in 5 developing these conservation programs? 6 A. That would be North Snake Groundwater 7 District, Magic Valley Ground Water District, American 8 Falls-Aberdeen Ground Water District, and 9 Bonneville-Jefferson Ground Water District. 10 MR. FLETCHER: Director, we're -- Hearing 11 Officer, we're going to object. This is a rehash of 12 what was presented on the 2021 breach and is not 13 relevant to the issue before this Hearing Officer. 14 MS. PATTERSON: Respectfully, this is 15 relevant. This is not -- while similar testimony may 16 have been elicited during the 2021 breach matter just 17 because these are things that don't change. 18 Here in terms of damages and remedy, it needs 19 to be acknowledged that the Director's final order, 20 which effectively changed IGWA's understanding of the 21 agreement, their obligations under it, didn't come out 22 until September of 2022, two-thirds of the way through 23 the irrigation season. 24 What Mr. Higgs is testifying about is highly 25 relevant to whether or not it's even feasible for</p>

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13 (Pages 46 to 49)

<p style="text-align: right;">46</p> <p>1 groundwater districts to avoid breach. 2 HEARING OFFICER: This is in 2022? 3 MS. PATTERSON: Yes, Your Honor. 4 HEARING OFFICER: Sir? 5 MR. FLETCHER: Yeah, whether there was a 6 breach isn't before this hearing. 7 HEARING OFFICER: I'm going to sustain the 8 objection. The biggest problem is, and -- I'm not going 9 to say it. Please talk to Mr. Budge, and I apologize 10 for interrupting, ma'am. 11 MS. PATTERSON: We would request that you 12 overturn that objection. We are not addressing whether 13 or not there was a breach with this line of testimony, 14 rather we're looking at the equities of the 15 circumstances here and fashioning a remedy and -- 16 HEARING OFFICER: I don't think equities go 17 into it, madam. We have a contract that's been 18 interpreted, and we are here to see how you can cure the 19 breaches previously found. And I'm not sure that 20 equities go into that acknowledgement -- or that 21 analysis. 22 Sustained. Thank you, though. 23 MS. PATTERSON: Nothing further, then. 24 HEARING OFFICER: Cross? 25 MR. FLETCHER: Mr. Higgs, I'm Kent Fletcher.</p>	<p style="text-align: right;">47</p> <p>1 I think we've known each other quite a while. 2 THE WITNESS: Yep. 3 MR. FLETCHER: And as I understand it, the 4 Director did allow the expert report -- excuse me -- the 5 hearing officer allowed the expert report into evidence; 6 is that correct? 7 UNIDENTIFIED SPEAKER: [Unintelligible.] 8 MR. FLETCHER: Was the expert report admitted? 9 HEARING OFFICER: As an offer of proof. 10 MS. PATTERSON: The 2022 -- oh, sorry, the 11 expert report? That was not admitted. 12 MR. FLETCHER: The expert report was not 13 admitted? 14 HEARING OFFICER: Correct. 15 Yes, ma'am? 16 MS. PATTERSON: We would like to clarify that 17 the first addendum was submitted as an offer of proof. 18 That would be Exhibit 131. 19 We had gone through most of the testimony, 20 Mr. Fletcher objected, you sustained, and we're making 21 that as an offer. 22 HEARING OFFICER: Exhibit 131? 23 MS. PATTERSON: Yes. 24 HEARING OFFICER: And that is what, madam. 25 MS. PATTERSON: That is the first addendum to</p>
<p style="text-align: right;">48</p> <p>1 the 2022 performance report. That is when IGWA adopted 2 alternate baseline and reported under that. 3 HEARING OFFICER: As an offer of proof? 4 MS. PATTERSON: Yes. 5 HEARING OFFICER: Thank you. That will be 6 marked as a proposed exhibit not admitted but as an 7 offer of proof. 8 MR. FLETCHER: So Exhibit 131 was admitted 9 under an offer of proof. Exhibit 142, the expert report 10 was not admitted; is that correct? 11 HEARING OFFICER: Madam? 12 MS. PATTERSON: That is correct. 13 UNIDENTIFIED SPEAKER: For clarification, I 14 think [unintelligible] 141, but 142 was admitted 15 yesterday. That was [unintelligible]. 16 MR. FLETCHER: I'm sorry, Exhibit 141 was not 17 admitted? 18 UNIDENTIFIED SPEAKER: That's my 19 understanding. 20 MR. FLETCHER: In light of that, I don't have 21 any questions. 22 HEARING OFFICER: Very well. 23 Mr. Higgs, thank you, sir. 24 The next witness. 25 MR. JOHNS: If IGWA doesn't have any others,</p>	<p style="text-align: right;">49</p> <p>1 Bonneville-Jefferson, Mr. Hearing Officer, would like to 2 present, on rebuttal, Bryce Contor. 3 HEARING OFFICER: Very well. 4 MR. BUDGE: IGWA does have a lay witness, but 5 because Mr. -- IGWA has another lay witness that we'll 6 call, Bill Stoddart, but because Mr. Contor is an expert 7 witness, we thought it was appropriate to have him 8 testify at this time. 9 HEARING OFFICER: I appreciate the courtesy, 10 sir. 11 MR. FLETCHER: No objection. 12 HEARING OFFICER: Very well. Please identify 13 yourself, sir. 14 MR. JOHNS: My name is Skyler Johns, and I 15 represent Bonneville-Jefferson Ground Water District. 16 HEARING OFFICER: Very good. 17 UNIDENTIFIED SPEAKER: [Unintelligible.] 18 HEARING OFFICER: Sure. 19 20 BRYCE CONTOR, 21 called as a rebuttal witness by the Bonneville-Jefferson 22 Ground Water District having been first duly sworn to 23 tell the truth relating to said cause, testified as 24 follows: 25 ///</p>

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14 (Pages 50 to 53)

<p style="text-align: right;">50</p> <p>1 HEARING OFFICER: Very well. Please be 2 seated. I apologize to individuals, I have 40 years in 3 the court system, and usually a clerk does that. So I 4 appreciate your patience in my incompetence in that 5 regard. I'm sure there are other thoughts of my 6 incompetence, but we'll move on. 7 MR. JOHNS: Well, first, just preliminary, 8 Mr. Hearing Officer, we are sensitive to the time 9 restraints, so some of this presentation we have worked 10 through in effort to try and avoid any duplicity of 11 presentation, so there will be some questions -- again, 12 I told Travis Thompson this as well -- that we're going 13 to maybe refer to prior testimony. 14 It's not in any way trying to shortchange the 15 report. It's just to try and speed things along so that 16 we're not spending all day going over similar 17 conclusions with respect to this expert. 18 HEARING OFFICER: I appreciate your discussion 19 with Mr. Thompson as well as your efforts here today. 20 Thank you, sir. 21 MR. JOHNS: Okay. Very well. 22 23 DIRECT EXAMINATION 24 QUESTIONS BY MR. JOHNS: 25 Q. Mr. Contor, will you please state your name</p>	<p style="text-align: right;">51</p> <p>1 and spell it for the record. 2 A. Bryce A. Contor. First name B-r-y-c-e, last 3 name C-o "N" as in "November," "T" as in "Tango," o-r. 4 Q. Do you mind if we refer to you as "Bryce" 5 during your testimony? 6 A. [No audible response.] 7 Q. Okay. What's your current position? 8 A. I'm the principal hydrologist of Contor Water, 9 LLC, which is -- mainly my wife [unintelligible]. 10 Q. And will you please briefly describe your 11 educational background? 12 A. I've got an associate's degree in farm crops 13 management, a bachelor's degree in agricultural 14 economics, I have a master's degree in hydrology. 15 Q. Do you have any licenses currently? 16 A. Driver's license. 17 Q. Very well. Do you have -- can you please 18 detail your experience in groundwater matters. 19 A. So my experience in groundwater matters begins 20 in 2001, 2001 through 2010. 2011 I worked for 21 University of Idaho developing ESPAM 1.0; 1.1, was 22 involved for most of; 2.1, was involved through all of 23 2.2 as a member of the Eastern Snake Hydrologic Model 24 Committee, but I was not one of the modelers working on 25 a team for that model. And then I've applied that work</p>
<p style="text-align: right;">52</p> <p>1 through my career since the development of ESPAM 1.2. 2 Q. Okay. Can you please clarify what the ESPAM 3 is? 4 A. It began as Enhanced Snake Plain Aquifer 5 Model. With version 2.2 then it was changed to Eastern 6 Snake Plain Model. It's the [unintelligible] model of 7 the [unintelligible]. It's used by IDWR in 8 administration and in planning and in evaluation. 9 MR. FLETCHER: Hearing officer, to the extent 10 this is being used to lay foundation that he's an 11 expert, we'll stipulate that he is. He's been 12 identified as an expert in previous Department 13 proceedings. If you're laying foundation for other 14 things, that's fine. 15 HEARING OFFICER: Very well. 16 MR. JOHNS: Thank you, Counselor. 17 HEARING OFFICER: Under 702 I'll allow expert 18 testimony. 19 MR. JOHNS: Very well. 20 Q. (BY MR. JOHNS) Moving along then, Mr. -- or, 21 Bryce, were you asked to prepare a report in this matter 22 for Bonneville-Jefferson Ground Water District? 23 A. I was, uh-huh. 24 Q. What were you asked to do? 25 A. I was asked to respond to the expert report</p>	<p style="text-align: right;">53</p> <p>1 prepared by Colvin. That was the limited scope I was 2 asked to complete. 3 Q. Okay. Is your analysis specific to 4 Bonneville-Jefferson? 5 A. It is. 6 Q. Okay. Are you familiar with the parties in 7 this case you referred to as the 2016 Settlement 8 Agreement? 9 A. Yes, I am. 10 Q. Okay. Did you review it in preparation for 11 your testimony? 12 A. I did. 13 Q. Okay. And we're going to refer you to -- I 14 think if we have Exhibit 1 up there, that's Mr. Colvin's 15 report. And just if you want to have that available for 16 reference. 17 A. I'm getting [unintelligible]. 18 Q. And then as you're getting there -- 19 MS. TSCHOHL: For clarification, that is 20 Exhibit 300; correct? 21 MR. JOHNS: For Mr. Colvin's report? 22 MS. TSCHOHL: Oh, Colvin. 23 MR. JOHNS: Mr. Colvin's report. Yeah, yeah, 24 Dave Colvin's report Exhibit 1. And then Bryce Contor's 25 report, 300. Mr. Hearing Officer, for reference, those</p>

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15 (Pages 54 to 57)

<p style="text-align: right;">54</p> <p>1 will be the primary documents that we'll be looking at. 2 HEARING OFFICER: Are these in here? 3 MR. JOHNS: Yep, 300 and Exhibit 1. 4 HEARING OFFICER: Thank you. You may proceed, 5 sir. 6 THE WITNESS: I think I was in the wrong book. 7 Okay. Here's an Exhibit 1 in this book. 8 Yes, okay. 9 MR. JOHNS: And then Bonneville-Jefferson's 10 Exhibit No. 300, which I think is the black binder. 11 THE WITNESS: The black binder? 12 MR. JOHNS: The black binder. 13 Sorry, everyone. 14 THE WITNESS: Okay. [Unintelligible]. 15 MS. TSCHOHL: Bryce, can you turn the 16 microphone on, please. [Unintelligible]. Thank you. 17 MS. PATTERSON: So Exhibit 1 is in here. 18 HEARING OFFICER: Do you have it? 19 THE WITNESS: Okay, I'm here. Thank you. 20 MR. JOHNS: Okay. Mr. Hearing Officer, are 21 you there? 22 HEARING OFFICER: Okay. You may proceed. 23 Q. (BY MR. JOHNS) Okay. Are the opinions that 24 you formulated with regard to Mr. Colvin's report 25 contained in an expert report that's been submitted</p>	<p style="text-align: right;">55</p> <p>1 today? 2 A. Yes, they are. 3 Q. Okay. And is that report marked as 4 Exhibit 300 in front of you there? 5 A. Yes, it is. 6 Q. Okay. Does your report identify any technical 7 deficiencies with methodology and approach contained in 8 Mr. Colvin's report? 9 A. It does. 10 Q. Okay. Does your report dispute the remedy 11 proposed by Dave Colvin? 12 A. It does. 13 Q. Okay. I'm going to ask you just a couple of 14 questions preliminarily. 15 Were you present during the testimony, 16 Mr. Colvin? 17 A. Yes. 18 Q. Okay. Were you -- do you recall testimony 19 regarding the Settlement Agreement and provisions that 20 informed his technical -- 21 A. I do. 22 Q. Okay. Did you find any provisions in the 23 Settlement Agreement that dictate what actions must be 24 taken by a groundwater district if they breach their 25 annual reduction requirement?</p>
<p style="text-align: right;">56</p> <p>1 A. I did not find any. 2 Q. Did you find any provisions of the Settlement 3 Agreement that require that the actions to be ordered by 4 the Director to cure a breach of the annual reduction 5 obligation be equal to the volume of water that a 6 signatory allegedly over consumed in any particular 7 year? 8 A. I did not find that in the order. 9 Q. Okay. So is it safe to say, from a technical 10 standpoint, your opinion is you didn't receive any 11 instruction on how to craft a remedy for breach? 12 A. The order does not provide any technical 13 guidance. 14 Q. Okay. Okay. Were you present during the 15 testimony of Sophia Sigstedt and Jaxon Higgs? 16 A. Yes. 17 Q. Okay. Did you reach similar conclusions in 18 your analysis as they did? 19 A. For the subset of their testimonies that I 20 analyzed, our conclusions were similar. 21 Q. Okay. So in the interest of time, as we work 22 through your report, I'm just going to ask that you 23 please indicate for each of the opinions where there may 24 be points of agreement so that the group knows that -- 25 and we don't need to go through in detail if it's</p>	<p style="text-align: right;">57</p> <p>1 already been presented -- could you just indicate what 2 your agreement is or if there's any variation, just for 3 the sake -- 4 A. I can. You may need to remind me. 5 Q. Very well. Okay. So let's turn to your 6 expert report. This will be Exhibit 300. And I first 7 want to go down to the bottom. Your opinion's on the 8 bottom there. You're challenging Opinion No. 9 and 9 Opinion No. 10, it appears, of Mr. Colvin's report. 10 Will you summarize what Mr. Colvin's opinions 11 were? And you may reference your report if it refreshes 12 your memory. 13 A. So we -- the opinions of Colvin that we 14 addressed I repeated at the beginning of the report. So 15 on page 2 of our report, he says, Opinion 9, that an 16 effective remedy to the 2022 breach could include 17 reducing 2024 pumping at specified locations. 18 And then Opinion 10 he provides the volumes 19 that he proposes that the reduction be and that it 20 should occur during the 2024 irrigation season. 21 Q. Okay. Do you disagree with that opinion? 22 A. I did disagree with that opinion. And 23 primarily my disagreement is -- springboards off of the 24 modeling that he proposed. And I -- conceptually, I 25 agree with the modeling that it's intriguing we have</p>

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<p style="text-align: right;">58</p> <p>1 talked about the purpose of the plan is to sustain the 2 aquifer. And that's my recollections from my 3 involvement during the negotiations. However, the 4 stated objective of the plan is to keep reach gains. 5 Oh, and so Mr. Colvin is correct in applying 6 the ESPAM -- but, yeah, the ESPAM, whatever you call it, 7 to assess those. He was technically incorrect in only 8 looking at a single year. Just as it would be 9 technically incorrect to look at one of the years that 10 IGWA vastly over performed and extrapolate that far into 11 the future. 12 Q. Could you please expound on why that was 13 technically incorrect? 14 A. It was technically incorrect because there is 15 a temporal delay caused by transitive actions through 16 the aquifer. And there is a spatial distribution of 17 efforts through the aquifer. And so to look at a single 18 year in isolation or to look at a single location in 19 isolation does not reflect the physical process of what 20 actually happens to effect that stated goal of the plan, 21 which is to preserve reach gains. 22 Q. As it pertains to Bonneville-Jefferson, did 23 you perform any analysis as to whether or not 24 Mr. Colvin's analysis in his modeling correctly 25 estimated what the correct remedy should be, in your</p>	<p style="text-align: right;">59</p> <p>1 opinion? 2 A. So I didn't repeat his modeling. I trust that 3 he performed it competently, but I corrected the 4 deficiency of only looking at one year and applied the 5 modeling to all the years and looked only at 6 Bonneville-Jefferson. 7 But qualitatively, the results were similar to 8 what was presented yesterday by Ms. Sigstedt. And that 9 was that not only did Surface Water Coalition receive 10 adequate in 2022, according to what the goal of the plan 11 was, which was to sustain their reach gains, actually, 12 you see that nearly double what basic performance would 13 have been had Bonneville-Jefferson conserved exactly 14 21 -- whatever the number is -- 21,134 exactly and only 15 that every year. 16 In 2022 Surface Water Coalition received more 17 than twice. This is not discussing the breach. The 18 breach is a [unintelligible] performance. The goal of 19 the plan and, therefore, what must be mitigated is what 20 was received at the reach. 21 And even if you only looked at 2022 efforts, 22 discarded everything previously, because much of 23 Bonneville-Jefferson's effort in 2022 was delivery of 24 wet water, even -- only looking at 2022, Surface Water 25 Coalition received more than it would have received if</p>
<p style="text-align: right;">60</p> <p>1 looking only at 2022 there had been a reduction of 21 2 whatever the number is. 3 Q. So it's your testimony, based off of that and 4 the goals as you looked at the Settlement Agreement, 5 adequate water supply was provided, and the remedy that 6 is proposed by SWC, therefore, isn't justified? 7 A. That is correct. 8 Q. Do you have any other information to add on 9 Opinion 9 or Opinion 10? 10 A. So we were asked in this proceeding to inform 11 our opinion of what the remedy should be. And globally 12 it is Rocky Mountain's opinion -- so I am a 13 subcontractor for Rocky Mountain Environmental. I am a 14 former employee, now retired, now a subcontractor. 15 Our proposal is that this methodology 16 introduced by Colvin and elaborated upon by Sigstedt and 17 myself, it is an appropriate methodology, that whenever 18 there's a breach -- and, perhaps, even if there is not a 19 breach -- that every year modeling should be used to 20 ensure that in that year the Surface Water Coalition 21 receives the benefit contemplated by the prescribed 22 actions. 23 Q. Okay. Anything else on that opinion? 24 A. No. Thank you. 25 Q. Okay. I think let's go back to your report.</p>	<p style="text-align: right;">61</p> <p>1 Maybe we'll just continue, we'll work our way 2 backwards -- 3 A. That's fine. 4 Q. -- for reference. 5 Could you please look at Opinion 8 and 6 summarize. 7 A. Yeah. So his Opinion 8 was that there should 8 be real-time reporting or near real-time reporting of 9 diversions from groundwater. And, you know, first of 10 all, I don't see that that speaks to a remedy. That 11 can't rewind the clock and change what happened in 2022. 12 But to the extent that that has merit, and I 13 think it does have merit, it applies to water of any 14 source. The spatial distribution should be similar 15 across sources. And the temporal timing of the near 16 real-time reporting should be commensurate with the -- 17 of the physical response. 18 So if the river drops on Monday and a surface 19 water user seemed to be short of water on Tuesday, that 20 informs the timing that would be appropriate for 21 real-time reporting of surface water diversions. If I 22 shut off a well in Bliss in 2021 and that effect finds 23 its way to the Surface Water Coalition reach in 2035, 24 that would inform the appropriate timing for that sort 25 of reporting.</p>

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17 (Pages 62 to 65)

<p style="text-align: right;">62</p> <p>1 Q. But as a remedy for breach, in your view, it 2 doesn't -- 3 A. It's irrelevant. 4 Q. But it potentially is preventative or it just 5 increases the ability to track and monitor water? 6 A. Yes. 7 Q. Okay. For both surface and groundwater? 8 A. Yes. 9 Q. Okay. Any other opinions you have on Opinion 10 No. 8 in Colvin's -- 11 A. No, sir. 12 Q. Okay. Go to Opinion No. 6. 13 Please summarize -- could you please summarize 14 your disagreement -- or what Mr. Colvin's opinion was 15 and what your disagreement was or if it's been covered 16 already by Sophia Sigstedt? 17 A. Well, thank you for that reminder. So, in 18 essence, our Opinion 6 is very similar analysis and 19 conclusions as Ms. Sigstedt's but applied just to the 20 Bonneville-Jefferson Groundwater District. 21 Figure 4, I think, is the key figure. The 22 white bars are what the Surface Water Coalition actually 23 received as a result of Bonneville-Jefferson's actions 24 taking Mr. Colvin's modeling paradigm and applying it to 25 all available data.</p>	<p style="text-align: right;">63</p> <p>1 And it's intriguing, 2023, though, by the 2 prescribed action, Bonneville-Jefferson exceeded its 3 requirement. By this alternate metric that Rocky 4 Mountain has proposed, the Surface Water Coalition would 5 be indicated by the modeling to not have received quite 6 enough. 7 And that's -- illustrates the difficulty of 8 moving goal posts with wheels on them, which is -- I 9 almost said bad words last night in that regard. 10 Q. And what do you mean by moving the goal posts? 11 What are you referring to? 12 A. Well, so even the agreement itself -- so I 13 think I'm the only one of the experts who was present 14 during negotiations, and it was very clear during 15 negotiations -- it was articulated yesterday by counsel 16 -- that the goal of the agreement was to raise water 17 levels broadly across the aquifer over a long period of 18 time. 19 The stinking thing doesn't say that in its 20 written objectives. In its objectives it says that the 21 goal is to keep reach gain. So I can see why sometimes 22 we're told to focus on aquifer levels, sometimes we're 23 told to focus on reach gains, and for convenience, the 24 actual metrics specified in the agreement is different, 25 yet, it's the sentinel wells. So I can see why</p>
<p style="text-align: right;">64</p> <p>1 sometimes we're told to focus on the stinking sentinel 2 wells. 3 Q. Well, and -- 4 A. Excuse me. 5 Q. And, Bryce -- and I can understand your 6 passion on the subject. You've been involved in it for 7 many years. 8 But could you please just describe why that 9 focus on the sentinel wells versus the reach gains is 10 significant as it pertains to determining what an 11 adequate remedy would be in this case? 12 A. Yeah, so yesterday there was confusion about 13 whether this proceeding was regarding adaptive 14 management or whether it was regarding addressing 15 breach. 16 And in the agreement, clearly, the adaptive 17 management is tied through the sentinel wells, and our 18 report goes through the technical reasons that that was 19 adopted as the metric. 20 I think that it's correct that the breach is 21 calculated based on annual performance. And I don't 22 dispute that. Although, there is a problem of 23 conservation of mass that, apparently, is not at issue 24 here. 25 But the stated objective of the plan is reach</p>	<p style="text-align: right;">65</p> <p>1 gains. And so there's no other guidance in the document 2 itself as to how breach should be remedied, except that 3 because the stated objective of the plan is reach gains, 4 it seems reasonable to me that the remedy should focus 5 on reach gains. 6 And Mr. Colvin, I think, correctly applied 7 modeling to assess part of the effect on reach gains. 8 And we simply have to expand that to include all 9 relevant data. And I think we have a scientifically 10 valid method to calculate the remedy that's consistent 11 with the stated goals of the plan. 12 Q. Okay. So on that -- I think you may have said 13 this already, but just to be clear on this point -- when 14 Mr. Colvin ran his modeling you're referring to where 15 he's -- he began in '22 and he looked at the injury 16 moving into the future on the -- to the reach -- 17 A. Well, so it would be impossible for Mr. Colvin 18 to analyze injury using the model. He used the word 19 "injury," or he may have used the word "impact." There 20 are people who assign nuances of meaning, and they may 21 read this word "impact" and think a particular nuance, 22 but, again, the model cannot predict impact. That's 23 impossible for the model to do. 24 The model can predict effect. And I believe 25 that much of what Mr. Colvin, when he used the word</p>

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18 (Pages 66 to 69)

<p style="text-align: right;">66</p> <p>1 "injury" or "impact," he meant "effect." And he did, he 2 used the model, and he correctly showed what a little 3 narrow slice of the record would be indicated the effect 4 of that. 5 And so all that has to be done is to simply 6 include all the relevant data, and then that becomes a 7 sound method. 8 Q. And that wasn't done in Mr. Colvin's analysis, 9 in your opinion? 10 A. I didn't see that he used the full suite of 11 data. 12 Q. Okay. Any further opinions that were not 13 offered previously to Response 6? 14 A. I don't think so. 15 Q. Okay. Will you please summarize Opinion 16 No. -- Mr. Colvin's Opinion No. 5, and just please 17 indicate whether you agree or disagree and whether it's 18 been addressed by Ms. Sigstedt and what your opinion is 19 with regard to how that was addressed by -- 20 A. So Mr. Colvin's Opinion 5 -- let me look at it 21 so I get this correctly. My response is more in my 22 mind. Okay. 23 ESPAM results show that the underperformance 24 will cause a certain calculated decline in the sentinel 25 well index. This is significant -- these impacts</p>	<p style="text-align: right;">67</p> <p>1 propagate into the future and warrant mitigation. 2 So starting at the back, "impacts propagate 3 into the future and warrant mitigation," I would agree 4 that effects propagate into the future and weren't 5 mitigation. And this applies to all years of the 6 record. 7 Whether .29 feet is significant in the context 8 of a record that has ranged from minus 3 feet and would 9 have been clear down at minus 13 feet and whether 10 .29 feet is significant in that, I don't know if it's 11 statistically significant. 12 I think it's maybe, in Mr. Colvin's opinion, 13 subjective opinion, but -- significant. But I think 14 more importantly -- and maybe because Mr. Colvin wasn't 15 present during the negotiations, he's conflating those 16 three different sets of goalposts that we talked about. 17 It is important, I think, to consider the 18 effect of any shortfall or any overperformance on the 19 sentinel well index. And I think the valid way to 20 perform that would be the way IDWR did as reproduced 21 here in Figure 3. 22 Ms. Sigstedt referred to an earlier version of 23 this figure that ended in 2021-2022. This one goes 24 clear through to 2023. I think the highlight of this 25 figure is the last set of lines. The black line is</p>
<p style="text-align: right;">68</p> <p>1 where we are. It's at not quite minus 9. So minus 8.8 2 something. The bottom dashed line is where we would 3 have been without implementation of the plan, which is 4 minus -- maybe minus 13.2. I think that's one takeaway. 5 The other takeaway is that, perhaps, 6 Mr. Colvin's method of comparing -- directly comparing 7 aquifer -- changes in aquifer storage to the index has 8 some merit, except that the data are widely scattered. 9 But to take a single pair of data from a time series is 10 statistically invalid. 11 I could look at a year when -- on page 6, my 12 Table 1, I could look at 2018 to 2019 storage went down 13 by 30,000 acre-feet, the well index came up by 0.4. We 14 can extrapolate that and say if we really want to 15 improve the index, then IGWA should over pump by 16 300,000, and then you'll come up by 4 feet. Well, 17 that's idiotic because it's statistically invalid. 18 Q. So it's your opinion still that by isolating 19 the data and not looking at all the relevant technical 20 data that we've -- that you normally look at as a 21 hydrologist, his opinion was technically -- 22 A. Correct. 23 Q. -- incorrect? 24 A. Yeah. It's correct that the -- that the 25 opinion was incorrect.</p>	<p style="text-align: right;">69</p> <p>1 Figure 1 talks about how much difference a 2 version of the model makes. I think Ms. Sigstedt 3 covered that adequately, and I think Mr. Colvin 4 explained it correctly in his testimony. So I think 5 that's all on -- I've gone astray. That was Opinion 5. 6 I apologize. 7 Q. Okay. So just so we're clear, so you were 8 just giving testimony with regard to Opinion 5? 9 A. I was. And you had asked about 6, and I 10 apologize. 11 Q. That's okay. Do you have anything else to add 12 on Opinion No. 5? 13 A. No, sir. 14 Q. Okay. Is there anything you need to add on 15 Opinion No. 6 of Mr. Colvin's report that you dispute? 16 And is there anything in there that you have to add that 17 Ms. Sigstedt may have -- may or may not have covered? 18 A. No, sir. I think her analysis was slightly 19 different than mine because mine was focused on a 20 district. Mine was more detailed than Mr. Colvin's, 21 less detailed than Mr. Sigstedt's [sic], but I think the 22 results are consistent when applied to all the data. 23 Q. Okay. So you agree with Ms. Sigstedt's 24 testimony -- 25 A. [Unintelligible.]</p>

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19 (Pages 70 to 73)

<p style="text-align: right;">70</p> <p>1 Q. -- on it as to that point. 2 Okay. We're moving right along here. Would 3 you please summarize your response to Opinions No. 3 and 4 7 and indicate if there's any additional information 5 that you have on that that Ms. Sigstedt may or may not 6 have covered? 7 A. So -- 8 Q. And please summarize the opinions for the 9 record, as well. 10 A. So here's -- Opinion 3 is that effects 11 propagate into the future. We agree. We agree that 12 that applies to -- we agree with Ms. Sigstedt that 13 applies to effects of all actions. 14 Opinion 7 is that the mitigation plan 15 recognizes the long-term cumulative impacts of IGWA's 16 junior pumping. I think it's implicit. I didn't find 17 that explicitly stated, but I think implicitly it is in 18 there. 19 Underperformance in 2022 causes, he says, 20 impacts. It's impossible to know, but it certainly 21 affects the propagate as do all other years of the 22 record. And I think Ms. Sigstedt appropriately 23 responded to that. 24 Q. Okay. And you -- and I think you've clarified 25 this, but impacts versus effects, what's the</p>	<p style="text-align: right;">71</p> <p>1 significant -- 2 A. Yeah. 3 Q. -- what's the significance of that in trying 4 to craft remedy or determine what -- 5 A. Yeah. So an effect is inescapable. If I take 6 a bucket of water out of the Snake River, the Snake 7 River is one bucket of water short. That is an effect. 8 And the model is sometimes not so shiny, but it's our 9 shiniest toy for estimating effects. 10 If when I take that bucket of water out of the 11 river, the water supply situation is such that someone 12 could not receive their full paper allocation of their 13 water right, that becomes an impact. But suppose the 14 moment that that effect and that impact reaches their 15 headgate, it's August, they've already harvested their 16 grain, they have not yet started fall irrigation to 17 facilitate tillage, there is no injury. 18 So effect is automatic. It's what happens 19 when there's less water than there would have been. The 20 spring of 1997 when I was filling sandbags in Roberts, 21 there would have been no injury from the pumping that 22 occurred 40 years before in Mud Lake that was finally 23 propagating its way to the river. 24 Q. So if you're trying to meet the roles in what 25 you have described of the agreement to make sure that</p>
<p style="text-align: right;">72</p> <p>1 the reach gains aren't injured and provide water to the 2 SWC through the reach, you need to be looking at 3 impacts; is that correct? 4 A. Yes. Yeah. 5 Q. Do you believe Mr. Colvin's report adequately 6 did that in discussing what remedy was appropriate? 7 A. So I think that if we just substitute the word 8 "effect" for "impact," that overcomes that little 9 difficulty of his report. The fact that he did not 10 include all data is a larger problem that can't be 11 changed by a semantics. 12 Q. Very good. Okay. Anything else on response 13 to Opinions 3 and 7? 14 A. No. 15 Q. Okay. And then finally on response to Opinion 16 1, I think you have referenced this before, 17 "conservation of mass," is there anything that hasn't 18 been addressed already by other experts with regard to 19 your response to Opinion 1? 20 A. So. 21 Q. If you would please summarize what your 22 response to Opinion 1 is. 23 A. Yeah. So, you know, his Opinion 1 was that it 24 was -- there was a breach, and he quantified the breach. 25 And, in and of itself, that's all right, but I</p>	<p style="text-align: right;">73</p> <p>1 understood that his was a technical report. This sounds 2 more like a legal opinion, and legally I understand that 3 that's been decided. But, technically, there is the law 4 of conservation of mass. And the calculation that was 5 used to arrive at those numbers violates the 6 conservation of mass. 7 Q. And would you please describe, briefly, what 8 you mean by the law of conservation of mass for us lay 9 people? 10 A. Yeah. So you cannot create or destroy water, 11 essentially. It's conservation of mass. And so if 12 you -- you know, if you put five bricks in a pot and 13 grind them up into brick powder and then you add 4 14 tablespoons of olive oil and weigh it, the weight is 15 going to add up to the rate of the original bricks and 16 the weight of the olive oil. 17 If you were to set fire to it and the olive 18 oil were to burn off, the reduction in the weight would 19 correspond to the amount of the olive oil that became 20 smoke. That's conservation of mass. 21 So in the case of the 240,000, the 240,000 -- 22 and I was there when this was debated -- was rounding up 23 a best scientific estimate of the shortfall of water in 24 the aquifer. And that shortfall was attributed to 25 groundwater pumping. And the groundwater pumping that</p>

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<p style="text-align: right;">74</p> <p>1 actually caused that shortfall was the groundwater 2 pumping from ridgetop to ridgetop. 3 A large part of that groundwater pumping was 4 immediately excluded. Anything outside of the Rule 50 5 was excluded. Anything that was not within a 6 groundwater district was immediately excluded. So that 7 was part of it. 8 And then later another part was excluded, and 9 that was the part of groundwater districts or irrigation 10 districts relying upon groundwater to have alternate 11 plans. And, yes, the original 240 was never reduced. 12 It's like three guys go into a restaurant. 13 They [unintelligible] a bill of \$240. The first guy 14 gets up and leaves. The second guy gets up and pays 15 \$80. The third guy goes to the cash register, and the 16 clerk says, "That will be \$240, sir," that's 17 conservation of mass. 18 Q. Okay. 19 A. And that's -- that's independent of what's 20 been determined legally. That's just a technical fact 21 that Mr. Colvin omitted to -- failed to acknowledge. 22 Q. Okay. And so by not acknowledging that, from 23 a technical standpoint, is it your opinion that 24 Mr. Colvin's report was technically deficient in that 25 regard?</p>	<p style="text-align: right;">75</p> <p>1 A. It's technically deficient in that regard. 2 And then second, that it really wasn't a technical 3 opinion to start with, it was a legal opinion. 4 Q. Okay. Do you have anything else -- or any -- 5 if you want to take a moment and just scan through your 6 report, is there any other responses to Mr. Colvin's 7 opinions that you would like to share that we -- or 8 discuss relative to your report that we haven't covered 9 already? 10 A. There is one. Figure 4 is modeled accruals. 11 It's very similar, conceptually, to what Ms. Sigstedt 12 did, only it refers only to the Bonneville-Jefferson. 13 If you look at the red line indicated to be 14 today, there begins to be a decline. And that's only 15 because we did not project future actions in our 16 modeling. 17 In reality, my clients have told me that 18 they're committed to do what's necessary to actually 19 keep the Surface Water Coalition whole. And so those 20 lines, in reality, will continue to build, and that 21 decline will not actually occur. 22 Q. So there was an assumption made that you 23 disagreed with, is that what I'm hearing? 24 A. Only that there is a danger of misinterpreting 25 Figure four.</p>
<p style="text-align: right;">76</p> <p>1 Q. Okay. Any other responses that you need to 2 cover or you feel you need to cover from your report? 3 A. Let me just read the last -- the most 4 important part of my report is the last sentence. 5 Q. Okay. Just for reference, we're on Exhibit 6 No. 300 -- 7 A. Page 11. 8 Q. -- page 11. 9 A. You got it. So just above the signature 10 block. 11 Q. Okay. 12 A. Then remedies should be crafted so that at the 13 end of each year the accruals for that year from the 14 full history of Bonneville-Jefferson Ground Water 15 District efforts would sum to at least the accruals for 16 that year that would have resulted from a continuous 17 time series at exactly the required reduction. And the 18 reason for that conclusion is the stated goal of the 19 plan to keep the Surface Water Coalition reach whole. 20 Q. In your opinion, has Bonneville-Jefferson 21 accomplished that for the 20 -- as of the 2022 season? 22 A. As of -- the cumulative results of all 23 Bonneville-Jefferson's efforts as of the year end of 24 2022 achieved that goal. If you should -- it's 25 technically invalid. But if you were to pull out</p>	<p style="text-align: right;">77</p> <p>1 Bonneville-Jefferson's 2022 efforts in isolation, 2 because so much of that effort was in direct wet water 3 delivery, it's also true for that year in isolation. 4 Q. Okay. And you're referring to the wet water 5 delivery that was pursuant to an agreement with SWC and 6 IGWA to remedy prior breaches; is that correct? 7 A. So. 8 HEARING OFFICER: Excuse me. Whom? The 9 first -- 10 MR. JOHNS: The Idaho Ground Water 11 Appropriators and the Surface Water Coalition. 12 HEARING OFFICER: Very good. 13 MR. JOHNS: My apologies. 14 HEARING OFFICER: Thank you. That's fine. 15 THE WITNESS: So I do not understand the 16 administrative background, but there's a block of water 17 every year dedicated in the plan that we did not 18 consider. But the data that were provided me from 19 Mr. Higgs, so consistent with Mr. Higgs' testimony, 20 indicated that there was a certain volume of reduction 21 that Bonneville-Jefferson did in 2022, and then there 22 was a block of direct delivery that Bonneville-Jefferson 23 did independently. Now, the administrative origin of 24 that block of water, I don't know what it is. But 25 that's -- those are the number s I'm referring to.</p>

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21 (Pages 78 to 81)

<p style="text-align: right;">78</p> <p>1 Q. (BY MR. JOHNS) Okay. So you're just, 2 technically, analyzing water that you understood was -- 3 A. Right. 4 Q. -- provided and then looking at what model -- 5 A. What -- so what does the model say Surface 6 Water Coalition received from that block of reduction 7 that occurred in that year, plus, the block of wet water 8 that, modeled or not, we did receive that year. 9 That sums to more than they would have just 10 looking in that year in isolation had it just been the 11 21 whatever -- 21,134 at that -- just looking at that in 12 isolation. That would have given them less water than 13 what they actually got just from 2022 activities. 14 Q. Okay. So in your opinion, they had received, 15 based off of what had actually occurred, more water than 16 Bonneville-Jefferson? 17 A. Right. And so -- then if the appropriate 18 metric for the remedy is the stated purpose of the plan, 19 there's not a requirement for additional water to 20 provide the remedy, even though by the metric of the -- 21 of annual performance, the Director has decided that 22 there was a breach in that year. 23 MR. JOHNS: Okay. I'm just skimming my notes, 24 Mr. Hearing Officer, briefly, just to make sure that I 25 covered everything. I believe I covered everything.</p>	<p style="text-align: right;">79</p> <p>1 Q. (BY MR. JOHNS) Do you believe you covered 2 everything that you prepared for this day? 3 A. I think so, but this isn't my -- thinking on 4 my feet isn't my strong suit. 5 Q. To be continued; right? 6 MR. JOHNS: Mr. Hearing Officer, with that, I 7 would move to admit Exhibit 300, the expert report of 8 Mr. Contor. 9 HEARING OFFICER: Objection? Any objection? 10 UNIDENTIFIED SPEAKER: No, judge. 11 HEARING OFFICER: This report will be -- 12 anything from IGWA? 13 The report will be admitted. 14 (Exhibit 300 admitted.) 15 MR. JOHNS: Okay. I believe I don't have any 16 other questions for this witness. 17 HEARING OFFICER: Thank you, sir. 18 MR. JOHNS: Thank you. 19 HEARING OFFICER: Cross? 20 21 CROSS-EXAMINATION 22 QUESTIONS BY MR. FLETCHER: 23 Q. Mr. Contor, I'm Kent Fletcher. We've known 24 each other quite a while. 25 A. Yes, sir.</p>
<p style="text-align: right;">80</p> <p>1 Q. Is it fair to characterize your report as 2 suggestions on how the methodology -- or excuse me -- 3 the Settlement Agreement should be changed? 4 A. No, sir. 5 Q. Okay. You -- your testimony is today that 6 your opinions were based upon goals set forth in the 7 Settlement Agreement; correct? 8 A. Yes, sir. 9 Q. Okay. Would you like to turn to Exhibit 500. 10 A. Oh, which book is that going to be in? 11 MS. TSCHOHL: [Unintelligible] the exhibit 12 volume. 13 THE WITNESS: Pardon. 14 MS. TSCHOHL: [Unintelligible.] 15 THE WITNESS: It's the first one. I bet I 16 could have figured that out. I'm there, sir. 17 Q. (BY MR. FLETCHER) Okay. Can you point out -- 18 Exhibit 500 is the Settlement Agreement; correct? 19 A. It's the Settlement Agreement, but I don't see 20 the addendum that actually talks about the remedy for 21 breach, but it is the agreement. 22 Q. Yeah, I'm going to address that. I'm 23 addressing the agreement itself. Because your report -- 24 you're testifying today, your report, your discussion of 25 what should be done is based upon goals set forth in</p>	<p style="text-align: right;">81</p> <p>1 this agreement dealing with reach gains; correct? 2 A. Yes. 3 Q. Okay. Can you point out to me in this 4 Settlement Agreement any objective standard of what 5 reach gains should be achieved pursuant to the terms of 6 this agreement? 7 A. So as I discussed with Mr. Johns, and has been 8 discussed before, the agreement is pretty scant. And so 9 let me read you what's -- what I find in this agreement 10 regarding reach gains. 11 Objective 1A, mitigate for material injury the 12 surface water rights that rely upon natural flow in the 13 near Blackfoot to Milner reach to provide part of the 14 water supply for the senior surface water rights. 15 That's what I find. 16 Q. Okay. How about turning to page 3 of that 17 agreement. 18 A. Okay. I have page 3. 19 Q. And I would ask that you look at paragraph 20 sub (b) on that paragraph. 21 A. Okay. 22 Q. That says for factual goals, doesn't it? 23 A. It does. And as I explained to Mr. Johns, 24 those are the goals that define adaptive management. 25 And yesterday there seemed to be some confusion whether</p>

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22 (Pages 82 to 85)

<p style="text-align: right;">82</p> <p>1 this proceeding was regarding adaptive management or 2 whether it was regarding breach. 3 But, yes, there are goals stated here. There 4 was some testimony yesterday about whether those goals 5 were reasonable based on -- 6 Q. You're going beyond my question. 7 A. I'm sorry. 8 Q. Paragraph E sets forth specific goals with the 9 metric measurement; correct? 10 A. Yes. 11 Q. And does that talk about reach gains? 12 A. Those do not. And that's -- those do not. 13 Q. Anywhere in this agreement does there -- under 14 the heading of "Goal" is there an objective measurement 15 of a reach gain that should be achieved? 16 A. There's not a numerical number. 17 Q. Okay. 18 A. But the first objective listed in the 19 agreement, which in my mind would be the most important 20 is for reach gains. 21 Q. Okay. Well, let's look at what the agreement 22 actually says in paragraph E sub (i). The actual goal 23 of the agreement states that it's to stabilize and 24 ultimately reverse the trend of declining groundwater 25 levels and return groundwater levels to a level equal to</p>	<p style="text-align: right;">83</p> <p>1 an average of the aquifer levels from '91 to 2001. 2 Isn't that the goal of the agreement? 3 A. Well, that says that that is the groundwater 4 level goal and benchmark, which is under a subheading 5 titled No. 3, "Long-Term Practices Commencing 2016." 6 So, to me, the goal of the agreement goes back 7 to the very first thing stated on the agreement. 8 Q. Okay. 9 A. I agree that there are groundwater level 10 benchmarks. And Mr. Johns asked me what those referred 11 to, and I can repeat that. And I agree that that is 12 stated in here. And I agree that if this were a 13 proceeding regarding adaptive management, this would be 14 the place to drill in, because that is how adaptive 15 management is defined, is my understanding. 16 Q. Yeah. Well, let's step down to sub (3) under 17 that same section. 18 A. Okay. 19 Q. One of the goals is to develop a reliable 20 method to measure reach gain trends in the Blackfoot to 21 Milner reach within ten years -- 22 A. Yes. 23 Q. -- correct. 24 So that is the goal of the agreement. It 25 sounded --</p>
<p style="text-align: right;">84</p> <p>1 A. So -- 2 (Unintelligible crosstalk.) 3 HEARING OFFICER: Wait for the question, sir. 4 THE WITNESS: I'm sorry. 5 Q. (BY MR. FLETCHER) That's a yes-or-no 6 question. 7 A. It is a groundwater level goal of subsection 8 (3) of long-term practices. 9 Q. So I guess the hearing officer's 10 interpretation of your testimony has to be based upon 11 your definition of a goal, which is not the goal stated 12 in the agreement, but an objective stated on the first 13 page? 14 A. So I'm not an attorney, and I'm not an English 15 professor. I'm a hydrologist. And I speak plain 16 English, and I speak some Spanish, and I speak some 17 Persian. And in my -- 18 HEARING OFFICER: They're helpful in these 19 things too. 20 THE WITNESS: Yeah. So in my mind -- 21 Q. (BY MR. FLETCHER) [Unintelligible] expert 22 testimony covers those things? 23 A. Objective and goals are synonyms. If they're 24 not, I do not know how to respond. 25 Q. Okay. All right.</p>	<p style="text-align: right;">85</p> <p>1 A. But I agree that under subsection E, number I 2 talks about water levels. I agree that under subsection 3 E, No. 3 talks about developing methodology to major 4 reach gains. 5 Q. So isn't -- if you are going to define a 6 remedy, shouldn't it be -- if you're going to model to 7 define a remedy, which is what you're suggesting here, 8 shouldn't it be centered on the goal, stated goal of the 9 agreement rather than your interpretation that it should 10 be an undefined modeling number? 11 A. So I actually was following Mr. Colvin's lead. 12 Mr. Colvin's lead, which I thought was reasonable, was 13 to use modeling to estimate in a future year how much of 14 a shortfall would propagate to the Surface Water 15 Coalition. 16 Now, you may be right that Mr. Colvin was 17 wrong. You may be right that I was wrong. But 18 following his lead, that seems reasonable. And this 19 particular part of the agreement, without any addenda, 20 does not specify how breach will be addressed. 21 And so we were asked to come with a proposal. 22 Mr. Colvin came with a proposal. We agreed in part. We 23 [unintelligible] elaborate. We came with a proposal. 24 And, yes, my proposal is that the appropriate remedy for 25 breach is to do whatever is necessary so that the</p>

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23 (Pages 86 to 89)

<p style="text-align: right;">86</p> <p>1 Surface Water Coalition receives what it would have 2 received had the specified actions actually been taken 3 exactly on schedule lockstep with no deviation up or 4 down. 5 Q. So you're analyzing this more in an injury 6 context to the Surface Water Coalition? 7 A. No, sir. I'm analyzing it in context that 8 there was a plan, the plan specified some actions, the 9 Director has found that those actions did not occur 10 and, therefore, the most reasonable remedy for that is 11 to provide something that replaces what would have 12 happened had those actions occurred. 13 Now -- 14 Q. But your proposal doesn't -- 15 HEARING OFFICER: Wait a second. Let him 16 finish. 17 MR. FLETCHER: Oh, I thought he was done. I'm 18 sorry. 19 THE WITNESS: I may have been going on, but 20 it's -- 21 HEARING OFFICER: That's fine. 22 Next question, sir. Thank you. 23 Q. (BY MR. FLETCHER) But your proposal doesn't 24 make a suggestion as to what should be done to cure the 25 breach, your proposal is saying based upon modeling</p>	<p style="text-align: right;">87</p> <p>1 nothing needs to be done. 2 Isn't that your suggestion? 3 A. So may I refer back to my report? 4 Q. Sure. 5 A. Okay. If I can find -- okay. "At the end of 6 each year the accruals for that year from full history 7 of BJGWD efforts with some but at least the accruals for 8 that year that resulted from continuous time series 9 after the required reduction." 10 So following Mr. Colvin's lead, the model is 11 an imperfect tool. It's been deemed the best available 12 science. There's no other way that I know of, 13 technically, to evaluate what the Surface Water 14 Coalition would have received had performance been 15 adequate. 16 And so, yes, my proposal is that we use the 17 best available science to determine what the -- the 18 Surface Water Coalition would have received had the 19 specified actions in the plan been followed. And then 20 if that is inadequate, do what is necessary to be sure 21 that the Surface Water Coalition gets that much water. 22 Now, in this specific case, the modeling 23 happens to show that the efforts were adequate. But 24 that's just a specific case. 25 Q. Well, we're talking about this specific case?</p>
<p style="text-align: right;">88</p> <p>1 A. Yes. And -- 2 Q. And in order to accomplish your opinion on 3 that very matter, you are looking at all the actions 4 occurring prior to 2022? 5 A. In my report I did evaluate all those, but as 6 I explained to Mr. Johns, if we were to peel away all 7 years but 2022, if we were to look at only what Surface 8 Water Coalition would have received if 9 Bonneville-Jefferson had never conserved nor ever would 10 again in the future but it only conserved in 2022, the 11 model says how much water the Surface Water Coalition 12 would have received in 2022. 13 We can also look at only what 14 Bonneville-Jefferson actually did in 2022. And we can 15 model that, and we can only look at what Surface Water 16 Coalition received in 2022 from what actually was done 17 in 2022. 18 And if you look at what Surface Water 19 Coalition actually received in 2022, only what 20 Bonneville-Jefferson did in 2022, as if they had never 21 done anything nor ever would again, if you compare that 22 to what Bonneville-Jefferson -- if Bonneville-Jefferson 23 had done exactly 21,1 -- what's the number -- 21,1 24 something, 21,100 and some odd acres. 25 If only in 2022 Bonneville-Jefferson had done</p>	<p style="text-align: right;">89</p> <p>1 that, had never done anything before, never done 2 anything since, the Surface Water Coalition would have 3 got less than they actually got from 4 Bonneville-Jefferson -- 5 Q. So no matter how you are analyzing this, 6 you're looking at prior year's actions in determining 7 what to do about the 2022 breach? 8 A. No. 9 Q. Whether you're speculating about if they'd 10 only done their allocation every year or what they 11 actually did every year, you're having to include those 12 actions, whether they're paper actions like you're 13 talking about now or actual actions, in order to get it 14 to your conclusion? 15 A. No. I'm sorry, I did not explain that. 16 Q. Okay. What if -- did you do any analysis if 17 Jefferson Clark [sic] had done nothing? Nothing. 18 A. Had Bonneville-Jefferson -- 19 Q. I mean Bonneville-Jefferson. Excuse me. 20 A. I did not do the analysis, but analysis is not 21 needed. Had Bonneville-Jefferson done nothing, the 22 Surface Water Coalition would have received nothing. 23 It's -- I don't even need the stinking model to do that. 24 Q. Yeah. So is it your understanding that if 25 Bonneville-Jefferson is required to reduce</p>

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24 (Pages 90 to 93)

<p style="text-align: right;">90</p> <p>1 21,000 acre-feet per year that the Surface Water 2 Coalition should receive that benefit with that year? 3 A. So I didn't find anything in this document nor 4 any addendum that identified when the Surface Water 5 Coalition was to receive the benefit. I only found -- I 6 didn't even -- I didn't even find all that's been 7 ordered. But I did find that there was to be a 8 particular volume of reduction. 9 Q. Okay. Well, have you read the order that was 10 entered in summary judgment in this case? 11 A. I looked at it briefly. I can't say that I'm 12 familiar with it. 13 Q. Did you read the Director's order finding that 14 Bonneville-Jefferson breached in 2022? 15 A. I did. 16 MR. JOHNS: I'm going to -- I'm going to 17 object. I think that's going outside the scope. We 18 didn't discuss summary judgment order or anything in my 19 direct. 20 MR. FLETCHER: Well, it's foundational to his 21 opinion. Well, I guess I can -- if he didn't read them, 22 then he can say he didn't, and then we'll know that that 23 wasn't considered in his opinion. 24 HEARING OFFICER: You can answer as to whether 25 or not you read that.</p>	<p style="text-align: right;">91</p> <p>1 THE WITNESS: I did read it. 2 Q. (BY MR. FLETCHER) Okay. And in that order 3 the Director found that Bonneville-Jefferson breached 4 the agreement; correct? 5 A. That is correct. 6 Q. And he found that they breached it in the 7 amount of 21,341 acre-feet; correct? 8 A. That is not correct. That was the number that 9 he used to indicate what performance should have been. 10 But there was some performance, so that's the number 11 from which he subtracted the actual performance. 12 Mr. Colvin identified the number, and I think I repeated 13 it. But it was -- let's see. I think I can find it 14 more quickly in -- 15 Q. Well, if I misstated it, I want to get the 16 correct -- 17 HEARING OFFICER: Well, wait a second. Let 18 him answer. 19 THE WITNESS: Yeah. So Opinion 1, Mr. Colvin 20 says that Bonneville-Jefferson -- okay. So 21 Bonneville-Jefferson is the second in the list. 22 5,204 acre-feet is the second number in the list of 23 numbers. 24 And so I accept that 5,204 acre-feet is the 25 shortfall in the performance that the Director</p>
<p style="text-align: right;">92</p> <p>1 identified. And as I thought I said when I was 2 explaining our response to Opinion 1, I don't challenge 3 that. I believe that that is what the shortfall has 4 been legally deemed to be. 5 Q. (BY MR. FLETCHER) Yeah, you're correct. I 6 misstated the numbers. I appreciate you clarifying 7 that. 8 So your suggestion to the hearing officer for 9 the purposes of the only issue that's before this 10 hearing, which is what can be done to cure the 2022 11 breach, is that Bonneville-Jefferson doesn't have to do 12 anything? 13 A. That is correct. 14 Q. And in doing your work, you did not do any 15 analysis about how their lack of performance in 2022 may 16 have impacted the written goals of the agreement 17 concerning groundwater levels? 18 A. I did not do any independent work on 19 groundwater levels. 20 Q. I believe on page 7 of your report you even 21 went after Mr. Colvin when he stated that those 22 groundwater levels are now near historical lows? 23 A. I would agree with that statement. I thought 24 he said that they were at historical lows. And I don't 25 have access to the numbers, but using a ruler, I think</p>	<p style="text-align: right;">93</p> <p>1 near accurate -- near historical lows would be accurate. 2 Q. What year is lower than they are now? 3 A. So using a ruler, it looks to me like 2026 -- 4 2016 is the lowest of the actual. Importantly, on my 5 Figure 3, which came from Alex Moody of IDWR, had it not 6 been for the plan, 2023 would be dramatically the lowest 7 in the record by an additional -- like 7 feet lower than 8 it is now. 9 Q. So if there had been no mitigation provided 10 for seven years, it would be worse than it is today? 11 A. Correct. 12 Q. Right. But it is near that level -- at least 13 you'll agree that it's near the lowest level on that 14 chart, which was 2016? 15 A. I do agree that -- with that. 16 Q. And you agree that it's nowhere near the 2023 17 benchmark or the 2026 goal? 18 A. I agree with Ms. Sigstedt's analysis of all of 19 that. 20 Q. And you -- your report on page 10 agrees that 21 in order to prevent future breaches it would be a good 22 idea to have accurate measurement and near real-time 23 reporting of water use, and that that could benefit the 24 groundwater users and the surface water users? 25 A. Well, I think that what I said was that</p>

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25 (Pages 94 to 97)

<p style="text-align: right;">94</p> <p>1 accurate measurements and near real-time reporting water 2 use can equally benefit groundwater and surface water 3 management, but I also stated that's irrelevant because 4 it has no ability to rewind the clock to 2022 and 5 address the breach. 6 Q. But if one of the -- if the Director decides 7 he's getting tired of having breach hearings every year 8 and wants to try to prevent a breach, it would be a 9 course of conduct he can order? 10 MR. JOHNS: I'm going to object. It's 11 asking -- calling for a hypothetical response. 12 THE WITNESS: I wasn't asked to address this. 13 Excuse me. 14 HEARING OFFICER: I'm going to sustain the 15 objection. He has no idea what the Director would 16 need -- 17 MR. FLETCHER: Okay. 18 HEARING OFFICER: -- think or -- 19 MR. FLETCHER: He addressed it in his report, 20 and that's why I was asking. 21 HEARING OFFICER: Excuse me, I didn't hear 22 you, if that's your response. 23 MR. FLETCHER: I'm sorry. He addressed 24 measurement in his report and real-time reporting in his 25 report, and that's why I was asking him questions.</p>	<p style="text-align: right;">95</p> <p>1 HEARING OFFICER: But then you asked about the 2 reactions of the Director in the future. 3 MR. FLETCHER: Well, I -- 4 HEARING OFFICER: Sustained. Thank you. 5 Q. (BY MR. FLETCHER) And do you realize that the 6 Surface Water Coalition diversions from the Snake River 7 are monitored in near real time? 8 A. At a single location they are monitored -- 9 monitored in near real time. 10 Q. To your knowledge, is any groundwater district 11 monitoring in near real time? 12 A. I am not familiar with what all the 13 groundwater districts are doing. 14 Q. So you don't know of any? 15 A. I don't know one way or the other. 16 Q. Would you agree with the statement that your 17 recommendations really are better suited for determining 18 changes that couldn't be made for the purposes of 19 adaptive management rather than the 2022 breach? 20 UNIDENTIFIED SPEAKER: God damn I can use all 21 the help I can get. 22 THE WITNESS: I was not asked to consider 23 changes for adaptive management, so I haven't thought of 24 it in those terms. What I did was find that Mr. Colvin 25 laid a good foundation for what seemed to me like a</p>
<p style="text-align: right;">96</p> <p>1 sound technological approach to a ready of breach. And 2 I just adjusted his method for perceived deficiencies. 3 And I was focused on breach. 4 Now, to the extent that I offer any opinions 5 about measurement, I agree those are forward-looking and 6 if it had not been in Mr. Colvin's report, I would not 7 have gone there. 8 MR. FLETCHER: I don't have any other 9 questions. Thank you. 10 HEARING OFFICER: Thank you. 11 Were there any other questions from other 12 parties? 13 MR. ANDERSON: [Unintelligible]. 14 HEARING OFFICER: Sir, I didn't hear you. 15 MR. ANDERSON: This is Dylan Anderson from 16 Bingham Ground Water District. I just have a few quick 17 questions, if you don't mind. 18 HEARING OFFICER: Go ahead. 19 MR. ANDERSON: May I just do it from here? Is 20 that all right? 21 HEARING OFFICER: Certainly. That's fine. 22 Can you pick him up? 23 MS. TSCHOHL: [Unintelligible.] 24 /// 25 ///</p>	<p style="text-align: right;">97</p> <p>1 CROSS-EXAMINATION 2 QUESTIONS BY MR. ANDERSON: 3 Q. Bryce, Exhibit No. 1 is the report from the 4 Surface Water Coalition's expert. Okay? 5 A. Yes, I have got it. 6 Q. Would you turn to page 6 of that report. 7 A. Okay. I'm on page 6. 8 Q. In your testimony you touched briefly about 9 this modeling. And you didn't rework his modeling, you 10 assumed he did it correctly. 11 My question here in looking at this, he has 12 that distribution of effects from 2022, '23, '24. 13 You see that graph in front of you? 14 A. I see that, yes, sir. 15 Q. If you were to change the year on that, for 16 instance, if it were to start in, I don't know, 2018 and 17 2019, 2000, you know, '20, would that distribution be 18 the same? 19 A. It would be the same. 20 Q. And the way I understand this, this was the 21 effects of not putting something into the aquifer, 22 but -- or, sorry, this is taking out of the aquifer. 23 But it would be the same if you put something in the 24 aquifer; right? 25 Does this model work both ways? Did I say</p>

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26 (Pages 98 to 101)

<p style="text-align: right;">98</p> <p>1 that clearly enough? 2 A. So I think what you're saying is that the 3 model would give the same numerical value whether the -- 4 Mr. Colvin used the word "stress." That's our geeky 5 term for something we do to the model. And if the 6 stress is positive, you put water into the aquifer, or 7 if the stress is negative, meaning you take the water 8 out, it will give you the same numerical value just a 9 negative sign. I think that's what you were asking, and 10 the answer to that yes. 11 Q. Yes. And you used the term "effect," it would 12 have the same -- similar effect. I just want to try to 13 draw a contrast here. Let's pretend that that's the 14 year -- it starts in year 2018, so that would make year 15 2026, 2022; right? 16 A. Let's see, that's correct. 17 Q. And it's -- and I do believe this is -- the 18 numeric value here is about 56,000 acre-feet? 19 A. So the sum of effect for four years down the 20 road is 1,648. 21 Q. Oh, yes. Yeah, let's look at that for -- 22 yeah, you're right. It's for -- 23 A. Maybe I'm not understanding the question. 24 Q. No, you're correct. The 56,000 is for all 25 groundwater districts listed there. So the sum effect</p>	<p style="text-align: right;">99</p> <p>1 is 1,648, you're correct. 2 A. And may I clarify? 3 Q. Yeah. 4 A. So that's -- the 56,000, I think, had to do on 5 the farm, the 1,648 is at the reach. 6 Q. Correct. Okay. So I'm just trying to 7 understand this. That's -- just quick math in my head, 8 that's about 3 percent of that, you know, 1,600 is, 9 roughly, 3 percent of 5,600? 10 A. I get in trouble when I do math in my head. 11 But, you know, the hearing officer will have the numbers 12 in a calculator, so that's fine. 13 Q. Right. I'm just -- I want to ask you about a 14 distinction between that, what you're talking about 15 here, the effects on reach gain and averaging. 16 Now, if I were averaging, and I put in 17 56,000 acre-feet of recharge or something in 2018, and 18 then I was deficient that amount in 2022, averaging 19 would give me credit for the full 56,000; right? 20 A. So I'm not sure -- you know, the nuance of 21 averaging is what are you adding up and what are you 22 dividing by? And -- 23 Q. Well, assume all the years are -- 24 HEARING OFFICER: Wait. Whoa, whoa. Let him 25 answer.</p>
<p style="text-align: right;">100</p> <p>1 THE WITNESS: So unless I know what I'm adding 2 up and what I'm dividing by, it's hard for me to know 3 the answer to that. 4 Q. (BY MR. ANDERSON) Sure enough. Fair enough. 5 Let's say in 2018 the requirement of 240 6 was -- existed, but I did 56,000 acre-feet more than 7 that. 8 A. Okay. 9 Q. Okay? Then in 2020 -- let's say I did 240 10 every year after that. 11 A. Okay. 12 Q. And then in 2022 I was deficient 13 56,000 acre-feet? 14 A. Okay. 15 Q. I'd only done 184, or whatever the math is. 16 A. Whatever the math is. 17 Q. I was deficient. But if I'm averaging, then 18 in 2022 I would get that full benefit of that 19 56,000 acre-feet; correct? 20 A. If that -- if the averaging period included 21 that, that is correct. 22 Q. Yes. That's not what we're talking about 23 here; right? 24 A. It's certainly not what I'm talking about. 25 Q. Right. What you're showing -- or what Dave</p>	<p style="text-align: right;">101</p> <p>1 kind of introduced and you're piggybacking on is that 2 effect of previous conservation recharge just in that 3 year. And it's a small percentage. If I'm looking at 4 it, it would only be about 3 percent from 2018, if we 5 used his same distribution; correct? 6 A. So, you know, it is correct -- if you look at 7 the totals, you know, in total at the bottom, whatever 8 he put into his model over all time to this reach, 9 26,000 acre-feet came out. And in the first year was a 10 small number, the second year was the biggest number in 11 the record, the third year was just a little bit lower 12 than the first number, and they declined. 13 And so I think, you know, I'm not entirely 14 sure I understand your question, but I think 15 conceptually the beauty of using the model is that we 16 can be sure we're not attributing to the benefit of the 17 Surface Water Coalition something that actually happened 18 last year or next year. 19 Q. Correct. And I think you've answered my 20 question here. I just wanted to make sure that there 21 was a distinction here that this is not averaging? 22 A. Oh, very good. Yes, that's correct. 23 Q. Okay. And, in fact, to get this benefit in 24 one year, if it's a -- only a, you know, 3 percent or, 25 you know, 10 percent that you're after, you have to do</p>

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<p style="text-align: right;">102</p> <p>1 quite a bit more conservation or recharge to even -- to 2 even make up for a deficiency in a given year; is that 3 correct? 4 Is that a correct assumption? 5 A. So for the location of Bonneville-Jefferson 6 Ground Water District, it's correct that to get an 7 immediate benefit in that same year you've got to pile 8 on a lot of water to get only a little bit of benefit. 9 MR. ANDERSON: Okay. I have no further 10 questions. 11 HEARING OFFICER: Mr. Budge or Elisheva, 12 anything? 13 Sir? 14 MR. JOHNS: May I -- 15 HEARING OFFICER: Yes. 16 MR. JOHNS: Brief redirect? 17 HEARING OFFICER: Sure. 18 MR. JOHNS: Is it okay if I just do it from 19 here? 20 HEARING OFFICER: Yes, please. 21 MR. JOHNS: Very well. 22 23 REDIRECT EXAMINATION 24 QUESTIONS BY MR. JOHNS: 25 Q. Mr. Contor, thank you for your testimony. I</p>	<p style="text-align: right;">103</p> <p>1 just want to ask you a couple questions. 2 There was a line of inquiry that Mr. Fletcher 3 had asked you about regarding Exhibit 500, which is the 4 Settlement Agreement. 5 A. Okay. 6 Q. I just briefly want to clarify your testimony 7 as to issues that he was discussing with you there, so 8 if you'd please turn to Exhibit 500. 9 A. Common Exhibit 30? 10 Q. Yes, of the common exhibits. 11 A. I am here. 12 Q. Very well. Mr. Fletcher, do you recall him 13 asking you questions about Section 3(e)? 14 A. Yes. 15 Q. Okay. And do you recall your testimony 16 regarding Section 1(a), which is the objectives? 17 A. I certainly can't reiterate it word for word, 18 but I recall trying to explain my understanding of that. 19 Q. Okay. So I just want to clarify. Is it your 20 testimony that you understood, and as you were preparing 21 for your technical analysis, that subsection 5, so 22 subsection V of Section 3(e) and a breach thereof 23 triggered adaptive management measurers? 24 A. That is my understanding. 25 Q. And to be clear, Section 1(a) is outside of</p>
<p style="text-align: right;">104</p> <p>1 Section 3(e) and the objectives stated pertaining to 2 reach gain. Reach gains is separate from Section 3(e) 3 and all the provisions, including section -- 4 subsection 5? 5 A. Yes. 6 Q. Okay. So when you read the agreement, is it 7 fair to say the conclusion you came to is what you could 8 technically and should technically look at was different 9 than Mr. Colvin's? 10 A. Yes. 11 Q. Okay. And part of that is the -- is your 12 testimony that the agreement does not specify that the 13 direct must only evaluate technical information 14 beginning from the year in which the breach occurred? 15 A. Yes. If we include -- this part has nothing 16 about the breach. If we include the addendum where 17 breach is addressed, there's absolutely no technical 18 guidance on what is or is not required, what is or is 19 not acceptable for calculation of breach. 20 Q. So you used what you typically do as a 21 hydrologist to calculate impacts to inform what your 22 recommendation for breach of the annual reduction 23 requirement will be? 24 A. So I used the primary objective of the plan 25 and Mr. Colvin's modeling lead to calculate effects. I</p>	<p style="text-align: right;">105</p> <p>1 have no way of predicting impacts. 2 MR. JOHNS: I don't have anything else on 3 redirect, Mr. Hearing Officer. 4 HEARING OFFICER: All right. Please be 5 seated. Thank you, sir. 6 THE WITNESS: Thank you. 7 HEARING OFFICER: Next witness? 8 MR. FLETCHER: I think we talked about having 9 Mr. Colvin testify on rebuttal as an expert. We're kind 10 of out of order. They had one more lay witness. 11 HEARING OFFICER: Okay. 12 MR. FLETCHER: If that's okay with the hearing 13 officer. 14 HEARING OFFICER: Any objections? 15 MR. BUDGE: No objection, but can we take a 16 brief recess before? 17 HEARING OFFICER: Oh. Oh, gosh, yeah. Sorry, 18 it's just so titillating, I... 19 (Break taken.) 20 HEARING OFFICER: Mr. Thompson, will you call 21 your next witness out of order without any objection of 22 any party. 23 MR. THOMPSON: Thank you, Mr. Burdick. We 24 would call Dave Colvin back on rebuttal. 25 HEARING OFFICER: Any objection to having him</p>

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28 (Pages 106 to 109)

<p style="text-align: right;">106</p> <p>1 under oath from yesterday? 2 Hearing none, you are under oath from 3 yesterday, sir. 4 5 DAVID COLVIN, 6 called as a rebuttal witness by SWC having been 7 previously duly sworn to tell the truth relating to said 8 cause, testified as follows: 9 10 HEARING OFFICER: You may proceed. 11 12 DIRECT EXAMINATION 13 QUESTIONS BY MR. THOMPSON: 14 Q. Good morning, Mr. Colvin. 15 A. Good morning. 16 Q. For the record, Travis Thompson for A&B 17 Irrigation District, et al. 18 I think I just wanted to go back and ask you 19 some questions. There's been quite a bit of testimony 20 about different modeling that's been done. You did some 21 modeling, Ms. Sigstedt did some modeling, I think 22 Mr. Contor testified as to some modeling. 23 Can you describe the purposes of your modeling 24 exercise with respect to both the sentinel well index 25 and the reach gains?</p>	<p style="text-align: right;">107</p> <p>1 A. Yeah. So I performed modeling to, basically, 2 evaluate the impact of the 2022 breach numbers from the 3 Director's order. So we used the model to evaluate the 4 impact of those -- the breach over pumping numbers on 5 the sentinel well index and the reach gains. The 6 sentinel well index we, basically, just wanted to show 7 the relationship between that over pumping from the 8 breach and how that lowered the sentinel well index 9 levels. 10 And then for the reach gains that we 11 tabulated, we're, basically, just showing that the 12 impacts stretch over many years and just wanted to show 13 what that impact was at the reach, but it wasn't 14 intended to inform the proposed remedy that I had in my 15 report. 16 Q. Fair to characterize it as just an example of 17 here's what can happen on the ground as far as not 18 performing the full 240,000 acre-feet production 19 obligation in 2022? 20 A. Yes, that's right. 21 Q. Can you turn to Exhibit 2. 22 A. Okay. 23 Q. And identify that document for the record. 24 A. This is my rebuttal report. 25 Q. And what did you review for the purposes of</p>
<p style="text-align: right;">108</p> <p>1 this report? 2 A. I reviewed the expert reports that were 3 submitted for IGWA, which included the Lynker expert 4 report and the Water Well Consultants expert report. 5 Q. And can you just generally describe your -- I 6 guess your conclusions in this rebuttal report? 7 A. Well, I went through, basically, a number of 8 the issues that were contained in both reports that 9 weren't relevant to the one technical issue for this 10 hearing, which was a proposed remedy for the breach in 11 2022. 12 And so I went through a number of explanations 13 of where they included things that weren't relevant to a 14 remedy and then in Section 3 reiterated my opinions from 15 my original expert report that were relevant to a 16 remedy. 17 Q. And did any of those reports change your 18 ultimate conclusion of what you're recommending is a 19 remedy in this case? 20 A. No. 21 Q. And Ms. Sigstedt also submitted a rebuttal 22 report in this case. 23 Did you review that? 24 A. I did. 25 Q. And you heard the testimony of Ms. Sigstedt</p>	<p style="text-align: right;">109</p> <p>1 yesterday -- 2 A. Yes. 3 Q. -- is that correct? 4 And is it fair to characterize that 5 Ms. Sigstedt has identified surplus conservation that 6 the groundwater districts did between 2016 and 2020? 7 A. Yes, she did. 8 Q. And she modeled, I guess, the results, the 9 estimated impacts on the Snake River reach because of 10 those -- 11 A. Yes. 12 Q. -- excess conservation? 13 A. Yes, that's right. 14 Q. And did you hear her testimony about 15 evaluating 2021 -- 16 A. Yes. 17 Q. -- that was not included in her tables? 18 A. That's right. 19 Q. I guess, would the conservation deficiency in 20 2021 effect, ultimately, the impact on the reach there 21 was in 2022 and in future years? 22 A. Yes, it would. 23 Q. In looking at what the groundwater districts 24 did in those years, would you agree that that excess or 25 surplus conservation can assist in meeting the sentinel</p>

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29 (Pages 110 to 113)

<p style="text-align: right;">110</p> <p>1 well index benchmarks and goals? 2 A. Yes. It would raise the water levels from the 3 excess conservation. 4 Q. And would you agree that that surplus 5 conservation does not offset the total impact of all 6 groundwater diversions within those districts? 7 A. No, it did not. 8 Q. We talked about the modeling, the modeling you 9 did, and I guess with respect to your exercise, why did 10 you assign the mitigation deficiencies in 11 2022 District-wide as opposed to specific wells? 12 A. Well, looking at the 2016 mitigation plan in 13 the agreement, it seemed that the spatial detail was 14 only down to the district level rather than specifying 15 what would happen at each well. So I limited our 16 modeling to district-wide representation of the 2022 17 breach over pumping numbers. 18 Q. And if the Director does order a cure for the 19 2022 breach, could he apply that deficiency volume to 20 specific wells rather than just apply district-wide? 21 A. He could. 22 Q. And by example, if a particular groundwater 23 user was 10 acre-feet short in 2022, the Director could 24 order that same groundwater user to reduce an additional 25 10 acre-feet in 2024?</p>	<p style="text-align: right;">111</p> <p>1 A. Yes. And I think the IGWA performance reports 2 do include a well-by-well tally of each well's pumping 3 and their baseline pumping comparison, so whether they 4 met their conservation goal or not. 5 Q. And that would be consistent with the 6 remedy -- 7 HEARING OFFICER: When you say "report," what 8 report? 9 THE WITNESS: IGWA's annual report. 10 HEARING OFFICER: Performance report. 11 THE WITNESS: Performance report. 12 HEARING OFFICER: Very good. Thank you. 13 Q. (BY MR. THOMPSON) And that performance report 14 includes spreadsheets of each individual district's 15 individual wells; is that correct? 16 A. Yes. 17 Q. And whether the Director does that 18 district-wide or specific wells, that would be 19 consistent with the remedy you're recommending in this 20 case; is that correct? 21 A. Yes, as long as it was, basically, an amount 22 that would equal the 2022 breach numbers that are 23 tabulated in my report and come from the Director's 24 order. 25 Q. And he applies that to the specific districts</p>
<p style="text-align: right;">112</p> <p>1 for the deficiency volumes identified for each one; 2 would that be correct? 3 A. That's right. 4 Q. I just want to turn to the Rocky Mountain 5 Environmental rebuttal. 6 Did you review that rebuttal report submitted 7 by Rocky Mountain in this case as well? 8 A. I did. 9 Q. And you were present for the testimony of 10 Mr. Contor today? 11 A. I was. 12 Q. Mr. Contor, I heard, criticized your report 13 because it just looked at the 2022 deficiency and did 14 not consider all relevant data. 15 My question would be, I guess, you know, what 16 would be a full set of relevant data if we were looking 17 at complete impacts on the Snake River reach gains in a 18 particular year? 19 A. Well, that would be a very comprehensive 20 modeling analysis that could include the entire 21 calibration period of the model, which goes all of the 22 way back many decades and represents all the pumping 23 prior to 2016. 24 And it would represent all of the hydrologic 25 variables that exist in reality as closely as possible</p>	<p style="text-align: right;">113</p> <p>1 in a model. And so it would be at a very comprehensive 2 modeling effort that would be much more than what any of 3 the experts have done for this hearing. 4 Q. So fair to say that what shows up in the reach 5 in a given year is a multitude of factors, it's not just 6 looking at the deficiency only in 2022 or the 7 conservation actions taken by the groundwater district 8 since 2016? 9 A. That is right. 10 Q. Do you have any comments or opinions that were 11 offered by Contor in his report? 12 A. I mean, just in general, I think that I stand 13 by my modeling analysis as, basically, just a 14 demonstration of the impacts. And then my proposed 15 remedy being within the confines of the 2016 mitigation 16 plan. And I think that specific to a remedy, he was 17 recommending something that doesn't fit within the 18 framework of the 2016 mitigation plan. 19 Q. Fair to say that Mr. Contor's report relies 20 upon past actions or years of surplus conservation to 21 state that there's nothing for Bonneville-Jefferson 22 Ground Water District to do this year to cure that 2022 23 breach? 24 A. Yes. 25 MR. THOMPSON: That's all of the questions I</p>

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30 (Pages 114 to 117)

<p style="text-align: right;">114</p> <p>1 have, Mr. Colvin. Thank you. 2 THE WITNESS: Thanks. 3 HEARING OFFICER: Thank you, sir. 4 Cross by IGWA? 5 MR. BUDGE: For the record, this is TJ Budge, 6 attorney for IGWA. 7 8 CROSS-EXAMINATION 9 QUESTIONS BY MR. BUDGE: 10 Q. Thank you, Mr. Colvin. I want to ask you a 11 few questions about your rebuttal report. That's 12 Surface Water Coalition Exhibit 2. 13 Do you have that in front of you. 14 A. I do. 15 Q. If you would please turn to page 3 of that 16 report under the heading Section two. 17 A. Okay. 18 Q. In that first paragraph, the second sentence 19 reads -- and it's referring to the expert reports of 20 IGWA's consultants -- it says, "They also include 21 erroneous application of multiyear or averaged annual 22 mitigation actions to IGWA's 2022 mitigation plan 23 obligations." 24 You understand that Ms. Sigstedt did not use 25 average diversions as part of her modeling analysis?</p>	<p style="text-align: right;">115</p> <p>1 A. Well, she didn't have yearly averages. So she 2 did represent the actions for each year. 3 Q. Uh-huh. 4 A. And so in that sense, it wasn't averaged data. 5 Q. Okay. So you understand Ms. Sigstedt modeling 6 the actual groundwater conservation actual recharge that 7 occurred each year? 8 That's correct; right? 9 A. Yes. 10 Q. She did not average those across multiple 11 years and then do the modeling? 12 A. Right. 13 Q. So that reference to average annual mitigation 14 actions in your report would be inaccurate? 15 MR. FLETCHER: I object. That misstates what 16 it says. 17 HEARING OFFICER: It's overruled. 18 You may answer, sir. 19 THE WITNESS: I think that was referring to 20 the Water Well Consultants report. I do open that 21 paragraph with reference to the two reports. And 22 perhaps I'm not specific enough when I say "they also 23 include." 24 Q. (BY MR. BUDGE) And what was it that Water 25 Well Consultants did that utilized an average?</p>
<p style="text-align: right;">116</p> <p>1 A. Well, they had several different approaches to 2 calculating the conservation numbers for 2022. And 3 several of those approaches did include averaging over 4 years. 5 Q. You're referring to the baseline against which 6 conservation is measured? 7 A. Or the actual conservation numbers that had -- 8 in most of the tables that were presented, there was an 9 averaging that included a balance carried over from 10 previous years, so it was kind of a rolling average. 11 Q. You're referring to the performance report 12 spreadsheets? 13 A. Yeah, the proposed ones that Water Well 14 Consultants presented. 15 Q. The ones that were actually submitted to the 16 Department each -- 17 A. No, no in the expert report. 18 Q. You're referring to the alternative methods 19 for measuring compliance that were in the expert report 20 of Water Well Consultants? 21 A. That's right, yes. 22 Q. And explain how the averaging was used in 23 those reports? 24 A. If I recall, there were several different -- 25 MR. THOMPSON: I guess I'm going to object to</p>	<p style="text-align: right;">117</p> <p>1 this line of questioning on Mr. Higgs' report that has 2 been excluded. I did not go into any questions on 3 Mr. Higgs' report. 4 HEARING OFFICER: Well, you mentioned the 5 rebuttal report. It seems to me -- the bigger problem I 6 have is the Water Well report is not in evidence. So 7 when we talk about Water Well and his report, we're 8 talking about something that is not in evidence at this 9 time. 10 THE WITNESS: And maybe I can clarify it this 11 way -- 12 HEARING OFFICER: He's already testified the 13 expert who -- Ms. Sigstedt testified not using any 14 averages, that's what I remember, but not Water Well 15 because it's not in the evidence. 16 Q. (BY MR. BUDGE) And so just to be clear, in 17 Section 2 of your rebuttal report where you refer to 18 "averaged annual mitigation actions," you're referring 19 specifically to the Water Well Consultants analyses and 20 not to Lynker's analyses? 21 A. That's right. 22 Q. If you'll turn to the next page of your 23 report, I'm looking at Section 2.1. 24 A. Okay. 25 Q. The second paragraph down, the second sentence</p>

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<p style="text-align: right;">118</p> <p>1 reads: "Lynker's modeling of the impact from 2016-2021 2 activities is irrelevant to the 2022 breach and does not 3 address the four issues specified for this hearing." 4 You would agree this is a legal conclusion? 5 A. Well, I think that there are technical issues 6 that were part of the -- I guess it would have been the 7 scheduling order for this hearing, and so I don't know 8 if it's a legal conclusion. We had to have some topics 9 to address in this hearing, and so I don't know that 10 that's a legal conclusion. 11 Q. Which of your technical analyses support the 12 statement that Lynker's modeling is irrelevant? 13 A. By comparison, I model the reach numbers that 14 the Director had in his order, and the Lynker modeling 15 included other components that weren't part of the 2022 16 reach order. 17 Q. So is it your testimony that any modeling done 18 by another expert that's different than yours is 19 irrelevant? 20 A. No. 21 Q. You would agree that whether the analyses done 22 by Ms. Sigstedt or Mr. Contor or Mr. Higgs is relevant, 23 that's a decision that the hearing officer makes, it's a 24 legal conclusion? 25 A. Okay.</p>	<p style="text-align: right;">119</p> <p>1 Q. Okay. So just to be clear, you would agree, 2 then, that this sentence in your expert report is not a 3 technical analysis, it's a legal conclusion that 4 you're -- you've inserted or, you know, with 5 consultation with legal counsel? 6 A. Well, if we break down that sentence, I still 7 think that Lynker's modeling isn't relevant to the 2022 8 breach because it includes other hydrologic variables 9 that they've put into modeling. And it is my opinion 10 that it doesn't address the issue specified for this 11 hearing. So I don't think that's a legal conclusion, 12 but... 13 Q. Okay. I appreciate you're not a lawyer. I'll 14 move on to my next question. 15 Let me ask you about the next sentence. You 16 state: "Lynker does not address whether the Director 17 was in error by not specifying actions to cure the 2022 18 breach." 19 You understand that Lynker did do modeling to 20 show the effect of surplus conservation in the years 21 prior to 2022? 22 A. Yes. 23 Q. And you understand Lynker's -- Ms. Sigstedt's 24 explanation that if you account for that surplus 25 conservation, that there's a net benefit to the sentinel</p>
<p style="text-align: right;">120</p> <p>1 well index and a net benefit to the reach gains? 2 A. Yes. 3 Q. And you understand that that evidence was 4 presented because it has a bearing on the remedy that 5 may be imposed in this case? 6 A. That part I struggle with, because my 7 understanding is that the remedy needs to be fashioned 8 within the framework of the 2016 mitigation plan. And 9 so I think that there are things that are representative 10 of that modeling that are inconsistent with the 11 mitigation plan long-term actions that are what could be 12 done here. 13 Q. So, Mr. Colvin, part of the trouble that we 14 have with your report is it's filled with legal 15 statements and legal analyses as to what's relevant, 16 what the agreement requires. And as a technical expert, 17 your analysis should be grounded in technical analyses. 18 And the point I'm making is that you're discounting the 19 relevance of Lynker's analyses, and that's a decision 20 for the hearing officer. 21 Would you agree that that's ultimately the 22 hearing officer's decision to decide what -- which of 23 her analyses are relevant to this case. 24 MR. THOMPSON: Mr. Burdick, we would stipulate 25 to that. This is an argumentative line of questioning.</p>	<p style="text-align: right;">121</p> <p>1 I guess what is actually in Mr. Colvin's report, how it 2 compares to what Ms. Sigstedt did, and that is something 3 you'll have to decide, but to sit here and quibble over 4 words in his report and say he's offering legal 5 conclusions, I just -- 6 HEARING OFFICER: I agree. 7 MR. THOMPSON: -- think it's argumentative. 8 HEARING OFFICER: I will sustain the 9 objection. But I also agree with you, I'm going to go 10 through that report and make my own conclusion as to 11 what the law is, and away we'll go. And I -- 12 MR. BUDGE: Thank you. 13 HEARING OFFICER: You've made your point for 14 the hearing officer. Thank you. 15 MR. BUDGE: Thank you. 16 Q. (BY MR. BUDGE) Mr. Colvin, I want to ask you 17 about some of the analyses that Lynker did to which you 18 did not object in your rebuttal report. 19 And I'll just go through some of these. If 20 you, you know, want to reference Sophia's report, which 21 I know you're familiar with, it's Exhibit 142. And then 22 a rebuttal report is 143. And I can just read these for 23 you. 24 A. Okay. 25 Q. But on Exhibit 142, page 11 of that exhibit,</p>

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32 (Pages 122 to 125)

<p style="text-align: right;">122</p> <p>1 that's page 9 of Sophia's report, I'm looking at 2 Section 3.1. And she's discussing the tables that she 3 prepared. And you can look at those. You can -- but 4 the tables that show the net benefit to the Blackfoot to 5 Minidoka reach from the conservation that was performed 6 during the period of record 2016 to 2022 -- 7 A. What page are we on again? 8 Q. Page 11 is where it begins. 9 HEARING OFFICER: Page 11 of her report? 10 MR. BUDGE: It's -- the exhibit number has a 11 different page. It's page 11 of the exhibit. It's 12 page 9 of her report. 13 HEARING OFFICER: Very good. Thank you, sir. 14 Q. (BY MR. BUDGE) Do you recall Ms. Sigstedt -- 15 these tables that she has starting on page 11 of that 16 exhibit and continuing through page 13? 17 A. Yes. 18 Q. And you don't disagree with the modeling that 19 Sophia did to generate these tables or the data in these 20 tables? 21 A. I don't disagree with how the modeling was 22 performed. 23 Q. Okay. 24 A. But I do disagree with kind of how the results 25 were applied.</p>	<p style="text-align: right;">123</p> <p>1 Q. Okay. You don't disagree with any of the 2 numeric figures -- 3 A. No. 4 Q. -- that Ms. Sigstedt modeled? 5 A. I haven't -- I haven't thoroughly checked the 6 modeling, but I trust that she did a good job with the 7 modeling. 8 Q. Okay. Let me have you turn to page 14 of the 9 exhibit -- 10 A. Okay. 11 Q. -- which is page 12 of her report. 12 One of her conclusions, No. 6, reads that 13 "From 2016 to 2022 IGWA's members conserve a total of 14 2,195,103 acre-feet or 313,586 acre-feet annually on 15 average when compared to average pre-Settlement 16 Agreement diversions from 2010 to 2014. 17 You don't dispute that data? 18 A. I didn't double-check those numbers, but, 19 again, I trust that she did the math correctly. 20 Q. Okay. So if you look at the last sentence on 21 that conclusion 6, it says, "Thus IGWA's members 22 conserved, on average, 108,586 acre-feet more than they 23 understood was required." 24 Do you agree that the groundwater districts 25 during that period conserved more than -- on average,</p>
<p style="text-align: right;">124</p> <p>1 more than was required under the terms of the agreement? 2 A. Yes. Again, I trust her math. 3 Q. Okay. If you'll turn to Ms. Sigstedt's 4 rebuttal report. That's the next exhibit, 143. And 5 then turn to page 3 of that exhibit. 6 A. Okay. 7 Q. Under Section 2, if you look at the fifth 8 paragraph, it reads that, "Surplus conservation by the 9 groundwater districts from 2016 to 2020 resulted in 10 higher sentinel well levels than would have occurred if 11 the groundwater districts had implemented the precise 12 conservation targets allocated by IGWA and IDWR." 13 You agree with Ms. Sigstedt's analysis in that 14 effect? 15 A. Yes. 16 Q. And if you'd turn to the next page, 4, there's 17 a paragraph right in the middle that begins with the 18 words, "I agree." 19 A. Yes. 20 Q. Ms. Sigstedt agrees with you when she states 21 that, "I agree that the effects of groundwater pumping 22 propagate into the future. However, the effects of 23 groundwater conservation also propagate into the future. 24 Surplus groundwater conservation by the groundwater 25 districts from 2016 to 2020 have resulted in a net</p>	<p style="text-align: right;">125</p> <p>1 increase to near Blackfoot to Minidoka reach gains and a 2 net increase in groundwater levels, as measured by the 3 sentinel well index." 4 You don't dispute that either; correct? 5 A. That is correct. 6 MR. BUDGE: No further questions. 7 HEARING OFFICER: Thank you, sir. 8 Further questions? Sir? Mr. Johns? 9 MR. JOHNS: Just briefly, Mr. Hearing Officer. 10 Do you mind if I stay here? 11 HEARING OFFICER: Sure. 12 MR. JOHNS: Thank you. 13 14 CROSS-EXAMINATION 15 QUESTIONS BY MR. JOHNS: 16 Q. Mr. Coleman -- Colvin, thank you for your 17 testimony. A lot of things to sort through, a lot of 18 different testimony has been presented. 19 I just wanted to touch on a comment that you 20 had made about Mr. Contor's testimony. I just wanted to 21 ask: Have you -- were you present during the entire 22 time that Mr. Contor, Bryce, had testified? 23 A. The very last redirect I think I missed. I 24 had to step out for a moment. 25 Q. Okay. Were you present when he testified that</p>

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<p style="text-align: right;">126</p> <p>1 he only looked at the 2022 year, and even if you look at 2 the 2022 year, he testified that the Surface Water 3 Coalition received more accruals to the reach that 4 benefits them just looking only at 2022 and what efforts 5 were done there? 6 A. I was here for that. I'm not exactly sure 7 if -- yes, I believe I was here for that. 8 Q. Okay. So you're not exactly sure what was 9 said, but would you defer -- 10 A. Yeah. 11 Q. -- to any written or recorded statements of 12 this hearing with regard to him only looking at 2022? 13 A. Wait, I'm sorry, can you say that again? 14 Q. So do you -- you don't recall everything Bryce 15 said as far as only looking at the 2022 year and the 16 accruals of the SWC? 17 A. I do remember him saying that, yes. 18 Q. Okay. So is it fair to say he did look at 19 just 2022? 20 A. I think that's fair, yes. 21 Q. Okay. Thank you. And then just one other. 22 Would you please -- I think you've got common 23 exhibits -- 24 A. Yep. 25 Q. -- 500, 501, and 502. And I'm just going to</p>	<p style="text-align: right;">127</p> <p>1 ask you just have those available. 2 A. Okay. 3 Q. Could you please identify the specific 4 provisions in this [unintelligible] documents that 5 constitute the 2016 agreement? 6 A. Yeah. 7 Q. Correct? 8 A. Yeah. 9 Q. Can you please identify the specific 10 provision, stating the section numbers, that you believe 11 conflict with Mr. Contor's analysis and his proposals in 12 his report? 13 A. I think that the long-term practices is 14 Section 3 of Exhibit 500. Those are the actions defined 15 within the 2016 mitigation plan. And that's where I 16 think that his proposal focusing on the reach gain 17 calculations is not within these long-term practices. 18 Q. Okay. Could you please look at subsection 5 19 of section 3(e)? 20 HEARING OFFICER: Of 501? 21 MR. JOHNS: Of Exhibit 500. 22 HEARING OFFICER: 500? 23 MR. JOHNS: Yeah. 24 THE WITNESS: Safe harbor section? 25 MR. JOHNS: No. It will be section 3(e).</p>
<p style="text-align: right;">128</p> <p>1 THE WITNESS: Oh, oh, I see. 2 Q. (BY MR. JOHNS) Okay. And then -- 3 A. Okay. Yes. 4 Q. Yep. In subsection 5, what does subsection 5 5 indicate will occur if there's a breach of any of the 6 provisions in 3(e)? 7 HEARING OFFICER: Excuse me. You've kind 8 of -- I don't understand the question. You referred to 9 3(e), and then you referred to 5. 10 MR. JOHNS: Sorry. Subsection 5 of 3(e). 11 HEARING OFFICER: Oh, 3(e). Okay. 12 MR. JOHNS: Correct. 13 HEARING OFFICER: Thank you, sir. 14 MR. JOHNS: My apologies, Hearing Officer. 15 HEARING OFFICER: I'm sorry. That's my fault. 16 Q. (BY MR. JOHNS) Okay. So subsection 5 of 17 Section 3(e), does it state what actions trigger 18 adaptive measures in there or does it state -- talk 19 about adaptive measures? 20 A. Yes. "If any of the benchmarks or groundwater 21 level goal is not achieved, adaptive measures will be 22 identified and implemented per Section 4 below." 23 Q. Okay. Does it mention anything in that 24 section about what occurs if there's a breach of the 25 annual reduction requirement?</p>	<p style="text-align: right;">129</p> <p>1 A. No. 2 Q. Okay. Do you know where that language is 3 contained in the agreement? 4 A. No, I don't. 5 Q. Okay. Can you look at Exhibit 502. 6 A. Okay. 7 Q. Okay. And this will be Section 2(c)3(m). And 8 that's going to be page -- 9 A. Page 3? 10 Q. Yeah, page 3, correct. And then subsection 11 III there, can you see where I'm looking? 12 And then -- 13 A. Yes. 14 Q. Okay. And then there at the bottom, I believe 15 this is the section, if you want to just take a look 16 there, does it -- do you see anything in subsection III 17 on page 3 that tells you what year you should measure -- 18 or which years you should only look at when determining 19 a breach of the annual reduction requirement? 20 A. No, I don't see anything in there about the 21 timeframe of the breach. Any of my references to that 22 were coming from the Director's order. 23 Q. Okay. Just one last question: Is it fair to 24 say that you and Mr. Contor disagree on your 25 interpretation of what the agreement tells you to do</p>

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<p style="text-align: right;">130</p> <p>1 technically when there's a breach? 2 A. I guess so. 3 Q. Fair enough. 4 MR. JOHNS: Thank you. 5 HEARING OFFICER: Thank you. Anything further 6 in terms of cross? 7 Hearing none, rebuttal? 8 MR. THOMPSON: Just one question on redirect. 9 HEARING OFFICER: Or redirect. I'm sorry. 10 MR. THOMPSON: This is Travis Thompson again 11 for Surface Water Coalition. 12 13 REDIRECT EXAMINATION 14 QUESTIONS BY MR. THOMPSON: 15 Q. Dave, Mr. Budge asked you questions about your 16 rebuttal report, and he took issue with your sentence 17 that talked about multiyear and averaging analysis that 18 were done in the IGWA reports. 19 Do you recall that? 20 A. Yes. 21 Q. And, I guess, would you agree on page 14 of 22 Ms. Sigstedt's original report she did include that 23 conclusion about averaging looking at what IGWA's 24 members had done prior to 2022. 25 A. Let me pull that reference real quick.</p>	<p style="text-align: right;">131</p> <p>1 Q. It should be Exhibit 142, page 14. 2 A. 142, is that what you said? 3 Q. Yes. 4 A. And what page was that? 5 Q. It should be exhibit page 14. It would be 6 part 4, her summary of conclusions? 7 A. And which -- 8 Q. Looking at No. 6. 9 A. No. 6. Yes, so she includes averaging IGWA's 10 conservation over the period of 2016 to 2022 and comes 11 up with the average numbers for conservation there. 12 Q. And is it your understanding the Director has 13 prohibited averaging for purposes of the 240,000 annual 14 obligation? 15 A. That is my understanding, yes. 16 Q. Thank you. 17 HEARING OFFICER: Very well. Thank you, sir. 18 You may be seated. 19 THE WITNESS: Thanks. 20 HEARING OFFICER: I guess it's about noon. 21 Any -- I guess you have another witness, then, sir? 22 MR. BUDGE: Correct. One lay witness. 23 HEARING OFFICER: Do you want to do -- do that 24 now or after lunch? 25 What is -- what do --</p>
<p style="text-align: right;">132</p> <p>1 MR. BUDGE: I think after lunch would be 2 ideal, then we don't have to break in the middle. 3 HEARING OFFICER: Mr. Fletcher, you either 4 have gas or you don't agree with that? 5 MR. FLETCHER: Oh, probably. I was hoping 6 we'd just power through. I don't know how long it's 7 going to take, though, if it's going to take over an 8 hour or whatever. 9 MR. BUDGE: So based on the hearing officer's 10 rulings this morning that limited some of the evidence, 11 I think it would be helpful if I reworked some of 12 Mr. Stoddart's testimony. 13 HEARING OFFICER: We'll go after lunch. 14 Thank you, sir. 15 MR. BUDGE: Yeah. 16 HEARING OFFICER: We'll be -- the court -- the 17 hearing is in recess. Please excuse me. 18 (Lunch break taken.) 19 HEARING OFFICER: Back on the record. 20 And as I remember, Mr. Budge, you had a 21 further witness, sir. 22 MR. BUDGE: IGWA will call Bill Stoddart. 23 HEARING OFFICER: Mr. Stoddart, please come 24 forward. 25</p>	<p style="text-align: right;">133</p> <p>1 WILLIAM STODDART, 2 called by IGWA, having been first duly sworn to tell the 3 truth relating to said cause, testified as follows: 4 5 HEARING OFFICER: Thank you, sir. Please be 6 seated. 7 MR. BUDGE: Good afternoon, Bill. Thanks for 8 being here. 9 THE WITNESS: Thank you. 10 MR. BUDGE: For the record, this is TJ Budge 11 on behalf of IGWA. 12 13 DIRECT EXAMINATION 14 QUESTIONS BY MR. BUDGE: 15 Q. Bill, to begin would you please state your 16 name and address. 17 A. My name is William Edward Stoddart, Stoddart 18 is S-t-o-d-d-a-r-t. And my address is 1849 North 800 19 East, Montevue, Idaho. 20 Q. For those who may not be familiar with 21 Montevue, where is that in Idaho? 22 A. It's east. It's about 45 miles west of 23 Rexburg, Idaho. 24 HEARING OFFICER: Is there anything else out 25 there?</p>

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<p style="text-align: right;">134</p> <p>1 THE WITNESS: No. 2 HEARING OFFICER: Very well. Sorry. 3 Q. (BY MR. BUDGE) Well, there's Mud Lake; right? 4 A. Yes, if you're more familiar with the Mud 5 Lake metropolitan area, that is one of the suburbs. 6 MR. BUDGE: Can we go off the record for a 7 moment, please. 8 (Discussion held off the record.) 9 Q. (BY MR. BUDGE) Okay. Bill I understand 10 you're a farmer? 11 A. I am. 12 Q. Did you grow up on a farm? 13 A. Yes. 14 Q. In that area? 15 A. Yes, the same farm. 16 Q. Been farming your whole life? 17 A. Yes. 18 Q. Are you a member of any groundwater district? 19 A. I'm a member through my canal company where I 20 own ground. They're the member that represents us. 21 Q. Of what -- 22 A. Of the Jefferson Clark Ground Water District. 23 Q. Explain how a canal company is a member of 24 Jefferson Clark Ground Water District? 25 A. So they, like any other members, hold the</p>	<p style="text-align: right;">135</p> <p>1 water rights in their name for many of their members of 2 shares and stuff in a -- for a canal company. So they, 3 like many of our other members, are water right holders 4 in the Jefferson-Clark area. 5 Q. Now, when I think of canal company, I think of 6 surface water right holders. 7 Is your canal company a holder of surface 8 water rights or groundwater rights? 9 A. Strictly groundwater rights. 10 Q. So there's wells that pump water into a canal 11 that takes that water to the shareholder in the company? 12 A. Correct. 13 Q. So your canal company is subject to the 14 mitigation plans of the groundwater district? 15 A. Yes. 16 Q. Has your canal company been a member of 17 Jefferson Clark Ground Water District since its 18 formation? 19 A. Yes, they have. 20 Q. Do you know when the district was formed? 21 A. In 2009, I believe November. 22 Q. Okay. Are you involved with the Jefferson 23 Clark Ground Water District in any other way beside 24 being a member? 25 A. I'm currently the manager of the Jefferson</p>
<p style="text-align: right;">136</p> <p>1 Clark Ground Water District. 2 Q. How long have you had that job? 3 A. A little over six years. 4 Q. And tell me generally what your duties are as 5 manager. 6 A. I do everything from compliance, things like, 7 you know, reporting to the controller's office our audit 8 and everything, Title 74 issues, open meeting laws, 9 public record requests. I compile and send out all 10 assessments, all water usage reports. I compile data 11 from IDWR that records the actual meter readings. I put 12 them in our database and send all of that out. I 13 present the agendas and any information they need at 14 board meetings. 15 I'm the secretary for the board meetings. I 16 record all the minutes. I deal with all compliance 17 issues with the members. They, generally, call me with 18 questions of the district. Any informational stuff, I 19 worked with -- I work with IDWR on, pretty much, any 20 issue that involves our members. You know, flow meter 21 replacements, making sure they are only farming so many 22 acres, any of those things, what measurements were 23 recorded by them and whether they were correct or not. 24 So pretty much the whole host of everything that the 25 district does.</p>	<p style="text-align: right;">137</p> <p>1 Q. Okay. And it sounds like you're involved in 2 implementing the district's conservation program? 3 A. Yes. Yes, I am. 4 Q. Are you also involved with IGWA? 5 A. I am. 6 Q. How long have you been involved with IGWA? 7 A. So the day after I got hired, I started going 8 to IGWA meetings, and that was six years ago. And so 9 I've gone to IGWA meetings ever since. And different 10 entities that IGWA's involved with, other meetings and 11 stuff like that. 12 Q. Do you hold a leadership position within IGWA? 13 A. I'm currently treasurer of IGWA. 14 Q. Okay. And are you familiar with the 15 mitigation plans and activities that IGWA undertakes? 16 A. Generally, we discuss other -- the differences 17 between mitigation plans of other districts. Mine, 18 certainly, is more familiar, even though it's more 19 complex than, I think, some of the others. I'm far more 20 familiar with mine. But, yes, I am generally familiar 21 with some of the aspects of other district's mitigation 22 plans. 23 Q. Okay. And who are the members of IGWA, 24 currently? 25 A. There's ten groundwater districts and one</p>

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<p style="text-align: right;">138</p> <p>1 irrigation district. Magic Valley, North Snake, Carey, 2 Big Lost, Bingham, Aberdeen-American Falls, Jefferson 3 Clark, Bonneville-Jefferson, and Southwest Irrigation 4 District, and then Henry's Fork and Madison Groundwater 5 District. And I think that was all of them. 6 Q. Okay. And are you testifying today on behalf 7 of the IGWA? 8 A. Yes. 9 Q. Are you also testifying on behalf of the 10 Jefferson Clark Ground Water District? 11 A. I am. 12 Q. Bill, we've been discussing a Settlement 13 Agreement between the Surface Water Coalition and the 14 groundwater districts. There's three documents that 15 make up that Settlement Agreement. One of them is what 16 we sometimes refer to as the 2015 Agreement. That's 17 Exhibit 500 in this case. And then there was a first 18 addendum, which is Exhibit 501. And a second addendum, 19 which is Exhibit 502. 20 Are you familiar with those documents? 21 A. I am. 22 Q. I'll refer to those documents collectively as 23 the "Settlement Agreement" or the "Agreement" during our 24 discussion, and you may do the same. 25 A. Okay.</p>	<p style="text-align: right;">139</p> <p>1 Q. Were you involved in negotiating a Settlement 2 Agreement? 3 A. I was not. 4 Q. Were you involved with Jefferson Clark Ground 5 Water District at the time the agreement was negotiated? 6 A. I was not. 7 Q. Were involved in developing Jefferson Clark's 8 program to comply with the Settlement Agreement? 9 A. Not the original plan. 10 Q. Okay. And so your involvement is in 11 implementing Jefferson Clark's program since you became 12 the manager? 13 A. Correct. 14 Q. Okay. Bill, as you're aware, Section 3(a) of 15 the Settlement Agreement provides for a total 16 groundwater diversion reduction of 240,000 acre-feet 17 annually. And it states that, "Each district with 18 members pumping from the ESPA shall be responsible for 19 reducing their proportionate share of the total." 20 Are you familiar with that term of the 21 agreement? 22 A. Yes, I am. 23 Q. Does the Settlement Agreement specify each 24 district's proportionate share of the 240,000 acre-feet? 25 A. It does not.</p>
<p style="text-align: right;">140</p> <p>1 Q. If you'll turn in your book labeled "Common 2 Exhibits" to Exhibit 518. 3 Do you recognize that? 4 A. I do. 5 Q. Please describe it. 6 A. That's the -- IGWA's reported 2016 performance 7 summary table. 8 Q. Okay. And you're familiar with that report 9 that IGWA submits annually? 10 A. I am. 11 Q. On that spreadsheet, on the -- towards the 12 left, there's a column labeled "Target Conservation." 13 Do you see that? 14 A. I do. 15 Q. And do you understand that to be each 16 district's proportionate share of the 240,000 acre-feet, 17 at least as it was calculated at that time? 18 A. I do. That was the target conservation we'd 19 agreed to amongst the districts. 20 Q. Okay. And for Jefferson Clark, it shows 21 54,178 acre-feet? 22 A. Correct. 23 Q. And you understand that's the annual 24 conservation obligation that pertained to Jefferson 25 Clark, at least at that time?</p>	<p style="text-align: right;">141</p> <p>1 A. Correct. 2 Q. Do you know how that number was determined? 3 A. I do. 4 Q. And please explain. 5 A. So we took a percent based on the 2010 to 2014 6 baseline of those entities, and we divided up the 7 240,000 amongst them. So it, approximately, ended up to 8 around 12.35 percent to each district listed there. 9 Q. Okay. So that allocation was an agreement 10 among the groundwater districts? 11 A. Correct. 12 Q. If you'll turn to Exhibit 521, that's the 2017 13 performance spreadsheet. 14 Do you see that? 15 A. I do. 16 Q. I noticed when I was going through these that 17 the target conservation obligation for Jefferson Clark 18 had gone up a little bit. It was -- it's 19 54,373 acre-feet. 20 Do you know why it changed from 2016 to 2017? 21 A. From the time I began, there was always slight 22 adjustments to the measurements made during 2010 to 2014 23 due to corrections just in the fact that the numbers 24 reported to IDWR during that time were not as accurate 25 as everybody believes it to be. So if any better</p>

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<p style="text-align: right;">142</p> <p>1 information the district had, they would slightly change 2 some of the diversions during those times. 3 Q. Thank you for that. Has Jefferson Clark's 4 obligation remained at that 54,373 acre-foot figure 5 since 2017? 6 A. It has. 7 Q. You testified that you're involved in 8 implementing the program that Jefferson Clark developed 9 to conserve 54,373 acre-feet annually. 10 Would you please describe the program that was 11 developed? 12 A. So in our district we do it a little different 13 than others. We take what is the 2010 to 2014 diversion 14 or average -- average of those diversion numbers across 15 all our wells for every individual, and we use that as a 16 starting point. 17 And from that we reduce based on the weighted 18 average priority dates of their water rights for those 19 individuals or combined individuals. Those reductions 20 range from 3 percent to 17 percent, based on the 21 weighted priority date. And so that's how we 22 determine -- 23 HEARING OFFICER: The net percentage is the 24 percentage of 100 percent within the district; is that 25 correct.</p>	<p style="text-align: right;">143</p> <p>1 THE WITNESS: No. So we take -- so your 2 diversion baseline -- we take a baseline number, which 3 is the average of your points of diversion, what they 4 pump during those years, and then we reduce that by 5 anywhere from 3 to 17 percent based on the priority 6 dates, the weighted priority dates of those water rights 7 that are made up in those diversions. 8 HEARING OFFICER: Thank you. 9 THE WITNESS: Yes. 10 Q. (BY MR. BUDGE) So maybe just to give an 11 example: Hypothetically, if you had a patron whose 12 average diversions from 2010 to 2014 were 13 1,000 acre-feet, then Jefferson Clark would require them 14 to reduce by somewhere between 3 percent and 17 percent 15 based on the priority date of that patron's water 16 rights? 17 A. Correct. And that 3 percent goes from 1913, 18 our very earliest right, up to 2001 is the distribution 19 of that -- those percentages. 20 Q. Okay. So more junior rights have to conserve 21 more than more senior rights? 22 A. Correct. 23 Q. Does Jefferson Clark then give each patron an 24 annual pumping limit? 25 A. We do.</p>
<p style="text-align: right;">144</p> <p>1 Q. And Jefferson Clark keeps track of the amount 2 of groundwater diverted by each patron? 3 A. Correct. 4 Q. What if a patron pumps less than their annual 5 limit? 6 A. Then before we used to give them credit for 7 that. We would mark it on their things, and I would, 8 every year, post it on their new water usage report as a 9 carry-forward credit. 10 Q. Okay. So you sent an annual report out to the 11 patrons that shows where they stand in water usage? 12 A. Correct. 13 Q. What if a patron pumps more than their annual 14 limit? 15 A. If they pump more than their annual limit in a 16 year, they're required to make that up. And they can do 17 that in several ways. They can -- the district would 18 buy recharge in many of those years, and they could buy 19 -- whatever our cost was, was we would sell them some of 20 those recharge credits to offset theirs, or they can buy 21 them from other individuals that have credits. 22 Q. If they had surplus in a prior year, were they 23 able to use that towards their deficit? 24 A. They were. 25 Q. Okay. You mentioned that patrons can acquire</p>	<p style="text-align: right;">145</p> <p>1 recharge from the district to help them meet their 2 individual conservation obligations. 3 Can you explain Jefferson Clark's recharge 4 program? 5 A. So our main goal of our recharge problem -- 6 program was to make sure we did plenty of recharge in 7 the very wet years when it was available and it was 8 beneficial, and that we would use it in the years that 9 were hot and dry where it was harder to meet the 10 obligation. We could use some of that in those years to 11 offset our pumping diversions. 12 Q. Okay. We discussed earlier the performance 13 report that IGWA submits annually to the Surface Water 14 Coalition and to the Department. 15 You're familiar with those; correct? 16 A. I am. 17 Q. And I think it's been mentioned earlier that 18 these reports are prepared during the winter following 19 the irrigation season; is that right? 20 A. Correct. 21 Q. Do you know why the reports aren't prepared 22 until the winter following the irrigation season? 23 A. Most of the time they're just waiting for the 24 sheer amount of data to come in. And our district, they 25 read flow meters at the end of the year as late as they</p>

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<p style="text-align: right;">146</p> <p>1 can to make sure they get read before the snow falls. 2 So it can be October even November, at the latest. 3 But then we have a fair amount of 4 self-reporting and PCC numbers that they, a lot of 5 times, don't get the information from the power company 6 until December, late December to January. And so by the 7 time I compile all that information and make sure it's 8 correct with the members, it's February, March. 9 Q. You mentioned "PCC." What is that? 10 A. A power of coefficient. It compares when 11 IDWR, at least for our district, goes out and measures 12 nonflow meter diversions, they measure the power usage 13 to a volume over a set period of time creating a ratio. 14 That way at the end of the year they can get a power 15 reading, and that will be used to know how much volume 16 they pumped during the year. 17 Q. So some of the wells in your district have 18 meters on them that you're reading after the irrigation 19 season to see how much was pumped that year? 20 A. Yes. 21 Q. And other wells the measurement is done 22 through the power consumption coefficient? 23 A. Correct. 24 Q. And just to summarize, it takes the district 25 several months to collect all of that data so that you</p>	<p style="text-align: right;">147</p> <p>1 have the diversion volumes for the prior irrigation 2 season? 3 A. Yes. And we have, technically, IDWR compile 4 and collect all of our measurements. And it takes them 5 that long to get the power readings from Rocky Mountain 6 Power. 7 Q. Okay. Very good. 8 Do you still have in front of you the 9 performance report? And I don't remember what year we 10 were looking at. 11 A. This was 2017. 12 Q. 2017, okay. There's a column there labeled 13 "Diversion Reduction." 14 What does that represent? 15 A. It's the difference between the diversion 16 baseline and the target conservation. 17 Q. Okay. And you understand the baseline is the 18 average diversions from 2010 to 2014, which you 19 described previously? 20 A. Correct. 21 Q. So if the diversion reduction shows a positive 22 number, that means district patrons collectively 23 diverted less water that year than they diverted from 24 2010 to 2014; is that right? 25 A. Yes.</p>
<p style="text-align: right;">148</p> <p>1 Q. And if the diversion reduction column shows a 2 negative number, that would mean district patrons 3 diverted more water that year than they did on average 4 from 2010 to 2014? 5 A. Correct. 6 Q. Okay. So, Bill, I've gone through each of the 7 performance reports from 2016 to 2021 and tabulated the 8 diversion reduction volumes for each of those years. 9 I'm not going to require you to go look at them, because 10 I know you're familiar with these. I'm just going to 11 read them for the record and you can confirm they're 12 accurate. 13 So for Jefferson Clark Ground Water District, 14 there was a diversion reduction of 22,574 acre-feet. 15 That's Exhibit 518. In 2017 they reduced by 16 67,878 acre-feet. That's Exhibit 521. In 2018 they 17 reduced by 69,555 acre-feet. That's Exhibit 524. In 18 2019 your patrons reduced by 52,922 acre-feet. That's 19 shown in Exhibit 527. In 2020 your patrons reduced by 20 41,244 acre-feet. That's shown in Exhibit 530. And in 21 2021 your patrons reduced by 36,838 acre-feet, as shown 22 in Exhibit 533; is that correct? 23 A. The last one is 36,856. 24 Q. 36,856 acre-feet. Thank you for the 25 correction.</p>	<p style="text-align: right;">149</p> <p>1 Those numbers are accurate? 2 A. Yes, I believe so. 3 Q. And so every year since 2015, Jefferson 4 Clark's patrons have diverted tens of thousands of acre 5 feet less than they did on average from 2010 to 2014; ; 6 is that right? 7 A. Yes. 8 Q. Even during the very dry years like 2021? 9 A. Yes. 10 Q. Okay. What had Jefferson Clark's patrons done 11 to be able to conserve groundwater or pump less 12 groundwater every year? 13 A. So different patrons, we -- we're a little 14 different than some of the other groundwater districts. 15 We're not next to the river, so conversions are kind of 16 out. Mostly end gun removals, corner dry-ups. There's 17 been changes to cropping patterns and different crops 18 and the number of cuttings that -- we mostly hay, grain, 19 and potato area. So some of them have reduced from 20 three cuttings of hay to two. 21 We've implemented some ground dry-ups as part 22 of the district. And some of that and other -- they've 23 done, you know, things like pipelines and stuff for some 24 of those people that aren't directly hooked to wells to 25 try to increase their efficiencies.</p>

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<p style="text-align: right;">150</p> <p>1 Q. Okay. So you were here yesterday when 2 Mr. Fletcher made a statement to the hearing officer, 3 "The groundwater users just ignore the rulings of the 4 Department and the courts and do whatever they want." 5 Is this consistent with your experience? 6 A. It isn't. For the most part, the patrons have 7 complied with what we've asked of them. And they -- you 8 know, most of it took a little while. When we first 9 started to -- both as the board to get understanding how 10 to apply a mitigation plan, in general -- you know, a 11 groundwater district's a unique entity with the rules 12 that aren't very specific on how they're supposed to 13 implement something. 14 So from the start, there was, you know, a 15 little trouble, but, you know, they got through that and 16 implemented a plan that, for the most part, is complied 17 with by the patrons. 18 Q. Let me ask you a little more about the 19 recharge that your district does. 20 Those performance reports often show recharge 21 values, and those are in addition to the diversion 22 reductions; correct? 23 A. Yes. 24 Q. So as I look through those reports, in 2016 25 Jefferson Clark did 32,193 acre-feet of recharge, as set</p>	<p style="text-align: right;">151</p> <p>1 forth in Exhibit 518. In 2017 your district had 2 58,878 acre-feet of recharge, as set forth in 3 Exhibit 521. In 2018 your district had 17,101 acre-feet 4 of recharge, as set forth in Exhibit 524. In 2019 your 5 district had 6,833 acre-feet of recharge, as set forth 6 in Exhibit 527. In 2020 your district had 7 26,213 acre-feet of recharge, as set forth in 8 Exhibit 530. In 2021 your district had 5,881 acre-feet 9 of recharge, as set forth in Exhibit 533. And in 2022 10 your district had 7,647 acre-feet of recharge, as set 11 forth in Exhibit 536. 12 Are those numbers accurate? 13 A. Yes, I believe so. 14 Q. So if I did the math right, Jefferson Clark 15 district has done over 154,000 acre-feet of recharge 16 since beginning this agreement in 2016; is that right? 17 A. Correct. 18 Q. How much money has your district spent on 19 recharge? 20 A. Over 2.5 million. 21 Q. And how has the district paid for this? 22 A. Through assessments to all the district 23 members. 24 Q. So the district patrons have paid for all this 25 recharge?</p>
<p style="text-align: right;">152</p> <p>1 A. Correct. 2 Q. Is this consistent with Mr. Fletcher's 3 statement that the districts ignore the rulings of the 4 Department and the courts and do whatever they want? 5 A. No. 6 Q. How much effort has it been for the district 7 to develop and implement the recharge program and 8 conservation program? 9 A. I know it's been a considerable effort on the 10 board to devise a plan that, you know, tries to deal 11 with the equities and inequities present in water rights 12 and our huge distribution of, you know, priority years. 13 When I first -- before I first began as a 14 manager, I was on a subcommittee devised by the board 15 after their first implementation of the plan to look at 16 their implementation of the plan and address some of its 17 shortcomings and, you know, that through direct 18 implementation of a single plan there's bound to be 19 variances and needs for that. 20 And so through that subcommittee, they adopted 21 what we call the 1.85 plan, which was to bring up some 22 of the very lowest users, you know, through 23 circumstances to a minimum kind of level of water usage. 24 You know, so that's -- it's taken a lot of time, and we 25 have a lot of meetings. And we still discuss it to this</p>	<p style="text-align: right;">153</p> <p>1 very day, you know, how is this plan working, what do we 2 need to do to adapt to it and try to address some of the 3 shortcomings of the plan. 4 Q. Thank you. Do you know how many water rights 5 are in your district? 6 A. I think there's a little under 1,800. 7 Q. I can appreciate the complexity. 8 In 2017 Jefferson Clark did 58,878 acre-feet 9 in recharge, and as we discussed earlier, Jefferson 10 Clark's total conservation obligation is 11 54,373 acre-feet. 12 Why did Jefferson Clark do more recharge than 13 its total conservation obligation that year? 14 A. The board believed that doing that would 15 provide them some buffer, you know, in those dry years 16 to work against their required reduction in those years. 17 So the board thought, you know, there's plentiful water, 18 we need to make sure that goes in the ground, and this 19 will provide, like I said, a buffer against those dry 20 years that are inevitable. And in order to provide some 21 stability to the farmers that make up the groundwater 22 district, this is one of their ways to try to manage 23 risk. 24 Q. So if I look at the mitigation balance column 25 for 2017, that's Exhibit 521, it shows that Jefferson</p>

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<p style="text-align: right;">154</p> <p>1 Clark had a balance of 72,383 acre-feet; right? 2 A. Yes. Correct. 3 Q. So the district did, basically, 4 72,000 acre-feet more than was required of them that 5 year? 6 A. Yes. 7 Q. And that was reported to the Surface Water 8 Coalition and the Department? 9 A. Correct. 10 Q. Did the Coalition or the Department ever tell 11 Jefferson Clark that its wasting its money and effort by 12 doing excess conservation? 13 A. No. 14 Q. If I look through the -- through the 15 mitigation balance figures in those performance 16 reports -- and I'll just read these to you -- in 2016 17 Jefferson Clark had a positive balance at 589 acre-feet, 18 as set forth in Exhibit 518. In 2017 Jefferson Clark 19 had a positive balance of 72,383 acre-feet, as set forth 20 in Exhibit 521. In 2018 Jefferson Clark had a positive 21 balance of 32,283 acre-feet, as set forth in 22 Exhibit 526. In 2019 Jefferson Clark had a positive 23 balance of 5,382 acre-feet, as set forth in Exhibit 527. 24 In 2020 Jefferson Clark had a positive balance of 25 13,084 acre-feet, as set forth in Exhibit 530. And in</p>	<p style="text-align: right;">155</p> <p>1 2021 Jefferson Clark had a negative balance of 2 11,636 acre-feet, as set forth in Exhibit 533. 3 Do those numbers look correct? 4 A. Yes. 5 Q. So if I did the math right, Bill, during that 6 period from 2016 to 2021, Jefferson Clark had 7 cumulatively about 112,000 acre-feet more conservation 8 than is required by the agreement; is that right? 9 A. That is correct. 10 Q. And is that consistent with Mr. Fletcher's 11 statement that the districts ignore the rulings of the 12 Department and the courts and do whatever they want? 13 A. No. 14 Q. Why did Jefferson Clark do so much more? 15 A. It was, you know, to try to help provide 16 actual -- you know, administrating a plan is different 17 than, you know, drawing up a plan. This is -- we have 18 to deal with actual compliance with that and helping our 19 members comply with the plan. 20 And so we believed this was a way we could 21 build into it the compliance aspect of it by providing 22 extra recharge water in the years, when available, and 23 using that as a credit against our diversions. If it 24 was hot and dry, it provided us a buffer to those hot 25 and dry years.</p>
<p style="text-align: right;">156</p> <p>1 Q. And that incentive has been effective, it 2 looks like, for your district? 3 A. Yes. 4 Q. Let me have you turn to Exhibit 510. It's in 5 the common exhibits folder. 6 That document is titled "Final Order Regarding 7 Compliance With Approved Mitigation Plan." 8 Do you see that? 9 A. I do. 10 Q. And do you see the date on that? 11 Probably at the back. 12 A. September 8th, 2022. 13 Q. Are you familiar with that order? 14 A. I am. 15 Q. Just describe, briefly, what that order means 16 to you? 17 A. This was an order by the Director that, in 18 application of the 2016 -- the Settlement Agreement, 19 that 240 was to be allocated amongst the districts, the 20 signees of the agreement, and that no averaging would be 21 allowed in that agreement. 22 Q. So that decision was made on September 8th of 23 2022; is that right? 24 A. Correct. 25 Q. So prior to that date, your district was using</p>	<p style="text-align: right;">157</p> <p>1 the same target conservation figures that you had been 2 from 2016 or '17? 3 A. That is correct. 4 Q. And you had been operating under the 5 assumption that you could use averaging of some sort 6 between the years to carry forward surplus conservation? 7 A. That is -- was our belief, yes. 8 Q. About what time of year does your district 9 send out the usage report or allocation reports to the 10 patrons? 11 A. So the water usage -- so along with the water 12 usage reports I send out reporting last year's, unless 13 there's been a change in the allocation, those are the 14 basis for the next year's water usage. So, generally, 15 as soon as I can do them. The first year, due to just 16 our previous manager passing away, it was clear into 17 March when I did that. But most years I try to do it in 18 January -- 19 Q. Okay. 20 A. -- of the following year. 21 Q. So in January your patrons get a report that 22 tells them how much water they have to use, basically, 23 in the upcoming irrigation season? 24 A. Correct. 25 Q. And did they adjust their planting decisions</p>

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<p style="text-align: right;">158</p> <p>1 based on that? 2 A. I would hope so and everything. 3 Q. And so for 2022 -- for the 2022 irrigation 4 season, Jefferson Clark or you would have sent out these 5 usage reports and allocation reports in, you said, 6 February or something like that? 7 A. Correct. 8 Q. January or February. 9 After the Director issued his decision in 10 September near the end of the irrigation season, was it 11 realistic for you to go back and change the conservation 12 allocation -- or the diversion reduction numbers for 13 your patrons? 14 A. It wouldn't have been. The bulk of the -- the 15 irrigation season in our area is done by then. 16 Q. Okay. Let me have you turn to Exhibit 536. 17 Bill, do you recognize that as IGWA's 2022 18 performance spreadsheet? 19 A. I do. 20 Q. And, obviously, the first page of that looks 21 significantly different than those from 2016 to 2021; is 22 that right? 23 A. It does. 24 Q. And can you explain why IGWA made a different 25 report in 2022?</p>	<p style="text-align: right;">159</p> <p>1 A. At the time, we were required to provide some 2 sort of summary report. The status of everything was 3 influx, and how we were going to apply the Director's 4 new ruling in September. 5 Q. You were here for the testimony of Mr. Higgs 6 earlier today? 7 A. I was. 8 Q. I think there was some review of the timeline, 9 but just to confirm, so the Director's initial decision 10 that you referenced a moment ago was issued 11 September 8th, 2022; correct? 12 A. Correct. 13 Q. And that was issued without a hearing? 14 A. Yes. 15 Q. And there was an after-the-fact hearing held 16 in February of '23? 17 A. Yes. 18 Q. And a decision had not been made on that 19 after-the-fact hearing by the time this report was due 20 on April 1st? 21 A. No. 22 Q. Okay. And so at that time, as you mentioned, 23 what was, you know, required under [unintelligible] 24 agreement was up in the air? 25 A. It was.</p>
<p style="text-align: right;">160</p> <p>1 Q. If you'll turn to Exhibit 535. 2 Do you recognize that document, Bill? 3 A. I do. 4 Q. Explain what that is. 5 A. So this was a report, a settlement report, 6 reporting the '22 -- along with the '22 performance 7 report addressing things like -- since they were influx, 8 that's knowing how we're going to measure the 9 proportional share distributed to the districts was now 10 unknown and waiting on a final ruling from the Director 11 and stuff. 12 Q. So we've been talking a lot about the 13 spreadsheets that IGWA -- in this proceeding, the 14 spreadsheets that IGWA submits every year to the 15 Coalition and the Department. 16 Those spreadsheets are accompanied every year 17 by a narrative report; is that right? 18 A. Correct. 19 Q. So every year when IGWA submits its annual 20 performance report, it submits the spreadsheet, which is 21 the data, and then it supports a narrative report to 22 accompany that? 23 A. Correct. 24 Q. And you're reviewing the narrative report that 25 was submitted in 2022?</p>	<p style="text-align: right;">161</p> <p>1 A. Yes. 2 Q. I'm going to have you read just two small -- 3 HEARING OFFICER: Under IGWA? 4 MR. BUDGE: Yes. Yes, thank you. 5 Q. (BY MR. BUDGE) I'm going to have you read 6 just two short paragraphs from that report. The first 7 one is on page 1. It's under the heading, "2022 8 Performance." And I want to have you read the second 9 paragraph beginning with the word "Unlike." 10 A. "Unlike IGWA's performance reports in the 11 years past, the summary tab shows only groundwater 12 diversion and recharge data. It does not contain a 13 table showing a baseline, target conservation, or 14 mitigation balance. Because the final order regarding 15 compliance with approved mitigation plan, the compliance 16 order, is issued on September 8th, 2022, necessitates 17 that IGWA and the Surface Water Coalition revisit how 18 compliance will be measured under the agreement for 2022 19 and future years, as explained below." 20 Q. Okay. And then the second one is on page 2. 21 It's the fourth paragraph down, beginning with the word 22 "Since." 23 A. Since the method of measuring compliance will 24 change depending on the outcome of the Director's 25 reconsideration of the compliance order, the enclosed</p>

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<p style="text-align: right;">162</p> <p>1 spreadsheet does not purport to demonstrate compliance 2 with the agreement in 2022. However, the usage analysis 3 tab of the spreadsheet does contain the same table 4 provided in prior years that show baseline, target 5 conservation, and mitigation balance. This table is 6 provided for informational purposes and is not 7 conclusive of each district's compliance with the 8 agreement because it compares single year's diversions 9 against a five-year average baseline. IGWA will 10 determine a more appropriate method of measuring 11 compliance method once the Director's decision becomes 12 final." 13 Q. So in the spring of '22 when that report was 14 submitted, the groundwater users, as you mentioned the 15 requirements under the Settlement Agreement were up in 16 the air -- 17 A. The spring of '23? 18 Q. The spring of '23, thank you. 19 And then that report states that if the 20 Director's decision, which [unintelligible] on averaging 21 and reallocated the 240, if that doesn't change, that 22 the districts would adopt a new method for measuring 23 compliance. 24 A. Correct. 25 Q. Can you explain why?</p>	<p style="text-align: right;">163</p> <p>1 A. Well, the way we viewed it before is if, you 2 know, the average of the years were dictating of the 3 baseline, we should use that as our -- part of our 4 compliance. And we had always done, you know, a credit 5 system before of when we reported every year, that this 6 is how we believed it was to be done, and told our 7 members that was how they had access to carryover 8 credits to be used on the next year and everything else 9 in order to meet our compliance. 10 Q. Okay. And have the groundwater districts, in 11 fact, adopted an alternative compliance method, as 12 they've said they would in that report? 13 A. They have. 14 Q. When was that done? 15 A. That was -- 16 MR. FLETCHER: Objection. Mr. Hearing 17 Officer, he's trying to get right into the same issue 18 you've already excluded, the updated report that he now 19 is talking about. 20 HEARING OFFICER: I agree. Sustained. 21 MR. FLETCHER: Thank you. 22 HEARING OFFICER: I previously indicated this 23 is irrelevant. [Unintelligible]. 24 MR. BUDGE: I have. Thank you, Hearing 25 Officer. The exhibit that Mr. Fletcher's referring to</p>
<p style="text-align: right;">164</p> <p>1 is Exhibit 131. It's the addendum to the 2022 2 performance report, and as Mr. Fletcher pointed out, 3 that has been accepted under an offer of proof but has 4 not been admitted into evidence at this time. 5 In further support of the prior offer of 6 proof, I would like to offer some testimony from 7 Mr. Stoddart in support of that offer of proof. 8 HEARING OFFICER: And what would that say? 9 MR. BUDGE: That testimony will explain -- 10 HEARING OFFICER: I think the rule indicates 11 that offers of proof in these hearings are verbal. 12 MR. BUDGE: Okay. I'd be happy to do that as 13 well. 14 HEARING OFFICER: Please. 15 MR. BUDGE: Yeah. So Mr. Stoddart's testimony 16 will explain that the groundwater districts waited until 17 a decision had been entered by Judge Wildman before 18 deciding to change the methodology. That decision came 19 out in November of 2023. 20 After that, the districts undertook a process 21 of evaluating different alternative methods of measuring 22 compliance, and they selected a three-year average 23 baseline, the years 2012 to 2014. They selected that, 24 in part, because in a -- one of the pleadings that the 25 Coalition and IGWA had filed with the Director in 2017</p>	<p style="text-align: right;">165</p> <p>1 authorized the use of a three-year average baseline so 2 that there was precedent for it. 3 And they felt if averaging was no longer 4 allowed, that that was a more fair and equitable way to 5 achieve the objectives of the Settlement Agreement. 6 That Exhibit 131 then includes a table that shows the 7 mitigation balance for each of the districts using that 8 new method. And in that table Jefferson Clark has a 9 positive mitigation balance instead of a negative 10 mitigation balance. 11 HEARING OFFICER: Thank you. 12 MR. BUDGE: You bet. 13 HEARING OFFICER: You may proceed. 14 Q. (BY MR. BUDGE) Mr. Stoddart, this proceeding 15 is about ferreting out what a proper remedy is for the 16 alleged noncompliance of the Settlement Agreement in 17 2022. And I want to ask your perspective as a manager 18 of a groundwater district who's intimately familiar with 19 how the various remedies that are considered may work. 20 One of the proposals made by the Coalition is 21 that the Department just curtail every water right 22 within the district that has a negative mitigation 23 balance. 24 Did the districts have the ability to curtail 25 their patrons water rights?</p>

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<p style="text-align: right;">166</p> <p>1 A. We do not. 2 Q. Did the districts own the water rights in 3 their district? 4 A. No, they do not. 5 Q. The patrons own those? 6 A. Yes. 7 Q. The district's job is not to curtail or 8 enforce diversion reductions by their patrons? 9 A. No. 10 Q. The district's job is to develop a mitigation 11 plan that the patrons can utilize to protect themselves 12 from curtailment; correct? 13 A. That is correct. 14 Q. And if patrons don't comply, then it's up to 15 the Department if they want to curtail people? 16 A. That is correct. 17 Q. If the Department attempted to curtail all the 18 members of your district for noncompliance in 2022, do 19 you think this would be an effective remedy? 20 A. I don't believe so. I think it would, 21 effectively, end the groundwater districts. It's -- we 22 did provide -- we provided the obligation and told them 23 that if they performed these duties and functions, they 24 would be protected under their mitigation call. 25 And they did that, they performed. And due to</p>	<p style="text-align: right;">167</p> <p>1 that, they're going to have further obligations. So the 2 effectiveness of a groundwater district will cease to 3 exist. And as such, I assume most of the district 4 members will sue the groundwater district and that will 5 be the end of the Jefferson Clark. 6 Q. Let's say the Department took the 2022 7 performance report and looked strictly at the -- you 8 know, well by well which wells had a deficit that year 9 and proceeded to curtail those patrons only. 10 Do you think that would be an effective 11 remedy? 12 A. No. Because that has really no relation to 13 how well someone performed according to our distribution 14 of those mitigation obligations. 15 Q. So if the Department looked at those 16 individual wells in the 2018 performance report, that 17 would not reflect whether a patron had a surplus from a 18 prior year that they could draw on in 2022? 19 A. No. 20 Q. So if the Department did that, they would be 21 out curtailing patrons who were in compliance with the 22 district's conservation program? 23 A. Absolutely. 24 Q. As an alternative, the Coalition has proposed 25 that the Department add conservation deficits from 2022</p>
<p style="text-align: right;">168</p> <p>1 to the district's conservation obligation in 2024. And 2 I think you were here for some earlier discussion of 3 that. 4 Do you think this would be an effective remedy 5 in your district? 6 A. I don't think so. I mean, you're massively 7 increasing our obligation for 2024. And after what 8 they've done in the past to try to buffer themselves 9 against these sort of obligations, these continuous 10 obligations, they'll have no, you know, appetite for 11 continuing to do that. 12 Q. So what would happen is patrons who had 13 conserved water in reliance on the district's program 14 that said, yes, you can conserve surplus and carry it 15 forward, if you take that away and say that was all for 16 not, you see that being problematic? 17 A. Absolutely. You know, it's one of the methods 18 to ensure compliance with a -- you know, this type of 19 program is to allow carryovers, to do more in wet years 20 when it's available and, you know -- and -- but it also 21 encourages, even in the wettest of years, for those 22 people to be as conservative as they can be in hopes 23 that that will buffer them against the next year. 24 Farming is all about managing risks, and this 25 is one of many risks that farmers manage. And if you</p>	<p style="text-align: right;">169</p> <p>1 have no ability to do that, you don't leave them a whole 2 lot of options. 3 Q. What do you think would be an effective remedy 4 for mitigating the over pumping in 2022 or the 5 conservation deficit in 2022? 6 A. You know, my opinion is that it has been 7 remedied, but, you know, I -- that is kind of how I view 8 it is doing in the past is more effective than doing it 9 after the fact. You know, I guess that's where I am and 10 the view of the board of the Jefferson. 11 MR. BUDGE: Okay. Thank you, Bill. I have no 12 further questions. 13 HEARING OFFICER: Cross-Exam? 14 15 CROSS-EXAMINATION 16 QUESTIONS BY MR. THOMPSON: 17 Q. Good afternoon, Mr. Stoddart. I'm Travis 18 Thompson for A&B Irrigation District, et al. 19 You went through a number of those performance 20 reports that the groundwater district submitted to the 21 Coalition and to the Department from, I think, 2016 22 through 2022; is that correct? 23 A. Yes. 24 Q. And were you aware of the Coalition's dispute 25 that IGWA was including A&B and Southwest Irrigation</p>

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44 (Pages 170 to 173)

<p style="text-align: right;">170</p> <p>1 District in those annual performance reports? 2 A. Was I aware? 3 Q. Yes. 4 A. Yes. 5 Q. So did counsel bring that to your attention in 6 the spring of 2017 when that dispute was raised? 7 A. I don't believe so. 8 Q. If you'd turn to Exhibit 512. That's the 9 Director's order from last summer, the August 2nd, 2003 10 [sic], order. 11 Can you turn to page 8. And do you see the 12 column in Table 2 identified as "IDWR Target 13 Conservation"? 14 A. I do. 15 Q. And do you recognize that the Director has 16 found that the annual conservation number for Jefferson 17 Clark is [unintelligible] acre feet? 18 A. Yes, then he changed it to 60 -- what did you 19 say? Could you repeat that? 20 Q. 63,530 -- 21 HEARING OFFICER: Wait a second. 22 THE WITNESS: I just needed him to repeat the 23 number he said. 24 HEARING OFFICER: Oh, okay. Sorry. My fault. 25 Continue.</p>	<p style="text-align: right;">171</p> <p>1 Q. (BY MR. THOMPSON) Do you recognize that 2 that's the number the Director has found? 3 A. What was the number you said? 4 Q. You can go ahead and read it? 5 A. Okay. 63,533. 6 Q. And does the district now recognize that 7 number as their annual conservation obligation? 8 A. The district recognizes that that was what was 9 ordered by the Director. 10 Q. Do you recognize that today? 11 A. As what was ordered by the Director? 12 Q. Yes. 13 A. Yes. 14 Q. And did the district meet that number in 2023? 15 A. Yes. 16 UNIDENTIFIED SPEAKER: Objection. You asked 17 if he met that in '23? 18 HEARING OFFICER: I didn't hear you, sir. 19 UNIDENTIFIED SPEAKER: I'm sorry, Mr. Thompson 20 asked about meeting that in 2023, which is outside the 21 scope of this hearing. We're talking about 2022 22 compliance. 23 MR. THOMPSON: Well, Mr. Stoddart's familiar 24 with the district's reduction obligations. You were 25 asking questions about Mr. Fletcher saying that the</p>
<p style="text-align: right;">172</p> <p>1 districts don't follow what [unintelligible] said. He 2 testified that they do. So that's -- I'm just 3 confirming. 4 HEARING OFFICER: [Unintelligible] on that 5 very limited area. 6 Q. (BY MR. THOMPSON) So you have the numbers 7 from 2023, and the district did comply with that number? 8 A. Yes. 9 Q. Thank you. But they did not meet this number 10 in 2021 or 2022; is that correct? 11 A. This target conservation number? 12 Q. Yes. 13 A. In what years? 14 Q. 2021 and 2022? 15 A. Correct. 16 Q. And the district settled the noncompliance 17 from 2021; is that correct? 18 A. We did, yes. 19 Q. But you have not settled for the district's 20 noncompliance in 2022? 21 A. No. 22 Q. So you provided testimony about the early 23 efforts in good water years to do the surplus 24 conservation and the additional reductions, the 25 additional recharge in those early years.</p>	<p style="text-align: right;">173</p> <p>1 Would you agree that that surplus conservation 2 would help the district in meeting the sentinel well 3 benchmark and goal? 4 A. As well, yes. 5 Q. And so it wouldn't be a waste of money to 6 perform that action beyond 240 in those years, would it? 7 A. It wouldn't, no. 8 Q. Mr. Budge asked you some questions about 9 compliance with your individual patrons. 10 Does the district enforce the reduction that 11 it sets for its patrons? 12 A. We do. 13 Q. And how do you do that? 14 A. As far as the process we do to enforce it. 15 Q. Correct. 16 A. Okay. First, we allow the district -- the 17 district member to offset -- you know, they have one 18 entity, but they may run several entities. And their 19 first deal is to offset that [unintelligible] reduction 20 of other entities, as well as, then they can proceed to 21 purchase water from other entities that were under their 22 allocated amount. 23 Thirdly, the district often buys additional 24 recharge that we sell according to the statute to offset 25 any of that. If they refuse to do any of that, the</p>

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45 (Pages 174 to 177)

<p style="text-align: right;">174</p> <p>1 district would turn them over for curtailment by IDWR. 2 Q. Has the district [unintelligible]? 3 A. Has the district done what? 4 Q. Turned any noncompliant patrons over to the 5 Department? 6 A. We have. 7 Q. In what years? 8 A. We have turned noncompliant in in several 9 years. I know '20 I did one here a couple weeks ago due 10 to assessments. 11 Q. So if a user is noncompliant with the 12 District's plan, that user has been turned in to the 13 Department. 14 What has been the Department's response? 15 A. No, no, no. I've turned over people for 16 curtailment. And that was your question. I have due to 17 assessments. 18 Q. For nonpayment of assessments? 19 A. Correct. 20 Q. Okay. And what's the Department done with 21 that? 22 A. They have proceeded with contacting the 23 individual, and the timeframe of hearings. We have gone 24 as far as a prehearing. By that time usually the patron 25 comes into compliance.</p>	<p style="text-align: right;">175</p> <p>1 Q. And so are any patrons out of compliance 2 today? 3 A. As of today? 4 Q. Yes. 5 A. Yes. 6 Q. [Unintelligible]? 7 A. On payment of assessments. 8 Q. For nonpayment of assessments only? 9 A. Correct. 10 Q. Not noncompliance with the mitigation plan? 11 A. Correct. 12 Q. But my question is specific to the mitigation 13 plan. 14 Do you have any district patrons that are not 15 in compliance with your mitigation plan that you've 16 turned over to the Department? 17 A. No, not at this moment. 18 Q. But you recognize that as a potential remedy, 19 do you agree? 20 A. I recognize that -- yes, I don't know what it 21 means. 22 Q. Mr. Budge talked about a remedy and that 23 you're -- you've testified that curtailing individual 24 wells would not provide remedy for the 2022 deficiency. 25 Do you recall that?</p>
<p style="text-align: right;">176</p> <p>1 A. Yes. 2 Q. But would you agree the Department could 3 curtail individual users to bring somebody into 4 compliance for that breach? 5 A. I don't know what they can and cannot do. 6 Q. But you recognize the Department's deficiency 7 number from 2022 for Jefferson Clark 18,605 acre-feet? 8 A. Do I recognize it -- could you repeat that for 9 me. 10 Q. What the Director has found as far as 11 Jefferson Clark's noncompliance for 2022, being 12 18,605 acre-feet? 13 A. Do I recognize that he said that was the 14 number? 15 Q. Yes. 16 A. I recognize he stated that was the number. 17 Q. And if a remedy is ordered, the district will 18 comply with that order, do you agree with that? 19 A. I can't say what the district will do. 20 Q. I think you talked about that you believe the 21 remedy for the breach has already been taken care of by 22 past actions; is that correct? 23 A. Yes. 24 Q. And that's based upon excess conservation 25 performed in past years?</p>	<p style="text-align: right;">177</p> <p>1 A. Yes. 2 Q. But you agree that under 2022 that the 3 district's noncompliance with what they were required to 4 do in 2022 has not yet been remedied? 5 A. I believe the Director said that. 6 MR. THOMPSON: That's all of the questions I 7 have. 8 9 EXAMINATION 10 QUESTIONS BY THE HEARING OFFICER: 11 Q. You need to clear something up for me. You 12 indicated that you can turn a noncomplying well user in 13 to the Department for curtailment; correct? 14 A. Correct. 15 Q. And then you said, well, I don't know if -- 16 what the Department can do with curtailment; is that 17 correct? 18 A. That is correct. 19 Q. Then why'd you turn them over for curtailment? 20 A. We don't have a lot of options to try to 21 collect those assessments, and our duty is to collect 22 the assessments, so we use available means. We have 23 curtailment, the threat of curtailment -- 24 Q. Then if -- that's what I'm saying. The 25 Department can curtail an individual well user?</p>

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46 (Pages 178 to 181)

<p style="text-align: right;">178</p> <p>1 A. If -- 2 Q. It has the power after hearings? 3 A. That's -- I don't know what their -- 4 Q. Well, you are the treasurer of IGWA, and you 5 don't know that? 6 A. No. I mean -- I'm sorry, Your Honor. I -- 7 when we request curtailment, what does that mean? If 8 they're 10 acre-feet over, how is that applied -- 9 Q. I'm talking about the assessments which you've 10 indicated did? 11 A. Correct. I don't know how they would apply 12 that. Is it permanent curtailment or \$1,000 assessment? 13 Do they permanently -- are they permanently shut off 14 from their water? I don't know how the Department would 15 ever apply that. We've never carried it that far. 16 Q. Okay. Then I understand your answer. 17 A. I'm sorry. 18 Q. That's fine. 19 HEARING OFFICER: Redirect? 20 MR. BUDGE: I do, but there may be other 21 cross-examination. 22 HEARING OFFICER: Sir? 23 MR. JOHNS: Not for Bonneville-Jefferson. 24 HEARING OFFICER: Sir? 25 MR. ANDERSON: Just quickly, if --</p>	<p style="text-align: right;">179</p> <p>1 HEARING OFFICER: Please. 2 MR. ANDERSON: -- if you'll allow it. 3 Dylan Anderson with Bingham Ground Water 4 District. 5 6 CROSS-EXAMINATION 7 QUESTIONS BY MR. ANDERSON: 8 Q. If I could ask you just to kind of put on your 9 IGWA hat here, and maybe we can conserve some time. 10 Could you open up 527, Exhibit 527. This is 11 one of the reports that you had just gone over with TJ. 12 A. The 2019 performance report. 13 Q. Correct. And TJ kind of went through these 14 reports and asked you questions specific to Jefferson 15 Clark about possible recharge and going above and beyond 16 the target conservation; correct? 17 A. Correct. 18 Q. Could that same -- your same logic as your 19 understanding of IGWA be applied to other groundwater 20 districts? 21 A. Yes. 22 Q. For example, on that particular year, Bingham 23 Ground Water District -- and you can see the numbers 24 right in front of you -- had a target conservation of 25 35,000, they reduced 44,000, and then continued to do</p>
<p style="text-align: right;">180</p> <p>1 more recharge of -- in excess of 22,000 acre-feet; 2 correct? 3 A. Correct. 4 Q. Now, in your conversations with other 5 groundwater districts who also did excess recharge and 6 conservation, what's your understanding of why they did 7 that? 8 A. They had the same understanding of the 9 application of the agreement as sort of like us. They 10 varied on how they distributed their allocation, but 11 they believed there was some sort of credit or averaging 12 in their application of meeting their reductions every 13 year. 14 Q. And you testified that there was several 15 different groundwater users. And it looks -- as we look 16 at these documents -- and the documents speak for 17 themselves -- at any given time, any given year, there 18 was excess recharge done by pretty much all these 19 groundwater users. 20 As your position in IGWA, do you expect 21 testimony to be similar for each groundwater user, 22 groundwater district, that they did that excess recharge 23 in anticipation of getting some future benefit for it? 24 A. I assume that, yes. 25 MR. ANDERSON: I have no other questions.</p>	<p style="text-align: right;">181</p> <p>1 HEARING OFFICER: Mr. Budge? 2 3 REDIRECT EXAMINATION 4 QUESTIONS BY MR. BUDGE: 5 Q. Hey, Bill, I just have just a few follow-up 6 questions. 7 Remind me when your -- you became manager of 8 Jefferson Clark. 9 A. I became the manager on January 9th, 2018. 10 Q. And that's when you began working with IGWA? 11 A. Yes. 12 Q. So Mr. Thompson asked you if you were aware of 13 a dispute that happened in the spring of 2017 involving 14 A&B and Southwest. 15 Do you remember that? 16 A. Yes. 17 Q. That would have been before you began working 18 with IGWA? 19 A. Correct. 20 Q. Mr. Thompson asked you about Exhibit 512. You 21 can pull that open. That's the Director's order from 22 August of '23 where he found a breach [unintelligible] 23 in '22. 24 If you'll turn to Table 2 of that exhibit. 25 It's on page 8.</p>

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47 (Pages 182 to 185)

<p style="text-align: right;">182</p> <p>1 A. Okay. 2 Q. And that shows the reassigned conservation 3 targets that the Department imposed, and you had read 4 that for Jefferson Clark it's 63,533 acre-feet? 5 A. Correct. 6 Q. Is that number prescribed in the Settlement 7 Agreement anywhere? 8 A. It is not. 9 Q. Has Jefferson Clark agreed to that figure? 10 A. No. 11 Q. Let me switch gears for a moment and ask you 12 about some of the questions Mr. Thompson asked about 13 compliance. 14 He asked if any of your patrons are currently 15 out of compliance with the district's conservation 16 program and I think I heard you testify that they are 17 not currently? 18 A. No, they're not currently -- 19 Q. So if the Department proceeds with curtailment 20 as a remedy, they're going to be curtailing patrons who 21 have, in fact, done what the district asked of them? 22 A. Correct. 23 Q. Mr. Thompson asked you if you recognize the 24 Director's ruling that in August of '23 that Jefferson 25 Clark had a conservation deficit of 18,605 acre-feet.</p>	<p style="text-align: right;">183</p> <p>1 Do you remember that? 2 A. Yes, I do. 3 Q. And that figure came out of the August 2023 4 order of the Director? 5 A. Correct. 6 Q. And that order was issued prior to the 7 supplemental performance report? 8 A. Correct. 9 Q. So that was issued before the groundwater 10 districts had decided an alternative compliance method? 11 A. Correct. 12 Q. And is it your view that Jefferson Clark 13 Ground Water District is in compliance in '22 based on 14 the alternative compliance method? 15 MR. FLETCHER: I'm going to object to that. 16 The court has -- they've tried three or four times to 17 backdoor this alternative compliance method into the 18 record, and you have sustained those objections each 19 time. 20 HEARING OFFICER: And I'll sustain this one. 21 MR. FLETCHER: Thank you. 22 MR. BUDGE: Yeah. I will just -- 23 HEARING OFFICER: That testimony will be 24 stricken. I think you've made yourself clear. I am not 25 going to accept an offer of proof.</p>
<p style="text-align: right;">184</p> <p>1 You may proceed. 2 MR. BUDGE: Yeah, I won't do that. I do want 3 to note that opposing counsel opened the door when they 4 asked Mr. Stoddart if he recognizes that he's out of 5 compliance in 2022 based on the 18,000 acre-foot number. 6 And so in response, I had to ask him to acknowledge that 7 he does not believe he's out of compliance. 8 HEARING OFFICER: You may proceed. 9 MR. BUDGE: No further questions. Thank you. 10 HEARING OFFICER: Thank you. 11 Is there any further evidence by any of the 12 other parties? 13 MR. JOHNS: Nothing here, Mr. Hearing Officer. 14 HEARING OFFICER: Mr. Anderson? Ma'am? Sir? 15 Mr. Budge? 16 MR. BUDGE: No, none from IGWA. Thank you. 17 MR. THOMPSON: Hearing Officer, I just need to 18 move to admit Exhibit 2 from this morning, that we 19 failed to do that. 20 HEARING OFFICER: Excuse me, sir? 21 MR. THOMPSON: Move to admit Exhibit 2, Dave 22 Colvin's rebuttal report. We did not move to admit that 23 exhibit. 24 HEARING OFFICER: That's right. You indicated 25 that prior to lunch.</p>	<p style="text-align: right;">185</p> <p>1 Is there an objection on the rebuttal report? 2 MR. BUDGE: No objection. 3 UNIDENTIFIED SPEAKER: No objection. 4 HEARING OFFICER: Mr. Budge, objection on the 5 rebuttal report. 6 MR. BUDGE: No objection. 7 HEARING OFFICER: Thank you. Anything further 8 from SWC? 9 MR. FLETCHER: We don't have any further 10 evidence. 11 HEARING OFFICER: Oh, that exhibit is 12 admitted. 13 (Exhibit 2 admitted.) 14 HEARING OFFICER: Are you getting ready to 15 attack here? 16 MS. PATTERSON: It is a bit of a dance with 17 all of these binders. 18 I just have a cleanup item, if that's kind 19 of -- 20 HEARING OFFICER: Sure. 21 MS. PATTERSON: -- where we're at in the 22 proceedings. 23 It was brought to my attention that the Common 24 Exhibit 527, I believe, which is the 2019 performance 25 spreadsheet -- now, this exhibit is the workbook, but</p>

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<p style="text-align: right;">186</p> <p>1 we've provided here in the binder a screenshot from the 2 first page of that, and it has been marked by mistake as 3 528 down at the bottom. So that just needs to read 4 "527" and wanted the record to reflect that. 5 HEARING OFFICER: Very well. Thank you, 6 ma'am. 7 Anything further? 8 MR. BUDGE: I don't have anything further, but 9 I would like to, while we've got everybody here, confirm 10 which exhibits have been admitted, just to make sure 11 we're operating on the same -- 12 HEARING OFFICER: Do you mind if we take a 13 brief recess? You folks can [unintelligible] some 14 motion concerning exhibits? 15 Who wishes to put that in the record? 16 MR. THOMPSON: Mr. Burdick, we had a 17 discussion before this hearing on common exhibits that 18 both parties, essentially, stipulated to. We have a 19 subset of those that we want to discuss with you that 20 weren't specifically referenced in the hearing, but they 21 are the Department's annual review of IGWA's performance 22 report. 23 So all the performance reports 2016 forward 24 that Mr. Budge discussed. And I think some of those, 25 maybe all of them, were admitted. The Department's</p>	<p style="text-align: right;">187</p> <p>1 subsequent review of that report, which they publish a 2 couple months later, I think we referred to it in 3 general but didn't specifically ask to admit those, but 4 that's -- 5 HEARING OFFICER: How many documents are 6 those? 2016 to 2023 or 2024 or 2022? 7 MR. FLETCHER: '22, through 2022. 8 MR. THOMPSON: '16 through '22. 9 HEARING OFFICER: '16 to '22? 10 MR. BUDGE: That's correct. And those are 11 identified as Common Exhibit Nos. 517 through 537. That 12 captures the performance reports and Department's 13 review. So our agreement was to stipulate to Exhibits 14 517 through 537. 15 MR. FLETCHER: About half of those are already 16 admitted. 17 HEARING OFFICER: Are what? 18 MR. FLETCHER: Already admitted. 19 HEARING OFFICER: Yeah, the performance 20 reports from Stigland (phonetic) and... 21 Well, I just haven't -- I get antsy when 22 there's a bunch of hearsay that I don't know who said 23 what, why they're saying it, et cetera. I guess it 24 stands for itself, and I'll be in charge of sifting 25 through it and making a finding.</p>
<p style="text-align: right;">188</p> <p>1 MR. BUDGE: Those are pretty benign reports, 2 so -- 3 HEARING OFFICER: I have heard some benign 4 testimony this morning in court here. What can be more 5 benign than, "Here's some water." 6 MR. BUDGE: There's also a few exhibits that 7 Sarah pointed out did get discussed and referenced by 8 exhibit number during the hearing today. 9 HEARING OFFICER: And those are fine. 10 MR. BUDGE: And those were 500 through 503. 11 Those are the documents that make up the Settlement 12 Agreement. 510 was the Director's August 20 -- or 13 excuse me -- September 2022 order regarding compliance 14 with the mitigation plan in 2021. And then 512 was the 15 August 2nd, 2023, order by the Director. Those are part 16 of the Agency record already, but because they were 17 referenced by exhibit number, we thought they should be 18 included -- 19 HEARING OFFICER: That's fine. 20 MR. BUDGE: -- by those numbers. 21 HEARING OFFICER: That's what I expected. 22 I'll -- I will, pursuant to stipulation of the parties, 23 allow the Director's response to the performance report 24 s, I guess, is how we would frame that. 25 And you have the numbers, Sarah?</p>	<p style="text-align: right;">189</p> <p>1 MS. TSCHOHL: I do. Do you want me to read 2 them? 3 HEARING OFFICER: Please. 4 MS. TSCHOHL: So I've got 517, 519, 520, 522, 5 523, 525, 526, 528, 529, 531, 532, 534, and 537. 6 HEARING OFFICER: All right. Is that what the 7 parties have stipulated to? 8 MR. BUDGE: That's correct. That's consistent 9 with my notes. 10 MR. THOMPSON: Yes, thank you. 11 (Exhibits 517, 519, 520, 522, 523, 525, 526, 12 528, 529, 531, 532, 534, and 537 admitted.) 13 HEARING OFFICER: In addition to the ones that 14 have been previously mentioned, and you'd know those, 15 Sarah. 16 MS. TSCHOHL: 500 through 503, 510, 512. 17 (Exhibits 500 through 503, 510, 512 admitted.) 18 HEARING OFFICER: Okay. Anything further by 19 any party. 20 MR. BUDGE: Just for the record, Exhibits 142 21 and 143 have been admitted. Exhibit 300 has been 22 admitted. Exhibit 131 was not admitted but was 23 submitted as an offer of proof. And then there was the 24 stack of documents relating to our motion to take 25 official notice that were offered as proof but not</p>

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<p style="text-align: right;">190</p> <p>1 admitted. 2 HEARING OFFICER: Okay. 3 MR. FLETCHER: And Exhibits 1 and 2. 4 HEARING OFFICER: Exhibits 1 and 2? 5 MR. FLETCHER: Were already admitted. 6 HEARING OFFICER: Very well. 7 Okay. I'm going to -- is there a motion or 8 does somebody wish to have a transcript? 9 UNIDENTIFIED SPEAKER: Mr. Budge 10 [unintelligible]. 11 MR. BUDGE: It will be ordered once we get the 12 audio recording. So we've made arrangements to have it 13 transcribed once the audio recording is done. I think 14 Sarah does some kind of proofing afterwards or something 15 to the effect, and then she'll email it to me, and we'll 16 work with the reporter, and we'll have it transcribed. 17 HEARING OFFICER: Okay. I'm -- as I 18 previously indicated, I'm trying to get this out by 19 April. And as a result, who are you using to 20 transcribe? 21 MR. BUDGE: It used to be M&M. They have a 22 new name. 23 HEARING OFFICER: Okay. 24 MR. BUDGE: Word 4 Word, I think it is. 25 HEARING OFFICER: Okay. All right. What is</p>	<p style="text-align: right;">191</p> <p>1 the -- what would be an appropriate time period in that 2 regard, Sarah, or counsel for the transcript to arrive? 3 MR. BUDGE: M -- I call them M&M still, but 4 they reported that it would take about ten days from 5 when they received the audio to have the transcription 6 done. 7 MS. TSCHOHL: Is that the expedited or is that 8 standard? 9 MR. BUDGE: Standard. 10 HEARING OFFICER: We can have expedited? 11 MS. TSCHOHL: There's additional cost. 12 HEARING OFFICER: Oh. 13 MR. BUDGE: I think it was double or something 14 like that. 15 MS. TSCHOHL: I don't know their new policies. 16 MR. BUDGE: We can check on that, if it's 17 reasonable and makes sense. 18 HEARING OFFICER: I would like expedited. 19 Does SWC enter into any sort of payment in 20 that regard also? 21 MR. FLETCHER: We just have to get 22 confirmation from our clients. 23 HEARING OFFICER: All right. 24 MR. BUDGE: We've customarily split that. 25 HEARING OFFICER: Do you think that will be a</p>
<p style="text-align: right;">192</p> <p>1 problem, Mr. Fletcher or Mr. -- 2 MR. FLETCHER: I don't think so. 3 HEARING OFFICER: All right. So why don't we 4 get it expedited, tentatively set for sharing of costs 5 in that regard. I appreciate you volunteering your 6 clients in that regard Mr. Fletcher. 7 MR. FLETCHER: [Unintelligible]. Travis has 8 his fancy charge card from his firm. [Unintelligible]. 9 HEARING OFFICER: Okay. Other issues? 10 Briefing, we will get the transcript on "X" 11 date. I'd like to have simultaneous briefing within 12 14 days from that date, limited to ten pages. 13 MR. BUDGE: Single spaced, 8-point font? 14 HEARING OFFICER: The usual font, the spacing 15 of Supreme Court pagination in the rule so that we can 16 read it without a magnifying glass. 17 MS. TSCHOHL: Can I just clarify so that we 18 know from the date, if we're doing 14 days from the date 19 the transcript is received, will you send the transcript 20 to the [unintelligible] email for the Department so that 21 we can all have a record of exactly [unintelligible]? 22 MR. BUDGE: Yeah, we can do that. 23 HEARING OFFICER: I appreciate it. 24 Anything further? 25 One of the things that the Supreme Court does</p>	<p style="text-align: right;">193</p> <p>1 is it shakes the hands of hardworking lawyers of a 2 hearing. I'd like to do that at this time. 3 (All simultaneously speaking.) 4 HEARING OFFICER: The hearing is concluded. 5 6 (End of audio file.) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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1 REPORTER'S CERTIFICATE.

2 I, ANDREA L. CHECK, CSR No. 748, Certified
3 Shorthand Reporter, certify:

4 That the audio recording of the proceedings
5 were transcribed by me or under my direction;

6 That the foregoing is a true and correct
7 transcription of all testimony given, to the best of my
8 ability;

9 I further certify that I am not a relative or
10 employee of any attorney or party, nor am I financially
11 interested in the action.

12
13
14 IN WITNESS WHEREOF, I set my hand and seal
15 this 25th day of March, 2024.

16
17
18
19
20 *Andrea Check*



21 ANDREA L. CHECK, CSR No. 748, RPR, CRR
22 Notary Public
23 P.O. Box 4525
24 Boise, Idaho 83205
25 My Commission expires July 20, 2028.

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