BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF BASIN 37   ) DOCKET No.

ADMINISTRATIVE PROCEEDING   ) AA-WRA-2021-001

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VOLUME II

(Pages 265-412)

BEFORE

HEARING OFFICER: GARY SPACKMAN

Date: June 8, 2021 - 8:32 a.m.

Location: Idaho Department of Water Resources

             322 East Front Street

             Boise, Idaho

REPORTED BY:

COLLEEN P. DOHERTY, CSR 345

Notary Public

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1   **I N D E X**

2   **W I T N E S S E S**

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1   THE HEARING OFFICER: Okay. It is 8:30.

2   Let's see. Do we have anything that we need to talk

3   about this morning?

4   I think I wanted to address just before we

5   start, Chris Bromley, your inquiry about a request for

6   information or documents about staff memoranda. And I

7   think Meghan has looked at that and sent out an inquiry.

8   Meghan, do you have --

9   MS. CARTER: I did speak with Mr. Bromley this

10   morning about that. Staff is working on it. I know

11   that we'll have at least one later on this morning, if

12   not several this afternoon. And I will be getting those

13   out as soon as we get full information from each

14   individual staff.

15   THE HEARING OFFICER: Okay.

16   MS. CARTER: So I will wait until they are all

17   in just --

18   THE HEARING OFFICER: Well, I apologize for

19   our delinquency. So I can't do much else but say, I'm

20   sorry. We'll send it as soon as we gather it.

21   MR. BROMLEY: Thank you.

22   THE HEARING OFFICER: Okay. Are we ready to

23   start? Let's begin.

24   So this is Day 2 of a contested case hearing

25   for administrative proceeding regarding the

1   administration of water in the Big Wood River Basin, and

2   in particular in the Bellevue triangle and the impacts

3   of ground water pumping on Silver Creek and its

4   tributaries. And we finished yesterday with Phil

5   Blankenau, Department witness.

6   And I see Tim Luke is here today, and he

7   knows, he's done this enough times he just automatically

8   walked to the witness chair without being called. So

9   anyway, thanks, Tim, for being here.

10   Anything else we need to talk about before Tim

11 is called as a witness and testifies? Anybody?

12   TIM LUKE,

13 first duly sworn to tell the truth relating to said

14 cause, testified as follows:

15   THE HEARING OFFICER: Please be seated.

16   Ms. Carter, you may examine Mr. Luke.

17   DIRECT EXAMINATION

18 QUESTIONS BY MS. CARTER:

19   Q. Good morning. Would you please state your

20 full name and spell it for the record.

21   A. First and last name?

22   Q. Yes, please.

23   A. Tim Luke, T-i-m, L-u-k-e.

24   Q. And you are an employee of the Idaho

25 Department of Water Resources; correct?

1   A.   Yes.

2   Q.   What is your current job title?

3   A.   Current what?

4   Q.   Job title.

5   A.   Water compliance bureau chief.

6   Q.   And what are your responsibilities in this

7   position?

8   A.   Manage and oversee up to 19 staff in five

9   separate programs within the Bureau, including water

10 distribution, which works a lot with water districts and

11 water measurement programs; ground water protection

12 section, which permits well construction and licensing

13 of well drillers, and also permitting of underground

14 injection control wells; stream channel alteration

15 program, which permits stream channel alterations; flood

16 plain management unit, one person unit that assists with

17 administration of national flood insurance program in

18 the state; and a water right enforcement coordinator

19 that does enforcement activities across those programs,

20 and general water rights enforcement.

21   Q.   And so as you supervise all of those different

22 programs, what involvement do you have regarding water

23 distribution, and specifically some of the topics that

24 we'll be talking about today?

25   A.   Well, that's related to our water distribution

1 area, and so administration or administrative matters

2 and operations of water districts, water delivery

3 disputes, guidance to watermasters, training of

4 watermasters, compliance with water measurement

5 requirements. I've worked off and on over the years

6 with creation and modification of water districts, water

7 district assistance.

8   Q. And how long have you been in your current

9 position?

10   A. About ten years.

11   Q. And prior to your current position, what

12 position did you hold?

13   A. I was the water distribution section manager.

14   Q. And how long were you in that position?

15   A. I think about 13 years.

16   Q. Did you hold any other positions at IDWR prior

17 to that?

18   A. Yes, I worked as a water right agent, senior

19 water right agent, I think the staff hydrologist.

20   Q. And what is your college education?

21   A. I have a bachelor's degree in geography from

22 West Virginia University, and a master of science in

23 geography from the University of Idaho.

24   Q. And did you prepare a memo discussing water

25 deliveries in the Wood River Basin?

 1   A.   Yes.

 2   Q.   Hand you a copy of IDWR Exhibit 4. And is

 3   that Exhibit 4 the memo you prepared?

 4   A.   Yes.

 5   Q.   And why did you prepare this memo?

 6   A.   It's in response to the Director's request for

 7   staff memorandum in the matter of Basin 37

 8   administrative hearing. There were ten items on that

 9   request. I addressed three to four of those that

10   aligned or overlapped with my area of responsibilities.

11   Q.   And in front of you next to the binders is the

12   scheduling order for this matter.

13   A.   Yes.

14   Q.   On page 5 of that order, there is a correction

15   to your staff memo. Do you recognize that?

16   A.   Yes.

17   Q.   And what is that correction?

18   A.   That's a correction to part of the memorandum.

19   There was just -- it's giving an example of water right

20   priority cuts in Water District 37, and it's got a

21   couple of typos specifically with the dates, so we

22   changed. An example, I had an incorrectly put May 15th,

23   1885, and it should have been 1884. And then I was

24   referencing the next priority right, and I should have

25   said junior-priority right instead of senior.

 1   Q. Okay. Thank you. Did you notice after the

 2   scheduling order went out, any other errors in your

 3   staff memo?

 4   A. Yes, I did. There were a few.

 5   Q. Could you tell us what those are?

 6   A. Yes, I'm going to go to my original copy where

 7   I noted those. So on page 9, the sentence above Figure

 8   3, just right above Figure 3, the very end it says, "Big

 9   Wood Canal Company also holds a 1920 priority right for

10   87 cfs. That should be 69.3 cfs. The 87 cfs is for the

11   1905 priority right, which I mentioned in the prior

12   sentence.

13   THE HEARING OFFICER: What's the number again,

14   Tim?

15   THE WITNESS: 67.3 -- or I'm sorry. I got new

16   eyes here. I just had cataracts -- 69.3.

17   THE HEARING OFFICER: Thank you.

18   THE WITNESS: The following page, page 10,

19   right below Table 1 and above Figure 4 in the paragraph

20   in between the two items, the second sentence says,

21   "Note that the cumulative rate of diversion by priority

22   is generally greater than the Little Wood River." I

23   should have probably put in "Silver Creek." So it

24   should read, "Note that the cumulative rate of diversion

25   by priority on Silver Creek."

1   On page 12, fifth paragraph below Table 2, the

2   second sentence reads, "Three days later on July 12, the

3   September 1983 -- I'm sorry -- "Three days later on July

4   12 to September 9, 1883 priority rights were cut,

5   followed by cuts to the April," it reads "1886." It

6   should read "1883 priority rights." I think that error

7   was noted in my deposition by Mr. Barker.

8   Page 18, under item 9, third paragraph, a

9   reference to Figure 1 should be Figure 5, which is on

10   page 19. And on page 21, in the very first sentence, it

11   reads, "The 2021 predicted April SWSI value of negative

12   2.7 published by the NRCS is based on a SWSI analysis

13   period from 1981 to present." It should read "1991."

14   And that's all I had.

15   MS. CARTER: Okay.

16   MS. McHUGH: Can I ask a clarifying question

17   on that last one? Could you explain again what page

18   that was on, Tim? I can't find it.

19   THE WITNESS: It was on page 21.

20   THE HEARING OFFICER: I didn't hear the

21   inquiry, Ms. McHugh.

22   MS. McHUGH: We couldn't find the correction

23   because our page 21 wasn't --

24   THE HEARING OFFICER: So page 21.

25   THE WITNESS: Item 10 (A) beginning of the

 1 | fourth paragraph.

 2 | MS. McHUGH: Oh, thank you. That's what we

 3 | missed.

 4 | MR. BROMLEY: I thought you said first.

 5 | MS. McHUGH: I thought you said first as well,

 6 | so...

 7 | THE WITNESS: Sorry.

 8 | MS. McHUGH: And could you explain the

 9 | correction again? Sorry.

10 | THE WITNESS: Yeah. Where it says the

11 | "analysis period from 1981 to present." It should say

12 | "1991 to present." You are not seeing it?

13 | Q. (BY MS. CARTER) All right. Thank you.

14 | So --

15 | MS. McHUGH: One other clarifying question,

16 | Mr. Luke, and for the record. The Exhibit 4 that you

17 | are entering into the record, is it a corrected exhibit,

18 | or is it the old exhibit with interlineations with

19 | corrections, or do we have to compare the old -- the

20 | original Exhibit 4 to the corrections that you just made

21 | on the record?

22 | MS. CARTER: Currently we just have the

23 | original staff memo with the corrections made on the

24 | record.

25 | MS. McHUGH: Okay.

 1   THE HEARING OFFICER: So the corrections are

 2   handwritten?

 3   MS. CARTER: Yes.

 4   THE HEARING OFFICER: Okay.

 5   MS. McHUGH: So the original document that

 6   Mr. Luke is going to testify to has handwritten

 7   corrections in it?

 8   MS. CARTER: At this point, yes.

 9   MS. McHUGH: Okay.

10   MS. CARTER: I have not had the opportunity to

11   meet with Mr. Luke on the specifics of his corrections

12   to get an updated document.

13   MS. McHUGH: Okay. Thank you.

14   THE HEARING OFFICER: What do you intend to

15   do?

16   MS. CARTER: I can work with Mr. Luke on that,

17   and get those corrections made. And we can submit the

18   corrected document in the record tomorrow.

19   THE HEARING OFFICER: Would it be helpful if

20   we also asked Ms. Sukow to change hers so we're not

21   referring back and forth to any graph that some may

22   interpret in using, though it's not correct?

23   MS. CARTER: I can certainly do that.

24   THE HEARING OFFICER: Thank you.

25   MS. McHUGH: It may be just as easy to take

1 his interlineated document and give us copies, so we all

2 had the actual interlineated document, I mean, that he's

3 actually testifying to. I mean, that would also be an

4 option, so just to make it clear for the record.

5   THE HEARING OFFICER: Well, whatever

6 Ms. Carter wants to do. If those written corrections

7 are in the document, that's fine. But I am concerned

8 about Jennifer Sukow's staff memo, in the fact that the

9 graph contained in there is not correct. And some may

10 inadvertently refer to it. So I think we should correct

11 her memo to include the graph that's accurate.

12   MS. CARTER: I will ensure that happens.

13   THE HEARING OFFICER: Thank you.

14   Q. (BY MS. CARTER) So let's turn back to the

15 substance of your memo. You discuss surface water

16 deliveries in the Little Wood River and Silver Creek

17 area. Starting on page 11, you talk about variability

18 and water right priority deliveries. Focusing on Silver

19 Creek would you walk me through that variability?

20   A. Yes. The request for memorandum asks for some

21 summary of variability in priority right deliveries on a

22 good year, an average year, and a water short year. So

23 this part of the memo just selected three years. The

24 three years I selected were consistent with the three

25 years selected by Mr. Blankenau in his memo. And I did

1   that because he had already done it, and so for

2   consistency purposes. And two, I had looked at those

3   years, and went through the SWSI tables and verified

4   that each of those years fit within the categories of a

5   good year, above normal year, a normal year, and a below

6   normal year, or dry year, or a water short year.

7   And that's summarized in the Table 2 on page

8   12. And so you'll see that I show the streamflow April

9   to September in thousands of acre-feet as reported in

10   the SWSI tables, along with the 30-year ranking for the

11   period 1991 to 2020. And just commenting on the good,

12   normal, and water short years. So those are just

13   examples.

14   And then I just summarized the priority

15   deliveries in those three years, and attached tables

16   from the watermaster reports, the annual reports from

17   Water District 37, for each of those three years. Those

18   are on pages on 14, 15, and 16 of the memo. So it will

19   show the different levels of priority cuts, not just on

20   Silver Creek and Little Wood River, but the other

21   systems or reaches of the Big Wood River as well within

22   the water district.

23   Q. And you also talk in your memo about Condition

24   161 or the exchange condition. Could you explain what

25   that is?

1   A. Yes. So that is a condition that's placed on

2   a number of water rights in Water District 37 having a

3   source of either the Big Wood or the Little Wood River

4   with points of diversions and places of use below the

5   Milner Gooding Canal. And the condition was placed on

6   these rights during the Snake River Basin Adjudication,

7   so these are on decreed rights. And I'm paraphrasing,

8   the condition just states that the rights are to be

9   delivered to the provisions of exchange contracts

10   between the United States Bureau of Reclamation,

11   American Falls Reservoir District 2, which I'll just

12   say, AFRD2, and the Big Wood Canal Company.

13   Q. Why is that the condition relevant to this

14   proceeding?

15   A. So maybe I should explain what the condition

16   means a little bit further. So what it means is that

17   those rights having that condition with lands below

18   Milner Gooding Canal, well, they all have lands below

19   Milner Gooding Canal, receive their water from the

20   Milner Gooding Canal, which is a diversion from Milner

21   Dam on the Snake River, either storage water our natural

22   flow held by AFRD2, in lieu of, or in exchange for the

23   natural flow rights that would otherwise be delivered to

24   those places of use, are then delivered to lands within

25   the Big Wood Canal Company above Milner Gooding Canal.

 1   Q. Okay. And what does the condition have to do

 2   with which water rights the Department, or specifically

 3   you looked at in your memo in terms of cuts?

 4   A. So, yeah, and you asked why was it relevant?

 5   And I didn't answer that. So it was relevant because

 6   those rights may -- well, we understand that those

 7   rights also have supplemental sources of water. And

 8   unlike other rights that are above or below Milner

 9   Gooding Canal that don't have those same conditions,

10   rely, or may rely on only on the natural flow water

11   rights that they hold from the Big Wood or Little Wood

12   Rivers. But these rights that have the conditions do

13   have some supplemental supply through AFRD2.

14   And our understanding is that -- and I'm not

15   sure what all those exact supplies are for each

16   individual right or right holder. But we assume those

17   rights had an adequate supply of water, so we removed

18   those from consideration. And the ET analysis that we

19   did as part of Mr. Blankenau's memo, so it was just sort

20   of narrowing the scope of the water rights on the Little

21   Wood River, in particular in this proceeding, that may

22   be short of water in 2021.

23   Q. Okay. In your memo, you compare water right

24   priority cuts for 2021 and pre-groundwater development.

25   Could you explain how you picked the years that you've

 1   used for pre-groundwater development?

 2   A.   Yes.   So I used a similar approach that we had

 3   used for identifying analog years in more recent years

 4   in that 30-year period from '91 to 2020 that Mr. Vincent

 5   explained in his testimony using the SWSI NRCS tables.

 6   So as per his memo using the SWSI tables for the above

 7   Hailey gage, we selected 2020 and 2004 as the most

 8   closest analog years to what I think the tables

 9   published for April 1 looked like in comparison to 2021,

10   so...

11   And then we had an expanded SWSI table for 104

12   years.   I can't remember what year it went back to, all

13   the way through 2020.   So similarly it ranked all the

14   different years, the runoff from April to September,

15   gave a SWSI index.   And I looked at that expanded table

16   and selected two years from pre-groundwater development

17   period, which was described nicely in Jennifer Sukow's

18   memo.   The ground water development period was from the

19   late 1940s to 1991.   And so I focused on years prior to

20   mid to late 1940s, and went down through that table the

21   two closest years I found using that 50 percent

22   probability within that pre-development period.

23   And the pre-development period for which I

24   would have records from is the black books of Water

25   District 37, which started in 1919, and go all the way

1   through 2019. We don't have a 2020 book yet. And we

2   have those books here, in the Department. I looked in

3   the -- well, for those two closest years were 1937 to

4   1939, and we did have priority cut tables in those

5   annual books.

6   Q. And what did you learn from comparing priority

7   cuts pre-groundwater development to the analog years to

8   2021?

9   A. In general, the more senior priority rights

10   those being 1883 and 1884 on the Little Wood and Silver

11   Creek, were or have been cut more frequently and for

12   longer durations in more recent years, and in

13   particularly those analog years that we chose, 2020 and

14   2004.

15   MS. CARTER: Okay. Thank you, Mr. Luke.

16   That's all I have.

17   THE HEARING OFFICER: I didn't hear you.

18   MS. CARTER: I said that's all I have.

19   THE HEARING OFFICER: Okay.

20   MS. CARTER: I was going to move to admit

21   Mr. Luke's staff memo into exhibit. But would you like

22   me to wait until we get a corrected version, and have

23   him verify that's --

24   THE HEARING OFFICER: Yeah, that would be

25   great.

1   MS. CARTER: Okay.

2   THE HEARING OFFICER: Okay. Mr. Rigby,

3   Mr. Fletcher?

4   CROSS-EXAMINATION

5   QUESTIONS BY MR. FLETCHER:

6   Q. Good morning, Mr. Luke.

7   A. Good morning.

8   Q. When you discussed these exchange rights, the

9   exchange right you are talking about on the water rights

10   is typically referred to as Condition 161; isn't that

11   correct?

12   A. Yes.

13   Q. And as part of your analysis, did you examine

14   all of the 161 rights, and see if they did, in fact,

15   have supplemental rights?

16   A. When you say "supplemental," AFRD2

17   supplemental water supply?

18   Q. Yes.

19   A. I didn't confirm that.

20   Q. What is your understanding of supplemental

21   rights?

22   A. It's a supplemental supply of water through

23   AFRD2 being either storage water or whatever supplies of

24   water they hold, which my understanding is limited to

25   storage water of 395,000 to 400,000 acre-feet from

1   American Falls Reservoir, and a 1921 natural flow water

2   right.

3   Q.   For the purposes of your memo, you assumed

4   that all exchange rights, all rights with the 161

5   condition had a supplemental water right; correct?

6   A.   Correct, that was my understanding.

7   Q.   And you assumed also that the supplemental

8   right would fully replace the natural flow right that's

9   stated on the decree; correct?

10   A.   I wouldn't say I assumed that fully replaced.

11   I think my handicap is not knowing what those supplies

12   are. From a prior meeting that I had with AFRD2

13   officials on March 18th of this year, I was advised,

14   maybe I misunderstood, but that anybody with these

15   conditions have some sort of supplemental supply.

16   Q.   Okay. So, for example, if someone had a

17   supplemental right, but it only provided half the volume

18   or half the amount of water that the natural flow right

19   provided, it would not supply a full -- it would not

20   provide a full water supply; correct?

21   A.   Perhaps not.

22   Q.   And you didn't take that into account in doing

23   your memo?

24   A.   No, because I don't know what those supplies

25   are. I had previously asked the AFRD2 for at least a

 1   list of rights of people that do not have any AFRD2

 2   supplies. This was going back a couple months, well

 3   before the memo. And I was never given that

 4   information.

 5   Q.   I would like you to turn to page 17 of your

 6   staff memo.

 7   A.   Okay.

 8   Q.   The second to last paragraph on there states

 9   that, "Based on recent communication with AFRD2

10   representatives and the WD37 watermaster, as well as

11   past correspondence from the WD37 watermaster attached

12   to Luke (2015), IDWR understands that most or all of the

13   exchange condition water rights of places of use have a

14   supplemental supply of water from the Snake River

15   delivered by AFRD2 via the Milner Gooding Canal. The

16   watermaster has explained that when a river right place

17   of use has AFRD2 supplemental water and the river right

18   is cut by priority, the supplemental water replaces the

19   river right after the right is cut."

20   So when you use the term in that paragraph

21   "replaces," what is your understanding of replacement?

22   A.   Well, as the priority of the decreed right

23   goes off or is exhausted, then the supplemental water

24   comes into effect or kicks in.

25   Q.   So aren't these two concepts -- aren't they

1 actually two concepts, exchange versus supplemental

2 rights?

3   A.   Yeah, they are different things.

4   Q.   Well, let's start with the exchange rights.

5 Are the exchange rights in place if the water right is

6 not in priority?

7   A.   The water right has to be in priority. It has

8 to be deliverable.

9   Q.   So when an exchange right, a water right with

10 a 161 condition is out of priority, the exchange no

11 longer applies; isn't that correct?

12   A.   Correct.

13   Q.   So at that point they are not relying upon the

14 exchange condition of the water right for a water

15 supply; correct?

16   A.   When you say "they," you mean the holder of

17 the exchange right?

18   Q.   The holder of a water right with an exchange

19 condition cannot rely upon the exchange condition for a

20 supply of water if the water right is out of priority?

21   A.   Yeah, you can't rely on the amount of water

22 under that exchange right.

23   Q.   So it has to be in priority for the exchange

24 to be in place?

25   A.   Correct.

1   Q.   So then the supplemental right, if the water

2   right holder has one, kicks in; correct?

3   A.   That's my understanding.

4   Q.   And it only kicks in to the extent that the

5   supplemental water right holder has agreed to or is

6   provided a volume of water for that supplemental right;

7   correct?

8   A.   That's my understanding, correct.

9   Q.   And that may or may not match up to the

10 underlying water right?

11   A.   Correct, I don't -- I don't know what those

12 are.

13   Q.   Have you examined any of the depositions that

14 have been taken in this case of the holders of these 161

15 exchange rights?

16   A.   No.

17   Q.   Have you been provided any information since

18 you wrote this memo about the fact that many of the

19 water right holders with this exchange right do not have

20 supplemental rights sufficient to satisfy their crop

21 needs?

22   A.   Have I been given information about that?

23   Q.   Yes. Since you wrote this memo?

24   A.   Yeah. I received two emails one from

25 watermaster Kevin Lakey, and one from Cooper Brossy. I

1 think that related to that subject. I guess took some

2 exceptions in my understanding of exchange rights.

3   Q. Let's move on to the next paragraph on page

4 17, the last paragraph. It states, "IDWR staff finds

5 there may be some lack of clarity or understanding among

6 water users and the water delivery entities regarding

7 the delivery of exchange condition rights and extent of

8 AFRD2 supplemental water delivered to the lands covered

9 by such rights. Unless additional information is

10 furnished regarding available water supplies for lands

11 with exchange condition water rights, IDWR assumes such

12 lands have a full supply of water in 2021 and most other

13 years. Therefore, IDWR assumes that the exchange

14 condition rights are not injured from depletion of river

15 flows caused by ground water pumping."

16   So in that paragraph you state that the

17 Department is assuming that these lands have a full

18 supply of water, because they have an exchange condition

19 basically; isn't that true?

20   A. They have an exchange condition and

21 supplemental supply of water from AFRD2.

22   Q. Well, the last sentence, I'm just going to

23 direct your attention to the last sentence on page 18

24 states, "IDWR assumes that the exchange condition rights

25 are not injured from depletion of river flows caused by

1 ground water pumping." So I'm just trying to clarify

2 this. It's not the exchange condition that supplies a

3 full supply of water; correct?

4   A. Correct. It's --

5   Q. It's if they have a supplemental right?

6   A. Correct. The lands to which the exchange

7 condition rights are appurtenant have a supplemental

8 supply of water. And so if there are additional sources

9 or supplies of water to those lands, they may not be

10 injured, or they may not be short.

11   Q. To the extent that they have a supplemental

12 supply; correct?

13   A. Yes.

14   Q. And you don't have sufficient information to

15 determine which of the exchange rights have supplemental

16 rights; correct?

17   A. I haven't examined that. I was -- again, it's

18 my understanding from the meeting with Mr. Hobdey that

19 all of those have supplementals supply.

20   Q. And you have not examined how much

21 supplemental right each one of those water right holders

22 has?

23   A. No.

24   Q. So when you are making this assumption -- or

25 let me put it this way. Based upon that assumption, you

1 are then taking all of these people with exchange rights

2 effectively out of this proceeding; correct?

3   A.   Based on my assumption, yes.

4   Q.   So you did not consider in your analysis

5 losses this year to those that have exchange rights?

6   A.   Correct.

7   Q.   Let me just give you a hypothetical because

8 there was quite a bit of testimony in this regarding the

9 depositions. If an exchange right water holder had a

10 supplemental right, but that water right, that

11 supplemental right was only for 50 percent of the water

12 required to irrigate the crop, wouldn't that still

13 constitute a shortage that should be considered in this

14 proceeding?

15   A.   Well, it could be a shortage. But the

16 shortage in supply is not entirely from the Little Wood

17 or Silver Creek. It would be then a shortage of supply

18 from the Snake River. But a shortage is a shortage. If

19 we look typically in all the sources of water that might

20 be available, but we didn't have that information as to

21 what the supplemental supply was.

22   Now, I will say that in the meeting with

23 Mr. Hobdey, there was some information given that -- and

24 I talked to the watermaster and several users afterward

25 that seemed to disagree with Mr. Hobdey. But I seemed

 1   to get an understanding from Mr. Hobdey that they had, I

 2   guess, an adequate supply, but I didn't understand some

 3   of the things explained by Mr. Hobdey, and some of the

 4   users seemed to disagree with that.

 5   I will say, and I didn't note this anywhere

 6   prior, but if you look at the 1955 black book, there is

 7   a resolution from the AFRD2 about this particular

 8   subject, delivery of water to the decreed rights, and

 9   that is a very confusing to me, a very confusing

10   resolution. But it seemed to align a little bit with

11   what Mr. Hobdey was saying, because either they would

12   continue to get the same water under their decreed

13   rights, or would get the normal delivery that everyone

14   else in the AFRD2 system gets, which I believe is

15   five-eighths of an inch per acre.

16   The resolution in and of itself seemed

17   to -- there was some conflicting language in it. So

18   I -- but nonetheless, that resolution seemed to track a

19   little bit with what Mr. Hobdey was saying. So I think

20   that's the purpose here of this statement, that there

21   seems to be some lack of understanding about this item

22   and either between the entity, AFRD2, and the water

23   users -- in fact, Mr. Hobdey, I remember even saying

24   that there is not a good understanding or maybe

25   documentation --

1   Q.   Well, I think --

2   A.   -- these exchange scenarios.

3   Q.   Excuse me. I think the most important thing

4   for this proceeding is that you disregarded all of those

5   water rights for the purposes of determining injury?

6   A.   I wouldn't say disregard, but we just had a

7   lack of information. And I again I'm saying, if we had

8   the information, or if the information is provided, and

9   I think that's the purpose of this hearing, is that

10 information can be presented.

11   Q.   And that was my next point. That if these

12 water right holders get up and testify about the extent

13 of these supplemental rights, you may have to reconsider

14 this opinion that you've stated in this staff memo;

15 isn't that correct?

16   A.   That was the intent of saying, unless or until

17 we get further information, yes. And there have been

18 some discussion about that during the advisory committee

19 meetings, and that information was never provided as far

20 as I knew.

21   MR. FLETCHER: Thank you, Mr. Luke.

22   THE HEARING OFFICER: Thank you.

23 Mr. Fletcher, and I personally want to thank

24 Mr. Fletcher for speaking up so that what he says can be

25 heard by everyone. So thank you.

1   Mr. Rigby, do you have questions?

2   MR. RIGBY: Just a couple, Mr. Director.

3   CROSS-EXAMINATION

4   QUESTIONS BY MR. RIGBY:

5   Q. Good morning, Mr. Luke.

6   A. Good morning.

7   Q. Have you seen the most recent NRCS IDWR

8   Exhibit No. 5, which is the June, I believe it's right

9   there. Yes.

10   A. Yes, I have.

11   Q. And, of course, in your analysis, and back

12   when you did your memo, you used the, I'll say it, the

13   good year, the good water supply regular year and not so

14   good water supply year?

15   A. The good, the bad, and the ugly.

16   Q. Yeah, the good, the bad, and the ugly, a good

17   way to put it. If you had had this for this particular

18   year, and, of course, this year 2021 it seems to be the

19   focus of this particular hearing, would you estimate

20   then that your priority cuts estimations would be much

21   sooner?

22   A. Well, I don't -- are you asking me if I would

23   have selected another year?

24   Q. Okay. I'll ask you that, yes.

25   A. Yeah, I might have.

1   Q.   And if this were the year you selected, I'm

2   just asking if this were the year you selected, would

3   you estimate the priority cuts that you addressed in

4   your memo would be sooner?

5   A.   Well, I think that's hard to say without going

6   through the analysis. But I think we might have

7   selected a different year. I think Mr. Vincent talked

8   about 1994. And to take it a step further, if I looked

9   at a comparable year in the pre-groundwater development,

10   I might have selected 1931. And we do have priority

11   delivery records from 1931.

12   Q.   And do you have any estimation as to what the

13   outcome of that would have been?

14   A.   No, I haven't looked at that closely. I will

15   say 1931 -- excuse me -- in the expanded SWSI table that

16   I talked about early for the past 104 or five years,

17   1931 was ranked the lowest. And it's possible 2021

18   could be similar to that or possibly worse.

19   Q.   But it just seems reasonable to assume, is it

20   not, that having chosen a year that is to a good, a bad,

21   and the ugly, even more ugly than the one you chose,

22   would reduce or shorten the priority cut; isn't that

23   reasonable to assume?

24   A.   I think it's reasonable to assume that, yes.

25   Q.   Do you have any estimate of the adequate water

1 supply for the irrigated acres of the Little Wood in the

2 Silver Creek drainage? Have you done any study on that?

3   A.   The adequate water supply?

4   Q.   Correct.

5   A.   How do you mean exactly?

6   Q.   Well, it's been addressed in the memos. And

7 I'm just asking you, what have you done in any kind of a

8 study for adequate water supply in this drainage, if

9 any?

10   A.   I haven't, not beyond what's in my memo, I

11 believe.

12   MR. RIGBY: Okay. I have no further

13 questions.

14   THE HEARING OFFICER: Thank you, Mr. Rigby.

15   Mr. Barker.

16   MR. BARKER: Thank you, Mr. Director.

17   CROSS-EXAMINATION

18 QUESTIONS BY MR. BARKER:

19   Q.   Albert Barker for the South Valley Ground

20 Water District. Good morning, Tim. How are you?

21   A.   Good.

22   Q.   How are your eyes today?

23   A.   Doing pretty well, a little flickering.

24   Q.   I have to apologize. I'm going to ask you to

25 look at some documents if that's okay?

1   A. Yeah, no worries.

2   Q. If you look in that book with the yellow color

3   on the binder right in front of you. There you go.

4   A. Okay.

5   Q. So what I would like to do is a little bit

6   similar to what we talked about in the deposition, and

7   start with how water has been administered in the Big

8   Wood area. And so what I would like you to do first is

9   turn to Exhibit 3?

10   MR. FLETCHER: Which Exhibit 3 are you talking

11   about?

12   MR. BARKER: SVGWD/GGWD Exhibit 3.

13   THE WITNESS: That's on --

14   Q. (BY MR. BARKER) It's in the binder. So there

15   is a tab in the binder. I don't see a tab for 3. It

16   starts at 5.

17   MR. BARKER: May I see what happened, maybe

18   somebody -- that's all yours.

19   THE WITNESS: That's my stuff, yeah.

20   Q. (BY MR. BARKER) I don't know --

21   THE HEARING OFFICER: We can switch,

22   Mr. Barker.

23   MR. BARKER: We had some documents fall out

24   apparently. There they are.

25   Q. (BY MR. BARKER) Mr. Luke, do you recognize

 1   Exhibit 3?

 2   A.   Yes.

 3   Q.   Okay. And tell me what this is?

 4   A.   It is the order designating the Big Wood River

 5   ground water management area.

 6   Q.   So are you familiar with this order?

 7   A.   Yes, I've seen it before.

 8   Q.   Okay. And what was the purpose, if you know,

 9   of designating the Big Wood ground water management

10   area?

11   A.   Concern and the reason for designating was

12   to -- well, it's because of concerns about continued

13   ground water pumping and effects on interconnected

14   surface water sources and supplies.

15   Q.   And this was dated in 1991?

16   A.   Yes.

17   Q.   And it included an area, or an area bigger

18   than the triangle, it included the Camas Prairie, the

19   triangle, and parts of the basin to the north; right?

20   A.   Correct.

21   Q.   And the ground water management area was

22   intended to set up a method of managing ground water in

23   this entire area?

24   A.   Yes.

25   Q.   And attached to the ground water management

1   area is a management policy?

2   A.   Yes.

3   Q.   And in that management policy, the Department

4   or the Director at that time issued an order that said

5   there will be a moratorium on new wells that were either

6   consumptive or that were not fully mitigated?

7   A.   Yes.

8   Q.   And then it has an observation in the

9   management policy on page 3, at the bottom, where it

10   lists the geohydrologic characteristics of the Big Wood

11   River Basin. The second paragraph under that says that

12   "Silver Creek is fed by numerous springs whose flows

13   depend partly on percolating seepage resulting from Big

14   Wood River irrigation diversion and use upstream in the

15   Bellevue area." Do you see that?

16   A.   It's on page 3.

17   Q.   On page 3 of the exhibit, the first page of

18   the management policy.

19   A.   Okay.

20   Q.   Okay.

21   A.   Which is page 1 of the management policy.

22   Okay.

23   Q.   Correct. So is what I read consistent with

24   your review of the geohydrology of the basin?

25   A.   Okay. You were reading from which sentence

1   now?

2   Q.   Sorry.   The last paragraph at the bottom of

3   page 3 --

4   A.   Okay.

5   Q.   -- 3, first page of the management policy.

6   Where it says, "how Silver Creek is fed."

7   A.   Yes.

8   Q.   Okay.   Do you understand that to be the way

9   that Silver Creek is supplied with water?

10   A.   Yes.

11   Q.   In this order did the Department in 1991

12 establish an area of common ground water supply?

13   A.   No, not -- no.

14   Q.   Then move on to Exhibit 4.

15   MR. BARKER: Can I offer Exhibit 3 into

16 evidence as SVGWD/GGWD Exhibit 3?

17   THE HEARING OFFICER: Any objections to the

18 document being admitted into evidence?

19   MR. LASKI: No.

20   MR. THOMPSON: No.

21   THE HEARING OFFICER: The document marked as

22 Exhibit 3 of South Valley and Galena Exhibit 3 is

23 received into evidence.

24   (SVGWD/GGWD Exhibit 3 received.)

25   MR. BARKER: Thank you.

1   Q.   (BY MR. BARKER)   Okay.   Would you turn to

2   Exhibit 4?

3   A.   Yes, sir.

4   Q.   This is a preliminary order creating a water

5   measurement district for ground water rights in the Big

6   Wood and the Little Wood Basins?

7   A.   Yes.

8   Q.   Were you involved in establishing this ground

9   water measurement district?

10   A.   Yes.

11   Q.   And what was the purpose of the measurement

12   district?

13   A.   To begin measurement and reporting of ground

14   water diversions within the Big Wood ground water

15   management area and other areas that Basin 37 that were

16   not already subject to measurement orders.   So the only

17   other area would be there were a few wells in the Carey

18   area.

19   Q.   And if you look at page 13 of the preliminary

20   order, Attachment A, it describes the area subject to

21   the ground water measurement district?

22   A.   Yes.

23   Q.   And that includes all of the triangle?

24   A.   It includes the triangle.

25   Q.   This order came out in 2011.   What then took

1   place after that? Well, let me back up a step.

2   What was the impetus for the Department

3   creating the ground water measurement district?

4   A. Well, to begin the process of measuring and

5   reporting ground water use, and getting the requirement

6   out there for users to comply with the deadlines for

7   installation of measuring devices.

8   Q. On page 2 of the preliminary order at the

9   bullet at the top of the page. There is a statement

10   there that said, "Senior surface water rights owners

11   within the Big and Little Wood River basins have

12   requested the Department to implement conjunctive

13   administration of ground water and surface water

14   resources."

15   A. Yes.

16   Q. What were those requests to the Department?

17   Let me back up. Do you know who those requests came

18   from?

19   A.   Well, prior, when I say prior, a year or two,

20   maybe a couple of years prior to this, there were

21   inquiries or requests to start moving towards

22   conjunctive administration, including measurement in

23   reporting of ground water use, bring ground water rights

24   into districts, development of a ground water model, and

25   just generally the management and administration of

 1   ground water rights and diversions in this area.

 2   Q.   Had there been requests for conjunctive

 3   management of those ground water rights?

 4   A.   Well, I don't know about specific requests.

 5   There were discussions. I remember inquiries, and I

 6   guess I would just say, maybe pressures from surface

 7   water users, inquiries from local legislatures about

 8   where the Department was, what we were doing? We had

 9   this Snake River Basin Adjudication that was ongoing at

10   about the same time, and that was one of the last basins

11   in the state that the Department was issuing

12   recommendations, and recommendations for partial

13   decrees.

14   And that's one of the reasons we created the

15   measurement district, because we didn't have those

16   partial decrees yet. So we couldn't put the ground

17   water rights in a water district yet, we didn't have

18   authorization from the court for administration of those

19   rights until they are at least recommended by the

20   Department, and we weren't quite there yet. So this was

21   an interim step to begin getting the ground water rights

22   at least measured and reported.

23   Q.   Was it the Department's position that it could

24   not do conjunctive management until the rights were

25   decreed?

1   A.   Yes.

2   Q.   Was it also then the Department's position

3   that they couldn't do conjunctive management until you

4   had a measurement in place?

5   A.   I don't think that's necessarily true, but I

6   think it's helpful.

7   Q.   So in order to help conjunctive management,

8   you needed to be able to measure the wells?

9   A.   Yes.

10   Q.   And so you issued an order requiring -- the

11   Department issued an order requiring wells to be

12   measured over some period of time?

13   A.   Yes, we required installation of measuring

14   devices for irrigation wells over five acres, and by the

15   2013 irrigation season, as well as non-irrigation uses

16   by January of 2013, and then installation measuring

17   devices for irrigation of five acres or less by 2014.

18   Q.   So contemporaneous with this, there was the

19   USGS was in the process of developing a ground water

20   model for the Big Wood ground water area?

21   A.   I believe they were, yes.

22   Q.   Was part of the reason for asking for a

23   measurement district or sorry -- for instituting a

24   measurement district to gather measurements for the

25   model that was being developed for the ground water

1 management, for the ground water area?

2   A.   In my mind and perspective, I think that was

3 the helpful purpose of measuring the wells, yes.

4   MR. BARKER: So, director, I would move the

5 admission of South Valley and Galena Exhibit 4.

6   THE HEARING OFFICER: Any objection to the

7 admission of this document?   Hearing no objection, the

8 document marked as South Valley and Galena Exhibit No. 4

9 is received into evidence.

10   (SVGWD/GGWD Exhibit No. 4 received.)

11   Q.   (BY MR. BARKER)   Okay.   Would you move over to

12 Exhibit 5, please.

13   A.   Okay.

14   Q.   So you recognize Exhibit 5?

15   A.   Yes.

16   Q.   And this is a preliminary order -- well, tell

17 me what it is, what this order does?

18   A.   This order abolished the measurement district

19 and included ground water rights in the triangle and

20 Upper Wood River Valley within Water District 37, and it

21 also combined Water District 37 and 37M, "M" as in Mary,

22 which 37M is Little Wood River and Silver Creek.   And 37

23 was the Big Wood River and Malad River.   And at the time

24 those technically operated, there were separate water

25 districts, but for all intents and purposes, they shared

1   the same watermaster. They more or less operated as one

2   district. So we combined those two districts into one.

3   We created a separate water district for the Camas

4   Prairie to include surface water and ground water

5   diversions and rights. And we included the ground water

6   rights as I said earlier, in the Bellevue triangle, Wood

7   River Valley. And within that same ground water

8   management area outside of the Camas drainage within

9   Water District 37. Ground water rights in the Eastern

10 Snake Plain Aquifer were already being or were already

11 included in Water District 130.

12   Q. So this order was 2013; is that right?

13   A. Yes.

14   Q. So is this just a natural progression of

15 creating the measurement district or is this a change in

16 view by the Department of how the water rights should be

17 managed, the ground water rights should be managed?

18   A. Well, it is a progression. But the primary

19 difference is that by placing them in a water district,

20 the water district has the authority to administer or

21 regulate the rights, as well as assume responsibility

22 for measurement in reporting. The measurement district

23 under Idaho Code as the authority there is limited to

24 just measurement and reporting only of diversions.

25   Q. And then in the preliminary order, page 3,

1   paragraph 13, it indicates that you gave a presentation

2   describing how all of this would work to the water users

3   in attendance at the hearing?

4   A.   Correct.

5   Q.   And do you remember that presentation?

6   A.   Yes.

7   Q.   And in bullet point 3, under your presentation

8   it says that combining the water districts with surface

9   and ground water will provide for proper conjunctive

10 administration of surface and ground water rights and

11 protect senior priority rights; is that right?

12   A.   Right.

13   Q.   So that's one of the reasons for doing the

14 district?

15   A.   Correct.

16   Q.   And then you remember that some of the users

17 raised questions about the impact of including the

18 ground water rights in with the surface water rights?

19   A.   Right.

20   Q.   Do you recall that?

21   A.   Yes.

22   Q.   And then if you look at page 6, item 24?

23   A.   Yes.

24   Q.   The first bullet under there says, adversarial

25 interests between ground water users and surface water

1   users resulting from any potential conjunctive

2   administration process would compromise the operations

3   of a water district when you combine the two. Is that

4   one of the concerns that people raised?

5   A.   Yes.

6   Q.   And then the Department in its order,

7   conclusions of law, address that concern; correct?

8   A.   Yes, I think we did.

9   Q.   If you look on page 10, paragraph 16.

10   A.   Yes.

11   Q.   It says, I think I'll read the whole or a part

12   of paragraph 16. In response to the testimony that was

13   provided opposing the combination, the Department's

14   conclusions of law say the following. "Adversarial

15   tensions between ground water and surface water users

16   resulting from potential conjunctive administration of

17   water rights should not negatively affect water district

18   operations given the limited regulatory scope of the

19   water district and the that conjunctive administration

20   is guided by separate processes outlined in the

21   Conjunctive Management Rules (CMRs) (IDAPA 37.03.11).

22   Did I read that correctly?

23   A.   Yes, you sure did.

24   Q.   And is that the intention of the Department

25   when the ground water rights were incorporated into the

1 water district that conjunctive administration would be

2 guided by the Conjunctive Management Rules?

3   A.   Yeah, the -- from my perspective at that time,

4 we were anticipating a delivery call under the

5 Conjunctive Management Rules.

6   Q.   And you didn't advise, you, the Department,

7 and the folks involved in creating this order, didn't

8 tell the water users that there would be other types of

9 conjunctive administration?

10   A.   Well, I don't recall discussions to that

11 extent.

12   Q.   So this is in 2013. And then you know that in

13 2015, there was an effort for a delivery call that was

14 made by some of the surface water users; right?

15   A.   Yes.

16   Q.   Okay. And you did an evaluation. Here it is.

17 Turn to Exhibit 26.

18   MR. BARKER: Before I move on to that exhibit,

19 I would offer exhibit South Valley/Galena Exhibit 5 into

20 evidence.

21   THE HEARING OFFICER: Any objection to the

22 admission of the document? The document marked as South

23 Valley and Galena Exhibit 5 is received into evidence.

24   (SVGWD/GGWD Exhibit 5 received.)

25   Q.   (BY MR. BARKER) So, Tim, do you recognize

 1   this Exhibit 26?

 2   A.   Yes, I do.

 3   Q.   Okay. And tell me what Exhibit 26 is?

 4   A.   It's a staff memo that I prepared in response

 5   to the Director's request for memoranda, dated June 12,

 6   2015. And specifically I summarized the water rights

 7   that were identified in the delivery call, some

 8   background information about the delivery system with

 9   the Big Wood Canal Company, and the water rights, and

10   how the watermaster administers the different areas of

11   the water district and those water rights, and how we

12   determined priority cuts and various related items or

13   issues.

14   Q.   And attached to your memorandum to the

15   Director in 2015 is an Attachment 5. It starts on page

16   29 of the exhibit.

17   A.   Yes.

18   Q.   And that is a letter that you received from

19   the watermaster for Water District 37 explaining how he

20   administered water rights?

21   A.   Correct.

22   Q.   And then if you look at page 5 of your memo,

23   not of the letter.

24   A.   Yes.

25   Q.   About two-thirds of the way down you discuss

1   the exchange condition?

2   A.   Yes.

3   Q.   Do you see that?

4   A.   Yeah.

5   Q.   And that's the same exchange condition that

6   you were mentioning earlier in your testimony, and

7   that's described in your staff report for this

8   proceeding?

9   A.   It is, correct.

10   Q.   Okay. And after writing that, did you ever

11   receive any information from the Big Wood, Little Wood

12   water users association members explaining to you that

13   your interpretation in this memo about the exchange

14   condition was incorrect?

15   A.   I didn't receive information from anyone about

16   anything I had said in this memo about exchange rights.

17   Q.   And was your August 31, 2015 memo also part of

18   what you relied upon when you prepared your May 17th,

19   2021 staff memorandum?

20   A.   Yes, I made numerous citations to this memo in

21   my May 17th, 2021 memo.

22   MR. BARKER: Mr. Director, I offer South

23   Valley/Galena Exhibit 26 into evidence.

24   THE HEARING OFFICER: Any objection to the

25   admission of this document? Hearing none, the document

1 marked as South Valley and Galena Exhibit 26 is received

2 into evidence.

3   (SVGWD/GGWD Exhibit 26 received.)

4   Q. (BY MR. BARKER) Now, turn back to the very

5 first exhibit.

6   A. Okay.

7   Q. Mr. Luke, have you seen a copy of this

8 memorandum decision and order before that's marked as

9 Exhibit 1?

10   A. Not -- I may have seen it, but I'm not

11 familiar with it.

12   Q. So if I represent to you that this is the

13 decision by the court in response to the 2015 delivery

14 call, would that help you?

15   A. Yes, it would. I agree with that.

16   Q. Okay. And I certainly don't want you to offer

17 any legal opinions about the Judge's order. But is it

18 your understanding that the reason that the delivery

19 call was -- well, let me say. You understand that the

20 delivery call was rejected by the court as being

21 improperly broad?

22   A. Yes, there were, I guess, I would just

23 generally say, there were procedural problems with the

24 delivery call.

25   Q. Right. And one of those procedural problems

 1 with the delivery call was that the court believed that

 2 the mechanism that was being used was improper because

 3 there was no area of common ground water supply that had

 4 been identified in for the Big Wood?

 5   A. Well, I don't know about that. My

 6 general -- my personal understanding was an issue with

 7 the Conjunctive Management Rules in which rules the

 8 Department was using in addressing that delivery call --

 9   Q. And --

10   A. -- of which set of rules.

11   Q. So did you understand that the area of common

12 ground water supply was a significant question in which

13 rules the Department could use?

14   A. Well, I didn't -- I guess I didn't understand

15 that to be a critical issue in that, but I don't know.

16   Q. And then --

17   A. I didn't follow it that closely.

18   Q. So were you involved in any discussions within

19 the Department after this decision came out about what

20 kind of action the Department would take, if any, with

21 respect to this 2015 delivery call?

22   A. Not that I recall specifically, just generally

23 that we'd have to consider carefully how we're

24 implementing the rules on any subsequent delivery call.

25   Q. Was there any discussion within the Department

1   about trying to establish an area of common ground water

2   supply so that a delivery call could proceed?

3   A.   Not that I know of.

4   Q.   Is there a reason that the Department has not

5   established an area of common ground water supply for

6   the Big Wood ground water area?

7   A.   Not that I know of.

8   MR. BARKER: I'll offer South Valley/Galena

9   Exhibit 1.

10   THE HEARING OFFICER: Any objection to the

11   admission of this document. Hearing none, the document

12   marked as South Valley and Galena Exhibit 1 is received

13   into evidence.

14   (SVGWD/GGWD Exhibit 1 received.)

15   Q.   (BY MR. BARKER) Now, Tim, I want to switch

16   gears a little bit and go to Exhibit 6.

17   A.   Okay.

18   Q.   And what I'm going to tell you to give you a

19   little introduction here, Exhibit 6 through 11 in this

20   book are documents relating to the contracts for

21   delivery of water out of American Falls Reservoir

22   District to the area served by AFRD2 and Big Wood Canal

23   Company. So I'll start through with some of these

24   documents and ask you if you've seen them before. And

25   then we can talk about them if you have or have not. So

1   Exhibit 6 is a 1927 contract. Do you see that?

2   A. Yes.

3   Q. Have you ever seen this 1927 contract before?

4   A. Yes.

5   Q. In what context have you seen this contract?

6   A. I've reviewed it several days ago in

7   preparation of this hearing.

8   Q. And what was, if any, the relevance of this

9   1927 contract to your analysis of the exchange condition

10 that you've talked about earlier today?

11   A. Well, as I said I never reviewed it until just

12 a couple of days ago. Like I had no knowledge -- well,

13 let me back up. I was aware of the 1927 contract by

14 referencing later contracts, including the 1954 and 1962

15 contracts, which are referenced in the exchange

16 condition placed on those water rights in the SRBA. But

17 I never had since those contracts amended, or actually

18 superseded this, I never, A, had reason to look at it,

19 and 2, until I think a couple of months ago didn't even

20 have access to this contract, so...

21   Q. Okay. So it's your view that the earlier

22 contracts were, because they were superseded by the 1954

23 contracts, are not particularly relevant to your

24 analysis?

25   A. Right.

1   Q.   Okay.

2   A.   At the time, yes.

3   Q.   So look on page 3 of Exhibit 6.

4   A.   Okay.

5   Q.   And I just want to read a paragraph, and ask

6   you if you think this comports with your understanding

7   of the water supply. And this is in 1927. "Whereas,

8   most of the lands of said Idaho irrigation project have

9   been reclaimed and improved and are occupied by settlers

10   who have separate crop losses on account of such water

11   shortages and on account of such water shortages are

12   struggling under great difficulties to continue the

13   occupation and cultivation of the lands of the project."

14   So my question is, what is your understanding

15   of that statement about the condition of the water

16   supply to lands that were within what now became the Big

17   Wood service area as of 1927?

18   A.   There were typically or often waters short

19   because they relied on -- well, the available water

20   supply just often was not adequate to serve all of the

21   lands under the project. This was a Carey Act project.

22   And it's not uncommon with many Carey Act projects in

23   the day, they were often, or that was often the case

24   where they had more lands to be irrigated than they had

25   a water supply for.

1   Q.   And these water shortages which resulted in

2   crop losses occurred long before there was significant

3   development of ground water in the Bellevue triangle?

4   A.   Yes.

5   MR. BARKER: So I will move the admission of

6   Exhibit 6.

7   MR. FLETCHER: Mr. Director, I don't object to

8   it as a historical document. I object to it to the

9   extent that people may be trying to treat this contract

10 as totally ineffective, because it was not as stated by

11 Mr. Luke. It was superseded by Exhibits 9 and 10 of

12 Mr. Barker's list of exhibits. So to that extent, I

13 would object to the admission of this.

14   THE HEARING OFFICER: Any other objection to

15 the admission of this document? Okay. I will admit it

16 with the stipulation with the statement that this

17 document is admitted into evidence for historical

18 purposes. And based on the testimony, it is a contract

19 that has been superceded by additional amended

20 contracts. And I think you'd agree with that?

21   MR. BARKER: Yes, Your Honor, that's correct.

22   THE HEARING OFFICER: Okay. So it's admitted

23 with that particular statement.

24   (SVGWD/GGWD Exhibit 6 received.)

25   THE HEARING OFFICER: Let me add, Mr. Barker,

 1   that sometimes I am struggling with your references to

 2   pages. So, for instance, in looking at Exhibit 6, I

 3   think you referred to page 3, but it's actually page 4

 4   of your exhibit. And so I'm trying to go back and forth

 5   trying to figure out which pagination is the one that

 6   you are referring to.

 7   MR. BARKER: I will be more clear. Thank you

 8   for the direction.

 9   THE HEARING OFFICER: Thanks.

10   MR. BARKER: And just for the record, I think

11   I was looking at the page 3 of the contract and not the

12   page 3 of the exhibit when I was referring to that

13   reference.

14   THE HEARING OFFICER: Right.

15   Q. (BY MR. BARKER) So let's skip over 7 and 8.

16   Let's go to Exhibit 9. This is the contract that

17   Mr. Fletcher indicates is the replacement. Okay. So

18   have you seen this 1954 contract?

19   A. Yes.

20   Q. Well, what's your understanding of this 1954

21   contract?

22   A. Well, I've reviewed it specifically with

23   respect to the exchange language in the exchange

24   condition water rights. So my understanding is that the

25   contract authorizes or acknowledges the practice whereby

 1 decreed river rights from the Big Wood and Little Wood

 2 Rivers may receive water from the Snake River via the

 3 Milner Gooding Canal in exchange or in lieu of that same

 4 water being distributed to lands within the Big Wood

 5 Canal Company above the Milner Gooding Canal.

 6   Q. So if you look on page 1, this does say that

 7 this amends and supplements the 1927 contract?

 8   A. Yes.

 9   Q. Okay. So you were talking about the exchange

10 condition. If you would move to paragraph 28, page 27

11 of Exhibit 9.

12   A. Item did you say 28 or --

13   Q. Yes, paragraph 28.

14   A. Okay.

15   Q. So the first provision of this contract says

16 it's the intent to provide each irrigable acre of the

17 old lands within the district, whether located above or

18 below the main canal, with the same benefits from

19 American Falls storage and other sources.

20   So is it your understanding that the idea of

21 this contract was people above and below the canal were

22 going to get the same amount of water?

23   A. Well, that's the stated objective.

24   Q. And in on the next page on subparagraph 1, it

25 says that the water users below the canal are deemed to

1 agree that the water from AFRD will essentially replace

2 the water from Big Wood or Little Wood or Magic

3 Reservoir?

4   A. Referring specifically to sub item 1 or?

5   Q. Yes.

6   A. Yes, the owners of old lands below the Milner

7 Gooding Canal were entitled to water from the Big Wood

8 or Little Wood River or Magic Reservoir deemed to agree

9 that water from those sources may be used on old lands

10 above the canal, and to accept in lieu of water from

11 those sources, an equal amount of water from American

12 Falls storage and other sources available to the

13 district.

14   Q. So this is the exchange that you were

15 referring to?

16   A. Yes, this is the key language to the exchange.

17   Q. And then in paragraph 2, underneath that it

18 discusses pooling water between Magic and the other

19 sources. Is that paragraph 2 something that you took

20 into consideration in your evaluation of water supply?

21   A. I'm just reading through that again. So your

22 question is, did I take it into consideration for what?

23   Q. For the water supply available to these water

24 users with the exchange condition.

25   A. In 2021?

1   Q.   At all. I mean, you looked at it in 2015.

2   You looked at it again in 2021.

3   A.   Well, I don't -- I didn't really consider

4   this, Item 2, specifically. My review of these

5   documents was really more to understand the nature and

6   foundation of the condition, and also for purposes of

7   giving guidance to the watermaster this year in terms of

8   how these exchange rights should be administered.

9   Q.   But your guidance to the watermaster is not

10 just for this year; is it?

11   A.   No.

12   Q.   It's for that's how these rights should be

13 delivered?

14   A.   Right. But my point was, it was issued this

15 year and going forward, because we didn't have something

16 similarly in place prior to that.

17   Q.   And so the same question with respect to

18 paragraph 3 about what happens in the event of an

19 extreme shortage in water supply above Big Wood and

20 Little Wood? You can go ahead and read through that, if

21 you don't mind, to yourself.

22   A.   Yes, I've reviewed it.

23   Q.   Do you understand how that language fits in

24 with your instructions to the watermaster on

25 implementation of the exchange condition?

 1   A.   It doesn't. Not specifically to that item 3.

 2   Q.   And when you're talking about the exchange

 3   condition, you are talking about this entire paragraph

 4   28 of this contract; right?

 5   A.   Yes, generally. I think my guidance included

 6   specific language from 28, and I think it was from 28,

 7   item 1.

 8   Q.   But you didn't include any guidance on

 9   subparts 2 or subparts 3 to 28(A) -- or sorry --

10   A.   No.

11   Q.   -- 28(B)?

12   A.   No, not specifically.

13   MR. BARKER: Would move the admission of South

14   Valley/Galena Exhibit 9.

15   THE HEARING OFFICER: Any objection to the

16   admission of this document?

17   MR. FLETCHER: No objection.

18   THE HEARING OFFICER: The document that's

19   marked as South Valley/Galena Exhibit 9 is received into

20   evidence.

21   (SVGWD Exhibit 9 received.)

22   Q.   (BY MR. BARKER) Mr. Luke, turn to the next

23   exhibit, Exhibit 10.

24   A.   Yes.

25   Q.   Have you seen Exhibit 10 before?

1   A.   Yes.

2   Q.   And tell me what your understanding of Exhibit

3   10 is?

4   A.   I believe that's the 1962 contract between the

5   Bureau of Reclamation, AFRD2, and big Big Wood Canal

6   Company.

7   Q.   And is it your understanding that under this

8   contract that the Big Wood Canal Company is obligated to

9   the exchange condition in the 1954 contract?

10   A.   So my understanding is some of the exchange

11 condition information -- well, let me back up. This

12 contract includes or reiterates the exchange provisions

13 from 1954. So there is references to exchange

14 deliveries in this contract.

15   Q.   And those are the same exchange deliveries

16 that you looked at in the 1954 contract?

17   A.   Yes.

18   MR. BARKER: And I would offer Exhibit 10 at

19 this time, South Valley/Galena Exhibit 10.

20   THE HEARING OFFICER: Any objection to the

21 admission of this document? The document marked as

22 South Valley and Galena Exhibit No. 10 is received into

23 evidence.

24   (SVGWD/GGWD Exhibit 10 received.)

25   Q.   (BY MR. BARKER) Mr. Luke, will you turn to

1   Exhibit 11, please?

2   A.   Okay.

3   Q.   Have you seen Exhibit 11 before?

4   A.   Yes.

5   Q.   And how did you get your hands on Exhibit 11?

6   A.   This exhibit and the other, the '54 and '62

7   contracts, and maybe some other documents obtained

8   through a FOIA request in 2015 to the Bureau of

9   Reclamation as part of our, or my review and

10 investigation of the exchange water rights.

11   Q.   So this is something you relied upon in

12 evaluating exchange water rights?

13   A.   Well, in 2015 at the time, I remember looking

14 at it.

15   Q.   Is this something that was part of your

16 evaluation, though, for determining how the exchange

17 provisions operated?

18   A.   In 2015, or in my more recent memo to the

19 water district?

20   Q.   Either time.

21   A.   I don't recall really relying on it for the

22 more recent guidance to the watermaster, but I recall

23 reviewing this in 2015 relative to trying to understand

24 the exchange rights.

25   Q.   And in the first full paragraph about halfway

 1   through, the Commissioner of Reclamation advises

 2   Secretary of Interior that the principal objective of

 3   the contract is to assure substantially equal treatment

 4   for both new and old lands in AFRD2 and the Big Wood

 5   Canal Company, as to water supply and operation and

 6   maintenance. Is that consistent with your understanding

 7   of those contracts?

 8   A. Yes.

 9   MR. BARKER: I would move the admission of

10   Exhibit 11.

11   THE HEARING OFFICER: Any objection to the

12   admission of this document? Hearing none, the document

13   marked as South Valley and Galena Exhibit 11 is received

14   into evidence.

15   (SVGWD/GGWD Exhibit 11 received.)

16   Q. (BY MR. BARKER) Mr. Luke, there has been a

17   reference in both, I think in the 2015 memo that you

18   wrote, to some Cottonwood rights?

19   A. Yes.

20   Q. Can you explain what those Cottonwood rights

21   are, and how they are supposed to be administered?

22   A. No, I can't really.

23   Q. Okay. Are they rights that are water from the

24   Big Wood or from the Little Wood?

25   A. Yeah, I know just a little bit about them. My

1   understanding is the source of water on the so-called

2   Cottonwood Decree rights are -- or Cottonwood rights are

3   from the Big Wood River. Many or most of those, and

4   perhaps all, I'm not certain, are injected or diverted

5   out of the Big Wood River at the Richfield Canal and

6   injected into the Little Wood River near Richfield, and

7   then re-diverted downstream. And the water --

8   Q. A lot of those --

9   A. Go ahead. Sorry.

10   Q. I'm sorry.

11   A.   I was just going to say, those set of rights

12   have had different priority administration, if you will,

13   not strictly off the face of the water rights, which are

14   all 1899 priority. The watermaster has cut those rights

15   at times different from the normal 1899 priority on the

16   Big Wood. And it's somehow related to when the dam goes

17   in at Glendale Road up in the triangle. But I don't

18   understand, and I have never understood the basis for

19   it. I'm not aware of any general provisions or

20   conditions in the water rights. So I've --

21   Q. So --

22   A. I've advised the watermaster to just

23   administer those as 1899 priority rights.

24   Q. So those rights are administered now or should

25   be administered now as 1899 Big Wood priority rights

 1 even though there may be some deliveries in the Little

 2 Wood?

 3   A.   That's my position on that. I haven't

 4 formalized any guidance to the watermaster to that

 5 effect yet.

 6   Q.   Okay.

 7   THE HEARING OFFICER: Mr. Barker, how much

 8 longer? Should we take a break?

 9   MR. BARKER: Let's take five minutes or ten

10 minutes, whatever you like.

11   THE HEARING OFFICER: Let's take ten. So

12 let's come back about 20 after.

13   MR. BARKER: Thank you.

14   (Recess.)

15   THE HEARING OFFICER: Go ahead and go on the

16 record. I'm receiving some encouragement from some

17 corners in the room that both the attorney and the

18 witness need to speak up loudly, please, and I've

19 noticed it as well.

20   Q.   (BY MR. BARKER) Tim, let's look at your

21 exhibit, Department's Exhibit 4, which is your staff

22 memo.

23   A.   Okay.

24   Q.   And attached to your staff memo is an

25 instruction to watermaster, dated April 27, 2021 to

1 Kevin Lakey?

2   A.   Yes.

3   Q.   And on the last page of that attachment is

4 your description of how to deliver the water rights with

5 the exchange condition?

6   A.   Correct.

7   Q.   And I think I heard you say earlier that you

8 had received some communications about your watermaster

9 instructions from Kevin Lakey and Cooper Brossy?

10   A.   Not about the instructions. I think it was

11 about my memo from May 17th.

12   Q.   So --

13   A.   Related to specifically exchange rights.

14   Q.   Is that information that's been made available

15 to the parties in this case, those communications?

16   A.   I don't know.

17   Q.   Is --

18   A.   I think so. Yeah, I think so.

19   Q.   Is that information that has influenced any of

20 your testimony here today?

21   A.   No.

22   Q.   Not relevant to your testimony?

23   A.   Well, I mentioned it in my testimony, so...

24   Q.   I guess all I'm trying to find out is if there

25 is information that you are relying on to testify today

 1 that is not in your staff report that we haven't seen.

 2 That's what I'm trying to drive at?

 3   A. I think the exchanges that I referenced in my

 4 testimony earlier were provided in the information

 5 request. As far as I can remember right, there was a

 6 lot of stuff there, so I'm not 100 percent sure.

 7   Q. And you also mentioned consulting with AFRD in

 8 a meeting in, when was that, March?

 9   A. March 18th.

10   Q. And you mentioned the name Craig Hobdey?

11   A. Correct.

12   Q. Can you identify for the record Craig Hobdey?

13   A. He's the former attorney for AFRD2. He

14 retired I believe at the end of 2020.

15   Q. And he's been the long-time attorney for AFRD2

16 and Big Wood, both?

17   A. Yes.

18   Q. And so you felt it was reasonable to rely upon

19 what he told you about the contracts?

20   A. Well, one of the reasons for the meeting was

21 to get some of the ground water users in the room that

22 had asked a lot of questions in the ground water

23 management area advisory committee about the exchange

24 rights with representatives from AFRD2 that could

25 address some of these questions. And Craig, given his

 1 long tenure with those entities, seemed to would have a

 2 lot of knowledge about the subject.

 3   Q. And turn to page 12 of your staff memo.

 4   A. Okay.

 5   Q. You reference that you have a Table 2 on page

 6 12 referencing three particular years with streamflow,

 7 their rank over the 30 years, and SWSI, we've been

 8 calling that SWSI?

 9   A. Correct.

10   Q. So a SWSI number of more than one is a good

11 water year, or an above medium water year; is that

12 right?

13   A. Right. The range is plus four to negative

14 four, or it might be a 4.1 to negative 4.1.

15   Q. And each increment, so let's say is this

16 by -- let me see if I can ask this right. Is this by

17 percentage of how much water is accrued to the basin in

18 a particular year? And what I'm trying to get at is, if

19 you have a SWSI value of one, and compared to a SWSI

20 value of two, do you have 12 percent more water in the

21 basin in that particular year?

22   A. With the higher SWSI value, you would have

23 more runoff.

24   Q. Is that 12 percent?

25   A. I don't know.

1   Q.   You don't the percentages at all?

2   A.   No, I don't.

3   Q.   Okay. And so you selected these three years

4 this is for the work that Mr. Blankenau did?

5   A.   Right. Mr. Blankenau had actually selected

6 these years for the analysis he was doing, but he was

7 selecting years that would also be representative of a

8 good supply, a normal supply, and a water short supply.

9   Q.   So what's your role in putting -- I mean,

10 what's the purpose of you putting this table in your

11 report, because you are just reporting what the years

12 that Mr. Blankenau was going to use for his analysis?

13   A.   Well, I was just trying to respond to the

14 request in the Director's memorandum. It specifically

15 asked for identification of those types of years. And

16 Mr. Blankenau had already selected those. And in my

17 review, I confirmed that those seemed like

18 representative years for those three categories.

19   Q.   And then you identify the priority cuts for

20 the --

21   A.   Yes.

22   Q.   -- low, medium, and higher water years?

23   A.   Yes.

24   Q.   And that page is 14 through 16?

25   A.   Correct.

 1   Q.   And then for your analysis that you did, did

 2   you use any of these water years?

 3   A.   No.

 4   Q.   That was all the analysis that Mr. Blankenau

 5   did?

 6   A.   Right.

 7   Q.   Okay. So let's turn to section 9, page 18.

 8   A.   Okay.

 9   Q.   So in this section you identified irrigated

10   lands potentially injured by ground water pumping. So

11   what was the criteria for determining potential injury?

12   A.   Well, we were focused on the Little Wood River

13   and Silver Creek in accordance with the notice that the

14   Director had issued about this proceeding. So I focused

15   on identifying lands that had decreed river rights or

16   natural flow rights from those sources. I guess those

17   would be the rights that are my priority, may have

18   senior priorities, and might experience shortages in a

19   dry year like this.

20   Q.   And those rights are contained on Attachment

21   A?

22   A.   Yes.

23   Q.   And you included rights without regard to

24   their priority dates?

25   A.   Right, I selected all of the rights.

1   Q.   So you didn't go through and say, well, some

2   of these priority dates couldn't possibly be injured

3   because of how late priority they are?

4   A.   Right. I selected all the rights. Some of

5   the lands may have multiple priority rights on the same

6   land.

7   Q.   But you still listed the lands with the late

8   priority dates as well; right?

9   A.   I did.

10   Q.   And then you've gone through and taken some of

11   those rights off the list based upon the criteria you've

12   identified in the bullet points in section 9?

13   A.   Yes.

14   Q.   Okay. So then what did you do with that list?

15   What happened next with the list of water rights?

16   A.   The remaining list?

17   Q.   No. No. The list that you've identified in

18   Exhibit A. What happened to that?

19   A.   Well, that was used by Mr. Blankenau in his ET

20   model analysis.

21   Q.   And did you review his ET model analysis?

22   A.   I reviewed his memo, yes.

23   Q.   And did you find anything to disagree with

24   Mr. Blankenau in the results that he reported?

25   A.   No.

1   Q.   So in section 10 is where you get to analysis

2   of potential or possible injury. Okay. So tell me

3   again what you mean by possible injury here?

4   A.   I think I was -- I think the reference to

5   possible injury was just an attempt to be consistent

6   with the memorandum.

7   Q.   And so your methodology was to choose two

8   water right years, 1937 and 1939, as to compare 2021

9   with; is that right?

10   A.   Well, comparing two years or two analog years

11   that are recent and similar to 2021.

12   Q.   So you used 2020 and 2004 --

13   A.   Correct.

14   Q.   -- and as the analog comparable years?

15   A.   To 2021.

16   Q.   Okay.

17   A.   And then looked at those priority cuts in

18   those two years, and then compared with priority cuts

19   from 1937 and 1939, and I explained to Ms. Carter

20   earlier how the process for selecting those two years.

21   Q.   And then you selected 1937 to 1939 because you

22   had delivery records for those years?

23   A.   We had delivery records and looking at the

24   historical SWSI table for above Hailey, those two years

25   were similar to the projected runoff for 2021.

 1   Q. And you said something about a 1931 water year

 2   earlier in your testimony.

 3   A. I did.

 4   Q. And there is not a 1931 water year analyzed in

 5   this document?

 6   A. No, because at the time we did it, we were

 7   going off of the projected streamflow, April through

 8   September, based on the April 1 NRCS report.

 9   Q. Do you have the delivery records for 1931 that

10   you've looked at?

11   A. We do have delivery records from 1931.

12   Q. Have you looked at them for your analysis or

13   for your testimony today?

14   A. I don't know how to answer that. I looked at

15   the priority table, but I don't recall. I didn't look

16   at it very closely. I just confirmed that, yes, we do

17   have priority cut table listed for that year. I didn't

18   do any real further study or analysis of it. I just

19   glanced at it.

20   Q. Is it consistent with '37 and '39, or is it

21   different, significantly different?

22   A. I can't say. I'm sorry. I didn't look at it

23   closely, or I don't recall.

24   Q. So the 37 SWSI index was minus 3.2 according

25   to your report --

1   A. Yes.

2   Q. -- on page 21?

3   A. Correct.

4   Q. And the 39 SWSI year was .3, minus .3? Sorry.

5   A. Yes.

6   Q. And do you understand what the current SWSI

7   estimate for the remainder of 2021 is minus --

8   A. It's pretty low, yeah.

9   Q. -- minus 4.0? You are looking at IDWR Exhibit

10   5?

11   A. Yes, it would be minus 4.0 based on the 50

12   percent chance forecast.

13   Q. So that would mean that there is a significant

14   difference in the water supply in 2021 compared to the

15   1939 and 1937 SWSI reports?

16   A. Yes, it potentially would be lower.

17   Q. And so the priority rights would be filled

18   without regard to pumping would be filled or would be

19   cut sooner?

20   A. They might potentially be cut sooner or longer

21   and longer.

22   Q. And so is your effort here in Table 7 through

23   10 an attempt to identify material injury to any

24   individual water right?

25   A. No, I was just trying to respond to the

 1 request for information in the Director's request for

 2 staff memoranda.

 3   Q. Well, he asked for ways to possibly determine

 4 injury; did he not?

 5   A. Yes, and this was one of those.

 6   Q. So are you suggesting that comparing these two

 7 tables is a way to determine injury in the Department's

 8 practice?

 9   A. I think it's information that might be related

10 to review or determination of injury. I don't think in

11 and of itself it would necessarily be so.

12   Q. And so let's take, for example, the priority

13 cut table. Let's look at Table No. 7 on page 24.

14   A. Okay.

15   Q. So if you had a SWSI year in the 1930s of 4.0,

16 it's very possible that these May 1884 rights would not

17 be wrong, and that would change your entire

18 calculations?

19   A. Well, there would be a different table

20 comparing 2020 and 2004 to --

21   Q. That's fair.

22   A. -- 1931.

23   Q. And that's not been done by the Department?

24   A. No.

25   Q. If you go back to the exhibit book. If you

 1 would turn to Exhibit 19, please.

 2   A.   Okay.

 3   Q.   Do you have Exhibit 19 in front of you?

 4   A.   Yes, sir.

 5   Q.   And we talked about these in your deposition.

 6 So you've seen these -- we've talked about these in your

 7 deposition; right?

 8   A.   Yes.

 9   Q.   And you've seen all the meeting minutes of the

10 advisory committee?

11   A.   Yes.

12   Q.   And you attended all the advisory committee

13 meetings?

14   A.   I did.

15   Q.   And you reviewed these minutes before they

16 went out?

17   A.   I did.

18   Q.   And so you are familiar with the content?

19   A.   Yes.

20   Q.   I would ask you to look at the November 18th

21 advisory committee meeting minutes.

22   A.   Okay.

23   Q.   And in the third paragraph, there is a

24 description of Deputy Attorney General Baxter giving a

25 presentation and comparing and contrasting delivery

 1　calls under the conjunctive management rules and

 2　management plans under the ground water management act

 3　area?

 4　　　　A.　Yes.

 5　　　　Q.　Right.　What do you recall about the

 6　presentation?　Well, first of all, what was the purpose

 7　of giving the committee this explanation of the

 8　difference between the delivery calls and the ground

 9　water management area?

10　　　　A.　I believe it was really just background

11　information, educational.

12　　　　Q.　Were people interested in how, what the

13　process was for administration of ground water rights in

14　this advisory committee?

15　　　　A.　Yes, I think that's fair.

16　　　　Q.　And in this presentation by Mr. Baxter was

17　there ever any indication that there was an alternative

18　way of administration using 42-237a.g.

19　　　　A.　No, I don't recall that being discussed.

20　　　　Q.　And, in fact, throughout the advisory

21　committee meetings 42-237a.g. was not brought to the

22　attention of any of the water users, surface or ground

23　water?

24　　　　A.　Well, I think it may have been in the last

25　meeting or two.

1   Q.   You think there was a specific reference to

2   that statute?

3   A.   I thought there was at least by April 15th.

4   And it may not be reflected in these notes. But I guess

5   from my perspective by April 15th, everybody was pretty

6   well aware 237a.g.

7   Q.   How were people made aware of 237a.g.?

8   A.   Well, from the Director's comments in the

9   meetings about taking potential action and initiating

10   some proceedings.

11   Q.   And did the Director specifically tell people

12   he was going to initiate proceedings under 237a.g.

13   instead of under the Conjunctive Management Rules?

14   A.   Well, I don't know or can't remember if he

15   discussed or referenced 237a.g. But I think it would

16   have been apparent that absent a delivery call, we would

17   not be operating under the Conjunctive Management Rules.

18   So it would have to be under some other statute.

19   Q.   And so apparent because somebody at the

20   Department told the water users that you would not be

21   operating under the Conjunctive Management Rules?

22   A.   Repeat that. Sorry.

23   Q.   You said it was apparent you wouldn't be

24   operating under the Conjunctive Management Rules. Was

25   it made apparent, because somebody at the Department

1   said that to the water users?

2   A.   No, I guess I'm saying it's apparent by

3   April 15th based on the Director's comments that we

4   would be operating under other statutes, because we

5   didn't have a delivery call pursuant to the Conjunctive

6   Management Rules.

7   Q.   And in the November meeting there was no

8   mention made of 237a.g. because you hadn't thought of it

9   at that time as a potential means for administration; is

10   that right?

11   A.   Yeah, I don't think there was any discussion

12   of it at that point. Personally I wasn't -- I certainly

13   wasn't thinking of it or really even aware of it. As an

14   agency, at that point in time, I don't think we were

15   thinking about any curtailment, or proceeding, our

16   objective at that time was to --

17   Q.   Well, you were discussing the Conjunctive

18   Management Rules which certainly could lead to a

19   curtailment; right?

20   A.   Correct. I thought you were asking about some

21   intent. I mean, I may have misunderstood your question.

22   Sorry.

23   Q.   Okay. Let's skip up to page, it looks like

24   page 14, a January 5th meeting.

25   A.   Okay.

1   Q.   It says there in the second paragraph that you

2 gave an update on losses in Silver Creek at Highway 93

3 crossing. Do you recall what information you presented

4 to the advisory committee about -- let me back up a

5 step. What information did you have at the time of this

6 meeting about losses in Silver Creek at Highway 93?

7   A.   I was aware that the watermaster, Kevin Lakey,

8 has made some measurements above and below the Highway

9 93 bridge. And that those measurements, miscellaneous

10 measurements taken over the past prior several years,

11 and that he had measured losses from between 7 and 15

12 cfs.

13   Q.   Did you ever get copies of that data?

14   A.   No.

15   Q.   Have you seen any other data showing seepage

16 losses in Silver Creek and Little Wood between the

17 Sportsman Access gage and the Station 10 gage?

18   A.   Only information in Ms. Sukow's memo of May

19 17th.

20   Q.   And that's a calculation that she did just for

21 this proceeding; correct?

22   A.   Correct.

23   Q.   Let's talk about the meetings at the very end.

24 Let's look at the April 7th meeting minutes.

25   A.   Okay.

1   Q.   On the second page there is a summary of some

2   of the things that the Director said at that meeting.

3   Is that what you were referring to about moving forward

4   with administrative actions, taking action by the

5   Director?

6   A.   Yes.

7   Q.   Do you remember the Director saying at that

8   meeting that he had sufficient evidence of injury at

9   that time to take action?

10   A.   I don't remember.

11   Q.   Did the Department have information as of

12 April 7th, 2021 about injury for the 2021 water season?

13   A.   We had information that was presented to the

14 committee on, I think, March 24th of the observations

15 from staff about water supply conditions in 2021 up to

16 that point or at least the beginning of March, and

17 information about impacts to Little Wood and Silver

18 Creek and Big Wood River per the ground water model.

19   Q.   Had a curtailment run been done by the

20 Department for 2021 at this time, similar to the one

21 that Jennifer Sukow included in her staff report?

22   A.   I don't believe so not for 2021.

23   Q.   So whatever information there was about injury

24 that the Department had in April was based on the

25 observations that you all provided to the advisory

 1 committee?

 2   A. Yes, that's my understanding.

 3   Q. And I thought you said earlier that impacts to

 4 streamflow does not necessarily equate to injury?

 5   A. I think I had said that in my deposition. I

 6 don't know that I said that today.

 7   Q. Isn't that the case?

 8   A. Yeah, I would agree with that. You could have

 9 a very good water year and have impacts or depletions to

10 the stream. But that doesn't necessarily translate into

11 injury if there is adequate supply to in that year until

12 senior rights.

13   Q. And similarly just because the water supply is

14 low doesn't necessarily mean there is an injury because

15 Mr. Blaneknau ET analysis show that there was no injury

16 to Silver Creek and Little Wood water rights in the 2013

17 water year?

18   MR. RIGBY: I object. That's not what he

19 said.

20   THE HEARING OFFICER: Sustained.

21   Q. (BY MR. BARKER) Okay. So what did

22 Mr. Blankenau tell you about the impact of the 2013

23 water year on the Big Wood and Little Wood water rights?

24   A. In general I believe he was saying that it was

25 difficult to see a lot of water shortage in that year.

 1   Now, there could be reasons for that. ET is just

 2   limited to evaluating ET. Potentially there could be

 3   other reasons, if those landowners acquired other water

 4   supplies on contract or something to that effect.

 5   Q.   So look at Mr. Blankenau's exhibit, which is

 6   IDWR Exhibit 3, I believe.

 7   A.   Yes.

 8   Q.   And turn to page 10.

 9   A.   Okay.

10   Q.   And you see that it says at the last

11   paragraph, first sentence, "This analysis did not

12   clearly identify water shortage in Little Wood and

13   Silver Creek area during the 2013 drought."

14   A.   Yes.

15   Q.   Have I read that right?

16   A.   You read it correctly.

17   Q.   And that's a poor water year, maybe not as bad

18   as this year, but a poor water year?

19   A.   Yes.

20   Q.   Right?

21   A.   Correct.

22   MR. BARKER: Thank you, Tim. Thank you,

23   Mr. Director, for your patience. I don't have any

24   further questions.

25   THE HEARING OFFICER: Thank you, Mr. Barker.

 1   MR. BARKER: I'm sorry. I would like to move

 2 for the admission of Exhibit 19.

 3   THE HEARING OFFICER: Exhibit 19 is the

 4 meeting minutes for the ground water management area

 5 advisory committee for the Big Wood. I have previously

 6 stated I think that I will take notice of these,

 7 Mr. Barker. But if they've been marked. And I guess

 8 I'll just ask, is there any objection to the admission

 9 of these documents?

10   All right. So the documents marked as South

11 Valley and Galena Exhibit 19, the documents are received

12 into evidence.

13   (SVGWD/GGWD Exhibit 19 received.)

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

15   THE HEARING OFFICER: All right. Mr. Laski, I

16 think you are next.

17   MR. LASKI: I don't have any questions.

18   THE HEARING OFFICER: Okay. Mr. Moroney?

19   MR. MORONEY: Thank you, Director.

20   CROSS-EXAMINATION

21 QUESTIONS BY MR. MORONEY:

22   Q. Good afternoon, Tim. I'm Owen Moroney,

23 representing the Idaho Department of Fish and Game. So

24 in general, Mr. Luke, when water is short and the

25 Department makes priority cuts, are nonconsumptive

1 rights included in the cuts, generally speaking?

2   A. Can you be more specific to are we talking

3 surface water, ground water, what kind of scenarios?

4   Q. In my scenario I'm talking about

5 nonconsumptive fish propagation rights.

6   A. So we could limit it to curtailment of ground

7 water rights resulting from a delivery call, let's say?

8   Q. Yes.

9   A. Okay. Well, we looked to the order, the

10 curtailment order, itself, in that case. And per my

11 deposition Ms. Vonde clearly pointed out that past

12 orders direct that nonconsumptive rights are not

13 curtailed.

14   Q. So in your experience does the Department

15 consider fish propagation as nonconsumptive?

16   A. Normally in my experience based on where those

17 hatcheries have been located.

18   Q. Have you ever been aware of a fish propagation

19 right that the Department considered consumptive?

20   A. No, not offhand.

21   Q. I would like to point your attention to some

22 Fish and Game exhibits. They are in that black binder

23 there, it looks like this (indicating). So to start off

24 could I have you look at Exhibit 16, it should be tabbed

25 at 16. Do you recognize this memo?

 1   A.   Only since it was identified to me in my

 2   deposition.

 3   Q.   What does the memo discuss?

 4   A.   It's specific to the Water Right 37-8252.

 5   It's discussing nonconsumptive use condition. And I

 6   haven't read the memo in full. The first time I had

 7   seen it was when Ms. Vonde handed it to me a week ago,

 8   or ten days ago.

 9   Q.   So is there a standard approval condition for

10   nonconsumptive use?

11   A.   There is a water right condition for

12   nonconsumptive use.

13   Q.   What's the number of that condition?

14   A.   I believe it's 027 as it's stated here in the

15   memo.

16   Q.   So when you look at the memo, does it discuss

17   how nonconsumptive rights are considered in curtailment

18   scenarios?

19   A.   Bullet three there underneath the first

20   paragraph says -- I think it's referencing the condition

21   that's placed on many water rights, and it has -- the

22   condition has a number of purposes including in the

23   third bullet, it says, "It indicates water rights that

24   may not have to be regulated by priority in a

25   curtailment scenario because they do not deplete the

 1 amount of water available to holders of senior rights."

 2   Q. And in your experience is that just the

 3 general reason why nonconsumptive rights often are not

 4 curtailed because they don't deplete the amount of water

 5 for the other users?

 6   A. Yes.

 7   MR. MORONEY: I move to admit IDFG Exhibit 16

 8 into the record.

 9   THE HEARING OFFICER: Any objection to the

10 admission of this document? Hearing none, the document

11 marked as IDFG No. 16; is that correct, Mr. Moroney?

12   MR. MORONEY: Yes.

13   THE HEARING OFFICER: Is received into

14 evidence.

15   MS. CARTER: Are those actually marked or do

16 we need to mark them?

17   MR. MORONEY: We do need to mark them

18 actually.

19   THE HEARING OFFICER: Thank you, Ms. Carter.

20   (IDF&G Exhibit 16 marked and received.)

21   Q. (BY MR. MORONEY) Thank you, Mr. Luke. Next I

22 want to run through Fish and Game three ground water

23 rights that apply to this hearing. First, these have

24 previously been admitted with Ms. Sukow. First I want

25 to point you to Exhibit 4 in the binder. Is there such

 1   a nonconsumptive condition on the face of this right?

 2   A.   There is -- I'm sorry. Repeat the question.

 3   Q.   Does this right, Water Right 37-08271 state

 4   that the use of the water shall be nonconsumptive?

 5   A.   Yes, there is a comment that says "use of the

 6   water under this right shall be nonconsumptive."

 7   Q.   Next I want to point you to the next Fish and

 8   Game Exhibit No. 6. This exhibit has previously been

 9   admitted too. It's Water Right 37-08331. Is there also

10   a condition on the face of this right that discusses

11   nonconsumptive use?

12   A.   Yes, Conditional of Approval 2 says, "use of

13   water under this right shall be nonconsumptive."

14   Q.   And then the final Fish and Game water right

15   is in Fish and Game Exhibit 2, which was previously

16   admitted. It is right 37-07038. This right doesn't

17   have a nonconsumptive use condition on the face of the

18   right. But if I was to represent to you that this right

19   is commingled with the two previous rights and used in

20   the same fish hatchery, would you say it would be fair

21   to assume that it should also be labeled as

22   nonconsumptive?

23   A.   I would agree that it could be labeled as

24   such.

25   Q.   Have you worked on other delivery calls for

 1   the Department of Water Resources?

 2   A.   Yes.

 3   Q.   How in general has IDWR treated nonconsumptive

 4   water rights in the curtailment orders for those calls?

 5   A.   Well, if we have a priority cut established in

 6   a curtailment order, then we pull all the water rights

 7   within the area, and the rights qualified in the

 8   Director's curtailment order. And we will look at the

 9   rights that appear to have nonconsumptive uses. So in

10   my deposition one of the things we discussed was, is the

11   right or the diversion of that ground water consumptive

12   to the source or not. And the example I gave was,

13   because I know personally we've looked at some of these

14   individually and have confirmed. So a good example is

15   ground water rights for heating and cooling purposes.

16   Most of those are close loop systems where they have an

17   injection well. So they divert the ground water out,

18   run it through a heat exchanger, divert it back into the

19   ground. That would be an example where it's not

20   consumptive through the source. However there are a few

21   that might run it through that same heat exchanger, but

22   rather than going back into the ground it would

23   discharge somewhere and not return to aquifer, or maybe

24   directly to the Snake River. And so in that case it

25   could be consumptive to the source. And so we have left

1 those kinds of consumptive rights -- I'm sorry. What

2 might be perceptually viewed as a nonconsumptive right

3 on the curtailment list.

4   Q. So in a situation where it, say, bypasses the

5 senior water user?

6   A. Yeah, or otherwise just consumptive through

7 the source.

8   Q. So it's really a fact specific analysis?

9   A. Correct. So I guess what I'm trying to say is

10 that just because Condition 27 could be on a right, or

11 could not be on the right, you know, we typically try to

12 look at them individually.

13   Q. All right. So now, I want to ask you a couple

14 more questions about Fish and Game exhibits. If you

15 turn to Exhibit 8, do you recognize this document?

16   A. Yeah, it looks familiar.

17   Q. Could you describe is it the Clear Springs

18 notice of potential curtailment?

19   A. Yes.

20   Q. If you look at the first paragraph in the

21 document, on page it's Bates stamped IDFG 0322. At the

22 end of that paragraph how does this document say

23 nonconsumptive uses are going to be treated?

24   A. "Nonconsumptive uses in culinary and house

25 uses of water are not subject to curtailment under the

1   orders."

2   MR. MORONEY: I move to admit IDFG Exhibit 9

3   into the record -- or Exhibit 8.

4   THE HEARING OFFICER: Any objection to the

5   admission of this document? We need to mark it, again.

6   Thank you, Meghan.

7   (IDF&G Exhibit 8 marked.)

8   THE WITNESS: Did you have me look at 8? I

9   was looking at 8?

10   MR. MORONEY: Yes, 8. I misspoke by saying 9.

11   Sorry.

12   THE WITNESS: Okay. I think we got it right.

13   THE HEARING OFFICER: I hope that's correct.

14   I'm looking at a Notice dated November 2nd, 2009,

15   Mr. Moroney?

16   MR. MORONEY: Yes, that's correct, sir.

17   THE HEARING OFFICER: So I'm not sure I ruled.

18   So the document marked as IDFG No. 8 is received into

19   evidence.

20   (IDF&G Exhibit 8 received.)

21   THE HEARING OFFICER: Okay. Mr. Moroney.

22   Q. (BY MR. MORONEY) Next, Mr. Luke, could I turn

23   you to Exhibit 9, IDFG No. 9?

24   THE HEARING OFFICER: Would you speak up

25   Mr. Moroney?

1   MR. MORONEY: Yes.

2   THE HEARING OFFICER: Thank you.

3   Q. (BY MR. MORONEY) Do you recognize this

4 document, Mr. Luke?

5   A. Yes.

6   Q. Would I be correct to characterize it as a

7 Surface Water Coalition notice of potential curtailment?

8   A. Yes.

9   Q. If you look at the bottom of paragraph 2, how

10 does that say nonconsumptive rights are going to be

11 considered?

12   A. The same as the last exhibit nonconsumptive

13 uses and culinary and house uses of water are not

14 subject to curtailment under the order.

15   MR. MORONEY: I move to admit IDFG Exhibit 9

16 into the record, Director.

17   THE HEARING OFFICER: Any objection to the

18 admission of this document? The document marked or that

19 will be marked as IDFG 9 is received into evidence.

20   (IDF&G Exhibit 9 marked and received.)

21   Q. (BY MR. MORONEY) So next, Mr. Luke, I want to

22 turn your attention to the document tabbed 11. Do you

23 recognize this document?

24   A. Yes.

25   Q. Would I be correct to characterize it as the

1   Rangen call order reaffirming curtailment?

2   A.   Yes, correct.

3   Q.   If you turn to the third page of that

4   document.

5   A.   Okay.

6   Q.   Under the header subsection "Order." Does

7   this mention curtailment of nonconsumptive rights or

8   only consumptive water rights?

9   A.   It appears to mention only consumptive. So

10   midway through that first paragraph, "This order shall

11   apply to all consumptive ground water rights, including

12   agriculture, commercial, industrial, and municipal uses,

13   but excluding ground water rights used for de minimis

14   domestic purposes where such domestic use is within the

15   limits of the definitions set forth in Idaho Code,

16   Section 42-1401(11).

17   MR. MORONEY: All right. I move to admit IDFG

18   Exhibit 11 into the record.

19   THE HEARING OFFICER: Any objection to the

20   admission of this document? Okay. The document that

21   will be marked as Exhibit 11 is received into evidence.

22   (IDF&G Exhibit 11 marked and received.)

23   Q.   (BY MR. MORONEY) Next I want to turn your

24   attention to IDFG tabbed as 13. Are you familiar with

25   this document?

1   A.   No.   I probably have seen it in my career, but

2   not intimately familiar with it at this time.

3   Q.   So looking at the document, does it

4   specifically deal with processing applications for water

5   rights?

6   A.   It's dealing with processing of applications

7   for permit, correct.

8   Q.   And specifically does it deal with processing

9   permits in ground water management areas, in critical

10   ground water management areas?

11   A.   Yes, it appears so.

12   Q.   And to start with the ground water management

13   areas at the bottom of the first page, does it mention

14   whether or not the Department will issue a water right

15   permit for nonconsumptive uses in areas where it's

16   managing ground water? Sorry the --

17   A.   They are both ground water management areas

18   and critical ground water areas it states -- well, let

19   me back up and say that prior to the sections for ground

20   water management areas and critical ground water

21   management, it says, Department policy with respect to

22   the filling of applications --

23   THE REPORTER: Can you slow down please?

24   THE WITNESS: I'm sorry. Yeah.

25   THE REPORTER: Department policy --

1   THE WITNESS: -- with respect to the filling

2   of applications for permit and subsequent Department

3   action on the applications in ground water management

4   areas and critical ground water areas is as follows:"

5   The ground water management areas one of the items says,

6   "The Department will issue a water right permit for

7   nonconsumptive uses." And it goes on to say other

8   things. And then under "Critical Ground Water Area," it

9   says, "The Department will issue a water right permit

10   for nonconsumptive uses."

11   MR. MORONEY: All right. I move to admit IDFG

12   Exhibit 13 into the record.

13   THE HEARING OFFICER: Any objection to the

14   admission of this document? Okay. The document that

15   will be marked as IDFG No. 13 is received into evidence.

16   (IDF&G Exhibit 13 marked and received.)

17   Q. (BY MR. MORONEY) Mr. Luke, I want to have you

18   look at one additional Fish and Game exhibit, that would

19   be Exhibit 15. Have you seen this memo before?

20   A. No.

21   Q. Does this memo deal with the Department's

22   processing of applications to appropriate water in trust

23   water areas?

24   A. It appears so, yes.

25   Q. And would I be correct to say those are areas

1   managed to meet the minimums at Swan Falls?

2   A.   Yes.

3   Q.   If you turn to page 3 of this document, there

4   is a bullet discussing nonconsumptive use; correct?

5   A.   Yes.

6   Q.   And what does that bullet provide?

7   A.   It says, "IDWR will place the following

8   condition on all new trust water appropriations for

9   nonconsumptive uses of water and consumptive uses

10   subject to mitigation." And the condition reads as

11   follows, "Administration of this right to satisfy the

12   minimum streamflow water rights in the Snake River at

13   Murphy Gage shall not be required because use of water

14   pursuant to this right is either nonconsumptive or the

15   right holder is required to provide ongoing mitigation

16   to offset the depletion of water resulting from the use

17   of this right."

18   Q.   Thank you, Mr. Luke.

19   MR. MORONEY: I move to admit IDFG 15 into the

20   record, Director?

21   THE HEARING OFFICER: Any objection to the

22   admission of this document? The document will be marked

23   as IDFG Exhibit 15 is received into evidence.

24   (IDF&G Exhibit 15 marked and received.)

25   Q.   (BY MR. MORONEY) So, Mr. Luke, areas

1   including curtailments, ground water management areas

2   and trust water areas are all spots where the Department

3   has determined water to be in short supply; is that

4   correct?

5   A.   Say that once more.

6   Q.   Curtailments, ground water management areas,

7   and the trust water area, are all areas where water is

8   in short supply; correct?

9   A.   Yes.

10   Q.   So why has the Department excluded

11   nonconsumptive rights in these areas?

12   A.   Because it's a use that will not necessarily

13   impact senior rights.

14   MR. MORONEY: Thank you, Mr. Luke.   I have no

15   further questions.

16   THE HEARING OFFICER: Okay.   Thank you,

17   Mr. Moroney.   I might just ask of you, there are a

18   number of additional exhibits that you have included in

19   your binder.   As I look through it, none of those

20   exhibits are marked.   And it seems to me we could save

21   some time if you would pre-mark those exhibits before we

22   take testimony about them.

23   MR. MORONEY: I will do that.   Thanks.

24   THE HEARING OFFICER: Okay.   Thank you.

25   All right.   Now, I am looking at Group No. 1,

1   and I want to note that Mr. Lawrence Schoen is here, who

2   has appeared independently individually as a party in

3   Group No. 1. So, Mr. Schoen, do you have questions for

4   Mr. Luke?

5   MR. SCHOEN: I do not have questions for

6   Mr. Luke, Mr. Director. I would like to speak however

7   as a participant in Group 1 at the appropriate time,

8   hopefully today.

9   THE HEARING OFFICER: Okay. Thank you. Well,

10 we need to finish with Mr. Luke first.

11   All right. Let's move on to Group 3,

12 Mr. Bromley or Mr. Lawrence.

13   MR. BROMLEY: We'll consolidate questions with

14 Mr. Lawrence to be efficient there, Mr. Director.

15   THE HEARING OFFICER: Thank you.

16   MR. LAWRENCE: Thank you, Mr. Director.

17   CROSS-EXAMINATION

18 QUESTIONS BY MR. LAWRENCE:

19   Q. Good morning, Mr. Luke.

20   A. Good morning.

21   Q. As you know, my name is Mike Lawrence. I'm an

22 attorney for the City of Hailey in this proceeding. I

23 will try to be efficient and get us out of here before

24 lunchtime.

25   Mr. Luke, the analysis in your staff memo,

 1 which I believe has been marked as IDWR Exhibit 4,

 2 resulted in a listed "potentially injured" water rights

 3 attached as Attachment A to that memo; is that correct?

 4   A. Yes.

 5   Q. And earlier in your discussion with

 6 Mr. Barker, you referenced and discussed your 2015 staff

 7 memo, which I believe has been marked as the Ground

 8 Water Districts Exhibit 26. Do you recall that?

 9   A. Yes.

10   Q. Do you know how many of the water rights in

11 your Attachment A list to your 2021 staff memo were

12 included in your analysis in your 2015 staff memo,

13 Exhibit 26?

14   A. I don't know the number offhand, but some of

15 the rights in the attachment of the 2021 memo would have

16 been included in the 2015 delivery call.

17   Q. But not all of the rights in your 2021

18 Attachment A were included in your 2015 memo; is that

19 correct?

20   A. I think that's probably correct.

21   Q. Mr. Luke, are you aware of Mr. Vincent's

22 testimony that the SWSI information for the Big Wood

23 above Hailey gage correlates well in his belief to water

24 supplies in Silver Creek and the Little Wood River?

25   A. Yes, I listened to that testimony.

1   Q. And a few moments ago, I believe it was with

2   Mr. Barker, you discussed Mr. Blankenau's analysis where

3   he concluded that in 2013, which you identified as a

4   water short year based on the SWSI, that there were not

5   low evapotranspiration results in the Little Wood,

6   Silver Creek area; is that correct?

7   A. My recollection was Mr. Barker pointed me to a

8   comment in the conclusions that said the analysis did

9   not clearly identify water shortage in the Little Wood

10 and Silver Creek area during the 2013 drought.

11   Q. But I guess a better way to ask the question

12 that I'm really getting at is if Mr. Vincent says that

13 the Big Wood above Hailey SWSI correlates well with

14 Little Wood and Silver Creek water supplies, and 2013

15 has been identified as a water short year based on that

16 SWSI gage, can you explain how Mr. Blankenau's analysis

17 resulted in it not showing a water shortage in Little

18 Wood, Silver Creek in 2013?

19   A. I can't explain it. I did offer one

20 possibility earlier in my testimony, and just from

21 personal experience I know some users have acquired

22 other sources of water to cover that shortage.

23   Q. Mr. Luke, do you know generally speaking which

24 priority dates on the Little Wood and Silver Creek

25 streams are considered senior or junior, meaning a

 1 senior right that's rarely if ever cut, or a junior

 2 right that almost in all years is cut?

 3   A. Generally 1883 and 1884 senior-priority rights

 4 are good priority rights that are not cut often.

 5   Q. Are 1885 and junior rights cut frequently?

 6   A. They are cut sometimes, yes.

 7   Q. In most years would an 1885 right be on for

 8 the full season?

 9   A. Certainly an '85 priority right is cut more

10 frequently than an '84 and '83.

11   Q. And on it goes as they get more junior?

12   A. Correct.

13   Q. I guess what I'm asking is what is the date at

14 which a water right priority cannot be expected to have

15 a full season supply, are those 1885 in juniors, are

16 those 1886s in junior? Obviously, the higher you go

17 then the less fill they would be?

18   A. I don't feel like I have enough experience

19 with the priority cuts in the system to answer that.

20 Obviously, that's going to be affected by water supplies

21 and the type of water year that it is. And there is, as

22 I said earlier, there could be quite a range from very

23 good water years where a few rights are cut, if any, and

24 other years where the cuts can be deeper.

25   Q. In your list in Attachment A to your 2021

1   memo, does it include some rights that have such

2   senior-priority dates that they are essentially never

3   curtailed?

4   A.   I think there are some rights on that list

5   that I'm not sure that they've ever been curtailed.

6   There is, for example, 1887 priority, and rights between

7   1877 and 1882 that from my limited review of the various

8   years that I've looked at in the different memos, I have

9   not recalled seeing cuts to those types of

10   senior-priority rights.

11   Q.   And similarly, are there rights on your list

12   in Attachment A in your 2021 memo that are so junior

13   that they are essentially curtailed every year even in a

14   good year?

15   A.   I don't know about every year, but I would say

16   most years. I think there is possibly some years where

17   everything was on all year. I can't say absolutely one

18   way or the other.

19   Q.   Mr. Luke, if a water user does not ask for

20   water, does the water district or watermaster

21   nevertheless deliver them water to their headgate -- at

22   their headgate?

23   A.   Let me repeat that and see if I understand.

24   You are saying a user who does not request delivery?

25   Q.   Correct.

 1   A.   Does he receive delivery nonetheless?

 2   Q.   Correct?

 3   A.   I would not think so.

 4   Q.   But you don't know how the watermaster

 5   administers?

 6   A.   I think if a user does not request -- well,

 7   maybe you need to repeat your question. I'm taking your

 8   question to mean, a user tells the watermaster he does

 9   not want delivery of water. And you are asking me, does

10   the watermaster deliver it anyway?

11   Q.   No, I think I would phrase it as, if a water

12   user does not affirmatively request delivery of water,

13   does the watermaster nevertheless deliver it, just

14   assuming that the water user wants the water?

15   A.   I don't know for sure. That would be a better

16   question for the watermaster.

17   Q.   I want to ask you a few questions about the

18   exchange conditions that have been discussed quite a bit

19   already. So I just want to make sure that I understand

20   how the Department, and through your instructions,

21   reasonable instructions, the watermaster intends to

22   administer these exchange conditions. Is it correct to

23   say that the rights with the exchange conditions are

24   entitled to Snake River water from AFRD2 when their

25   Little Wood River rights are available to be delivered

 1 in priority?

 2   A.   Yes.

 3   Q.   And when those rights are entitled to the

 4 Snake River water from AFRD2, the Little Wood water that

 5 they would otherwise be entitled to can be delivered to

 6 other Little Wood rights located above the Milner

 7 Gooding Canal?

 8   A.   Correct.

 9   Q.   Is that correct?

10   A.   And specifically to the Big Wood Canal

11 Company's Little Wood River -- well, to the Big Wood

12 Canal Company.

13   Q.   If that exchange condition is administered in

14 the way we just described, wouldn't that change the

15 priority cuts on Silver Creek and the Little Wood River?

16   A.   No.

17   Q.   Why wouldn't it?

18   A.   Because you still have to -- you are

19 delivering the water to the Big Wood Canal Company not

20 physically to the users located below Milner Gooding.

21 So it's an exchange. So they are getting the Snake

22 River water in exchange for physically delivering that

23 water from the Little Wood downstream below.

24   Q.   But if an acre-foot of water that does not

25 need to go below Milner Gooding Canal because of the

1 exchange condition can be applied to lands above the

2 Milner Gooding Canal, doesn't that increase the supply

3 available above the Milner Gooding Canal?

4   A. It doesn't increase the supply. You still

5 have the same supply. You still have to honor those

6 exchange rights. So you have to have water available

7 for those rights. You are just not delivering it to the

8 locations below Milner. You are delivering it to first

9 the Big Wood Canal Company because that's in accordance

10 with the provisions of the contracts. If the Big Wood

11 Canal Company doesn't have demand for that, then it may

12 be available for the next priority right in line. So to

13 that extent then a more junior right holder may benefit

14 from the exchange.

15   Q. A more junior right holder above -- well, on

16 both sides --

17   A. Above Milner Gooding.

18   Q. Above Milner Gooding --

19   A. Yes.

20   Q. -- could benefit from that?

21   A. Right.

22   Q. That's what I meant wouldn't that change the

23 priority cuts? But I think you just answered --

24   A. Okay. You said "supply" though and --

25   Q. Well, my original --

1   A. It may result in some adjustment to the

2   priorities, correct --

3   Q. Okay. Great. Thank you.

4   A. -- in that scenario.

5   Q. I think that answered my question. Thank you?

6   A. Milner Gooding.

7   Q. So in a nutshell, when the exchange condition

8   will be administered, and if it's administered properly,

9   the lands below the Milner Gooding will rely on the

10 Snake River AFRD2 water, the lands about Milner Gooding

11 Canal will rely on the Little Wood water; is that

12 correct?

13   A. Yes, except there are some rights -- yeah, it

14 is only specific to rights on the Little Wood that have

15 that condition. There are some rights below that do not

16 have that condition.

17   Q. Right, rights with that condition. Mr. Luke,

18 did you analyze whether water resulting from curtailment

19 of ground water rights in the Bellevue triangle in 2021

20 would be available for diversion at any particular point

21 of diversion for a senior water right?

22   A. Yes, in the observations we prepared in March

23 for the advisory committee -- I think I'm getting your

24 question -- we did look at curtailments of ground water

25 rights within the Bellevue triangle, and I think within

1   the Wood River Valley model area, the impacts of that on

2   Silver Creek. And I look at in working with the

3   watermaster on Little Wood, what the additional flow in

4   Silver Creek from curtailment, how that might affect

5   delivery of water to priority rights. I think that was

6   your question.

7   Q. I think I understand generally speaking what

8   you mean. But I mean specifically with respect to a

9   senior water right, did you analyze whether curtailment

10 of ground water pumping resulting in additional water in

11 Silver Creek or Little Wood would actually be delivered

12 to a specific point of diversion for a senior water

13 right?

14   A. Not beyond what I just described to you.

15   Q. Mr. Luke, let me describe this. In your memo,

16 Table 7 through 10, which are on pages 24 and 25.

17   A. Yes.

18   Q. These tables comparing Silver Creek and Little

19 Wood priority cuts in 1937, '39, 2004 and 2020, these

20 tables display only the days that the later years were

21 cut off compared to the earlier years; correct?

22   A. Yes.

23   Q. These tables do not display the days when the

24 earlier years were cut off compared to the later years;

25 is that right?

1   A.   That's correct.

2   Q.   But it's true, isn't it, that there are days

3   when priorities were cut off in earlier years that were

4   not cut off in the later years that you examined?

5   A.   Yes, I think in my deposition I noted that in

6   the '37 or '39 years, there might -- well, there were

7   junior rights that experienced cuts or were off more

8   days in that earlier year than they were in 2020. I

9   think the point we were trying to make here is that the

10 more senior rights were not cut at all in those earlier

11 years, but were cut in the more recent years.

12   Q.   Right. But going back to my question, it's

13 true that there are periods of time when you compared

14 the earlier years to the later years, where the earlier

15 years priorities were cut off when they were not cut off

16 in the later years; is that correct?

17   A.   Right. So in part is controlled not going on,

18 looking beyond like the 1784 priority in 1937. Because

19 the next junior-priority right, the total number of days

20 cut in that year were more than it was in 2020 or 2004.

21   Q.   Okay. Thank you. Mr. Luke, did you analyze

22 actual or material injury in 2021 to any particular

23 water right?

24   A.   No.

25   Q.   And do you know whether all of the acres

 1 within the places of use for any water right will be

 2 irrigated in 2021?

 3   A. Repeat that.

 4   Q. Do you know whether all of the acres within

 5 the place of use for any particular water right will be

 6 irrigated in 2021?

 7   A. No.

 8   Q. Did you analyze whether in 2021 any water

 9 rights will use water efficiently and without waste?

10   A. Not in 2021.

11   Q. Have you done that analysis in other years?

12   A. Which criteria is this again?

13   Q. I'm asking whether you analyzed whether water

14 rights will use water efficiently without waste.

15   A. In other years besides --

16   Q. I first asked in 2021 and then --

17   A. Yeah, and I said, no.

18   Q. Okay.

19   A. But then you asked me other years, and it was

20 to the efficiency?

21   Q. Yes.

22   A. Yes, in part in the 2015 memo, the delivery

23 call, we inventoried all the diversions that were part

24 of that delivery call, and that was summarized in the

25 appendices to my memo.

1   Q. But as we discussed not all of the rights in

2   your Attachment A to your 2021 memo were included in

3   that 2015 memo; correct?

4   A. I think that's correct.

5   Q. And you haven't updated that analysis since

6   2015?

7   A. No.

8   Q. Did you analyze the amount of water available

9   in 2021 in the source from which a particular water

10   right is diverted?

11   A. No.

12   Q. Did you analyze the effort or expense of the

13   holder of a water right to divert water from the source

14   in 2021?

15   A. Did I analyze the what?

16   Q. The effort or expense of the holder of a water

17   right to divert in 2021?

18   A. I did not do any analysis.

19   Q. Did you analyze whether the exercise of junior

20   priority ground water rights individually or

21   collectively effective the quantity and timing of when

22   water is available to any particular senior priority

23   surface or ground water right in 2021?

24   A. No, not specifically.

25   Q. And similarly did you analyze whether the

 1 exercise of junior priority ground water rights

 2 individually or collectively effects the cost of

 3 exercising any particular senior surface or ground water

 4 right?

 5   A. No. And I didn't --

 6   Q. For the twenty-twenty- --

 7   A. I think you are reading from Rule 42 of the

 8 conjunctive management rules. So I'll just say that we

 9 didn't do the analysis that you are, going through each

10 of those bullet points, or that I didn't anyway.

11   Q. So just to clarify then, you are familiar with

12 the Rule 42 factors in the conjunctive management rules?

13   A. Yeah, I looked at them -- yes, I am. And you

14 went through those yesterday in Mr. Blankenau's

15 testimony?

16   Q. Correct. And you are familiar with all of

17 those factors in Rule 42?

18   A. Yes.

19   Q. And is it --

20   A. I have looked at them. I looked at the rule,

21 yes.

22   Q. And with respect to any particular water

23 rights exercised in 2021, have you evaluated those

24 factors under Rule 42?

25   A. Other than -- no, not for 2021. As I said

1 earlier, I think a few of those factors we looked at for

2 some of the -- well, the rights that were part of the

3 2015 delivery call, like water measurement, for example,

4 is one of those.

5   Q. Mr. Luke, I'm going to ask you if the Director

6 orders curtailment of junior ground water rights in this

7 proceeding, what options would be available to junior

8 users to prevent shutting off or to mitigate their use?

9   A. I don't know that there would be any.

10   MR. LAWRENCE: No further questions. Thank

11 you, Mr. Luke.

12   THE HEARING OFFICER: Thank you, Mr. Lawrence.

13   Mr. Simpson, questions.

14   MR. SIMPSON: No questions.

15   THE HEARING OFFICER: Let's see.

16 Mr. O'Bannon, I think you were on the list.

17   MR. O'BANNON: No questions.

18   THE HEARING OFFICER: Okay. We are through

19 with Group 3.

20   Let's circle around. And redirect,

21 Ms. Carter?

22   MS. CARTER: I have one item regarding

23 Mr. Luke's staff memorandum.

24   THE HEARING OFFICER: Okay.

25 ///

1   REDIRECT EXAMINATION

2   QUESTIONS BY MS. CARTER:

3   Q.   Mr. Luke, I'm going to hand you a different

4   copy of IDWR Exhibit 4. I have that other one just to

5   make sure. Now, this copy has changes handwritten based

6   on your testimony earlier today. Would you review that

7   and let me know if that is accurate?

8   MR. LASKI: Is that Exhibit No. 4?

9   MS. CARTER: It is.

10   THE WITNESS: Yes, it appears accurate.

11   Q.   (BY MS. CARTER) I apologize. Would you tell

12   me again; is that correct?

13   A.   Yes, ma'am, it appears accurate.

14   MS. CARTER: Thank you. I move to have IDWR

15   Exhibit 4 admitted into the record.

16   THE HEARING OFFICER: As amended by --

17   MS. CARTER: Yes.

18   MS. McHUGH: May I ask a clarifying question?

19   Do you think this contains interlineations or do you

20   just think that they are correct?

21   MS. CARTER: It's been corrected in line as

22   best as possible.

23   MS. McHUGH: So you think there is a strike

24   out and a change?

25   MS. CARTER: Yes. For example, page 9.

1   MS. McHUGH: Okay.

2   MS. CARTER: Did I give you the wrong copy?

3   MS. McHUGH: I don't see anything

4 interlineated. Do you?

5   MR. FLETCHER: Yes.

6   MS. McHUGH: We don't have the right copy.

7 Our copy doesn't have anything on it.

8   MS. CARTER: I apologize. I don't know how

9 that happened.

10   MS. McHUGH: This one does. This makes sense

11 to me. Okay. Thank you.

12   MR. FLETCHER: That was on purpose.

13   MS. McHUGH: Well, IDWR and typos can be job

14 ending. So I just want to make sure we were right.

15   MS. CARTER: And this is not my paper.

16   MR. BROMLEY: Well, you gave it to us.

17   MS. McHUGH: You gave it to us.

18   MS. CARTER: I know. I think it was probably

19 here.

20   MR. LAWRENCE: Oh, I might have left it over

21 there.

22   MS. CARTER: Yeah.

23   THE HEARING OFFICER: Somebody else's slight

24 of hand. Okay. You have the copy in front of you now,

25 Ms. McHugh.

 1   MS. CARTER: That is all I have.

 2   THE HEARING OFFICER: Okay. And Counsel has

 3 moved for the admission of IDWR Exhibit No. 4. Any

 4 objection to admission of this document? Okay. The

 5 document marked as IDWR Exhibit No. 4 is received into

 6 evidence.

 7   (IDWR Exhibit 4 received.)

 8   THE HEARING OFFICER: Any more redirect,

 9 Ms. Carter?

10   MS. CARTER: No.

11   THE HEARING OFFICER: Mr. Fletcher, I'll

12 characterize your questioning as redirect. So do you

13 have any more questions?

14   MR. FLETCHER: I don't.

15   THE HEARING OFFICER: Mr. Rigby?

16   MR. RIGBY: Just one.

17   RECROSS-EXAMINATION

18 QUESTIONS BY MR. RIGBY:

19   Q. Mr. Luke, yesterday I believe you were

20 listening in to Ms. Sukow's testimony; is that correct?

21   A. Most of it, yes.

22   Q. Do you recall her testifying that curtailment

23 in the triangle would result in a significant increase

24 in flows at the Sportsman Access for this year?

25   A. Yes.

 1   Q. Do you have any reason to disagree with that?

 2   A. No.

 3   Q. Do you agree with it?

 4   A. Yes.

 5   MR. RIGBY: I have no further questions.

 6   THE HEARING OFFICER: Okay. Thank you. Now,

 7   Mr. Barker within the scope of redirect?

 8   MR. BARKER: Not a thing, Your Honor.

 9   THE HEARING OFFICER: Mr. Laski?

10   MR. LASKI: No.

11   THE HEARING OFFICER: Mr. Moroney?

12   MR. MORONEY: No.

13   THE HEARING OFFICER: Okay. Group 3, anything

14   further?

15   MR. LAWRENCE: No, nothing.

16   MR. BROMLEY: No.

17   THE HEARING OFFICER: All right. Thank you,

18   Mr. Luke, you are finished.

19   THE WITNESS: Thank you.

20   (Witness excused.)

21   THE HEARING OFFICER: And it's five minutes to

22   the hour. So I think we should take a lunch break.

23   MR. THOMPSON: I've got one issue, Director.

24   On the timing of the staff reports, I know they are all

25   dated May 17th, that's how they show up on the

 1 Department's website, which I don't believe is the

 2 official docket. We never received those until, I

 3 think, late in the day of the 18th. And then some of

 4 Jennifer Sukow's files weren't supplied until the 19th,

 5 20th, something like that. I just would like the

 6 Department to create a record of when those were

 7 actually filed in this case, and that we have that on

 8 the record.

 9   THE HEARING OFFICER: Well, Mr. Thompson, you

10 can make that record I suppose if you want to.

11   MR. THOMPSON: Well, I don't work here. So I

12 need to know when this stuff was actually filed and

13 received, because we didn't get it until the 18th. It's

14 all dated the 17th, and it is supposedly showing on your

15 record as filed on the 17th, but we never got it.

16   THE HEARING OFFICER: I think if you read our

17 rules of procedure, whether you think they are fair or

18 not, I think the rules of procedure say the service is

19 complete upon mailing. So the date that you received it

20 may be important to you, but in terms of the date that

21 the document was served, I think the rules of procedure

22 say complete upon mailing. And I may be wrong, but

23 that's what I recall.

24   MR. THOMPSON: Well, that's the point, I don't

25 think those were ever mailed. And I would like the

1   staff to determine if those were, what date that was

2   when it was mailed.

3   THE HEARING OFFICER: Well, we'll certainly

4   look into it.

5   MR. THOMPSON: Okay. It's an important matter

6   for this case and the timing, every day counts.

7   THE HEARING OFFICER: Well, you'll certainly

8   have an opportunity to establish that as you call

9   witnesses.

10   MR. BROMLEY: Well, Director, I can confirm

11   with Mr. Thompson the same, because I was on the website

12   both on the 17th and the 18th. The memos were not

13   posted on the 17th to the website. They were not

14   served. That's another issue out there was that they

15   were never served on April. On the 18th, I was on the

16   website in the morning, and the staff memos were not

17   posted. They were posted at some point later some time

18   afternoon on the 18th. Those are my observations

19   consistent with what Mr. Thompson is saying. And he's

20   correct, every day in this proceeding that's been

21   created and the procedure, it does matter.

22   THE HEARING OFFICER: Well, and all of you

23   will have an opportunity to raise that as you present

24   evidence. So we'll look at it.

25   MR. THOMPSON: But I'm just trying to confirm

1   when it happened. We have no knowledge of when that was

2   posted, and you know who did that, and at what time.

3   And it's represented as the 17th, which I think is

4   incorrect.

5   MS. McHUGH: Perhaps we need to call a witness

6   from your IT staff, or from your legal staff or

7   something if you want us to create a record.

8   THE HEARING OFFICER: Well, that's possible.

9   MS. McHUGH: And if you want to identify those

10   people, that would be great.

11   THE HEARING OFFICER: Let's talk with counsel

12   about it. All right. Let's take a lunch break. We'll

13   be back at 1:00.

14   MR. BROMLEY: Thank you.

15   (Lunch recess.)

16   THE HEARING OFFICER: Okay. We are recording

17   again. It's 2:00, an hour later than the appointed time

18   that we agreed to start. As I was saying earlier, we've

19   delayed the beginning of the afternoon presentation of

20   testimony because of some ongoing discussions possibly

21   about, I guess, I suspect some kind of settlement. And

22   is there somebody prepared to report to us here?

23   MR. RIGBY: Mr. Director, I'll take a crack at

24   it to begin with.

25   THE HEARING OFFICER: Okay. Mr. Rigby.

1   MR. RIGBY: Thank you, Mr. Director. And

2   really, you are correct, there has been some discussions

3   that have gone on. And we're not prepared yet to

4   indicate what those would be or if a settlement has even

5   been reached. But there are certain terms and

6   conditions that need to be confirmed and/or sought out

7   or verified, and we need the afternoon to do that. And

8   for that reason we are here asking that this be

9   continued until tomorrow morning at 9:00. And the

10   reason I say, 9:00, instead of 8:30 is because we could

11   be scrambling tomorrow morning to do this.

12   And if it please the Director and Counsel,

13   that's where I think we are standing. I will say we are

14   negotiating in good faith. Obviously, there is

15   some -- a lot of issues here, a lot of different

16   parties, and so this is not an easy task. Although

17   Mr. Schoen wants to testify, and we certainly have no

18   objection to that.

19   THE HEARING OFFICER: Mr. Barker, do you have

20   something to add?

21   MR. BARKER: I just want to express my

22   agreement with Mr. Rigby as rare as that is. But today

23   we do agree of the status of where we're at. We do

24   think there is prospects for a resolution, and we're

25   hoping to. But we need some more time to discuss.

 1   THE HEARING OFFICER: Thank you, Mr. Barker.

 2   Anybody else?

 3   Okay. I'm inclined to grant the continuance

 4 reminding everybody that we also have a Saturday

 5 scheduled should this fall apart. So I have another day

 6 we can replace the afternoon with, and next week, of

 7 course. All right. So I will grant the continuance

 8 until 9:00 tomorrow morning.

 9   But before we do, Mr. Schoen, do you wish to

10 testify today?

11   MR. SCHOEN: I think -- well, you know what,

12 I -- let me go to the podium.

13   THE HEARING OFFICER: Now, are you planning to

14 testify right now, or do you have some preliminary

15 questions?

16   MR. SCHOEN: I have some questions. I'm

17 coming to the podium so that I can be heard by everybody

18 rather than standing in the corner.

19   THE HEARING OFFICER: Yes.

20   MR. SCHOEN: Because I know from having

21 watched on the screen, it's very hard to hear anybody

22 that is standing in the back of the room. So I'm just

23 trying to be respectful of the people who are listening

24 in.

25   THE HEARING OFFICER: I just want to ensure

 1 that you are not testifying, because I need to swear you

 2 in if you do.

 3   MR. SCHOEN: Understood. So I have remarks

 4 that I prepared. I'm not an attorney. I'm here

 5 representing my own interests, which I feel I have a

 6 right to do in a process like this. I don't know if it

 7 makes sense to testify, because I don't know what the

 8 terms of this are going to be. But I drive

 9 two-and-a-half hours each way to get here, and want to

10 know -- you know, and many of us go who are going to go

11 home tonight are going to want to know whether they

12 should be back here at 9:00 in the morning or not.

13 That's the first thing.

14   And so my testimony may -- you know, I don't

15 know what my own role in this will be as a participant.

16 It's not clear to me if I'm scheduled to speak. You

17 know, all I know is today was set aside for people in

18 Party 1 to speak. And yet, you know, we didn't even get

19 through yesterday's work until noon. And so because the

20 schedule is not well defined, and we don't know who gets

21 to do what when, it just makes it harder for us who have

22 other commitments and obligations, notwithstanding our

23 recognition of the importance of this. So I am

24 wondering if you can just speak to what your outlook is

25 for how this is going to proceed?

 1   THE HEARING OFFICER: Well, I'm not sure I

 2 have an outlook, other than I've reserved a number of

 3 additional days for testimony, and that's my outlook.

 4 Should I express optimism or pessimism? I don't know.

 5 I don't know enough about what's being discussed. So

 6 the best I can tell you is if you wish to present your

 7 testimony today, I would encourage you to present it, or

 8 you can wait.

 9   MR. SCHOEN: I think I will go ahead and

10 present my testimony if it's okay with you?

11   THE HEARING OFFICER: Okay.

12   MR. SCHOEN: I think some of what I have to

13 say has a bearing on what these folks are going to

14 negotiate, because my testimony has to do with the

15 principles of this whole proceeding.

16   THE HEARING OFFICER: Okay. And I assume you

17 will narrate your testimony?

18   MR. SCHOEN: I will. I will. You know, and

19 this isn't -- obviously, there is some qualities of a

20 courtroom-style proceeding here, you know, with

21 objections sustained and overruled and all that sort of

22 thing. But I'm speaking on my own behalf to defend my

23 rights. And you'll have to guide me, because I've never

24 participated in a proceeding like this if I get out of

25 line.

1   THE HEARING OFFICER: Yeah. Well, do you wish

2   to testify from the podium or from the chair?

3   MR. SCHOEN: I'm very comfortable standing

4   here if that's okay with you?

5   THE HEARING OFFICER: That's fine.

6   Mr. Schoen, if you'll raise your right hand.

7   LAWRENCE SCHOEN,

8   first duly sworn to tell the truth relating to said

9   cause, testified as follows:

10   THE HEARING OFFICER: Go ahead.

11   MR. SCHOEN: Okay. My name is Lawrence

12   Schoen, L-a-w-r-e-n-c-e, last name is spelled

13   S-c-h-o-e-n. This is the testimony I had intended to

14   give today despite the fact that, you know, there are

15   some other developments as have been noted. I'm just

16   going to give it as I had intended to.

17   The first thing I want to do is thank the

18   Director for this process, and I particularly want to

19   thank the staff who put in a lot of work for us to get

20   here. Some of these folks gave depositions, and then

21   they were questioned and asked the same questions

22   repeatedly, and they stood up to it extremely well, and

23   I'm very grateful to them.

24   I farm -- I own 306 acres adjacent to the

25   Silver Creek Preserve, a tributary to Silver Creek flows

 1   through my property. My water rights are Water Right

 2   37-351B and 37-352B. I irrigate a grand total of 14.4

 3   acres. So this isn't about the money to me. I raise

 4   horse hay and pasture on that land. But this is about

 5   the principle about how water rights are administered,

 6   not just in Basin 37, but in the state of Idaho.

 7   I also, my land is classified by the Blaine

 8   County Assessor as sub-irrigated, but that sub-irrigated

 9   land is turning into dry land. And the reason that is

10   happening is because the water table in the Wood River

11   aquifer is being drawn down so dramatically, and that's

12   from years of unregulated ground water pumping and

13   drought conditions that have existed, you know, for

14   quite a few years.

15   I was a county commissioner in Blaine County

16   for 12 years. From the time I became county

17   commissioner, I've worked closely with the Department of

18   Water Resources on helping us get to this point where we

19   could have a good understanding of water rights in our

20   basin. And I believe that I served as a county

21   commissioner to ensure the participation of many people

22   in Blaine County in this process. My work with the

23   Department goes back to Director Tuthill. I worked with

24   you, Director Spackman, in an official capacity, and Tim

25   Luke, and Sean Vincent, and a number of other people in

1 the Department of Water Resources, not to mention the

2 U.S. Geological Survey.

3   Blaine County has been very forward in

4 studying the water, and the hydrology, and the

5 hydrogeology, hydrogeomorphology of Blaine County's

6 water resources. We sponsored four studies by USGS.

7 Each one of those studies successively drew on the work

8 done before. And, yes, there is still work to be done,

9 but we have a very good understanding of our aquifer and

10 the water resources in it.

11   And another thing I want to say about that is,

12 when I worked with Director Tuthill, one of the

13 expressions that both of us used continuously is that

14 water use and land use are two sides of a coin. And I

15 understand all too well the consequences of changes in

16 patterns of water use on land use and what that means.

17 This is not just about the impacts on individual

18 farmers, but it's about the impacts on an entire

19 community. So I'm very well aware of the stakes here.

20   No one is here to harm anybody else. These

21 folks, I mean, there is a lot of lawyers in the room,

22 but they represent friends and neighbors of mine. And,

23 you know, this issue to me is very simple, despite,

24 Mr. Director, the efforts of some to persuade you

25 otherwise. And I believe the resolution of this issue

 1 is very simple too if you follow the science, if you

 2 follow the law, and you follow the Constitution of the

 3 State of Idaho and the United States, which guarantees

 4 equal protection under the law. You know I'm very

 5 grateful for the advisory committee meetings that we had

 6 beginning in November, but no results were achieved.

 7   I was wondering if I could ask Meghan to put

 8 up the first photo that I sent to her. I have three

 9 photos that I would like to share as part of my

10 testimony, that's without objection.

11   MR. BROMLEY: Director, if I could ask a

12 question just in aid of clarification?

13   Mr. Schoen, were any of these disclosed as

14 exhibits at the exhibit deadline? I haven't seen them.

15 It's just --

16   MR. SCHOEN: They weren't. I took them

17 yesterday. And if there is an objection, and I'm not

18 allowed by the rules of procedure to present them,

19 that's fine. I can describe them. I'm simply trying to

20 give a visual aid to illustrate my point. But, you

21 know, you guys know the hearing rules better than I do.

22   MS. McHUGH: It might just be helpful to see

23 them, if we could just look at them.

24   MR. SCHOEN: Okay. Well, once they are seen.

25 They can't be unseen, right? You know that, right?

 1   MS. McHUGH: But they are not part of the

 2   evidence.

 3   MR. BROMLEY: Yeah, they necessarily wouldn't

 4   go into the record.

 5   MR. SCHOEN: Okay.

 6   THE HEARING OFFICER: Well, let's at least

 7   approach it from the standpoint that these photographs

 8   or images being presented for illustrative purposes.

 9   And then he'll have to move, if he wants to.

10   MR. SCHOEN: They don't necessarily need to

11   be. They are just a visual aid for my testimony. I

12   don't need them to be entered into the record if

13   that's --

14   MR. BROMLEY: If they are for illustrative

15   purposes, Director, I'm fine with that.

16   THE HEARING OFFICER: Okay.

17   MR. SCHOEN: Talk slower? I'm from New York

18   originally. I can't help myself.

19   MS. McHUGH: I'm just saying.

20   THE HEARING OFFICER: What's the self-effacing

21   New York comment?

22   MS. McHUGH: I asked him to speak a little

23   slower.

24   THE HEARING OFFICER: Oh. Drawl like the rest

25   of us.

1   MR. SCHOEN: Yeah. Okay. That's good enough,

2   Megan. So the picture is a picture of -- so my -- I was

3   shut off last week, and the ditch rider -- and my water

4   rights are 1886 and 1887. The watermaster came by my

5   house, and I spoke to him on Friday, and he told me that

6   the water rights in Silver Creek were shut off back to

7   1884. This is across the road from me. This is a well

8   that is pumping as we speak with a water right 94 years

9   junior to mine that is pumping right now.

10   I apologize for my cynicism about this. But

11   as I was saying, the advisory committee meetings didn't

12   accomplish anything. And now we have -- we're in

13   another hearing that was extended before it even began.

14   I feel, you know, it's a legitimate question, are our

15   partners in this acting in good faith or not? Why?

16   This is the evidence that I introduced, or whether it's

17   the photograph or just my statement, that ground water

18   users are continuing to pump while surface water users,

19   who are a hundred years senior, are being curtailed.

20   And all I am asking is that everybody be treated the

21   same. We have a priority doctrine in the state of

22   Idaho. I don't know why we're not following it.

23   I would ask the Director to direct legal staff

24   to begin drafting an order, stating that all water users

25   in Basin 37 shall be treated equally under the law,

1 whether we pump or whether we don't pump, that's up to

2 you. But I'm saying that let's treat each other the

3 same. That's where I'm having a problem with the

4 negotiation that is going on. Because from what I know

5 of it, I'm not sure that it's going to accomplish that.

6   And the reason I say this is because the issue

7 that we face is very simple. Silver Creek is a spring

8 fed system. The primary water source is the Wood River

9 aquifer. I could have questioned Mr. Luke on this, but

10 I didn't need to. It's all in the record. The

11 headwaters come right up out of the ground. The ground

12 water is the source, and the ground water is the water

13 that is flowing in the surface of Silver Creek and all

14 the tributaries.

15   Every study acknowledges this fact. The

16 earliest basin hydrologic study that I found dates to

17 1950. And the earliest specifically describing the

18 ground and surface water connections dates to 1972.

19 That's 50 years ago. There is no contradiction of these

20 basic facts. The study, all the staff memos cite all

21 the studies. And the studies within the staff memos

22 cite all the studies that all uphold this basic idea of

23 the ground water feeding Silver Creek. And it's all one

24 water source.

25   It's plainly obvious then that ground water

 1 pumping depletes the aquifer this year and every year,

 2 and that depletes surface flows. By depleting the

 3 aquifer, you diminish the surface flows in the Silver

 4 Creek system. That's how simple this is. You have to

 5 think of this as not just a year-by-year thing. It's a

 6 cumulative effect.

 7   So, Meghan, if you could put up the next

 8 picture, Photo 2, again, to illustrate.

 9   MS. JENKINS: I'm going to assume this is 2.

10 It's the second one down to it.

11   MR. SCHOEN: Yeah, that might be it. I need

12 you to zoom out. Okay. Yeah, that's the photo. You

13 can leave it there. That's fine. This is the picture

14 taken from the Stocker Creek Bridge yesterday. I

15 don't -- it has never been this low in anybody's

16 lifetime that I know of that I've spoken with.

17   You can see the exposed mud that's never been

18 exposed in the 30 years that I've lived there. You can

19 see the typical water mark. In the springtime, the

20 water is up above that little dock. Now, you can see

21 where it is. And here we are, the first of June, this

22 is the earliest my water rights have been shut off. But

23 I want you to see what Stocker Creek looks like right

24 now. Stocker Creek is one of the three main tributaries

25 in the Silver Creek system.

1   Could you go to the next photo, please,

2   Meghan?   Okay.   That's good.   This is a tap at the

3   corner of Highway 20 and Stocker Creek Road.   I have

4   lived at my location for 30 years.   For the first 25

5   years, that tap flowed continuously.   It no longer flows

6   that is because the aquifer has been depleted.

7   Thank you, Meghan, that's all with the photos.

8   So I want to say to you again, Mr. Director,

9   the decision here is very clear.   It's very simple, and

10   it's very obvious.   And no amount of obfuscation of the

11   facts or doubts cast upon percentage of uncertainty

12   should turn you from this basic conclusion.   I implore

13   you not to be led astray from the elegant simplicity to

14   the solution of this problem.

15   I mentioned, you know, my sense that a lot of

16   issues have been brought up, a lot of doubt has been

17   cast on the facts on what is best available science, on

18   the accuracy of the ground water flow model, on arcane

19   information about American Falls water.   We've even had

20   the honesty of the down basin users impugned.   We've

21   discussed uncertainty over uncertainty data gaps, staff

22   credibility, and whether this process is the best

23   process or another process is best.   But I just come

24   back to the fundamental idea here is that the ground

25   water and the surface water are one and the same water

1 source here, and they should be managed on the continuum

2 according to priority doctrine.

3   I want to address a couple of details that

4 have come out -- came out in the advisory committee

5 meetings and probably will in the hearings. It's been

6 stated that Allan Wiley's 2019 A report, Allan Wylie's

7 staff for IDWR who has put transducers in some of the

8 wells, ground water table has stabilized. And his

9 report has been quoted. The quote that has been given

10 is, "These maps indicate that the ground water flows

11 from the north to the south and out to the basin to the

12 east and the west. The water table contours also show

13 that the water table tends to be stable within the Wood

14 River Valley portion of the Big Wood ground water

15 management area."

16   That's the quote that has been given. The

17 part that hasn't been given is the second sentence of

18 that paragraph which reads. "This may be because the

19 Big Wood River is in direct hydraulic communication with

20 the unconfined aquifer, and the river is depleted to

21 sustain the unconfined aquifer. In other words, as the

22 aquifer is drawn down, more water falls out of the river

23 and into the aquifer, stabilizing the aquifer, but

24 further depleting flows into the surface flows.

25   I want to address another issue, this question

1   that was raised in the Brockway exhibit that was

2   submitted that talks about, you know, the location of

3   certain wells, and that they are in the unconfined -- or

4   they are in the confined aquifer, so don't have an

5   impact on the aquifer -- on surface flows.

6   Jennifer Sukow was asked about this yesterday.

7   Her opinion yesterday was that, you know, there is

8   connection between the confined and the unconfined and

9   so -- and so the statement that drawing from the

10   unconfined aquifer would not impact the aquifer, itself,

11   and therefore, surface flows, she did not agree with.

12   That is -- that was taken --

13   MR. THOMPSON: Director, I'm going to object

14   to this line of question I guess. Paraphrasing what

15   Ms. Sukow has already said, that's in the record. We

16   don't need somebody to tell us what she's said. If

17   Mr. Schoen has information on that point as his own

18   personal knowledge, we can hear that. But we don't need

19   to go back and forth on what the staff has already

20   testified to.

21   MR. SCHOEN: That's funny, because I heard

22   lawyers, you know, quoting from other people's testimony

23   when they were asking questions. I guess they can do

24   it, but I can't.

25   MR. THOMPSON: You are not a lawyer.

 1   THE HEARING OFFICER: Well, I don't think that

 2   will be the basis, Mr. Thompson for ruling on your

 3   objection. In fact, it persuades me to go the other

 4   direction that kind of response.

 5   Mr. Schoen, the difficulty I'm having is that

 6   you are presenting what I would characterize as oral

 7   argument, rather than facts that you know. So I'll

 8   overrule the objection. But I want you to focus on

 9   facts that you know. And I think, you know, your

10   testimony about your observations there of Stocker

11   Creek, and whether a particular tap or a pipe is free

12   flowing or not flowing. I think those are very

13   important facts that we need to know about.

14   MR. SCHOEN: Okay. Well, I respect that, sir.

15   I will tell you that having sat through many years of

16   presentations from the USGS and IDWR about this fact, I

17   feel fairly well informed. I feel as well informed as

18   Mr. Thompson on the matter. I'm not an expert in it. I

19   don't have a Ph.D. in it. But I've heard it time, and

20   time, and time again from the experts. And I do know a

21   fact that if you put a straw in a cup, no matter how

22   many twists and turns and convolutions that are in the

23   cup. If you draw from that straw, it's going to draw

24   down the water level in the cup. That's a fact that I

25   know. And it's the same thing with our aquifer. And

1 it's all in the record. It's all in the record. It's

2 in the staff memos. It's in the studies that are cited

3 by the staff memos. And it's in the studies cited in

4 the staff memos in their footnotes to the previous

5 studies that go back 50 to 60 years.

6   I just want to make the following statement.

7 I support the extent of the curtailment area for this

8 year alone. These are mostly ag areas. And these are

9 the areas that have the biggest impact on the ground

10 water in the Silver Creek drainage. I want to state

11 that I support the Director's action pertaining to the

12 2021 irrigation season under 42-237a.g. A water call at

13 this point accomplishes nothing.

14   And, you know, my earlier statements are, you

15 know, I don't know want to delay this any further. I

16 want us to get to a decision as quickly as possible,

17 because I think that's what's called for here as a

18 matter of fairness, if not the law and -- fairness, if

19 not the law.

20   So in conclusion, I'm asking you to do two

21 things. I'm asking you to issue an order either halting

22 ground water pumping or allowing seniors to continue to

23 pump pending your decision on curtailment. I ask this

24 so that all of us may be treated the same. I think this

25 would go a long way towards reducing the resentments and

 1 healing the rift between all of us using water, the

 2 limited water that we have in Basin 37.

 3   After that, once these hearings are complete,

 4 I would ask you to make a decision on curtailment that

 5 treats water users fairly and equally under the law and

 6 the constitution that honors the foundational principles

 7 of first in time first in right, that acknowledges that

 8 we have limited water resources according to the

 9 well-established science of our basin's aquifer system.

10   I'm also suggesting that you consider creating

11 a new doctrine, call it the Silver Creek Rule, that

12 recognizes that where you have one water source, but the

13 water may take longer than some period of time, I've

14 heard 24 hours is the rule. It may take longer than 24

15 hours to show up, but it does show up. That it will be

16 managed as one resource.

17   You know, I don't know that anybody has

18 studied how long it takes a molecule of water to get

19 from the north fork of the Big Wood River to the

20 Glendale Bridge. There is this presumption that

21 somehow, you know, if you draw from the aquifer via a

22 well in the Bellevue triangle at a certain point, that

23 it takes some time. This is not the Eastern Snake Plain

24 aquifer. We have a ground water flow model that we can

25 use.

1   But, you know, anecdotally, however you want

2   to describe it, we all know when the pump -- for

3   example, when the pumps go off to cut hay, the water

4   table comes up. I see it on that tap that I showed in

5   the photo. I see it in my creek that flows through my

6   property. These are things that I know that I have

7   observed. There is an almost immediate impact to ground

8   water extraction and the cessation of ground water

9   extraction. And I qualify that by saying now that the

10 aquifer is so low, that that impact is becoming muffled.

11 It's becoming less obvious. The aquifer is now so low

12 that these effects, that the return of surface flows

13 with the curtailment with cessation of pumping, the

14 immediate cessation of pumping is becoming harder and

15 harder to distinguish. And that speaks to the

16 cumulative effects of allowing unlimited ground water

17 extraction by ground water pumpers through the entirety

18 of the season, it is having a long term deleterious

19 effect on our aquifer and on surface flows in Silver

20 Creek. And the last thing I want to say is, even a 1932

21 surface right is senior to a ground water right.

22   Thank you, Mr. Director. I don't know if I

23 need to stand for questions or anything?

24   THE HEARING OFFICER: Yes. You are subject to

25 examination. And I would like you to take the chair, if

1 you would, so the participants can examine you. How do

2 we want to structure this examination, shall we follow

3 the same order that we followed previously?

4   MR. FLETCHER: That's fine.

5   THE HEARING OFFICER: It seems to make sense.

6 And then those who may be adversarial to Mr. Schoen's

7 position, I don't know, can then cross-examine.

8   So, Ms. Carter, any questions for Mr. Schoen?

9   MS. CARTER: I don't have any.

10   THE HEARING OFFICER: Mr. Fletcher.

11   MR. FLETCHER: No questions.

12   THE HEARING OFFICER: Mr. Rigby stepped out.

13 We'll come back.

14   MR. THOMPSON: I have a couple.

15   THE HEARING OFFICER: Mr. Thompson.

16   CROSS-EXAMINATION

17 QUESTIONS BY MR. THOMPSON:

18   Q. Hi, Mr. Schoen, Travis Thompson for the South

19 Valley Ground Water District. And that comment earlier

20 wasn't meant to be flippant. It was to just getting to

21 the point of providing testimony on things to your

22 personal knowledge and not paraphrasing the staff

23 reports that are in the record.

24   A. Understood.

25   Q. Thank you. You have two water rights; is that

 1 correct?

 2   A.   Correct.

 3   Q.   And one 37-351B is that an 1886 priority?

 4   A.   That, I believe so, yeah, a June of '86.

 5   Q.   And .16 cfs?

 6   A.   Correct.

 7   Q.   Authorized for irrigation of 14 acres?

 8   A.   Well, there is two water rights combined equal

 9 14.4 acres. So there is also an 1887 right.

10   Q.   And that would be 37-352B?

11   A.   Correct.

12   Q.   And those two waters rights have the source as

13 a ground water; is that correct?

14   A.   It's a surface right. It's managed as a

15 surface right. When the pump was installed just

16 for -- I asked for whether I could take it from ground

17 water just for simplicity sake, but it is a surface

18 right, and it is managed as a surface right, but the

19 source is ground water, and it's in the unconfined

20 aquifer.

21   Q.   Your priority is managed together with other

22 priorities on Silver Creek; is that true?

23   A.   Correct.

24   Q.   But the source on your water right states

25 ground water; isn't that correct?

1   A.   Correct.   I'm not in the ground water

2   district, however, I opted out of the ground water

3   district, and that request was granted.

4   Q.   I understand that.   But you understand your

5   water right says it's ground water?

6   A.   I do understand that.

7   Q.   And do you accept as far as projected impacts

8   on Silver Creek from ground water pumping, whether there

9   is curtailment of ground water rights this season in

10   July or August, and the resulting impacts of that

11   curtailment, do you accept the Department's reports as

12   to where that water would show up and when?

13   A.   I can't answer that question, because I

14   haven't read through them thoroughly enough to give you

15   an informed answer to the question.   I believe that if

16   ground water pumping is curtailed in the Silver Creek

17   drainage, that it will have a both short and long term

18   positive impacts both on the aquifer and on surface

19   flows in Silver Creek.

20   Q.   And as for the 2021 irrigation season, do you

21   know if your water rights will be restored or not?

22   A.   I can't say, but, you know, it's interesting,

23   Mr. Thompson, that you would ask me that question,

24   because one of the other attorneys working for the

25   ground water districts was questioning the idea that,

1 you know, if -- I think it was the questioning of

2 Mr. Luke saying --

3   Q. I'm asking you.

4   A. I know, but I'm answering you. My answer is

5 that saying that less senior senior rights that would

6 normally be curtailed, somehow don't suffer injury

7 because they are less senior senior rights is a

8 nonstarter with me. Because those rights are still

9 senior to the junior ground water rights. And so just

10 saying that because I would normally be curtailed, and I

11 am, every year I'm curtailed typically around the end of

12 June, the first of July and with an '86 and an '87

13 right, just because I would be curtailed doesn't mean I

14 should be curtailed if all water rights are managed on a

15 priority -- according to priority doctrine.

16   And so this question of how we are asked to

17 come in here and determine our injury? I know this may

18 be extending down the scope of your question. But to

19 me, that's a really problematic question, and that's a

20 really problematic line of inquiry as to how -- what the

21 outcome of this proceeding ought to be. Because how do

22 we determine injury when we've been curtailed all these

23 years and cumulative extraction from --

24   MS. McHUGH: I'm going to object to the

25 witness just going. I don't know exactly what he's

1 doing. But I think Mr. Thompson had a question that --

2   THE WITNESS: I answered it, and I was adding.

3   MS. McHUGH: And I'm not sure it was answered

4 but --

5   MR. THOMPSON: I'll just ask it again. I

6 don't think I did get an answer.

7   THE HEARING OFFICER: Well, Ms. McHugh, I

8 think it's the responsibility of the attorney who is

9 cross-examining to govern the way in which the witness

10 is responding. So I'll overrule the objection.

11   MS. McHUGH: Okay.

12   Q. (BY MR. THOMPSON) Do you know if your water

13 rights will come back on if ground water rights are

14 curtailed in July or August of this year?

15   A. I have -- I would have no idea.

16   Q. Okay. And you haven't reviewed the staff

17 reports to determine whether or not that would be the

18 case?

19   A. I have reviewed the staff reports to the

20 extent of Ms. Sukow's memo talking about the gross

21 amounts of water that would returned, how that

22 would -- how the watermaster would make decisions as to

23 whether my rights would be included in that amount or

24 not. I don't know that that analysis has been done yet.

25 But if it has, and it's in the reports, I haven't seen

 1 them.

 2   MR. THOMPSON: Okay. That's all I have.

 3   THE WITNESS: Thank you.

 4   THE HEARING OFFICER: Okay. Thank you,

 5 Mr. Thompson.

 6   Jerry, I'll circle back to you. Do you have

 7 questions for Mr. Schoen.

 8   MR. RIGBY: No, Mr. Director. Thank you.

 9   MR. LASKI: I don't have any.

10   THE HEARING OFFICER: Mr. Moroney?

11   MR. MORONEY: No, Director.

12   THE HEARING OFFICER: I think that's Group 2.

13 Group 3, anybody, any takers?

14   MS. McHUGH: As tempting as it might be, no

15 thanks.

16   THE HEARING OFFICER: I don't see Mr. O'Bannon

17 back there.

18   MR. RIGBY: You didn't say, Mr. Simpson.

19   THE HEARING OFFICER: Well, I looked at him.

20 He was shaking his head.

21   MR. SIMPSON: Thank you, Mr. Rigby.

22   THE HEARING OFFICER: Okay, thank you,

23 Mr. Schoen.

24   MR. SCHOEN: Thank you, Mr. Director.

25   (Witness excused.)

1   THE HEARING OFFICER: Okay. So at this

2   juncture then, we'll adjourn for today and reconvene at

3   9:00 in the morning here again.

4   Any other comments before we close the record

5   for today? Close the record isn't a correct term,

6   interrupt.

7   All right. We'll see everybody at 9:00 in the

8   morning.

9   MR. RIGBY: Thank you, Mr. Director.

10   THE HEARING OFFICER: Thank you.

11   (Hearing adjourned at 2:39 p.m.)

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REPORTER'S CERTIFICATE

1   I, COLLEEN P. DOHERTY, CSR No. 345, Certified

2   Shorthand Reporter, certify:

3   That the foregoing proceedings were taken

4   before me at the time and place therein set forth, at

5   which time the witness was put under oath by me;

6   That the testimony and all objections made were

7   recorded stenographically by me and transcribed by me or

8   under my direction;

9   That the foregoing is a true and correct record

10   of all testimony given, to the best of my ability;

11   I further certify that I am not a relative or

12   employee of any attorney or party, nor am I financially

13   interested in the action.

14   IN WITNESS WHEREOF, I set my hand and seal this

15   15th day of June, 2021.

16

17

18

19

20   _____

21   COLLEEN P. DOHERTY, CSR 345

22   Notary Public

23   P.O. Box 2636

24   Boise, Idaho 83701-2636

25   My commission expires September 7, 2023.

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