

**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

SETTLED AGENCY HEARING TRANSCRIPT ON APPEAL

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

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Audio Transcription

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the Director of the Idaho Department of)

Water Resources,)

Respondents.)

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TRANSCRIBER'S TRANSCRIPT ON JUDICIAL REVIEW

Appealed from the Idaho Department of Water Resources

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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

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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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17 Sarah Tschohl

18 William Stoddard

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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 numeral -- 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.)

19 -oOo-

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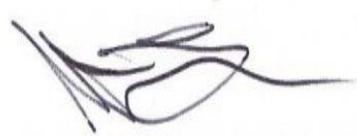
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IN WITNESS WHEREOF, I set my hand and seal this 1st day of June, 2023.



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My commission expires December 30, 2023