

EXHIBIT B

The Hearing on the As Applied Order Transcript
Volume I
May 24, 2010

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 &) HEARING ON THE AS
B IRRIGATION DISTRICT, AMERICAN) APPLIED ORDER
FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY.)
_____)

HEARING ON THE AS APPLIED ORDER

May 24, 2010

Volume I, Pages 1 - 179

REPORTED BY:

COLLEEN P. KLINE, CSR No. 345

Notary Public

1 THE HEARING ON THE AS APPLIED ORDER
 2 was taken BEFORE THE HEARING OFFICER GARY
 3 SPACKMAN, Director of the Idaho Department of
 4 Water Resources, at the offices of Idaho
 5 Department of Water Resources, located at 322 E.
 6 Front Street, Boise, Idaho, commencing at 1:25
 7 p.m., on May 24, 2010, before Colleen P. Kline,
 8 Certified Shorthand Reporter and Notary Public
 9 within and for the State of Idaho, in the
 10 above-entitled matter.

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1 have some guidance as far as what type of
2 evidence you are going to allow?
3 THE HEARING OFFICER: Okay. Thank you.
4 As I wrote into the Order that was issued Friday,
5 we will be specifically receiving evidence
6 regarding how the Department applied the
7 Methodology Order, and that application is
8 limited to Steps 3 and 4 in the Order.
9 And we could pull the Order and read
10 those. But essentially, as I understand without
11 looking at it, Steps 3 and 4, it would be the
12 pre-irrigation season, or early prediction of the
13 shortfall applying the methodology.
14 So it would be the projection of what a
15 shortfall would be applying what's in the
16 Methodology Order.
17 Clarification?
18 And I guess I would anticipate -- and I
19 don't want to pre-state how far we go. But there
20 will be a number of questions that were raised
21 this morning, that I believe are fair game for
22 exploration in this As Applied Order.
23 I don't want to receive evidence
24 regarding all of the steps all the way through
25 the irrigation season, because the order only

1 THE HEARING OFFICER: Okay. We've all
2 arrived. Are we ready to start?
3 This is the time and place and
4 beginning of a hearing for the water -- what I
5 would refer to as the As Applied Order or the
6 application of the methodology that we discussed
7 previously, and was issued to the 2010 water
8 year, and specifically, the application of Steps
9 3 and 4 of the Methodology Order.
10 Are there preliminary matters that we
11 need to discuss prior to beginning testimony?
12 Parties? Sarah?
13 MS. KLAHN: Your Honor, I would just
14 reiterate our comments made at the start of the
15 2008 hearing this morning, and I won't repeat
16 those again. But the pre-hearing brief, I
17 believe was filed in both of these proceedings.
18 So I'll just let that stand.
19 THE HEARING OFFICER: Okay. Anything
20 further?
21 Yes; Kent.
22 MR. FLETCHER: I would just ask that
23 the Director give us some guidance, again, as to
24 the breadth of this hearing, and what issues
25 specifically are to be addressed. So that we

1 applied to Steps 3 and 4.
2 And again, I know that this -- and,
3 Mr. Budge, I would go back to your original
4 argument, that it might be nice to have all of
5 this together going up as an entire season. But
6 nonetheless, the applications of Step 3 and 4
7 could result in the issuance of a curtailment
8 order. And it is a separate final order. And
9 consequently, it is subject to the provisions of
10 Idaho Code Section 42-1701 A, allowing the
11 parties to request a hearing.
12 And that's what's happened. And so we
13 have an obligation, both to hold the hearing, and
14 move forward expeditiously, because of the need
15 for resolution of these issues for the 2010
16 irrigation season.
17 Mr. Budge?
18 MR. BUDGE: I have one other primary
19 matter that I just want to make a record of. We
20 had sought to take the depositions of Lyle Swank
21 and Tony Olenichak in this matter, and that was
22 refused by the Department. We would also ask for
23 an opportunity to informally interview them,
24 which was denied. And we would ask that they be
25 made available witnesses at the hearing, which

1 was denied.
 2 And our desire to use these witnesses
 3 is, because they are the most knowledgeable, and
 4 would have the most accurate and complete
 5 information regarding the Water District 1
 6 procedures. And we had hoped to have them
 7 testify concerning Steps 3 and 4, in particular,
 8 some of the timing aspects as it relates to the
 9 day of allocation, and when storage water
 10 supplies are allocated to space holders, when
 11 they are available to other, such as IGWA for
 12 release. And the timing of requiring that we
 13 provide mitigation water the 1st of May, before
 14 that allocation is known, when those lessors, of
 15 whom we leased water, know their supply, know the
 16 price. And also, in particular, with respect to
 17 the application of the predicted supply and
 18 natural flow shortage to AFRD2.
 19 Based on prior communications with
 20 these witnesses back during the course of the
 21 Surface Water case, they were of the opinion that
 22 AFRD2's supply was almost entirely from snow melt
 23 runoff, basically were a storage supply. And by
 24 reason of the late priority 1921 surface water
 25 right of AFRD2, there is seldom, if any, water

1 MR. ARKOOSH: Well, I do want to
 2 respond just very, very briefly. Number one, the
 3 request for discovery was on the Methodology
 4 Order and on the As Applied Order with the
 5 watermaster, and assistant watermaster as to
 6 whether or not AFRD2 was not conjunctively hooked
 7 up to the rest of the system.
 8 That was litigated in front of
 9 Judge Schroeder, and not appealed. And he
 10 ruled -- he ruled in line with this Director's
 11 view that, in fact, we are conjunctively hooked
 12 up to the system, and curtailment of junior
 13 ground water rights will result -- it does affect
 14 our storage and natural flow water, and will
 15 result in water we can apply to beneficial use.
 16 I just want to have a response on that.
 17 THE HEARING OFFICER: Mr. Budge?
 18 MR. BUDGE: I guess my recollection of
 19 that order is considerably different than Mr.
 20 Arkoosh's. I don't know that it benefits us to
 21 argue it here. But, in fact, the Hearing Officer
 22 confirmed that there was no injury to AFRD2. And
 23 also made a specific finding with respect to
 24 AFRD2, and I think it was BID and MID, that their
 25 water right is almost entirely supplied from snow

1 available in the priority, because when the
 2 irrigation demand is on, it's all being divided
 3 between Twin Falls and North Side.
 4 And so we expected that those witnesses
 5 would be able to validate these same arguments,
 6 which we've set forth in the affidavit of
 7 Dr. Brendecke that is filed in this case.
 8 And so our objection would be that
 9 we've been prejudiced by not having the
 10 Department's own witness there available to
 11 basically indicate that the manner in which the
 12 Methodology Order is being applied under Step 3
 13 and 4, is inconsistent with, and contrary to the
 14 actual water delivery records in Water District
 15 1, which would show -- would establish in their
 16 view, that there could not be much, if any,
 17 injury to their storage water rights by reason of
 18 ground water pumping, because the water comes
 19 from above Heise, and the ground water users, of
 20 course, don't impact it.
 21 So I wanted to make that record. And I
 22 do accept the ruling that has been made
 23 previously.
 24 THE HEARING OFFICER: Okay.
 25 Mr. Arkoosh?

1 melt, a storage right only. And that all of the
 2 natural flow during normal irrigation season,
 3 except maybe a short window, goes to 1900 rights
 4 of Twin Falls and North Side.
 5 So I recognize that Tom and I are
 6 arguing over what that order meant. But I
 7 certainly didn't want to leave standing in this
 8 record, the representation made by Mr. Arkoosh as
 9 to what he felt Justice Schroeder did.
 10 MR. FLETCHER: Since MID was brought
 11 into this. There is no finding in the order that
 12 MID, or anybody else's water right is snow melt.
 13 In fact, that theory was completely tossed by the
 14 Hearing Officer and by the Court, never appealed.
 15 And so far it's been upheld through the entire
 16 system.
 17 So there is a characterization of
 18 storage being snow melt, that the Ground Water
 19 people have argued and lost on every front, and
 20 they continue to make this argument. But so far,
 21 no court, no Hearing Officer, no Director has
 22 ever agreed with it.
 23 MR. BUDGE: The characterization was
 24 that the supply was primarily storage, not
 25 natural flow. Take the word "snow melt" out of

1 the equation. The supply, according to the
2 Hearing Officer, was storage, not natural flow
3 for those particular entities. But there is no
4 need to argue here.

5 THE HEARING OFFICER: Yes, the argument
6 is about what Judge Schroeder wrote and intended.
7 I'll read the decision, and will look at the
8 language.

9 I think it's important for me to
10 respond, Mr. Budge, as to where I think the
11 boundaries of this hearing are in the context of
12 what you've said, and I think that's important,
13 so that I state those out.

14 And you raise two specific areas: One
15 of those areas was a question about whether there
16 needed to be evidence about when the day of
17 allocation occurs, and what the price might be
18 for the ground water users to grant water, and
19 whether there is certainty or not certainty.

20 And in my opinion, and this is the way
21 I'll restrict the presentation of testimony, all
22 of that is outside of the review of the
23 methodology, of Steps 3 and 4. Steps 3 and 4
24 implement the Methodology Order. And the
25 Methodology Order in Steps 3 and 4 don't address

1 is almost all about timing. And if we were
2 seeking to put on evidence of the problems with
3 the timing requiring mitigation water by May 1
4 prior to the date of allocation, that's not
5 within the realm of relevancy you are going to
6 accept?

7 THE HEARING OFFICER: No. It is beyond
8 the implementation. The question is: Are the
9 Steps 3 and 4 -- have they been followed as
10 described in the Methodology Order? That's the
11 scope of the hearing.

12 Now, some of the adjustments that you
13 are talking about, and I'm talking about
14 specifically, 2006, 2008, data that's been used
15 for those predictions. If there are adjustments
16 that the parties find are inappropriate, or
17 improper, or don't follow the Methodology Order,
18 then I think that's a subject that can be
19 explored.

20 And with respect to the deliveries of
21 water, or the predictions to AFRD#2, I guess I'll
22 reserve a ruling on that subject. I think it's
23 marginally relevant, Mr. Budge, at least at this
24 point. But I'll allow some exploration on that
25 subject. And I assume you have your own

1 those subjects. So I don't see that they are
2 relevant in this hearing.

3 Now, they may be relevant in subsequent
4 orders that the Department issues, because the
5 day of allocation is a part of later steps. But
6 this particular hearing is only for Steps 3 and
7 4, and whether the Methodology Order has been
8 followed.

9 MR. BUDGE: So your ruling is simply
10 whether the Department properly put the numbers
11 in the right category, not what adjustments may
12 or may not have been made for evaporation, or
13 something like that?

14 THE HEARING OFFICER: Oh, I think some
15 of those adjustments are probably fair game, if
16 those adjustments are part of what the Department
17 did in the Methodology Order related to Steps 3
18 and 4.

19 But when you start talking about when
20 the day of allocation occurs, and how much water
21 is available, or how much water is not available
22 that's not part of the predicted process that was
23 contained in the Methodology Order that's
24 implemented in Steps 3 and 4.

25 MR. BUDGE: So just to clarify. Step 4

1 witnesses that might establish evidence regarding
2 that subject.

3 Okay. Further questions?

4 MR. THOMPSON: Mr. Director?

5 THE HEARING OFFICER: Yes,
6 Mr. Thompson.

7 MR. THOMPSON: Just one procedural
8 issue. This is Travis Thompson. If you recall
9 in the record of this proceeding, we filed a
10 motion for issuance of a subpoena for Tim Deeg.
11 But Mr. Budge represented before lunch, that they
12 will make him available tomorrow. So I just
13 wanted to get that on the record.

14 THE HEARING OFFICER: Okay. Thank you.
15 And I appreciate the cooperation of the parties.
16 I had staff halfway through preparing the
17 subpoenas. And I appreciate the prompt response,
18 Mr. Budge, in accommodating the request.

19 Okay. As far as the procedures, I,
20 again, ask Chris Bromley, Deputy Attorney
21 General, to present evidence that the Department
22 used, and also testimony as to how Steps 3 and 4
23 were implemented. And Mr. Bromley, I think,
24 intends to call one or two witnesses. They will
25 be subject to cross-examination in the same order

1 that Mr. Weaver was examined previously in the
2 previous hearing. So the Surface Water Coalition
3 would go -- or I'm sorry. The ground water users
4 would go first, the City of Pocatello, and then
5 Surface Water Coalition would cross-examine
6 second. And then will have another opportunity
7 for another round of recross, if that opportunity
8 comes. Okay?

9 Mr. Bromley.

10 MR. BROMLEY: Thank you, Hearing
11 Officer. This is Chris Bromley on behalf of the
12 Department of Water Resources. I will be calling
13 two witnesses today, Mathew Weaver and Elizabeth
14 Cresto. I would first call Mathew Weaver.

15 MATHEW WEAVER,

16 first duly sworn to tell the truth relating to
17 said cause, testified as follows:

18 THE HEARING OFFICER: Mr. Bromley, you
19 may examine.

20 MR. BROMLEY: Thank you.

21 DIRECT EXAMINATION

22 QUESTIONS BY MR. BROMLEY:

23 Q. Mr. Weaver, if you would please state
24 and spell your name for the record.

25 A. Mathew, M-a-t-h-e-w, Donald,

1 Q. (BY MR. BROMLEY) I am going to hand
2 you what's been marked as IDWR Exhibit 1000. If
3 you'd please identify that. Can you please
4 identify that document?

5 A. This is the Methodology put out by the
6 Department.

7 Q. Thank you. Mr. Weaver, I believe you
8 just identified Exhibit 1000; is that correct?

9 A. I did. Thanks.

10 Q. And are you familiar with the
11 Methodology Order?

12 A. I am.

13 Q. Mr. Weaver, would you please turn to
14 page 33?

15 A. (Witness complying.)

16 Q. And under the order heading, would you
17 please read the paragraph that starts, "Based
18 upon"?

19 A. "Based upon and consistent with the
20 Findings of Fact and Conclusions of Law, the
21 Director hereby orders that, for purposes of
22 determining material injury to reasonable
23 in-season demand and reasonable carryover, the
24 following steps will be taken."

25 Q. Mr. Weaver, are you aware if the

1 D-o-n-a-l-d, Weaver, W-e-a-v-e-r.

2 Q. And, Mr. Weaver, if you would please
3 describe your educational background.

4 A. I have a bachelor of science in civil
5 engineering from Montana State University, and
6 I'm currently pursuing a master's of science in
7 hydrologic sciences from Boise State University.

8 Q. Mr. Weaver, if you could please
9 generally, describe your work history?

10 A. I graduated with my bachelor's degree
11 in 1997. From that time until about 2007, I
12 practiced civil engineering. At that time, I
13 went back to school. And following a year of
14 graduate school, I took my current position with
15 the Department.

16 And with the Department, I'm a staff
17 engineer, and provide technical support on water
18 measurement and water resource matters.

19 Q. Mr. Weaver, are you a licensed engineer
20 in any states?

21 A. I'm licensed in the State of Idaho.

22 Q. Thank you. Mr. Weaver --

23 MR. BROMLEY: And if I may approach?

24 THE HEARING OFFICER: Yes.

25 (Exhibit 1000 marked.)

1 Director has applied any of these steps in this
2 section?

3 A. I'm aware that he's applied Steps 3 and
4 4.

5 Q. If you would turn to the next page,
6 page 34. Are Steps 3 and 4 described there?

7 A. Yes, they are.

8 (Exhibit 1001 marked.)

9 Q. (BY MR. BROMLEY) Mr. Weaver, I'm going
10 to hand you what's been marked IDWR Exhibit 1001.
11 And if you would please identify that exhibit for
12 the record?

13 A. This order summarizes the Department's
14 application of Steps 3 and 4.

15 Q. Are you familiar with what I'll call
16 the As Applied Order?

17 A. Yes, I am.

18 Q. And did the As Applied Order apply
19 Steps 3 and 4 from the Methodology Order?

20 A. It did, yes.

21 Q. Mr. Weaver, if you would please refer
22 back to Exhibit 1000, that's the Methodology
23 Order, on page 34, again. You may still have it
24 open. Would you please describe Step 3?

25 A. Step 3 identifies that at the beginning

1 of April, once the Bureau of Reclamation, Army
2 Corps of Engineers issued their joint forecast
3 supply, that we will take the information
4 contained therein, and combine that, or subtract
5 from that the baseline demand to arrive at a
6 demand shortfall. And that we would do that for
7 each of the entities to determine the initial
8 demand shortfall for that season, if any.

9 Q. And, Mr. Weaver, if you were to set
10 aside the timing of when this forecast supply
11 order would be issued, would it be fair to say,
12 in your opinion, that there are two components in
13 Step 3? That being contributions, one, from
14 natural flow; and two, contributions from
15 storage?

16 A. I think it's fair to characterize the
17 forecast supply as being comprised of those two
18 components.

19 Q. Turning first to natural flow,
20 Mr. Weaver. Are you familiar with how the
21 Department predicts natural flow for the upcoming
22 irrigation season?

23 A. Yes, I am.

24 Q. And would you generally describe how
25 the Department makes its prediction?

1 A. The Department has prepared a
2 relationship based on the regression analysis of
3 the runoff volume of the Snake River from April
4 to July as measured at Heise, and the natural
5 flow diversions for each of the entities.

6 With the expression that describes that
7 relationship, when you are given an estimate of
8 forecast supply, you can calculate the natural
9 flow diversions for each entity based on their
10 respective regression analysis. And we take the
11 predicted value, less one standard error, to
12 arrive at the volume that we use as a projected
13 volume forecast supply to natural flow.

14 Q. Mr. Weaver, who at the Department makes
15 the natural flow prediction?

16 A. Liz Cresto does.

17 Q. What is your role in determining or
18 reviewing the natural flow prediction?

19 A. I provide support and peer review.

20 Q. Turning to storage prediction,
21 Mr. Weaver, are you familiar with how the
22 Department predicts storage for the upcoming
23 season?

24 A. Specific to this year, I was. I am,
25 yes.

1 Q. And, Mr. Weaver, if you would please,
2 generally describe how the Department made its
3 prediction this year for storage allocation?

4 A. We considered a number of factors that
5 were summarized in a memo that we've prepared,
6 including forecast supplies, NRCS snow melt data,
7 and climate forecasts. And based on the
8 information provided from those sources, we come
9 up with an analog year for each of the entities.

10 Once the analog year is selected, we go
11 and find a storage allocation volume as
12 associated with that entity for the respective
13 reservoirs. And then we assign that for the
14 total of all of those allocation volumes from
15 each of the reservoirs as the component of
16 storage in developing the forecast supply.

17 Q. Mr. Weaver, who at the Department makes
18 the storage prediction?

19 A. Liz Cresto.

20 Q. What is your role in determining or
21 reviewing those storage predictions?

22 A. Again, it's one of support, and peer
23 review.

24 Q. Mr. Weaver, I would like to talk about
25 Step 4 now. And if you still have Exhibit 1000

1 out. I believe we're still on page 34. Would
2 you please describe Step 4?

3 A. So Step 4 says that if a volume of
4 shortfall is calculated or anticipated, that it's
5 in excess of volume of water that's already been
6 provided by IGWA. Then the Director wants to see
7 good evidence be submitted, and that it meets the
8 criteria that he has in showing proof that they
9 have obtained additional water.

10 And that that water needs -- or that
11 evidence needs to be provided to the Director
12 within 14 days of the issuance of the initial
13 forecast supply or May 1st, whichever is latter
14 in time.

15 Q. Let's talk first about the predicted
16 shortfall, Mr. Weaver. If you'd please pull out
17 Exhibit 1001, which is the As Applied Order that
18 I've handed to you, and you've identified. If
19 you turn to page 2 of that exhibit, and if you
20 look at Finding of Fact 4.

21 A. (Witness complying.)

22 Q. What was the predicted shortfall as of
23 the issuance of the As Applied Order?

24 A. For the entire Surface Water Coalition,
25 it was 84,300 acre-feet.

1 Q. And how is that broken out by entity?

2 A. That identifies 27,400 acre-feet in
3 association with AFRD2, and 56,900 acre-feet in
4 association with Twin Falls Canal Company.

5 Q. And, Mr. Weaver, if you could use this
6 table, and explain how the predicted shortfall is
7 calculated?

8 A. Column one describes each of the
9 entities. The second column is the summary of
10 the predicted natural flow supply for each of the
11 entities. The third column is the predicted
12 storage allocation. The fourth column is the
13 total supply, which is the combination of the two
14 sources, summarizing columns 2 and 3.

15 The fifth column is the summary of the
16 baseline year diversions. And the last column is
17 the shortfall, was the difference between the
18 baseline diversion, and the total predicted
19 supply for this year.

20 Q. Mr. Weaver, are you aware if the
21 predicted shortfall has been reexamined by the
22 Department?

23 A. I'm aware that it has, yes.
24 (Exhibit 1002 marked.)

25 Q. (BY MR. BROMLEY) Mr. Weaver, I'm going

1 and justify how we got them. And it resulted in
2 slight changes.

3 The other factor pertains exclusively
4 to AFRD2. And in between the issuance of this
5 order and the As Applied Order regarding the
6 AFRD2, we were able to determine with certainty
7 what the minimum natural flow diversions were
8 going to be for that entity.

9 So rather than relying upon a forecast
10 supply, the Director felt that it was appropriate
11 to use a value that was known, and that was
12 measured. And so the changes regarding the AFRD2
13 reflect the use of a certain value versus the
14 forecast supply from the initial As Applied
15 Order.

16 Q. Mr. Weaver, when I look at this table,
17 I don't see that there were any other updates for
18 actual diversions. And specifically, I'm looking
19 at Twin Falls Canal Company.

20 Are you aware whether the Director did
21 not update the Twin Falls Canal Company's actual
22 diversions?

23 A. Twin Falls Canal Company relies more
24 heavily on natural flow to make up their need.
25 And their natural flow is available to them late

1 to hand you what's been marked as IDWR Exhibit
2 No. 1002. Would you please identify Exhibit 1002
3 for the record?

4 A. It's titled, "The Order Regarding the
5 IGWA Mitigation Obligation." And I guess it's a
6 reevaluation, or an update of the As Applied
7 Order.

8 Q. Mr. Weaver, would you please turn to
9 page 3. Is the reexamination that we've just
10 been discussing set forth on that page?

11 A. Yes, it is.

12 Q. What factors are you aware of that were
13 included in this reexamination?

14 A. I'm aware of two factors. The first
15 one is an updating of some of the data that was
16 relied upon in building the regression analysis.
17 Specifically, it was the natural flow diversions
18 for individual entities. And the data that was
19 relied upon previously in the regression
20 analysis, and it was inherited by myself and Liz.
21 We were unable to duplicate that data from the
22 water accounting software.

23 So in some instances, we've replaced it
24 with what we feel is more defensible numbers, and
25 ones that we can explain where they came from,

1 in the season, and sometimes all the way all
2 through the season. So the certainty that the
3 Director knew regarding AFRD2, certainly didn't
4 apply to Twin Falls Canal Company.

5 Q. So, Mr. Weaver, based on the updated
6 regressions, which I'll represent to Counsel, I
7 will get into detail with Ms. Cresto, and the
8 actual natural flow diversions by AFRD2, what is
9 the current predicted shortfall to the Coalition?

10 A. 68,400 acre-feet.

11 Q. I'm going to jump subjects here a
12 little bit, Mr. Weaver. But do you have any
13 familiarity with the Conjunctive Management
14 Rules?

15 A. I have some familiarity with them, yes.

16 Q. Do you have any familiarity with the
17 ESPA Model?

18 A. Again, I have some familiarity with it.

19 Q. And are you aware of the difference
20 between the model boundary in the ESPA Model, and
21 the boundary described in the Conjunctive
22 Management Rules as the area of common ground
23 water supply?

24 A. I'm aware of the difference, yes.

25 Q. What are the differences?

1 A. Well, when the Conjunctive Management
2 Rules were adopted, I believe, that was 1994.
3 They relied upon a document put forth by the USGS
4 in 1992 that described the extent of the Eastern
5 Snake Plain Aquifer, and that is the boundary
6 that went into the Conjunctive Management Rules.

7 Since that time, there has been an
8 evolution and an ongoing use of the ESPA Model
9 that's led to the reestablishment of those
10 boundaries to their current state, and that's the
11 difference.

12 Q. Are you familiar with orders issued by
13 the Director on other delivery calls, including
14 this delivery call?

15 A. I'm familiar with some of them, yes.

16 Q. Are you aware to which boundary the
17 Director has curtailed in the past?

18 A. It's my understanding that the boundary
19 identified in the Conjunctive Management Rules
20 has been used in the past.

21 Q. So the area of common ground water
22 supply, not the ESPA Model boundaries?

23 A. That's correct, the area of common
24 ground water supply.

25 Q. If you could look at Exhibit 1001, that

1 boundary is the correct boundary to be using?

2 A. The area of common ground water supply.

3 Q. Okay. Mr. Weaver, to kind of change
4 topics here. If you would look at Exhibit 1002,
5 I believe you probably still have that in front
6 of you.

7 If you turn to page 4, paragraphs 12
8 and 13. If you just take a moment to look at
9 those.

10 A. (Witness complying.)

11 Q. Are you familiar with those paragraphs
12 and the table in paragraph 12?

13 A. Yes, I am.

14 Q. And, Mr. Weaver, recognizing that these
15 paragraphs and table relate to a separate
16 contested case we're seeing before the
17 Department, what is your understanding of these
18 paragraphs, and how do they relate to what we're
19 talking about today?

20 A. IGWA at one point during the recent
21 past, submitted the documents to the Department
22 for consideration, where they outlined a
23 mitigation credit that they should be due based
24 on previous mitigation efforts. The Department,
25 I guess, took that under consideration, and

1 would be the As Applied Order. Specifically,
2 page 3, paragraph 7 at the top.

3 In this order, Exhibit 1001, when the
4 Department determined the original shortfall
5 calculation, which boundary did the Director
6 curtail?

7 A. In paragraph 7, describes the
8 difference between those two boundaries, and the
9 resulting difference in volumes of water in
10 irrigated area. And I think the intent was to
11 use the area of common ground water supply.

12 But in the final sentence there, there
13 was a mistake. And we actually used the volume
14 of water that was associated with the larger
15 current boundary of the model.

16 Q. And, Mr. Weaver, if you turn to Exhibit
17 1002, that's the order regarding IGWA mitigation
18 obligation. Are you aware as to which boundary
19 the Director used in that order?

20 A. I believe in this one, he
21 correctly -- or I shouldn't say correctly -- but
22 he changed the mistake maybe from the previous
23 one, and used the common ground water supply
24 boundary.

25 Q. So based upon your understanding, which

1 reviewed the material that they submitted.

2 And this volume summarized in paragraph
3 12, 5,707 acre-feet represents the total volume
4 of mitigation credit recognized by the
5 Department.

6 Paragraph 13, provides the
7 justification for why this volume was used, and
8 not the full volume of water associated with the
9 steady state model run, and I believe requested
10 for by IGWA was used.

11 Q. And again, these paragraphs relate to a
12 different contested case that -- we're not
13 addressing that today, but it is in Exhibit 1002?

14 A. Correct.

15 Q. So, Mr. Weaver, let's try and put the
16 map together. Based on the updated regression
17 equations, and the actual diversions by AFRD2,
18 and the Department's reexamination of injury at
19 this point is 68,400 acre-feet; is that correct?

20 A. That's correct.

21 Q. And then in order to only curtail those
22 rights that are within the area of common ground
23 water supply, the Department modeled that benefit
24 as to what would occur to the Near Blackfoot and
25 Minidoka gages; is that correct?

1 A. That's correct.
 2 Q. So that 68,400 acre-feet obligation was
 3 reduced to 62,232 acre-feet?
 4 A. Yes.
 5 Q. And as you've stated previously, that's
 6 consistent -- using the common ground water
 7 supply boundary, that's consistent with how the
 8 Department's previously used the boundaries?
 9 A. That's certainly my understanding, yes.
 10 Q. Okay. And if you would stay with this
 11 same exhibit. If you would look on page 5,
 12 paragraph 17. Does the table summarize what's
 13 the remaining obligation is for junior ground
 14 water users, that being 3,525 acre-feet?
 15 A. Yes, it does.
 16 Q. If junior ground water users were able
 17 to provide no additional water for mitigation
 18 purposes, what would the result be to the best of
 19 your understanding?
 20 A. A partial curtailment.
 21 (Exhibit 1003 marked.)
 22 Q. (BY MR. BROMLEY) Mr. Weaver, I'm going
 23 to hand you what's been marked as IDWR Exhibit
 24 No. 1003. Would you please identify that exhibit
 25 for the record?

1 Q. And on page 2 of that exhibit, does the
 2 first full paragraph explain the priority date,
 3 and then the priority date within the priority
 4 date that you've just referenced?
 5 A. I believe it does, yes.
 6 Q. Mr. Weaver, if you would turn to
 7 Attachment A to that same exhibit.
 8 A. (Witness complying.)
 9 Q. How many acres would be curtailed based
 10 on this model run?
 11 A. 4,598.
 12 Q. And, Mr. Weaver, does Attachment C
 13 contain the list of affected rights, including
 14 the enlargement rights?
 15 A. Yes, it does.
 16 MR. BROMLEY: I have nothing further.
 17 THE HEARING OFFICER: Okay. Thank you,
 18 Mr. Bromley.
 19 Ms. Klahn?
 20 MS. KLAHN: Thank you.
 21 CROSS-EXAMINATION
 22 QUESTIONS BY MR. KLAHN:
 23 Q. Working backwards, Mr. Weaver, is
 24 curtailment as contemplated in that Exhibit 1003,
 25 part of step No. 4, then?

1 A. It's titled "Technical Supplement to
 2 the May 17, 2010 Order Regarding Mitigation
 3 Obligation."
 4 Q. And what is the significance of this
 5 exhibit?
 6 A. When Exhibit 1002, or the order
 7 regarding the mitigation obligation was first, or
 8 was sent out to the parties, the Department was
 9 unable to come up with a finalized list of water
 10 rights that would be curtailed.
 11 The reason for that is, because the
 12 curtailment date landed in the middle of a block
 13 of water rights referred to as enlargement water
 14 rights, which were subordinate to all other water
 15 rights, and have an effective priority date of
 16 one date, which is different than the actual
 17 priority date on the water right.
 18 The technical supplement was issued
 19 after the Department was able to drill down into
 20 that block of enlargement rights, and then
 21 identify those specific rights that would be
 22 curtailed by analyzing the priority date within a
 23 priority date, so to speak. And that information
 24 was released to the parties in that document, the
 25 technical supplement document.

1 A. I think so, yes.
 2 Q. Do you have any idea how the Department
 3 will be able to curtail A & B's enlargement
 4 rights, that are pumped from the same wells, and
 5 serve the same lands as their senior ground water
 6 rights?
 7 A. I don't.
 8 Q. Have there been any discussions of that
 9 kind of thing?
 10 A. Not by myself.
 11 Q. Let's talk about Exhibit 1002 for a
 12 minute, please. It's the May 17th Mitigation
 13 Obligation. Looking at the table on page 3 that
 14 Mr. Bromley talked with you about, comparing it
 15 to the table from the Exhibit 1001, I think. Is
 16 that the right comparison?
 17 Do you have both of those open in front
 18 of you?
 19 A. I do, yes.
 20 Q. And you went through and described the
 21 headings in those tables for Mr. Bromley; didn't
 22 you?
 23 A. I did, yes.
 24 Q. Did you develop this table?
 25 A. I did not, no.

1 Q. Who did?
 2 A. I believe Liz Cresto did.
 3 Q. Do you have personal familiarity with
 4 it?
 5 A. I do, yes.
 6 Q. Why?
 7 A. I provide peer review for Liz, and the
 8 material that she provides and puts together
 9 regarding the methodology.
 10 Q. So Liz Cresto provided both the table
 11 in Exhibit 1001 and the table in Exhibit 1002; is
 12 that right?
 13 A. That's correct.
 14 Q. And you provided peer review for both;
 15 is that correct?
 16 A. That's correct.
 17 Q. And describe for me what your peer
 18 review in the Table 1001 applied to? That's the
 19 earlier order, the As Applied Order.
 20 A. Right. Going in and being able to
 21 duplicate the numbers in that table.
 22 Q. You did that for Exhibit 1001, on April
 23 29th, or before April 29th, when that was issued?
 24 A. I did, yes.
 25 Q. And at that time, you were able to

1 represented the minimum natural flow diversions
 2 for AFRD2 for the season, as opposed to a
 3 constructed number or forecasted number which
 4 relied on the regression equation.
 5 Q. Is that the constructed number, as you
 6 called it, relying on the regression equation
 7 found in Exhibit 1001, does that indicate to you
 8 there was a problem with the underlying
 9 regression analysis?
 10 A. It does not.
 11 Q. That was a number you were able to
 12 reproduce in Exhibit 1001; correct?
 13 A. That's correct.
 14 Q. And what was your method for
 15 reproducing that number?
 16 A. Going in and identifying the sources of
 17 data, and constructing the exact same regression
 18 analysis, both of them were done in Excel, both
 19 of them used the same numbers. You can arrive at
 20 the same numbers by duplicating the work.
 21 Q. And then two-and-a-half weeks later, it
 22 turned out that AFRD diverted 16 times almost as
 23 much water -- 16 -- is that right? Yes -- times
 24 as much water as was predicted on April 29th; is
 25 that correct?

1 reproduce the numbers that were in that order?
 2 A. I was, yes.
 3 Q. And then what happened between then and
 4 May 17th, when Exhibit 1002 was issued by the
 5 Department, the order regarding IGWA Mitigation
 6 Obligation, as far as your ability to reproduce
 7 those numbers?
 8 A. I'm not sure I ever went in and tried
 9 to reproduce the numbers in the second table. I
 10 just reviewed the numbers that she had in there,
 11 and we had a discussion on it. And I don't think
 12 I did the same level.
 13 Q. So which numbers are correct?
 14 A. The ones identified in Exhibit 1002.
 15 Q. And how, for example, AFRD#2's natural
 16 flow supply went from 1,256 in the April 29th
 17 Order, which is Exhibit 1001, to 16,874, which is
 18 the numbers shown in Exhibit 1002? What happened
 19 in between those two, that period of days that
 20 caused that number to change like that?
 21 A. Well, I think that paragraph 9, on page
 22 3 of Exhibit 1002 attempts to address that. But
 23 as I indicated, between those two dates, the
 24 Director felt it was appropriate to rely on an
 25 actual diversion volume of water, which

1 A. That's correct.
 2 Q. Milner's number in Exhibit 1002 changed
 3 from zero to 924. What's that change based on?
 4 A. That's the second factor -- or the
 5 first factor that I described, which was an
 6 updating of the natural flow values that were
 7 used in the regression analysis from the
 8 spreadsheets that had been inherited to the ones
 9 that Liz and myself could identify, go out and
 10 duplicate, and defend.
 11 Q. Is that your same answer for North
 12 Side, to go from 233,000 to 243,000?
 13 A. I believe Footnote 2 identifies the
 14 A & B where there was updates. That identifies
 15 A & B, Milner, North Side Canal Company and Twin
 16 Falls Canal Company. So you asked specifically
 17 about Milner, and what was the other entity?
 18 Q. North Side.
 19 A. Yes, North Side is identified in the
 20 footnote No. 2. So that -- my answer to that
 21 would be, yes.
 22 Q. And yet by May 17th, all of these
 23 entities presumably, with the possible exception
 24 of A & B, had diverted some amount of natural
 25 flow supply; had they not?

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1 A. I would imagine so, yes.
2 Q. And yet you made an adjustment only for
3 AFRD#2's diversion of natural flow to reflect
4 their actual diversions. Did you attempt to make
5 a similar kind of correction for the other
6 entities' actual diversions of natural flow as of
7 May 17th?
8 A. Not that I'm aware of.
9 Q. Why not?
10 A. As I tried to explain earlier, I
11 believe that the other entities to varying
12 degrees have natural flow contributions that
13 aren't as certain. They aren't as complete at
14 this point as AFRD2's are. I don't remember any
15 discussion on the matter. We looked at AFRD2. I
16 don't remember being asked to look at the other
17 entities.
18 Q. Mr. Weaver, do you have an
19 understanding of when the Surface Water Coalition
20 entities, with the exception of Twin Falls Canal
21 Company --I should say, of whether the other
22 Surface Water Coalition entities, with the
23 exception of Twin Falls, all eventually rely on
24 storage water?
25 A. I'm aware that they all have varying

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1 ratios of their dependency on storage water to
2 natural flow. I know -- or at least, I think,
3 that I know, Twin Falls Canal Company represents
4 one extreme dependency on natural flow, and
5 AFRD#2 represents the other extreme dependency on
6 storage. I don't know where exactly the other
7 entities fallout in that relationship.
8 Q. If during the course of the irrigation
9 season, say, maybe perhaps at the time the river
10 dries up at Blackfoot, if it became apparent to
11 you that, for example, North Side Canal Company
12 or Minidoka had completed their diversion of
13 natural flow supply, and was relying solely on
14 storage, would you recommend that the Director do
15 a similar kind of analysis as was done here, to
16 reflect the actual diversions from those entities
17 at that time?
18 MR. THOMPSON: I'll object to the
19 question as to the scope of outside of the scope
20 of this proceeding, and as it relates to Steps 3
21 and 4 of the proceeding.
22 THE HEARING OFFICER: Well, sustained,
23 Ms. Klahn. I think the question needs to be
24 asked in the context of the timing of Steps 3 and
25 4. I think your question presupposes possible

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1 adjustment throughout the irrigation season. And
2 there is a time frame that's described by Steps 3
3 and 4, so...
4 MS. KLAHN: It was my understanding,
5 Your Honor, that the May 17th interlocutory order
6 was actually a reapplication of Steps 3 and 4,
7 insofar, as the Department was able to determine
8 that AFRD was done with natural flow diversions.
9 And as an interlocutory order, I
10 assumed that it was possible to issue more
11 interlocutory orders. So getting at the issue of
12 whether it wouldn't be appropriate to make a
13 similar kind of adjustment later in the season,
14 if it turns out that the natural flow supply, for
15 example, of Minidoka ends up being a number
16 different than either of the numbers indicated in
17 these tables, for the same reasons that the
18 Department adjusted AFRD's, you had real numbers.
19 That's where I was going with it.
20 THE HEARING OFFICER: Well, I'll ask
21 you to confine your questions to the time periods
22 that are set forth in the Methodology Order.
23 THE WITNESS: So should I answer the
24 question?
25 THE HEARING OFFICER: Well, I've

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1 sustained the objection, until the question is
2 more carefully directed.
3 Q. (BY MS. KLAHN) Mr. Weaver, is there
4 another time contemplated by the Methodology
5 Order when Steps 3 and 4 would be applied again?
6 A. There is, yes.
7 Q. And when is that?
8 A. There is two anticipated in the
9 Methodology Order. One at the mid season point
10 correlating to the day of allocation, or after
11 the day of allocation, and then a third
12 reevaluation corresponding to what the
13 methodology refers to at the time of need.
14 Q. Would you anticipate doing a similar
15 kind of analysis as that done for AFRD in the May
16 17th order, Exhibit 1002, for the other entities
17 of the Surface Water Coalition, as far as actual
18 natural flow diversions made at that time?
19 A. Yes.
20 Q. Those times, I should say?
21 A. Yes, I think that the Methodology Order
22 is clear that when this is revisited around the
23 day of allocation and at the time of need, that
24 the forecast supply will be comprised of two
25 things: One, would be the actual flows diverted

1 for use, another one would be a forecast of
 2 supplies moving onto the future.
 3 Q. Thank you. Mr. Weaver, you were a
 4 witness at the hearing this morning on the 2008
 5 data; were you not?
 6 A. I was, yes.
 7 Q. And in the course of that hearing, I
 8 believe Ms. McHugh asked you whether the
 9 adjustment made to the baseline year --
 10 sorry -- reasonable in-season demand for wheeling
 11 water was appropriately considered as part of the
 12 Step No. 3. Do you recall that?
 13 A. I think so, yes.
 14 Q. And I believe your answer was that it
 15 was?
 16 A. Yes.
 17 Q. Okay. I would like you to turn to
 18 Exhibit 1000, and take a look at paragraph 43.
 19 A. (Witness complying.) I'm there.
 20 Q. And this is the paragraph from Exhibit
 21 1000 that describes adjustments including
 22 wheeling; is that correct, paragraph 43?
 23 A. That's correct.
 24 Q. Do you recall that you were deposed in
 25 this matter?

1 Q. Do you recognize the tables in Exhibit
 2 3000?
 3 A. I do, yes.
 4 Q. Can you describe them, generally?
 5 A. These tables are listed from our BD and
 6 RSD calculated spreadsheet. I believe the
 7 specific tab in there is the demand tab. And
 8 this represents the calculations where we took
 9 the raw diversion demands for each month and each
 10 year for each entity, and subtracted out the
 11 adjustments that we identified.
 12 Q. And, Mr. Weaver, if you would turn with
 13 me to the last page of this exhibit, which is
 14 titled "SWC Monthly Wheeled Water." Do you see
 15 that?
 16 A. I do, yes.
 17 Q. Okay. And then would you open your
 18 Exhibit 1000 back up to paragraph 43, please?
 19 A. Okay.
 20 Q. Now, I want to ask you about the note
 21 at the bottom of, I think, that's either the page
 22 you are looking at in Exhibit 3000, Mr. Weaver,
 23 or perhaps the second page, the very last page of
 24 Exhibit 3000. There you go. There is a note
 25 there starting, "Wheeled water transactions." Do

1 A. I do, yes.
 2 Q. And do you recall an exhibit that was
 3 provided by your counsel at the deposition?
 4 MS. KLAHN: Your Honor, could I
 5 approach the witness?
 6 THE HEARING OFFICER: Yes.
 7 MS. KLAHN: We would like to mark this
 8 as Exhibit 3000.
 9 MR. BROMLEY: It's what would be
 10 Exhibit 1004. It's all of that information that
 11 was provided on a compact disk, plus it also has
 12 the -- I think this is what your --
 13 MS. McHUGH: That's not it.
 14 MR. BROMLEY: I think it is, what she's
 15 holding, unless it's something different.
 16 THE HEARING OFFICER: Let's go off the
 17 record.
 18 (Discussion held off the record.)
 19 (Exhibit 3000 marked.)
 20 THE HEARING OFFICER: Okay. We're on
 21 the record. Thank you.
 22 Q. (BY MS. KLAHN) Mr. Weaver, you've been
 23 handed an exhibit marked 3000. And have you had
 24 a chance to take a look at that?
 25 A. I have, yes.

1 you see that?
 2 A. I do, yes.
 3 Q. Could you read that, please?
 4 A. "Wheeled water transactions for A & B,
 5 AFRD2, Minidoka, and Twin Falls Canal Company may
 6 have occurred. The values were less than one
 7 percent of the total demand; and therefore, were
 8 not considered." And then there is some
 9 shorthand notations there that says "percent
 10 adjustment is less than percent error of
 11 measurement."
 12 Q. Thank you for reading that. And then I
 13 would like you to turn back to paragraph 43 in
 14 Exhibit 1000.
 15 A. (Witness complying.)
 16 Q. Do you see anything in paragraph 43 of
 17 Exhibit 1000 that indicates a rationale or even a
 18 statement that wheeled water would not be
 19 subtracted, unless it was more than one percent
 20 of total demand?
 21 A. I do not.
 22 Q. And your analysis of the wheeled water
 23 then is not consistent with the statement in
 24 paragraph 43; would you agree?
 25 A. I would agree that paragraph 43 doesn't

1 address it one way or the other, I guess.
 2 Q. Okay. And just for the record, why
 3 don't you describe what -- again, I mean, I think
 4 you talked about this this morning. But since
 5 we're in a different hearing with a different
 6 record, why don't you describe what the monthly
 7 wheeled water adjustment was, so that we can talk
 8 about this one percent in context?

9 A. Well, my understanding of wheeled water
 10 is, is that is one entity diverts water at its
 11 headgate from the river on behalf of another
 12 entity.

13 Q. Okay. And for purposes of the DS
 14 & RISD Calculator, what did you do with the
 15 wheeled water?

16 A. We subtracted it from the diversion
 17 volume that we used in our calculations.

18 Q. Why?

19 A. Because what we wanted to get at was
 20 the volume of water that was diverted by a
 21 specific entity to meet crop water needs. And
 22 when you divert water on behalf of another
 23 entity, we felt that it was appropriate not to
 24 include that, because it wasn't being used by the
 25 entity that diverted it.

1 Q. Okay. Except you didn't subtract all
 2 wheeled water; is that right?

3 A. That's correct.

4 Q. And your cutoff point was one percent
 5 of total demand; is that right?

6 A. That's correct.

7 Q. Can you describe what that means?

8 A. Probably not as well as Liz Cresto
 9 could. Would you like me to do my best?

10 Q. Yes, please.

11 A. So the diversion volume of the annual,
 12 or I guess in this case, the monthly total
 13 diversion volume from the wheeled water
 14 adjustment was less than one percent of that
 15 number. It probably was not considered.

16 But it probably -- actually in thinking
 17 about it, it probably would be on an annual
 18 basis. Because part of the problem and part of
 19 the reason that we overlooked the one percent was
 20 a practical issue that you often in the small
 21 volumes can't assign, or determine where to
 22 assign those diversions.

23 Q. I didn't follow it totally, that last
 24 statement. You can't assign what diversions?

25 A. So for the very small wheeled water

1 diversions, you might see that at the end of the
 2 year as an annual total, but not be able to
 3 assign to what month, or what period during the
 4 irrigation season that that took place. Now,
 5 that's my understanding of it.

6 Q. Okay. Would you agree that to the
 7 extent that wheeled water is not subtracted from
 8 the diversions, it's possible that it increases
 9 the diversion amount in a way that could
 10 implicate additional mitigation water being
 11 provided by IGWA or other juniors?

12 A. I'm sorry. Could you restate that?

13 Q. Yes. It's kind of mish-mash.

14 To the extent that the Department
 15 decides not to subtract wheeled water from
 16 diversion records, it increases overall
 17 diversions; correct?

18 A. That's correct.

19 Q. Or at least it doesn't reduce diversion
 20 by amounts that aren't being used for beneficial
 21 uses; right?

22 A. Correct.

23 Q. And that that could have the effect
 24 then of increasing overall mitigation
 25 requirements by juniors or IGWA?

1 A. It could, yes.

2 Q. Your last sentence on that page we're
 3 looking at of Exhibit 3000, Mr. Weaver, says,
 4 "percent adjustment left arrow percent
 5 measurement." I think that left arrow means less
 6 than?

7 A. That's correct.

8 Q. Describe your understanding of that
 9 shorthand statement there.

10 A. That's my shorthand notation, and it
 11 was a note to myself based on a conversation that
 12 Liz and I had regarding the matter. Following
 13 subsequent conversations that I've had with Liz
 14 after the deposition, which was raised, I would
 15 say, that that's not accurate.

16 Q. Okay. So initially you were thinking
 17 that a less than one percent adjustment could be
 18 less than the percent error of measurement?

19 A. That's correct.

20 Q. And you no longer believe that to be
 21 true?

22 A. I believe that that wasn't the reason
 23 that we considered the one percent.

24 Q. Okay. That wasn't the reason?

25 A. That's correct, yes.

1 Q. Okay. Mr. Weaver, I'm looking now
 2 at -- Exhibit 1002 is the As Applied Order;
 3 correct, or the 1001. I'm sorry.
 4 A. 1001 is the As Applied Order.
 5 Q. Okay. And if you look on page 2 of
 6 Exhibit 1001, back at the table we were talking
 7 about a minute ago.
 8 A. Paragraph 4?
 9 Q. Yes.
 10 A. Yes.
 11 Q. I guess we could easily work from
 12 Exhibit 1002. But there is a column there called
 13 "Shortfall." Do you see that?
 14 A. I do.
 15 Q. So based on the discussion that we just
 16 had about not subtracting wheeled water amounts
 17 that were less than one percent of total demand,
 18 would you agree that if injury is less than one
 19 percent, if shortfall is less than one percent,
 20 should that also be disregarded, and the juniors
 21 not be required to compensate for it?
 22 A. Are you asking me if I would agree with
 23 that?
 24 Q. Uh-huh.
 25 A. I don't think that I would agree with

1 that.
 2 Q. And at the time, I believe you said,
 3 that you didn't think it was appropriate to do
 4 that comparison for the year 2006 or the year
 5 2008. Do you recall that?
 6 A. I do.
 7 Q. Okay. And you've had a little time to
 8 think about that, I'm sure.
 9 And would you agree with me, that it
 10 would be one way to test whether or not the 2006,
 11 2008 average is an appropriate, I guess, measure
 12 for purposes of the order to apply that to 2006
 13 and 2008 and see how close it comes to the actual
 14 diversions?
 15 A. I would say that initially in the
 16 year -- in April, with the initial calculation,
 17 where it's strictly a function of the baseline
 18 diversions, I'm not sure it would have as much
 19 value as if you carried that calculation forward
 20 to the end of the season, or the time of need
 21 calculation.
 22 So I guess I could see how there would
 23 be value in doing that, and value in the latter
 24 half calculations.
 25 MR. KLAHN: All right. That's all I

1 that.
 2 Q. Okay. Now, Mr. Weaver, one last area I
 3 wanted to explore with you. When you were
 4 talking about the reasonable in-season demand,
 5 baseline demand calculator a minute ago. Do you
 6 recall that?
 7 A. Yes.
 8 Q. That was a spreadsheet we looked at
 9 during the hearing this morning; wasn't it?
 10 A. That's correct.
 11 Q. And that particular spreadsheet is the
 12 annual, I guess, month-by-month analysis of each
 13 entities' baseline year; is that right?
 14 A. Well, it does that, yes.
 15 Q. Okay. And this morning we had some
 16 conversation about your statements regarding
 17 application of the 2006, 2008 average to the
 18 actual diversions in the study period. Do you
 19 recall that?
 20 A. So we compared the '06, '08 average of
 21 the baseline diversions to what -- what was the
 22 second half of that?
 23 Q. To the actual diversions for those
 24 years.
 25 A. Yes, I remember we had discussion on

1 have. Thank you, Mr. Weaver.
 2 THE HEARING OFFICER: Ms. McHugh?
 3 Mr. Budge?
 4 CROSS-EXAMINATION
 5 QUESTIONS BY MS. McHUGH:
 6 Q. This is Candice McHugh for the Ground
 7 Water Districts. Good afternoon, Mr. Weaver.
 8 A. Good afternoon.
 9 Q. Just following up on what Ms. Klahn was
 10 asking you about. Now, the baseline diversions
 11 that the Department is using, and as set forth in
 12 paragraph 4 of Exhibit 1001, which is the same as
 13 the baseline year diversions contained in
 14 paragraph 8 of Exhibit 1002.
 15 Would you agree that those are the key
 16 years for determining the initial supply that
 17 IGWA will need to provide by May 1st?
 18 A. I would agree that the initial
 19 selection of baseline years an average of '06 and
 20 '08, and that that data subtracted from the
 21 forecast supply for the shortfall, because it
 22 plays a critical role, yes.
 23 Q. Okay. Because if IGWA can't meet the
 24 amount that comes from the equation, if there is
 25 a determination of shortfall, then the

1 expectation is, they would be curtailed. Is that
2 your understanding?

3 A. It is, yes.

4 Q. And they need to provide that water by
5 May 1st or 14 days after that calculation; is
6 that according to Steps 3 and 4?

7 A. Well, they need to provide evidence
8 that they can secure it, not necessarily provide
9 it to the Surface Water Coalition.

10 Q. Okay. Essentially, they have to go out
11 and get water to show the Director that they have
12 the ability to secure that much water, or have
13 secured that much water; is that your
14 understanding?

15 A. Right, the ability to secure.

16 Q. And if they don't, then the expectation
17 would be that they would be curtailed, the junior
18 users would be curtailed?

19 A. That's correct.

20 Q. Okay. And if you turn to paragraph 43
21 of the Methodology Order?

22 A. (Witness complying.)

23 Q. Ms. Klahn talked to you about one of
24 the adjustments that is set forth there. And
25 that was the adjustment for wheeling water?

1 Q. Okay. And if we assume that the
2 baseline year is an okay method, would you agree
3 that if there were diversions for other purposes
4 not used for crop needs, such as hydropower, that
5 that also would reduce the amount contained in
6 that baseline year column in both Exhibits 1001
7 and 1002?

8 A. I guess that would assume that it was
9 diverted for no other purpose than to generate
10 power, correct?

11 Q. Correct. If it was diverted for
12 hydropower purposes only and not for crop needs,
13 then it would go to reduce that number? Would
14 agree with that?

15 A. I would say that paragraph 43
16 anticipates removing that if that were the case.

17 Q. Okay. But when you applied the
18 methodology in paragraph 43 to make such
19 adjustments, did you try to determine if that
20 happened, if there was diversions for hydropower?

21 A. Not that I'm aware of.

22 Q. Okay. And the same is true for leased
23 water? That there was no attempt to reduce the
24 baseline year in your As Applied Order to account
25 for leased water?

1 A. Yes.

2 Q. And she examined you on Exhibit 3000?

3 A. Yes.

4 Q. Which appears to be wheeled water for
5 recharge purposes. Is that your understanding of
6 what that exhibit is?

7 A. So pages 5 and 6 of that exhibit are a
8 table that summarized the sum total of
9 adjustments made to the baseline diversion data
10 from the water rights accounting. And included
11 in the sum or total of those adjustments, are all
12 adjustments representing wheeled water, and all
13 in-season recharge adjustments.

14 Q. Okay. So it's not just wheeled water
15 for recharge purposes? It's your understanding
16 that this adjustments also include wheeled water
17 for, say, delivery to another entity for use for
18 actual -- for different entities' delivery of
19 crop needs, or something?

20 A. That's correct. It could be
21 mitigation. It could be to irrigate with. It
22 could be any number of things.

23 Q. And by taking that out, as Ms. Klahn
24 said, the amount in the baseline year is reduced?

25 A. That's right.

1 A. I just don't know. Not that I'm aware
2 of, I guess.

3 Q. Okay. If you don't know, who would
4 know if that got adjusted for lease water?

5 A. Liz Cresto.

6 Q. Is it your understanding that the
7 baseline year got adjusted for lease water?

8 A. I don't know.

9 Q. This morning when I asked you the
10 question as to whether or not water leases from
11 the entities, the Surface Water Coalition
12 entities for at least the 2008 data was adjusted
13 for leases, do you recall that you said that it
14 was not?

15 A. I recall that, yes.

16 Q. And do you agree with that still?

17 A. Well, I guess since then, I've had a
18 discussion with Liz. And if those were
19 represented in wheeled water in the water rights
20 accounting, then we would have adjusted for it.
21 And if they weren't, if there was some other
22 arrangement, then we didn't probably account for
23 it.

24 Q. What about leases for something other
25 than leases to the rental pool, for example?

1 A. Yeah, I'm just not aware of how those
 2 are addressed in the adjustments.
 3 Q. Okay. And Liz would know that?
 4 A. I think so. Conceivably.
 5 Q. If you don't know, and if Liz doesn't
 6 know, is there anybody else at the Department
 7 that would know?
 8 A. I think Liz Cresto probably knows the
 9 answer to that.
 10 Q. And is the same true for flow
 11 augmentation water?
 12 A. She would be the best person to ask
 13 that question, yes.
 14 Q. In your application of the baseline
 15 years in that same table, if the entity had
 16 hardened acres, or acres that weren't irrigated,
 17 or could be irrigated in that water irrigation
 18 season, were those adjusted for and taken out?
 19 A. I guess I'm not sure how it would be
 20 appropriate to address that concern with our
 21 adjustments.
 22 Q. And could you explain that?
 23 A. Well, if I understand what you are
 24 asking me, you are saying if the irrigated area
 25 decreased from one year to the next, would the

1 Q. (BY MS. McHUGH) And how, if in 2006 or
 2 2008, if the entity in those years -- since
 3 that's the baseline years you've used, if they
 4 were not irrigating their full irrigated acres,
 5 how was that adjustment made to determine what
 6 their crop needs were, or their diversions in
 7 those years for crop growing purposes as it
 8 relates to Finding of Fact 43? How was that
 9 adjustment made, or was it?
 10 A. So all the calculations in the
 11 methodology as it was released, rely on the
 12 assumption that the irrigated area was as
 13 established in the record.
 14 Q. And the record you are referring to is?
 15 A. I'm not sure what to call it. The
 16 Surface Water Coalition call.
 17 Q. The 2008 hearing record?
 18 A. Yes, the one that Judge Schroeder
 19 issued the final opinion on. I'm not sure of the
 20 terminology.
 21 Q. And I think I asked you this question
 22 this morning, or actually I might have asked it
 23 to Liz. Can you tell me where in that record the
 24 number of irrigated acres for those two years is
 25 located?

1 methodology address that decrease in irrigated
 2 acres by putting an adjustment in this table? Is
 3 that a fair summary of your question?
 4 Q. Yes.
 5 A. And I would say the answer to that
 6 would be, no, this would not be the methodology
 7 to address that.
 8 Q. Explain how the methodology would
 9 address that.
 10 MR. THOMPSON: I guess I'll just lodge
 11 an objection. If this question delves into the
 12 Methodology Order, not Steps 3 and 4 As Applied?
 13 THE HEARING OFFICER: Okay. Overruled.
 14 Mr. Weaver.
 15 THE WITNESS: If I recall, the
 16 Methodology Order says that prior to the start of
 17 the irrigation season, the Surface Water
 18 Coalition will provide a number of irrigated
 19 acres for the upcoming year.
 20 And so that value would be used in the
 21 calculation of the crop water need. And so
 22 that's how the -- that's how the change in
 23 irrigated area, as it would reflect the
 24 diversions would be incorporated into the
 25 methodology.

1 A. Well, I think it's discussed in the
 2 expert reports of both Pocatello and the Surface
 3 Water Coalition, and probably IGWA, although I
 4 don't recall that one as well. I seem to recall
 5 that in the expert report, both parties made
 6 their own calculations of what the irrigated area
 7 was.
 8 And then in addition, for specific
 9 entities, and again, I don't recall what they
 10 were. There was additional expert reports in the
 11 record that addressed exactly what you've
 12 discussed here, which is the decrease in the
 13 irrigated area, the hardening of ground. And
 14 proposed a number less than what was in the
 15 Director's report as far as irrigated areas go.
 16 Q. And then by the Director's report, you
 17 mean, the SRBA Director's report?
 18 A. That's correct.
 19 Q. And so then you looked at the record.
 20 I need to summarize your testimony, so I can make
 21 this clear. You looked at the record there. And
 22 then you took that number, and you put it
 23 into -- which spreadsheet did you put that number
 24 into?
 25 A. It's in the DS and RISD spreadsheet.

1 Q. Were you here this morning for the
2 question I asked Ms. Cresto about the irrigated
3 area within the Twin Falls Canal Company? We
4 pulled that up on the --

5 A. I was, yes.

6 Q. Do you recall that spreadsheet?

7 A. I do, yes.

8 Q. Can you tell me what the name of that
9 spreadsheet was?

10 A. I can't. It's the one that addresses
11 irrigated -- or crop areas --

12 Q. Okay.

13 A. -- or entities.

14 Q. And where did those numbers come from?

15 A. So the specific irrigated area used in
16 determining the crop distributions in that
17 spreadsheet, which ultimately only resulted in a
18 percentage or a ratio -- the areas -- the
19 irrigated areas represented in that spreadsheet
20 were not used later in the calculations.

21 But the areas for -- the irrigated
22 areas in that spreadsheet were developed by Tony
23 Morris and Bill Kramber in an effort that they
24 had with each of the Surface Water Coalition
25 entities to identify the areas of ground that

1 shortfalls is a function of historic diversions
2 only and forecast supply.

3 Now, as you progress in the season,
4 we're going to correct for historic diversions
5 with actual crop water need in the season, or
6 actually, you know, water consumed by the crops,
7 irrigation requirement.

8 So in the As Applied Order, the crop
9 distribution didn't play a role, because we
10 weren't -- the equation that calculated demand
11 shortfall was not being considered by any
12 in-season crop water need.

13 Q. So the method that you used in the As
14 Applied Order is different than the method you
15 are applying in future steps?

16 A. Well, I would say the calculation is
17 different. I'm not sure I agree with how you
18 couched it.

19 Q. Does the As Applied Order look at crop
20 water needs?

21 A. It doesn't, because there are no crop
22 water needs yet associated with this season. So
23 it cannot.

24 Q. Okay. But didn't I just hear you say
25 that, in future steps, you anticipate calculating

1 were irrigated within their boundaries strictly
2 by surface water. And that was a back-and-forth
3 effort, I guess I'll just say, between Tony
4 Morris for lack of knowing who exactly was
5 involved with it and each of the entities.

6 And for some of the entities, that
7 resulted in a final shape file, our map shape
8 file, both parties were satisfied, the Department
9 and the entities. And for certain entities, they
10 never responded to our initial request that they
11 provide feedback on our shape file.

12 Now, the reasons that I use those shape
13 files and not other ones, is because those had
14 already been broken down per county, per
15 irrigation district. So the information that I
16 needed was readily available, and it was what was
17 provided to me by our GIS technical services
18 group.

19 Q. Okay. So you got that information from
20 the GIS technical services group. Can you
21 explain to me how you used that information in
22 the As Applied Order?

23 A. The As Applied Order is only the
24 implication -- or I'm sorry -- the implementation
25 of Steps 3 and 4. In Step 3, the demand

1 crop water needs; is that right?

2 A. And I guess I'm familiar enough with
3 the equation that we use to calculate demand
4 shortfall that that's how it was used. We have
5 two components in that equation. One component
6 that we made up of historical diversions, which
7 in April it dominates, and the crop water need is
8 zero.

9 And as you progress into the season, it
10 still came to the same calculations and nothing
11 has changed, it's just the more you get into the
12 season, the more demand shortfall is influenced
13 by the crop water need, the actual crop water
14 need associated with the season, and it's
15 becoming less influenced by the historical
16 diversions.

17 Q. Okay. I'm just going to talk to you a
18 little bit more about the adjustments in Finding
19 of Fact 43, and then as you apply the adjustments
20 that aren't directly in support of the beneficial
21 use of crop development.

22 Was the Minidoka return flow credit
23 from Twin Falls Canal Company to other entities,
24 was there any adjustment to the baseline year in
25 2006, 2008 for that transfer of water from Twin

1 Falls Canal Company?
 2 A. I don't know.
 3 Q. And who would know?
 4 A. Again, I think Liz Cresto would be able
 5 to answer that question.
 6 Q. Now, as the baseline year relates to
 7 evaporation and the predicted storage allocation
 8 for each of the Surface Water Coalition entities,
 9 if the baseline year is not adjusted to
 10 include -- to add evaporation back into the
 11 storage supply for them, isn't the storage supply
 12 actually overstated?
 13 MR. ARKOOSH: I object. That calls for
 14 a conclusion of law. I would object on that
 15 basis.
 16 THE HEARING OFFICER: Sustained.
 17 Q. (BY MS. McHUGH) Is it your
 18 understanding that in looking at the table in
 19 Finding of Fact 8 and Finding of Fact 4, in
 20 Exhibits 1001 and 1002, for the predicted storage
 21 allocation, that that predicted storage
 22 allocation has evaporation removed from it?
 23 A. I'm sorry. Can you tell me the tables?
 24 You went through that pretty fast.
 25 Q. Looking at Exhibits 1001, 1002.

1 to add back in the evaporation, it would
 2 increase, not decrease the total supply. Yes.
 3 Q. And because the total supply is then
 4 used to compare to the baseline years to
 5 determine shortfall, would you agree that if you
 6 don't add evaporation back into the storage
 7 allocation, that the shortfall is greater?
 8 A. I agree.
 9 Q. Okay. I believe Mr. Bromley asked you
 10 some questions that the Department predicts
 11 natural flow supply; do you remember that, and
 12 also makes a storage prediction?
 13 A. I remember the questions he asked, yes.
 14 Q. Okay. Do you know whether Water
 15 District 1 makes natural flow predictions?
 16 A. I don't.
 17 Q. Do you know whether Water District 1
 18 makes storage predictions?
 19 A. I don't.
 20 Q. Following up on some questions
 21 Ms. Klahn asked about, when you made the
 22 adjustment between Exhibits 1001 and 1002, as it
 23 relates to AFRD#2?
 24 A. Yes.
 25 Q. And you stated that essentially, AFRD2

1 A. I have Exhibit 1001.
 2 Q. And look at Finding of Fact 4.
 3 A. Okay.
 4 Q. And Exhibit 1002, Finding of Fact 8.
 5 A. Okay.
 6 Q. Is it your understanding that the
 7 predicted storage allocation in those two tables
 8 has evaporation removed from it?
 9 A. That's my understanding, yes.
 10 Q. Okay. So the logical conclusion would
 11 be, that if evaporation was added back into those
 12 storage allocation totals, that the storage
 13 supply would be greater for each of the entities.
 14 Would you agree with that?
 15 A. I would.
 16 Q. And because the storage allocation and
 17 the predicted natural flow supply is added
 18 together to equal a total supply, if the
 19 evaporation is not added back into the storage
 20 supply, doesn't that affect the total supply?
 21 A. It does, yes.
 22 Q. It decreases the total supply; would
 23 you agree with that?
 24 A. Yeah, I get what you are -- I think it
 25 does. If you would subtract out, or if you were

1 natural flow diversion is now certain. Do you
 2 recall that testimony?
 3 A. I believe that I said the minimum
 4 amount is certain.
 5 Q. Okay. Why is it that AFRD natural flow
 6 is minimum is now certain?
 7 A. Well, that's a complicated matter, and
 8 I think we talked about this in my deposition.
 9 And although I was involved in some of the
 10 discussions, and I guess I'll refer to the same
 11 document that I did then. The Eagle decree that
 12 governs how you consider the natural flow
 13 diversions for AFRD2 in April and May, I was
 14 involved in those discussions. But I don't
 15 understand it as intimately as others do in the
 16 Department. So I can't give you the reasons, the
 17 specific details why that represents the minimum
 18 supply.
 19 Q. Okay. And who told you that? Who were
 20 the discussions with that told you that the AFRD
 21 natural flow minimum supply is now certain?
 22 A. Liz and myself.
 23 Q. So Liz understands why that's the case,
 24 and how the Eagle decree works with relation to
 25 AFRD#2?

1 A. You would have to ask Liz that.
 2 Q. Was there anybody else in those
 3 discussions?
 4 A. I think Chris Bromley was involved in
 5 those discussions, and potentially, Allan Wiley.
 6 Q. Are the reservoirs still currently
 7 filling in Water District 1; do you know?
 8 A. I think they are, yes.
 9 Q. Has the day of allocation occurred yet?
 10 A. Not that I'm aware of.
 11 Q. So is it possible to find out when
 12 AFRD's minimum natural flow diversion is certain
 13 before the reservoirs fill?
 14 A. The minimum amounts it would be, yes,
 15 that's correct.
 16 Q. Okay. Is there a time when the minimum
 17 natural flow amount is certain for the other
 18 Surface Water Coalition entities?
 19 A. I don't know.
 20 Q. Do you know who might know that?
 21 A. Liz Cresto would be a better person to
 22 ask that question.
 23 Q. I'll have you look at Exhibit 1002.
 24 A. (Witness complying.) Okay.
 25 Q. In paragraph 11, do you see that there?

1 people that don't fall within the ground water
 2 district's boundaries?
 3 A. Yes.
 4 Q. Okay. And so for members that are
 5 outside ground water district boundaries, is it
 6 your understanding that they are included in the
 7 62,282 acre-foot obligation or not?
 8 A. It's my understanding that they aren't
 9 included in that.
 10 Q. They aren't included in it. Was there
 11 any calculation made for those people that fell
 12 outside of ground water district boundaries?
 13 A. I'm not sure.
 14 Q. So if IGWA was trying to determine how
 15 much water it needed to supply to cover its
 16 members, how would it determine that? Do you
 17 know?
 18 A. I guess it had always been my
 19 assumption that that was the amount that they had
 20 to come up with.
 21 MS. McHUGH: Okay. May I approach the
 22 witness?
 23 THE HEARING OFFICER: Yes. And as you
 24 do, Ms. McHugh, how much longer do you have with
 25 Mr. Weaver? I'm wondering whether we ought to

1 A. I do, yes.
 2 Q. And it appears that the Mitigation
 3 Obligation for junior ground water users is now
 4 62,232 acre-feet?
 5 A. That's correct.
 6 Q. Was there any calculation made to
 7 identify what the Idaho Ground Water
 8 Appropriators and its ground water district
 9 member's share of that amount is?
 10 A. So what do you mean by its members?
 11 Q. Its ground water district members.
 12 A. Water District 130 and Water District
 13 120, is that what you are referring to?
 14 Q. Well, let's ask this question first:
 15 Does that reflect the mitigation obligation of
 16 all junior ground water users?
 17 A. That's certainly my understanding.
 18 Q. So if the ground water user was outside
 19 of the ground water district or not part of IGWA,
 20 that would potentially reduce IGWA's obligation
 21 or their member's obligation of that?
 22 A. So if they were outside of the area of
 23 common ground water supply, or if they were just
 24 outside of a water district boundary?
 25 Q. Okay. Are you aware that there are

1 take a break.
 2 MS. McHUGH: I think this is my last
 3 subject of questions. So it shouldn't be too
 4 much longer.
 5 THE HEARING OFFICER: Okay. Thank you.
 6 MS. McHUGH: I'll have marked here as
 7 2000 -- it was Deposition Exhibit No. 6. So I
 8 think everyone has already seen it.
 9 (Exhibit 2000 marked.)
 10 Q. (BY MS. McHUGH) Do you recall
 11 providing this document to us at your deposition?
 12 A. I do, yes.
 13 Q. Can you tell me what this document is?
 14 A. I prepared this document when I was
 15 asked to provide peer review on Liz Cresto's
 16 selection of analog years. We had a discussion
 17 about how she went about doing that. In essence,
 18 what this document is, is if Liz wasn't here,
 19 this was notes to myself so I could recreate that
 20 effort.
 21 Q. And the analog year that you are
 22 referring to regarding the storage allocation as
 23 a component of the forecast supply used in Steps
 24 3 and 4; is that fair?
 25 A. It is fair, yes.

1 Q. Okay. And is the information contained
2 in this exhibit, is it explained in the
3 Methodology Order?

4 A. The details in this memo are not in the
5 Methodology Order.

6 Q. So how did you know to prepare this
7 memo, or to do the steps that are outlined in
8 this memo, if it's not in the Methodology Order?

9 A. Well, I got my direction from Liz
10 Cresto in how to go about doing it. It was my
11 understanding that she had inherited that
12 methodology from the prior hydrologist who had
13 worked on this matter.

14 Q. So without this document, can you
15 actually come up with a storage allocation to
16 forecast supply?

17 A. I think you could, yes.

18 Q. And how would you do that?

19 A. Well, I believe the methodology says
20 that you would select an analog year that would
21 be representative of the current year, and this
22 is a summary of the considerations that we did in
23 selecting that analog year. But I believe
24 another professional hydrologist or professional
25 engineer could go out and develop their own

1 the deposition. And I don't think that I could
2 find at that time anywhere in the methodology
3 where evaporation was addressed one way or the
4 other.

5 Q. Okay. And would you agree that ground
6 water pumping can't affect evaporation?

7 A. I'm sorry?

8 Q. Would you agree that ground water
9 pumping cannot affect evaporation?

10 A. Cannot affect evaporation?

11 Q. Yes.

12 A. I'm not sure I would agree with that.

13 Q. And then finally, looking at Exhibits
14 1001 and 1002, again, in the shortfall
15 calculation. Granted the numbers are different,
16 and we can just agree with that in Finding of
17 Fact 8 and Finding of Fact 4.

18 But do you know, is the shortfall
19 calculation in either of those tables as you
20 apply them, based on the ground water users'
21 hydraulic connection to the Snake River?

22 A. So is there a connection between the
23 numbers summarized in those tables and the
24 pumping of the ground water users?

25 Q. As it affects the East Snake River?

1 methodology with the guidance to arrive at their
2 own analog years, and arrive at their own
3 allocation volumes.

4 Q. So the Methodology Order doesn't
5 actually spell out how you are going to come up
6 with the predicted storage allocation?

7 A. Right.

8 Q. Is that fair?

9 A. I think you are right, yes.

10 MS. McHUGH: Nothing further for me.

11 THE HEARING OFFICER: Okay. Thank you.
12 Let's take a 15-minute break, and let's come back
13 about 3:25.

14 (A recess was had.)

15 THE HEARING OFFICER: We're recording
16 again.

17 And, Candice, you said you have a
18 couple extra questions?

19 MS. McHUGH: Yes, I do. Thank you.
20 Sorry, I missed my one page here.

21 Q. (BY MS. McHUGH) Mr. Weaver, following
22 up on the questions I asked about evaporation.
23 Where in the Methodology Order does it say that
24 we should deduct evaporation from the supply?

25 A. As I recall, this also came up during

1 A. I think that the number that's used in
2 baseline demand, which is used to calculate
3 shortfall, is influenced by ground water pumping,
4 yes.

5 MS. McHUGH: Nothing further.

6 THE HEARING OFFICER: Examination of
7 Mr. Weaver by the Surface Water Coalition? What
8 order do you want to proceed?

9 MR. FLETCHER: Mr. Arkoosh will go
10 first.

11 THE HEARING OFFICER: Mr. Arkoosh?

12 CROSS-EXAMINATION

13 QUESTIONS BY MR. ARKOOSH:

14 Q. Mr. Weaver, my name is Tom Arkoosh. Do
15 you remember me? We met at the deposition.

16 A. I do remember.

17 Q. Mr. Weaver, water that evaporates from
18 the reservoir system is by definition not
19 available for diversion to beneficial use for
20 irrigation; is it?

21 A. I would agree with that, yes.

22 Q. It's not part of the supply of storage
23 plus natural flow?

24 A. I think the term that people use is
25 it's not part of the wet water.

1 Q. It's true, is it not, that American
 2 Falls Reservoir District No. 2 has not leased
 3 water during the irrigation season, well, in
 4 recent years; isn't that correct?
 5 MR. BUDGE: Objection. This is going
 6 beyond the scope of this proceeding.
 7 MR. ARKOOSH: If I might. Leased water
 8 and wheeled water were part of the examination in
 9 the cross that IGWA did regarding whether or not
 10 those things were excluded from the water supply
 11 of American Falls No. 2.
 12 THE HEARING OFFICER: Yes. Explain why
 13 this is not within the scope of the examination?
 14 MR. BUDGE: I think the witness was
 15 testifying what adjustments he made. And I think
 16 Counsel is now wanting to go into why he did or
 17 didn't make adjustments.
 18 MR. ARKOOSH: I don't want to know why.
 19 I just want to know whether the water was leased
 20 or not leased.
 21 THE HEARING OFFICER: Overruled.
 22 MR. ARKOOSH: I would also ask that the
 23 examining lawyer make objections.
 24 THE WITNESS: I'm not aware of any
 25 leased water.

1 diversion; is that correct?
 2 A. That's correct.
 3 Q. And you would have to look at climate,
 4 available water supply, and irrigation practices;
 5 is that right?
 6 A. Those were all things that were
 7 discussed to be considered, yes.
 8 Q. And as I understood what you told
 9 IGWA's counsel, there are essentially -- really
 10 are three times that you look at Step 3 during
 11 the irrigation season. One is after the April
 12 determination. The second time is at the time of
 13 allocation. And the third time is the time of
 14 need; is that right?
 15 A. The methodology recognizes those three
 16 in-season methods.
 17 Q. Well, as I understood it, it's
 18 essentially the repetition of Step 3; is that
 19 right, in whole or in part?
 20 A. That's correct, yes.
 21 Q. And as I understood the discussion you
 22 had with IGWA's counsel, is when you look again,
 23 particularly at time allocation and time of need,
 24 you are going to take into account actual crop
 25 needs and actual climatic conditions during that

1 Q. (BY MR. ARKOOSH) And wheeled water
 2 inside the irrigation season?
 3 A. I would have to refer to the exhibit
 4 for that.
 5 THE HEARING OFFICER: You are referring
 6 to what exhibit?
 7 THE WITNESS: 3000. And then in 3000,
 8 pages 5 and 6, summarize the adjustments that
 9 were made that include wheeled water. And for
 10 AFRD from 2000 until 2008, there was no wheeled
 11 water or in-season recharge adjustments.
 12 Q. (BY MR. ARKOOSH) The baseline year
 13 calculation is generally part of Step 3; is that
 14 correct?
 15 A. Yes.
 16 Q. And it's my understanding that this was
 17 a prototypical year? There was some
 18 determinations made in the Methodology Order; is
 19 that right?
 20 A. That's right. The Methodology Order
 21 puts forth the initial baseline year to be used.
 22 Q. And the whole purpose of the baseline
 23 year, as I understand the Methodology Order, it
 24 says it should represent years of above average
 25 diversion and avoid years of below average

1 period of time; is that right?
 2 A. That's correct.
 3 Q. So in my terms, if it got good and hot,
 4 you'd take a look at that, and that would be part
 5 of your consideration to mid season; is that
 6 correct?
 7 A. That's correct.
 8 Q. Now, what you've actually done
 9 with -- notwithstanding what the Methodology
 10 Order says. With the American Falls forecasted
 11 supply of water, you've actually reduced it prior
 12 to the time of allocation; is that right?
 13 A. Can you repeat the question?
 14 Q. The forecasted supply of water,
 15 actually you've increased the forecasted supply
 16 of water, and reduced the forecasted mitigation
 17 necessary prior to the time of allocation; is
 18 that right?
 19 A. For AFRD2?
 20 Q. Yes.
 21 A. Correct.
 22 Q. And you will agree with me, that that
 23 step is not reflected in the Methodology Order?
 24 A. I would agree with that.
 25 Q. And that was an effort to mitigate

1 risks to the junior user, because there was a
2 feeling given the particularities of the American
3 Falls 2 right under the Eagle decree, we knew
4 that American Falls had received more natural
5 flow than was forecasted in the initial April
6 forecast?

7 MS. KLAHN: I'm going to object to that
8 to the extent it characterizes what the
9 Department was doing with regard to the, quote,
10 junior risks.

11 THE HEARING OFFICER: Overruled.

12 THE WITNESS: I think that that's a
13 fair summarization.

14 Q. (BY MR. ARKOOSH) Now, we understand
15 that water supply -- and this has been a position
16 of IGWA's -- is not broken down into natural flow
17 and storage right, but you have to take into
18 consideration the entire water supply; isn't that
19 correct?

20 A. I guess I'm not sure.

21 Q. Okay. Fair enough. As I understood
22 what you told me in your deposition, you believe
23 that now you have created a new ceiling to the
24 amount of mitigation that can be provided to the
25 American Falls right by reducing the amount of

1 the ceiling increases the risk to the senior user
2 through the season?

3 MS. McHUGH: Objection. It calls for a
4 legal conclusion.

5 MR. ARKOOSH: I'm asking for a factual
6 analysis. I'm not calling for a legal
7 conclusion.

8 THE HEARING OFFICER: Sustained.

9 Q. (BY MR. ARKOOSH) If, in fact, the time
10 of need comes around, and it is significantly
11 hotter than we anticipated, and more water is
12 needed than was in the technical order -- not the
13 technical order, but the Exhibit No. 1002, which
14 was 68,400 acre-feet. But less water is needed
15 than the 84,300 acre-feet that was the April
16 estimate. Will the Surface Water Coalition be
17 given mitigation up to the 84,300 acre-feet, or
18 no more than the 68,400 acre-feet?

19 A. It's my understanding is it will be no
20 more than the 68,000.

21 Q. Is there anywhere provided in the
22 Methodology Order that it's allowable to do this
23 at this time?

24 A. I think the Methodology Order
25 recognizes the three in-season calculations.

1 mitigation owing from the initial April estimate;
2 is that correct?

3 A. I would say that the ceiling that
4 exists would to be the entire Surface Water
5 Coalition. And how that gets distributed at the
6 time of need is going to be a function of the
7 calculations that we run at the time of need, and
8 the demand shortfall that's found at that time.

9 Q. Okay. So the ceiling for the entire
10 group has been reduced; is that correct?

11 A. That's correct.

12 Q. And this was done notwithstanding the
13 commitment in the Methodology Order that we would
14 have an abundant year in order to alleviate any
15 risk if there was an error on the part of the
16 forecast of too little mitigation required?

17 A. So you are going to have to rephrase
18 that.

19 Q. Boy, that was pretty awkward.

20 The ceiling, the mitigation ceiling was
21 lowered notwithstanding the promise that the
22 forecast would be very generous, because there
23 would be no upward movement; do you recall that?

24 A. I think so, yes.

25 Q. Okay. And do you agree then, lowering

1 Q. Okay. So the answer to my question is,
2 no, it's nowhere provided?

3 A. I can't think of any language that
4 strictly provides for or discusses it.

5 Q. I'm not being critical in trying to
6 deal with certainties. But we do deal with
7 overall supplies. Don't you agree that's true
8 when you do the baseline calculations? You deal
9 with overall supplies?

10 A. Amongst the whole Surface Water
11 Coalition?

12 Q. And overall supply of natural flow plus
13 storage?

14 A. Yes.

15 Q. How did it come about that this
16 determination was made? Was it your idea?

17 A. Which determination are you referring
18 to?

19 Q. That the determination in 1002,
20 reducing the April forecast, was that your idea
21 to do that? And I understand you don't know
22 exactly how the Eagle decree right operates. But
23 you would have known, I'm assuming, that there
24 has already been much natural flow anticipated
25 had been provided?

1 A. There was discussion amongst the group
2 of people that had the most responsibility in
3 issuing the final Methodology Order. And based
4 on that discussion, I would say that the Director
5 decided to make the reevaluation of the demand
6 shortfall.

7 MR. ARKOOSH: I'm going to mark Exhibit
8 4000. I think, Mr. Director, is where we are.
9 (Exhibit 4000 marked.)

10 MS. McHUGH: May I take a brief one
11 minute break?

12 THE HEARING OFFICER: Off the record.

13 MS. McHUGH: Off the record.

14 (Discussion held off the record.)

15 THE HEARING OFFICER: Back on the
16 record.

17 Q. (BY MR. ARKOOSH) Mr. Weaver, you
18 indicated that there were some discussions with
19 the Director, and then your group discussed it
20 together. Did somebody then make the
21 determination to make this reduction in
22 mitigation requirement, or how did that come
23 about exactly; do you recall?

24 A. It's my understanding that the Director
25 made that decision.

1 question. I'm going to give him a standard. And
2 then I'm going to ask him whether that what's
3 happened has met that standard as a matter of
4 fact.

5 Now, he may think it does. He may
6 think it doesn't. But I think it's fair for this
7 record as we go up, to have the Department's
8 opinion whether this adjustment in the overall
9 supply, and it's affect on the mitigation
10 requirements early in the season, when there is a
11 ceiling ratchet on this thing, meets the standard
12 that's contained in this case.

13 And I feel that having the Department's
14 opinion, factual opinion regarding what happened
15 in Step 3, I think is -- and maybe the Department
16 doesn't want to proffer an opinion on that. But
17 I think I'm entitled to ask that question.

18 MS. McHUGH: And based on that, I'm
19 going to have an objection, because it seems to
20 me like we don't have the witness that has that
21 foundation. And I think Mr. Arkoosh is trying to
22 say it's a factual inquiry. I think it calls for
23 a legal conclusion that only the Director can
24 decide. So I'm going to object on the
25 foundation. It requires a legal conclusion.

1 Q. Okay. Fair enough.
2 Would you look at page 35 of Exhibit
3 4000? Have you seen Exhibit 4000 before you do
4 that?

5 A. I don't think I have.

6 Q. Okay. I'll represent to you that it is
7 a memorandum decision of the district court, and
8 for the County of Minidoka in the A & B appeal.
9 Were you aware that the A & B appeal was out?

10 A. I was not, no.

11 MS. KLAHN: I want to pose an objection
12 here on the grounds of relevance, outside the
13 record. And I'll also point out that, our
14 reference to the A & B Hearing Officer's order,
15 Judge Schroeder's order, which was attached to
16 Mr. Sullivan's materials that we submitted in our
17 petition to reconsider drew an objection from the
18 Surface Water Coalition as being outside of the
19 record.

20 So it seems to me if it's outside the
21 record at the Hearing Officer level, it's outside
22 the record on the district court level. And
23 there is no basis for questions about this today.

24 MR. ARKOOSH: Well, I don't agree with
25 that at all. I'm going to ask him a factual

1 THE HEARING OFFICER: Well, I don't
2 think we're there yet. So the objection may be
3 premature.

4 But, Mr. Arkoosh, I don't know how you
5 can re-characterize this ultimately into a
6 factual question. It seems that --

7 MR. ARKOOSH: Maybe I can't. But I
8 think I can.

9 THE HEARING OFFICER: Let's see where
10 it goes.

11 MR. ARKOOSH: Your Honor is very
12 directly in control of what I'm doing. You well
13 know that.

14 THE HEARING OFFICER: My guess is I
15 will sustain the objection. So pose it at the
16 appropriate time.

17 MS. McHUGH: Okay.

18 Q. (BY MR. ARKOOSH) Would you look at
19 pages 35 and 50, please?

20 A. (Witness complying.) I'm there.

21 Q. The middle of the paragraph starting
22 with the word "However." Do you see that
23 language?

24 A. The sentence?

25 Q. Yes.

1 A. That starts with "However"? I see
 2 that.
 3 Q. Okay. I'm going to read that to you.
 4 It says, "However, if the Director regulates
 5 juniors to satisfy a quantity less than decree,
 6 there is a risk to the senior that the Director's
 7 determination is incorrect. There is no remedy
 8 for the senior if the Director's determination
 9 turns out to be in error, and the senior comes up
 10 short of water during the irrigation season. Any
 11 burden of this uncertainty should be borne by the
 12 junior. The only way to eliminate risk to the
 13 senior, while at the same time give effect to the
 14 total economic development and optimum use of the
 15 water resources, is to require a high degree of
 16 certainty supporting the Director's
 17 determination."
 18 Now, the first thing I want to ask you
 19 is: Was the quantity adjudicated in this call,
 20 quantities less than decree?
 21 MS. KLAHN: I'm going to object. I'm
 22 going to renew my objections.
 23 MR. ARKOOSH: That's a factual question
 24 certainly, Your Honor.
 25 THE HEARING OFFICER: That is a factual

1 MR. ARKOOSH: If it please the
 2 Director, Step 3 is to determine what the
 3 shortage is in calculation of supply and demand.
 4 Maybe I can make the question --
 5 THE HEARING OFFICER: No, overruled.
 6 Q. (BY MR. ARKOOSH) Let me rephrase the
 7 question, maybe it will be clearer. Is the
 8 supply of water contemplated in Step 3 less than
 9 the supply decreed, but instead based upon need?
 10 A. Not -- I think generally, yes, but I'm
 11 not intimately familiar with the decreed volume
 12 of each of those entities.
 13 Q. Okay. Then is it contemplated by the
 14 Methodology Order -- let me rephrase that
 15 question.
 16 Who bears the burden if you are
 17 incorrect?
 18 MS. McHUGH: Objection. It calls for a
 19 legal conclusion.
 20 THE HEARING OFFICER: Sustained.
 21 MR. ARKOOSH: Okay. Let me phrase it a
 22 different way.
 23 Q. (BY MR. ARKOOSH) Who doesn't get to
 24 irrigate if you are incorrect? That's a factual
 25 question, Your Honor.

1 question. And if he knows the answer --
 2 Q. (BY MR. ARKOOSH) In Step 3 --
 3 MS. KLAHN: Also, I would like to add
 4 an additional objection, since your use of the
 5 verbiage adjudicates, which I don't believe that
 6 it's done in this case. It's your
 7 characterization, but it's certainly not what the
 8 Department is doing.
 9 MR. ARKOOSH: Well, I would submit for
 10 the record, that every one of these seven water
 11 rights have a decree appended to it. Not an SRBA
 12 decree just --
 13 MS. KLAHN: Maybe it was the way you
 14 asked the question. But you asked whether the
 15 Department's adjudication in this matter.
 16 MR. ARKOOSH: I'm going to rephrase the
 17 question.
 18 THE HEARING OFFICER: Fine.
 19 Q. (BY MR. ARKOOSH) Are the amounts of
 20 water forecasted to which mitigation must be
 21 provided, less than the amounts decreed in Step
 22 3?
 23 MS. McHUGH: I'm going to object as
 24 being outside the scope of the application of
 25 Step 3 and 4.

1 MS. McHUGH: Objection; foundation.
 2 THE HEARING OFFICER: Overruled. I'll
 3 let Mr. Weaver venture it.
 4 THE WITNESS: So if the demand
 5 shortfall was less in April than what the actual
 6 demand shortfall was in the season? And that
 7 discrepancy couldn't be covered by a carryover or
 8 storage volume, then the Surface Water Coalition
 9 would not be able to irrigate potentially as much
 10 as it otherwise could have.
 11 Q. (BY MR. ARKOOSH) So then what standard
 12 do you all -- like, for instance, you met as a
 13 group and talked this through. What standard of
 14 certainty is the Department implying in Step 3,
 15 in picking baseline years, and all the other
 16 steps to be sure -- I mean you are not using the
 17 decree right.
 18 So to be sure that the senior gets to
 19 irrigate, what standard of certainty is being
 20 applied by the Department?
 21 MS. McHUGH: Objection. It calls for a
 22 legal conclusion.
 23 THE HEARING OFFICER: Sustained. I
 24 think it could be asked in another way,
 25 Mr. Arkoosh, but when it's a standard of

1 certainty.

2 MR. ARKOOSH: Yes.

3 Q. (BY MR. ARKOOSH) How is it determined
4 that the senior will be able to -- once the
5 senior has made a call, and you all go through
6 your processes, and you make your forecasts, and
7 you go through Step 3. How is it determined that
8 the senior will be able to irrigate? How is that
9 done?

10 A. How is it determined that they will be
11 able to irrigate? I'm not sure I understand.

12 Q. Okay. The purpose of the call is to
13 provide the senior with irrigation water; isn't
14 that correct?

15 A. Correct.

16 Q. Okay. How is a determination made that
17 that will occur? How does the Department
18 determine that?

19 MS. KLAHN: I'm going to object on
20 foundation. The Department isn't responsible to
21 make sure the water gets down the irrigation
22 ditch.

23 THE HEARING OFFICER: Well,
24 Mr. Arkoosh, what I guess I would like to ask you
25 to do is, if you were to concentrate on the

1 Can you elaborate on that determination
2 for me?

3 A. Well, I believe in one of the documents
4 that was provided, there was a table that
5 summarized the day-to-day diversions for AFRD2
6 for the month of April and May potentially. And
7 that was taken from the Water District 1 records.
8 And so that's how that determination was made.

9 Q. But we don't know with any certainty at
10 this time, do we, what the overall demand of not
11 only AFRD#2, but all of the Surface Water
12 Coalition entities would be at the time of need,
13 or coming this way at the time of allocation?

14 A. I agree. We don't.

15 Q. Okay. So the burden of this
16 uncertainty the way you've done this, is now
17 borne by the senior; is it not?

18 MS. McHUGH: Objection. It calls for a
19 legal conclusion.

20 THE HEARING OFFICER: Sustained.

21 Q. (BY MR. ARKOOSH) Well, once again, if
22 you are incorrect, who doesn't get irrigation?

23 MS. McHUGH: Objection. I think that's
24 speculation.

25 MS. KLAHN: It's already asked and

1 specific numbers for AFRD#2, and the adjustments
2 that were made, and the certainty of those
3 adjustments, then I think we can get to the heart
4 of the matter, which is who you represent anyway.

5 And I think Mr. Weaver can better
6 answer the question if we address it with that
7 that specificity.

8 MR. ARKOOSH: I think that's fair,
9 because that actually happened.

10 Q. (BY MR. ARKOOSH) So how is it
11 determined then with AFRD#2, notwithstanding the
12 dictates of the Methodology Order when
13 adjustments would be made in the forecast, to
14 make the determination now? And I'll give you a
15 little predicate language in Exhibit 1002,
16 paragraph 9.

17 The Director knows with certainty that
18 AFRD#2 diverted more natural flow than it was
19 predicted to receive during the 2010 irrigation
20 season. Based on that certainty, it is
21 appropriate for the Director to find that
22 AFRD#2's predicted remaining shortfall for 2010
23 irrigation season is 11,800 feet. The Director
24 will not adjust the shortfall for Twin Falls
25 Canal Company.

1 answered.

2 THE HEARING OFFICER: Yes. Sustained.

3 Q. (BY MR. ARKOOSH) Again, if the
4 determination of mitigation water is too low when
5 they arrive late in the season, who will be short
6 of water; the senior or the junior?

7 A. The senior.

8 Q. Okay. You told me in deposition,
9 Mr. Weaver, that the baseline year as part of
10 Step 3 as we're going to look at it in the future
11 years cannot be different; years for different
12 entities? Do you recall that?

13 A. I recall that discussion, yes.

14 Q. And we agreed that was not in the
15 Methodology Order; do you recall?

16 A. I agreed that the language that you
17 pointed out to me was open to interpretation,
18 yes.

19 Q. Well, if it's in the Methodology Order
20 that they cannot be different years, would you
21 point it out now?

22 A. I believe how I answered that in
23 deposition, and I think I would still hold to
24 that, is that pages 11 and 12 is where the
25 selection of the initial baseline year is

1 discussed, paragraphs 27 and 28 were
2 predominately written by myself. And the intent
3 that I had when writing that, and which I thought
4 was clear at the time, was that whatever the
5 baseline year selection might be, whether it be
6 multiple years or a single year, it would be the
7 same for all the entities.

8 But I think after the conclusions of
9 your questions in deposition that I agreed, that
10 maybe it wasn't as clear, and that maybe it was
11 open for determination that you could have
12 different baseline years for different entities.

13 Q. Well, one year that represents a year
14 of above-average diversion for one entity may not
15 be the year or average of years that represent an
16 above-average diversion for another entity; isn't
17 that correct?

18 A. I think that's certainly true for a
19 single year.

20 Q. How about average years?

21 A. I think if you were selecting multiple
22 years to arrive at an average, and that was the
23 condition that you were trying to address, then
24 the multiple years that you would select would
25 give you the results you were looking for.

1 have some connotation in the legal realm. But in
2 a general sense, they also have some meaning.
3 And I'll let the question stand.

4 Mr. Weaver.

5 THE WITNESS: I would -- I'm sorry. I
6 would agree with that.

7 Q. (BY MR. ARKOOSH) You received a
8 representation of how much water was available
9 from ground water users. And then the Director
10 immediately issued an order that says, I
11 need -- the standard is the satisfaction of the
12 Director, and I need some more material to look
13 at. And then you received another order. And I
14 think you were gone the day that order came in;
15 is that right -- or I mean, that filing came in?

16 A. That's correct.

17 Q. And you have not had much involvement
18 with that filing; is that right?

19 A. That's correct.

20 Q. Did you help draft the satisfaction of
21 Director language in Step 4?

22 A. I did, yes.

23 Q. What did you contemplate?

24 A. I think when that language was
25 initially drafted, speaking for myself, who

1 Q. Why isn't that true with analog years
2 for reservoir storage that you described when you
3 answered IGWA's questions?

4 A. I think during the deposition, I also
5 acknowledged that there was an inconsistency
6 there that I can't address.

7 Q. You could come to a reasonable
8 realistic result using different baseline years
9 or average baseline years for one entity to
10 represent above-average diversions, and a
11 different baseline year or average of baseline
12 years from another entity to represent
13 above-average diversions; isn't that correct?

14 A. So you would get different results if
15 you use different baseline years for different
16 entities?

17 Q. No. You could come to a reasonable,
18 rational determination of above-average
19 determinations for each of the seven entities by
20 using different baseline years or averages of
21 baseline years?

22 A. Right.

23 MS. McHUGH: Objection. It calls for a
24 legal conclusion as simple and rational.

25 THE HEARING OFFICER: Well, those terms

1 didn't have much experience beyond this, I was
2 contemplating option agreements and contract
3 agreements that showed that when the water had
4 been optioned, storage water had been optioned.
5 And I think at one point there was discussion
6 that kind of put us more on the track of the
7 language that's in there now.

8 Q. Do you know whether the 27,000
9 acre-feet that was promised to the Spring call
10 mitigation conversions is part of the 50,000-some
11 acre-feet that is represented now committed to
12 the Surface Water Coalition mitigation?

13 MS. McHUGH: Objection. It assumes
14 facts not in evidence. The promise to the Spring
15 users, there is no evidence of that.

16 THE HEARING OFFICER: This is a
17 preliminary question. I'll let it stand.
18 Overruled.

19 MR. ARKOOSH: I can rephrase it, and
20 see if it will sound any better.

21 THE HEARING OFFICER: Okay.

22 Q. (BY MR. ARKOOSH) Do you know whether
23 the 27,000 acre-feet that was initially
24 contemplated to be used for the Spring Water
25 calls is included in this 50,000-some feet

1 mitigation that is at issue in this proceeding?
 2 A. I guess I don't know that for certain.
 3 Q. Do you know whether the Department's
 4 investigated that at all?
 5 A. I'm not aware that we have.
 6 Q. Has the Department looked outside of
 7 the filing made by IGWA in any way to see whether
 8 Step 4 has been fulfilled, if you know?
 9 A. Not that I'm aware of.
 10 Q. We talked in the deposition about Step
 11 4, where it said -- and let's find Step 4
 12 together, please.
 13 A. (Witness complying.)
 14 Q. Do you have it, Mr. Weaver?
 15 A. I'm looking at the Methodology Order,
 16 page 34.
 17 Q. Yes, sir. The last sentence says, "If
 18 junior ground water users cannot provide this
 19 information by May 1 or within 14 days of an
 20 issuance in values set forth in Step 3, whichever
 21 is later in time, the Director will issue an
 22 order curtailing junior ground water users."
 23 Do you see that language?
 24 A. I do, yes.
 25 Q. Did you write that language?

1 it.
 2 Q. (BY MR. ARKOOSH) Is the curtailment
 3 calculation done by the Department as part of
 4 Step 4 in this proceeding, calculated to put the
 5 amount of water, the 3,400 acre-feet of water in
 6 the reaches this year?
 7 A. I think it is, yes.
 8 Q. So is that a steady state analysis?
 9 A. I understood your question to be, is
 10 that the intent of it?
 11 Q. Would put that much water in the
 12 reaches this year?
 13 A. Yes.
 14 Q. So that in Exhibit 1003, the technical
 15 order, there is a group of people that are
 16 labeled to be curtailed; is that right?
 17 A. That's correct.
 18 Q. And if these people are curtailed, it's
 19 your understanding that that 3,400 acre-feet will
 20 be in the reaches this year?
 21 A. And again, I think this is something
 22 that we talked about at length in the deposition,
 23 and I believe that that's the steady state volume
 24 that would be available. So the actual volume of
 25 water that would be available in-season this year

1 A. I believe I did, yes.
 2 Q. Is the purpose of this language to
 3 provide water in the reaches in time, and in an
 4 amount to mitigate for the water that the junior
 5 did not receive, but for the actions -- the
 6 senior did not receive, but for the actions of
 7 the juniors?
 8 A. I think that that's the intent, yes.
 9 Q. The curtailment scenarios that you've
 10 done for both of your calculations, one to come
 11 up with -- the last one to come up with
 12 3,000-some plus or minus acre-feet in the
 13 reaches, and the one prior to that, both of those
 14 curtailment calculations are what you've called
 15 transient; is that right?
 16 MS. McHUGH: Objection; foundation.
 17 MR. ARKOOSH: If he knows. Maybe he
 18 doesn't know.
 19 THE HEARING OFFICER: No, I don't know
 20 that it needs foundation. The transient steady
 21 state nature of the model runs simulations have
 22 been described in the orders, and we'll see if
 23 Mr. Weaver understands.
 24 MR. ARKOOSH: Maybe the question is
 25 confusing, and I'll withdraw it and just re-ask

1 would be less than that.
 2 Q. Okay.
 3 A. Although I don't know how much less.
 4 Q. Is there anywhere in the order that
 5 provides -- will do a steady state analysis to
 6 arrive at this year, for instance, the 3,400
 7 acre-feet at steady state, rather than arrive at
 8 3,400 feet this year?
 9 A. As it regards to calculate demands for
 10 a following season, I don't think the methodology
 11 addresses that.
 12 Q. How in performing Step 4 then -- and
 13 you were involved in the performance of Step 4;
 14 were you not?
 15 A. The performance of it?
 16 Q. Relative to development of a
 17 curtailment order?
 18 A. Yes.
 19 Q. How was it determined that we're not
 20 really going to provide 3,400 feet this year, but
 21 we're going to do a steady state analysis on the
 22 curtailment?
 23 A. That was another matter that was
 24 discussed at some length by the group, which is
 25 comprised of the Director, and Dr. Allan Wiley,

1 and Chris, and Liz, and myself, and when you took
2 the deposition, I recognized Jack Peterson as
3 also being there, which he was.

4 And there was discussions both for
5 using the steady state and against using steady
6 state. And I guess I would say that at the end
7 of those discussions, the Director made his
8 decision. And it is what it is, that it would be
9 steady state.

10 Q. Have you heard of Lincoln's cabinet
11 meetings when he says there is 11 nays, and one
12 aye, and the ayes have it?

13 MR. BROMLEY: Do you have tapes of
14 those days, Tom?

15 Q. (BY MR. ARKOOSH) But there is nowhere
16 we can find in the Methodology Order that says
17 that, we'll use a method that does not supply the
18 water during the irrigation season need; is that
19 correct?

20 A. Again, I would say when calculating the
21 demand shortfall in-season, that's correct.

22 Q. Okay. So this is something, this
23 methodology used for Step 3 curtailment this
24 year, is something that you had to find guidance
25 outside the order; is that correct?

1 A. It specifically pertains to the
2 mitigation credit that was requested by IGWA.
3 And certainly from my perspective, when we were
4 developing the Methodology Order, I don't
5 remember even considering a mitigation credit.

6 I mean, the order doesn't address it,
7 because it wasn't something that was at least on
8 my radar.

9 MR. ARKOOSH: Okay. If I could have
10 just a second, Mr. Director, I think I'm
11 finished.

12 (Discussion held off the record.)

13 MR. ARKOOSH: I have nothing further,
14 Mr. Weaver. Thank you very much.

15 THE HEARING OFFICER: Thank you,
16 Mr. Arkoosh.

17 Other questions, Mr. Fletcher,
18 Mr. Thompson?

19 MR. FLETCHER: Are you going to ask?

20 THE HEARING OFFICER: Do you have
21 questions, Mr. Fletcher, for Mr. Weaver?

22 MR. FLETCHER: I have a few, but I
23 believe Travis has a few.

24 THE HEARING OFFICER: Okay.
25 Mr. Thompson.

1 CROSS-EXAMINATION
2 QUESTIONS BY MR. THOMPSON:

3 Q. Good afternoon, Mr. Weaver. Just a few
4 questions to confirm, I believe, your testimony
5 from last week to your depositions.

6 Going back to the As Applied Order, the
7 April 29th Order. Would you agree that
8 implementing that Step 4 requires junior ground
9 water users to establish that they can secure and
10 provide 84,300 acre-feet to the Surface Water
11 Coalition, or face a curtailment order from the
12 Director if they can't meet that obligation?

13 A. I think that's correct.

14 Q. And is that what is consistent with
15 what is required in Step 4 in the Methodology
16 Order?

17 A. I think so, yes.

18 Q. And as far as providing this
19 information, would you agree that that Step 4
20 contemplates they must provide that information
21 by May 1st, or within 14 days from the issuance
22 of the As Applied Order?

23 A. I do, yes.

24 Q. And do you recall the deadline for that
25 information for 2010?

1 A. I don't.

2 Q. I guess I'll represent to you it was
3 May 13th. And do you have any information, or do
4 you know if the ground water users supplied
5 information regarding their ability to secure
6 that amount by that date?

7 A. I don't know the exact date that IGWA
8 first submitted it, but I believe it was after
9 that date.

10 Q. And do you know if they secured -- they
11 provided information that they could secure and
12 provide 84,300 acre-feet by that time?

13 A. They did not.

14 Q. And I think in your deposition, if you
15 have it, it's Exhibit 1003. Is that the May 17th
16 Order? I'm sorry. It's 1002.

17 A. I have that document.

18 Q. And on page 3 of that exhibit, I
19 believe, we talked about this at your deposition.
20 Paragraph 11, would you agree that that number
21 identified in the As Applied Order, the 84,300
22 acre-feet, was reduced to what is now 62,232
23 acre-feet in this order?

24 A. I would agree.

25 Q. And I believe you confirmed this with

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1 Mr. Arkoosh. Would you agree with what was done
2 in the May 17th Order was not provided for in
3 Step 3 or Step 4 of the Methodology Order?
4 MS. McHUGH: Objection; asked and
5 answered.
6 THE HEARING OFFICER: Overruled.
7 THE WITNESS: Can you please repeat
8 your question?
9 Q. (BY MR. THOMPSON) Yes. I guess the
10 results here in paragraph 11 of the May 17th
11 Order, would you agree that what was done was not
12 provided for in Step 3 or 4 of the Methodology?
13 A. I would agree.
14 Q. A few questions about the model runs
15 that were performed with the As Applied Order and
16 this May 17th Order. Just -- do you have some
17 general familiarity with the ESPA Model that was
18 used?
19 A. I do.
20 Q. And is it Version 1.1 that the
21 Department uses; is that correct?
22 A. It is.
23 Q. And can you describe the aquifer
24 boundary that's used in the model, just
25 generally?

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1 A. Do you want me to describe it
2 spatially, or in reference to another boundary?
3 Q. I guess just generally as it stands
4 alone, what is it supposed to represent?
5 A. Well, I think it's supposed to
6 represent the area of common ground water supply,
7 so it represents the areas within the Eastern
8 Snake Plain that are hydrologically connected to
9 the Snake River.
10 Q. And would the Department agree that the
11 aquifer boundary depicted by the model depicts
12 areas that supplies water to and receive water
13 from the Snake River?
14 A. Yes.
15 Q. And would you agree that ground water
16 rights within that model boundary impact water
17 supplies tributary to the Snake River?
18 A. Yes.
19 Q. And can that be modeled?
20 A. Yes.
21 Q. Do you know when the aquifer boundary
22 for model Version 1.1 was established?
23 A. I do not.
24 Q. And does IDWR agree with the boundary
25 that's been established in the model?

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1 A. I should think so.
2 Q. And we talked about this at your
3 deposition, comparing the model aquifer boundary
4 to what is described in Rule 50 of the
5 Conjunctive Management Rules as an area of,
6 quote, "common ground water supply." And have
7 you reviewed the Conjunctive Management Rules?
8 A. I have.
9 Q. And are you familiar with that report
10 referenced in Rule 50, describing the area of
11 common ground water supply?
12 A. Only inasmuch as it's referenced in the
13 Conjunctive Management Rules.
14 Q. And would you agree that that report
15 identified in Rule 50 was dated 1992 from the
16 USGS?
17 A. I would agree with that.
18 Q. So would you agree that the model
19 boundary represents more current information as
20 opposed to the 1992 USGS report, for purposes of
21 defining an -- aquifer ground water areas that
22 supply water to, or receive water from the Snake
23 River?
24 MS. KLAHN: I'm going to object on the
25 foundation. He said he hadn't read the report.

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1 THE HEARING OFFICER: Overruled.
2 Mr. Weaver.
3 THE WITNESS: I would agree that the
4 model boundary that's used now is a better
5 representation of our current understanding.
6 Q. (BY MR. THOMPSON) And would you agree
7 what's identified in Exhibit 1002, the model run
8 that was performed, would you agree that the
9 model run that was performed to make up the
10 shortage, was just looking at ground water rights
11 within the area of common ground water supply?
12 A. I would agree.
13 Q. And I guess in both orders, we'll take
14 this one at a time. Did that reduce the number
15 of acres, or the ground water rights affected,
16 when you just looked at the common ground water
17 supply compared to what was included within the
18 model boundary?
19 A. It does, yes.
20 Q. And did the curtailment that was run,
21 did that produce the entire shortfall that was
22 estimated by implementing Steps 3 and 4?
23 A. In the re-evaluated number? I guess in
24 either case, no.
25 Q. And was there any discussion of running

1 the model just within the area of common ground
 2 water supply to find a priority date to make up
 3 the entire calculated shortfall?
 4 A. There was no discussion on that.
 5 Q. Do you know why not?
 6 A. It's my understanding, there was no
 7 discussion, because that's the way it's been
 8 carried out previously, and that's the way the
 9 Department implements the model and its results.
 10 Q. Would you agree that you could perform
 11 a model run to determine what rights would need
 12 to be curtailed, just within the area of common
 13 ground water supply to make up the entire
 14 shortfall?
 15 A. I agree with that.
 16 Q. And do you think that would push the
 17 priority date back further?
 18 A. I imagine it would, yes.
 19 Q. And would you agree that those ground
 20 water rights, whatever priority date that is,
 21 would likely still be junior to the surface water
 22 rights of the Surface Water Coalition?
 23 A. Yes.
 24 Q. I guess by using the common ground
 25 water supply model boundary for the common ground

1 if it was set at those various priority dates?
 2 A. We did find water rights affected?
 3 Q. Yes.
 4 A. That would be curtailed?
 5 Q. At least identified in the model,
 6 that's what my understanding was. To produce the
 7 amount of water, the shortfall that was
 8 estimated, a model run was done considering all
 9 ground water rights within the boundary of the
 10 model?
 11 A. That's correct, yes.
 12 MR. THOMPSON: I have no further
 13 questions at this time.
 14 THE HEARING OFFICER: Okay. Questions,
 15 Mr. Fletcher?
 16 MR. FLETCHER: Yes, I would like to
 17 inquire in just one area.
 18 CROSS-EXAMINATION
 19 QUESTIONS BY MR. FLETCHER:
 20 Q. The order regarding the IGWA Mitigation
 21 Obligation, which is Exhibit 1002, I believe.
 22 A. (Witness complying.)
 23 Q. Are you on that page?
 24 A. What page? I'm sorry.
 25 Q. 5.

1 water supply, as defined by the Conjunctive
 2 Management Rules, would you agree that when you
 3 use that, it produces the acres in ground water
 4 rights affected by the curtailment?
 5 A. I agree.
 6 Q. Are you aware of these ground water
 7 rights outside the common ground water supply,
 8 but within the model boundary? Are they located
 9 in any water districts?
 10 A. So are there -- I'm sorry. I'm going
 11 to have to ask you to repeat the question.
 12 Q. Ground water rights located outside of
 13 the boundary defined by Rule 50 that are within
 14 the model boundary, there is this class of ground
 15 water rights that we know have been defined by
 16 the model run. Are those ground water rights
 17 within water districts?
 18 A. I don't specifically know that.
 19 Q. And --
 20 A. Were there -- I believe there was
 21 exhibits -- well, I don't know.
 22 Q. And just a final question. The
 23 Department did perform model runs identifying
 24 ground water rights within the model boundary
 25 that would be affected by that curtailment order

1 A. I'm there.
 2 Q. In paragraph 17?
 3 A. Okay.
 4 Q. Previously through the Department's
 5 counsel you had talked about how the water supply
 6 obligation was reduced to 62,232 acre-feet, and
 7 you talked about the credit request total of
 8 5,707 acre-feet. But you didn't really talk
 9 about the 53,000 secured water total.
 10 Can you explain to me where this number
 11 came from, the 53,000 acre-feet under secured
 12 water total?
 13 A. I believe that's the volume of water
 14 that IGWA identified that it had dedicated to the
 15 Surface Water Coalition call.
 16 Q. Can you tell me how that was
 17 identified?
 18 A. Well, they submitted something to the
 19 Director's request that they identify a specific
 20 volume of water, and provide contractual
 21 agreements for that line of water.
 22 Q. Okay. Was that the supplement to
 23 IGWA's notice of secured water? Is that what you
 24 are talking about?
 25 A. I think so. I don't know if I have it

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1 in front of me.
2 Q. Okay. You reviewed that at the time of
3 your deposition; correct?
4 A. I did, yes.
5 Q. And it had various documents attached
6 to it; is that correct?
7 A. That's correct.
8 Q. And do you remember what those
9 documents were that were attached to it?
10 A. Well, I thought that they were lease
11 agreements.
12 MR. FLETCHER: Can I have this marked,
13 please?
14 (Exhibit 4001 marked.)
15 Q. (BY MR. FLETCHER) Handing you what's
16 been marked as Exhibit 4001. Can you identify
17 that document?
18 A. Yes, this is the supplement to IGWA's
19 notice of secured water.
20 Q. Is that the document you are referring
21 to in which IGWA stated it had 53,000 acre-feet
22 of water available for this call?
23 A. It is, yes.
24 Q. And attached there are several exhibits
25 and documents; correct?

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1 A. That's correct.
2 Q. And some of those are water rights
3 leases, and some are called storage water
4 options?
5 A. That's correct.
6 Q. And then there is some letters, and
7 odds and ends. All of those show redactions;
8 correct?
9 A. They do, yes.
10 Q. And was a signature of any person,
11 other than Tim Deeg, appear on any document
12 attached to that document?
13 A. (Witness complying.) The only
14 signature that's legible is that of Tim Deeg's.
15 Q. Do you know who Tim Deeg is?
16 A. Only by looking at his title in the
17 signature block.
18 Q. And who is he?
19 A. He's the president of the Idaho Ground
20 Water Appropriators.
21 Q. So he's the president of the entity
22 that's trying to supply mitigation water?
23 A. That's correct.
24 Q. Now, this document represents the
25 53,000 acre-feet of the total attached to this

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1 document, is available in this call; correct?
2 A. That's correct.
3 Q. And this document represents, there is
4 a total of 68,000 acre-feet available; correct?
5 A. Yes.
6 Q. Did the Department or anyone in the
7 Department ever demand un-redacted copies of
8 these documents, to your knowledge?
9 A. I don't know.
10 Q. Were the statements contained in this
11 filing, compared to any of the sworn statements
12 made by representatives of IGWA in this
13 proceeding and other proceedings, stating that
14 27,000 acre-feet of water was already committed
15 to the Spring users' call?
16 A. Again, I don't know.
17 Q. Do you know if anyone checked to see if
18 these documents were filed with the Water
19 District 1 rental pool committee?
20 A. Not that I'm aware of.
21 Q. Can you tell me how it was determined
22 to the satisfaction of the Director that 53,000
23 acre-feet of water was available in this call?
24 A. As Tom Arkoosh alluded to, the
25 decisions and the discussions reviewing this,

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1 occurred on a day that I was not in the office.
2 And the reply, I believe, went out in one day.
3 So I was not privy or attending any of those
4 discussions -- privy to or attending any of those
5 discussions.
6 Q. So the answer is, you don't know how it
7 was determined to the Director's satisfaction?
8 A. That's right.
9 Q. And the only other witness that the
10 Department is intending on calling in this
11 proceeding is Liz; is that correct? Is that what
12 was stated?
13 MR. BROMLEY: That's what I stated.
14 Q. (BY MR. FLETCHER) Was Liz present at
15 that meeting on the day you were absent?
16 A. Well, I wasn't there, so I don't know
17 for sure, but...
18 Q. Other than IGWA's representations
19 contained in this exhibit, was there any other
20 source of information that the Department relied
21 upon to determine that 53,000 acre-feet of water
22 would be available to the Surface Water
23 Coalition?
24 A. Not that I know of.
25 MR. FLETCHER: I have no further

1 questions.
 2 THE HEARING OFFICER: Okay. Thank you,
 3 Mr. Fletcher.
 4 We're at 4:30. I'm happy to stay until
 5 all hours. I'm sure some of you have other
 6 commitments. Can we start on reexamination of
 7 Mr. Weaver, Ms. Klahn?
 8 MS. KLAHN: I don't have anything else.
 9 I was going to move to admit Exhibit 3000.
 10 MR. BROMLEY: I actually have a few
 11 questions on direct, Mr. Director Spackman.
 12 THE HEARING OFFICER: We'll go through
 13 again, then. So we'll start with Mr. Bromley.
 14 I'm sorry to overlook you.
 15 MR. FLETCHER: Before we get there. I
 16 would move to admit Exhibit 4001.
 17 THE HEARING OFFICER: Yes, and I have a
 18 number of documents that have been marked with
 19 various numbers, and I don't think any of them
 20 have been offered that I recall for -- or into
 21 the record.
 22 So maybe as we go back through, we can
 23 have those offered, and then go through it here.
 24 Mr. Bromley?
 25 MR. BROMLEY: Hearing Officer, I would

1 questions?
 2 A. Yeah.
 3 Q. What I would like to ask you,
 4 Mr. Weaver, is: What's the importance of making
 5 this prediction as early as possible in the
 6 season for determining shortfalls, if any, to the
 7 coalition?
 8 A. The importance of making it early in
 9 the season is to give IGWA as much time as can be
 10 afforded to provide the water, and/or be
 11 curtailed, and know as soon as possible in the
 12 season if curtailment is going to exist.
 13 Q. You were asked questions about, I
 14 think -- it could have been inferred, about
 15 waiting until the day of allocation to make this
 16 prediction. Do you remember those questions?
 17 A. I do, yes.
 18 Q. How soon or how far out in the season
 19 would the day of allocation conceivably be, if
 20 you know?
 21 A. It can be as late as the second week of
 22 July.
 23 Q. And so why then is the Department
 24 making a prediction early in April, as you would
 25 understand it?

1 move to admit Exhibits 1000, 1001, 1002, 1003.
 2 THE HEARING OFFICER: Okay. Any
 3 objection from the parties? They are, in my
 4 opinion, facsimiles or copies of documents
 5 already in the record. But we'll receive them
 6 into the record as separate exhibits for
 7 reference.
 8 (Exhibits 1000, 1001, 1002, 1003
 9 admitted into evidence.)
 10 THE HEARING OFFICER: Okay.
 11 Mr. Bromley, questions?
 12 MR. BROMLEY: I have two areas of
 13 inquiry. It should be pretty short.
 14 REDIRECT EXAMINATION
 15 QUESTIONS BY MR. BROMLEY:
 16 Q. Mr. Weaver, reflecting back on your
 17 testimony. Earlier questions were asked of you
 18 by the City of Pocatello, and the Ground Water
 19 Users, IGWA, regarding, I think, asking you to
 20 speculate about future adjustments, and/or your
 21 understanding of actual diversions that have been
 22 made by other users of the Surface Water
 23 Coalition. Do you remember that?
 24 A. I think so.
 25 Q. Generally, do you remember those

1 A. Well, as I said, if curtailment is
 2 going to exist, we're going to have that
 3 curtailment occur early in the season, and that's
 4 not going to be an issue we have to deal with
 5 late in the season and have the potential of the
 6 curtailment not occur, and the season seniors not
 7 get a volume of water or not curtailment.
 8 Q. So it's important to you to have as
 9 much certainty as possible at the start of the
 10 season?
 11 A. It is, yes.
 12 Q. And, Mr. Weaver, you were asked
 13 questions by Mr. Arkoosh, and just a second area
 14 of inquiry of that, and after that, I won't have
 15 any further.
 16 You were asked by Mr. Arkoosh about
 17 whether the methodology prohibited the Director
 18 from reexamining known facts at a time before the
 19 mid season evaluations. Do you recall those
 20 questions?
 21 A. I do.
 22 Q. Is there anything in the methodology
 23 that prohibits the Director from reevaluating,
 24 reexamining based on facts that can be known?
 25 A. I don't think so.

1 Q. And would you agree or not agree that
 2 the climate that we've been witnessing in the
 3 last couple of months, is it unusual, or is it
 4 typical in your opinion?
 5 A. Typical of what?
 6 Q. That's my question to you. I mean, you
 7 are aware of climate records. You are aware of
 8 what springs have been like. Is this an
 9 unusually wet and cool spring in your opinion?
 10 A. I would say so, yes.
 11 MR. BROMLEY: Nothing further.
 12 THE HEARING OFFICER: Okay. Ms. Klahn?
 13 MS. KLAHN: I don't have any questions
 14 for Mr. Weaver. But I would like to offer
 15 Exhibit 3000, which was the list or spreadsheets,
 16 particularly, the wheeled water sheet.
 17 THE HEARING OFFICER: Any objection
 18 from the parties? The document marked as Exhibit
 19 3000 is received into evidence. Thank you.
 20 (Exhibit 3000 admitted into evidence.)
 21 THE HEARING OFFICER: Ms. McHugh?
 22 MS. McHUGH: I don't have any
 23 questions. But I would like to offer Exhibit
 24 2000, which was Deposition Exhibit 5 before, 14,
 25 the 2010 memo that Mr. Weaver prepared as it

1 and I'll receive it into evidence.
 2 MS. McHUGH: Your Honor, just on that
 3 basis, I would treat it -- I would request that
 4 it not be treated as evidence like a factual
 5 piece of evidence or testimony.
 6 If your purpose is to make it so that
 7 it's easily referenced as a potential legal
 8 argument, or something like that, I think it
 9 should be so restricted. It shouldn't be
 10 considered factual or testimony evidence.
 11 MS. KLAHN: How about if we just admit
 12 page 35?
 13 MR. ARKOOSH: I've never seen so many
 14 lawyers afraid of the law, Your Honor.
 15 THE HEARING OFFICER: Well, here's --
 16 well said, Ms. McHugh. Received into evidence
 17 with that qualification. Thank you.
 18 (Exhibit 4000 admitted into evidence.)
 19 MR. ARKOOSH: Thank you, Your Honor.
 20 THE HEARING OFFICER: Okay.
 21 MR. THOMPSON: 4001, did you offer
 22 that?
 23 MR. FLETCHER: I offered that a while
 24 ago, but it was kind of bypassed.
 25 THE HEARING OFFICER: Yes. Well, what

1 relates to the prediction of storage allocation.
 2 THE HEARING OFFICER: Any objection
 3 from the parties? The document marked as Exhibit
 4 2000 is received into evidence.
 5 Thank you.
 6 (Exhibit 2000 admitted into evidence.)
 7 THE HEARING OFFICER: Any further
 8 examination from the Surface Water Coalition?
 9 Mr. Arkoosh?
 10 MR. ARKOOSH: I just wanted to offer
 11 Exhibit 4000, Your Honor.
 12 MS. KLAHN: Objection.
 13 MS. McHUGH: I would object that it's
 14 irrelevant.
 15 MR. ARKOOSH: I would suggest to the
 16 Hearing Officer, that he can, in fact, take
 17 notice of the opinions of the court.
 18 MS. McHUGH: It's not evidence.
 19 MS. KLAHN: It doesn't need to be
 20 admitted into the record.
 21 MR. ARKOOSH: Well, I would suggest
 22 it's something brand new, and it probably needs
 23 to be.
 24 THE HEARING OFFICER: Well, my sense is
 25 that what we're talking about is a technicality,

1 you did was offer it, and then I thought I would
 2 come back around. So thanks for the reminder.
 3 Any objection to the admission of the
 4 document marked as Exhibit 4001?
 5 MS. McHUGH: No.
 6 THE HEARING OFFICER: Received into
 7 evidence.
 8 (Exhibit 4001 admitted into evidence.)
 9 THE HEARING OFFICER: Okay. Thanks for
 10 everybody's help here at the end.
 11 Mr. Weaver, I think you are finished.
 12 (Witness excused.)
 13 THE HEARING OFFICER: And now,
 14 Mr. Bromley.
 15 MR. BROMLEY: Hearing Officer, we
 16 would -- the Department would call Liz Cresto, if
 17 the parties are so inclined to begin right now?
 18 MS. McHUGH: We are.
 19 THE HEARING OFFICER: I want to be
 20 considerate of Ms. Cresto as well. Do you have
 21 commitments tonight?
 22 MS. CRESTO: No.
 23 THE HEARING OFFICER: And I want to be
 24 sensitive to everybody's time and their other
 25 obligations.

1 MS. CRESTO: May I have a break?
 2 THE HEARING OFFICER: Let's take a
 3 ten-minute break. Thanks.
 4 (A recess was had.)
 5 THE HEARING OFFICER: Figuratively, Ms.
 6 Cresto, your stature has been enhanced by
 7 Mr. Weaver's testimony.
 8 ELIZABETH A. CRESTO,
 9 first duly sworn to tell the truth relating to
 10 said cause, testified as follows:
 11 THE HEARING OFFICER: And I assumed we
 12 were on the record. Thank you.
 13 Mr. Bromley?
 14 MR. BROMLEY: Thank you, Your Honor, or
 15 Mr. Hearing Officer, and Mr. Director.
 16 DIRECT EXAMINATION
 17 QUESTIONS BY MR. BROMLEY:
 18 Q. Ms. Cresto, would you please state and
 19 spell your name for the record.
 20 A. Elizabeth Ann Cresto,
 21 E-l-i-z-a-b-e-t-h, A-n-n, C-r-e-s-t-o.
 22 Q. And, Ms. Cresto, would you please
 23 provide your educational background.
 24 A. I have a bachelor's of science in
 25 environmental science from Virginia Tech, and I

1 technical background in developing this document.
 2 Q. Ms. Cresto, I believe Exhibit 1001 also
 3 appears on the table. Is that the workout
 4 supply, or As Applied Order as we've been
 5 referring to it?
 6 A. Correct, yes.
 7 Q. And are you familiar with that order?
 8 A. Yes.
 9 Q. And how are you familiar with this
 10 order?
 11 A. I provided technical information in
 12 this order.
 13 Q. And, Ms. Cresto, what's your area of
 14 expertise in regards to Exhibit 1000 and 1001?
 15 A. I'm familiar with the water rights
 16 accounting, and doing the natural flow and
 17 storage water predictions, and the results.
 18 Q. Have you had any previous involvement
 19 in predicting natural flow and storage in this
 20 delivery call?
 21 A. Yes, I have. I moved into the
 22 hydrology section in 2005. And soon after Pam
 23 Pace left and Steve Burrell took over as the lead
 24 hydrologist on the delivery call, I then became
 25 backup to him. And then -- and so I peer

1 have a master's degree in hydrology from the
 2 University of Arizona.
 3 Q. And, Ms. Cresto, your work history,
 4 please.
 5 A. Out of grad school, I came to work here
 6 in 2004. And I started out in the planning
 7 section as a hydrologist. And a year later, in
 8 2005, I moved over into the hydrology section as
 9 a hydrologist, and I'm a technical hydrologist.
 10 Q. Is that your current position?
 11 A. That's my current position.
 12 Q. Ms. Cresto, were you present for
 13 Mr. Weaver's testimony?
 14 A. Yes.
 15 Q. And was there anything in Mr. Weaver's
 16 testimony that you disagreed with?
 17 A. No.
 18 Q. Ms. Cresto, I believe in front of you,
 19 you should see Exhibit 1000, the Methodology
 20 Order?
 21 A. Yes.
 22 Q. Are you familiar with that exhibit?
 23 A. Yes.
 24 Q. How are you familiar with that exhibit?
 25 A. I have worked on it, and provided

1 reviewed data, and looked over his work.
 2 In 2007, I did a mid-season update when
 3 Steve Burrell was temporarily absent. And so I
 4 forecasted the supply in July of 2007. So I've
 5 been involved for a number of years now.
 6 Q. In April, Ms. Cresto, would you please
 7 explain how natural flow is predicted?
 8 A. Natural flow is predicted using a
 9 regression analysis, and there is two components
 10 to that. There is the natural flow at Heise, and
 11 then the natural flow diverted by each surface
 12 water entity.
 13 The natural flow at Heise is an April
 14 through July volume, and that's taken from the
 15 Bureau's Hydromet records. The natural flow is
 16 the natural flow diverted by each surface water
 17 entity, and that comes from the water rights
 18 accounting. And so that regression equation was
 19 developed using that data.
 20 Then you get on -- sometime after
 21 April, the Bureau and the Army Corps of Engineers
 22 come out with a forecast supply, or a forecast of
 23 the Heise natural flow from April through July.
 24 You take that number, plug it into the regression
 25 equation for each of the surface water entities,

1 and then you take one standard error below that,
2 and that's the natural flow supply for each
3 entity.

4 Q. And I'll ask you in a few minutes about
5 the errors that Mr. Weaver testified to regarding
6 the regression equation. But first, I'd like to
7 ask you if you are aware of the regression
8 analysis that you just described. Has this been
9 used previously by the Department in this
10 proceeding? By "this proceeding," I mean, this
11 delivery call.

12 A. Yes, it has.
13 (Exhibit 1007 marked.)

14 Q. (BY MR. BROMLEY) Ms. Cresto, I would
15 like to have you look at what I've introduced as
16 Exhibit No. 1007, and it's a little out of order.

17 MR. BROMLEY: And IGWA introduced an
18 exhibit that I didn't think they would introduce.
19 I thought I would introduce. But anyway, this is
20 where we are.

21 THE HEARING OFFICER: Okay.

22 Q. (BY MR. BROMLEY) Would you please
23 identify Exhibit 1007 for the record?

24 A. This is the Fifth Supplemental Order in
25 the Replacement Water Requirements.

1 Q. Ms. Cresto, I believe you also have
2 there, IDWR, Exhibit 1002. Is that the order
3 regarding IGWA Mitigation Obligation?

4 A. Yes.

5 Q. And would you please turn to page 3,
6 Footnote 2, and discuss what's written in that
7 paragraph?

8 A. It says that we have found some slight
9 data errors in some of the natural flow numbers
10 that were used in the regression analysis, and
11 those have now been updated for A & B, Milner,
12 North Side, and Twin Falls Canal Company.

13 Q. Mr. Weaver made mention of this
14 previously; is that correct?

15 A. Yes.
16 (Exhibit 1004 marked.)

17 Q. (BY MR. BROMLEY) Ms. Cresto, I'm going
18 to hand you what's been marked as IDWR 1004, and
19 it has suffixes A through H. If you could please
20 identify those documents?

21 A. A is the April shortfall calculations.
22 B contains the regression analysis or the
23 regression equations for each of the canal
24 companies. C contains the Bureau of Reclamation
25 Hydromet data for the Snake River Heise.

1 Q. And, Ms. Cresto, are you familiar with
2 this order?

3 A. Yes.

4 Q. And I believe you testified earlier
5 that you've been employed with the Department
6 since before this order was issued?

7 A. Correct.

8 Q. And you testified about how the
9 Department predicts natural flow and storage?

10 A. Correct.

11 Q. Would you please turn to page 9?

12 A. (Witness complying.)

13 Q. Do any of the paragraphs on page 9
14 inform you as to how the Department makes its
15 natural flow predictions in this delivery call?

16 A. Yes, it's outlined in this document.

17 Q. And are these paragraphs, specifically
18 14 through 19, are they consistent or
19 inconsistent with the steps that you've just
20 described in your testimony?

21 A. They are the same.

22 Q. And are these the same steps that the
23 Department applied to determine natural flow in
24 the As Applied or Exhibit 1001?

25 A. Yes.

1 MS. McHUGH: Just one minute. I want a
2 clarification on these. It appears that hers
3 have suffixes, and I didn't realize ours didn't.
4 So the first document is suffix A 1004-A?

5 THE WITNESS: Yes. So the second -- B
6 is the regressions. C is the Bureau's Heise
7 data. D, E, F, G, H, and I, are all the natural
8 flow calculations that come from the water rights
9 accounting. And then H is a comparison of the
10 data that was presented in the natural flow
11 supplies from the regressions from 1002 versus
12 1001. So it's a comparison of how the natural
13 flow has changed in the diversions.

14 Q. (BY MR. BROMLEY) So in Exhibit 1007,
15 the regressions that were used, were not the
16 regressions that were used in Exhibit 1002; is
17 that correct?

18 A. Did you say 1007?

19 Q. 1007, which would be the fifth
20 supplemental order issued by Director Tuthill.
21 Are those regression equations the same, or are
22 they different than regressions in Exhibit 1002?

23 A. They are different.

24 Q. Why, again, are they different? I
25 believe Mr. Weaver testified to this.

1 A. Well, the fifth supplemental order also
2 has less data in it. So not only is it comprised
3 of less data, but there is also the change in the
4 natural flow numbers that we could not replicate
5 based on the accounting record, and the record
6 that we -- or the files that I inherited as I
7 began this project, I could not replicate those
8 numbers in that file.

9 Q. So who prepared the document in Exhibit
10 1004?

11 A. I did, with the exception of H. And
12 Mat prepared that comparison document.

13 Q. And I think you stated that the reason
14 that you prepared these regression equations was
15 because you couldn't replicate the data; is that
16 correct?

17 A. That's correct. And I couldn't find
18 any source that linked the regression to any
19 other sources that I had.

20 Q. Are you aware if the parties had been
21 provided this information previously?

22 A. Yes, they have.

23 Q. And is it your understanding that the
24 information in Exhibit 1004 is the information
25 that was provided to the parties?

1 it, and made changes as I saw fit.

2 Q. Do you agree with its contents?

3 A. Yes.

4 Q. Is there anything in Exhibit 2000 that
5 you would revise or have cause to disagree with?

6 A. No, the only thing that I would add to
7 this is this is how the storage water was
8 applied -- or predicted at this year. And
9 because we were predicting a full reservoir
10 contents, we did not run it through the storage
11 report, because it was an unnecessary step in the
12 process.

13 But other years, you could have prior
14 to, run it through the storage report to get an
15 allocation. But this year, in particular, we did
16 not, because we were predicting a full reservoir
17 for all entities.

18 Q. In Exhibit 1006, can you please
19 identify that?

20 A. That's for the April shortfall
21 calculation, and that's how we allocated the
22 storage. The top table is the analogous year we
23 used for the reservoir fill. And the bottom
24 tables are the actual values in the 2010 estimate
25 total storage allocation.

1 A. Yes.

2 Q. Okay. Ms. Cresto, if you would please
3 look at Exhibit 1001. It's the As Applied.
4 Turning to page 2. And then also look at Exhibit
5 1002, and turn to page 3. Which of these tables
6 is correct?

7 A. The Exhibit 1002.

8 Q. And why is Exhibit 1002 correct?

9 A. Because it has the data on -- the
10 updated data as a result of the regressions, and
11 it has updated information for AFRD2.

12 Q. Ms. Cresto, I would like to talk about
13 predicting storage allocation. If you look at
14 Exhibit 1001.

15 A. (Witness complying.)

16 Q. And then I'm going to hand you -- well,
17 you've got one of the exhibits I was going to
18 hand you to talk about Exhibit 1001. The other
19 Exhibit 2000, which is a memo.

20 A. Correct.

21 (Exhibit 1006 marked.)

22 Q. (BY MR. BROMLEY) And then I'm going to
23 hand you what I've marked as IDWR Exhibit 1006.

24 Who prepared Exhibit 2000?

25 A. Mat was the lead author, but I reviewed

1 Q. Who prepared Exhibit 1006?

2 A. I did.

3 Q. And what led you to prepare Exhibit
4 1006?

5 A. Just for documentation purposes.

6 Q. So with these exhibits in mind,
7 Ms. Cresto, Exhibit 1006, Exhibit 2000, would you
8 explain how storage allocation is predicted?

9 A. Storage allocation is predicted
10 using -- they look at the current reservoir
11 contents, compare it to historical years. You
12 look at the current snow pack. You compare it to
13 historical snow pack. And you look at various
14 water supply forecasts, three-month climate
15 forecasts.

16 And basically you come up with a -- how
17 you predict the reservoirs will fill. And you
18 predict an evaporation volume that will be the
19 evaporation for the current year. And then from
20 those numbers, you come up with a storage
21 allocation for each entity.

22 And, you know, we look at the Bureau's
23 forecast. We look at the NRCS's data, which is
24 snow melt data, which is used in all the
25 forecasts by the Bureau, and all the other

1 entities that forecast water supply.
 2 We talk to the Bureau and get their
 3 opinion of how the reservoirs are going to fill,
 4 because they are the ones that do the
 5 forecasting, and they are the ones operating the
 6 reservoir. So they really have a good idea where
 7 they think the year is going to end up with the
 8 fill.

9 So based on all of those factors, you
 10 have to make a decision as to the storage fill
 11 volume in April for that specific water year.

12 Q. And is the method that you just
 13 described, Ms. Cresto, for predicting storage,
 14 same or different from how the Department has
 15 previously made its prediction? And I would draw
 16 your attention again to Exhibit 1007, page 10, 11
 17 and 12, paragraphs 20 through 23.

18 A. It is consistent with the information,
 19 and the way we did it in 1007, and in the way
 20 we've done it in the past.

21 Q. Did the As Applied Order, Exhibit 1001,
 22 spell out how the Department predicted storage?

23 A. No, it did not.

24 Q. And do you believe the fact that the
 25 Department predicted 100 percent fill influenced

1 has previously predicted storage?

2 A. No, that's not varied. We've done it
 3 consistently.

4 MR. BROMLEY: Thank you, Ms. Cresto. I
 5 have nothing further.

6 THE HEARING OFFICER: Okay. Ms. Klahn?

7 MS. KLAHN: Thank you, Mr. Director.

8 CROSS-EXAMINATION
 9 QUESTIONS BY MS. KLAHN:

10 Q. Good afternoon, Ms. Cresto. And thanks
 11 for indulging us, since this is taking longer
 12 than any of us had hoped. I have some questions
 13 about what Mr. Bromley had asked you.

14 As I understood your testimony to
 15 Mr. Bromley, it's your position that there is a
 16 methodology that the Department, particularly
 17 you, used, I should say, in developing the
 18 projected water supplies for the Methodology and
 19 the As Applied orders; is that right?

20 A. Correct, yes.

21 Q. And it's also your position that the
 22 methods you used are consistent with what's been
 23 used in the past; is that correct?

24 A. Correct.

25 Q. And what I would like to do is go

1 the lack of discussion?

2 A. I believe so, yes.

3 Q. Do Exhibits 1005 and 1006, and I guess
 4 the paragraphs that we discussed in Exhibit 1007,
 5 which is the Fifth Supplemental Order. Does that
 6 accurately summarize how the Department predicted
 7 storage with regards to -- let me take back, and
 8 rephrase the question.

9 Do Exhibits 1005 and 1006 accurately
 10 summarize how the Department predicted storage
 11 for this season?

12 A. 2000, Exhibit 2000?

13 Q. I'm sorry. Yes, this is -- Candice put
 14 in an exhibit on me. Yes, does Exhibit 2000,
 15 which is your memo, your and Mat's memo, and then
 16 the single page, Exhibit 1006, does that
 17 accurately summarize how the Department predicted
 18 storage for this season?

19 A. Yes.

20 Q. Would it have been appropriate for the
 21 Department to have had a description of this
 22 process in the As Applied Order?

23 A. Yes, I believe so.

24 Q. But again, the process that you've just
 25 described, does that vary from how the Department

1 through with you, and ask you to help me
 2 understand that. As I understood your testimony,
 3 there are a number of -- can we call them
 4 variables that you look at in order to determine
 5 the forecasted water supply?

6 A. Correct.

7 Q. And those would include reservoir
 8 conditions?

9 A. Yes.

10 Q. Snow pack?

11 A. Yes.

12 Q. The federal agencies? And I'm just
 13 going to use that term in the plural -- the
 14 federal agencies' water supply forecast?

15 A. Correct.

16 Q. And three-month climate forecast?

17 A. Yes.

18 Q. So you have four variables there. So
 19 we're not talking about a simple analysis. This
 20 is a complicated analysis; would you agree?

21 A. Yes.

22 Q. And when the first one I mentioned
 23 there looked at reservoir conditions, can you
 24 point me to someplace in Exhibit 1000, 1001,
 25 1007, where a sort of specific analysis of what

1 looking at reservoir conditions means? To an
2 outsider that had to do this, what would they
3 make at looking at reservoir conditions? Maybe
4 you can point me to something.

5 A. So on page 10 on the 1007, paragraph
6 20, kind of in the middle, it says, "All storage
7 accounts filled in 2006, except for flood control
8 release, all storage accounts are predicted to
9 fill in seven given the snow survey data and
10 carryover storage available in all reservoirs
11 except Ririe."

12 So given the carryover storage
13 available, that would be part of the current
14 reservoir conditions.

15 Q. Okay. So an outsider that had to come
16 in and do your job would say, okay. I'm going to
17 look at current reservoir conditions, and I'm
18 going to consider carryover storage. Is that the
19 most important thing you look at when you look at
20 current reservoir conditions?

21 A. Actually, what they had accrued up to
22 that point in time in carryover, and what they
23 accrued the carryover happens as of October 31st,
24 and more over the winter.

25 Q. Let's talk about today, though, or

1 evaluation to determine projected water supply?

2 A. I look at it. You know, there is no
3 algorithm that puts all four variables into an
4 algorithm.

5 Q. Okay.

6 A. That comes in, and you look at it, the
7 raw data that's available.

8 Q. So would you agree with me, Ms. Cresto,
9 that your analysis of the variables we've
10 mentioned here, current reservoir conditions,
11 snow pack, water supply forecast, three-month
12 climate forecast, is based on your own discretion
13 as far as how you evaluate those four variables?

14 A. It's based on professional judgment,
15 yes.

16 Q. Okay. And a different professional
17 could take a look at those four variables, and
18 evaluate the same information, and come to a
19 different conclusion; would you agree?

20 A. Yes. Yes.

21 Q. Okay. And I think it was your
22 testimony that there is no algorithm for this?

23 A. No, there is no algorithm.

24 Q. And there is no place in any of these
25 orders where it's documented, so that it could be

1 rather let's talk about an appropriate time frame
2 in the context of the Methodology and As Applied
3 Orders when you look at forecast supply. So when
4 are you making this determination of forecast
5 supply? Let's make sure we're --

6 A. Shortly after April 1. That's when the
7 forecast supply is coming out for Heise
8 unregulated flows.

9 Q. So on April 1, when you look at current
10 reservoir conditions, you are looking at what?

11 A. Fill volume, which includes carryover,
12 the current reservoir content volume.

13 Q. Okay. And the second issue, the second
14 variable we talk about was snow pack.

15 A. Right.

16 Q. And what can you point me to in the
17 Methodology Order or the As Applied Order that
18 would give an outsider guidance about how you
19 evaluate snow pack?

20 A. I'm not sure. I know that the
21 forecasts are based on snow pack. And that's the
22 data that goes into the forecasts that the Bureau
23 and the Army Corps of Engineers use to come up
24 with their forecast.

25 Q. And you use snow pack as part of your

1 repeated by others; is that right?

2 A. That's been in these memos, and the
3 previous orders. It's in the exhibit and the
4 folders.

5 Q. Exhibit?

6 A. Exhibit 2000, and then the Fifth
7 Supplemental Order is consistent with the current
8 way we are predicting.

9 Q. Let me talk to you now about Exhibit
10 2000 for a minute. Is it fair to say, that in
11 Exhibit 2000, the last paragraph of the third
12 page of Exhibit 2000, summarizes your
13 conclusions, yours and Mr. Weaver's conclusions
14 based on the variables in the previous part of
15 the memo?

16 A. Correct.

17 Q. The first sentence of that paragraph
18 starts, "The Department will use 2001 to assign
19 storage allocation volumes to all members of the
20 Surface Water Coalition, with the exception of
21 Jackson and Lake Walcott storage rights." Do you
22 see that?

23 A. Yes.

24 Q. And the next to the last sentence says,
25 "Therefore, 2005 is a more appropriate and

1 realistic estimate for the 2010 allocation."
 2 Does that relate to Lake Walcott?
 3 A. Yes. Yes.
 4 Q. So would you agree with me, that having
 5 reviewed this memo, and read through the
 6 rationale that's contained here, that another
 7 professional could look at the same information
 8 and come to a different conclusion than you did
 9 about what the appropriate year was to assign
 10 storage allocation volumes?
 11 A. Yes, it's based on professional
 12 judgment.
 13 Q. Ms. Cresto, do you know when the
 14 forecast Heise natural flow is updated?
 15 A. I believe that they predicted it in
 16 January, and once in March.
 17 Q. For the entire irrigation season?
 18 A. I think they only update it through
 19 May.
 20 Q. Okay.
 21 A. So there is, you know, January,
 22 February, March, April, May, five months that
 23 they project Heise -- predict Heise.
 24 Q. And the Heise natural flow is
 25 the -- the Heise forecast, would you say that's

1 wouldn't you have expected that the regression
 2 analysis would have produced something closer to
 3 what was actually diverted by AFRD#2?
 4 A. If their prediction had continued to be
 5 as they -- you know, the predictions are a
 6 weather forecast as well. So the predictions
 7 are -- inherently have some error to it. It's
 8 just that the prediction is the best information
 9 available at the time.
 10 Q. And you would agree with me, there is
 11 quite a bit of difference between a 1,200
 12 acre-foot supply and a 16,000 acre-foot supply?
 13 A. Yes.
 14 MR. ARKOOSH: I would object to that
 15 question. One, it's irrelevant; and two,
 16 subjective.
 17 THE HEARING OFFICER: Overruled.
 18 Q. (BY MS. KLAHN) Ms. Cresto, for the
 19 entities in the Surface Water Coalition who don't
 20 have the particular sweet water rights that AFRD
 21 does, which allows the kind of interlocutory
 22 reevaluation that the Director was able to make
 23 for AFRD, is the difference between what AFRD
 24 actually diverted, and what was predicted give
 25 you any concern about the predictions in the

1 the most important thing you look at for
 2 predicting natural flow?
 3 A. Yeah. You know, that's the number that
 4 you use in the regression equation. So, yes.
 5 Q. And so is the natural flow prediction
 6 forecast -- I'm sorry -- if the natural forecast
 7 at Heise is updated, is it the Department's
 8 intention to revise the Surface Water Coalition
 9 natural flow supplies based on the updated
 10 forecast?
 11 A. I believe the Methodology Order only
 12 provides the April, and then two mid season
 13 updates. And they only can equal -- they
 14 equal -- are the Heise natural flow forecast.
 15 Q. Is that the problem that -- what
 16 happened this year, 2010, with the AFRD number
 17 that was projected so low, the Heise number was
 18 incorrect?
 19 A. No.
 20 Q. What happened?
 21 A. What happened was the actual data with
 22 what AFRD diverted. So it was the decision of
 23 the Director to replace the forecast with actual
 24 data.
 25 Q. Right. I understand that part. But

1 Heise gage, or the Heise natural flow forecasts,
 2 as far as what the other entities were predicted
 3 to receive as far as natural flow?
 4 MR. ARKOOSH: And I would object with
 5 the first part of that question. Our water right
 6 allows an interlocutory order or a recalculation.
 7 MS. KLAHN: I didn't mean it as
 8 a -- I'm sorry. I didn't mean it as an editorial
 9 comment there.
 10 THE HEARING OFFICER: Sustained.
 11 MR. ARKOOSH: That was an easy one,
 12 Mr. Director. The second part of the question I
 13 don't mind.
 14 Q. (BY MS. KLAHN) No, my point really is:
 15 I don't think there is any disagreement that AFRD
 16 has water rights that are diverted and delivered
 17 in such a way, that it's possible for them to
 18 make the reevaluation that the director made.
 19 The other entities it's not quite as clear cut.
 20 But given that there was such a
 21 difference between what the regression predicted
 22 and what AFRD received, does it give you, the
 23 professional in charge of the cause for concern,
 24 that the other predictions based on the
 25 regression might be similarly flawed?

1 A. I have not done that analysis.
 2 Q. Have you given it any thought?
 3 A. Some, but -- you know, cool, wet
 4 weather does make a difference on what their
 5 natural flow supplies would be.
 6 Q. Would you expect that the magnitude of
 7 the difference between the prediction for AFRD
 8 and the actual diversions for AFRD might also be
 9 the actual magnitude of difference for the other
 10 entities?
 11 A. I have no idea.
 12 MS. KLAHN: I think that's all I have,
 13 Your Honor. Thank you.
 14 THE HEARING OFFICER: Okay.
 15 Ms. McHugh.
 16 MS. McHUGH: Yes.
 17 CROSS-EXAMINATION
 18 QUESTIONS BY MS. McHUGH:
 19 Q. Good afternoon, Ms. Cresto. My name is
 20 Candice McHugh, and I represent the Ground Water
 21 Users. And I just want to follow-up on a couple
 22 of questions that I posed to Mr. Weaver this
 23 morning, or this afternoon maybe -- today, that
 24 he thought were better addressed to you.
 25 Do you know, does Water District 1

1 particular numbers. Tony Olenichak that is.
 2 Q. And did you ask Mr. Olenichak about the
 3 storage supply that you predicted, whether or not
 4 he felt that was reasonable for each of the
 5 entities?
 6 A. No.
 7 Q. And why is that?
 8 A. Well, our discussions were on total
 9 reservoir fill, and not on particular entities,
 10 so... We discussed whether he thought the system
 11 was going to fill this year.
 12 Q. Would you agree that Mr. Olenichak is
 13 most likely the person most familiar with the
 14 water rights accounting over the years, and what
 15 each entity diverts for natural flow, and what
 16 they retain for storage at the end of the year?
 17 MR. THOMPSON: I guess I'll lodge an
 18 objection; foundation.
 19 THE HEARING OFFICER: Sustained.
 20 MS. McHUGH: So I'm assuming that the
 21 objection was foundation, that Ms. Cresto isn't
 22 familiar with Mr. Olenichak's water rights -- or
 23 duties? I wasn't sure what the
 24 foundation -- what needed foundation there?
 25 THE HEARING OFFICER: Well --

1 predict natural flow?
 2 A. I don't. I'm not aware of any official
 3 forecast that they publish. I do not know.
 4 Q. Do they do anything unofficially?
 5 A. They have their professional judgments.
 6 You can ask them how their year is going.
 7 Q. And as far as your prediction of
 8 natural flow, did you talk to anybody in Water
 9 District 1 to kind of see if it jibed with the
 10 people who were in charge of water rights
 11 accounting?
 12 A. No, I did not ask them about the
 13 natural flow predictions.
 14 Q. Do they predict storage?
 15 A. Not that I'm aware of.
 16 Q. But Water District 1 is the entity, if
 17 you will, that accounts for storage --
 18 A. Right.
 19 Q. -- in Water District 1; is that
 20 correct?
 21 A. Yes.
 22 Q. Did you check your storage predictions
 23 at all with the Water District 1's staff?
 24 A. I believe I did discuss how Tony felt
 25 the reservoirs would fill. I did not go over

1 MR. THOMPSON: It's sustained, so fine.
 2 Q. (BY MS. McHUGH) Do you know who
 3 Mr. Olenichak is?
 4 A. Yes.
 5 Q. And he is in charge of Water District 1
 6 accounting?
 7 A. Yes.
 8 Q. Is there anybody in the Department or
 9 the Water District 01, who is more familiar with
 10 water rights accounting, as far as you know?
 11 A. Tony is certainly an expert on the
 12 subject.
 13 THE HEARING OFFICER: Ms. McHugh, I'll
 14 just tell you that one of the reasons I sustained
 15 it, is because it requires Ms. Cresto to do a
 16 comparison of various Department employees, and
 17 their individual expertise in the accounting
 18 processes. And I don't think that should be
 19 expected of her. I mean, she's given you the
 20 answer that she can best give you.
 21 Q. (BY MS. McHUGH) So if I heard you say,
 22 Mr. Olenichak is an expert on Water District 1
 23 accounting, did I understand your answer
 24 correctly?
 25 A. Yes.

1 Q. And that would apply to Water District
2 1 to the accounting records for the Surface Water
3 Coalition entities as far as their historic
4 natural flow diversions have been?

5 A. They certainly would have knowledge of
6 that.

7 Q. And their storage accounts and their
8 carryover over the years?

9 A. Yes, he would have knowledge.

10 MR. THOMPSON: I'm going to object to
11 the timing of the question. There is no
12 reference as to historical diversions or storage
13 over the years --

14 THE HEARING OFFICER: Overruled.

15 MR. THOMPSON: -- foundational.

16 THE HEARING OFFICER: Overruled.

17 Q. (BY MS. McHUGH) In Exhibits 1001 and
18 1002, I believe, the May 17th and the As Applied
19 Order. Steps 3 and 4 required a prediction in
20 natural flow in storage; would you agree?

21 A. Yes.

22 Q. And I went over some of these questions
23 with Mr. Weaver about the baseline year, and what
24 adjustments may or may not have been performed as
25 it relates to that year.

1 year that you used --

2 A. Uh-huh.

3 Q. -- to predict the 2010 storage; is that
4 correct?

5 A. Yes.

6 Q. And when you looked at the analog year,
7 so it was like a baseline year kind of --

8 A. Yes.

9 Q. -- for storage; would you agree with
10 that?

11 A. Yes.

12 Q. Did you look at whether there was
13 storage in that year, whether that entity had
14 sold or --

15 A. I would have looked at the percent fill
16 volumes, and it would not have been a -- it would
17 not have taken out adjustments, because we don't
18 know what the adjustments are for this year. So
19 when you are looking at an analog year, you are
20 only looking at how much you think their space is
21 going to fill.

22 So you would not have taken out
23 adjustments for the analog year, and applied it
24 to the 2010 allocation, because you don't know if
25 those adjustments will occur in 2010, as they did

1 To your knowledge, was the baseline
2 year -- were they adjusted, were the diversions
3 adjusted by any of the leases by any of the
4 Surface Water Coalition entities?

5 A. I'm not sure, you know, if the 2006 and
6 2008 data is the diversion at the headgate. And
7 then you are taking off any water that is wheeled
8 water or recharge, which is what Mat testified
9 to.

10 So if leased water was added to their
11 supply, they diverted it, it was considered -- it
12 was in this. If the entity supplied water to
13 another entity, another member, or say, sold
14 water, they did not divert that water at the
15 headgate; and therefore, it was not in the
16 diversion record for '06 or '08.

17 Q. And if they leased some of their
18 storage water, was the prediction for storage
19 when you looked at the storage year, was that at
20 all adjusted for water that was leased or sold as
21 you just said?

22 A. For 2010, because that's the only year
23 I predicted storage.

24 Q. I understood that you used an analog
25 year. You spoke with Ms. Klahn about the analog

1 in the analog year.

2 MS. McHUGH: Just one second.

3 (Pause in proceeding.)

4 Q. (BY MS. McHUGH) So in your application
5 of Steps 3 and 4 in predicting the storage supply
6 and the baseline year, and then ultimately to
7 shortfall to these entities, was there any
8 adjustment made for flow augmentation water?

9 A. Once again, I'm not aware of any flow
10 augmentation water -- or wasn't aware -- not
11 aware of any flow augmentation water that has
12 been leased out in 2010. I have to repeat the
13 question.

14 Q. Would your answer regarding leases,
15 because it wasn't -- the water wasn't diverted at
16 the headgate, would that apply equally to flow
17 augmentation water?

18 A. Correct. Flow augmentation water is
19 not diverted -- it's my understanding that no
20 flow augmentation water is diverted at any of the
21 Surface Water Coalition headgates. So the
22 baseline year does not have any water that was
23 diverted for flow augmentation, because it's just
24 what they diverted.

25 Q. At their headgate?

1 A. At their headgate.
 2 Q. And what's your understanding of how
 3 the Minidoka credit water is diverted? Is it
 4 diverted at the headgate, or what do you know
 5 about that?
 6 A. I believe it's an adjustment in the
 7 storage component in the storage reports.
 8 Q. Is it diverted through Twin Falls Canal
 9 Company's point of diversion, or any of the
 10 Surface Water Coalition's points of diversion; do
 11 you know?
 12 A. I'm not sure.
 13 Q. Did that ever come up in discussions as
 14 to whether it needed to be considered, or looked
 15 at, or decided if it influenced the baseline
 16 year?
 17 A. I don't recall any.
 18 Q. I asked Mr. Weaver some questions about
 19 storage evaporation. Do you remember those lines
 20 of questioning?
 21 A. Yes.
 22 Q. And was there anything he testified to
 23 with regards to evaporation that you disagree
 24 with?
 25 A. Not that I recall.

1 A. (Witness complying.)
 2 Q. Can you help me out on this. If you
 3 flip through these, and you look at the R squared
 4 values for all the Surface Water Coalition
 5 entities, they are in the .8 to .9 range. Do you
 6 see that?
 7 A. Yes.
 8 Q. Except for Twin Falls Canal Company;
 9 .5. What does that tell you? Can you explain
 10 that?
 11 A. It's not as strong of a relationship.
 12 That's my understanding of statistics.
 13 MS. McHUGH: That's all I have.
 14 THE HEARING OFFICER: Okay. Thank you.
 15 Mr. Arkoosh?
 16 CROSS-EXAMINATION
 17 QUESTIONS BY MR. ARKOOSH:
 18 Q. Thank you. This spring was wetter
 19 longer than your forecast had anticipated; is
 20 that correct?
 21 A. Correct.
 22 Q. As we sit here today, because the
 23 season has not completed, we really don't know
 24 for a fact whether the Surface Water Coalition
 25 members will all have the amount of water

1 Q. Okay. Now, would storage evaporation
 2 occur if the Surface Water Coalition didn't have
 3 storage water?
 4 A. There is no evaporation taken out of
 5 natural flow diversions.
 6 Q. Okay. And can you explain to me, if I
 7 understood Mr. Weaver's testimony correctly, and
 8 you can just explain it, if I'm not. The storage
 9 evaporation was not added back into the storage
 10 supply of the Surface Water Coalition entities;
 11 is that correct?
 12 A. That's correct.
 13 Q. Do you know whether ground water
 14 pumping impacts reservoir storage evaporation?
 15 A. I'm not sure.
 16 MS. McHUGH: I don't have any further
 17 questions.
 18 THE HEARING OFFICER: Okay. Thank you,
 19 Ms. McHugh.
 20 MS. McHUGH: Oh, I actually have one
 21 last thing. I always do at the end.
 22 Q. (BY MS. McHUGH) If I could have you
 23 look at Exhibit 1004 B, I believe. I wasn't
 24 tracking exactly. It's the one with the
 25 regression equation.

1 calculated for their deed this year; do we?
 2 A. No, we do not.
 3 MR. ARKOOSH: Nothing further.
 4 THE HEARING OFFICER: Okay.
 5 Mr. Thompson?
 6 MR. THOMPSON: I have no questions.
 7 THE HEARING OFFICER: Mr. Fletcher?
 8 CROSS-EXAMINATION
 9 QUESTIONS BY MR. FLETCHER:
 10 Q. During Mr. Weaver's testimony, he
 11 talked about a meeting that was held concerning
 12 Exhibit 4001. Do you have 4001 in front of you?
 13 A. Yes.
 14 Q. Were you part of that meeting that took
 15 place on the day Mr. Weaver was absent in
 16 which -- I guess, first of all, I should ask you,
 17 if you are familiar with that document?
 18 A. I am. I'm not sure if I was or not.
 19 There are several meetings over those course of
 20 days. So I was at the meeting where IGWA
 21 submitted their initial secured water, but I'm
 22 not sure if I was at all the meetings, subsequent
 23 meetings, because I know there were many.
 24 Q. Do you know how it was determined to
 25 the Director's satisfaction that 53,000 feet of

1 water would be available to the Surface Water
 2 Coalition in this column?
 3 A. I do not.
 4 Q. And do you know if there was any demand
 5 made by the Director or anyone else for
 6 un-redacted copies of the attachments to Exhibit
 7 of 4001?
 8 A. I'm not aware of any.
 9 Q. And do you know if the commitments of
 10 the ground water users -- to the spring users was
 11 considered when the Director determined that
 12 53,000 acre-feet would be available to the
 13 Surface Water Coalitions?
 14 A. I'm not aware.
 15 Q. And do you know if there was any
 16 inquiry made -- well, let me draw your attention
 17 specifically to one of the leases. And I can't
 18 identify it by name, because the names are Xed
 19 out. But it's the one that says "water rights
 20 lease agreement." I think it's the first
 21 attachment. Do you see what I'm talking about?
 22 A. Yes.
 23 Q. And it says 20,000 acre-feet in a
 24 square on the first page?
 25 A. Correct.

1 support the Director's finding that there was
 2 53,000 acre-feet of water available at that time?
 3 A. I'm not aware of any.
 4 MR. FLETCHER: I have no further
 5 questions.
 6 THE HEARING OFFICER: Okay.
 7 Mr. Bromley?
 8 REDIRECT EXAMINATION
 9 QUESTIONS BY MR. BROMLEY:
 10 Q. Ms. Cresto, you were asked some
 11 questions about your predictions, and the
 12 variability by Ms. Klahn.
 13 Based on your education and experience
 14 working with the Department, do you feel
 15 qualified to predict storage and natural flow in
 16 the context of this delivery call?
 17 A. I do.
 18 Q. You were asked some questions by
 19 Ms. McHugh about Water District 01 accounting.
 20 Are you familiar with Water District 01
 21 accounting?
 22 A. I am.
 23 Q. And you were asked some questions by
 24 Ms. McHugh about evaporation. Are you aware of
 25 how the Department has previously treated

1 Q. And then if you look down on paragraph
 2 1.1, it says, "Another party may reduce the
 3 quantity of leased water to as low as 20,000 acre
 4 feet by providing the other party written notice
 5 of the amount of reduction down to the minimum no
 6 later than May 1st."
 7 Do you see that?
 8 A. Yes.
 9 Q. Do you know if any inquiry was made
 10 about whether there had been a reduction of the
 11 amount available under this lease?
 12 A. I'm not aware of any.
 13 Q. And do you know whether or not the
 14 Director in his calculation gave credit for
 15 20,000 acre-feet or 10,000 acre-feet pursuant to
 16 this lease or some other number?
 17 A. I'm not sure.
 18 Q. Is there anything in the records
 19 showing how these numbers were computed for the
 20 purposes of the Director's order?
 21 A. I'm not aware of any.
 22 Q. To your knowledge, is there anything in
 23 the record, other than the statements contained
 24 in Exhibit 4001, made by the ground water users,
 25 concerning the amount of water available to

1 evaporation?
 2 A. I am.
 3 Q. And how has the Department previously
 4 treated evaporation?
 5 A. The Department has consistently
 6 deducted evaporation from each entities' water
 7 supply, and it's considered wet water is what is
 8 their supply, and not the evaporation. And
 9 that's consistent.
 10 Q. Exhibit 1007, for instance, on page 10
 11 of the last sentence of the paragraph 20, is that
 12 consistent with your understanding regarding
 13 evaporation?
 14 A. Yes, it is.
 15 MR. BROMLEY: I have nothing further.
 16 THE HEARING OFFICER: Okay. Ms. Klahn,
 17 further questions?
 18 RECROSS-EXAMINATION
 19 QUESTIONS BY MS. KLAHN:
 20 Q. One quick question on 1004 B that
 21 Ms. McHugh asked you about. Ms. McHugh directed
 22 your attention to the Twin Falls Canal Company
 23 regression graph. Do you recall that?
 24 A. Yes.
 25 Q. And she asked you about the R squared

1 of .54. Do you recall that?
 2 A. Yes.
 3 Q. Would you agree that an R squared of
 4 .54 suggests that there is a much less
 5 relationship between the Heise natural flow
 6 prediction, and the amounts Twin Falls has
 7 received during this historic period, than the
 8 other Surface Water Coalition entities?
 9 A. It's not as strong of a relationship
 10 based on our R squared value.
 11 Q. In other words, they get close to the
 12 same amount of water every year, regardless of
 13 what the Heise natural flow forecast is; isn't
 14 that right?
 15 A. Well, the slope is very low. I think
 16 the slope and the R squared are two different
 17 values. So the slope of the line --
 18 Q. And is the slope approaching --
 19 A. The slope of the line is similar
 20 to -- well, some of the other ones are even
 21 lower.
 22 Q. In your experience when --
 23 A. It's a scale issue. It could be not on
 24 a different scale. The line is very flat there;
 25 whereas, some of the -- you know, but...

1 A. Yes.
 2 Q. And I believe you were looking at the
 3 R squared value with Exhibit 1004 B with
 4 Ms. Klahn of .543 value?
 5 A. Correct.
 6 Q. Is there an R squared on Attachment G
 7 of 1007?
 8 A. .5456 it's R squared.
 9 Q. When you compare those values --
 10 A. They are very similar. They have not
 11 changed much.
 12 MR. BROMLEY: Thank you.
 13 THE HEARING OFFICER: Well, I allowed
 14 one more round. Anybody else?
 15 MR. FLETCHER: Anybody else have
 16 questions about a regression equation?
 17 MS. McHUGH: Mine was short, one
 18 question.
 19 THE HEARING OFFICER: Thank you,
 20 Ms. Cresto.
 21 Let's see. I think we had somebody
 22 here who's an expert in regression equations, and
 23 he'll -- Mr. Rumande could you teach a brief
 24 tutorial tonight?
 25 MS. KLAHN: Your Honor, I think we

1 Q. As a line -- but these are all the
 2 same, or they aren't all the same scale?
 3 A. They aren't all the same scale. So
 4 it's hard to make a comparison from one to
 5 another.
 6 MS. KLAHN: All right. Thank you.
 7 THE HEARING OFFICER: Further
 8 questions, Ms. McHugh?
 9 MS. McHUGH: Nothing further. Thank
 10 you.
 11 THE HEARING OFFICER: Mr. Arkoosh?
 12 MR. ARKOOSH: No. Thank you,
 13 Mr. Director.
 14 THE HEARING OFFICER: Mr. Thompson?
 15 MR. THOMPSON: No. Thank you.
 16 THE HEARING OFFICER: Mr. Fletcher?
 17 MR. FLETCHER: No. Thank you.
 18 MR. BROMLEY: I do.
 19 THE HEARING OFFICER: Mr. Bromley?
 20 FURTHER REDIRECT EXAMINATION
 21 QUESTIONS BY MR. BROMLEY:
 22 Q. Ms. Cresto, if you could turn to 1007,
 23 and look on Attachment G. And if you would also
 24 look, if you still have Exhibit 1004 B open, with
 25 the regression for Twin Falls Canal Company?

1 should call them aggression equations.
 2 MR. FLETCHER: Yes.
 3 MR. BROMLEY: Let's go off the record.
 4 THE HEARING OFFICER: Off the record.
 5 Let's recess for the day, and we'll start --
 6 MR. BROMLEY: Well, wait. Hold on.
 7 Could we do exhibits?
 8 THE HEARING OFFICER: Yes.
 9 MS. KLAHN: Could you offer in the
 10 morning?
 11 MR. BROMLEY: Let's offer it right now,
 12 otherwise I'm going to forget.
 13 I would offer Exhibits 1004, and the
 14 suffixes, Exhibit 1006, Exhibit 1007. There was
 15 no Exhibit 1005, just to make a record.
 16 THE HEARING OFFICER: Okay. Any
 17 objection from the parties?
 18 MS. McHUGH: No objection.
 19 THE HEARING OFFICER: The documents are
 20 received into evidence.
 21 (Exhibits 1004 with suffixes, 1006 and
 22 1007 admitted into evidence.)
 23 THE HEARING OFFICER: Now, do we have
 24 any others that were offered? I don't think so.
 25 Okay. Thank you.

1 Now, let's go off the record, we will
2 talk about what we'll do tomorrow.
3 (Hearing adjourned at 5:54 p.m.)
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