

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

IDAHO GROUND WATER APPROPRIATORS, INC.,

Petitioner,

v.

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

Respondents.

**Case No. CV27-22-00945**

IN THE MATTER OF THE DISTRIBUTION OF  
WATER TO VARIOUS WATER RIGHTS HELD BY  
AND FOR THE BENEFIT OF A&B IRRIGATION  
DISTRICT, AMERICAN FALLS RESERVOIR  
DISTRICT #2, BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE CANAL  
COMPANY, AND TWIN FALLS CANAL COMPANY

IN THE MATTER OF IGWA'S SETTLEMENT  
AGREEMENT MITIGATION PLAN

**AGENCY HEARING TRANSCRIPT ON APPEAL**

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

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR )  
THE BENEFIT OF A&B IRRIGATION )  
DISTRICT, AMERICAN FALLS RESERVOIR )  
DISTRICT #2, BURLEY IRRIGATION ) Docket No.  
DISTRICT, MILNER IRRIGATION DISTRICT, ) CM-MP-2016-001  
MINIDOKA IRRIGATION DISTRICT, NORTH )  
SIDE CANAL COMPANY, AND TWIN FALLS )  
CANAL COMPANY )  
\_\_\_\_\_ )  
IN THE MATTER OF IGWA'S SETTLEMENT )  
AGREEMENT MITIGATION PLAN )  
\_\_\_\_\_ )

TRANSCRIPT OF RECORDED STATUS CONFERENCE HEARING

AUGUST 5, 2022

BEFORE DIRECTOR GARY SPACKMAN

TRANSCRIBED BY:

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

Notary Public

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1 APPEARANCES (Continued):

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1 APPEARANCES (Continued):

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3 US BUREAU OF RECLAMATION

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7 mhoward@usbr.gov

8 For Bingham Groundwater District:

9 FORSBERG & EVANS LAW OFFICES, CHTD.

10 BY MR. DYLAN K. ANDERSON

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13 dylan@forsberglawoffices.com

14 Also Present:

15 Megan Jenkins, IDWR

16 Brian Ragan, IDWR

17 Scott Luvas, IDWR

18 Kendall Burkhart, IDWR

19 Cara Ferguson, IDWR

20 Matt Anders, IDWR

21 Jay Barlogi, SWC

22 Jason Brown, SWC

23 Dan Shewmaker, SWC

24 Gary Reynolds, SWC

25 Scott Reading, Milner

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APPEARANCES (Continued):

- Julie Sievers, Milner
- Jeff Orr, Milner
- Randy Brown, Milner
- John Lynch, Burley Irrigation District
- Dan Davidson, Minidoka Irrigation District
- Rick Pearson, Twin Falls Canal Company
- Alan Hanseen, North Side Canal Company
- Ellis Gooch, AFRD2
- Bob Turner, IGWA
- Alan Jackson, Bingham Groundwater District
- Connie Christensen, Bingham Groundwater District
- Brad Butters, Bonneville-Jefferson
- Jackson Higgs
- Adam McCoy
- Ryan Shirtliff
- Don Parker, Jefferson-Clark Irrigation District
- Skyler Johns, Bonneville-Jefferson Groundwater  
District
- Tony Olenichak, Water District 1
- Cassidy Telford, Bingham Groundwater District
- Bill Stoddard, Jefferson-Clark Groundwater  
District

1 (Begin transcription at 3:07 of audio file  
2 20220805\_SWC\_StatusConference RECORDING WEBEX.)

3 DIRECTOR SPACKMAN: Okay. Let me start -- start  
4 over again.

5 So this is a status conference that's been  
6 scheduled in the Surface Water Coalition and Idaho  
7 Ground Water Appropriators delivery call. And this  
8 status conference was requested by the Surface Water  
9 Coalition. And we are recording this proceeding today,  
10 and so the transcript of this proceeding will be  
11 available online following the status conference.

12 So let's take roll right now. And again,  
13 my name is Gary Spackman, Director of the Idaho  
14 Department of Water Resources. And we will introduce  
15 people in a clock -- I'm sorry, counterclockwise  
16 direction, and then we'll go to the gallery afterwards.

17 So, Megan, if you'll introduce yourself,  
18 please.

19 MS. JENKINS: Hi. My name is Megan Jenkins. I  
20 am Director Spackman's assistant, and I will be  
21 managing WebEx today. So if you guys are having any  
22 issues, feel free to message me in the chat.

23 DIRECTOR SPACKMAN: Brian, if you'll unmute.

24 MR. RAGAN: Yeah. Good morning. Brian Ragan,  
25 Idaho Department of Water Resources.



1           DIRECTOR SPACKMAN: Garrick.

2           MR. BAXTER: Garrick Baxter, attorney for the  
3 Department.

4           DIRECTOR SPACKMAN: And then in -- seated  
5 outside of the rectangular desks that are set up, let's  
6 just start in the front.

7                     If you'll unmute, Scott, and just identify  
8 yourself.

9           MR. LUVAS: Scott Luvás [phonetic], water  
10 resource agent.

11          DIRECTOR SPACKMAN: Step to the mic.

12          MS. BURKHART: Kendall Burkhart [phonetic],  
13 water resource agent.

14          DIRECTOR SPACKMAN: Okay.

15          MS. FERGUSON: Cara Ferguson [phonetic], Idaho  
16 Department of Water Resources, hydrologist.

17          MR. ANDERS: Matt Anders, hydrologist with IDWR.

18          DIRECTOR SPACKMAN: Okay. And that's a roll  
19 call of those who are attending today in person at the  
20 Department of Water Resources conference room.

21                     Now, participating remotely, and let's  
22 start with Surface Water Coalition.

23                     Travis, if you'd introduce yourself and  
24 whoever's there with you in the Twin Falls Canal  
25 Company offices.

1 MR. THOMPSON: Thank you, Director. Travis  
2 Thompson, Barker, Rosholt & Simpson, for Surface Water  
3 Coalition.

4 I have Jay Barlogi, Jason Brown, Dan  
5 Shewmaker, and Gary Reynolds.

6 DIRECTOR SPACKMAN: Okay. Thank you.

7 And then Kent Fletcher and anybody who may  
8 be with you. Go ahead.

9 MR. FLETCHER: Yeah. Director, this is Kent  
10 Fletcher. And I'm here today representing MID and A,  
11 party to. I'm out of town, so no one is in the room  
12 with me. Thank you.

13 DIRECTOR SPACKMAN: Okay. Thanks for  
14 participating, Kent.

15 And then is there anybody else from the  
16 Surface Water Coalition that's participating? I see  
17 somebody from Milner is signed in.

18 MR. READING: This is Scott Reading from Milner,  
19 and we have Julie Sievers [phonetic], Jeff Orr  
20 [phonetic], and Randy Brown here.

21 DIRECTOR SPACKMAN: Okay. Tell me who else is  
22 with you, Scott. It was a little muffled.

23 MR. READING: Okay. Sorry. Jeff Orr, Julie  
24 Siegers, Randy Brown.

25 DIRECTOR SPACKMAN: Julie Sievers and Randy

1 Brown.

2 MR. READING: Yes.

3 DIRECTOR SPACKMAN: All right. Thank you.

4 Anybody else from the Surface Water  
5 Coalition?

6 (Cross-talk.)

7 DIRECTOR SPACKMAN: All right. I knew we'd get  
8 in trouble, but I'm -- so one at a time.

9 MR. LYNCH: I'll go first. This is John Lynch  
10 [phonetic] from Burley Irrigation District.

11 DIRECTOR SPACKMAN: John, thanks for  
12 participating.

13 Who else?

14 MR. DAVIDSON: Director, this is Dan Davidson  
15 with Minidoka Irrigation District.

16 DIRECTOR SPACKMAN: Dan, thanks for signing in.

17 MR. PEARSON: Rick Pearson [phonetic], Twin  
18 Falls Canal Company.

19 DIRECTOR SPACKMAN: Thanks, Rick.

20 MR. HANSEEN: Alan Hanseen [phonetic], North  
21 Side Canal Company.

22 DIRECTOR SPACKMAN: Thanks, Alan.

23 MR. GOOCH: Ellis Gooch from AFRD2.

24 DIRECTOR SPACKMAN: Ellis, thanks for being a  
25 part of this.

1 Others?

2 Okay. Let's shift to the groundwater user  
3 group.

4 TJ, why don't you start, and then we'll  
5 figure out who else is on.

6 MR. BUDGE: Morning, Director. This is TJ  
7 Budge. I represent Idaho Ground Water Appropriators.  
8 I'm by myself, but I know there's some others on the  
9 phone as well today.

10 DIRECTOR SPACKMAN: Bob, are you there? Bob  
11 Turner?

12 MR. TURNER: Thank you, Mr. Director.

13 Can you hear me now?

14 DIRECTOR SPACKMAN: I can.

15 MR. TURNER: Thank you.

16 I'm alone in my hotel room.

17 DIRECTOR SPACKMAN: And you are Bob Turner;  
18 right?

19 MR. TURNER: I am Bob Turner.

20 DIRECTOR SPACKMAN: Okay. Thank you.

21 All right. Others? Other groundwater  
22 users who are participating?

23 MR. JACKSON: Yeah, Director, this is Alan  
24 Jackson. And I've got Connie Christensen [phonetic]  
25 here with Bingham Groundwater District.

1           DIRECTOR SPACKMAN: Alan Jackson. Thanks, Alan.  
2 And Connie's there with you.

3           MR. ANDERSON: This is Dylan Anderson, also with  
4 Bingham Groundwater District.

5           DIRECTOR SPACKMAN: What's your first name  
6 again?

7           MR. ANDERSON: Dylan Anderson.

8           DIRECTOR SPACKMAN: Dylan. Okay. Thank you,  
9 Dylan.

10                       Others?

11           MR. BUTTERS: This is Brad Butters [phonetic].  
12 I'm with Bonneville-Jefferson.

13           DIRECTOR SPACKMAN: Brad Butters. It's up on  
14 the screen.

15                       Thank you, Brad.

16                       Others who are participating?

17           MR. HIGGS: Jackson Higgs [phonetic]. And I  
18 have in my office Ryan Shirliff and Adam McCoy.

19           DIRECTOR SPACKMAN: Okay. You're coming through  
20 real softly, Jackson.

21           MR. HIGGS: Is this any better?

22           DIRECTOR SPACKMAN: Yeah, much better. Thank  
23 you.

24           MR. HIGGS: Yeah. I have Adam McCoy [phonetic]  
25 and Ryan Shirliff [phonetic] here in my office

1 listening.

2 DIRECTOR SPACKMAN: Do you need the names  
3 repeated, Megan?

4 MS. JENKINS: Adam McCoy and --

5 DIRECTOR SPACKMAN: Adam McCoy and who?

6 MR. HIGGS: Ryan Shirtliff.

7 DIRECTOR SPACKMAN: Thank you, Jackson.

8 MR. HIGGS: Thank you.

9 DIRECTOR SPACKMAN: Others? Okay.

10 MR. PARKER: Director, this is Don Parker from  
11 Jefferson-Clark Irrigation.

12 DIRECTOR SPACKMAN: Don, how are you?

13 MR. PARKER: Old and worthless.

14 DIRECTOR SPACKMAN: Well, it's good to hear your  
15 voice.

16 MR. PARKER: Thank you.

17 DIRECTOR SPACKMAN: You and I need to get  
18 together again at The Homestead.

19 MR. PARKER: We'll do it.

20 DIRECTOR SPACKMAN: Okay. Who else?

21 MR. JOHNS: Director, this is Skyler Johns  
22 [phonetic] with Bonneville-Jefferson Groundwater  
23 District.

24 DIRECTOR SPACKMAN: I'm sorry. Again, your  
25 name?

1 MR. JOHNS: Skyler Johns with the  
2 Bonneville-Jefferson Groundwater District.

3 DIRECTOR SPACKMAN: Okay. Thank you.

4 Other groundwater users?

5 And I think we have some other folks  
6 representing other entities on today.

7 I'm told at least from Megan that, Norm  
8 Semanko, are you there?

9 MR. SEMANKO: I am. Good morning, your Honor.  
10 Norm Semanko with Parsons, Behle & Latimer. And we  
11 represent Snake River Storage, just auditing the course  
12 today. Thank you.

13 DIRECTOR SPACKMAN: Great. Thanks, Norm. And  
14 for calling me "your Honor," you can join us at The  
15 Homestead when Don and I get together if you'd like.

16 MR. SEMANKO: On totally unrelated matters.  
17 Yes, sir. Thank you.

18 DIRECTOR SPACKMAN: And, Chris Bromley, are you  
19 there?

20 MR. BROMLEY: I am, Director. Thank you. Chris  
21 Bromley on behalf of the Coalition of Cities.

22 DIRECTOR SPACKMAN: Okay. Thank you, Chris.

23 Now, do we have anybody else on the line  
24 that I've missed?

25 MR. EARLY: Director, this is Darrell Early from

1 the Attorney General's office. I'm not here to speak  
2 today, but just monitoring the proceeding.

3 THE HEARING OFFICER: Thanks, Darrell.

4 MS. KLAHN: Mr. Director.

5 DIRECTOR SPACKMAN: Yes.

6 MS. KLAHN: I'm sorry. Go ahead.

7 DIRECTOR SPACKMAN: No, I just wanted to thank  
8 Darrell. But I hear a familiar voice.

9 Is that Sarah?

10 MS. KLAHN: That's right. Good morning,  
11 Mr. Director. I wasn't able to make the WebEx work, so  
12 I'm on the phone.

13 DIRECTOR SPACKMAN: Okay. Well --

14 MS. KLAHN: For the City of Pocatello. Thank  
15 you.

16 DIRECTOR SPACKMAN: Glad you're -- glad you're  
17 participating.

18 Okay. Others?

19 MR. OLENICHAK: Tony Olenichak, Water  
20 District 1.

21 DIRECTOR SPACKMAN: Tony, thanks for signing in.

22 Others?

23 MR. HOWARD: Mr. Director, this Matt Howard,  
24 Reclamation.

25 DIRECTOR SPACKMAN: Thank you, Matt.



1 MS. TELFORD: Cassidy Telford [phonetic],  
2 Bingham Groundwater.

3 DIRECTOR SPACKMAN: Did you get the name?

4 MS. JENKINS: Cassidy Telford?

5 DIRECTOR SPACKMAN: Telford?

6 MS. TELFORD: Yes.

7 DIRECTOR SPACKMAN: Thank you, Cassidy.

8 Others?

9 We have William Stoddard. Do we have a  
10 William Stoddard participating? Well, maybe listening  
11 anyway.

12 Okay.

13 MR. BUDGE: Director, this is TJ. Bill Stoddard  
14 is the manager of Jefferson-Clark Groundwater District.

15 DIRECTOR SPACKMAN: Thanks, Bill.

16 Others?

17 All right. After an exhaustive  
18 introduction process here, maybe we've identified  
19 everybody and we have you listed as participants today.  
20 And we have a number of people that are listening, and  
21 today at least in the conversation I want to rely  
22 largely on the attorneys to carry the conversation, and  
23 because otherwise I think we could get ourselves into a  
24 discussion that's maybe not controllable. I think at  
25 the end I'll allow people to ask some questions if they

1 have a desire to ask in the end.

2 So this particular status conference was  
3 scheduled because of a request filed by the Surface  
4 Water Coalition. And the document that was filed was  
5 the Surface Water Coalition's Notice of Steering  
6 Committee Impasse forward slash Request for Status  
7 Conference.

8 Again, this is in the matter of the Surface  
9 Water call that has been ongoing, and related  
10 specifically to a settlement agreement, and the  
11 adoption of the settlement agreement and amendments or  
12 other documents, and approval of those as a mitigation  
13 plan.

14 And the mitigation plan we'll just -- we'll  
15 talk about the agreement or at least the various  
16 documents in total as the settlement agreement. I have  
17 four documents that have been recognized by two  
18 separate orders of the Department.

19 So on May 2nd, 2016, the Department issued  
20 a final order approving the stipulated mitigation plan.  
21 And three of the four documents were recognized in the  
22 final order that was executed May 2nd, 2016.

23 And then on May 9th, 2017, the Department  
24 issued a final order approving an amendment to the  
25 stipulated mitigation plan, and that particular

1 document is a second amendment.

2           So I have as a complete representation of  
3 the agreement, unless somebody calls me out as being  
4 incorrect, as the settlement agreement entered into  
5 June 30th, 2015; an agreement dated October 7th, 2015,  
6 this related specifically to A&B Irrigation District  
7 and their participation as a member of the Surface  
8 Water Coalition; an addendum to the settlement  
9 agreement. And this -- this document was executed in  
10 October of 2015, looking at the signatures. And then  
11 the second amendment -- second addendum to the  
12 settlement agreement, and it's dated December 14th,  
13 2016.

14           So I have these four documents that  
15 probably will govern our discussion today regarding the  
16 mitigation plan that was approved.

17           Any corrections? Because I think we need  
18 to refer to these documents as we work through.

19           Okay. And so I want to go back and look at  
20 the document that was filed by the Surface Water  
21 Coalition. And this particular document, I think,  
22 refers, at least specifically, to the second addendum  
23 and a provision in the second addendum.

24           By the way, in an earlier order issued by  
25 the Department this summer, there was a discussion

1 about this particular provision. And so I'll refer to  
2 it. And it's in section 3, I guess 3.M is what it's  
3 labeled. Well, it's C. But anyway, it is small case  
4 Roman numeral iv. I'm a little confused by the  
5 numbering here. I have an A, B, C, but I'm not sure  
6 what the 3.M. is.

7 But anyway, under section C there's a small  
8 Roman numeral iv. And it says, "If the Surface Water  
9 Coalition and IGWA do not agree that a breach has  
10 occurred or cannot agree upon actions that must be  
11 taken by the breaching party to cure the breach, the  
12 steering committee will report the same to the Director  
13 and request that the Director evaluate all available  
14 information, determine if a breach has occurred, and  
15 issue an order specifying actions that must be taken by  
16 the breaching party to the -- to cure the breach or be  
17 subject to curtailment."

18 And at least it's my understanding that  
19 it's under this provision that -- that the notice of an  
20 impasse has been sent to me and that there's a request  
21 for the status conference.

22 Now, with that background -- oh, I also  
23 want to mention that I have received in the last couple  
24 of days documents from both Surface Water Coalition and  
25 IGWA. First from IGWA, titled "Response to Surface

1 Water Coalition's Notice of Steering Committee  
2 Impasse." And then yesterday a document titled  
3 "Surface Water Coalition's Reply to IGWA's Response."  
4 I have read both those documents.

5 And at this point I -- I guess I'd like to  
6 hear from the Surface Water Coalition regarding their  
7 filing, and specifically state, at least clarify,  
8 what's sought. There are five items here. And I'm  
9 ready to go to those at some point.

10 But, Travis or Kent, if you want to speak  
11 to this filing, I'd be glad, and I think the other --  
12 the folks participating would like to hear the basis  
13 for this request. Thank you.

14 MR. THOMPSON: Yeah, I can start, Director. And  
15 I can be brief. This is Travis Thompson.

16 I think it was appropriate once we had the  
17 groundwater districts' report back in March, and then  
18 as confirmed by the Department's verification report  
19 submitted at the end of June. You know, our opinion, I  
20 guess confirmed by IGWA and the data, that groundwater  
21 districts did not perform 240,000 acre-feet of  
22 reductions last year.

23 And so under the agreement, as you pointed  
24 out, the steering committee had a chance to review that  
25 and determine whether or not that was an

1 underperformance breach of that provision.

2           There was no agreement about that, and I  
3 think that's evident in the filings by the parties this  
4 week.

5           So under that second addendum the request  
6 then goes to the Director to evaluate that information  
7 and determine if a breach has occurred. And if so, I  
8 guess what actions must be taken by that breaching  
9 party to cure the breach or be subject to curtailment.

10           DIRECTOR SPACKMAN: Kent, anything further?  
11 Kent, anything further?

12           Well, I hope we still have Kent. But  
13 anyway.

14           If he -- I hope you can hear us, Kent. If  
15 you want to unmute, at any time speak up.

16           Okay. I think I'll move on.

17           Travis -- or, TJ, do you have a response  
18 just verbally here?

19           MR. BUDGE: Yeah, I could provide a brief  
20 response.

21           First let me just preface my comments by  
22 saying I -- I guess I share some of the feeling of  
23 disappointment that we ended up here before the  
24 Director today. It's been nice, you know, having lived  
25 through ten years of litigation between the groundwater

1 users and surface water users, it's been very nice the  
2 last six years to see all of the combined effort and  
3 energy and resources go into conserving water and  
4 expanding recharge capacity and implementing  
5 conversions and things of that nature. And we hope to  
6 see that continue.

7           That said, we -- we recognize that the  
8 sentinel wells have not recovered as swiftly as we  
9 anticipated. And I think we foresaw from the beginning  
10 that the day would come when we would experience, you  
11 know, multiple years of drought which would stress the  
12 agreement. And I think we're feeling some of that  
13 stress now.

14           And as groundwater users, we do recognize  
15 that it's within the purview of the Coalition to  
16 request the meeting that we're having today.

17           Our hope is that this does not turn into  
18 the parties retreating to their camps and we return to  
19 a posture where we're just litigating and -- with each  
20 other and that this does not become a barrier to  
21 continuing the cooperation that we've experienced in  
22 recent years.

23           So with that preface, let me respond to the  
24 comments that Travis made.

25           First Travis made a statement that the

1 groundwater users acknowledge that they did not  
2 conserve 240,000 acre-feet last year. And that's not  
3 accurate. We do acknowledge that the amount of water  
4 we conserved compared to the five-year average from  
5 2010 to 2014, that was less than 240. But we don't --  
6 we don't agree that we didn't actually conserve 240.

7           And this distinction is important. I don't  
8 think there's any disagreement between the parties that  
9 the settlement agreement contemplates a reduction of  
10 240,000 acre-feet year in and year out. So that is the  
11 goal, that there would be an annual conservation of  
12 240,000 acre-feet. That would happen on wet years, and  
13 it would happen on dry years.

14           And we all had the expectation that if we  
15 achieved that on wet years and dry years that the  
16 aquifer would recover and we would provide a secure  
17 water supply for the Coalition.

18           The issue really for the Director today is  
19 not whether that's an annual obligation. It's a  
20 question of how you measure compliance. That's really  
21 the issue before the Department.

22           And as IGWA's pointed out in our reply  
23 brief, we believe that the measurement must happen on a  
24 five-year rolling average, and we -- we base that  
25 primarily on the language in the settlement agreement



1 that refers to compliance on a five-year average.

2 Now, what I understand the Coalition to be  
3 advocating for is that compliance or that the  
4 conservation target be measured against the historic  
5 five-year average. So my understanding is that they  
6 would like that IGWA have to conserve 240,000 acre-feet  
7 annually from its historic average.

8 The problem with that is there's no  
9 verbiage in the settlement agreement to that effect.  
10 For the Department to make that ruling, the Department  
11 would have to effectively, you know, read in or write  
12 in to section 3(a)(1) that the -- that the conservation  
13 will be measured from the five-year historic average.  
14 And that language is just not in the settlement  
15 agreement.

16 IGWA could take the position that the 240  
17 is measured from its peak diversions during that  
18 five-year period. We could just as easily make that  
19 argument. But there's no support for that in the -- in  
20 the settlement agreement as well.

21 The only direction the settlement agreement  
22 gives is that compliance will be measured on a  
23 five-year rolling average. And that makes -- that  
24 makes perfect sense. I think it's the only practical  
25 solution as well is that we conserve water in wet years

1 and dry years through drying up land, the way we farm,  
2 applying less water, growing less-water-intensive  
3 crops, which we've been doing.

4 And our view is that the plain language of  
5 the settlement agreement requires that compliance be  
6 measured on that five-year rolling average.

7 That's all I have on this issue. I know  
8 there's another issue the Coalition raised about  
9 whether the groundwater districts are responsible for  
10 the full 240 or a proportionate share thereof. But  
11 Travis has not spoken to that yet, so I'll withhold my  
12 comments on that issue.

13 DIRECTOR SPACKMAN: So, TJ, this is Gary  
14 Spackman. So are you arguing that there is no  
15 benchmark or no baseline against which the 240,000  
16 acre-feet is supposed to be calculated, that any -- any  
17 random number can be -- the baseline from which the 240  
18 then is subtracted?

19 MR. BUDGE: No, not at all, Director.

20 So yeah, we recognize that the 240 -- the  
21 240 is a reduction from the amount of water that would  
22 have been diverted in the absence of the settlement  
23 agreement. And the way you measure that, the way we've  
24 decided to measure that, and the -- which we think is  
25 based on the language of the agreement, is that we form

1 a -- we formed a baseline based on average diversions  
2 during the 2010 to 2014 time frame.

3 Now, the settlement agreement doesn't tell  
4 us that that becomes the baseline. We selected that as  
5 the baseline because the settlement agreement refers to  
6 compliance being on a five-year average.

7 And so our approach to this from the  
8 beginning has been that if our compliance is measured  
9 on a five-year average, then the baseline needs to  
10 mirror that. It also needs to be a five-year average.

11 And so we could set the benchmark or the  
12 baseline based on pre-settlement agreement diversions  
13 during that five-year time period, and then we can  
14 measure compliance based on post-settlement diversions  
15 also on a five-year average.

16 Does that answer your question, Director?

17 DIRECTOR SPACKMAN: Well, I just want to ensure  
18 that everybody agrees that the baseline from which the  
19 240,000 acre-feet is calculated has been that five-year  
20 average, and there's no dispute about that in terms of  
21 the way the parties have treated and calculated whether  
22 the 240,000 acre-feet has been reduced or not.

23 And that is the way in which everybody has  
24 agreed; right? We're not arguing that there is no  
25 baseline.

1           MR. BUDGE: Well, we've -- we've never argued  
2 that in the past, Director. And everybody has  
3 certainly treated that five-year period as the  
4 baseline. And that five-year baseline is predicated  
5 upon compliance being measured on a five-year average.  
6 That's where that came from.

7           And so our view is the fact that everybody  
8 has accepted and agreed that the five-year historic  
9 pumping is the baseline, that settles the question as  
10 to how compliance is measured.

11           Now, if the Coalition wants to come in and  
12 say "No, that's not how we want to measure compliance,"  
13 well, then that calls into question what the baseline  
14 should be. And they could argue that it should be, you  
15 know, 240 measured from your historic low pumping. And  
16 we could argue, "No, it should be 240 measured from our  
17 historic high pumping, because the settlement agreement  
18 does not define the baseline."

19           And so, you know, our view is that it's --  
20 the settlement agreement effectively defines the  
21 baseline and compliance based on the provision that  
22 refers to a five-year average.

23           DIRECTOR SPACKMAN: Okay. Thanks, TJ.

24           Travis or Kent?

25           MR. FLETCHER: Director.

1           DIRECTOR SPACKMAN: Yeah.

2           MR. FLETCHER: Yeah, Director. This is Kent  
3 Fletcher. I was able to get off mute. I was having  
4 issues with my phone.

5                   I'd like to address the overall issues, if  
6 that's okay. And if TJ needs to respond to what I say,  
7 that's -- you know, I think that's fine, if you're okay  
8 with that.

9           DIRECTOR SPACKMAN: Sure.

10          MR. FLETCHER: Yeah. I think this whole  
11 discussion shows that some of the groundwater districts  
12 in particular have totally lost sight about what this  
13 agreement is all about. And I believe that we have to  
14 remember that this is a mitigation agreement, and the  
15 purpose of this agreement is to allow junior water  
16 users to pump out of priority, so long as they're  
17 complying with certain requirements.

18                   And we have to all remember that the goal  
19 of this agreement is to restore the water supply and to  
20 restore water to the senior users.

21                   The focus of the groundwater districts  
22 apparently has almost been solely on, you know, whether  
23 this 240,000 is met or not met. And under the  
24 agreement that is a measure toward a goal that in all  
25 likelihood will not be achieved next year under the

1 agreement.

2 The streamflows are declining. The  
3 sentinel wells are dropping. We are almost back to  
4 where we started from when we signed this agreement.  
5 And so when we look at all of this in the big picture,  
6 we have to take that into account.

7 As to the 240, the agreement is clear that  
8 the groundwater users are supposed to reduce diversions  
9 or to take other actions that reduce -- that can count  
10 toward diversions in the amount of 240,000 acre-feet a  
11 year. It says "annually." It does not say "rolling  
12 average."

13 And what the groundwater users are now  
14 trying to state is that under the agreement if they  
15 reach a goal, the goals, then they can start looking at  
16 five-year averages if they want to start taking other  
17 actions and perhaps allow additional diversions.

18 But they're nowhere near getting to that.  
19 They aren't close. In fact, under their own expert's  
20 projections they won't be near those goals for decades.

21 And so here we are. Last year we have the  
22 first bad weather situation, the first drought  
23 situation under the agreement, and the groundwater  
24 users divert more water than ever and only -- and only  
25 reduce diversions by half of what they're supposed to.

1           Now, when they start arguing about this 240  
2 per year thing that they're talking about, every year  
3 they file a report with the Department that talks about  
4 how they have complied with the 240 standard. So all  
5 the Department has to look at -- that's the measurement  
6 the groundwater districts are using. You can just look  
7 at their own report. That's the baseline they're  
8 measuring against. It's in their own report.

9           So I -- we're getting sidetracked by a lot  
10 of issues here. But the bottom line is the groundwater  
11 districts, and not all of them, but some of them,  
12 clearly breached this agreement last year.

13           At the same time AFRD2 shut down early.  
14 Twin Falls reduced diversions dramatically. And almost  
15 all of the other surface water users are at record low  
16 carryover levels. So we're on the brink of a collapse  
17 of the surface water supply system.

18           So I'm just pointing out that we're  
19 debating, you know, this issue dealing with 240, when  
20 the groundwater users in their own report show they did  
21 not comply with the 240 this past year. And in the big  
22 picture of things, this is really minor compared to  
23 what they should be doing in order to restore the water  
24 supply.

25           So I just wanted to keep us focused on how

1 this agreement started and where we are today.

2 Thank you.

3 DIRECTOR SPACKMAN: Thanks, Kent.

4 Travis?

5 MR. THOMPSON: Yeah, I guess just to touch back  
6 on TJ's point, I think it's kind of appropriate. Today  
7 is my 22nd anniversary, because you do have bumps and  
8 disagreements along the way doesn't mean you end the  
9 marriage.

10 So, you know, this agreement and what we've  
11 agreed to, we're committed to that. And I guess the  
12 process that's been outlined for when there's not  
13 compliance in somebody's opinion, that's why we're here  
14 today. I mean that's following what the mitigation  
15 plan order approved, and that's where we're at.

16 I don't have anything to add on the rolling  
17 average. I think the agreement speaks for itself. The  
18 reference to the five-year rolling average when the  
19 groundwater goal is achieved is a wholly different  
20 section. It's not related to the reductions at all.  
21 So that's -- the Director can read the agreement for  
22 that.

23 Thank you.

24 DIRECTOR SPACKMAN: TJ, any counter?

25 MR. BUDGE: Yeah, just a couple comments.



1           You know, the notion that the groundwater  
2 districts are not committed to aquifer recovery or do  
3 not recognize that as the ultimate objective of the  
4 settlement agreement, that's simply not true. The  
5 groundwater districts, they recognize that if the  
6 Coalition does not have a secure water supply they're  
7 going to continue to be at risk of curtailment.

8           And our primary objective from Day One has  
9 been to achieve that. And when we entered into the  
10 settlement agreement, we developed a mechanism that all  
11 parties thought would achieve that. A mechanism that  
12 we can control. And that's how much water we use and  
13 how much recharge we can conduct.

14           So, you know, we can't control the  
15 hydrology of the aquifer. We can't control the  
16 accuracy of the model. But what we can control is how  
17 much water we conserve.

18           And over the last five years on average  
19 we've conserved, you know, approximately 340,000  
20 acre-feet. And we've done that to try to recover the  
21 aquifer and provide a secure water supply for the  
22 Surface Water Coalition.

23           And if you compare our diversions over the  
24 last five years with the baseline period, during the  
25 wettest period during the baseline, our diversions were

1 higher than the wettest year we had in the last five  
2 years. And during the baseline period our diversions  
3 during the -- our peak diversions, so the hottest and  
4 driest year, they're also significantly higher than our  
5 diversions were last year.

6 So the districts are conserving water every  
7 year, and we're doing that because that's what we can  
8 control.

9 And the premise of the settlement and this  
10 tool was that we would conserve water every year, wet  
11 years and dry years. And that's what we've been doing.

12 We certainly recognize that our biggest  
13 challenge right now is the sentinel wells. We are most  
14 troubled about that. We understand that's the ultimate  
15 objective.

16 And believe me, we are more disappointed  
17 than anyone that the aquifer has not recovered as  
18 quickly as the model predicted. And that's a problem  
19 that's going to be challenging to fix, but we're  
20 committed to continue to work towards in good faith.

21 On how you measure the 240, Kent's saying,  
22 you know, we did not comply last year. Well, had we  
23 not had the settlement agreement our diversions would  
24 have been a lot higher than they were. They're as low  
25 as they were because of our actions, but it was a

1 really hot and dry year.

2           And the Coalition's not really given us an  
3 alternative way of measuring diversions on a -- you  
4 know, a single-year level. We can't -- we -- it would  
5 take a crystal ball for us to know what our diversions  
6 would have been in 2021 in the absence of the  
7 settlement agreement.

8           And so the only way we know how to, you  
9 know, reliably compare our post-settlement agreement  
10 performance with our pre-settlement agreement pumping  
11 is to -- is to use a five-year average, which is how  
12 the baseline was formed. That's the only way we know  
13 how to do it, and that's the premise we've been  
14 operating on from Day One.

15           And the reason we're here today is not  
16 because we've lost sight of the agreement. It's  
17 because the Coalition is saying "You're in breach for  
18 last year." That's why we're here today.

19           We're committed to the agreement long term,  
20 and we've already been discussing adaptive measures,  
21 because we know that we're going to have to do some  
22 things differently in the future, and I hope we can  
23 continue in that path.

24           That's all I've got, Director.

25           DIRECTOR SPACKMAN: Okay. Well, again, I want

1 to point out as I read the documents, all four of them  
2 collectively, at least the conclusion that I draw is --  
3 and before I even state a conclusion.

4 A mitigation plan is approved by the  
5 Director or by IDWR to replace the draconian  
6 curtailment and to establish some -- both a safe harbor  
7 for the junior water right holders, but also some  
8 security, significant security for the seniors.

9 And that mitigation plan may or may not  
10 contribute the exact amount of water that's necessary.  
11 But if the parties agree, and as the Director reviews  
12 the mitigation plan, the mitigation plan appears to be  
13 acceptable, then it's approved.

14 And so as I look at the language of the  
15 settlement agreement and just interpret that language,  
16 it states that the obligation is 240,000 acre-feet per  
17 year annually. And I don't find in that agreement  
18 any -- any real basis for an argument that there's a  
19 five-year averaging that somehow should be employed.

20 So I'll just make that much of a statement  
21 in my reading of the documents, that it -- that the  
22 mitigation that was proposed was year in, year out  
23 240,000 acre-feet, plus the other obligations that were  
24 a part of the mitigation plan.

25 Now, I -- I haven't determined yet whether

1 there's a breach, but certainly I think what I've told  
2 you is a clue, at least in my interpretation of the  
3 documents.

4 So then I want to go back to the second  
5 addendum to the settlement agreement.

6 MR. BUDGE: Director, this is TJ.

7 May I ask a question before you turn the  
8 page there?

9 DIRECTOR SPACKMAN: Well, I'm not sure I want to  
10 engage in a back-and-forth on this subject, TJ. But  
11 venture out, and then I'll determine whether I want to  
12 answer it or not. Go ahead.

13 MR. BUDGE: Yeah. My question is, since the  
14 settlement agreement does not define a baseline, from  
15 what do you -- in your view, from what do we measure  
16 the 240?

17 DIRECTOR SPACKMAN: Well, I'm not venturing into  
18 that arena right now. But -- but it seems to me that  
19 what the parties have done over the course of the six  
20 or seven years during which the settlement agreement  
21 has been in place and the reports that have been filed  
22 with the Department certainly would give the Director  
23 and the parties some clue as to what that baseline  
24 should be. I guess that's as far as I would go.

25 All right. I want to go back to this

1 paragraph, because it says "If the Director determines  
2 that there's been a breach, then the Director should  
3 issue an order specifying actions that must be taken by  
4 the breaching party to cure the breach or be subject to  
5 curtailment."

6 Now, I guess I've hinted to everybody at  
7 least my initial interpretation of the agreement.

8 Now, if I determine that there has been a  
9 breach, what alternatives are there out there? Because  
10 in this agreement or this addendum it contemplates that  
11 there would be other actions that might be taken by the  
12 breaching party to cure the breach.

13 And so I'd like to know before we get into  
14 a blunt hammer enforcement through curtailment what  
15 other alternatives there are out there for the  
16 breaching party to cure the breach.

17 And I would ask that Surface Water  
18 Coalition if there are alternatives that you have  
19 thought about. And I guess this is a hard discussion,  
20 and maybe there aren't alternatives.

21 But, Kent and Travis, I'd ask you, if I can  
22 at this point, are there alternatives short of  
23 curtailment?

24 And then, TJ, I'll ask you the same  
25 question.

1           So, Kent or TJ -- or I'm sorry, Travis.

2           MR. FLETCHER: Director, this is Kent.

3           You know, we -- we have mulled over that  
4 issue. And unfortunately, in our discussions nothing  
5 really came up that appeared -- that the groundwater  
6 districts appeared to be interested in doing to cure a  
7 breach. They wouldn't agree there was a breach.

8           But the bottom line is that my thinking on  
9 this issue is if they -- if they do not comply one  
10 year, then the following year they need to reduce  
11 diversions by that much more in an attempt to make up  
12 for the lack of compliance for the previous year.

13           Unfortunately, the timing under our -- the  
14 agreement makes that difficult to do. But for  
15 example -- and I'm just using round numbers, last year  
16 they only reduced by around 120, and so this year they  
17 should be reducing by 360 to make up that difference.

18           There is no way that they're going to  
19 achieve any goal doing it the way that they apparently  
20 are arguing now they think they can do it. So -- so it  
21 has to be some form of that.

22           The other issue that is there, and the  
23 agreement talks about this, is that those that do not  
24 comply with the agreement are not covered by the  
25 agreement. They don't get the protections of the

1 agreement.

2 And as you know, there is some statutory  
3 language that allows the Director to take action  
4 against those who do not comply with these plans.

5 And the groundwater districts, I believe,  
6 have engaged primarily in fining members who do not  
7 comply. Some of them. Some of them haven't even done  
8 that. But fining people isn't going to restore the  
9 aquifer.

10 And so I think it needs to be a hybrid. I  
11 think there has to be greater reductions to cure the  
12 breach, and I think those who are not complying need to  
13 be subject to administration some way.

14 Those are my thoughts.

15 DIRECTOR SPACKMAN: Travis?

16 MR. THOMPSON: Yeah, I'll agree with Kent. We  
17 haven't really discussed actions to cure, given the  
18 initial discussion about whether or not a breach has  
19 occurred.

20 We have done some initial modeling on the  
21 impacts of the overpumping, I'll call it, last year and  
22 how that affected the reach, which would have been  
23 storage in American Falls over the winter, which  
24 reservoir did not fill, and then end-season impacts to  
25 natural flow that we're experiencing right now. So



1 there could be a way to look at it that way.

2           Problem is, I guess, given where we are in  
3 the irrigation season, we had to make management  
4 decisions, cut deliveries again this year to get  
5 through the season. And so, you know, whether we can  
6 cure it this year or if it's kind of a long-term deal,  
7 like Kent mentioned, hey you have to make up the water  
8 you've taken as far as additional reductions the  
9 following year, that could be an option.

10           But it's a tough spot. And, you know, we  
11 had this discussion earlier, but we've followed the  
12 process, and I think it's important we know how this  
13 gets carried out.

14           DIRECTOR SPACKMAN: TJ, I'll ask you -- and I'm  
15 putting you in a difficult spot, but if I were to  
16 determine that there is a breach -- again, I go back to  
17 the second addendum, and it contemplates, I think, that  
18 there may be actions that should be taken to cure the  
19 breach and hopefully forestall the curtailment that  
20 might come.

21           Do you have ideas?

22           MR. BUDGE: Yeah. Let me first say, I -- I have  
23 to admit to being genuinely stunned that -- that the  
24 Department is going to write into the contract that  
25 the -- or at least is contemplating writing into the

1 settlement agreement that the 240 is measured from the  
2 historic average, because the contract says nothing of  
3 that. The contract only refers to compliance on a  
4 five-year rolling average. And contracts must be read  
5 as a whole.

6 So I would certainly ask the Department to  
7 take that very seriously and read the contract as a  
8 whole. If the Department is going to just say "Nope,  
9 you're -- you groundwater users are reducing your  
10 diversions from the historic average," that totally  
11 changes the whole nature of the contract.

12 What that effectively means is during wet  
13 years pumpers really need to reduce very little, maybe  
14 none at all. And during dry years they may have to  
15 reduce, 3, 4, 500,000 acre-feet over what they would  
16 have pumped that year in the absence of the settlement  
17 agreement.

18 If the Department goes that direction, I'm  
19 quite certain the settlement agreement is going to fall  
20 apart. I just don't think it's workable.

21 In terms of compliance, my understanding  
22 from speaking with my clients is -- is similar to  
23 Kent's. What we contemplated is if a district did not  
24 comply with their five-year average, that they would  
25 have one year to make up for it.

1           So hypothetically, let's say a district's  
2 performance on a five-year rolling average was, you  
3 know, 2,000 acre-feet short of its obligation, that  
4 following year it would have to conserve not only its  
5 average, but it would have to conserve 10,000  
6 acre-feet. So five years times 2,000 acre-feet.  
7 That's how we contemplated that section of the second  
8 addendum functioning.

9           If the Department rules that there is no  
10 average, that the conservation is based on an historic  
11 baseline of 2010 to 2014 and there's no averaging in  
12 terms of measuring compliance against that, I -- I  
13 don't know anything that can be done. Certainly  
14 nothing this irrigation season. It's -- you know,  
15 we're way too far into it.

16           And my understanding is that, you know, at  
17 least some of the districts really have -- it's not  
18 feasible or practical for them next year to make up for  
19 2021, say, and ignore all of the excess conservation in  
20 the prior years.

21           So, you know, the Department's -- the  
22 Director's kind of hinting of where he's leaning is  
23 kind of throwing me for a bit of a tailspin, and I  
24 don't see any other solutions if averaging is not  
25 utilized for purposes of compliance.

1           DIRECTOR SPACKMAN: Okay. Well, argument's  
2 noted. Thanks, TJ.

3           I felt it was important for me at least to  
4 discuss the provisions of subsection (4), and at least  
5 my understanding in the reading of it that the parties  
6 contemplated that there might be an opportunity to cure  
7 the breach. Otherwise, the language wouldn't have been  
8 included in here "or be subject to curtailment," and  
9 that that responsibility to find those alternatives to  
10 cure the breach shouldn't be laid solely on the  
11 Director and my limited imagination.

12           So that's why I asked the question whether  
13 there was some possibility of discussion, and I'd  
14 encourage the parties to continue to talk.

15           So at this point I want to move on to the  
16 five items that were listed in the -- in the document,  
17 the request for a status conference. I don't want to  
18 take them up in the order that they were listed.

19           I've asked Brian Ragan today to discuss  
20 No. 4, disparity in the reports, what was the actual  
21 number of both diversion reduction recharge that  
22 occurred in 2021. And so Brian can discuss this  
23 particular matter.

24           And then we'll circle around and talk about  
25 the other four in some order, and I'm not sure they'll

1 follow the order that they're listed. But I want to at  
2 least work through each of these particular numbered  
3 requests for information or for some opinion from the  
4 Director.

5 So, Brian.

6 MR. RAGAN: Yes, Mr. Director. Thank you.

7 I could speak generally to differences in  
8 the datasets, and then in these comments there are two  
9 groundwater districts that were called out  
10 specifically. And I'll be mentioning those.

11 The differences between the IGWA and  
12 Department datasets have existed since this data was  
13 first reported six years ago. Differences appear in  
14 each of the four data categories presented.

15 These categories are the five-year average  
16 baseline volumes, the annual usage volumes, the  
17 resultant reduction volumes, and recharge volumes.  
18 These differences have been identified and discussed  
19 openly in the presentations given by IGWA and the  
20 Department to the board members during each of the  
21 annual steering committee meetings, and also written  
22 into the Department's annual review memo, which is  
23 shared with the parties.

24 As explained in the steering committee  
25 meeting presentations and in the memos, differences

1 between the five-year average baseline and annual  
2 diversion volume datasets is due to how the underlying  
3 data from the Department's Water Measurement  
4 Information System, or WMIS, database is analyzed.

5 IGWA will sometimes adjust the WMIS data  
6 and provide a reason for the adjustment. For example,  
7 if the measuring device suffered a failure and data was  
8 not available, IGWA will use an alternative method to  
9 estimate a volume.

10 In instances of no data the Department does  
11 not use alternative methods to estimate a volume. The  
12 Department does not adjust the data extracted from  
13 WMIS. And this was the case for the data for Carey  
14 Valley and North Snake Groundwater Districts in the  
15 2021 progress report.

16 Differences in the recharge data is  
17 primarily due to the inability of the Department to  
18 verify authorizations exist in the form of private  
19 lease or rental contracts, temporary water permits,  
20 natural-flow permits, or water supply bank rentals.

21 In most of these instances the supplemental  
22 information submitted as part of IGWA's progress report  
23 is lacking these authorization documents, and as a  
24 result the Department does not include these volumes in  
25 its recharge total.

1           In another instance the recharge volume  
2 determined by the Department is different than what  
3 IGWA reported. The Department reports what it  
4 determines. This was the case with the recharge data  
5 from the 2021 progress report.

6           So in closing, the IGWA and the  
7 Department's datasets have not matched, they will not  
8 match, and they're not expected to match. And this  
9 isn't a bad thing.

10           The Department has included the following  
11 statement in each of its annual review memos: Quote,  
12 "The verification results are presented objectively  
13 with no assumption as to which dataset is correct or  
14 incorrect. Notes are provided under each table  
15 explaining additional details specific to that  
16 particular table or dataset. Possible explanations are  
17 offered regarding differences between IGWA and  
18 Department datasets."

19           That's all I have, Mr. Director.

20           DIRECTOR SPACKMAN: Okay. Do the attorneys have  
21 questions?

22           Surface Water Coalition, you wanted a  
23 report.

24           MR. THOMPSON: Yeah, I can start. This is  
25 Travis again.

1 I guess in the prior years -- and I  
2 appreciate Brian's explanation and report. The  
3 differences have existed. We know there's been little  
4 discrepancies here and there. And I think that's  
5 probably due in part to IGWA having knowledge on the  
6 ground, talking to different users on particular  
7 readings. So I'm not disputing that.

8 But every year it's been over. So when  
9 they're doing more than what's required under the  
10 agreement, I'm not sure it matters as much. When we  
11 get into this situation where there is a nonperformance  
12 or an underperformance, I think it's important to know  
13 exactly what that is so we can identify, you know, what  
14 actions are taken, if there is a cure, or if there are  
15 alternative actions that are taken to remedy that  
16 situation.

17 So I think it is important. I guess it  
18 looks like the main difference, apart from the  
19 recharge -- and maybe that can be further explored  
20 between IGWA and the Department to verify that  
21 additional recharge that they didn't find.

22 The diversion that's reported zero use, I  
23 think that could be cleared up too. And IGWA and its  
24 members certainly have the knowledge on the ground what  
25 water was pumped out of those diversions last year, or



1 I think they used the baseline number as an assumption,  
2 so there may have been meters not working or whatever  
3 for whatever reason.

4 But I think we can get to the bottom of it.  
5 It may just take some further communication to say  
6 here's what we believe that diversion volume was,  
7 rather than assume it was zero.

8 That's all I have. Thanks.

9 DIRECTOR SPACKMAN: Kent, do you have questions?

10 MR. FLETCHER: No, I don't have anything to add  
11 to that, Director. Thank you.

12 DIRECTOR SPACKMAN: TJ?

13 MR. BUDGE: No, I don't think so.

14 In terms of the discrepancies on  
15 diversions, those discrepancies are known and IGWA's  
16 reported those. Jackson Higgs puts annotations in his  
17 spreadsheets, or perhaps those have been discussed with  
18 the steering committee.

19 So I don't think there's any -- I think the  
20 information is there as to why the discrepancies exist,  
21 and we've discussed those in the past. And if the  
22 Coalition would like to discuss those in further  
23 detail, I don't see a problem doing that.

24 In terms of recharge documentation, in the  
25 past it was just less formal. And so one thing IGWA's

1 got a lot better at during the course of the settlement  
2 is requiring written contracts and requiring written  
3 reports from its recharge partners to document when the  
4 recharge is performed, at what location, to the level  
5 of specificity that Brian Ragan has requested.

6           So if you look at, you know, our most  
7 recent couple years, the Department's been able to  
8 verify all or almost all of our recharge. And it will  
9 continue to be that way going forward. It just took  
10 some time to, I think, create a more formal process and  
11 get our recharge partners to provide written reports  
12 that provided further detail about where the recharge  
13 was performed and when.

14           DIRECTOR SPACKMAN: Okay. Thanks, Brian.  
15 Thanks for the report.

16           All right. Let's go back to the numbered  
17 items now and just work through them. And I think I  
18 can address some of these summarily. And I've hinted  
19 at the responses.

20           But the first one is "IGWA's annual  
21 diversion reduction requirement annual or average."  
22 And I've already stated my inclination in reading the  
23 documents and the arguments that have been presented.

24           And again, I'll go back through everything,  
25 but part of my reason for stating an inclination here

1 is -- is to redirect the parties back to that small  
2 Roman numeral number iv in the second addendum and  
3 encourage the parties to start talking about possible  
4 solutions to cure a possible breach.

5           Because of the timing of the irrigation  
6 season, if I issue an order, really what I've heard  
7 from Judge Wildman is that -- and I think this was in  
8 the Rangen matter, that if there's noncompliance with a  
9 mitigation plan, then the Director is required to  
10 curtail, and that that's the authority that the  
11 Director has, and to order some other alternative that  
12 may or may not be -- may or may not be acceptable to  
13 the parties is probably not within my authorities.

14           And as all of you know, a curtailment order  
15 for noncompliance is a very blunt instrument in  
16 crafting solutions and can create a lot more chaos than  
17 perhaps the parties might want.

18           Number two, what is the requirement,  
19 240,000 acre-feet or something less? I won't opine on  
20 this particular question today. I think this raises  
21 some -- well, maybe it's No. 3.

22           There's -- there's some allegation, I think  
23 it's been stated today, that some of the groundwater  
24 districts may have fully complied with their  
25 proportionate obligation and some did not. And in

1 fact, the agreement talks about the assignment  
2 proportionately to the various groundwater users.

3 So there is an outstanding question about  
4 whether the noncompliance by some and the compliance by  
5 others would then require that the Director assign  
6 proportionate penalties for noncompliance and possible  
7 curtailment for that noncompliance, at least to those  
8 who are not complying.

9 So this is a subcomponent of a couple of  
10 these questions. And it's unresolved, at least to me  
11 right now.

12 So No. 2 and 3, won't opine further on  
13 these subjects. We've talked about No. 4.

14 So let's move to No. 5, "The Director's  
15 planned action in response to IGWA's noncompliance."  
16 And I guess I'd reword that, is the Director's planned  
17 action in response to the request by the Surface Water  
18 Coalition that I determine that there's a breach, and  
19 then what happens afterward.

20 So let me just talk about timing. What I  
21 want to do is I want to go to the methodology order.  
22 This is the fourth amended methodology order that was  
23 issued April 19th, 2016. And the methodology order  
24 governs the Department's computation of annual  
25 obligations, and then those -- it determines a demand

1 shortfall at various stages during the year. And we  
2 issue these sub methodology orders every year and  
3 determine whether there is a demand shortfall or not.

4 Now, the mitigation plan has protected the  
5 participants in the mitigation plan from curtailment  
6 under the methodology order. But if there is a breach,  
7 then my understanding is that the methodology order and  
8 its various steps would then govern how the  
9 noncomplying groundwater users would be administered  
10 and their water rights and use would be administered.

11 So we are at a stage in the methodology  
12 order, and I'd go to the order portion. This is on  
13 page 38. And we are at step seven. We've already  
14 issued an order for step six. And we are at step  
15 seven. It says, "Shortly before the estimated time of  
16 need, but following the events described in steps five  
17 and six, the Director will for each member of the  
18 Surface Water Coalition," and then it talks about  
19 calculating ultimately what the demand shortfall would  
20 be for each member of the Surface Water Coalition.

21 And so in that computation, then -- and it  
22 talks about how -- how we do that. And I don't want to  
23 go into the details. We could here. But then it says,  
24 "The information will be used to recalculate the  
25 reasonable end-season demand, adjust the projected

1 demand shortfall for each member of the Surface Water  
2 Coalition." And then we issue, you know, those values.

3 And then at the time of need it says --  
4 this is step eight -- "Junior groundwater users are  
5 required to deliver to each injured member of the  
6 Surface Water Coalition the step seven revised demand  
7 shortfall calculated at the time of need."

8 Now, so there's a step seven and then a  
9 step eight. And when that time of need comes, then  
10 whatever that demand shortfall is has to be delivered  
11 or there's a curtailment.

12 So we have typically issued, and we try to  
13 estimate when the time of need is. In our step six we  
14 estimated that time of need. We anticipate that  
15 because of an extended growing season and some -- the  
16 most recent hot weather that the demand shortfall will  
17 probably increase.

18 And what that means is that the time of  
19 need will probably backdate from what we have  
20 estimated. How much that will be, I don't know. But  
21 we anticipate that this step seven order will be issued  
22 middle of August. And that timing is similar to what  
23 we've done in the past. And I anticipate issuing an  
24 order relating to this request and the question of  
25 whether there's been a breach or not approximately

1 simultaneous with that step seven order. So that's the  
2 timing that we anticipate.

3 We -- and so it would be issued prior to  
4 the determination of the time of need, and certainly  
5 issued prior to the time of need so that both the  
6 Surface Water Coalition would have the assurance that  
7 its water supply would -- would be made whole for this  
8 year under the methodology order.

9 And we want to ensure that -- and by the  
10 way, that's -- that's an obligation imposed on me by  
11 the Court that, you know, I protect the senior users.

12 So anyway, that's the timing of orders that  
13 are issued.

14 Now, I -- Matt Anders is here and has some  
15 information, if you want to hear about it, about  
16 present conditions. This is a little beyond what we --  
17 what we at least consider to be the direct subjects of  
18 this status conference. But if you want to hear it or  
19 see it.

20 Do you have a presentation, Matt, or do you  
21 just have -- I don't think we have anything that we're  
22 bringing up, do we?

23 MR. ANDERS: Mr. Director, since so many people  
24 were online, I just had that reach gain figure. That  
25 was all.

1 THE HEARING OFFICER: Okay.

2 MR. ANDERS: I planned to hand it out, but  
3 nobody's here. So we were going to put it on the  
4 screen.

5 DIRECTOR SPACKMAN: Okay. So is there a desire  
6 to have Matt present this information?

7 MR. THOMPSON: This is Travis. I think the  
8 managers would certainly like to hear it. Thank you.

9 DIRECTOR SPACKMAN: Well, I think what it will  
10 do is the presentation will increase the urgency of  
11 what we're doing over the next two to three weeks.

12 Matt.

13 MR. ANDERS: Megan, is it on the screen?

14 DIRECTOR SPACKMAN: Oh, you can bring it up,  
15 then? Oh, good. Okay.

16 MR. ANDERS: Here we go.

17 DIRECTOR SPACKMAN: Thank you.

18 MR. ANDERS: Yep. Mr. Director, everyone else  
19 on the call, my name is Matt Anders. I'm a hydrologist  
20 here at IDWR.

21 MR. THOMPSON: Sorry. This is Travis. Can you  
22 scoot up to the microphone. It's really hard to hear.  
23 Thank you.

24 MR. ANDERS: Can you hear me better now?

25 DIRECTOR SPACKMAN: You may have to just speak



1 up too.

2 MR. ANDERS: Okay.

3 MR. THOMPSON: That sounds better.

4 MR. ANDERS: I'll start over. Thank you.

5 My name is Matt Anders. I'm a hydrologist  
6 here at the Department of Water Resources. I work on  
7 the methodology in calculating the shortfall.

8 So what I want to talk about here is two  
9 things: Give an update on the reach gains in the Near  
10 Blackfoot to Milner reach, and then also briefly touch  
11 on Spring Creek and what is happening there.

12 So the figure you're seeing here is the  
13 reach gains for 2022 in the Near Blackfoot to Milner  
14 reach of the river. On the left I have the reach gains  
15 in cfs. Please note that it doesn't go to zero. It  
16 only goes between 2800 and 800, and that is just to  
17 make it easier to see what's going on in the July time  
18 frame. On the bottom I have days of the year.

19 So the green line on the figure is the  
20 median of record from 2002 to 2021.

21 The blue line is the minimum of record  
22 during that same time period.

23 And the red is the current year.

24 So what we're seeing is in July we got down  
25 close -- the reach gains got close to the minimum of

1 record. They didn't get all the way down there. But  
2 since then we've seen a rebound as we've gone through  
3 July.

4 The -- where this figures in with the  
5 methodology is if you boil the methodology down, it is  
6 you take supply minus demand, and it gives you your  
7 shortfall. So the reach gains figure into the supply  
8 side of that equation.

9 During the midseason right now what we're  
10 using the reach gains for is to identify comparable  
11 years so that we can estimate when the Surface Water  
12 Coalition will run out of storage, if they will, or get  
13 near their reasonable carryover, and how much natural  
14 flow they have left coming -- or we would expect them  
15 to have in this year.

16 So one of the things that we did see was  
17 we've been talking a lot about Spring Creek. There's  
18 been a lot of interest there. This -- for those that  
19 aren't familiar with this gauge, it's a very difficult  
20 gauge to measure. They have vegetation issues there.  
21 It gets shifts on a regular basis.

22 On July 5th the USGS went out there and did  
23 two manual measurements on that gauge, and they came up  
24 with 170 cfs. That's about 30 cfs lower than the  
25 period of record minimum for that gauge.

1           We -- we talked to the Fort Hall Tribe.  
2 They had done a measurement at what they call Bronco  
3 Road, and they confirmed that they thought that  
4 measurement -- that the USGS did was pretty accurate.

5           What we saw in the data after July 5th,  
6 the cfs at the gauge was creeping down, you know,  
7 drifting down. And as of Monday it got around 105 cfs.

8           The USGS went back out there on Tuesday and  
9 measured it again, and they got a measurement of about  
10 210 cfs. So if you haven't looked at the gauge, the  
11 data have been revised, and it looks much different.

12           A -- kind of a -- on a related note, with  
13 that shift at Sheep Creek, it also changed the data for  
14 Water District 1 and the accounting. So the reach  
15 gains have changed in the last couple of days. If you  
16 had looked at this graph in late July -- or you looked  
17 at this graph earlier this week, late July would have  
18 been near the minimums.

19           But with that revision at the Spring Creek  
20 gauge and Near Blackfoot I think changed as well. The  
21 reach gains are -- have increased relative to what we  
22 saw earlier in the week. They aren't to the median of  
23 record yet, but they're significantly above the minimum  
24 of record.

25           And I checked the Spring Creek gauge. It

1 was 210 this morning. It looks like it might be  
2 drifting down again. So we may have this problem over  
3 the next few weeks, and we may see a data revision  
4 again coming up.

5 Mr. Director, that's all I had.

6 DIRECTOR SPACKMAN: Okay. Questions for Matt?

7 Kent?

8 Travis?

9 MR. THOMPSON: Thanks, Director, I have one.

10 This kind of highlights maybe some concerns  
11 we had last year with the Blackfoot gauge, and maybe  
12 just timing of measurements because of the length of  
13 time between that July 5th and that August 3rd  
14 measurement.

15 Twin Falls Canal Company, the manager of  
16 the board here, has to make decisions on deliveries,  
17 and they made that. And we cut to a half inch on  
18 Monday for the foreseeable future, maybe the rest of  
19 the irrigation season. Based it in part on what we  
20 were seeing with those readings.

21 So I -- I think it's worth maybe further  
22 meeting, maybe some sort of task force with the  
23 Department and GS at some point to talk about some sort  
24 of measurement protocol for at least the peak of  
25 irrigation season, at least June through August, to

1 identify, hey, how do we get this information verified  
2 in a timely manner so we can be sure of what those  
3 numbers are.

4 I know there's going to be shifts and  
5 changes over time. But when we're making realtime  
6 management decisions for the shareholders, we need the  
7 best information possible. And waiting a month has  
8 some pretty significant impacts on that.

9 So I think it's really helpful. I thank  
10 Matt for doing that. Thank you for contacting the  
11 Tribe. And perhaps we can continue this discussion in  
12 another forum to think about some sort of protocol  
13 going forward and trying to implement that for the  
14 betterment of the Water District.

15 DIRECTOR SPACKMAN: Kent, anything?

16 MR. FLETCHER: No, Director. I don't have much  
17 to add. I do know that Water District -- the Committee  
18 of Nine basically authorized the more frequent  
19 measurements at these gauges, and whether those have  
20 been occurring or not I don't know on the Blackfoot  
21 gauge, the problem gauge. So it is a little  
22 problematic when these shifts occur this late in the  
23 season.

24 But that's all I have to say.

25 DIRECTOR SPACKMAN: Well, and I don't want to

1 get too far into this because we're really talking  
2 about operations, measurement, frequency of  
3 measurement.

4 And the reason that I asked Matt Anders to  
5 present this information is that this information will  
6 bear on the computation, both of the time of need;  
7 right?

8 MR. ANDERS: Yes.

9 DIRECTOR SPACKMAN: Because the water supply and  
10 our ability to predict what it may be for the rest of  
11 the year will depend on these hydrographs. And so  
12 that's, I guess, the reason for the presentation. And  
13 I want to limit it -- I don't want to launch into a  
14 discussion about what we need to do for better  
15 measurement.

16 These are the data that we have; right,  
17 Matt?

18 MR. ANDERS: Yes, Mr. Director.

19 DIRECTOR SPACKMAN: And so we'll use these data  
20 as best we can to then find an analogous year and  
21 determine that time of need. That's the process that's  
22 described; right, Matt?

23 MR. ANDERS: Yes, Mr. Director.

24 DIRECTOR SPACKMAN: And of course, that water  
25 supply then will also have a bearing on the possible

1 priority date in a curtailment in the -- following the  
2 methodology order processes; right?

3 MR. ANDERS: Yes.

4 DIRECTOR SPACKMAN: So that's the reason for the  
5 presentation of this information.

6 TJ, do you have comment?

7 MR. BUDGE: No, thank you.

8 DIRECTOR SPACKMAN: Okay. Well, I think I've  
9 reached the end of what I want to talk about here.

10 Are there any general questions or any  
11 other inquiries at this point?

12 MR. ANDERSON: Director.

13 THE HEARING OFFICER: Yes.

14 MR. ANDERSON: This is -- this is Dylan  
15 Anderson. I'm the attorney for Bingham Groundwater  
16 District. And as far as the discussions go, you know,  
17 I'm silent on the arguments.

18 But this is -- this is my concern for my --  
19 my folks is, you know, I understand the Director's  
20 position that the courts say you have to protect senior  
21 groundwater rights. But, you know, almost every  
22 constitution in the land has due process rights. And I  
23 guess I'm a little concerned about making a decision as  
24 far as breach goes off of just this status conference,  
25 with limited briefing.

1           And the reason I'm worried about that is  
2 just the idea that it's been thrown around that, you  
3 know, the agreement has always been IGWA is the  
4 groundwater rights of groundwater districts together.  
5 The idea is thrown around that you're going to go after  
6 individual groundwater rights. You know, the idea that  
7 some might be punished and some others not.

8           I just don't know that we've had our  
9 opportunity to have our say, if that's going to be the  
10 case. And so I'd ask that the Director open it up for  
11 a little more briefing before a decision on this breach  
12 goes, because our concern is not just the breach now,  
13 but what it does ultimately to the agreement as it  
14 would stand.

15           DIRECTOR SPACKMAN: Okay. I'll consider the  
16 argument. I don't know that I really have a response,  
17 but I appreciate your input.

18           Okay. I think I'm ready to finish. You  
19 know the timetable that we will follow here at least  
20 right now. And we have a lot of work to do in the  
21 next -- and I hope you do, too, as you think about  
22 what's happening and the possibilities.

23           So there's one -- one more little statement  
24 I want to add that's a by-the-way statement so  
25 everybody knows. And I think it's important, given



1 that we're together here. It doesn't bear directly on  
2 this particular matter, but I want everybody to know  
3 that I have asked Matt Anders to reconvene a technical  
4 working group to look at the methodology order and its  
5 components.

6 The methodology order was never intended to  
7 be a static document. And we need to rely on the best  
8 scientific data and information we have available to us  
9 in determining the rights and obligations of the  
10 parties.

11 And so I've asked Matt Anders to reconvene  
12 a working group. Many of you have seen, I think, a  
13 list of possible subjects that need to be reviewed in  
14 looking at the methodology order. And I'd like that  
15 review to begin 1st of September or so and end about  
16 the 1st of December.

17 And so just so everybody knows that we're  
18 embarking on a review of the methodology order. And  
19 I'll just reiterate, without doing that I think the  
20 Department of Water Resources is remiss in not looking  
21 at the most recent and best information that we have,  
22 as well as employing the scientific methods that have  
23 been enhanced since the time the fourth methodology  
24 order was issued in 2016.

25 Okay.

1 MS. KLAHN: Mr. Director, this is Sarah Klahn.

2 Could I ask a question?

3 DIRECTOR SPACKMAN: Sure.

4 MS. KLAHN: You just talked about a working  
5 committee on the methodology order.

6 Is that the -- that's the broad methodology  
7 order that could potentially even apply against the  
8 cities in the event we fail to meet the terms of our  
9 settlement and mitigation plan; is that right?

10 DIRECTOR SPACKMAN: That's true.

11 MS. KLAHN: Is it possible to have a City  
12 representative participate in that? I hadn't heard  
13 about that.

14 DIRECTOR SPACKMAN: I don't know the composition  
15 of the working group. There was a working group  
16 previously.

17 Isn't that correct, Matt? I'm sorry,  
18 you're away from a microphone now.

19 But I think there was a working group that  
20 was formed back in 2014/'15. I don't know.

21 Go ahead.

22 MR. ANDERS: Mr. Director, you're correct.  
23 There was a working group back in 2014 and '15. I  
24 believe that the -- that the groundwater interests had  
25 consultants there, the surface water, and I think the

1 cities even had people there at that time. So we'll  
2 take whoever wants to come in terms of that. We don't  
3 have a set list.

4 MS. KLAHN: Okay. Well, I just wanted to get on  
5 any mailing or e-mailing list so we could alert  
6 consultants to see if they could attend. We would  
7 probably send Heidi or Greg or something, so...

8 DIRECTOR SPACKMAN: Yeah, we don't want to  
9 exclude anybody in that process. And my reason for  
10 announcing it today is this particular group probably  
11 has more participants together right now than we might  
12 be able to gather together at some later date.

13 We'll send out notices. But I wanted  
14 everybody to know that the working group will reconvene  
15 over the next three months or so and look at the  
16 methodology order.

17 MS. KLAHN: Okay. Thank you.

18 DIRECTOR SPACKMAN: Yep.

19 MR. BUDGE: Director, this is TJ.

20 DIRECTOR SPACKMAN: Yes.

21 MR. BUDGE: It would be helpful if we had a more  
22 clear picture of the process the Department anticipated  
23 going through in terms of revising the methodology  
24 order. I haven't put much thought into this. But this  
25 was all created in the context of a contested and

1 litigated case. And so we've got principles of res  
2 judicata and due process that need to be taken into  
3 account in revising that.

4           And what I'm afraid is going to happen is  
5 this is going to turn into a re-litigation of the  
6 entire delivery call case, that once the Department  
7 opens the methodology order, the Coalition is going to  
8 make every, you know, argument it can to advance its  
9 position, whether that's related to the model or  
10 whatever, and the groundwater users are going to do the  
11 same.

12           We're going to want to perhaps, you know,  
13 challenge calculations of need and challenge the trim  
14 line and, you know, based on model changes and things  
15 of that nature. And I'm troubled by that. And that  
16 would be, you know, a tremendous expense to both  
17 parties, particularly considering that there's only a  
18 relative handful of groundwater users that are not  
19 currently covered under either IGWA's or the cities'  
20 mitigation plans.

21           And so I'm quite concerned about, you know,  
22 what this could turn into and the cost benefit  
23 involved. And also, as I mentioned, just issues of,  
24 you know, res judicata and due process. And so I think  
25 we really need to have a clear picture of what the

1 Department's contemplating in the scope of the analysis  
2 so we can consider that in light of just applicable  
3 legal principles.

4 DIRECTOR SPACKMAN: Okay. Thanks for a reminder  
5 of the legal principles. And I mean that honestly, TJ.  
6 I'm not being facetious. So we'll take what you said  
7 into consideration.

8 But really, this is a technical working  
9 group looking at the methodology order and trying to  
10 determine whether there's even a need for a change at  
11 this point.

12 So I think some of what you're arguing is  
13 perhaps premature, but certainly a forewarning to all  
14 of us. And at least from my perspective, there's  
15 always a tension out there between assurance and  
16 consistency and -- and the other side of it is what  
17 information do we have that we didn't have previously,  
18 and how should it bear on the activities of the  
19 Department so that we actually employ the best  
20 available science, which the Court requires of us.

21 And so I think that tension has to be  
22 somehow addressed in how we operate here. And I'm not  
23 sure where that path is right now.

24 But anyway, thanks for the -- at least  
25 identifying those legal pitfalls that could be ahead of

1 us, TJ.

2 All right. Anything else today?

3 Thanks, all, for your participation.

4 MR. THOMPSON: Thank you.

5 (End of audio file.)

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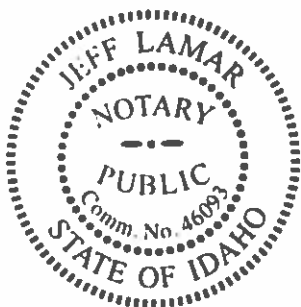
I, JEFF LaMAR, CSR No. 640, Certified Shorthand Reporter, certify:

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

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

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

IN WITNESS WHEREOF, I set my hand and seal this 14th day of November, 2022.



*[Handwritten signature]*

JEFF LaMAR, CSR NO. 640  
Notary Public  
Post Office Box 2636  
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My commission expires December 30, 2023