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

CITY OF POCATELLO, CITY OF IDAHO FALLS,
CITY OF BLISS, CITY OF BURLEY, CITY OF
CAREY, CITY OF DECLO, CITY OF DIETRICH,
CITY OF GOODING, CITY OF HAZELTON,
CITY OF HEYBURN, CITY OF JEROME, CITY
OF PAUL, CITY OF RICHFIELD, CITY OF
RUPERT, CITY OF SHOSHONE, CITY OF
WENDELL, and MCCAIN FOODS USA, INC.,

Petitioners,

vs.

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

Respondents.

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

Case No. CV01-23-08306

IDWR Docket No. CM-DC-2010-001

**DECLARATION OF
MAXIMILIAN C. BRICKER IN
SUPPORT OF MOTION FOR
STAY BASED ON IDWR'S
INTERFERENCE WITH LAWFUL
DISCOVERY**

I, Maximilian C. Bricker, declare and state as follows:

1. I am over the age of 18 and competent to testify. I have personal knowledge of the facts set forth herein and, if called upon as a witness, I could and would competently testify thereto. I am an attorney admitted to the bar of Idaho and am an attorney at Somach Simmons & Dunn, P.C.

2. I am an attorney of record for Petitioner City of Pocatello (“Pocatello”) in the above-captioned action, as well as an attorney for Pocatello in proceedings before the Director (“Director”) of the Idaho Department Water Resources (“IDWR” or “Department”) in Docket No. CM-DC-2010-001.

3. Attachment 1 is a true and correct copy of the Department’s *Order Denying Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* (“Discovery Order”), issued on May 5, 2023.

4. Attachment 2 is a true and correct copy of the Transcript of the Deposition of Matt Anders, P.G., which took place on May 12, 2023. For convenience, relevant portions of the Transcript have been highlighted.

5. Attachment 3 is a true and correct copy of the Transcript of the Deposition of Jennifer Sukow, P.E., P.G., which took place on May 10, 2023. For convenience, relevant portions of the Transcript have been highlighted.

6. Attachment 4 is a true and correct copy of Email Correspondence between Garrick Baxter and Thomas J. Budge, dated May 16, 2023.

7. Attachment 5 is a true and correct copy of the District Court’s Decision and Order in *The Idaho Press Club, Inc. v. Ada County*, Case No. CV 01-19-16277 (December 13, 2019).

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED this 19th day of May, 2023.

SOMACH SIMMONS & DUNN, P.C.



Maximilian C. Bricker, ISB #12283

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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Attachment 1

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

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

Docket No. CM-DC-2010-001

ORDER DENYING THE CITIES' MOTION FOR APPOINTMENT OF INDEPENDENT HEARING OFFICER AND MOTION FOR CONTINUANCE AND LIMITING SCOPE OF DEPOSITIONS

BACKGROUND

On April 21, 2023, the Director of the Idaho Department of Water Resources (“Department”) issued his *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”) as well as his *Final Order Regarding April 2023 Forecast Supply* (“As-Applied Order”). The Methodology Order revises the nine steps used to determine material injury to members of the Surface Water Coalition (“SWC”). The As-Applied Order predicts a shortfall for the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to December 30, 1953.

Anticipating that one or more parties would request a hearing pursuant to Idaho Code § 42-1701A(3) in response to one or both of the orders, the Director also issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery* (“Notice of Hearing”) on April 21, 2023. The Notice of Hearing scheduled a prehearing conference for April 28, 2023, and an in-person evidentiary hearing on the Methodology Order and As-Applied Order for June 6–10, 2023.

Immediately before the April 28, 2023 prehearing conference, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Idaho Falls, Jerome, Paul, Pocatello, Richfield, Rupert, Shoshone, and Wendell (collectively the “Cities”) filed a *Motion for Appointment of Independent Hearing Officer* (“Motion to Appoint”) requesting that the Director appoint an independent hearing officer to preside over the hearing set for June 6–10, 2023. The Cities also filed a *Motion for Continuance*, asking the Director to continue the evidentiary hearing “until a date in December or January 2024” Mot. for Continuance at 8.

The prehearing conference was held on April 28, 2023. During the prehearing conference, the Cities presented argument in support of their *Motion for Continuance*. The Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Groundwater District, and McCain Foods orally moved to join the Cities’ *Motion for Continuance*. The SWC opposed the Cities’ motion, arguing the hearing should remain as scheduled on June 6–10, 2023. The Director orally denied the Cities’ request to delay the hearing until December or January 2024

ORDER DENYING THE APPOINTMENT OF AN INDEPENDENT HEARING OFFICER
AND MOTION FOR CONTINUANCE AND LIMITING SCOPE OF DEPOSITIONS —Page 1

but left open the possibility of moving the hearing dates to another week in June. This order memorializes the Director’s oral ruling.

ANALYSIS

A. Motion for Continuance.

The Cities request that the hearing, currently scheduled for June 6–10, 2023, be delayed approximately six months. Mot. for Continuance at 8. The Cities assert additional time is needed to conduct discovery, prepare witnesses, properly evaluate the updated Methodology Order and As-Applied Order, and because one of its attorneys (Ms. Candice McHugh) will be unable to appear in person June 6–10. *Id.* at 4–6. The Cities further assert the Director should grant its request because no exigency exists given the above-average snowfall this year. *Id.* at 6–8.

During the April 28, 2023 prehearing conference, the Director orally denied the Cities’ request to move the hearing to December or January 2024 but offered limited flexibility regarding the June hearing dates. The Director stated he was willing to move the hearing anytime within the first three weeks of June 2023 if all the parties agreed to move the hearing. In response to the Cities’ claims of being surprised by the changes, the Director observed that last fall the Department conducted multiple presentations regarding possible amendments to the *Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fourth Methodology Order”). The Director also reminded the parties he had, multiple times, publicly expressed his intention to revisit the Fourth Methodology Order. In denying the Cities’ request, the Director emphasized his court-ordered obligation to timely predict water supplies and issue orders timely to ensure senior water right holders are protected. The Director reaffirms his denial of the Cities’ *Motion for Continuance* but remains willing to move the hearing within the first three weeks of June 2023 if the parties file a stipulated motion requesting a change.¹

B. Motion to Appoint an Independent Hearing Officer.

The Cities move the Director to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2), which states in relevant part that “[t]he director, *in his discretion*, may direct that a hearing be conducted by a hearing officer appointed by the director.” (Emphasis added). Accordingly, the Director has the discretion to grant or deny the Cities’ request.

In support of the Motion, the Cities argue that “the only evidentiary hearing of any magnitude” in the SWC delivery call proceedings occurred in 2008 when former Idaho Supreme Court Chief Justice Gerald Schroeder was appointed to serve as a hearing officer. *Motion to Appoint* at 3–4. The Cities assert that the updated Methodology Order constitutes a “sea-change”

¹ At the April 28, 2023 prehearing conference, Ms. McHugh asked that she be allowed to participate in the hearing remotely if the Director was going to keep the June hearing date. The Director granted Ms. McHugh’s request to appear at the hearing remotely in his *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (issued May 2, 2023).

and that “the Methodology Order fails to update data as to SWC irrigation efficiencies, irrigation practices, irrigated area, among other topics that will need to be addressed at an evidentiary hearing with a fully developed record.” *Id.* at 4. The Cities argue that it has been 15 years since “an evidentiary hearing of any consequence has taken place,” and recommend that an independent hearing officer be appointed to hold this upcoming evidentiary hearing. *Id.* at 5. The Cities suggest the Department has established a “practice” of appointing an independent hearing officer in the SWC delivery call and encourages the Director to continue with this “practice.” *Id.*

The Director declines to grant the Cities’ request to appoint an independent hearing officer. The Director has held many evidentiary hearings related to conjunctive administration of water rights. For example, the Director held a multi-day evidentiary hearing in the Rangen delivery call matter. *See Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 801, 367 P.3d 193, 196 (2016) (“IDWR Director Gary Spackman (‘Director’) presided over an evidentiary hearing.”). The Director held a multi-day evidentiary hearing in the Basin 37 administrative matter. *See Final Order, In re Basin 37 Administrative Proceeding*, No. AA-WRA-2021-001 (Idaho Dep’t of Water Res. June 28, 2021) (The Director presided over evidentiary hearing held June 7–12, 2021).

The Director has held evidentiary hearings related to mitigation plans in the SWC delivery call matter. *See Am. Final Order Re. Compliance with Approved Mitigation Plan, In re IGWA’s Settlement Agreement Mitigation Plan*, No. CM-MP-2016-001 (Idaho Dep’t of Water Res. April 24, 2023). Significantly, the Director has held an evidentiary hearing on previous updates to the methodology order. *See Am. Final Order Re. Method. for Determ’g Material Injury to Reasonable In-Season Demand & Carryover.*

These examples are just a few of the many administrative hearings the Director has held. As these examples illustrate, there is no fixed practice of appointing a hearing officer in this or other contested administrative matters. The Director has presided over many evidentiary hearings related to significant water administration issues and is able to preside over the upcoming evidentiary hearing.

Furthermore, time is of the essence given that the As-Applied Order predicts a shortfall for the 2023 irrigation season resulting in mitigation requirements or curtailment for ground water rights junior to December 30, 1953. The urgency for water administration mandates a timely decision because “[w]hen a junior appropriator wrongfully takes water that a senior appropriator is entitled to use, there is often the need for very prompt action.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 815, 252 P.3d 71, 96 (2011); *see also IGWA v. Idaho Dep’t of Water Res.*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho).

The Director is thoroughly familiar with all aspects of the Methodology Order and the As-Applied Order and is the person in the best position to preside over this matter and consider the arguments raised by the parties. Appointing an independent hearing officer would unreasonably delay the proceedings and delay administration of hydraulically connected surface and ground water rights.

C. Scope of Depositions of Department Employees

During the prehearing conference, the Director also identified Matthew Anders and Jennifer Sukow as the witnesses that will testify on behalf of the Department at the hearing to explain the facts and information the Department considered in updating the Methodology Order and As-Applied Order. Questions were raised regarding the appropriate scope of the depositions. As indicated at the prehearing, the deposition process is not an opportunity for parties to question Department employees about the Director's deliberative process related to legal and policy considerations. The Methodology Order clearly explains the Director's views regarding the legal and policy considerations on the issues like why the Director is updating the methodology order and steady-state vs. transient-state modeling. Rule 521 of the Department's Rules of Procedure states: "The presiding officer may limit the type and scope of discovery." IDAPA 37.01.01.521. Accordingly, the Director will limit the scope of the depositions to preclude questions regarding the Director's deliberative process on legal and policy considerations.

ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that the Coalition of Cities' *Motion for Continuance* is DENIED. The Director will consider moving the hearing to other dates within the first three weeks of June 2023 if the parties file a stipulated motion requesting the change.

IT IS FURTHER ORDERED that the Coalition of Cities' *Motion for Appointment of Independent Hearing Officer* is DENIED.

IT IS FURTHER ORDERED that the scope of any deposition of a Department employee will preclude questions regarding the Director's deliberative process on legal and policy considerations.

DATED this 5th day of May 2023.



Gary Spackman
Director

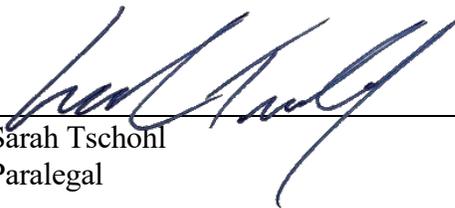
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of May 2023, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Attachment 2

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO VARIOUS WATER RIGHTS)
HELD BY OR FOR THE BENEFIT OF A&B) DOCKET NO.
IRRIGATION DISTRICT, AMERICAN) CM-DC-2010-001
FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
_____)

DEPOSITION OF MATTHEW ANDERS, P.G.

MAY 12, 2023

REPORTED BY:

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

Notary Public

Page 2

1 THE DEPOSITION OF MATTHEW ANDERS, P.G., was
 2 taken on behalf of the Various Water Users, at the
 3 offices of IDWR, located at 322 East Front Street, 6th
 4 Floor, Boise, Idaho, commencing at 9:06 a.m., on
 5 May 12, 2023, before Andrea L. Check, Certified
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 7 State of Idaho, in the above-entitled matter.

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 25 Heather Rice

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 2
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 5 Sophia Sigstedt-Lynker
 6 Thane Kindred
 7 Jaxon Higgs
 8 Bryce Contor
 9 Dave Shaw
 10 Dave Colvin
 11 Jay Barlogi,
 12 Charles Brockway
 13 Greg Sullivan
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1 PROCEEDINGS

2

3 MATTHEW ANDERS, P.G.,

4 first duly sworn to tell the truth relating to said

5 cause, testified as follows:

6

7 MR. BAXTER: So, Sarah, before we get started

8 today -- and I understand we are on the record now --

9 I'd like to lay some foundation, similar to like I did

10 at our last deposition.

11 On May 5th, 2023, the Director issued an order

12 limiting the scope of discovery in this proceeding. He

13 precluded discovery regarding the Director's

14 deliberative process on legal and policy considerations.

15 As the Director discussed at the April 20th status

16 conference, he relied upon staff to help with technical

17 matters, so the Director has made staff available to

18 answer questions related to technical matters.

19 Please be aware that if counsel starts asking

20 questions about the Director's deliberative process on

21 legal and policy matters, I will object and instruct the

22 witness not to answer the question. Please also be

23 aware that the witnesses have been instructed not to

24 provide documents related to the Director's deliberative

25 process.

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1 So that's the foundation I wanted to lay this
2 morning, Sarah. So I believe you're the one leading off
3 today.
4 MS. KLAHN: That's right.
5 MR. BUDGE: Hey, Sarah, can I ask a quick
6 question of Garrick?
7 MS. KLAHN: Sure.
8 MR. BUDGE: Garrick, could you define on the
9 record what is encompassed in the deliberative process?
10 MR. BAXTER: Well, TJ, generally, it's the --
11 any information related to the communications with the
12 Director related to his considerations of legal and
13 policy issues and information that would have supported
14 his decisions related to legal and policy issues.
15 Now, please be aware, there might be other
16 things that, as we go along, I identify that might also
17 fall into that, but generally, I think that's a good
18 starting point.
19 MR. BUDGE: So you'll be instructing the
20 deponent not to identify information that he shared with
21 the Director if you consider that to be part of the
22 deliberative process?
23 MR. BAXTER: Yes.
24 MR. BUDGE: Okay. Thank you.
25 MS. KLAHN: Well, Garrick, since we're all

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1 starting out with this, I'll just say that we don't
2 agree with that objection. And so I don't want you to
3 think that I'm trying to be combative. We are going to
4 create a record today that would support seeking some
5 extraordinary relief from this kind of limitation. So I
6 may ask questions that I understand you will object to,
7 but it's in aid of creating that record so that we can
8 take it up. So just so you know.
9 MR. BAXTER: Understood.
10 EXAMINATION
11 QUESTIONS BY MS. KLAHN:
12 Q. All right. Good morning, Mr. Anders.
13 Could you state your name for the record,
14 please.
15 A. My name is Matt Anders.
16 MR. BAXTER: And, Matt, you're going to have
17 to speak up today.
18 THE WITNESS: Louder? Were you able to hear
19 me, or should I do it again?
20 Q. (BY MS. KLAHN) No, no. I could hear you.
21 And could you spell that, please?
22 A. M-a-t-t, A-n-d-e-r-s.
23 Q. Okay. Mr. Anders, have you had your
24 deposition taken before?
25 A. I have not.

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1 Q. Okay. So there are a few baseline rules. One
2 is if you don't understand my question, please ask me to
3 rephrase it or clarify. If you answer my question, I'm
4 going to assume that you understood it.
5 A second is one that Andrea referred to before
6 we went on the record, which is: Let's try not to talk
7 over each other. Sometimes in the heat of questioning
8 that happens, but let's do our best not to do that.
9 Because she'll yell at both of us, and we don't want
10 that.
11 The third thing is to make sure that if
12 there's -- you know, if you need to take a break or
13 something, you just need to ask to take a break, but
14 there won't be any breaks while there's a question on
15 the table. So you can't stop and confer with Garrick in
16 the middle of a question or something like that. If you
17 need to take a break, we will take a break after you
18 finish answering the question.
19 Does that make sense?
20 A. Yes, I understand.
21 Q. Mr. Anders, how long have you worked at the
22 Department of Water Resources?
23 A. I've worked -- I started in 2004, so I've been
24 here a little over 18 years.
25 Q. And can you just run through, quickly, what

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1 your different positions have been there?
2 A. I started as a contractor in the GIS section.
3 I worked as a hydrogeologist in the well section. I
4 worked as a hydrologist in the hydrology section. And
5 then I became a supervisor in the hydrology section.
6 And I'm currently the technical services bureau chief,
7 which is the supervisor of the hydrology and the GIS
8 section.
9 Q. Okay. Was your -- what degrees do you hold
10 from college or higher education?
11 A. I have a bachelor of arts in geology from
12 Gustavus Adolphus College, and I have a master's of
13 science in geology from Utah State University.
14 Q. When did you graduate with your BA?
15 A. 1992.
16 Q. And when did you get your master's?
17 A. 2003.
18 Q. So right before you came to work for the
19 Department?
20 A. Yes, a couple of years before I came.
21 Maybe -- yeah, just a couple years.
22 Q. And what did you do between '92 and 2000 --
23 and starting your -- what did you do between undergrad
24 and graduate school?
25 A. I worked as an environmental specialist for an

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1 Indian tribe for a couple of years. I went in the Peace
2 Corps and was in Kazakhstan for two years. I worked in
3 consulting for a couple of years.
4 MS. KLAHN: Okay. Andrea, could you hand the
5 witness -- or whoever is handling the deposition
6 exhibits -- could somebody hand the witness the joint
7 notice of deposition duces tecum.
8 COURT REPORTER: Yeah, just a second.
9 MS. KLAHN: It will be Exhibit 1.
10 MS. McHUGH: Sarah, do we want to have our
11 deposition exhibits be chronological from Jennifer's or
12 do you want to have brand-new numbers for this
13 deposition?
14 MS. KLAHN: I don't know. I'm open. What do
15 you think?
16 MS. McHUGH: I think it makes sense to have
17 them not have duplicate exhibit numbers. So I think we
18 would end with the last exhibit in Jennifer's, which
19 I'll have to look up here real quick.
20 MS. KLAHN: Well, I think Andrea has them
21 there.
22 So, Andrea, can you label this as the next
23 consecutive number after the last exhibit we marked at
24 Jennifer Sukow's deposition, please.
25 COURT REPORTER: Yeah, I believe it's 10.

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1 (Exhibit 10 marked.)
2 Q. (BY MS. KLAHN) Matt, have you been handed
3 what's been marked Exhibit No. 10?
4 A. Yes.
5 Q. Could you identify this document, please?
6 A. It says, "Document No. CM-DC-2010-001 Joint
7 Notice of Deposition Duces Tecum of Matthew Anders P.G."
8 Q. Okay. And then if you'd turn to page -- well,
9 first of all, have you seen this document before?
10 A. Yes, I have.
11 Q. Could you turn to page 4.
12 A. Okay.
13 Q. Who showed you this document?
14 A. I was provided it by legal counsel.
15 Q. Did you talk about the contents of this
16 document with legal counsel?
17 A. Yes.
18 Q. So let's look at the list starting on page 4.
19 And what I'm going to ask you is simply whether you
20 produced any materials related to each of these
21 enumerated paragraphs. I'm going to start with that,
22 and then we'll come back to asking questions about them.
23 I just want to know what you might have brought with
24 you.
25 So the first paragraph relates to "All

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1 documents, memoranda, reports, analyses or notes relied
2 on by the Department to prepare the December 23rd, 2022,
3 recommendations related to the technical work group."
4 Do you have an understanding of what that
5 universe of documents would be?
6 A. Yes.
7 Q. Did you bring any documents that are
8 responsive to that?
9 A. I did provide documents.
10 Q. You've brought them with you?
11 A. Did I? I don't know. I provided them to
12 legal counsel. I don't know where they are.
13 Q. Oh, okay.
14 MR. BAXTER: So, Sarah, just to help out with
15 regards to this one: Matt, the Department has provided
16 documents that were uploaded to IDWR's website. Are
17 those the documents that you're discussing that are as
18 it outlines on here: "Notes relied on by the Department
19 to prepare the December 23rd, 2022, Summary of
20 Recommended Technical Revisions to the 4th Amended Final
21 Order Regarding Methodology For Determining Material
22 Injury to Reasonable in-Season Demand and Reasonable
23 Carryover for the Surface Water Coalition"?
24 THE WITNESS: I guess I'm confused. I
25 provided two sets of documents. I don't know where they

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1 went or what -- do you know what I mean? When you say
2 they're uploaded, I didn't upload them. I don't know.
3 MR. BAXTER: Are they available on the
4 website?
5 THE WITNESS: I think so.
6 Q. (BY MS. KLAHN) Okay. Those would have been
7 provided in advance of our deposition today, I assume;
8 correct?
9 A. Yeah.
10 Q. Okay. Did you bring anything in addition to
11 whatever you've previously provided to be uploaded on
12 the website?
13 MR. BAXTER: Now, Sarah, not to jump in, but,
14 Matt, let me help out here.
15 THE WITNESS: Okay.
16 MR. BAXTER: I believe you had identified
17 documents that were responsive to some of these
18 questions, and I had provided them on a thumbdrive here.
19 And we can open those up and show those documents to
20 everybody here in the room and online, but are those
21 responsive to -- the documents that you provided me last
22 night, are those responsive to this particular question?
23 THE WITNESS: Yes. That was my confusion,
24 what documents were which, were we talking about. Yes,
25 what I provided you is responsive to this. What threw

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1 me off was the question: Are they on the webpage or
2 have they been provided? I don't know.
3 MR. BAXTER: Okay. Fair enough.
4 MS. KLAHN: Garrick, maybe during a break you
5 could -- are there a lot of documents? How many are we
6 talking about?
7 MR. BAXTER: So there's two caches of
8 documents. They're the documents that we've previously
9 posted to the website that were provided with regards to
10 the notice. And then Matt has identified additional
11 documents that are responsive, it's my understanding, to
12 some of these questions. And we have them on a
13 thumbdrive here, and we can pull them up and do a share
14 screen, and he can walk through those documents with
15 folks as -- it's my understanding, as we get to a
16 question that it's responsive to that particular
17 question.
18 MS. KLAHN: So are we talking about a lot of
19 documents that would have been things we haven't seen
20 before?
21 MR. BAXTER: A fair number. And, you know,
22 they're like Excel spreadsheets. Matt also prepared
23 some notes for himself with regards to his testimony
24 here today, that those are included as well. And an
25 email with regards to those notes should be going out

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1 here -- there it is finally. Actually, an email with
2 regards to those notes just went out to the parties.
3 MS. KLAHN: Okay. Very good. Thank you.
4 MR. SIMPSON: Excuse me. Sarah, if I could,
5 this is John. Just to clarify, when you say "notes," is
6 that everything on the thumbdrive? Is that what you're
7 saying?
8 MR. BAXTER: There are other things on the
9 thumbdrive. For example, Excel spreadsheets, which are
10 so large we --
11 MR. SIMPSON: Couldn't put those in an email?
12 MR. BAXTER: Yeah.
13 MR. SIMPSON: All right. Sorry, Sarah.
14 Thanks.
15 MS. KLAHN: Oh, no, that's okay.
16 Q. (BY MS. KLAHN) Well, let's keep going through
17 the list, and then we'll take a second to think about
18 how to evaluate the materials that you've brought along
19 that are new.
20 All right. So the second paragraph refers to
21 "documents, memoranda, reports, notes related to the
22 Department's decision to exclude from the Fifth
23 Methodology Order: Near Real Time METRIC for
24 determining Crop Water Need; April and July Regressions
25 used to predict natural flow supply."

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1 Are any of the materials that Garrick was just
2 talking about on that thumbdrive responsive to paragraph
3 No. 2?
4 A. Yes.
5 Q. Okay. Paragraph No. 3, any documents
6 responsive to the Department's decision to include
7 transient modeling in the Fifth Methodology Order?
8 A. No, I did not provide anything. That would be
9 from Jennifer Sukow.
10 Q. Okay. Paragraph 4, "documents, memoranda,
11 reports, analyses, or notes related to the Department's
12 review of information submitted by Greg Sullivan and/or
13 Spronk Water Engineers to IDWR and the Technical Work
14 Group in late 2022 and early 2023."
15 Are any of the documents you brought with you
16 today related to the Department's review of that
17 information?
18 A. Yes.
19 Q. Okay. Paragraph 5, the same category except
20 relating to information submitted by Sophia Sigstedt for
21 IGWA?
22 A. Yes.
23 Q. Paragraph 6, "documents or memoranda, reports,
24 analyses, reports related to other potential Baseline
25 Year(s) for use in the Fifth Methodology Order other

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1 than the 2018 baseline year?"
2 A. Yes.
3 Q. "All documents, memoranda, analyses, or notes
4 related to the authorized and actual irrigated area of
5 the Surface Water Coalition members?"
6 A. Yes.
7 Q. Any documents?
8 A. Yes. Sorry.
9 Q. That's okay. "All documents, memoranda,
10 reports, analyses, or notes related to SWC member
11 groundwater pumping and other sources of water available
12 to the SWC members?"
13 A. For the first half of that, the SWC member
14 groundwater pumping, we're working on gathering
15 materials for that. For the second half of that, the
16 other sources of water available, it's unclear to me
17 what is being sought.
18 Q. Okay. Basically, because the district court
19 and Supreme Court decisions that form the framework for
20 the methodology -- I'll ask you to accept this. I know
21 you're not a lawyer -- but the source of this question
22 is what we understand to be the legal framework for the
23 methodology order, and that includes the Director's
24 obligation to evaluate whether the Surface Water
25 Coalition is using sources other than their decreed

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1 surface water rights to satisfy irrigation. And that
2 would -- considering those sources would, potentially,
3 reduce the amount of surface water required or to meet
4 irrigated demand.
5 So I don't know if there's any other sources
6 than groundwater and surface water. I understand your
7 confusion about the last half of that, but that's what
8 that was getting at.
9 Does that make sense?
10 A. I think so.
11 Q. Okay. With that explanation, do you think
12 there's any other information that you're aware of which
13 would be responsive to this that would be in addition to
14 the materials that you said you're gathering related to
15 groundwater pumping of Surface Water Coalition members?
16 A. Can you repeat the question?
17 Q. Yes. So with that explanation, do you think
18 there's any other information you're aware of which
19 would be responsive to the second half, I'll call it, of
20 paragraph 8 that would be materials in addition to what
21 you're gathering related to groundwater pumping of
22 Surface Water Coalition members?
23 A. Possibly. I don't know exactly everything the
24 Department has. We may have something that would be
25 related to the second half.

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1 Q. Okay. What would that be, in general terms?
2 A. I guess I'm thinking groundwater-related water
3 rights or things like that, or I think -- that indicate
4 if there are groundwater rights within the place of use
5 of the Surface Water Coalition. That's what I'm
6 thinking of. We likely have something like that.
7 Exactly what it is, I'm not sure.
8 Q. Okay. At this time, is there any effort being
9 made to identify and collect that material, do you know?
10 A. Not yet, no.
11 Q. No. 9, "All documents, memoranda, reports,
12 analyses, or notes related to the analysis of reasonable
13 carryover for the SWC members"?
14 A. I have provided everything that is not related
15 to the deliberative process of the Director.
16 Q. Okay. And when you say you've provided, it's
17 on the thumbdrive that Garrick referenced?
18 A. Yes. Sorry, yes.
19 Q. Paragraph 10, "materials presented at
20 technical meetings, all analyses, reports, data sets, or
21 other materials evaluated, examined, or developed in
22 connection therewith," referring back to paragraph 9. I
23 think it's an extension of paragraph 9.
24 The same answer?
25 A. Yes, I have provided documents, except for

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1 those related to the Director's deliberative process.
2 Q. Okay. Let me just stop there and ask about
3 that.
4 So when you say you have not provided
5 documents related to the Director's deliberative
6 process, are you aware that there are such documents?
7 A. Related to his deliberative process?
8 Q. Yes.
9 A. There are documents, yes.
10 Q. Okay. And were those documents created by
11 members of the Department or members -- employees of the
12 Department?
13 A. Yeah, I think that's all internal people
14 working on that stuff.
15 Q. And those were materials that were developed
16 during the course of the -- from the time of the
17 Director's announcement last fall in 2022 that he was
18 going to update the Fourth Methodology Order until the
19 time that the Fifth Methodology Order was released,
20 would that be the time frame in which those documents
21 would have been created?
22 A. Sorry, I'm rereading the question. Yeah, I
23 believe that is the correct time frame.
24 Q. Okay. Do you have realtime there?
25 A. What do you mean "realtime"?

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1 Q. Do you have the transcript? You can see the
2 transcript in front of you?
3 A. I have a paper copy of the order.
4 Q. Oh, of Exhibit 10?
5 A. Yes. That's what I'm looking at, yes.
6 Q. You said you were rereading the question, so I
7 was just wondering if you were --
8 A. Oh, I'm sorry, I'm rereading the order.
9 Q. No, that's okay. You could very well have the
10 realtime transcript there, so that's fine. I do.
11 That's how come I could reread you the question a minute
12 ago.
13 All right. Paragraph 11, "All documents,
14 memoranda, reports, analyses of an average of multiple
15 years for consideration on the Base Line Year(s) and
16 associated hindcast in the Base Line Year(s) shortfall."
17 Are there any materials like that on the
18 thumbdrive?
19 A. Yes. I provided materials except for the
20 materials that are part of the Director's deliberative
21 process.
22 Am I talking loud enough?
23 Q. I can hear you, yeah.
24 A. I feel like I'm really quiet. I'll do better.
25 THE WITNESS: Can you hear me?

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1 COURT REPORTER: I can hear you, but you are
2 quiet.
3 THE WITNESS: I will do better. It seems like
4 I'm -- okay.
5 Q. (BY MS. KLAHN) I have an ear infection, so I
6 can't hear out of the left side of my head anyway, and
7 I'm afraid I'm shouting. So if I'm too loud, tell me.
8 Paragraph 12, "All court filings that discuss,
9 review, analyze, or identify areas of the methodology
10 that require further technical analysis."
11 MR. BAXTER: Sarah, I'm going to object to
12 this request. It's vague and ambiguous and does not
13 relate to the factual or technical basis for the Fifth
14 Methodology Order or the as-applied order, but relates
15 to the Director's legal conclusions made in those
16 orders.
17 Furthermore, the Fifth Amended Methodology
18 Order directly addresses this issue and addresses these
19 particular -- this question. Thus, staff has been
20 instructed to not provide documents related to this
21 request.
22 MS. KLAHN: Can I ask, are there documents
23 that would be responsive to this request?
24 MR. BAXTER: You're asking for all court
25 filings, and we're not sure exactly -- again, I'm still

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1 trying to understand the question itself, but we haven't
2 further analyzed it beyond that, no.
3 Q. (BY MS. KLAHN) No. 13, "documents, memoranda,
4 reports, analyses or notes related to any analysis in
5 the intervening years from the 2015 technical work group
6 to the 2022 technical work group that's related to the
7 Fifth Methodology Order"?
8 A. Yeah, I provided all documents that we have
9 that aren't related to the Director's deliberative
10 process.
11 (Interruption.)
12 MS. KLAHN: Hey, Chuck, can you put it on
13 mute?
14 Q. (BY MS. KLAHN) Okay. "All documents,
15 analyses, reports -- I'm on paragraph 14 -- "All
16 documents, analyses, reports, data, or other materials
17 evaluated, examined or developed in connection with, or
18 related to, the Department's determination and reasoning
19 to use steady state modeling in the previous as applied
20 orders"?
21 A. I did not provide any documents. That would
22 be from Jennifer Sukow.
23 MS. KLAHN: Okay. Garrick, in the interest of
24 efficiency, is it possible for you to email like the
25 titles or the directory of documents?

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1 I mean, if there's 200 documents on that
2 thumbdrive, that doesn't seem like something that we're
3 going to be able to get through efficiently today. If
4 there's five, that's a whole other matter. If you can
5 email around the names of the documents, it might be
6 possible for somebody to do a little bit of triaging,
7 and we could focus on a few of them in a productive
8 manner.
9 MR. BAXTER: Sarah, this is Garrick. I think
10 what might be helpful is just to refresh Mr. Anders'
11 recollection as to what documents he has previously
12 provided and were posted to IDWR's website, start there
13 so that he knows the documents that have been directly
14 already provided to the parties.
15 THE WITNESS: Okay.
16 MR. BAXTER: And then I think it would be
17 helpful for us to share the screen, and we can go in and
18 show what is on the directory of the thumbdrive so that
19 you can see the scope of the particular items.
20 You know, for example, one of the questions
21 relates to the analysis that he undertook for Greg
22 Sullivan's information that he provided. I think easily
23 today we could go into that, and he could show you
24 documents related to that as we move through the
25 questions.

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1 So that's just one example of an area where I
2 think we can kind of talk through them. And if we need
3 to -- some of these documents -- let me say it this way,
4 his notes we have provided to you individually. That's
5 part of what's in here. A lot of what's in here,
6 though, is spreadsheets, as you might imagine, given the
7 technical nature of this.
8 And so let's take a look at it and kind of
9 evaluate and go from there once you have a chance to see
10 what's on the thumbdrive. But let's go off for record
11 for a second and let me show Matt -- refresh his
12 recollection as to what's on the website.
13 MS. McHUGH: May I offer a suggestion before
14 we go off the record?
15 MS. KLAHN: Yes.
16 MS. McHUGH: In order to just assist the
17 parties and all of us for a clean record, would it be
18 possible to mark as an exhibit just the list of
19 documents, like Sarah was saying, and then we have that
20 as an exhibit, and then Matt, I agree, off the record
21 can look at that, and he can say "On Exhibit," whatever
22 the number is -- mark what ones he has so we know what
23 we're talking about. If it's just on the screen, we
24 don't have anything to refer back to.
25 Does that make sense?

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1 MS. KLAHN: That's a good idea.
2 MR. BAXTER: I understand what you're saying
3 Candice, but I think when you take a look at what's on
4 the thumbdrive, you'll see that it's organized by
5 folders, and so it doesn't lend itself to an easy list
6 of document by document. So let's take care of --
7 MS. KLAHN: Let's go off the record and take a
8 look at -- let's try Garrick's approach first. I like
9 the idea, though, of trying to create some kind of paper
10 record of what we're actually talking about so that we
11 could, again, be efficient as we move through this
12 stuff.
13 MR. BAXTER: Sounds good. Are we off the
14 record?
15 COURT REPORTER: Off the record.
16 (Discussion held off the record.)
17 Q. (BY MS. KLAHN) So the parties went off the
18 record in order to discuss the thumbdrive that
19 Mr. Anders brought to the deposition, and the thumbdrive
20 contains a number of folders organized by topic.
21 And the folders are "Baseline Year," "Crop
22 Water Need," "Forecast Supply," "Irrigated Acres," "The
23 METRIC," "Project Efficiency," "Reasonable Carryover,"
24 "System Volume Information," "Twin Falls Canal Company
25 Increase in Diversion." There's a Word document called

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1 "Deposition Preparation Topics Version 1." And then
2 there's the Matt Anders' notice. That's what seems to
3 be on the menu, if you will, of the thumbdrive.
4 And the -- at this point -- oh, in addition,
5 we received an email from somebody at the Department at
6 9:20 a.m. Mountain Time, which contained documents also
7 that are responsive to the subpoena. And so we may work
8 from those today, or we may not, depending on if we have
9 time to process the information in between things.
10 And, Garrick, as I understand it, you've
11 offered to leave the deposition open so that we could
12 come back and ask Mr. Anders about some of these things?
13 MR. BAXTER: Yes.
14 MS. KLAHN: Okay.
15 Q. (BY MS. KLAHN) Let's go now to my outline,
16 which doesn't have anything about this on it because I
17 didn't know.
18
19 THE WITNESS: Do we want to stop sharing?
20 MR. BAXTER: She didn't ask.
21 Q. (BY MS. KLAHN) Can you take that down from
22 the share screen?
23 A. That was my question, did you want to stop
24 sharing? Okay.
25 Q. Yes, please.

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1 A. All right. We're back.
2 Q. Great, thanks. Mr. Anders, we talked a little
3 bit about your different roles at IDWR, and I wanted to
4 ask you in more general terms, since you've -- in your
5 experience in life, generally, do you have any
6 experience with irrigation, operating an irrigation
7 system?
8 A. No.
9 Q. Have you ever done any technical analyses
10 related to irrigation?
11 A. Could you clarify the question?
12 Q. Yes. So, for example, and I suspect if you
13 don't have any experience with irrigation, this answer
14 may also be you don't have any experience with this, but
15 irrigation analysis could include things like
16 scheduling, irrigation scheduling, setting up an
17 irrigation system, different things that would be
18 related to implementing irrigation, even if you're not
19 the actual guy who's turning on the faucet.
20 Do you have any experience with that?
21 A. I do not.
22 Q. Could you describe your experience with water
23 rights administration?
24 A. Since 2014, I've been working -- I'm sorry,
25 I'll speak louder -- in the hydrology section I work on

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1 the water right accounting program for the Bear, the
2 Boise, the Big Lost. That is all water right accounting
3 administration.
4 Q. Are you familiar with Water District 01's
5 accounting program?
6 A. I am. I do the coding for that, and I do the
7 technical support for data for them, for Water District
8 1.
9 Q. And then describe your experience with
10 conjunctive administration, conjunctive water
11 administration?
12 A. I do not have any experience with conjunctive
13 administration. Most of the water right accounting
14 programs are surface water only.
15 Q. How do you define "conjunctive
16 administration"?
17 A. I think I would define it as either curtailing
18 water rights, groundwater and surface water rights, as a
19 group based on priority date.
20 Q. Do you have any experience with groundwater
21 modeling?
22 A. When I worked in the well section, I worked on
23 a subgroup of wells called "injection wells." I did
24 some modeling with a software called WhAEM there, which
25 is wellhead-protection type of software.

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1 Q. And you just, I think, described for me your
2 knowledge of Water District 01 accounting, but just to
3 make it a clean record, what are all the different
4 things that you're aware of related to -- I'm sorry,
5 what is your experience and knowledge related to Water
6 District 01 accounting?
7 A. As I stated, I do their tech support in terms
8 of if they have potential changes to the water right
9 accounting, I may test that for them. If they have bugs
10 or errors in accounting, I go in and talk to them and
11 work out a solution.
12 I also manage their databases, so if -- their
13 database, I should say -- that they use to prepare data
14 to put into accounting. So mostly it's a tech support
15 role is what I do for Water District 1.
16 Q. Who do you work with when you are assisting
17 them? What individuals up at the Water District 1
18 office?
19 A. I work with Tony Olenichak, I work with Craig
20 Chandler, Travis Soderquist, and Amanda. I have
21 forgotten Amanda's last name.
22 Q. Sawyer; is that right?
23 A. That doesn't sound correct.
24 Q. Okay.
25 A. Sorry, I feel really bad.

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1 MR. SIMPSON: Fowler.
2 THE WITNESS: Fowler. Somebody said Fowler in
3 the room. That is her.
4 Q. (BY MS. KLAHN) Fowler, thank you. I knew
5 there was a "W" in there.
6 And today, of course, we're here because the
7 Director issued the Fifth Methodology Order. Can you
8 give me, in a general sense, the areas of knowledge that
9 you are familiar with related to the Fifth Methodology
10 Order?
11 And I believe the methodology order is sitting
12 next to Andrea, so we could ask her to hand that to you,
13 if it would be helpful for you to look at it.
14 A. I am familiar with all parts of the
15 methodology order. The way we have it broke down as
16 staff is that we always have two staff members working
17 on the calculations, but we're both familiar with all
18 parts of the methodology order. We have our specialties
19 and the calculations that we focus on that we're better
20 at, you know, but we are familiar with them.
21 Q. So when you say you have two staff people
22 working on all of the calculations, do you have one
23 person who you work with all the time on
24 methodology-order-related things, or are there multiple
25 people who might form the other part of that two-person

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1 team?
2 Does that make sense?
3 A. Yes. So I should clarify a bit there. We
4 have one person that works on the demand portion of the
5 calculations, and then one person that works on the
6 supply.
7 Q. Okay.
8 A. And then if there is a shortfall, then there's
9 others at the Department who become involved, like
10 Jennifer Sukow and other people in our administration if
11 there's a curtailment. So we bring other people in as
12 we need. But the general calculations described in the
13 order are primarily done by two people.
14 Q. Who are those two people?
15 A. I work on the demand side. Kara Ferguson
16 works on the supply side.
17 Q. And when you said you have two people working
18 on all calculations, are you and Kara then sort of
19 backstopping each other, or do you have another
20 assistant, someone else who's helping you?
21 A. No. Primarily with the calculations, it's --
22 we each do our portion, and we consult each other when
23 we have questions, we're aware of what the other one is
24 doing, and then we also do quality assurance on each
25 other's calculations.

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1 Q. And you've used the word "calculations" a
2 number of times now. Could you give me an example of a
3 calculation on the demand side?
4 A. So, for example, when we're calculating crop
5 water need, we are looking at crop mix, we're
6 calculating the crop mix from the crop data layer, we're
7 looking at -- we're collecting ET data, we're adjusting
8 it for precipitation. All of this is done in Excel
9 files and are calculations that we're building to get to
10 the demand.
11 Q. Okay. So you've worked -- I didn't keep good
12 track when you were telling me about your history at the
13 Department.
14 In which position were you first involved in
15 the Surface Water Coalition delivery call?
16 A. In 2014 I moved to the hydrology section from
17 the well section as a hydrologist. And in 2014, I
18 started working on the Surface Water Coalition.
19 Q. So in 2014, that would have been right before
20 the convening of the technical work groups in 2015; is
21 that right?
22 A. Correct. I started in like August or
23 September, and the technical working group, I think,
24 convened in early 2015 and had several meetings.
25 Q. So can you describe your involvement in the

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1 2015 technical work group?
2 A. I presented on an updated version of
3 calculating ET. We -- at that point, we were using
4 countywide data, and we proposed a new method to use,
5 what we eventually adopted, which was using AgriMet
6 data.
7 So I talked about how that -- what the new
8 method would be or proposed it to the technical working
9 group. I also looked at some -- I think I presented on
10 reasonable in-season demand as well, looking at possible
11 ways to calculate that, some alternatives. We did not
12 implement that. There may have been other topics, but
13 that's what I remember.
14 Q. The 2015 technical work group, was that led by
15 Liz Cresto?
16 A. Yes.
17 Q. And so after the technical work group in 2015
18 developed its recommendations, those were announced, and
19 the Director had those available to him, and he then
20 issued the Fourth Methodology Order.
21 Do you have a sense of the connection between
22 those two events? Like, was the Director waiting for
23 the technical work group recommendations to issue the
24 Fourth Methodology Order, or were they parallel
25 processes?

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1 A. What I remember is the technical working group
2 issued a memo, a technical memo. I think Liz Cresto and
3 I wrote -- I mean, it was under our name to the
4 Director. Yeah, I think it was that he was waiting to
5 review that memo and then proceed with the update as the
6 Fourth -- that would have been the Third Amended
7 Methodology at that point.
8 Q. I think it was the Fourth? No?
9 A. I think that the Third came out in 2015, and
10 then we did a small amendment -- well, a small edit and
11 Four came out in 2016.
12 Q. Oh, okay. And was that a change in acres?
13 A. In the '16 edit?
14 Q. Yeah.
15 A. I don't remember.
16 Q. Okay. Then we fast forward for six years to
17 -- the bad thing about working at home is you have to
18 look out the window and see what people are doing.
19 Sorry about that -- so then we fast forward six years to
20 2022 and the technical work group process.
21 When did staff start working on the technical
22 work group questions, I guess, if you will?
23 A. Could you clarify?
24 Q. Well, my understanding is that -- this is just
25 my understanding, so I'm trying to understand if it's

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1 correct -- my understanding is that staff, IDWR staff
2 started thinking about this technical work group process
3 sometime in August or September of 2022. And then the
4 Director, in October of 2022, announced that there would
5 be such an event at a status conference or something
6 connected to the Surface Water Coalition delivery call
7 matter.
8 And so I'm wondering if -- let me ask it this
9 way: The first time the parties were aware that there
10 was going to be a technical work group was when the
11 Director announced that at the status conference.
12 Was staff aware that there would be a new
13 technical work group before the status conference or did
14 you learn on the same day the rest of us did?
15 A. I think that I knew it was being contemplated
16 by the Director. I wasn't sure if he was going to go
17 that way to have a technical work group.
18 Q. So you didn't start working -- you and Kara
19 didn't start working in August or September to prepare
20 topics or, you know, questions or anything that you were
21 going to work through with the technical work group?
22 A. We review -- we did review and were talking
23 with the Director about the possible need to look at
24 some of the topics, some of the calculations, and that
25 would have been before he notified.

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1 Q. If I can say it this way: The staff was the
2 source of the Director's decision? You said to him,
3 "Hey, we should think about doing this," he went off and
4 thought about it, did his little deliberative process,
5 and made a decision.
6 Is that a fair statement of the train of
7 events?
8 MR. BAXTER: Objection. I think that
9 improperly characterizes the witness's earlier
10 testimony.
11 MS. KLAHN: Well, that's why I asked him if it
12 was a fair statement.
13 Q. (BY MS. KLAHN) Please correct where I
14 misstated.
15 A. Could you read back what you stated?
16 Q. You bet. So if I can say it this way: The
17 staff was the source of the Director's decision to move
18 forward with the technical work group?
19 Essentially, you said to him, "Hey, we should
20 think about this issue, and this issue, and this issue.
21 Maybe we need to start doing a technical process with
22 the parties." He went and thought about it, announced
23 it in October; is that a fair statement?
24 MR. BAXTER: Objection; leading question.
25 Matt, go ahead and answer the question,

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1 though.
2 THE WITNESS: We communicate with the Director
3 about, you know, our reviews of the methodology. What
4 he ultimately decides or how he goes about that, I don't
5 know.
6 Q. (BY MS. KLAHN) So a couple questions ago you
7 said, "We did review and were talking with the Director
8 about the possible need to look at some of the topics,
9 some of the calculations?"
10 A. That is correct.
11 Q. Do you recall that?
12 A. Yep, I do remember that.
13 Q. When were you talking with the Director about
14 the possible need to look at some of the topics or some
15 of the calculations?
16 A. I would guess, just estimate, late summer we
17 were talking about -- thinking about some of this. We
18 need to review some of this, the methods.
19 Q. Now, in terms of initiating the technical work
20 group, do you know -- this is just a do you know
21 question -- do you know if the Department provided
22 notice of the technical work group to entities beyond
23 those who were involved in the Surface Water Coalition
24 delivery call?
25 A. The question again, please?

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1 Q. Do you know if the Department provided notice
2 of the technical work group that was going to be forming
3 to entities beyond those who are involved in the Surface
4 Water Coalition delivery call?
5 A. I don't know.
6 Q. Do you know if the Department considers the
7 technical work group to be a formal part of any process
8 to update the methodology order?
9 A. I don't know.
10 Q. In 2016 you mentioned that there was a small
11 update to the methodology order, which I think we talked
12 possibly was related to the acres.
13 A. I can't remember whether there was a minor
14 update compared to the -- the third amendment had a lot
15 of changes to it. All I remember is that the fourth
16 amendment was minor, and I don't remember what it was
17 that was updated.
18 Q. And was there any technical work group formed
19 before the fourth amendment?
20 A. No.
21 Q. Do you know what the Department hoped to
22 achieve in conducting the technical work group in 2022?
23 A. Yes.
24 Q. What was that?
25 A. My interpretation -- yeah, my interpretation

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1 of what we were trying to achieve -- or the Department
2 or the Director was trying to achieve, was to inform the
3 technical staff of the parties, this is what we're
4 reviewing, these are the things we've looked at, these
5 are our results, and to get feedback from them, the
6 technical staff.
7 Q. So if I can -- tell me if this restatement is
8 correct, so you wanted to share the work you'd been
9 doing internally and get feedback on that work related
10 to the Fourth Method -- any updates to the methodology
11 order; is that right?
12 A. Yeah, I think that's accurate.
13 Q. Do you believe that goal was achieved?
14 A. We did provide the information, and we did get
15 feedback. Yes, I believe it was achieved.
16 MS. KLAHN: Let's look at the December 23rd,
17 2023, Department recommendations related to revisions to
18 the Fourth Amended Methodology Order. And that's going
19 to be Exhibit 11, I think, Andrea.
20 COURT REPORTER: So give me just a second to
21 mark it.
22 MS. KLAHN: You bet.
23 MR. BUDGE: Sarah, are you referring to the
24 one-page summary issued in December of last year?
25 MS. KLAHN: Yeah. It has an unreasonably long

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1 title, so I was circling it.
2 MR. BUDGE: I think that was Exhibit 4 from
3 Jennifer.
4 MS. KLAHN: Oh, I apologize. Okay.
5 If it's not too late, Andrea, you can just
6 pull out Exhibit 4.
7 COURT REPORTER: It's not too late, because I
8 wasn't sure which one you were talking about. I hadn't
9 found it yet, so I'll just give him Exhibit 4.
10 MS. KLAHN: Fair enough. Thank you.
11 THE WITNESS: Okay. I have Exhibit 4.
12 Q. (BY MS. KLAHN) Could you identify Exhibit 4,
13 including it's -- with it's unreasonably long title, for
14 the record?
15 A. It says, "Summary of Recommended Technical
16 Revisions to the 4th Amended Final Order Regarding
17 Methodology for Determining Material Injury to
18 Reasonable in-Season Demand and Reasonable Carryover for
19 the Surface Water Coalition, dated 12-23-22. By: Kara
20 Ferguson, Staff Hydrologist & Matt Anders, Hydrology
21 Section Supervisor."
22 Q. Who was involved in developing these
23 recommendations that are contained in Exhibit 4.
24 A. I think, ultimately, Kara and I wrote the
25 first draft.

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1 Q. Who else provided input?
2 A. Once we write the draft, our process is to
3 hand it to legal counsel and then the Director.
4 Q. Is this Exhibit 4 in this -- is it the same
5 document that you submitted to legal counsel or were
6 there edits made?
7 A. Most likely there were edits made.
8 Q. This may be a place where we want to go to the
9 thumbdrive.
10 Could you identify the information that was
11 considered that had been supplied by the parties in the
12 technical work group process?
13 A. Could you restate that?
14 Q. Yes. Could you identify the information that
15 you considered in developing your draft of Exhibit 4?
16 And I'm saying maybe we want to go to the
17 thumbdrive if there's a compilation of that there. I
18 don't know.
19 A. Your question was different the second time.
20 You --
21 Q. Oh, well, answer the second question.
22 A. Excuse me?
23 Q. Answer the second question.
24 A. Okay. Am I limited to the thumbdrive only?
25 Q. No, you're not.

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1 A. Some of the documents that I provided
2 originally that are on the webpage -- I mean, the topics
3 that we covered are in those folders there, and then I
4 provided additional topics.
5 So I'm talking about baseline year,
6 irrigated -- not irrigated acres. I'm sorry, what is
7 it -- natural -- the forecasting the flow, reasonable
8 carryover, and topics like that. I can't remember. I
9 don't have the list. Would you like me to bring it up?
10 Q. Yeah, I'm actually interested in what
11 documents you received from the parties that contributed
12 to the recommendations that are contained in Exhibit 4?
13 A. And that is why I asked you to restate -- or I
14 said the question was different. The first time you
15 asked what came from the parties, and the second time
16 you asked what I provided. So just to clarify, what
17 came from the parties that we considered?
18 Q. Yes.
19 A. That would be in the baseline year and in the
20 project efficiency folders, for the most part. There
21 may be something else, but that was primarily -- Sophia
22 was -- her comments focused on the baseline year, and I
23 think forecast supply, I think. Greg's mostly focused
24 on project efficiency.
25 Q. And when you say that the documents would be

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1 in the folders that are titled "Baseline Year" and
2 "Project Efficiency," are you talking about the folders
3 on the website associated with the May 5th disclosure of
4 the materials you're going to rely on, or are you
5 talking about the thumbdrive, or both?
6 A. I'm talking both.
7 Q. Did you talk to the Director about the
8 recommendations before you wrote them up?
9 MR. BAXTER: Objection. To the extent, Matt,
10 that your answer to the question would require you to
11 disclose information regarding the Director's
12 deliberative process on legal or policy considerations,
13 you're instructed not to answer the question.
14 MS. KLAHN: Can I ask for clarification,
15 Garrick?
16 MR. BAXTER: Sure, Sarah.
17 MS. KLAHN: How is a question about whether he
18 had a conversation with the Director about the
19 recommendations before he wrote them up part of the
20 Director's deliberative process?
21 MR. BAXTER: I think it gets to -- you know,
22 what pieces did the Director -- you know, whether there
23 was that conversation goes to the Director's
24 deliberative process itself as to what was communicated
25 with the Director.

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1 MS. KLAHN: So is your view that any
2 information that was communicated with the Director, we
3 can't know that that information was communicated to the
4 Director?
5 MR. BAXTER: Well, you have a publicly
6 available record of what was provided here to the
7 Director. As Matt indicated, the Director reviewed this
8 letter. It has identified on it -- and when I say "that
9 letter," it's the letter of 12-23-2022 with the
10 unreasonably long title, as you've identified. So you
11 have documentation of what was considered.
12 MS. KLAHN: Actually, I don't think we do. If
13 there were other recommendations that didn't make it
14 into the draft, we certainly wouldn't know that. We
15 just know what came out of the internal process, I'll
16 call it.
17 MR. BAXTER: Well, not to be argumentative,
18 Sarah, but I think if you look through the PowerPoint
19 presentations, there are topics within that that you can
20 see for yourself there was presentations on. And,
21 ultimately, did not change. So as to your suggestion
22 that you can't see as to what was considered and maybe
23 not, ultimately, included, I think that's an incorrect
24 assumption on your part.
25 Q. (BY MS. KLAHN) How was Mat Weaver involved in

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1 the technical work group process?
2 A. He did not attend any meetings in person. I
3 believe that I saw him joining the meetings remotely. I
4 don't know if he attended all of them.
5 Q. Did he have any role in the exhibit -- in the
6 final version of Exhibit 4?
7 A. I believe he saw it. I don't know -- he saw
8 the draft we submitted and saw this version. I don't
9 know if he edited it.
10 Q. Let's look at the substance of Exhibit 4.
11 So the first paragraph -- do you need to take
12 a look at this, or have you refreshed yourself enough
13 about it that you feel comfortable to talk about it?
14 A. I think we can talk about it.
15 Q. Okay. So I want to ask you about -- will you
16 look at the second sentence of the second paragraph. It
17 says, "The meetings were attended by interested members
18 of the public."
19 Were there -- are you aware of people who
20 attended who weren't associated with the parties to the
21 Surface Water Coalition delivery call?
22 A. Yes, there were people in attendance, either
23 remotely or in person.
24 Q. Do you remember any of their affiliations,
25 like who were they with?

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1 A. The one I remember is -- I don't think they
2 attended all the meetings, but there were some Idaho
3 Power staff that did either remotely -- I can't remember
4 if -- they might have been in person one time.
5 Q. Anyone else?
6 A. Everyone else that attended was either -- that
7 I remember was either an attorney, a consultant, or
8 worked for one of the parties in some way, like a canal
9 manager. I think a couple canal managers were on the
10 call at different times, but I don't really remember
11 anybody else. I have the lists. We had a sign-in, and
12 we kept track, but I don't remember.
13 Q. Oh, and you kept track of the people on Zoom,
14 too?
15 A. Yeah. We have an attendance list for all of
16 those.
17 Q. Do you know if the materials from the
18 technical work group, including things like those lists,
19 are posted somewhere on the Agency's website?
20 A. Posted? I don't know if they're posted. I
21 don't think we have -- I can't remember. I'd have to
22 look to see if we have it. We have many technical
23 working groups. What I don't know is do we have a
24 Surface Water Coalition technical working group. I
25 would have to check on that.

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1 Q. I'm not going to brag about my Google skills
2 or anything because they're not very good, but I've
3 looked repeatedly for technical work group materials
4 related to the Surface Water Coalition delivery call,
5 and I don't find them. Although, I do find other
6 technical work group materials from other basins. So I
7 don't know, it might be a good thing to post, but that's
8 not why we're here today. I was just wondering.
9 So then if we go to the middle of the page,
10 "Based on the information presented in the meetings and
11 distributed to the technical work group, IDWR staff have
12 the following preliminary technical recommendations."
13 So I see three bullet points there. Can you
14 talk me through what the three preliminary technical
15 recommendations were?
16 A. So the first bullet is talking about the
17 baseline year and updating that. Our recommendation was
18 to update that to the 2018 irrigation season.
19 The second bullet is talking about reasonable
20 carryover and the need to update -- or our
21 recommendation to update that to use the -- in the
22 calculation to use 2018 baseline year.
23 And then the third bullet is to update the way
24 we calculate project efficiency. And we had previously
25 used a rolling average of 8 years, and it was to update

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1 it to 15 years.
2 Q. And we'll get in and talk about each of those
3 individually, but I wanted to just at least talk through
4 that. And then what -- the next paragraph, I believe,
5 covers what you didn't recommend.
6 Could you talk about that, please?
7 A. We presented, but we did not recommend using
8 near real time METRIC to establish ET and, ultimately,
9 crop water need. And then we also did not make a
10 recommendation on using the transient for the model
11 simulation for curtailment dates.
12 Q. And I think there's another one in there you
13 might have skipped. Updating the April and July
14 regressions --
15 A. Oh, I'm sorry. You are correct. That was the
16 second half of that sentence. Oh, I guess it's one long
17 sentence. I missed the second clause, you are correct.
18 We did not update the natural flow supply regressions as
19 well. Thank you.
20 Q. So the last sentence says, "IDWR will continue
21 to evaluate the integration of these and other
22 techniques into the methodology."
23 So was the thought at this point, from a
24 process perspective, that this is what staff was
25 recommending, you gave the parties three weeks to

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1 respond, and several did, and we'll talk about those
2 comments, but that the Department's -- I mean, at this
3 point, the modifications were limited to the three
4 bullet points that you were recommending?
5 A. I think that was our preliminary
6 recommendation. I don't think at that point we had --
7 at the time of the writing of this -- made the decision,
8 the final decision about what -- you know, or I should
9 say, not "we," the Director had not made the final
10 decision about what was going to be amended or not
11 amended.
12 MS. KLAHN: So those of you that actually
13 participated in the entirety of Jennifer Sukow's
14 deposition, were the Spronk Water Engineers' January 16,
15 2023, comments marked, does anyone know?
16 MR. BUDGE: They were not.
17 MS. KLAHN: So, Andrea, if you could take a
18 look for, it's about ten pages -- sorry, six or seven
19 pages long, and it has at the top "SWE, Spronk Water
20 Engineers," and it has a January 16, 2023, date.
21 (Exhibit 11 marked.)
22 Q. (BY MS. KLAHN) Have you been handed
23 Exhibit 11, Mr. Anders?
24 A. I do have a paper copy.
25 Q. Do you recognize this document?

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1 A. I do.
2 Q. Could you identify it, please?
3 A. It was submitted by Greg Sullivan from Spronk
4 Water Engineers to Kara Ferguson, staff hydrologist, and
5 Matt Anders, hydrology section supervisor, at the Idaho
6 Department of Water Resources. And it's from Heidi
7 Netter and Greg Sullivan at Spronk Water Engineers,
8 dated January 16th, 2023.
9 Q. And these are the comments for the Coalition
10 of Cities and City of Pocatello on the technical
11 revisions, potential technical revisions to the Fourth
12 Amended Final Order; is that right?
13 A. Yes.
14 Q. So the -- and I believe this summarizes the
15 materials that Spronk Water Engineers previously
16 submitted during the course of the meetings, but for now
17 I'm going to focus just on this document, Exhibit 11.
18 Let's turn over to page 2. The first paragraph there at
19 the top of page 2 relates to "Updated Baseline Year,"
20 and -- let's see here.
21 So there's a statistic there that the Surface
22 Water Coalition member diversions -- in the middle of
23 the paragraph, that first full paragraph on page 2 --
24 Surface Water Coalition member diversions during 2006,
25 2008, 2012 averaged a combined 3,194,722 acre-feet,

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1 which was 99.8 percent of the new 2001 to 2021 average.
2 Do you see that?
3 A. I do see that.
4 Q. Do you agree with that characterization?
5 A. It looks accurate.
6 Q. From the perspective of the way the
7 methodology order operates, do you know how a new
8 baseline year reflecting higher total diversions impacts
9 projected shortages?
10 A. Yes.
11 Q. How is it impacted?
12 A. Baseline year is used to predict what the
13 demand or what the reasonable in-season demand will be
14 for the portions of the season that we don't know yet,
15 that haven't occurred. So in April, it is -- the
16 baseline year is what we use for the demand portion of
17 the calculation.
18 So in April -- and then in July, it -- we use
19 the baseline year for -- we have the data for April
20 through June. We use only the portion of the baseline
21 year in July through the end of the year to predict the
22 rest of the year. And at the time of need, again, if
23 the time of need happens in August, then from that point
24 on, we use the baseline year.
25 So the baseline year, any changes in that,

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1 either higher or lower, will directly affect, especially
2 in April, the shortfall. Less so as you progress
3 through the season because it's a smaller portion of the
4 calculation.
5 Q. And it will affect the shortfall how, if it's
6 a higher baseline year average?
7 A. Our calculation for shortfall is supply minus
8 demand. So in that simple calculation there, if the
9 demand gets higher, if there is a shortfall, and you
10 increase the demand of the baseline year, it increases
11 the shortfall. And if it decreases, if we decrease the
12 baseline year, it will decrease the shortfall when there
13 is a shortfall in April and the rest of the year.
14 Q. So the diversions, using the 2001 to 2021
15 diversions, the average -- sorry, 2001 to 2021 average
16 diversions for Surface Water Coalitions have gone up; is
17 that true?
18 A. Yes, the average has increased since we looked
19 at it in 2015.
20 Q. Did you do any evaluation to find out whether
21 that was -- well, let me ask you, first, sort of a
22 statistics question. It might not be statistics.
23 But if before you were averaging 2006, 2008,
24 and 2012, and then you went to averaging 20 years, did
25 you do any analysis to see if comparing those two was a

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1 valid comparison?
2 In other words, that you were comparing apples
3 to apples?
4 A. I didn't understand that question.
5 Q. Well, I mean, let me give you a hypothetical.
6 If the baseline year for diversions had been 2013, which
7 was a very dry year, not very many diversions, okay? If
8 that was your baseline year, and then you went and took
9 an average of 20 years, you said, oh, look, diversions
10 went up, we have to use the new average, I'm asking if
11 it's truly a fair comparison to say what you were
12 looking at before doesn't represent reality anymore?
13 You picked a different way of looking at
14 reality, so how do you know it really is the right way
15 to characterize the baseline year?
16 MR. BAXTER: I'm going to object. I think
17 there was more than one question in there, compound
18 question. Is there a singular question for the witness?
19 But to the extent you can answer that question
20 or you understand the question, you can answer it, Matt.
21 THE WITNESS: I'm still trying to understand
22 the question.
23 Q. (BY MS. KLAHN) How did you know 2006, 2008,
24 and 2012 was the right combination of years for the
25 baseline year prior to your evaluations in 2022?

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1 A. How did we know it was the correct year? Is
2 that what you said, "correct year"?
3 Q. Yeah, the correct baseline year.
4 A. So the methodology lays out the criteria that
5 we use to select a baseline year. When we did it in
6 2014 and '15, there were no years that met the criteria
7 that we had laid out. And I think that had happened
8 when they did the Second Amended Methodology in 2010,
9 because I think they were using '06, '08 at that time.
10 So we followed that -- since we didn't have a
11 baseline year, we followed that methodology of using a
12 combination. As far as "correct," that word throws me a
13 little bit. I don't know that we ever know what's
14 correct. I don't know what that would be, but we did
15 select '6, '8, '12. The diversions at that point were
16 above average, which is what we wanted, and that was the
17 combination we selected.
18 Q. So the way you got to a higher baseline year
19 was by averaging 20 years of diversions, and it's
20 practically the same, 99.8 percent of the '06, '08, and
21 '12 is the 2001 to 2021 average. Do you see what I'm
22 saying?
23 Like, there's a very small difference between
24 those. So I'm just curious, from a technical
25 perspective, why -- I mean, if it was -- what if it was

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1 99 -- what if the '06-'08 -- well, let me stop there. I
2 really am curious about this. I'm not trying to be
3 difficult, but I'm having a hard time formulating a
4 question.
5 Let me withdraw all that and say it a
6 different way. If the 2001 to 2021 average was
7 significantly higher than '06, '08, and '12, you'd say,
8 "Oh, whoa, look, this is" -- "we're meeting the baseline
9 year criteria." But when there's only .2 percent
10 difference, did you have any questions about whether
11 this really was a valid change?
12 A. I think we have to look at the plain language
13 of the methodology that says it has to be above average.
14 Q. So the Spronk comments go on to say that the
15 average diversions are no longer -- the '06, '08, and
16 '12 average diversions are no longer above average
17 because diversions by several of the surface water
18 coalitions have increased since the methodology was
19 updated in 2016.
20 Did you do any analysis to find out why the
21 diversions had gone up?
22 A. What I see when I look at the data -- let's
23 start with crop water need -- I'm sorry, not crop water
24 need, crop mix. If we look at the crop mix data -- I'll
25 just define crop mix. That is the portion of the

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1 individual crops that we see within the Surface Water
2 Coalition service areas. We are -- that's part of our
3 calculation, so we have the data.
4 What we're seeing over time is a shift to
5 crop -- more crops, a larger percentage of alfalfa,
6 corn, and maybe potatoes a little bit. And we see that
7 shift over time. So there's more intensive crops being
8 grown, so that increases the crop water need, the need
9 for water.
10 In the comments from one of the -- that we got
11 for the technical working group, they provided more
12 information about what we can't see from the crop mix,
13 like additional cuttings of alfalfa, which increases the
14 crops, so -- and different harvesting methods, and
15 things like that.
16 So what we see is a shift to more intensive
17 water use. So, for me, I think the increase in the
18 diversions is related to that increase in crop water
19 need. I think it's accurate that -- what Spronk is
20 saying in terms of the diversions are increasing, just
21 the raw diversions.
22 Q. And you mentioned comments from -- I think it
23 was the Surface Water Coalition comments, actually, that
24 mentioned changes in harvesting and crop mix and that
25 kind of stuff that could support the reasons for higher

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1 diversions.
2 Are there other things other than the Surface
3 Water Coalition comments and your looking at the crop
4 mix that you started out talking about that
5 contributed -- or that you did as any sort of an
6 evaluation related to the increase in diversions?
7 A. I think that was it.
8 Q. If the -- so let me ask you how you interpret
9 the -- as the person who does the demand calculations,
10 the baseline year rubric, if I can call it that, in the
11 methodology order.
12 What happened in the Fifth Methodology Order
13 was you switched from 2006, 2008, 2012 because that
14 average was only 99.8 percent of the 2001 to 2021
15 average. If you had found that the '06, '08, and '12
16 average was 99.9 percent of the 2001 to 2021 average,
17 would you still have advocated for moving to the '01 to
18 '21 average?
19 A. I think that's still below average. I don't
20 think it's above average.
21 Q. So is there any amount of increased diversions
22 where you'd go, oh, we don't need to change this, it's
23 so small, or if it's more, it's more, and that's what
24 you go with?
25 A. I think that's what the methodology states.

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1 It has to be above average.
2 Q. So the next comment in the Spronk letter is
3 related to project efficiency. And the comment starts
4 by noting that the computed project efficiency has
5 decreased or remained flat since 2016, and Spronk's
6 comment is: "This is surprising given the continued
7 sprinkler conversions and general advances in irrigation
8 practices and technology that have occurred in the
9 irrigation industry over the past 20 years."
10 Do you agree with that comment?
11 A. Partially.
12 Q. What part?
13 A. I agree that there are advances in irrigation
14 practices and technology and that those should improve
15 project efficiency. I don't think that's the whole
16 story to look at. And when I talk about, you know,
17 there are increases in the crop water need also
18 occurring. So they're both happening at the same time.
19 Q. Can you talk about why an increase in crop
20 water need would lead to a reduction in efficiency -- in
21 the project efficiency? Sorry.
22 A. So we calculate project efficiency as the crop
23 water need, which is divided by the diversions. If the
24 diversions are increasing faster than the crop water
25 need, then the project efficiency is going to go down.

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1 So that's what's happening. The crop water need is
2 going up, we see that going up, but we see the
3 diversions going up at a faster rate. So that's
4 decreasing the project efficiency.
5 Q. With that relationship, the more the Surface
6 Water Coalition diverts, the higher the baseline year
7 will trend in the future, would you agree?
8 A. The baseline year -- let's say we selected
9 2008, even though the diversions go up, if they continue
10 to go up, that doesn't necessarily mean that we're going
11 to increase the baseline year.
12 Q. Why not?
13 A. If it's above average already, and it meets
14 the criteria that we have in the -- and by definition,
15 if it meets the criteria that we have, it may not have
16 to be adjusted. It might be possible to say -- I don't
17 know what's going to happen, but it's possible that it
18 could just stay at 2018 while -- if the diversions
19 continue to increase.
20 It's not -- the way you framed your question,
21 maybe I misunderstood, but it seemed like you were
22 saying, if diversions go up, crop -- the baseline year
23 has to go up, and I don't think that's accurate. It
24 just has to meet the criteria.
25 Q. But if the criteria is 2001 to 2021, if that's

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1 the average you're looking at, and the diversions
2 increase significantly, doesn't the average eventually
3 go up?
4 A. Oh, yeah, I agree. And it may get to the
5 point --
6 Q. And then the baseline year goes up. The
7 baseline year changes.
8 A. It may have to, yes, possibly. I agree with
9 that, yeah.
10 Q. So would you agree that for reasonable -- for
11 the reasonable in-season demand calculation, assuming
12 the same crop water need, the more the Surface Water
13 Coalition diverts, the lower the project efficiency will
14 be?
15 A. So if the trend continues that project
16 efficiency goes down, yes, over time, to get reasonable
17 in-season demand, we divide crop water need by the
18 project efficiency. So if the project efficiency is
19 going down, the reasonable in-season demand will be
20 going up.
21 Did that answer your question?
22 Q. It does.
23 A. Okay.
24 Q. As a technical person responsible for the
25 demand calculations in the methodology order, does that

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1 give you any concern?
2 A. If that's truly what's happening, and it's not
3 something that we are making an error, like something
4 like we're making an error in our calculations, and we
5 have the relationship wrong, or there's something wrong
6 with the calculations, if that's truly what's happening,
7 I don't think -- you asked if it was a concern to me.
8 Not if that's truly what's happening.
9 There's no threshold -- when you said
10 "concern," there's no threshold that we're like, it
11 can't go above this, or it has to be here. So I
12 don't -- I guess there's -- yeah, I'll leave it at that.
13 Q. So the policy considerations related to the
14 senior surface water users being able to be less and
15 less efficient, from a project efficiency standpoint,
16 and be rewarded with a higher reasonable in-season
17 demand, those policy considerations aren't part of your
18 job; is that right?
19 A. Yeah, I think that is correct.
20 Q. In your time working on the methodology
21 orders, have you ever had a conversation with the
22 Director about these kinds of policy issues where he
23 challenged any of the technical conclusions on the basis
24 of policy?
25 MR. BAXTER: I'm going to object to the

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1 question.
2 Matt, to the extent your answer to the
3 question would require you to disclose information
4 regarding the Director's deliberative process on legal
5 and policy considerations, you're instructed not to
6 answer the question.
7 MS. KLAHN: Let me clarify that, Garrick. So
8 my question was in his time working on any of the
9 methodology orders.
10 Q. (BY MS. KLAHN) And I'll refine that to say,
11 in your time working on the Third or Fourth Methodology
12 Orders, have you ever had conversations with the
13 Director about issues where he challenged any of the
14 technical conclusions on the basis of policy?
15 MR. BAXTER: I'm going to let you go ahead and
16 answer the question, Matt.
17 THE WITNESS: The Director, when we -- I'll
18 explain my experience. When we talk to the Director
19 about our calculations or review, I -- he often has a
20 lot of questions and a lot of conversation with us about
21 what it means and how we do things.
22 I don't ever really know what his motivation
23 for those questions are. I don't know if it's policy,
24 or he has a background as an engineer, he understands a
25 lot of this really, really well, surprisingly well, at

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1 times. So I don't know what his motivations are, why
2 he's asking his questions or challenging -- to use your
3 terminology -- challenging us on it.
4 Q. (BY MS. KLAHN) Thank you. As the person who
5 calculates the demand piece of the methodology, is there
6 any part of your calculations which you would call a
7 reasonableness check?
8 Do you know what I mean by that?
9 MR. BAXTER: I'm going to object. I think it
10 asks for a legal conclusion as to "reasonableness."
11 But go ahead and answer the question, Matt.
12 THE WITNESS: I think there's two pieces of
13 this. When I think of -- my interpretation of
14 reasonableness, there's a legal portion, and there's a
15 technical portion. We always are reviewing the data
16 that come in for what I would call reasonableness. Is
17 that a reasonable number? We're doing QA/QC checks.
18 Any calculation we make, does that make sense.
19 And that's -- so on that side, we are
20 reviewing the data for that. I am not a legal expert.
21 I cannot -- it's out of my expertise to speak to the
22 legal side of reasonableness.
23 Q. (BY MS. KLAHN) Thank you. Are you familiar
24 with the project efficiencies of the Surface Water
25 Coalition in April and October?

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1 A. I'm familiar with them, yes.
2 Q. Do you consider those low project
3 efficiencies, in the April and October time frame, to be
4 reasonable from a technical perspective?
5 A. Those portions of the irrigation season are --
6 those efficiencies are difficult to understand at times.
7 There's a certain amount of water -- if they're running
8 the canals, there's a certain amount of water that they
9 need, and, you know, it's more than the crop water, you
10 know, the plants may need at that portion or they may
11 get rain. There's different reasons.
12 They are often very -- they can be really high
13 or really low. From a reasonableness comparison to past
14 years, they are reasonable. They're not outside the
15 normal bounds that we see, from a technical point of
16 view, if that answers your question.
17 Q. So your universe of comparison is other
18 project efficiencies associated with the same canal
19 companies when you make that statement; is that right?
20 A. Yeah. I think every system and every area has
21 a unique set of circumstances that drive project
22 efficiency. You know, the canal setup, the soils, the
23 geology, there's -- it's all unique by system. Even
24 within a system, it changes.
25 Q. Sure. But the system can be run efficiently

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1 or it can be run inefficiently, given those baseline
2 facts that you described; would you agree with that?
3 A. What I see in the data is that it -- the
4 companies -- the Surface Water Coalition normally gets
5 more efficient in June, July, and August, and less
6 efficient on the shoulder seasons. I -- I'm going to
7 stop there.
8 Q. To the extent the less efficient shoulder
9 season efficiencies are driving the shortage
10 calculations, is that something that you have considered
11 from a technical perspective that needs to be addressed?
12 A. We have noticed that if you get a -- let's use
13 September -- if you get a really hot September where
14 they need a lot of water, there's a high crop water
15 need -- oftentimes, September has a lower project
16 efficiency -- there will be a lot of reasonable
17 in-season demand. So, yes, there can be some
18 inconsistencies there from year to year.
19 Q. And taking a step back, in your roles at the
20 Department of Water Resources, have you developed an
21 understanding of what, sort of, an industry standard
22 from an irrigation perspective -- what an industry
23 standard for a project efficiency -- what that range
24 looks like?
25 A. No.

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1 Q. And have you done any investigations, yourself
2 or your staff, of the seven canal companies that make up
3 the Surface Water Coalition and how their systems
4 operate?
5 A. No.
6 Q. Do you think those things could inform your
7 evaluation of the reasonableness of the efficiency
8 numbers?
9 MR. BAXTER: I'm going to object. Again,
10 asking the witness to draw a legal conclusion. As he
11 previously testified, he's not an expert in the legal
12 area as to the term of efficiencies -- or reasonableness
13 in which you're using it at this time.
14 MS. KLAHN: I'm not using it in the sense of
15 the legal area. As Mr. Anders appropriately divided it
16 up, there's a technical reasonableness and a legal
17 reasonableness. And this question of whether those
18 issues related to industry standards of irrigation or
19 exactly how the Surface Water Coalition operates, my
20 question was: Do you think those things would inform
21 evaluation of the reasonableness of the efficiency
22 numbers. Didn't ask him for a legal conclusion.
23 MR. BAXTER: I'm going to object as to the
24 foundation. As Mr. Anders testified at the beginning,
25 he does not have the experience or basis related to the

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1 technical operations of irrigation systems.
2 But, Matt, to the extent you understand the
3 question, go ahead and answer the question.
4 THE WITNESS: I think the more we know about
5 the system, yes, it would inform us about how it's
6 operated and the project efficiencies that we see.
7 MS. KLAHN: It is almost 11:00 o'clock. We've
8 been going at this for two hours. I propose we take a
9 ten-minute break.
10 How does that sound?
11 THE WITNESS: Of course. Yeah.
12 (Break taken.)
13 (Exhibit 12 marked.)
14 Q. (BY MS. KLAHN) Before we get back into the
15 document we were discussing, Exhibit 11, during the
16 break, we got a screenshot of the directories of the
17 thumbdrive that you brought to the deposition; is that
18 correct?
19 A. Correct.
20 Q. And that's been marked as Exhibit 12; is that
21 right?
22 A. Correct.
23 MS. KLAHN: And just to be clear on the
24 record, then, Garrick, some provision will be made to
25 make those files available to the parties?

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1 MR. BAXTER: Yes.
2 MS. KLAHN: Today, possibly?
3 MR. BAXTER: I believe that's possible. I
4 think IDWR was having some trouble with their FTP site,
5 but let me confirm with Sarah. I believe she's trying
6 to find a way to get that information out and
7 accessible.
8 MS. KLAHN: Excellent. Thank you.
9 Q. (BY MS. KLAHN) Returning to finish up
10 Exhibit 11, when we broke, we were talking about -- so
11 the last paragraph, next to the last paragraph on
12 page 2, refers to the -- a paragraph from it says, "The
13 2010 Fourth Amended Methodology Order," but I think that
14 might be just the Fourth Amended Methodology Order.
15 And it quotes from paragraph 15 that "during
16 periods of drought when groundwater users are subject to
17 curtailment, members of the Surface Water Coalition
18 should exercise reasonable efficiencies to promote the
19 optimum utilization of the State's water resources?"
20 Do you see that?
21 A. Yes.
22 Q. Have you -- are you familiar with that?
23 A. Yes, but I believe that it's either the 2010
24 Second Amended Methodology Order or the 2016 Fourth
25 Amended Methodology Order.

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1 Q. Yeah, I agree. I don't think the way it's
2 stated at the beginning of the sentence here is correct.
3 I think it's supposed to be the 2016 Fourth Amended
4 Methodology Order.
5 A. Okay.
6 Q. Is there any effort by the Department to
7 ensure that the Surface Water Coalition "exercises
8 reasonable efficiency during times of drought when
9 groundwater users are subject to curtailment"?
10 MR. BAXTER: Objection. I think that asks the
11 deponent to make conclusions as to legal issues,
12 especially efficiencies, reasonable efficiencies.
13 Q. (BY MS. KLAHN) I was really asking,
14 generally: Does the Department do any investigation to
15 see whether the Surface Water Coalition is reasonably
16 efficient during drought?
17 MR. BAXTER: Again, I think it goes to that
18 scope of the issue of reasonableness.
19 But, Matt, to the extent that you can answer
20 the question, go ahead and answer the question.
21 THE WITNESS: I don't know of anything that we
22 do that is investigating efficiencies for the Surface
23 Water Coalition.
24 Q. (BY MS. KLAHN) So under the -- of the
25 discussion that we -- the conversation that we've had so

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1 far on page 2, underneath the heading "Updated Baseline
2 Year," let me ask you: At the time you received these
3 in January of 2023, at the time you received these
4 comments, did you review them?
5 A. Yeah, I reviewed them many times.
6 Q. And do you think that the comments that Spronk
7 Water Engineers provided under the "Updated Baseline
8 Year" heading were valid, from a technical perspective,
9 in your view?
10 A. I took the data that we received that's
11 referenced in the later portions here, I did review the
12 data. I think that it was an accurate -- the graphs
13 that I saw and the data appeared accurate.
14 You know, our data are changing from time to
15 time, so they didn't match the data set that I used, but
16 the data seemed to be accurate. I -- I don't think that
17 I agree -- or, no, I did not agree with the way some of
18 the conclusions and the characterizations, the way the
19 data were characterized.
20 For example, the averaging the project
21 efficiency for the whole year, I think that tells us
22 something about the larger picture, but it doesn't -- we
23 calculate by monthly, and we do have the monthly data.
24 It tells more information to do that.
25 Q. So from a technical perspective, you didn't

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1 agree with that comment that Spronk had?
2 A. I think that I agreed with the -- well, let's
3 back up. Which comment am I agreeing with?
4 Q. Well, you picked out the -- what you
5 specifically said was the concept of moving from monthly
6 efficiencies to annual efficiency you didn't agree with.
7 A. Yeah, I'm not sure about the -- or at least
8 when I got it, I wasn't sure about the impact that had
9 on the analysis. So I looked at it, as well, on a
10 monthly time frame. But I agree that if you look at it
11 from an average, the project efficiency over the whole
12 year, it is decreasing. I do agree with that statement
13 that was made in there.
14 Q. So understanding that there's silos of
15 activity -- or silos of responsibility at the
16 Department, and that you are in the technical silo and
17 the Director's in the policy and legal silo, do these
18 kinds of technical issues ever get communicated to the
19 Director?
20 Understanding you're not having a policy
21 conversation with them. You made that clear a couple
22 questions ago, but is this the kind of stuff that you
23 would say, "Hey, maybe we should think about this," or
24 does that just not happen, it stays with you, you make
25 the decision, that's all it is.

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1 A. We communicate to the Director things such as
2 this. Any concerns we have or even things that we're
3 thinking about, there is a two-way conversation that,
4 you know, we say this, and then we get input back from
5 him.
6 Q. Okay. So I think you jumped to the last part
7 of the comments, which were the updated project
8 efficiencies, which is the bottom of 2 and the top of 3.
9 And the comment there is proposing to change the
10 computation of the monthly average project efficiency
11 value from the average from the most recent 8 years to
12 the average of the most recent 15 years. And the
13 comment is that Spronk believes this may lessen the
14 effect of recent reductions in project efficiency for
15 certain Surface Water Coalition members.
16 I guess the first question is: Can you
17 explain why you decided to go from an 8-year average to
18 a 15-year average?
19 A. Since the Fourth -- well, the Third
20 Methodology, we have been using the 8-year average. And
21 that is a calculation that I do. And I wasn't clear why
22 we were doing it. I couldn't justify it, so I -- that's
23 why we took it to the technical working group and why we
24 reviewed it internally. Why are we doing this? Do we
25 know why we're doing this? And the answer was we were

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1 unclear.
2 I think because we -- in the Third Methodology
3 we used an 8-year average, and when I started doing the
4 calculations, I just continued with that. So it was
5 just a matter of we're not sure why; is there a better
6 way. Something that we can explain to people why we're
7 doing it.
8 Q. But why not a 9-year average or an 18-year
9 average or a 22-year average? Like, what was magic
10 about 15, from a technical perspective?
11 A. There's nothing magic about 15. I think when
12 we do averages, we often think of kind of round numbers,
13 5, 10, 15. When you do an 8-year average, at least in
14 my mind, when I see that, I'm like, why are we doing 8?
15 There must be a reason that we're doing 8. But I don't
16 have a reason. So if you get off a rounded year, it
17 seems like you need to have a reason for that.
18 Q. Okay.
19 A. And I think we did debate shorter at the
20 technical working group, going to 5, 10, or 15. We
21 talked about 20. We really don't have enough data for
22 20 to really see the implication of that.
23 Q. So the remainder of this, I believe, is the
24 monthly project efficiency -- well, not the remainder of
25 it. If you flip to the last one, two pages of this,

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1 there are some graphs that Spronk Water Engineers put
2 together, and I believe they compare annual project
3 efficiencies, and then plot on the second one adjusted
4 diversions, the third one crop water needs, and then
5 look at annual versus monthly project efficiencies.
6 This information, I believe, was provided during the
7 time of the technical work group, I think, on
8 December 21st.
9 A. Uh-huh.
10 Q. Did you consider any of this -- any of these
11 graphs in developing your recommendations about what
12 should be changed in the Fifth Methodology Order?
13 A. The recommendations that we issued on
14 December 23rd?
15 Q. Yes. Yes.
16 A. We -- at that point, we had -- or I had only
17 had a limited amount of time to review. I hadn't
18 done -- at the time we issued that letter, I hadn't done
19 a full review of this yet.
20 Q. So then it was provided to you again in
21 January.
22 Were you able to do a full review in January?
23 A. Yeah, I worked on it after we had more time.
24 Q. Okay. And if we take a look at the first set
25 of graphs, which is titled, "Annual Project Efficiency

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1 2001 to 2021" --
2 A. Yep.
3 Q. -- "Excluding Years With Demand Shortfall,"
4 when you say you looked at these, did you like check
5 them to see if they were right?
6 A. I checked them to see if I could re-create
7 something close to this, which I was, with a different
8 data set. I didn't use the data set he sent us. I used
9 our current data set.
10 Q. And the declining efficiencies over time for
11 North Side Canal Company, for example, just to pick one
12 out, did that -- was that something you were aware of?
13 A. I think just generally. Not in the detail
14 that he's doing it here. When I say "he," I assume this
15 is Greg doing this.
16 Q. I think it was Greg. Even though I think
17 Heidi pulled it all together and sent it, I believe he
18 did this initial analysis.
19 And then if you turn to the next set of
20 graphs, "Annual Project Efficiency Plot Against Annual
21 Adjusted Diversions," did you draw any conclusions from
22 taking a look at this?
23 A. For some of these members, it shows that as
24 diversion is going up, annual project efficiency is
25 going down, at least a couple of them, but it looks like

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1 Twin Falls Canal Company is the exception here?
2 Q. Let's turn to the next page, the annual
3 project efficiency versus annual crop water need.
4 When you looked at this, what conclusions did
5 you draw?
6 A. As -- for all the companies, based on the
7 trend line that he gives, annual project efficiency is
8 increasing with annual crop water need. Yeah.
9 Q. And then if we go to the last page where we
10 have the graphs plotted, "Annual Project Efficiency
11 versus Monthly Project Efficiencies," I think this is
12 where my question came from related to the low project
13 efficiencies on the shoulder months.
14 When you took a look at this, what conclusions
15 did you draw?
16 A. I think that the -- often in April the project
17 efficiency is very high like for a couple of the
18 companies, Milner, A&B, so it seems like the trend is
19 more, you know, project efficiency. It's kind of around
20 the annual average early in the season, then it goes
21 above for the main summer portion of the irrigation
22 season, but it drops off significantly for a lot of
23 these companies late in the year.
24 And then the other two lines are just the --
25 oh, I see what he did. The annual average, and then

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1 annual average plus one standard deviation. So it's
2 just a comparison. If you average it, that's what it
3 would look like.
4 Q. Do any of these graphical presentations of
5 data suggest any modifications from a technical
6 perspective to the demand calculations that are in the
7 methodology order?
8 A. I think he suggested in the text here that we
9 should look at a seasonal project efficiency. I did
10 some testing on what I thought the possible ways that we
11 could approach that in an alternate data set. And I
12 looked at just averaging, you know, April and May or
13 averaging September and October.
14 For the most part, what I found was that
15 increases the demand shortfall if you do something like
16 averaging so there would have to be an alternate method.
17 I didn't come up with anything else, but it would have
18 to be some sort of -- rather than manipulation of the
19 data or averaging or something like that, setting some
20 kind of threshold or something. But I didn't pursue
21 that any farther.
22 Q. All right. Let's turn to the Fifth
23 Methodology Order, which I believe was marked during
24 Jennifer Sukow's deposition, if somebody could provide
25 that to Mr. Anders.

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1 MR. BAXTER: Was that Exhibit 2?
2 COURT REPORTER: He's got the exhibit book for
3 the previous exhibits.
4 MR. BAXTER: It will be in here under
5 Exhibit 2, Matt.
6 THE WITNESS: Exhibit 2?
7 MS. KLAHN: So is it Exhibit 2? Is that what
8 it was?
9 THE WITNESS: Yes, it is.
10 Q. (BY MS. KLAHN) Thanks. So let's look at
11 paragraph 19, please, in the findings of fact.
12 A. Is that on page 9?
13 Q. It is.
14 A. Okay.
15 Q. There is a term used in paragraph 19, subpart
16 (a), "the net area of the irrigated crops."
17 What does that mean?
18 A. To me, that means the actual irrigated land.
19 We often get or we're using shapefiles that represent
20 service areas. To me, this represents just the portion
21 that's irrigated within that.
22 Q. So your understanding would be that 19(a) is
23 the equivalent to irrigated acres?
24 A. "The net irrigated of the irrigated crops"?
25 Yeah, I think so.

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1 Q. Did you have any role in actually writing the
2 methodology order?
3 A. I did.
4 Q. Can you point out what paragraphs you were
5 involved in drafting?
6 A. Do you want me to identify every paragraph or
7 would you like me to identify just general topics that I
8 did?
9 Q. I mean, it won't take too long, I don't think.
10 Unless you wrote the whole thing, just tell me you wrote
11 the whole thing.
12 A. No.
13 Q. Just run through and tell me what you were
14 involved in drafting, paragraph by paragraph.
15 A. All right. So on page 3, I did some editing
16 on 9. And when I say "editing," I made some edits,
17 proposed edits. Ultimately, they're the Director --
18 whether he accepts them or not. So some of the edits
19 made it, but some did not.
20 Q. Okay.
21 A. On the "Climate," that figure on Figure 4, the
22 "Growing Season Precipitation." On page 5, I edited in
23 paragraph 14. Page 6, edited the figure, "April through
24 October Reference ET." Page 7, also the figure -- I did
25 the figure on "Growing Degree Days." 8, the figure on

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1 "Heise Natural Flow April through July." I don't know
2 who edited -- if it was Kara or I that edited 17. It
3 could have been either one of us to update it to the
4 current average and the years. The same with 18, it
5 could have been either one of us. We both are editing,
6 updating the order. I updated the figure on page 9, the
7 "Natural Flow and Storage Allocation." Page 10, I
8 edited 22 -- is that "Finding of Fact"? I think it is.
9 And the table. And then 11, page 11. 24, we edited
10 that together. That may or may not have been me, but
11 the figure was me. I did editing in 26 on page 11. I
12 did editing of 27. I did editing in the table there in
13 the middle of page 12 -- or proposed edits, I should
14 say.
15 Q. Well, let me ask you that: If it's technical
16 material and you made proposed edits, is there any
17 chance that the numbers were changed after you made the
18 proposed edits?
19 A. It's possible.
20 Q. Who would have done that?
21 A. I don't know.
22 Q. Is Garrick in there trying to do math or
23 something?
24 Just kidding, Garrick.
25 Okay. Sorry. Keep going.

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1 A. Okay. I think we were on page 14. That table
2 in the middle of 14.
3 Q. Wait. So nothing on page 12 or 13 other than
4 paragraph 27?
5 A. 12 and 13?
6 Q. Yeah.
7 A. So I edited 27, and then I edited the table --
8 or proposed edits on the table on 12.
9 Q. Nothing on paragraphs 28, 29, 30, 31, 32?
10 A. 32, yeah, there is a change there from 8-year
11 to 15-year rolling average, proposed some edits there.
12 Page 14, the table. Page 15, I don't see any at this
13 point on 15. So I've skipped to page 21. I have done a
14 quick cursory review of the pages in between. I didn't
15 see anything, but I may have missed something on there.
16 But kind of pointing out the major things that
17 I know that we spent time on, page 21, on "Reasonable
18 Carryover" -- actually, it would be on page 22 is where
19 we started editing, 60 -- did we do that? The table
20 under 66 there, it looks like we edited the years in the
21 actual 66, and the table under it, and 67 to update the
22 baseline year, at least that much editing. Editing
23 under 68 in the table.
24 Page 24, that table we added years, a
25 significant edit there. Page 25, Item 70 or

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1 paragraph 70 was edited. 26, also that table was
2 edited. 27, paragraph 71, and the table. And then I
3 believe for "Reasonable Carryover" starting in Section
4 D, we went through "A&B," "AFRD2," "BID," "Minidoka,"
5 "Milner" --
6 COURT REPORTER: Okay, wait. Can you go a
7 little bit slower for me?
8 THE WITNESS: Sorry. I forgot you were trying
9 to write this down. I'll go back. So on page 27, under
10 "Reasonable Carryover," the paragraphs for "A&B,"
11 "AFRD2," "Minidoka," and "BID," "Milner," "North Side
12 Canal Company," "Twin Falls Canal Company," and the
13 table in 78, there were varying amounts of editing
14 there.
15 Q. (BY MS. KLAHN) Okay.
16 A. Or proposals by us to editing. I'm on
17 page 31. All the edits -- I wouldn't have made any
18 edits to the determination of curtailment date. I
19 wouldn't have made any edits in "Conclusions of Law."
20 And I think there were edits on Step 2 of page 40, but
21 that would not have been -- because I see the word
22 "transient" there, so there had to be some kind of edit
23 going on there. And then on page 43, paragraph 20.
24 That's a general overview of just looking at
25 it quickly where we made -- or I or Kara made proposed

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1 edits.
2 Q. Okay. Thank you. Now, can I turn your
3 attention back to paragraph 20 of the "Findings of
4 Fact."
5 A. Okay. On page 9?
6 Q. Yes. So paragraph 20 says, "Sprinkler systems
7 are currently the predominant application system." And
8 there's a reference to the "Record Volume 37 at pages
9 7101 to 7102." And if you look up to paragraph 19, you
10 can see why I'm saying it's Volume 37 of the record.
11 Are you familiar with the -- with that
12 reference to Volume 37, the Record Volume 37?
13 A. No.
14 Q. Have you ever gone to look at what it says on
15 Record Volume 37 pages 7101 to 7102? 7102, yeah.
16 A. Not a time that I can identify.
17 Q. Do you know when the hearing was related to
18 that record of decision?
19 A. I do not.
20 Q. Are you familiar with any of the evidence that
21 was provided at that hearing that supported the
22 conclusion stated in paragraph 20?
23 A. I am not.
24 Q. To the best of your knowledge, has the
25 Department done any analysis since the hearing

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1 associated with the record cites there to evaluate the
2 nature of irrigation application systems in the Surface
3 Water Coalition lands?
4 A. Not that I am aware of.
5 Q. Is it possible that that kind of analysis
6 could be done and you wouldn't be aware of it --
7 A. Yes.
8 Q. -- given your position?
9 A. Yes.
10 Q. And who might do that analysis?
11 A. The most likely place -- just hypothesizing
12 who might do something like that -- somebody in the
13 hydrology section or possibly in the water distribution
14 may look at something like that.
15 Q. Is your title manager of hydrology and GIS?
16 A. Technical services, yeah, I am the --
17 Q. So if somebody was doing this kind of analysis
18 in the hydrology section, you would probably be aware of
19 it, wouldn't you?
20 A. It's likely that I would have heard about it,
21 but I -- let me back up, I've been in this position over
22 those two sections for about three months.
23 Q. Oh, okay.
24 A. So I -- but I may have heard about it, but
25 it's not guaranteed. There are -- I'm just estimating

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1 here -- there's about 15 or a little more hydrologists
2 and hydrogeologists and modelers working in the
3 hydrology section. I don't have, you know, just minute
4 understanding of what each one of them have done all the
5 time.
6 Q. If the Department were to conduct this kind of
7 an analysis, would it be provided to you as the person
8 who is in charge of demand calculations for the
9 methodology order?
10 A. I don't know if it would be -- what was the
11 term you used? What was the term you used there?
12 Q. If the Department were to conduct this kind of
13 analysis, would it be provided to you --
14 A. Oh, "provided."
15 Q. -- as the person who is in charge of demand
16 calculations?
17 A. It's likely I would be talking to them and see
18 their results, yes.
19 Q. Let's turn to paragraph 21 on the next page.
20 A. Okay.
21 Q. So, again, the first sentence says, "Estimates
22 of irrigated acres from the hearing show a trend of
23 decreasing irrigated acreage," and a reference to the
24 record from that hearing. It goes on to say, "According
25 to the Hearing Officer, beneficial use cannot occur on

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1 acres that have been hardened or are otherwise not
2 irrigated."
3 And, again, just to confirm, you haven't
4 looked at the record citations associated with those --
5 with that paragraph either; is that correct?
6 A. Correct.
7 MS. KLAHN: Before we talk about the table
8 there on page 10, I'd like to move to a new exhibit.
9 Andrea, there's a three-page exhibit that has
10 a picture of the Snake River on it, and it's dated
11 February 19th, 2015. And I'd like to mark that as
12 Exhibit 13.
13 (Exhibit 13 marked.)
14 Q. (BY MS. KLAHN) All right. Mr. Anders, you've
15 been handed Exhibit 13.
16 MR. BAXTER: Sarah, would you just pause for a
17 second. Dylan's trying to get us copies for the
18 attorneys here.
19 MS. KLAHN: Oh, I'm sorry, sure.
20 MR. ANDERSON: TJ, was that part of the group
21 that you had, or is this just unique to Sarah's?
22 MR. BUDGE: That's in the group of documents
23 Sarah emailed.
24 MR. ANDERSON: Okay. I don't have a printout
25 of that one. I think I could quickly send you a digital

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1 copy.
2 MR. SIMPSON: Yeah, that's great.
3 MR. BAXTER: Dylan, could you send me one too,
4 please?
5 MR. ANDERSON: Yeah.
6 MS. KLAHN: I apologize, Garrick. I
7 completely forgot that you wouldn't have seen -- you
8 wouldn't have a copy of this, so I apologize.
9 MR. BAXTER: No worries. I'm comfortable
10 moving forward.
11 MR. ANDERSON: Can we just state --
12 Q. (BY MS. KLAHN) Mr. Anders, could you identify
13 Exhibit 13 for the record, please.
14 MR. BAXTER: Hold on, Sarah. Dylan was
15 talking when you started.
16 MS. KLAHN: Oh, I'm sorry. I thought you said
17 you were ready to move forward.
18 MR. BAXTER: I was, but then Dylan piped up.
19 MR. ANDERSON: My fault, Sarah. Your email is
20 just not coming up.
21 MR. BAXTER: So it's my first name, Garrick,
22 G-a-r-r-i-c-k, dot Baxter, B-a-x-t-e-r, @idwr.idaho.gov.
23 MR. ANDERSON: Now it comes up after I type
24 it.
25 MR. BAXTER: Isn't that always how it works?

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1 MR. ANDERSON: And yours should come up. It
2 should be on its way.
3 (Discussion held off the record.)
4 MR. BAXTER: All right. Dylan said he's sent
5 it, but I'm okay with going ahead and moving forward,
6 Sarah.
7 MS. KLAHN: Okay. Thank you.
8 Q. (BY MS. KLAHN) Third time's a charm. Could
9 you identify Exhibit 13, please?
10 A. It looks like a PowerPoint that is printed out
11 with the title, "Proposed Modification to Develop" --
12 I'm sorry, "Proposed Modification for Determining
13 Reasonable in-Season Demand for the Surface Water
14 Coalition: Irrigated Acres For SWC Members. Presented
15 to the SWC Methodology Technical Working Group by Matt
16 Anders, February 19th, 2015."
17 Q. Do you recognize this document?
18 A. Yes, it looks like I made it.
19 Q. Could you turn to the second page?
20 A. "Irrigated Acres" at the top?
21 Q. Yeah. Okay. So the -- actually, let's just
22 go to the third page, the "Summary of irrigated acres."
23 A. Yep.
24 Q. This table shows the irrigated acres that were
25 known, I guess, at the time.

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1 Do you know what the source of these columns
2 is?
3 A. I remember that these were -- the information
4 that we had available when we were doing the technical
5 working group, you know, SPF there 2005 to 2007, that's
6 from SPF Consulting. It was somewhere -- I don't
7 remember off the top of my head where that came from.
8 And then the partial decrees were information that we
9 had. And then the 2013, that was the shapefiles that we
10 had for each of the members. And then, finally, what we
11 were using for the irrigated acres.
12 Q. And I think that 2005 to 2007 SPF number, I
13 mean, subject to check, I'll just tell you, I think that
14 is the number that was developed by the groundwater
15 users in the hearing that's referenced in the record
16 cites that we were just talking about. So I think that
17 might be where that came from. But it doesn't really
18 matter today.
19 Let's turn to page 4. And you have stated
20 there the legal standard to -- for the Department to
21 administer to less than the full amount of acres on the
22 face of the partial decrees.
23 What's your understanding of that? I
24 understand that you're not a lawyer, and Garrick's going
25 to object and say I'm asking for a legal conclusion, but

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1 I'm not. You are a technical person who's forced to
2 cross that interface from time to time.
3 How do you understand that legal standard that
4 is quoted there?
5 A. So the standard is "if the Department is going
6 to administer to less than the full amount of acres set
7 forth on the face of the Coalition's partial decrees,
8 such a determination must be supported by clear and
9 convincing evidence."
10 Q. Okay.
11 MR. BAXTER: So I will just go ahead and, for
12 the record, make the objection as to it's asking for a
13 legal conclusion because I do believe it is.
14 But go ahead and answer the question, Matt.
15 Q. (BY MS. KLAHN) Well, my next question is:
16 Have you had any discussion with anybody at the
17 Department about what that standard "clear and
18 convincing evidence" means?
19 A. Yeah. During -- while we're drafting the
20 order or while we were doing the analysis, we talked
21 internally about what that means, about what "clear and
22 convincing" means. To me, that is -- just on a
23 layman's, nonlegal type of thing, it means that it's a
24 pretty high standard to meet, that you can't just say
25 close enough. You need to have it laid out and very

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1 sure about the number that you're providing.
2 Q. Would you agree that the flip side of that is
3 that the Department should not be administering to acres
4 that are hardened or otherwise can't be irrigated?
5 A. If we can identify those and remove those, I
6 think, yeah, we should. Those are not irrigated.
7 Q. So if we flip back to page 3 of this -- where
8 we were looking at that irrigated acres table.
9 A. Yeah.
10 Q. So the "2013 RISD" column on the end there,
11 those are the acres you were using for purposes of the
12 methodology order in 2013; is that your recollection?
13 A. Yeah, I think that's accurate.
14 Q. And then the Surface Water Coalition shapefile
15 and partial decrees are shown in the two columns to the
16 left?
17 A. Yeah.
18 Q. I want to focus on Twin Falls Canal Company
19 for a moment.
20 Can you sort of put side by side the irrigated
21 acres table that's in Exhibit 13 and the table on
22 paragraph 22 of the Fifth Methodology Order?
23 A. Yeah, I have them laying side by side.
24 Q. Okay. So the Twin Falls Canal Company number
25 used in the Fifth Methodology Order is 194,732; is that

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1 right?
2 A. Yes.
3 Q. And the number shown in the "2013 RISD" column
4 was about, roughly, 10,000 acre-feet smaller than that.
5 Do you see that?
6 A. Yeah.
7 Q. What happened that caused the Department to
8 add acres to Twin Falls' irrigated acres?
9 A. I don't know.
10 Q. Were you involved in that decision to move
11 Twin Falls from 183,000 and change to 194,000 and
12 change?
13 A. I don't remember, like, making that decision,
14 but I would have been involved in it, yes.
15 Q. Let's go back to the PowerPoint, Exhibit 13,
16 and let's look at the third sheet, next to the last
17 page, that's titled "Shapefiles Submitted by SWC in
18 2013"?
19 A. Okay. Yep, I'm on that page.
20 Q. Okay. So I see that there's some bullet
21 points there, "Non-irrigated urban areas, farmsteads,
22 and subdivisions." The next bullet point, "Overlaps and
23 gaps." The next point, "Registration." The next point,
24 "Land irrigated with supplemental groundwater is not
25 segregated."

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1 What do those bullet points -- what are those
2 telling us about -- why did you include those here?
3 A. I don't remember exactly what I stated in this
4 presentation that I gave to the technical working group.
5 My best interpretation, from what I'm seeing, is types
6 of things that are in these shapefiles that would make
7 them less accurate in determining the irrigated acres.
8 Q. Okay. Do you recall if the 2015 version --
9 what did you say it was, in 2015 it became the Third
10 Methodology Order?
11 A. Yes.
12 Q. Were irrigated acres changed in 2015 for the
13 Twin Falls Canal Company? Sorry.
14 A. I don't remember.
15 Q. Well, we've checked, and it looks like the
16 Department used the 183,000 number that's shown in your
17 PowerPoint for Twin Falls through 2016. And it was
18 after that that the Department moved to 194,000 and so
19 on.
20 Does that sound right to you?
21 A. I don't -- I don't recall that change. I'm
22 not disputing it. I don't recall.
23 MS. KLAHN: I know it's lunchtime, but I have
24 about 30 minutes more, and I would be done, at least for
25 round one, subject to wanting to come back and ask about

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1 additional documents and so on that were provided today.
2 What is the pleasure of the group? Should we
3 go until 12:30 and take a lunch break then, or do you
4 want to take a lunch break now and come back at 1:00?
5 MR. BAXTER: Matt, what's your preference?
6 THE WITNESS: I'm flexible. I could go either
7 way.
8 MR. BAXTER: Do you want to keep going?
9 THE WITNESS: Yeah. We're on a roll; let's
10 go.
11 MS. KLAHN: He's having a good time, Garrick.
12 He's loving it.
13 THE WITNESS: I would disagree with that
14 comment, but, no --
15 MS. KLAHN: TJ, what is your thought?
16 MR. BUDGE: Either is fine with me. Take your
17 pick.
18 MS. KLAHN: What about everybody else in the
19 room, are your stomachs all going to rumble if we go for
20 another 30 minutes?
21 (Discussion held off the record.)
22 MS. KLAHN: I'd like to mark another exhibit.
23 And it is -- Andrea, it's an exhibit that has kind of a
24 colorful map on the front, and it's "Idaho Department of
25 Water Resources" in the upper left, and dated

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1 December 1st, 2022.
2 (Discussion held off the record.)
3 (Exhibit 14 marked.)
4 Q. (BY MS. KLAHN) So let's take a look -- again,
5 if you could keep the paragraph 22 table open on the
6 Fifth Methodology Order, Exhibit 2 --
7 THE WITNESS: Did you give me this, too?
8 Q. (BY MS. KLAHN) -- and turn to --
9 MR. BAXTER: Hold on, Sarah. Matt's trying to
10 communicate with Andrea.
11 COURT REPORTER: I might have given you an
12 extra. Sorry.
13 THE WITNESS: Okay. We're ready now. I had
14 too many documents.
15 Q. (BY MS. KLAHN) One got stuck together?
16 A. Yes.
17 Q. Let's turn to page, I believe it is, 19 of
18 that document. And I don't see page numbers on mine. I
19 apologize for that. It's a table called "Surface Water
20 Coalition Irrigated Acres," and the columns are "Surface
21 Water Coalition Member," "Created by SWC or IDWR" "Date
22 of Shapefile" "Shapefile Acres," "CDL Processing Acres,"
23 "NRT METRIC Processing Acres."
24 Do you see that?
25 A. Yep, I have that.

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1 Q. Can you just explain for the record, what is
2 "Near Real Time METRIC"?
3 A. So it is METRIC that's created in-season. As
4 the season progresses with milestones that we wanted the
5 data created. So like we wanted it by April through
6 July and then monthly after that. So it's not exactly
7 the same method as -- or procedure as METRIC, but it's
8 very similar. It's just they had to change it to make
9 it so we could do it in-season. METRIC is normally done
10 after the season is complete, and then they do METRIC.
11 This is actual while we're going through the season.
12 Q. Is IDWR using near real time METRIC in any of
13 its administration activities currently?
14 A. Not that I'm aware of.
15 Q. Is it a tool that might be available for
16 administration?
17 A. That is the idea why we -- we started -- we
18 have had a contract with the U of I with Rick Allen and
19 his group in, I want to say, like 2015 or '16. We've
20 had several years of data. So we were trying to develop
21 this concept in parallel, this procedure to see if we
22 could get it to work for the methodology and elsewhere,
23 so we've been working on this for a while.
24 Q. Okay. And I think I may have -- did I say
25 page 16 or page 19?

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1 A. 19.
2 Q. The page I want to look at has a table that
3 has -- the last two columns on the right are -- the
4 farthest right is called "Methodology Acres." The
5 second to the right is called, "If Remove Non-Irrigated
6 Acres With 2017 Irrigated Lands Data Set."
7 Do you see that?
8 MR. BAXTER: So I think you're on 16, Matt. I
9 think flip two more to 19.
10 THE WITNESS: Okay. Yeah, now I'm on the
11 right table.
12 Q. (BY MS. KLAHN) Okay. I apologize for that.
13 My notes weren't clear.
14 In that table, if you look at Twin Falls Canal
15 Company, in the middle column, it says, "If Remove
16 Non-Irrigated Acres With 2011 Irrigated Lands Dataset,"
17 and the total for Twin Falls Canal Company is 179,486.
18 Do you see that?
19 A. I do.
20 Q. What is the derivation of that -- the acres
21 shown in that column?
22 A. So the irrigated lands data sets are created
23 at IDWR. And, historically, they've been created by
24 hand digitizing the fields on the ESPA for modeling
25 purposes. So what they do is they are -- classified all

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1 land into irrigated, semi-irrigated, and nonirrigated.
2 So what we did was we took the shapefiles that we had,
3 and we did a GIS analysis with them to remove the
4 portions that were nonirrigated. So the leftover was
5 semi-irrigated and irrigated. So that number for that
6 whole column is for each company what acres were left
7 over once we made that analysis.
8 Q. Okay. So the column I was just asking you
9 about is the irrigated acres using the 2011 irrigated
10 lands data set. If we move to the right, the title is
11 "If Remove Non-Irrigated Acres With 2017 Irrigated Lands
12 Dataset.
13 Is that the same concept as what you described
14 with the other column?
15 A. The same concept, different year, yes. It's
16 based on 2017. That one was based on 2017.
17 Q. How frequently does IDWR update the irrigated
18 lands data set?
19 A. We have identified years that we want it done
20 for purposes of calibration for our model, for the ESPA
21 model. I don't know exactly, but we don't have it for
22 every year, but there are quite a few years that we
23 have. The most recent one we have available, as of -- I
24 think I talked to the lady who works on it a couple
25 weeks ago or maybe a month ago, was 2017 was the most

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1 recent one that we can use at this point. There's
2 others in development, but they're not complete.
3 Q. So the total for Twin Falls Canal Company in
4 that next to the last column with the 2017 irrigated
5 lands data set is 180,956. And then we go to the right,
6 and we have the methodology acres for Twin Falls, which
7 is 194,732, which matches what's in paragraph 22; is
8 that right?
9 A. Yes, you are correct.
10 Q. So why did you recommend the use of 194,732
11 instead of the lower numbers shown in the table that
12 we're looking at on page 19?
13 A. Because of that clear and convincing standard
14 from the Wildman decision in 2014.
15 Q. So you're more comfortable defending the Twin
16 Falls Canal Company shapefile in front of a judge than
17 the work of your own Department people --
18 MR. BAXTER: Objection --
19 Q. (BY MS. KLAHN) -- hand digitizing a map?
20 MR. BAXTER: Objection; argumentative.
21 Q. (BY MS. KLAHN) Well, I don't mean to be
22 argumentative; I'm surprised.
23 A. Let's use 2017. That data set is six years
24 old this year. If you start looking at that data set,
25 things have changed. Land that was classified as

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1 nonirrigated in that 2017 data set, in some cases, has
2 become irrigated. So we would be removing acres that --
3 or we would be not counting acres that were, in fact,
4 irrigated, if you open them on the 2021 aerial
5 photography. For me, that's not clear and convincing
6 that those acres were not irrigated. So that was the
7 standard that we were looking at.
8 Q. So based on the Exhibit 13 that we looked at,
9 which showed the RISD -- I'm going to call them the RISD
10 -- the methodology acres -- and you're welcome to pull
11 that out again.
12 So 2013, 2014, 2015, possibly 2016, the
13 Department used 183,589 acres for Twin Falls Canal
14 Company. And the Twin Falls Canal Company submitted the
15 shapefile in 2013, submitted -- if you compare it with
16 Exhibit 14, submitted a shapefile acreage that was
17 almost the same, 194,727.
18 I guess I'm just curious about if the Twin
19 Falls shapefile wasn't good enough up through 2015 or
20 2016, why is it good enough now, particularly, if you
21 haven't done any actual independent analysis of what's
22 good enough now?
23 A. I don't remember why we -- why the acres
24 changed at that point in 2016.
25 Q. The acres changed in 2016 to 194,000, let's

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1 say, 732, probably the same as now. Even though you
2 had, in 2017, an irrigated lands data set that showed
3 Twin Falls to be, roughly, 14,000 less than the
4 methodology of acres; is that right?
5 A. Yes.
6 Q. So if the Department is provided with clear
7 and convincing evidence -- I'm sorry, let me withdraw
8 that.
9 If the Department is provided with an analysis
10 of irrigated acres for the Twin Falls Canal Company
11 that's less than the Twin Falls Canal Company endorsed
12 shapefile, what kind of an evaluation would you make of
13 that information?
14 A. Submitted from a third party, is that what
15 you're suggesting?
16 Q. For instance, in the hearing on June 4th or
17 5th or 6th, or whenever we start, the groundwater users
18 may want to do something like that. My question is:
19 What kind of an analysis would the Department give that
20 kind of a -- you know, that kind of evidence?
21 A. I think we would review it on a -- using GIS
22 and start comparing it to what we're seeing on the
23 ground, you know, in air photos and try to evaluate
24 what -- how it's characterizing the irrigated acres and
25 nonirrigated.

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1 Q. Why haven't you done that with the Twin Falls
2 shapefile?
3 A. Right now to do an irrigated lands data set
4 takes us about a year of one person's staff time. We
5 know that that shapefile probably contains -- or does
6 contain hardened acres, farmsteads, some roads. We
7 don't have the staff time to create one of those every
8 year for the methodology.
9 We are -- we are investigating some automated
10 methods, but right now we don't have that ability to
11 create I think what it would take to be clear and
12 convincing, which is to have a recent --
13 Q. Well, but I mean, if I may?
14 A. Go ahead.
15 Q. It doesn't sound like the Department's number
16 is clear and convincing either if it contains hardened
17 acres.
18 MR. BAXTER: Objection; argumentative.
19 Q. (BY MS. KLAHN) I mean, flatfooted question:
20 If the goal is to administer to irrigated acres, and the
21 Department's irrigated acre number includes hardened
22 acres, that's not clear and convincing either, is it?
23 MR. BAXTER: Objection; calls for a legal
24 conclusion.
25 Q. (BY MS. KLAHN) You can answer.

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1 MR. BAXTER: Go ahead and answer.
2 THE WITNESS: I guess the way that I see that
3 statement -- I think I just read it here -- that
4 statement is not an even playing field. It's saying if
5 you can't clearly state why things should be removed,
6 you have to go with the decreed acres. While we do know
7 some of it's in there, I don't think we can clearly and
8 convincingly come up with what should be taken out right
9 now.
10 Q. (BY MS. KLAHN) Thank you. If you're using
11 the 2017 irrigated -- well, let me ask you this: Are
12 you using the 2017 irrigated lands data set for
13 modeling?
14 A. I don't know the answer to that.
15 Q. Would you think it would be important to have
16 a similar number being used for modeling shortages and
17 determining demand?
18 I realize -- well, I'll just let you answer
19 that question. Go ahead.
20 A. We try to be as consistent as we can, yes.
21 Q. I want to draw your attention to paragraph 23
22 on page 10.
23 A. Okay. I'm there.
24 Q. That starts with the statement that, "There
25 are lands within the Surface Water Coalition service

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1 area that are irrigated by supplemental groundwater."
2 The next sentence says, "Supplemental groundwater is a
3 factor that the Director can consider in the context of
4 a delivery call."
5 Have you ever been asked to do any analysis of
6 the groundwater -- the acres that are served by
7 groundwater in the Surface Water Coalition service
8 areas?
9 A. We discussed this topic in the 2015 technical
10 working group about what data do we have, and can we
11 determine the -- you know, when there's a supplemental
12 groundwater water right, can we determine what portion
13 of that, you know, the acres are irrigated with that.
14 At that time, we didn't have a good enough data set to
15 determine that. And that's still true today.
16 Q. So in the last eight years since you looked at
17 that in the 2015 technical work group, you haven't
18 attempted to develop any data sets related to
19 groundwater acres in Surface Water Coalition service
20 areas; is that true?
21 A. Not that I know of, that is true.
22 Q. Is that a priority for the Department?
23 A. We would like those data. Right now I don't
24 think it is a priority right now for the Department.
25 Q. What do you think would be required to develop

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1 a data set you'd be comfortable relying on to exclude
2 acres from the irrigated acres piece of the demand side?
3 A. That is difficult to determine the portion --
4 so let's say you have somebody -- a farm that has canal
5 shares on it, and then on top of it they have a
6 supplemental groundwater right, it is really difficult
7 to determine that.
8 We've spent a lot of time in the Bear River as
9 part of the Bear River Commission on that problem right
10 there trying to find that out. I think it's more than
11 just looking at water rights. Our experience there was
12 is you have to get out and talk to the users to
13 understand how they're using that supplemental right,
14 when they're using it. I think that's why we don't have
15 those data. It's hard to do. It's not just a remote
16 sensing application.
17 MS. KLAHN: Well, give me five minutes. Can
18 we just go off the record for five minutes, and I just
19 want to go through my notes one more time.
20 MR. BAXTER: Sounds good. We're off the
21 record.
22 (Break taken.)
23 Q. (BY MS. KLAHN) I just have one more question
24 related to that last line of questions we were talking
25 about.

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1 Mr. Anders, could you use pumping records to
2 evaluate which acres are served by groundwater in the
3 Surface Water Coalition service areas?
4 A. I think, theoretically, yes, but you would
5 have to understand the system. Like, do they have
6 multiple pivots on one well and where it's all going.
7 It's kind of the -- we've tried power consumption
8 records in the past to do these type of things, and we
9 hit the same problem.
10 If you understand the system, probably. If
11 you don't or they have a lot of configurations, like
12 sometimes this one is on, sometimes that pivot is on, it
13 makes it a lot harder and a lot more ambiguous.
14 MS. KLAHN: Well, for today, that's all the
15 questions I have for you subject to revisiting the -- or
16 visiting, for the first time, I guess, the documents
17 that were provided today by Sarah and that Garrick is
18 going to get posted on the FTP site. And so with that,
19 I'll see my time to lunch or TJ or whoever's going next.
20 MR. BAXTER: It's 12:33. I would propose we
21 break for lunch.
22 MR. BUDGE: Garrick, mine will only take
23 20 minutes.
24 MR. SIMPSON: No, last time it was 10. So
25 that's two hours if you're going to 20 minutes.

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1 MR. BUDGE: Lunch sounds good.
2 (Lunch break taken.)
3 MR. BUDGE: Thanks. Matt, before I get into
4 your deposition, I just want to have the record reflect
5 a conversation that we had before we started.
6 The groundwater users have filed what's called
7 a 30(b)(6) deposition notice for the Department, which
8 was scheduled to commence after the deposition of Matt
9 Anders, and counsel for the Department, Garrick Baxter,
10 reported that the Department will not be producing any
11 witnesses in response to that deposition notice. The
12 only witnesses being Matt Anders and Jennifer Sukow
13 pursuant to the order issued by the Director, I think it
14 was, on May 5th.
15 Is that correct, Garrick?
16 MR. BAXTER: That is correct.
17 EXAMINATION
18 QUESTIONS BY MR. BUDGE:
19 Q. Okay. Matt. Well, we're back. Hope you had
20 a nice lunch break.
21 A. Yeah, thank you.
22 Q. We've met before. I'm TJ Budge, and for the
23 record, I'm an attorney for Idaho Groundwater
24 Appropriators, which typically goes by its acronym,
25 IGWA, and we refer to as IGWA.

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1 I've got an outline of questions I want to ask
2 you, and many of these topics have been addressed by
3 Sarah Klahn, and so during the break I tried to, you
4 know, cut out questions that may be duplicative. I may
5 have some questions that overlap things Sarah asked
6 about or ask for clarification or follow-up questions,
7 but I'll try not to be too duplicative.
8 To begin, at the beginning of your deposition,
9 Ms. Klahn walked through your deposition notice and
10 there were several categories of documents that you had
11 been asked to bring to the deposition.
12 Do you remember that?
13 A. I do.
14 Q. And I understood from your answers that you've
15 produced all of the documents and information that had
16 been provided to the Director in this proceeding except
17 for those that you deem relate to the Director's
18 deliberative process; is that correct?
19 A. Correct, except the ones on the groundwater
20 pumping and the additional sources; we were still
21 collecting that information. But correct otherwise.
22 Q. Thanks for that clarification. I do remember
23 that answer. I have a question for your attorney.
24 MR. BUDGE: Garrick, can we get a log of all
25 of the documents and information provided to the

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1 Director that have not been produced? And I don't mean
2 the contents of them, but a log similar to a privilege
3 log that you would see for documents withheld due to
4 privilege?
5 MR. BAXTER: I'll ask the Director about that.
6 I don't have an answer for you here today.
7 MR. BUDGE: Okay. If you'll let us know in
8 writing, Garrick, that would be appreciated.
9 Q. (BY MR. BUDGE) Matt, I understand you
10 contributed, in some fashion, to the Third Methodology
11 Order and the Fourth Methodology Order?
12 A. Correct.
13 Q. When did you first learn that the Director was
14 considering, potentially, amending the Fourth
15 Methodology Order?
16 A. My best estimate is it's sometime in the
17 summer of 2015 or the fall of 2015. That's just an
18 estimate.
19 Q. I'm referring to updates to the Fourth
20 Methodology Order.
21 A. Oh, sorry. I thought you meant the -- when we
22 were going to update the Third to the Fourth.
23 Q. Yeah. So I'll restate the question for the
24 record.
25 When did you first learn that the Director was

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1 considering, potentially, amending the Fourth
2 Methodology Order?
3 A. Sometime in the summer of 2021.
4 Q. Okay. And how was that communicated to you?
5 A. I think that was informal communication within
6 the Department.
7 Q. From your perception, was the update to the
8 Fourth Methodology Order, was that something where the
9 Director was interested in updating the methodology, and
10 so he advised staff that he may pursue that; or was that
11 something where the staff felt there was a need to
12 update the methodology, and they tried to persuade the
13 Director that this was the time to do that?
14 A. Generally, the communication is going both
15 ways. We are working on the methodology, we have ideas
16 that we pass to the Director, and he provides the input.
17 Q. So back in the summer of 2021 when you first
18 heard that the Director may consider updating the
19 methodology, had you or other Department staff members
20 been providing the Director with information indicating
21 it needed to be updated?
22 A. I'm not sure that we were saying that it
23 needed to be. I think the discussion was more along the
24 lines of the methodology says that it needs to be
25 updated periodically, and it had been years since we had

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1 done it, and we were just needing to revisit and look at
2 some of these. Things like the regressions we're
3 constantly watching every year when we update those. So
4 it wasn't like one thing where we just said this
5 absolutely has to be. It was just time to start looking
6 at it and making sure.
7 Q. Okay. So one catalyst for updating the
8 methodology was just the passage of time?
9 A. I think that's part of it, one piece of it.
10 Q. Yeah. What other rationale were given for
11 updating the Fourth Methodology Order?
12 A. We had been watching -- like I said, we've
13 watched the regressions that we've used to forecast the
14 natural flow supply. We had seen Twin Falls Canal
15 Company, our regression declining somewhat, and we --
16 that's one of the companies that first has a shortfall,
17 if one does, so we wanted to make sure that we were
18 comfortable with where that regression was.
19 North Side is the same way -- or North Side
20 was one that we were concerned about in July. Baseline
21 year, when we selected baseline year, I want to say it
22 was 100 -- just estimating, it was about 101 percent of
23 average. So we knew that was relatively close, we
24 needed to go back and look at some of these things,
25 update the data and see where we were.

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1 Q. Did the Director give you any indications as
2 to why he was interested in updating the methodology?
3 A. I don't know what his thought process was
4 other than that he is aware that, you know, the
5 methodology says it needs to be periodically reviewed.
6 Q. Fair enough. Matt, are you aware that there's
7 a settlement agreement between IGWA and the Surface
8 Water Coalition that was entered into in 2015 involving
9 the coalition's delivery call?
10 A. I'm aware of that agreement, yes.
11 Q. Are you aware that some of the groundwater
12 districts have -- are, allegedly, in breach of that
13 agreement?
14 A. I'm aware of that also.
15 Q. Did that ever come up in discussions within
16 the Department involving reviewing the Fourth
17 Methodology Order?
18 A. Not that I ever remember. Not that is
19 expressed to me.
20 Q. In the, what's labeled "Deposition Exhibit 4,"
21 it's what I call the Department's preliminary
22 recommendations. It's the one-page document that you
23 and Kara Ferguson drafted, dated December 23rd, 2022.
24 Do you know which document I'm talking about?
25 A. Yeah, I think Garrick is getting it for me

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1 here. I don't -- I thought it was in my stack.
2 MR. BAXTER: It will be in this stuff --
3 folder.
4 THE WITNESS: Oh, it's in there. Was it in
5 the folder? You said 4, Exhibit 4?
6 MR. BUDGE: Yes.
7 THE WITNESS: Yes, I do have Exhibit 4 now.
8 Q. (BY MR. BUDGE) If you look at the first
9 sentence in the first paragraph, it refers to a status
10 conference held August 5th, 2022, where the Director
11 issued a directive to Department staff to convene a
12 committee of experts to review the Fourth Methodology
13 Order.
14 Do you see that?
15 A. Yes, I do.
16 Q. Were you present during that status conference
17 either in person or by video?
18 A. I believe I was in person for that one.
19 Q. Do you recall, during that status conference
20 when the Director brought up this idea of changing the
21 methodology order that I spoke up and raised a concern
22 about due process and this happening in the context of a
23 contested case, and we need to be cognizant of that?
24 A. I do not remember that.
25 Q. Okay. Are you aware that I subsequently sent

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1 emails to Department attorney, Garrick Baxter,
2 expressing a concern about any update of the methodology
3 needs to comply with the Administrative Procedures Act?
4 A. I didn't -- I'm not aware of that, no.
5 Q. Were you involved in any discussions within
6 the Department about whether a hearing should be held
7 before the methodology order is updated?
8 A. Could you restate that?
9 Q. Yes. Were you involved in any discussions
10 within the Department as to whether a hearing should be
11 held before the methodology order was updated?
12 A. No.
13 Q. To your knowledge, is there any reason why a
14 hearing could not have been held before the Director
15 issued a new methodology order?
16 A. I think that's a legal question I'm
17 unqualified to answer.
18 Q. Are there any reasons that technical staff
19 could not have participated in a hearing before the
20 Director issued a new methodology order?
21 A. We participate at the direction of the
22 Director. He tells us if we're going to participate.
23 Sorry, I may be too soft. He tells us if we're going to
24 participate.
25 Q. If the Director had told you he's going to

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1 hold a hearing before updating the methodology,
2 Department staff would have participated in that
3 hearing?
4 A. If he directed us to, yes.
5 Q. Okay. Who do you report to or who did you
6 report to during this process of updating the Fourth
7 Methodology Order?
8 A. When we started, I reported to Sean Vincent;
9 and when it finished, I reported to Mat Weaver. I was
10 promoted in the interim of that time.
11 Q. When did that transition happen from Sean to
12 Matt?
13 A. Early March. I don't know the date exactly,
14 but, like, the first or second week of March.
15 Q. Okay. So up through that time period, you
16 would report to Sean and then after early March you were
17 reporting to Mat Weaver?
18 A. Correct.
19 Q. Explain the process that was utilized within
20 your part of the review of the Fourth Methodology, the
21 technical aspect of it, after that August 5th status
22 conference when the Director announced that he would
23 take this on. Just explain what happened within your
24 world.
25 A. Okay. So I don't remember exactly when. At

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1 some point we were given guidance on topics from the
2 Director that we should start reviewing, and then we did
3 our reviews, and then we presented the results,
4 preliminary results, to the Director. We -- to get his
5 input. We took that input, in some cases we modified or
6 updated or did additional analysis, and then we
7 presented our analysis to the technical working group.
8 Q. Just timewise just trying to, you know, fit it
9 together, when did you get the list of topics that you
10 were to undertake?
11 A. I don't remember exactly. My best estimate is
12 sometime after he announced it at that status
13 conference.
14 Q. And then when did you give your preliminary
15 report to the Director?
16 A. It was over a series of days. We covered five
17 or six topics at the technical working group. It was
18 probably somewhere between four or six times that we met
19 with the Director to show him our preliminary results
20 and discuss them.
21 Q. And this happened prior to those
22 November-December meetings when you were presenting to
23 the outside consultants?
24 A. Yes.
25 Q. Back to the -- you know, stepping back in time

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1 to when you were given a list of topics to address, was
2 that a collaborative process, or was that more of an
3 instruction from the Director?
4 A. I think it was both. I mean, informal
5 conversations that we had had with the Director, and
6 then, ultimately, he decides what we're going to
7 address.
8 Q. Was that list put in writing at some point?
9 A. I don't remember it being in like a formal
10 writing of any sort. I don't remember it being in an
11 email either.
12 Q. Are there any topics or technical analyses
13 that were suggested for discussion that the Director did
14 not, ultimately, direct Department staff to pursue?
15 A. I don't remember any that we proposed that he
16 declined or didn't recommend or didn't guide us on.
17 Q. So there were no topics -- let me rephrase the
18 question.
19 At no point were you instructed not to pursue
20 any particular technical aspect of the Fourth
21 Methodology Order?
22 A. No, I don't remember ever being told not to --
23 or to stop reviewing something or to not review
24 something.
25 Q. Okay. Are there any analyses that Department

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1 staff wanted to do but they just didn't have enough time
2 to complete it?
3 A. Yeah. I think we would have liked to spend
4 more time with the forecast supply. And that was
5 discussed in the technical working group of things that
6 we could look at to maybe make those regressions better.
7 I would have liked to spend more time with Greg
8 Sullivan's comments and maybe doing more testing and
9 thinking about that with project efficiency. But that's
10 all I can think of right now.
11 Q. Was your inability to pursue those types of
12 topics, was that because you had a deadline?
13 A. I think it's partially a deadline, but also
14 just the workload of what else we have to do at the
15 Department. The Surface Water Coalition, while I would
16 like to work on it full-time, the calculations, we
17 just -- we have other things that we're assigned that we
18 have to complete. So balancing all of that, there's
19 just a limited amount that we can get done.
20 Q. Yeah. I can appreciate that. I feel that in
21 my line of work.
22 And did you understand that the Director
23 wanted to have a new methodology order issued before the
24 2023 irrigation season?
25 A. That was the general goal that I always

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1 understood was we were to get it completed for this --
2 the 2023 irrigation season, yes.
3 Q. Okay. And I know Sarah Klahn asked you about
4 who participated -- I was making notes -- but I'm not
5 sure I got it all straight. So I understand that on the
6 demand side of the equation you took the lead, and on
7 the supply side Kara Ferguson took the lead. And then
8 you mentioned there was work done by Amanda Fowler?
9 A. No, not on this --
10 Q. Oh, not worked on by Amanda Fowler, okay.
11 A. She worked -- she is a hydrologist at Water
12 District 1 that works on the Snake accounting.
13 Q. Okay. Gotcha.
14 A. The other person -- well, at least I thought I
15 mentioned -- was Ethan Geisler; he worked on the METRIC
16 and presented that at the technical working group.
17 Q. And then Jennifer Sukow?
18 A. Of course, yes, Jennifer Sukow as well.
19 Q. Did any Department staff members on the
20 technical side besides you, Kara, Jennifer, and Ethan
21 participate in reviewing the Fourth Methodology Order?
22 A. Can you repeat that question?
23 Q. Are there any technical staff at the
24 Department that participated in reviewing the Fourth
25 Methodology Order other than you, Kara, Jennifer Sukow,

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1 and Ethan Geisler?
2 A. I can't think of anybody that assisted us.
3 Q. To what extent did Sean Vincent participate?
4 A. Sean is general supervision of us. I believe
5 that he -- he was likely in some of the meetings but not
6 all during the review process. I don't think -- I can't
7 remember if he went to any of the technical working
8 group meetings, attended it remotely. I can't remember.
9 Q. Okay. And then to what extent did Mat Weaver
10 attend the technical meetings?
11 A. He wasn't in person that I remember. I think
12 he listened remotely to at least one of the meetings.
13 Q. Okay. And then if I'm just trying to make a
14 list of the information that was presented to the
15 Director for consideration, I'm assuming that your
16 preliminary recommendations, that Deposition Exhibit 4,
17 I'm assuming that was presented to the Director at some
18 point?
19 A. The word that I'm having trouble with there is
20 "presented." You mean like formally like a
21 presentation? Or we drafted it and gave it to him,
22 would be a more accurate way than a formal presentation.
23 Q. Okay. Maybe the word "provided"?
24 A. I like that word.
25 Q. So that document was provided?

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1 A. A draft of this document was provided.
2 Q. Okay. When was that draft provided?
3 A. I think the last technical working group
4 meeting was around the 15th of December, and then we
5 drafted this, and based on the fact that it came out on
6 the 23rd, it had to have been in that about week window
7 there between the 15th and the 23rd sometime.
8 Q. Did you receive any feedback on the draft?
9 A. Yeah, I think we received feedback and edits
10 on that draft that we gave him.
11 Q. Did the draft contain any recommendations that
12 did not make it into the final document?
13 A. No. There was one that we were unsure about
14 was METRIC, about the staff commitment that it was going
15 to take to do near real-time METRIC. But I think this
16 was our, after discussing it, was our recommendation.
17 Q. What did the draft say about near real-time
18 METRIC?
19 A. I think it recommended to not try to implement
20 it. We had -- we were unsure if we had the staff time
21 for that component. Even though we think it's an
22 improvement, we still think it's an improvement, it's
23 unclear if we can do it on the time frames needed.
24 Q. Yeah, I understand.
25 What other documents were provided to the

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1 Director beside the -- what I'm calling the preliminary
2 recommendation from you and Kara?
3 A. For this document I think that's all that was
4 provided, was this -- a draft of this.
5 Q. The materials that were presented in November
6 and December to the outside consultants, were those
7 materials provided to the Director?
8 A. I don't remember physically sending him the
9 documents. I'm thinking that was unlike -- I think that
10 was unlikely. But we were in communication with him
11 about the -- what feedback we got from the -- during the
12 technical working group meetings, which would have been
13 finished before this.
14 Q. Okay. The comments that Greg Sullivan and
15 Sophia submitted on January 16th, were those provided to
16 the Director?
17 A. I don't know.
18 Q. You didn't provide them to the Director, then?
19 A. No.
20 Q. In terms of just how information was
21 communicated, was that meetings, presentations, personal
22 conversations, emails; how did that happen?
23 A. All of the methods that you just discussed are
24 ways that we communicated with the Director and he
25 communicates with us.

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1 Q. Gotcha. And it was kind of -- it sounds like
2 it was kind of back and forth, the technical folks would
3 communicate things to the Director, and you would
4 provide feedback and input and things like that?
5 A. I think that's an accurate description, yeah.
6 Q. Was the Director involved from the beginning,
7 from back in August, or did he not come in until later
8 in the process?
9 A. He was involved the whole time.
10 Q. Gotcha. Okay. Let me take a step back. You
11 mentioned that the idea of, potentially, updating the
12 methodology, that first came to your attention in the
13 summer of 2021; is that right?
14 A. Correct. That's what I said, yeah.
15 Q. What happened in that regard from that time
16 until August of 2022 with regard to updating the
17 methodology?
18 A. We started reviewing pieces of the methodology
19 in 2021.
20 Q. What pieces did you start with then?
21 A. I remember working on baseline year. I
22 remember Kara was working on the forecast supply, and we
23 were also working on -- Ethan was helping us with the
24 near real-time METRIC. That's the three that I remember
25 at this point. There could have been more, but I

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1 remember working on those three.
2 Q. Gotcha. Was the Director also involved back
3 then, at least from an oversight standpoint?
4 A. Yes.
5 Q. Did that work continue, you know, through 2022
6 until we got to that August 5th status conference?
7 A. No, it wasn't continuous until then, until
8 2022.
9 Q. What work was done, say, from January until
10 August of 2022?
11 A. I don't remember working on it, on the update
12 during that time.
13 Q. So there was some work done in 2021, and then
14 it sounds like it was kind of -- you know, sat still for
15 a period of time, and then it resumed in August of '22;
16 does that sound fair?
17 A. That sounds relatively -- yeah.
18 Q. Did the folks that worked on the methodology
19 in 2021, did you communicate your findings and analyses
20 back then to the Director?
21 A. Yes.
22 Q. When you picked up the work in August of 2022,
23 was your work on those topics, baseline year and the
24 others, was that mostly completed, or was that -- were
25 those topics that needed a lot more analysis?

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1 A. They needed -- you know, we had another year
2 of data, so they needed to be -- that needed to be added
3 to the analysis. And then I think we -- I was trying to
4 think. Yeah, we, likely, did some additional analysis
5 on it at that point.
6 Q. Gotcha. Back in 2021 when you were doing your
7 technical work, did you communicate with anyone outside
8 the Department about that work?
9 A. I did not, no.
10 Q. What about from August of '22 until the Fifth
11 Methodology Order was issued, at the end of April, did
12 you communicate with anyone outside the Department about
13 the technical work that Department staff had been
14 performing?
15 A. Repeat the question, please.
16 Q. From August of '22 until the Fifth Methodology
17 Order was issued in April of '23, during that time
18 period, did you communicate with anyone outside the
19 Department about the technical work the Department staff
20 was doing on the methodology?
21 A. Yes, the technical working group.
22 Q. Yeah, very good. Other than the folks that
23 participated in those November-December technical
24 working group meetings did you communicate with anyone
25 else outside the Department?

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1 A. I don't remember specifically talking to
2 someone directly about the -- that were working on
3 amending that, but I could have easily mentioned it to
4 somebody, you know, like when we were doing the Swan
5 Falls technical working group, in a side conversation or
6 something like that; but not in any official, like,
7 "We're doing this, and here's what we need," or "Here's
8 what we want you to know."
9 So it would be more on an informal basis,
10 "Yeah, we got that going" or, "Yeah, we're working on
11 that." The same could be true of -- we were at the Bear
12 River Commission meeting, so we -- I may have mentioned
13 it to somebody that we were doing that.
14 Q. I understand. So there weren't any formal
15 presentations concerning the work you were doing to
16 folks outside the Department during that period?
17 A. I don't remember any. I don't think there
18 were any.
19 Q. Okay. After the -- you and Kara issued your
20 preliminary recommendations, that document dated
21 December 23rd, 2022, did Department staff do any
22 technical work after that date relating to the Fifth
23 Methodology Order?
24 A. After which date? Could you repeat that?
25 Q. December 23rd of last year, that's the day

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1 that -- that's the date on this Deposition Exhibit 4,
2 which is the preliminary recommendations that you and
3 Kara authored.
4 A. Yeah, we did additional analysis, reviewing
5 the comments received from the technical working group
6 and then additional analysis to prepare for the final
7 order.
8 Q. Okay. And was there continued dialog, you
9 know, during the first four months of '23 until the
10 Fifth Methodology Order was finally issued?
11 A. I don't understand that question.
12 Q. So I'm trying to, in my mind, envision -- I'll
13 give you some context.
14 You know, I'm wondering, did you, you know,
15 hand off all the technical data in, say, January, and
16 then from that point forward everything was just in
17 the -- you know, the Director's camp; or was there
18 continued dialog between technical staff and the
19 Director or his staff, you know, throughout this year
20 until the Fifth Methodology Order was issued?
21 A. There was continuous or continued dialog
22 between the Director and us.
23 Q. And then I think you mentioned earlier that
24 your -- the person you report to at some point shifted
25 from Sean Vincent to Mat Weaver; I think that was early

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1 March?
2 A. Correct.
3 Q. I understand. The comments that Greg Sullivan
4 and Sophia Sigstedt submitted on January 16th, who
5 within the Department reviewed those comments?
6 A. I reviewed those comments. I know that Kara
7 Ferguson reviewed those comments. I cannot speak for
8 other people and what they did with those comments.
9 Q. Did you forward those comments to other folks
10 within the Department?
11 A. Yes.
12 Q. And who would that be?
13 A. We would have forwarded them to legal counsel
14 and the Director.
15 Q. During this time -- you know, we can go back
16 all the way until, you know, summer of '21 until the
17 Fifth Methodology Order was issued last month, was there
18 anything you were instructed not to do or analyze or
19 evaluate?
20 MR. BAXTER: Objection. I think he's already
21 answered this question.
22 But, that said, go ahead and answer the
23 question, Matt.
24 THE WITNESS: I don't remember being
25 instructed to stop working on something.

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1 Q. (BY MR. BUDGE) Are there topics you were
2 instructed not to examine?
3 A. No. We followed the guidance of the Director
4 with the topics he wanted addressed.
5 Q. Is there any information or data that is
6 included in the Fifth Methodology Order that you
7 disagree with?
8 A. Please restate the question.
9 Q. Is there any information in the Fifth
10 Methodology Order that you disagree with?
11 A. No.
12 Q. Is there anything in there that -- is there
13 anything not in the Fifth Methodology Order that you
14 think should have been included?
15 A. No.
16 MR. FLETCHER: Did he hear your answer?
17 MR. BAXTER: TJ, did you hear his last answer?
18 MR. BUDGE: I did not.
19 THE WITNESS: Oh, sorry. I said "no." I was
20 waiting for you --
21 MR. BUDGE: Thanks, Matt. There must have
22 been a glitch or something like that, so thank you for
23 calling that out.
24 Q. (BY MR. BUDGE) So just thinking about just,
25 you know, how long it took to develop this, it sounds

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1 like Department staff worked for a number of months in
2 '21 and then worked from last August until, you know,
3 April, you know, to finally develop this, so, you know,
4 if you can just give me a rough estimate of the number
5 of months that the Department worked on developing the
6 Fifth Methodology Order, I'd appreciate that.
7 A. I would estimate not continuously but parts of
8 maybe 10 or 12 months.
9 Q. Okay, thanks. That helps me. Let me ask
10 about the April 2023 As-Applied Order.
11 Were you involved in the preparation of that
12 order?
13 A. I was.
14 Q. And did Sarah walk through that with you and
15 identify the parts of that order you contributed to?
16 A. She did not.
17 Q. I didn't think so, but there was a period of
18 time where I was multitasking.
19 MR. BUDGE: If the deponent could be presented
20 with Deposition Exhibit 3.
21 THE WITNESS: Is that in this book?
22 MR. BAXTER: Yes.
23 THE WITNESS: Okay. I have it.
24 Q. (BY MR. BUDGE) Do you recognize that as the
25 April As-Applied Order?

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1 A. Yes.
2 Q. Can you just walk me through it and just
3 identify the parts of this order you contributed to?
4 A. Yes. So I'm on page 1. We do the -- Kara and
5 I, generally, do the first draft of this order, so we
6 would have updated the year and the title; and then
7 paragraph 3, 4, and 5 would have been updated. The
8 table under 6 would have been updated, or we would have
9 proposed edits. When I say "updated," we would have
10 proposed edits in those sections. Section --
11 Q. Let me interrupt, Matt.
12 A. Sure.
13 Q. When you say "edits," it sounds like what
14 you're doing is you're using the As-Applied Order from a
15 year prior, and then you're just tweaking it to reflect
16 current conditions?
17 A. It may not be the year prior, but it is --
18 normally, we start with a previous version of the same
19 type of year. So if it doesn't have a shortfall, we
20 choose a year to start with from a previous for
21 consistency. But, yes, so that is how we do this.
22 Q. Okay. That makes perfect sense. I just
23 thought that would be helpful for the record.
24 A. I think I was on page 2. 8, paragraph 8;
25 paragraph 9 would have had edits; paragraph 10;

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1 paragraph 11; the table under 12 would have had proposed
2 edits; 14, on page 4, would have had proposed edits; 15
3 would have had proposed edits, but those would have been
4 done by Jennifer Sukow; and then 16, the same, Jennifer
5 Sukow.
6 I would not have -- well, I was about to say,
7 I wouldn't have touched "conclusions of law," but then
8 on page 5 there is "The Joint Forecast" under
9 paragraph 5, we would have updated that; and 6 there's a
10 shortfall there; Jennifer would have done some editing
11 in 7, and so there is a shortfall in there, we would
12 have also edited that. And then on page 6, the final
13 paragraph, where it's -- I guess it's just under the
14 order, we would have updated proposed edits there as
15 well. And I think -- and then Attachment A, page 1
16 through 4 -- yeah, page 1 through 4, we would have
17 proposed updated figures there.
18 Q. Thanks, Matt. I don't have any questions
19 about this at this time, but I may come back to it
20 later, so that's helpful.
21 Let me have you turn to Deposition
22 Exhibit 5 -- or, excuse me, Deposition Exhibit 2, which
23 is the Fifth Methodology Order.
24 A. Okay. I have it.
25 Q. I've got a number of questions about the

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1 baseline year. And I know Sarah asked you several
2 questions, so I'll try not to duplicate them, but I want
3 to make sure I have a clear understanding of your
4 answers and how that process worked.
5 Let's begin by just turning to page 3.
6 A. Okay. I'm on page 3.
7 Q. And if you look at paragraph 7, it reads, "A
8 baseline year is a year or average of years when
9 irrigation demand represents conditions that can predict
10 need in the current year of irrigation at the start of
11 the irrigation season."
12 Do you see that?
13 A. I see that, yes.
14 Q. The baseline year is, essentially, just a
15 volume of water that we assume the Coalition may need to
16 grow crops that year?
17 A. Yes, by company.
18 Q. By company?
19 A. But it's not one volume, yep.
20 Q. Thank you for the clarification. And just so
21 I understand, the baseline year does not -- the way the
22 Department has selected that, they've not selected the
23 year of the most likely water needs of each member of
24 the Surface Water Coalition; they are -- you're
25 intentionally selecting a year that assumes

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1 greater-than-average water demand?
2 A. Correct.
3 Q. I see. And then that paragraph we just read
4 it says it can be a single year or an average of years
5 to represent that above-average demand?
6 A. Yes.
7 Q. Rather than selected baseline year volume that
8 perfectly matches a prior year or an average of prior
9 years, has Department staff ever considered just
10 selecting a volume that's above average, whether or not
11 that volume was diverted in any particular year?
12 A. I think we've had, at a technical level -- I
13 cannot speak for the Director or anyone else -- at a
14 technical level, we have discussed that informally.
15 Q. And what would you see being the pros and cons
16 of that type of approach?
17 A. I'll start with the cons. What number is it
18 going to be? How do you justify that number?
19 Everything we do in the methodology is going to get
20 scrutinized, so we have to come up with a reason why
21 we're doing it. So that's the con, like what could we
22 do.
23 The pro of doing something like that is maybe,
24 possibly, we could -- we could make it -- you know, take
25 other considerations into -- you know, adjustments of

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1 some kind into it. We could adjust the number based on
2 the season or based on things like that. It would be a
3 little more flexible. I guess that was a long way
4 around to say it's a little more flexible. Sorry.
5 Q. Yeah, I understand. And maybe to give you a
6 hypothetical: If the years that met the criteria you
7 didn't feel were the best representations of water
8 demand, that flexibility would maybe allow you to select
9 a volume that's, you felt, more representative of likely
10 water demand for the Coalition?
11 A. Possibly. Possibly.
12 Q. Okay. Let's look at that same page. And if
13 we look at paragraph 8, there's three factors that are
14 considered: "climate; available water supply; and
15 irrigation practices." And just summarizing
16 paragraph 9, as I understand it, the selection criteria
17 set forth in the Fifth Methodology Order looks for years
18 that have above-average temperature, below-average
19 precipitation, and above-average diversions?
20 A. Those are three of the five criteria that we
21 look at.
22 Q. Okay. And tell me the other two criteria.
23 A. Growing degree days and limited supply.
24 Q. And "limited supply" or "unlimited supply"?
25 A. Supply not limited, you are correct.

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1 Q. Yes, supply not limited.
2 A. Thank you.
3 Q. Let me ask you about that last factor. And I
4 think we've got to flip to the next page. It's at the
5 bottom of paragraph 9, but it's on page 4 of the order.
6 A. Okay. I think I'm there.
7 Q. It's the last sentence. It says, "actual
8 supply should be analyzed to assure that the baseline
9 year is not a year of limited supply."
10 Explain the thinking behind that criteria.
11 A. My interpretation of that is they have the
12 water that they want to put to use, it's available to
13 them. They aren't limited in some other way, like they
14 would use more water if they had it, if they could get
15 it, but it's just not there. It's a short water supply,
16 storage wasn't enough.
17 Q. The way I read this, they're selecting a year
18 that does not have a constrained water supply. It's
19 got -- that the water supply is not limited.
20 Is that right, or am I not understanding that?
21 A. I think you're correct, that it's not limited.
22 Q. Meaning they have more water to divert if they
23 want it?
24 A. I don't know about more, but they have what
25 they need. It is available for what they need or what

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1 they demand for their crops.
2 Q. Gotcha. If we look at the prior sentence, one
3 of the factors is that you're going to strive to "select
4 a year of below-average precipitation to ensure that
5 increased diversions were a function of crop water need
6 and not other factors."
7 What types of other factors besides crop water
8 need would compel a member of the Coalition,
9 potentially, to divert water?
10 A. They also divert additional water for, like,
11 carrying water; you know, there's additional water they
12 need just -- not just what the crops need to get it to
13 their fields. So there is additional water there that
14 they need.
15 Q. Does some of the Coalition members also divert
16 water for their hydropower generation?
17 A. I don't know.
18 Q. Is that something that Department staff has
19 analyzed?
20 A. I have not analyzed it. I don't know if
21 someone else has analyzed that.
22 Q. You may not know the answer to this question,
23 but in years where there's plentiful natural flow, you
24 know, above-average water supply years, is it your
25 understanding that canal companies may divert as much

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1 water as they can get in the canal because it makes
2 management of the supply more convenient?
3 A. I don't know the answer to that.
4 Q. Okay, fair enough.
5 In terms of selecting the baseline year, the
6 Director ultimately makes the decision; right?
7 A. Yes.
8 Q. And then the role of staff is to arm him with
9 the data to help him make the best decision?
10 A. I believe that is our role, yes.
11 Q. I understood from some of the data presented
12 that there were two years that met the criteria for
13 selecting a baseline year, 2018 and 2020; is that right?
14 A. Yes.
15 Q. Did staff provide the Director with data
16 showing that 2020 was also a qualifying year?
17 A. Yes.
18 Q. Did staff provide the Director with
19 information about any other ways of, potentially,
20 selecting a baseline year?
21 A. That question is unclear to me. Could you
22 state it slightly different or repeat it?
23 Q. Did staff identify any alternate ways to
24 determine the baseline year and present that to the
25 Director for consideration?

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1 A. I feel like this is getting partially into the
2 deliberative process of the Director here about what we
3 present to him and how we communicate with him.
4 Q. Yeah. And I don't need you to answer the
5 latter part. I'm just trying to find out what
6 information was presented to him to consider.
7 So was information presented to the Director
8 about potential alternatives to 2018 or 2020 as the
9 baseline year?
10 A. I think in a general sense we did discuss that
11 in looking at the question. If we -- and just generally
12 speaking, like, if we don't use -- we have two years
13 that qualify, that meet the criteria -- if we don't use
14 those years, what else would we use. As just kind of a
15 general discussion about what our options are.
16 Q. Okay. I understand. That makes sense. If I
17 have you look again at Deposition Exhibit 4, which is
18 that December document that you and Kara Ferguson
19 authored, the preliminary recommendations.
20 A. Yes.
21 Q. How come that doesn't identify 2020 as a
22 potential alternative way to select a baseline year?
23 A. Under bullet -- the first bullet there, like
24 three-quarters of the way down, is that what you're
25 talking about, where we just talk about '18?

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1 Q. Right. Yeah.
2 A. Okay. At that point this is our
3 recommendation. Our recommendation was 2018.
4 Q. And was that at least partly based on feedback
5 you had received from the Director, you know, before
6 that date?
7 A. Yeah, I think he had provided input on when we
8 presented it to him before the technical working group
9 meetings.
10 Q. Okay. I understand.
11 MR. BUDGE: Dylan, could you hand Matt, to be
12 marked as an exhibit, or the Reporter, a copy of Sophia
13 Sigstedt's comments that she submitted on January 16th.
14 The document has a Lynker logo at the top, and it's
15 titled, a "Memorandum" to Matt Anders and Kara Ferguson
16 from Sophia Sigstedt and dated January 16th, 2023.
17 MR. ANDERSON: Yes, TJ. Sorry I didn't
18 answer.
19 (Discussion held off the record.)
20 (Exhibit 15 marked.)
21 Q. (BY MR. BUDGE) Do you recognize this
22 document, Matt?
23 A. Yes, I do.
24 Q. You've seen this before?
25 A. Yes, I have.

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1 Q. Okay. I want to ask you about some of the
2 suggestions Sophia had made here.
3 A. Okay.
4 Q. Let's begin by turning to page 2. And at the
5 top there's a paragraph or section No. 1, and Sophia
6 makes the suggestion that the Department consider rank
7 within the period of record and select an average in
8 years closer to the rank of the '06, '08, '12 baseline
9 year selected in 2015.
10 Do you remember reviewing Sophia's comments in
11 this regard?
12 A. I do.
13 Q. What do you think about her suggestion?
14 A. The methodology lays out the criteria that we
15 are going to use for selecting the baseline year. If
16 we -- we would have to modify the order to add that as a
17 criteria.
18 Q. Did you discuss with Sean Vincent or Mat
19 Weaver that possibility that Sophia had suggested, you
20 know, we could do this to identify -- or to designate a
21 different baseline year?
22 A. I don't think that I -- I didn't recommend it
23 to either one of those people.
24 Q. Okay. This suggestion, then, it sounds like,
25 didn't make it to the Director?

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1 A. I did not recommend it to the Director as a
2 change to make.
3 Q. Okay. You may have answered this: Was her
4 report forwarded to your superior at the time, either
5 Sean Vincent or Mat Weaver?
6 A. I think the last -- I answered the question
7 last time, the legal -- that I forwarded to legal staff
8 and the Director.
9 Q. That's right. That's correct. I apologize
10 for forgetting that.
11 If the Director was open to the idea of
12 changing the criteria for selecting the baseline year,
13 what do you think about Sophia's suggestion?
14 A. I think it's similar to your question about
15 could you just choose an average diversion. You can use
16 rank, but you have to justify it in some way, like
17 rationalize this is why we're using this rank. I think
18 it's a good way to characterize the data to determine
19 where you are in the body of the data, but I wasn't able
20 to -- in thinking about her proposal -- come up with a
21 rank that I could justify in some way. And, you know, I
22 thought about it, like how would I do that. And I
23 wasn't able to come up with something that I was willing
24 to recommend to the Director.
25 Q. It sounds like that might require some

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1 exercise of discretion by the Director?
2 MR. BAXTER: Objection; calls for a legal
3 conclusion.
4 But to the extent you can answer the question,
5 Matt, go ahead and answer the question.
6 THE WITNESS: I think that falls under
7 discretion.
8 Q. (BY MR. BUDGE) Yeah, okay. Let me ask -- if
9 we flip to page 4 --
10 A. Yep, I'm there.
11 Q. -- at the top of page 4 there's a paragraph
12 No. 2, it's another suggestion that Sophia had made.
13 And I'll just read the first sentence.
14 It says, "Another better alternative would be
15 to use diversion demands for the '06/'18 irrigation
16 seasons for the baseline year," because they were unique
17 hydrologic circumstances in 2018 that she doesn't
18 believe represents a typical dry year.
19 Do you remember this part of her comments?
20 A. I do.
21 Q. Do you agree that the hydrologic conditions in
22 2018 were unique, as Sophia describes in that paragraph?
23 A. I don't know if I'd use the word "unique"
24 there. It was a year that we were coming off -- 2017
25 was the previous year, a really good water year, the

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1 base flow was good, lots of carryover, so the supply was
2 really good going into 2018, and, for the most part, for
3 the first half.
4 Q. And then I think it had, like, zero
5 precipitation in July, or something like that; right?
6 A. And that's why it qualified for a baseline
7 year under our criteria. It got really hot and dry.
8 Q. Yeah.
9 A. I mean, that's what our criteria are looking
10 for is a warm, dry, you know, less-than-average
11 precipitation season.
12 I think she did talk about, you know, as far
13 as unique, there was no precipitation in, maybe, July,
14 August, or September. That is unique, but the
15 precipitation is normally low in those months anyway. I
16 mean, it's not uncommon to have very low precipitation
17 in those months.
18 Q. If the Director were to consider changing the
19 selection criteria for the methodology -- or, excuse me,
20 for the baseline year, do you think considering
21 diversion demands, like Sophia had suggested, is worthy
22 of consideration?
23 A. I think we do consider diversions. It's above
24 average. That's what we're looking -- that's what we're
25 trying to get, warm, dry seasons, so we're looking for

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1 higher diversions.
2 Q. I think you've answered other questions like
3 that on this topic, so I'm going to move on and ask a
4 few questions just about the forecast supply. And we
5 can turn back to the Fifth Methodology Order, which you
6 should have in front of you.
7 A. Yep, I do. Can you give me the exhibit number
8 again? Is that 2?
9 Q. Yes. Okay. I changed my mind, Matt. I want
10 to have you look at the technical working group
11 presentation dealing with the April and July forecast
12 supply. I don't know what the number is, but I'll see
13 if I can find it.
14 MR. BUDGE: This may not have been made an
15 exhibit yet. Unless someone else is aware of the
16 November 17th presentation to the technical working
17 group regarding April and July forecast supply, unless
18 someone else has that marked as an exhibit, Dylan, I'll
19 need you to pull that out.
20 MR. BAXTER: Dylan's grabbing it.
21 THE WITNESS: I'm going to show this, TJ. Is
22 this the one that you're --
23 MR. BUDGE: Not that one. It's the same date,
24 but at the bottom it says, "April and July Forecast
25 Supply."

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1 MR. BAXTER: By Kara Ferguson?
2 MR. BUDGE: Yeah, by Kara Ferguson.
3 MR. BAXTER: Let me just compare to make sure
4 I got an accurate copy here. This one has page numbers
5 on it. Yes.
6 MR. SIMPSON: It's too late for him to give it
7 back.
8 MR. FLETCHER: What's the date on it?
9 MR. SIMPSON: November 17th.
10 MR. FLETCHER: Of '22?
11 MR. SIMPSON: Yeah.
12 MR. BAXTER: July forecast. Yep, cool.
13 (Exhibit 16 marked.)
14 Q. (BY MR. BUDGE) You've got that in front of
15 you, Matt?
16 A. I do. We're ready.
17 Q. Do you recognize it?
18 A. I do.
19 Q. And that's the presentation given to the
20 technical working group on November 17th of '22;
21 correct?
22 A. I think it is. But what I was looking for is
23 Kara sent some follow-up information, but I can't
24 remember, off the top of my head, if she updated her
25 presentation. So this is either the original or a

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1 slightly modified after we got the input, but it has,
2 roughly, the same data; it would have been minor if it
3 didn't.
4 Q. Okay. And I'll note that I've added page
5 numbers to the bottom right-hand corner of the slide.
6 It's just for ease of reference.
7 A. Thank you.
8 Q. If you'll turn to slide 9.
9 A. Yep, I'm there.
10 Q. This shows the R-squared value for the
11 regression models for each of the SWC members; correct?
12 A. Yes.
13 Q. And they're pretty constant except for Twin
14 Falls Canal Company. And if you look at the tables, I
15 understand that the R-squared value has degraded over
16 time. It's gone from .86 in 2014 to .84 in 2016, .83 in
17 2018, .8 in 2020, and then drops all the way down to .72
18 in 2022.
19 Do you have any ideas as to why the R-squared
20 value is degrading?
21 A. We don't. We have -- we wonder if it's Box
22 Canyon. Box Canyon is the predictor variable. One of
23 the predictors here, Heise and Box Canyon are used on
24 these. We're wondering if it's that, but we're not
25 sure.

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1 Q. Have you identified any other potential
2 contributing factors?
3 A. At this point, no.
4 Q. Has the Department undertaken to look into
5 this to try to get to the bottom of it?
6 A. Yes. This is one that concerns us, the
7 degradation that you -- and the R-squared that you
8 pointed out, we watch it every year. We haven't found
9 what we think is a reason for it. We have some ideas.
10 At least on the technical level, Kara and I have talked
11 about do we need to -- do we need to find something
12 else. Do we need to do something else with this.
13 We, ultimately, decided that we would watch it
14 another -- you know, just watch it year to year and see
15 what happens to it. But we're -- we think we're kind of
16 on the -- we're getting close to the -- we'll have to do
17 something if it continues to degrade. And that's
18 because -- I'm sorry, go ahead.
19 Q. No, I didn't mean to cut you off. Go ahead
20 and finish, Matt.
21 A. That's just because Twin Falls Canal Company
22 has the first one that has a shortfall, so this one
23 means it has a lot of meaning to the shortfall. So we
24 are watching this one closely.
25 Q. Thank you for doing that. I appreciate the

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1 attention you're giving to that because, as you know, it
2 is significant. And I know you're the scientist, and
3 I'm not.
4 Can you just explain to me why degradation of
5 the R-squared value is important or significant?
6 A. The R-squared is an indicator about how well
7 the regression is predicting what we're trying to
8 predict, which is, in this case, in natural flow. So
9 it's an indicator of, you know, how well it explains
10 variability in the data. And it's a very common
11 variable that people use to evaluate their regressions.
12 The lower that number gets, the less power your
13 prediction is.
14 Q. That's what I understood, but I appreciate
15 that explanation.
16 And I think you mentioned at some point if the
17 R-squared gets too low, you've just got to look for some
18 other mechanism to try to, you know, predict supply?
19 A. Yes.
20 Q. Has the Department staff started to look at
21 any alternatives than the current regression equation?
22 A. As part of the technical working group, Kara
23 did some additional work. She used the Sentinel well
24 index for the settlement agreement, and she used another
25 well, and I don't -- off the top of my head, I don't

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1 know where it was or what the well number was, but she
2 did look at a slightly different well based on a
3 discussion that we had at the technical working group.
4 Q. Okay. This is something that's happened since
5 that technical working group meeting?
6 A. Yeah, she presented at the technical working
7 group and then worked on it and sent it back, kind of a
8 follow-up to the technical working group, saying we
9 looked at this, and it didn't really -- it wasn't the
10 magic that we were hoping it was going to be.
11 Q. Well, I wish you luck in finding the magic.
12 The earlier recommendations that you and Kara
13 made, that December 23rd document, it doesn't highlight
14 this issue with the R-squared value.
15 Is this something you discussed with the
16 Director at all?
17 A. Yeah.
18 Q. Let me have you turn back to the comments that
19 Sophia submitted. That's Exhibit 15.
20 A. Okay. I have it.
21 Q. Okay. And on page 4 of that, if you'll flip
22 to page 2 -- or, excuse me -- page 4.
23 A. Okay. I'm on page 4.
24 Q. Under Section 2, the second paragraph, I'll
25 just read the first sentence, it says, "Lynker's

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1 technical memorandum included as addendum to IDWR staff
2 recommendations in 2015 laid out an alternative forecast
3 model approach that I continue to think should be
4 further investigated."
5 Are you familiar with the alternative forecast
6 model approach that was laid out in Lynker's 2015 memo?
7 A. No.
8 Q. So you don't know whether the Department's
9 evaluated that recommendation at all?
10 A. As far as I know, we haven't evaluated that
11 recommendation.
12 Q. Okay. Thank you.
13 I want to ask a few questions related to the
14 acreage of Twin Falls Canal Company. And you'll recall
15 that Ms. Klahn highlighted the disparity between the
16 number of acres Twin Falls Canal Company reports as
17 being irrigated and the number of acres the Department
18 staff identified as being irrigated, somewhere around a
19 little over 10,000 acres, I think.
20 You mentioned during that dialog that you
21 didn't feel like the Department's analysis satisfied the
22 clear and convincing standard.
23 Did I understand that answer correctly?
24 A. Yes, that was my response.
25 Q. What type of acreage examination would be

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1 required to -- you know, to satisfy the clear and
2 convincing standard as you understand it?
3 MR. BAXTER: I'm going to object. It calls
4 for a legal conclusion by this witness.
5 But, Matt, go ahead and answer the question to
6 the extent you can.
7 THE WITNESS: I think to start with, it would
8 have to be -- ideally, if we could do it in-season, but
9 that's awfully difficult to do because the irrigation
10 season doesn't start until April, often, and we --
11 that's when we're issuing our order and issuing the --
12 so at least it would have to be within, I would say, you
13 know, a year, and it would have to look at trying to
14 take out things like hardened acres, try to capture, you
15 know, what irrigation is taking place.
16 Q. (BY MR. BUDGE) So I understood that
17 Department staff, when they did their review, they were
18 using satellite imagery and clipping out the
19 nonirrigated acres?
20 A. No. They -- well, there's three classes that
21 they have. And you're correct in that they're using
22 satellite imagery and aerial photography, and they may
23 use other things, as well. They classify it into
24 irrigated, nonirrigated, and semi-irrigated. The
25 semi-irrigated is the one that, for lack of a better

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1 term, is kind of the catchall. It ends up being things
2 like 10-acre farmsteads that have some irrigation but a
3 house and buildings on it, so it's a mixture on that
4 land. The nonirrigated is nonirrigated, and the
5 irrigated is irrigated, but we have this other class
6 within there.
7 Q. And is that other class, then, that you think
8 you would need some type of in-season inspection of to
9 have confidence in that analysis?
10 A. I'm not so -- I'm not so worried about -- or
11 concerned about that one. I mean, farmsteads and new
12 buildings don't change that much, but we don't have it
13 split out in that data set. So we would need to get it
14 split out.
15 I think, for me, the making it more recent
16 would be looking at the irrigated and nonirrigated
17 portions, you know, are there new pivots, have they
18 rearranged their fields, those types of things, have
19 things gone into CRP or something like that, you know,
20 that it's fallow for a year or two or something like
21 that.
22 Q. When was it that the Department did its
23 analysis that came up with the, you know, 183,000-acres
24 figure?
25 A. The one that Sarah showed earlier today was

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1 from 2015, the 183. The 179 and the 180 was done more
2 recently within the last couple of years. And it was --
3 I did it just recently, and then -- with the 2017. I
4 think for the METRIC, we were using the 2011. I think
5 that's where the 179 came from.
6 Q. Gotcha. Have you seen the report that IGWA's
7 consultant did back during the delivery call in around
8 '08, or something like that, where they came up with
9 around 100 -- I think it was also around 183,000 acres?
10 It was in the 180s.
11 A. Is that the -- I'm wondering if that's the SPF
12 column on that.
13 Q. Yes. Yeah, Scott King, SPF.
14 A. Yeah, I -- SPF participated in the 2015
15 technical working group. And I remember discussing that
16 report and talking to them. I think that's where I --
17 how I knew about it. I have not read that report
18 recently.
19 Q. Okay. Was this information presented to the
20 Director, you know, the Department's more recent
21 analysis showing there was around 179- or 180,000 acres
22 actually irrigated?
23 A. We did discuss that with the Director, yes,
24 the irrigated -- using the year, the 2017 irrigated
25 lands, that's what we talked to him about.

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1 Q. Okay.
2 A. Not the SPF data or the 2011.
3 Q. So what would we need to do this irrigation
4 season, you know, if IGWA or the groundwater users,
5 collectively, if we're going to take this on and try to
6 come up with a reliable analysis of how many acres are
7 actually being irrigated, what do we need to do for you
8 to have confidence in what we provide?
9 MR. BAXTER: Objection; calls for speculation
10 as to it's the Director who makes a decision here, and
11 what the Director may accept is not something within the
12 scope of Mr. Anders' knowledge.
13 But, Matt, to the extent you understand the
14 question, go ahead and answer the question.
15 THE WITNESS: Could you repeat the question?
16 MR. BUDGE: I can. And, Garrick, I would ask
17 that your objections be one-word objections and not
18 narrative.
19 Q. (BY MR. BUDGE) The question is: If the
20 groundwater users wanted to perform an analysis of
21 actual irrigated acres in Twin Falls Canal Company, what
22 would we need to do for you to have confidence in that
23 analysis beyond what Department staff have already done?
24 A. I think to have confidence in it, we would
25 want to be able to review it. And we would end up

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1 comparing it to some kind of remote-sensing type of
2 data, you know, aerial photography, to see what we --
3 how accurate it is. Do we, you know, spot check? I
4 don't know the standard that we would use. We've never
5 considered analyzing someone else's irrigated lands.
6 Q. Yeah. And this is why I'm asking -- it's not
7 a gotcha question -- it's just a genuine trying to find
8 out how do we get the best science available on this
9 component of the methodology.
10 And if the Department doesn't trust its own
11 analysis, and they don't really want outsiders analyzing
12 that, are we just stuck with decreed acres forever
13 regardless of what's actually irrigated?
14 MR. BAXTER: Objection. I think your
15 narrative mischaracterizes the deponent's earlier
16 testimony.
17 But to the extent there was a question there,
18 if there was one, feel free to answer the question.
19 THE WITNESS: I think we trust our data set.
20 I think our data set is out of date. It's not that I
21 don't think it's a good data set. I don't think that
22 it's a data set we could use to do clear -- to meet the
23 clear and convincing evaluation.
24 If we were to create a data set using the
25 methods that we use, I -- you know, like right now -- I

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1 would trust that data set; that is a really good data
2 set, the irrigated lands data sets. We -- those are
3 hand-digitized, a lot of those. Those are people
4 looking at fields. It doesn't -- there's a low -- I
5 mean, those are reliable data sets; it's just out of
6 date.
7 Q. (BY MR. BUDGE) And that's what happened in
8 2017?
9 A. What do you mean? I'm sorry, I didn't
10 understand the question.
11 Q. Oh. So you said you've got confidence in this
12 type of data set that you just described.
13 A. Yes.
14 Q. Is that what was done in 2017 by the
15 Department?
16 A. Used the irrigated lands data set?
17 Q. Yes.
18 A. We did not use the irrigated lands data set in
19 2017. So when -- we had parallel processes going in
20 developing METRIC, and this comes down to me. On one
21 hand I was working on the Surface Water Coalition, and I
22 was not using the irrigated lands data set to limit it
23 to irrigated and semi-irrigated acres.
24 But I developed this parallel process with
25 METRIC where I was using irrigated lands data set to

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1 reduce the acres. I didn't realize that I had two
2 different methods. And when I presented it to the
3 technical working group, I think I presented it as that
4 I was using the irrigated lands data set on -- for the
5 methodology and realized -- I think it was you,
6 possibly, who pointed out the acreage on my slide when I
7 was presenting it.
8 That was when I realized I had two different
9 methods, unknowingly had two different methods going
10 at -- you know, at the same time with METRIC. So we
11 haven't been using the irrigated lands data set on the
12 Surface Water Coalition shapefiles.
13 Q. Yeah, so let me see if I'm following you; I
14 might not be.
15 A. Okay.
16 Q. The last irrigated lands data set was created
17 in 2017; is that right?
18 A. Correct.
19 Q. But that's not what you've been using in the
20 methodology order since that time?
21 A. Since the 2000 -- since the Fourth Methodology
22 came out, I haven't been using an irrigated lands data
23 set on the Surface Water Coalition shapefiles.
24 Q. Gotcha. Have you or anyone else at the
25 Department reached out to the Twin Falls Canal Company

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1 or any other member of the Coalition and said the acres
2 you're reporting don't match up with the 2017 irrigated
3 lands data set and ask them to explain the difference?
4 A. We have not.
5 Q. Do you have any reason to believe that the
6 number they report is based upon a more robust analysis
7 than what the Department has performed to date?
8 A. I don't know the answer to that.
9 Q. Is the Department making any effort to develop
10 a contemporary irrigated lands data set so we can have
11 an accurate number of irrigated acres for Twin Falls
12 Canal Company or any other member of the Coalition?
13 A. We are working on additional data sets since
14 2017. I can't remember what year is going to be the
15 most recent year, but we have additional ones that we're
16 working on.
17 Q. When do you expect that to be completed?
18 A. I don't know. I'd have to find out.
19 Q. Okay. Let me have you turn to the Fifth
20 Methodology Order.
21 MR. BAXTER: TJ, we're going on an hour and a
22 half here.
23 MR. BUDGE: Yep.
24 MR. BAXTER: Matt, does it --
25 THE WITNESS: I would like a break soon, but

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1 if you're in the middle of a question, we can continue
2 until you get a natural break.
3 MR. BUDGE: I've probably got another
4 half-hour. So we can take a break here, and I'll
5 organize my -- the remainder of my outline so we can
6 expedite the remainder of my questions.
7 THE WITNESS: Yeah, I think that would be
8 good. A half-hour is probably too long, longer than I
9 want to go. How's that?
10 MR. BUDGE: It's 3:12. Do you want to shoot
11 for 3:20? 3:25?
12 THE WITNESS: 8:20 -- or, no, I said 8:20.
13 3:20.
14 MR. BUDGE: Okay. We'll see you then.
15 Thanks, Matt.
16 THE WITNESS: Thank you.
17 (Break taken.)
18 MR. BUDGE: Back on the record.
19 Q. (BY MR. BUDGE) Hey, Matt, if you'll turn to
20 the Fifth Methodology Order, that's Deposition
21 Exhibit 2, and flip to page 10.
22 A. Okay. I'm there.
23 Q. And under paragraph 22, you'll see the table
24 that shows the acres used in the methodology.
25 A. Yes, I do.

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1 Q. I'm looking at Twin Falls Canal Company, and
2 the table shows 194,732 acres.
3 Do you see that?
4 A. I do.
5 Q. Am I understanding correctly that that's the
6 number of acres Twin Falls reported to the Department?
7 A. In their -- their shapefile was from 2013,
8 then we do an analysis on it to -- or we did at that
9 point, we don't do it every year. That might not have
10 been the acres that their shapefile was. That was the
11 acres after we made sure there were no overlaps or acres
12 outside their service area that we had. So that might
13 not have been what they told us, but that's what we came
14 up with after our -- we do an analysis on all the
15 shapefiles.
16 Q. Okay. And tell me again what that analysis
17 consists of.
18 A. For most of them -- well, it's the same
19 analysis for everybody. We make sure that there's no
20 overlapping polygons in there and that -- so that acres
21 wouldn't be double-counted and that no acres fall
22 outside their service area in that shapefile.
23 Q. Okay.
24 A. For most of them we never do it. We only did
25 it once, but Minidoka gives us a shapefile every year,

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1 so we do that every year for Minidoka.
2 Q. Gotcha.
3 A. Sorry to cut you off.
4 Q. As part of that analysis, you don't go in and
5 look at hardened acres and remove acres that are
6 obviously not irrigated?
7 A. No, we don't.
8 Q. As part of the irrigation data set, the 2017,
9 this last time it was done at the Department, as part of
10 that analysis, the Department does go in and look at
11 hardened acres and other land that's obviously not
12 irrigated and cuts those out?
13 A. Partially. It cuts out roads and, you know,
14 things like the city of Twin Falls or Kimberly, those
15 big things like that; but the semi-irrigated
16 classification does have hardened acres in it. That's
17 the one with the farmsteads and maybe the road up to the
18 farmstead, so that's a mixture of that.
19 I call it "farmstead," but it could be other
20 things, you know, a park or something like that where
21 there's a shelter or something. But there's usually
22 some hardened acres. That's why we call it
23 semi-irrigated; there's something going on in there
24 that's not all irrigated.
25 Q. Okay. So the three classifications in the

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1 irrigation data set, the one from 2017, you've got
2 irrigated acres --
3 A. Yep.
4 Q. -- nonirrigated, and then semi-irrigated?
5 A. Yep.
6 Q. If you assume all of the semi-irrigated acres
7 are fully irrigated and you just take out what's
8 obviously not irrigated, do you know how many irrigated
9 acres would have been shown in that 2017 data set?
10 A. That's the 180,000. We take out -- the
11 roughly 180,000 that you end up with. When we do that
12 analysis, we take out the nonirrigated; what's left over
13 is the irrigated and the semi-irrigated. So even in
14 that number there is still some hardened acres that are
15 represented by that semi-irrigated land.
16 Q. Gotcha. So if you scrutinize the
17 semi-irrigated lands, then the net number may be less
18 than the 180,000?
19 A. Likely less, yes. How much, I don't know.
20 Q. Yeah, so explain again why the Department
21 doesn't just at least use the 180,000 figure. Is it
22 because you think maybe new land has been brought under
23 irrigation since 2017?
24 A. There have been changes since 2017 -- I'll
25 give you an example. You know, when I was looking

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1 through it and kind of comparing what we get with the
2 2021 aerial photography, I found a location where in
3 2017 it was individual fields that looked like maybe
4 they were wheel lines or something like that; but by the
5 time we got to 2021 -- so it was clipped out into -- all
6 these areas were clipped out of it as nonirrigated.
7 But when we get to 2021, a pivot had been
8 replaced in there, so areas that were -- we called
9 "nonirrigated" using the -- doing the 17 irrigated lands
10 data set, were now irrigated under that pivot. So they
11 had reorganized their fields, taken out roads. So there
12 were irrigated things that we had taken out of that data
13 set with it because it was out of date.
14 Q. Gotcha. So there's -- you're saying there's
15 probably some land that in 2017 was shown as
16 nonirrigated that may currently be irrigated?
17 A. And vice versa. I guess there's both, yes.
18 Q. Yeah, given the level of urbanization that's
19 occurred within the Twin Falls Canal Company service
20 area, wouldn't you expect, on the whole, that more land
21 would be taken out of irrigation since 2017 than brought
22 under irrigation?
23 MR. BAXTER: Objection; calls for speculation.
24 MR. SIMPSON: Objection.
25 MR. BAXTER: Go ahead and answer the question,

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1 though. Sorry.
2 THE WITNESS: I don't know. I don't -- I've
3 never seen anything that indicates that's true or false.
4 I just have no data or anything to rely on.
5 Q. (BY MR. BUDGE) Do you have any data that
6 would indicate to you that the number of acres shown on
7 page 10 of the Fifth Methodology Order -- and we can
8 look at Twin Falls again -- have you received any
9 information that would tell you that the 194,732-acre
10 figure is a more reliable representation of actual
11 irrigated acres than what is found in the 2017 data set?
12 A. I don't have anything that says it's more
13 reliable.
14 Q. Do you know if that 2017 data set is utilized
15 by Jennifer Sukow in her modeling activities?
16 A. I do not know if she uses that.
17 Q. Let me have you turn -- in fact, Dylan, I'm
18 going to have you hand Matt a new exhibit. It's the
19 technical working group presentation labeled, "Use of
20 the Near Real Time METRIC. Presented by Ethan Geisler,
21 Kara Ferguson, & Matt Anders," dated December 1st.
22 (Exhibit 17 marked.)
23 Q. (BY MR. BUDGE) Matt, has that exhibit been
24 provided to you?
25 A. Yes, it has. Thank you.

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1 Q. Do you recognize that document?
2 A. I do.
3 Q. And please identify it.
4 A. The title is "Proposed Modification to Method
5 for Determining Reasonable in-Season Demand for the
6 Surface Water Coalition: Use of Near Real Time METRIC.
7 Presented by Ethan Geisler, Kara Ferguson, & Matt
8 Anders," dated December 1st, 2022.
9 I believe this is the presentation that Ethan
10 presented to the technical working group.
11 Q. Were you present at that meeting where he made
12 that presentation?
13 A. Yes, I was.
14 Q. And are you familiar with the data he
15 presented?
16 A. I am, yes.
17 Q. You can turn to the very last page of that,
18 and, hopefully, you still have open page 10 of the Fifth
19 Methodology Order, because I want to look at those side
20 by side.
21 A. I don't, but I can get it open.
22 Q. If you would, that would be great.
23 A. And you're comparing to a similar table on
24 page 10, where it talks about "Shapefile Acres,"
25 "Partial Decree Acres"; is that correct?

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1 Q. Yep.
2 A. Okay.
3 Q. And I'll draw your attention to the line for
4 A&B Irrigation District. It looks to me that in the
5 methodology order and in the presentation, the same
6 acreage figure is used, 15,924?
7 A. I think you're -- I think that's correct.
8 They match.
9 Q. In the presentation at the bottom, there's an
10 asterisk that says, "A&B acres include" the following,
11 and the first bullet point says, "1 to 14,
12 14,637 acres."
13 Do you know what the "1 to 14" refers to?
14 A. That's water right 1-14, I believe.
15 Q. Okay. And then there's a list of beneficial
16 use claims.
17 Are you familiar with those?
18 MR. BAXTER: TJ, hold up real quick. I'm just
19 trying to find -- what page are you on?
20 THE WITNESS: We're on page 22.
21 MR. FLETCHER: The last page.
22 THE WITNESS: Yours isn't marked. I think you
23 have a different version.
24 MR. FLETCHER: It's on the very last page.
25 MR. BUDGE: Garrick, there's two versions of

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1 this presentation. There's one that had supplemental
2 slides.
3 MR. BAXTER: Okay.
4 MR. BUDGE: You need the version with the
5 supplemental slides.
6 MR. BAXTER: There we go. All right. Thank
7 you, TJ. I appreciate that. I'm good to go now.
8 Q. (BY MR. BUDGE) The second bullet is
9 "Beneficial use claims."
10 Are you familiar with those water rights?
11 A. Somewhat.
12 Q. Are those decreed water rights?
13 A. I believe they are.
14 Q. Okay. And then there's an enlargement
15 right -- two enlargement rights totaling 1175.2 acres.
16 Do you see that?
17 A. Oh, I'm sorry, yes.
18 Q. Do you know what the priority dates are on the
19 beneficial use claim of water rights?
20 A. I don't.
21 Q. What about the enlargement rights?
22 A. I don't.
23 Q. Okay. For purposes of calculating irrigation
24 season demand for A&B, the Department is using the
25 beneficial use claims or including the beneficial use

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1 claims and the enlargement rights; is that right?
2 A. Yes, that is correct.
3 Q. Has there been any discussion among Department
4 staff as to whether it's appropriate to include those
5 water rights?
6 A. I have not been part of any discussions about
7 that.
8 Q. Let me switch gears. I'm done with those
9 exhibits for the time being. And I'll have you pull up
10 Exhibit No. 15, which are the comments that Sophia
11 submitted in January of this year.
12 A. Yep, I have them.
13 Q. If you'll turn to page 6. Actually, you can
14 turn to page 5 to begin with, just to see the section
15 heading. We're in Section 4, which is labeled, "Project
16 Efficiency"; do you see that?
17 A. I do.
18 Q. And then the next page, page 6, there's some
19 comments that Sophia makes about project efficiency
20 among SWC entities. And this is a subject that
21 Ms. Klahn asked you questions about, and there was some
22 discussion about surface water efficiencies either being
23 flat or becoming slightly less sufficient in recent
24 years.
25 Do you remember that conversation?

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1 A. I do remember that, yep.
2 Q. I just have a few follow-up questions.
3 A. Okay.
4 Q. Had the Department ever investigated potential
5 system efficiencies or improvements available to the
6 Surface Water Coalition?
7 A. Not that I'm aware of.
8 Q. There's been no studies of their systems and
9 what improvements might be available to help them become
10 more efficient?
11 A. Not that I know of, no.
12 MR. BUDGE: Okay. Let me have marked as an
13 exhibit the conjunctive management rules.
14 MR. BAXTER: Did you provide those to Dylan?
15 MR. BUDGE: I did.
16 MR. FLETCHER: What is it?
17 MR. BAXTER: Conjunctive management rules.
18 (Exhibit 18 marked.)
19 Q. (BY MR. BUDGE) Thanks, Matt. If you'll turn
20 to page 3 of those rules.
21 A. Okay. I'm on page 3.
22 Q. I'm, initially, just going to ask whether
23 you're familiar with some of these rules. If you look
24 at the page 3, there's a Section 10 which has several
25 definitions.

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1 A. I see.
2 Q. And if you'll look at 10.07, there's a
3 definition of "Full Economic Development of Underground
4 Water Resources." I'm going to ask you to just read
5 that to yourself, and let me know if you're familiar
6 with this concept of "Full Economic Development of
7 Underground Water Resources."
8 A. Okay, I read it.
9 Q. Are you familiar with this rule or at least
10 the concept?
11 A. I'm mildly familiar with the concept.
12 Q. Okay. And then if you'll look at the next
13 definition, it's "Futile Call." If you'll read that and
14 let me know if you're familiar with that concept.
15 A. Okay. I'm done reading.
16 Q. Are you familiar with the futile call concept?
17 A. I am familiar with that concept.
18 Q. Okay. If you'll turn to page 5.
19 A. I'm on page 5.
20 Q. We're in Section 20 which has statements of
21 purpose and policies for the conjunctive management of
22 surface and groundwater resources. And I'll ask you to
23 read subsection 20.03, which is titled, "Reasonable Use
24 of Surface and Ground Water."
25 Read that again, and let me know if you're

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1 familiar with the concept described in that rule.
2 A. I have finished reading it.
3 Q. Are you familiar with the concepts of
4 reasonable use, optimum development of water resources,
5 and full economic development described in that
6 paragraph?
7 A. Somewhat familiar.
8 Q. And then the last sentence I'll read: "An
9 appropriator is not entitled to command the entirety of
10 large volumes of water in a surface or ground water
11 source to support his appropriation contrary to the
12 public policy of reasonable use of water as described in
13 this rule."
14 Are you familiar with this concept as well?
15 A. Yep, I am. Yes, I am. Sorry.
16 Q. Were concepts of reasonable use, futile call,
17 or full economic development ever brought up during your
18 work on the Fifth Methodology Order?
19 MR. BAXTER: TJ, I'm going to object to the
20 question.
21 At our April 28th status conference, the
22 Director stated that this is an evidentiary hearing,
23 that he is making employees available to testify
24 regarding evidentiary facts and the data in which the
25 methodology order relies upon. He made it clear, and

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1 identified both Matt Anders and Jennifer Sukow as
2 witnesses in which he is going -- he's identifying to
3 testify as to these particular issues. Questions about
4 reasonableness, futile call are legal questions and
5 outside the scope in which the Director has identified
6 these witnesses to testify to.
7 And so I'm going to instruct the witness not
8 to answer the question.
9 MR. BUDGE: Okay, Garrick, just to clarify,
10 I'm not asking the witness about legal conclusions. I'm
11 asking the witness what information he may have supplied
12 to the Director related to these topics.
13 MR. BAXTER: Matt, go ahead and answer the
14 question.
15 THE WITNESS: This is a legal topic. It's
16 outside of my expertise. I didn't provide any input to
17 the Director on these topics.
18 Q. (BY MR. BUDGE) Did you or anyone else at the
19 Department calculate the total number of water rights
20 that would be curtailed under a December 30th, 1953,
21 curtailment date in the absence of mitigation plans?
22 A. That -- yes, I -- that was not by me, but
23 somebody has that number at the Department, yes.
24 Q. Do you know who that would be?
25 A. It would be done out of the water distribution

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1 group. Normally, I think that once Jennifer identifies
2 a priority date, it goes to Brian Ragan, and he starts
3 compiling a list of what rights are going to be
4 curtailed, and he would -- and I think the first portion
5 of that is he knows how many water rights that is.
6 Q. Okay. That's not something that you're able
7 to testify about?
8 A. His process?
9 Q. Yeah, just the total number of water rights
10 curtailed under the current curtailment date in the
11 absence of mitigation plans.
12 A. I don't have that number, no.
13 Q. Did you or anyone else at the Department
14 calculate the total diversion rate in cfs that would be
15 curtailed under a December 30th, 1953, curtailment date
16 in the absence of mitigation plans?
17 A. Repeat that question, please.
18 Q. Did you or anyone else at the Department
19 calculate the total diversion rate in cfs under water
20 rights that would be curtailed under a 1953 curtailment
21 date in the absence of mitigation plans?
22 A. I would refer that question to Jennifer Sukow.
23 Q. Okay. Do you know if you or anyone else
24 calculated the total volume that would be curtailed in
25 the absence of mitigation plans? So I'm talking

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1 acre-feet.
2 A. Can you repeat that question, please?
3 Q. Yeah. Did you or anyone else at the
4 Department calculate the total volume in acre-feet of
5 water that would be curtailed under a December 30th,
6 1953, curtailment date in the absence of mitigation
7 plans?
8 A. That's the shortfall that we calculated in
9 April.
10 Q. Not the shortfall to the Coalition. I'm
11 asking about the total volume under groundwater rights
12 that would be curtailed.
13 A. That number that we put in the As-Applied is
14 not just for IGWA, that's everybody. That's the
15 shortfall, that's how much needs to be curtailed.
16 Q. Yeah, and so what I'm asking is the As-Applied
17 Order has a demand shortfall of 75,200 acre-feet; and
18 then to supply that 75,200 acre-feet, it orders the
19 curtailment of all groundwater rights junior to
20 December 30th, 1953.
21 What I am asking is: Do you know what the
22 authorized diversion volume is under all of those
23 curtailed groundwater rights?
24 A. I don't know. I would refer that to Jennifer
25 Sukow. She might know that, I'm not sure.

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1 Q. Do you know if anyone at the Department has
2 done any analysis relating to the magnitude of the
3 beneficial use of water that would be curtailed under
4 December 30th, 1953, curtailment date in the absence of
5 mitigation plans?
6 A. Not that I know of.
7 Q. Did you or anyone else at the Department
8 attempt to quantify the projected or potential crop loss
9 or other impairment to beneficial use of water within
10 Twin Falls Canal Company that would result from a demand
11 shortfall of 75,200 acre-feet?
12 A. Not that I know of.
13 Q. Are you aware that the Department has utilized
14 trim lines in prior delivery calls?
15 A. That is outside my expertise.
16 Q. Have you heard that term used before in the
17 Department?
18 A. I've heard the term "trim line," yes.
19 Q. What's your understanding of what a trim line
20 does?
21 A. My answer to that would not -- what's the best
22 way -- it might even be as bad as a guess. I don't have
23 a -- I don't have a good understanding of how we use it,
24 so when you ask me, I don't -- it would be worse, yeah,
25 than a guess, probably.

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1 Q. Did that term ever come up during your work in
2 regard to the Fifth Methodology Order?
3 A. Not in my portion of the methodology, the work
4 that we do.
5 Q. Okay. If the Director asked you to apply the
6 Fourth Methodology Order in the 2023 irrigation season,
7 could you have done that?
8 A. Yes.
9 Q. Are you aware of any emergency that required
10 use of the Fifth Methodology Order instead of the Fourth
11 Methodology Order in the 2023 irrigation season?
12 A. I don't know of an emergency.
13 Q. Okay.
14 MR. BUDGE: That's all the questions I've got,
15 Matt. As was mentioned earlier, we're going to keep
16 your deposition open, which means we may call you back
17 at a future date. That all depends on additional
18 information that's gathered in this case. We've not
19 completed discovery or technical work on our side, so I
20 appreciate the time you've given us today. It's been a
21 lot of time, and you've done a nice job, so thank you
22 for being here. And, hopefully, we don't need to call
23 you back, but there's a chance.
24 THE WITNESS: You're welcome. Thank you.
25 MR. BAXTER: Who's up next?

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1 MR. JOHNS: I think that would be me.
2 MR. BAXTER: All right. Skyler is moving to
3 the hot seat.
4 EXAMINATION
5 QUESTIONS BY MR. JOHNS:
6 Q. All right. Matt, admittedly, I'm not a
7 technical expert, and so some of these questions are
8 just going to be things that I reviewed with some
9 technical consultants, and they had just a couple of
10 questions. I think more just by way of clarification to
11 try and better understand why certain things were done.
12 A. Okay.
13 Q. Just for the record, my name is Skyler Johns.
14 I represent the Bonneville-Jefferson Ground Water
15 District, and so I'm here representing them.
16 I believe that we've already admitted the
17 Fifth Methodology Order, and that's Exhibit -- is it
18 Exhibit 2, Garrick, that we had?
19 MR. BAXTER: Yes.
20 Q. (BY MR. JOHNS) If you wouldn't mind grabbing
21 that. And then we have not, I don't believe, admitted
22 the Fourth Amended Methodology Order, so I'm going to go
23 ahead and give copies to you guys here.
24 MR. BUDGE: Hey, Skyler?
25 MR. JOHNS: Yes.

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1 MR. BUDGE: Skyler, this is TJ.
2 MR. JOHNS: Yeah.
3 MR. BUDGE: It's difficult to hear what you're
4 saying. I don't know if you could get closer to the
5 microphone. And then the Fourth Methodology Order is
6 Deposition Exhibit 5.
7 MR. JOHNS: Oh, okay. So we did get it in
8 there.
9 MR. BAXTER: Sorry, Skyler.
10 MR. JOHNS: No, that's okay.
11 MR. SIMPSON: Actually, Exhibit 5 is these.
12 MR. FLETCHER: Yeah, that was frequently asked
13 questions.
14 MR. SIMPSON: Right.
15 MR. FLETCHER: TJ, that was frequently asked
16 questions, Exhibit 5.
17 MR. JOHNS: We don't have it.
18 MR. FLETCHER: I don't remember...
19 MR. BUDGE: Okay. My mistake. I must have
20 marked the wrong document yesterday.
21 MR. JOHNS: Well, then, I guess we'll just be
22 thorough, and we'll just get it in.
23 TJ, can you hear me a little better?
24 MR. BUDGE: That's great, thank you.
25 MR. JOHNS: Yeah, I'll try to use my

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1 projection voice.
2 (Exhibit 19 marked.)
3 Q. (BY MR. JOHNS) Matt, can you read the caption
4 of what I just placed in front of you?
5 A. "Docket No. CM-DC-2010-001, Fourth Amended
6 Final Order Regarding Methodology for Determining
7 Material Injury to Reasonable In-Season Demand and
8 Reasonable Carryover."
9 Q. Are you familiar with this document?
10 A. I am.
11 Q. Did you perform work -- and you may have
12 answered this question already -- but did you perform
13 any work in this document?
14 A. I did.
15 Q. Okay. If you wouldn't mind pulling up the
16 Fifth Amended Methodology Order and then just having it
17 side by side. I just want to do some quick
18 comparisons --
19 A. Okay.
20 Q. -- and then just ask a few questions about a
21 couple of changes that --
22 A. Sure.
23 Q. -- or at least I'll represent things that we
24 saw were changes that were made between the Fourth and
25 the Fifth.

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1 So can you please turn, in the Fifth Amended
2 Final Order, to page 24.
3 A. Okay.
4 Q. And then on the Fourth, can you, please, turn
5 to page 24.
6 A. Okay. I have them both open and side by side.
7 Q. Okay. Are you familiar with the tables and
8 the information that are presented in the Fourth and the
9 Fifth Methodology Orders on pages 24 for both?
10 A. Yeah, I am familiar, yes.
11 Q. Did you perform work on the Fourth Methodology
12 Order table that's in there?
13 A. I don't think that I created this version in
14 the Fourth Methodology.
15 Q. Did you review this information in your --
16 A. Yes. Yep.
17 Q. -- in preparation for the Fifth?
18 A. Yep.
19 Q. Okay. I just want to ask a couple of
20 questions between the Fourth and the Fifth with regard
21 to the two -- well, let's start with the 2007. So if
22 you wouldn't mind going to 2007. Let me pull my notes
23 here. And comparing the information between Minidoka in
24 the Fourth Methodology Order and Minidoka in the Fifth
25 Methodology Order -- actually, I want to start on 1999

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1 not 2007.
2 A. Okay.
3 Q. Do you notice any differences in the
4 information between the two documents?
5 A. I do. Milner --
6 MR. SIMPSON: What pages again?
7 MR. JOHNS: Sorry. It's pages 24 on the Fifth
8 and page 24 on the Fourth.
9 MR. SIMPSON: Okay.
10 MR. JOHNS: And we're just looking at 1999 and
11 the information for Minidoka.
12 And sorry, Matt, I --
13 THE WITNESS: No, no, we're fine.
14 Q. (BY MR. JOHNS) Could you state whether or not
15 there's a difference between the information?
16 A. There is. In Milner in the Fourth Methodology
17 Order is 96, in the Fifth it's 100, North Side is 98 in
18 the Fourth and 100 in the Fifth, and Twin Falls Canal
19 Company is 99 in the Fourth -- oh, jeez, I was on the
20 wrong line. Let me go back.
21 Q. No, it's okay. No, let's focus on --
22 A. You guys should have cut me off.
23 Q. Here, I was going to actually --
24 A. I was totally on the wrong line.
25 Q. Why don't I -- I'm going to hand you a

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1 highlighter.
2 A. Okay.
3 Q. And would you mind, on 1999, looking
4 specifically at the information, the values that were
5 provided for Minidoka.
6 A. I'm sorry. So 1999, Fourth Methodology,
7 Minidoka?
8 Q. Yep.
9 A. Okay, yep.
10 Q. And then will you look at Minidoka's
11 information for the Fifth?
12 MR. BAXTER: Skyler, did you want him to
13 highlight?
14 Q. (BY MR. JOHNS) Yes, could you please
15 highlight the information. I apologize.
16 A. All right. And Minidoka 1995 on the Fifth?
17 Q. '99.
18 A. '99, I'm sorry.
19 Q. That's okay.
20 A. '99, yep, okay. Oh, that's much better.
21 Q. Okay. Is there a difference between those two
22 values?
23 A. Yes, in 19 -- in the Fourth Methodology Order
24 it's 100 percent, and in the Fifth it's 98 percent.
25 Q. Okay. Do you know why those values are

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1 different between the two orders?
2 A. When we -- the spreadsheets that we use we
3 went back and relooked at how we're calculating some of
4 that. There had been some updates in the data and a
5 little different interpretation on our part about how
6 the fill -- we use data from Water District 1 when we do
7 that, about whether it filled or not.
8 Q. So was there new information obtained between
9 the Fourth Methodology Order and the Fifth Methodology
10 Order with regard to past years, then?
11 A. At some point there was different data or a
12 different interpretation on our part, one of the two.
13 Q. And has that data been provided?
14 A. Yes. That's in the -- this is in -- these
15 data and this table are in the spreadsheet. I don't
16 have the name, but it's in the -- I'm guessing it's the
17 one that came out -- that's on our web page -- that came
18 out, I think you said, on the 5th. Is that right? It's
19 the one that Sarah gave the zip out on our webpage. I'm
20 guessing that's what it's in.
21 Q. Okay.
22 A. And it would be in "Reasonable Carryover"
23 folder.
24 Q. Thank you for that clarification. Would that
25 be the same with any other differing values between the

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1 Fourth and the Fifth?
2 A. Yes. I haven't checked, but my guess is
3 there's a few changes here and there because of the way
4 we did that, yes.
5 Do you want your highlighter back.
6 Q. Yeah. Thanks. And I haven't had a chance to
7 review that, so this deposition is being left open, so
8 if I have any additional questions, I might come back
9 and ask you about those after I've reviewed that data.
10 A. Sure.
11 Q. Okay, the next portion we have, would you mind
12 turning, on the Fifth Amended Order, to page 26.
13 A. Okay.
14 Q. And then on the Fourth, I believe it's on
15 page 25.
16 A. I have both of those on that page.
17 Q. And this is under Section C, "Average annual
18 carryover for the Fourth Amended and for the Fifth"; is
19 that correct?
20 A. Yes, that's what I see.
21 Q. Okay. And you're familiar with these tables,
22 as well, for the Fourth and the Fifth?
23 A. Yes, I am.
24 Q. How many categories was the table divided into
25 for the Fourth?

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1 A. We divided it into four, based on the
2 unregulated flow at Heise, very dry, dry, average, and
3 then I guess we didn't have a title in there, but it was
4 greater than 45 -- 4.5 million acre-feet.
5 Q. And under very dry -- and this says it's
6 represented in thousands of acre-feet, it has a value of
7 less than 3,000; is that the threshold measure for
8 everything?
9 A. So, yes, what that number represents, for
10 example, on very dry, less than 3 million acre-feet of
11 unregulated flow at the Heise Gage.
12 Q. Did that number change in the Fifth
13 Methodology Order, that measurement?
14 A. The categories changed, if that's what you're
15 asking.
16 Q. How so?
17 A. We looked at the categories that we used in
18 the Fourth Amended Methodology -- and, actually, I think
19 they came out in the Third, so they were in the Third
20 and the Fourth -- and it refers to very dry. The
21 conjunctive management rules only refer to dry. So we
22 revised that, and we -- while we still kept the
23 unregulated flow at Heise, we did not break it based on
24 dry and very dry or the flow at Heise. We just broke it
25 on the average. So below average is considered dry,

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1 above average is wet. We just have two categories.
2 Q. Was it you who made that recommendation that
3 it be taken from four categories down to two categories?
4 A. Kara and I discussed it, and we agreed that it
5 should be broken into two categories.
6 Q. On the Fifth Methodology Order there's a
7 footnote there, it's footnote 20. Would you mind
8 reading that? And I believe it goes from page 26 over
9 to page 27. Would you mind reading that?
10 A. Okay. "In the Fourth Methodology Order, this
11 table summarized data for the period 1994 to 2014 and
12 adjusted Water District 01 carryover values to remove
13 water received for mitigation or water rented by the
14 Surface Water Coalition entity to augment their
15 supplies. This Fifth Methodology Order updates this
16 chart with data for the period of 1992 to 2001 and uses
17 raw carryover values reported by Water District 01. Raw
18 numbers were used because adjusted numbers reduced the
19 Surface Water Coalition's potential entitlement to
20 reasonable carryover."
21 Q. So is it correct to say that there was a shift
22 in how you were using the data between the Fourth and
23 the Fifth Amended Methodology Order?
24 A. That is correct, yes.
25 Q. And it's explained in footnote 20?

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1 A. That is correct.
2 Q. Was that a recommendation that you made to the
3 Director?
4 A. Yes, that is a recommendation that I made.
5 Q. Okay. And it was accepted?
6 A. It's in the order, so he agreed with it.
7 Q. Okay. I was just curious if that was
8 consistent with your recommendations.
9 I had a follow-up question on the definition
10 of "dry years." In the past Fourth Methodology Order it
11 was less than 3 million acre-feet.
12 Was that the same case in the Fifth
13 Methodology Order, or did it increase?
14 A. Your question was is the dry -- are you
15 referring to the very dry?
16 Q. Oh, sorry.
17 A. Okay.
18 Q. Is the definition of "dry" in the Fifth
19 Methodology Order the same as or measured from the same
20 threshold as it was measured in the Fourth?
21 A. I don't quite understand the question.
22 Q. Maybe this will help clarify what I'm
23 thinking.
24 Could you go to page 27 of the Fifth Amended
25 Final Order.

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1 A. Okay. Sure. 27? Oh, on the Fifth? I'm
2 sorry.
3 Q. Yeah, sorry. On the Fifth. Maybe this will
4 help what I'm just trying to clarify.
5 A. I'm there. Okay.
6 Q. So under Section 2 it says -- under Section D
7 sub ii, just above paragraph 73, it says, "AFRD2"?
8 A. Yep.
9 Q. Does that stand for American Falls Reservoir
10 District No. 2?
11 A. It does.
12 Q. Paragraph 73, could you review that quickly
13 for me. It goes from page 27 over to page 28.
14 A. Okay. I have read that paragraph.
15 Q. So the question I'm getting at is in that
16 paragraph it references 3,100 K acre-feet; correct?
17 A. It does.
18 Q. Is that saying that's the threshold measure?
19 A. Yes, it does.
20 Q. Okay. And that's increased from the Fourth
21 Methodology Order where it was very dry years?
22 A. I don't understand the increased portion of
23 that. That 3,100 is -- 3,100,000 is the unregulated
24 flow at Heise.
25 Q. Oh, okay. So that's not setting a threshold

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1 measure from --
2 A. We're using that as a threshold measure to say
3 AFRD2 space filled all the time when the flow at Heise
4 was above that threshold. It -- that number is not
5 setting the dry very dry; it's just the threshold at
6 which AFRD2 no longer -- or every year had a fill for
7 their space.
8 Q. And I apologize, I'm trying to answer. I got
9 some technical inquiries, and I'm trying to translate
10 them. So I apologize if it's a little messy.
11 I think TJ had asked that question. Okay.
12 TJ Budge had asked you whether you disagreed with any
13 findings that were made in the Fifth Methodology Order,
14 and I believe your answer was "no"; is that correct?
15 A. [Witness nods head.]
16 Q. Can you identify any findings in the Fifth
17 Methodology Order that differ from the technical
18 information that you provided to the Director or
19 recommendations that you made?
20 MR. BAXTER: Matt, I'm going to object to the
21 question. To the extent that your answer to the
22 question would require you to disclose information
23 regarding the Director's deliberative process on legal
24 or policy issues, you're instructed not to answer the
25 question. But if you can find a circumstance to answer

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1 that without getting to the Director's deliberative
2 process and how it leads to conclusions, you're free to
3 answer the question.
4 THE WITNESS: Could you repeat that question?
5 Q. (BY MR. JOHNS) Yes. Can you identify any of
6 the Director's findings in the Fifth Amended Methodology
7 Order that differ from the technical information you
8 provided him or the recommendations you made to the
9 Director?
10 A. I don't have an instance where we made a
11 recommendation and he, without discussing it with us,
12 changed a number or something like that.
13 Q. So just to clarify, you -- are you saying that
14 he consulted -- you had made recommendations to him, and
15 if he made any change in the Fifth Methodology Order
16 from what your recommendations were, there was a
17 discussion that took place about that?
18 A. No. Now that you repeated that back, I don't
19 like that answer, if that's what I said.
20 Q. No. No. And I just want to be clear on --
21 A. I don't know of an instance where we provided
22 a recommendation that he changed, but it's not out of
23 the question. That's his prerogative as the person who
24 signs the order to do that if he wants, but I don't have
25 an example of that.

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1 Q. Okay. So to your knowledge, as you sit there
2 today, the recommendations you made were adopted?
3 A. We make a lot of recommendations to the
4 Director, and then we discuss them with him. That
5 question is very hard for me to answer because I don't
6 know if everything that we talked about was exactly the
7 way we presented it to him. My guess is in many cases
8 it wasn't, it got modified in some way. I'll leave it
9 at that.
10 Q. Okay. I don't think I have any more on that.
11 Just another follow-up question. Again, this is going
12 back to something TJ had asked you.
13 A. Okay.
14 Q. Do you recall the conversation you had with TJ
15 about whether there were any deadlines set for the -- I
16 believe it was the 2023 irrigation season for the Fifth
17 Methodology Order to be in place?
18 A. Okay. Not exactly, but okay.
19 Q. Yeah, my recollection was you said there were
20 some -- there were some deadlines, but then there were
21 other factors, like you didn't have the ability to
22 perform analysis on certain subject areas.
23 MR. BAXTER: I'm going to object to the
24 characterization of the witness's earlier testimony.
25 It's not quite how I remember it. But again, continue

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1 on.
2 Q. (BY MR. JOHNS) Maybe I'll just reask the
3 similar line of questioning that I think TJ was asking,
4 maybe that will be easiest rather than trying to
5 recharacterize what TJ had asked.
6 Were you ever instructed to have a Fifth
7 Methodology Order prepared for the Director to review
8 before the 2023 irrigation season commenced?
9 A. That was the goal that the Director gave us,
10 was to try to have it out before the irrigation season.
11 Q. And did he give you that goal before
12 August 2022 or after?
13 A. I think at that point that was the inferred --
14 or the preferred -- his preferred time frame was to get
15 it out by April for the irrigation for the 2023
16 irrigation season. I don't remember him saying, that's
17 it, it has to be out. I don't think there was any
18 directive like that.
19 Q. Was that before August 2022 or after?
20 A. I don't think that came until where we --
21 after we got the comments from the technical working
22 group and then had looked through those where it became
23 more of a, okay, we're going to try to modify this thing
24 and have it out for the irrigation season. I think back
25 in August it was more of a, let 's look through this.

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1 But the idea generally would be if we're going to make
2 changes, it's going to be for the 2023 season, but there
3 was no, like, we're for sure going to do this in August.
4 Q. Okay. So it was after the technical working
5 group presentations?
6 A. Yeah, I think that's when we started seeing
7 okay, what we want to do.
8 Q. Would you have liked more time to put it
9 together?
10 A. I always want more time.
11 Q. Why?
12 A. It's a complicated methodology. We spent time
13 trying to look through the different methods that we're
14 using and procedures. We worry over the details, and we
15 always want to do more, try to investigate more. So,
16 yeah, we always want more time to work on it and get it
17 as good as we can.
18 Q. As a scientist, do you feel like this was the
19 best work you could have done on the methodology, in
20 your scientific opinion?
21 A. I think in the time frame and with the data
22 that we have, I think we've used, in most cases -- or in
23 all cases, the best science that we have available and
24 time and kind of all the factors and staff that we have.
25 This is the best product we can get with this.

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1 Q. Other than the items you had previously
2 stated, is there anything else you would have liked more
3 time to be able to work through and prepare for the
4 Director other than things you've previously stated?
5 A. I don't have anything additional, no.
6 Q. This is a couple questions I have about the
7 technical working group meetings.
8 A. Okay. Yep.
9 Q. Who was in charge of organizing and scheduling
10 the technical working group meetings?
11 A. I scheduled and organized the meetings.
12 Q. Okay. Who was invited to attend those?
13 A. So when we started getting it together, I
14 inquired with the Director about who we should invite.
15 Q. Did the Director have final input on the
16 invitation list?
17 A. His response was ask the parties who they want
18 to attend the technical working group. I never -- I
19 think I gave him the list, but he never, like, said, you
20 know, you can't invite this or you can invite that
21 person. Just it was more of a, here's what we came up
22 with after contacting the parties.
23 Q. Was anyone invited to attend, or was it a
24 by-invitation-only process?
25 A. I would characterize it as by invitation

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1 only.
2 Q. Do you know why that is?
3 A. I don't know what all the Director was
4 considering when he said, ask the parties.
5 Q. So is it fair to say that no public comments
6 were sought on the technical working group?
7 A. I think that's accurate.
8 Q. Do you know whether any of the technical
9 working group materials were posted online prior to the
10 April 21st orders being -- or April 21st, 2023, orders
11 being issued?
12 A. I don't think any of the technical working
13 group -- I think there was a question earlier today
14 about whether we posted it. I don't think it's on our
15 web page. We distributed it, but I don't think we put
16 it on our web page.
17 Q. Okay. Yeah. And I think I said Sarah said
18 something about she couldn't find materials from a
19 Google search, so --
20 A. That sounds like -- I don't remember it being
21 out there. So I don't think it is.
22 MR. JOHNS: Let me just do a quick scan to
23 make sure.
24 I think you answered everything I have.
25 Thanks, Matt.

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1 THE WITNESS: Thank you.
2 MR. BAXTER: Dylan.
3 MR. ANDERSON: I've got, like, one question.
4 MR. BAXTER: Dylan said he has, like, one
5 question. We're holding him to it.
6 MR. ANDERSON: "Like" one question, depending
7 on the answer.
8 MR. BAXTER: One question with ten subparts.
9 MR. ANDERSON: Yeah. It's 15 questions in
10 one.
11 EXAMINATION
12 QUESTIONS BY MR. ANDERSON:
13 Q. Well, let me preface this with I understand
14 the standing objection that you cannot -- been
15 instructed not to talk about the Director's deliberative
16 legal process.
17 So with that in mind, and understanding the
18 objections there, my question is: As you talked about
19 discussions you had with the Director, did that result
20 in any modification or changes to the technical data
21 calculations that you had done and presented to the
22 Director?
23 A. Communication with the Director, did that
24 result in changes to the analyses and what we did?
25 Q. Yes.

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1 A. Often, we would talk with him and communicate
2 with him, present the data to him, he would give his
3 input, we may go back and do additional analysis or look
4 at it a different way, and then report that back to him
5 again. It is an iterative process with a lot of these
6 topics.
7 Q. Can you provide examples of when and how that
8 happened?
9 MR. BAXTER: I'm going to object. I've been
10 pretty generous in allowing the exploration of
11 information building up to that, but I think this is
12 last question goes to specifics that this is -- goes
13 directly to the Director's deliberative process. So I'm
14 going to instruct the witness not to answer that
15 question.
16 MR. ANDERSON: And can I ask a question just
17 in follow-up to that? So is it your -- when the data is
18 first presented to the Director, is that data process
19 over, and then once the Director gives input on that
20 data, any future changes to that data is now a part of
21 the deliberative process? Is that the position?
22 MR. BAXTER: Oh, are you asking me?
23 MR. ANDERSON: Yeah, I'm asking you.
24 MR. BAXTER: I'm sorry, Dylan, can you
25 restate?

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1 MR. ANDERSON: I just want to understand
2 the -- because, you know, the deliberative process, if
3 he calculates and does a workup on some formula that has
4 the data input, presents it to the Director and, as he
5 stated, subject to their conversation that might get
6 changed, once he comes back and starts changing it, it's
7 no longer part of the deliberative process; or is it
8 your view that after he presents that data the first
9 time, any subsequent changes to that data is part of the
10 deliberative process?
11 MR. BAXTER: You asked a question asking for
12 specific examples of the process in which the
13 back-and-forth goes, and I don't think it's appropriate
14 for -- given the limitation the Director has put on
15 here, to talk about, you know, details with regards
16 to -- and, again, I've been, you know, not objecting to
17 a lot of the questions today, to let you have an insight
18 into, you know, how this works; but now you're asking
19 about specifics, and that's my concern here.
20 MR. ANDERSON: Maybe I can revise the
21 question.
22 Q. (BY MR. ANDERSON) So I'm not asking about
23 specifics related to any discussions with the Director,
24 but can you give a specific example of data you worked
25 on and then reworked after talking to the Director?

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1 MR. BAXTER: Again, I think that's, you know,
2 if he gives you an example, it's talking about the
3 details of -- you know, your next question is going to
4 be, well, why did he ask -- you know, why did you have
5 this back-and-forth on this specific data, and so --
6 MR. ANDERSON: It probably would be.
7 MR. BAXTER: -- I just -- that's a step too
8 far from my opinion. So, again, I'm going to instruct
9 the witness not to answer the question.
10 MR. ANDERSON: Okay. I don't think I have any
11 further questions. Thank you.
12 THE WITNESS: Thank you.
13 MR. ANDERSON: Sorry I mumbled that.
14 COURT REPORTER: No, that's okay.
15 MS. McHUGH: This is Candice. I have some
16 questions.
17 EXAMINATION
18 QUESTIONS BY MS. McHUGH:
19 Q. Hi, Matt. Candice McHugh on behalf of the
20 Coalition of Cities. My understanding is that you are
21 Jennifer's supervisor; is that true?
22 A. Indirectly. Three months ago I became her
23 supervisor. I'm not -- Sean Vincent is her direct
24 supervisor. I am Sean's supervisor as of about three
25 months ago, early March.

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1 Q. Okay, fair enough. What did you instruct
2 Jennifer to do relative to the Fifth Methodology Order?
3 A. I did not give Jennifer any direct instruction
4 for the order.
5 Q. Who, to your knowledge, instructed Jennifer to
6 run the ESPAM model in the transient mode to determine
7 the curtailment date?
8 MR. BAXTER: I'm going to object. I think
9 it's -- well --
10 MS. McHUGH: I believe Jennifer said in her
11 deposition that Matt instructed her, so that's why I'm
12 asking.
13 Q. (BY MS. McHUGH) If you didn't instruct
14 Jennifer to run the model in a transient mode in order
15 to determine priority date, who would have?
16 A. My guess is that would have come through her
17 direct supervisor, Sean Vincent.
18 Q. Is it your testimony that you did not instruct
19 Jennifer to run the model in a transient mode?
20 A. I did not directly -- yes, that is my
21 testimony.
22 Q. Did you instruct anybody to instruct Jennifer
23 to run the model in transient mode?
24 A. No. There's a transition that happened here.
25 Jennifer and I were both reporting to Sean when the

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1 process started, when we started doing this review and
2 the process. So that came before I was in my current
3 role. So it's a little bit difficult for me to say I
4 instructed her because it had already started, the
5 process had already started before I got into my current
6 role.
7 Q. So is it your testimony that you don't know
8 who instructed Jennifer to run the model in the
9 transient mode to determine the priority date?
10 A. My testimony is I assume it was Sean, but I
11 don't know. I was not there when she was instructed.
12 Q. When did the determination get made to change
13 from a steady-state model -- you said the model to the
14 transient use of the model is reflected in the Fifth
15 Methodology Order?
16 A. The official change came when the Director
17 signed the order.
18 Q. Prior to April 21st, when did the
19 determination get made to use the model in a transient
20 mode to determine the priority date?
21 MR. BAXTER: I'm going to object to the
22 question.
23 Matt, to the extent your answer to the
24 question would require you to disclose information
25 regarding the Director's deliberative process on policy

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1 issues, such as change from transient to -- or to change
2 from steady state to transient, you're instructed not to
3 answer that question.
4 Q. (BY MS. McHUGH) Are you thinking?
5 A. Yeah, I'm thinking.
6 Q. Okay.
7 A. I think that came sometime after the comments
8 from the technical working group, in between when it was
9 signed.
10 Q. So the comments to the technical working
11 group, they were -- let me back up.
12 There was a memo that was discussed, and I
13 think it was exhibit -- is it Exhibit 4? It's the
14 technical working group memo dated December 23rd, 2022?
15 MS. KLAHN: I think that's right, Candice.
16 THE WITNESS: Okay. I do remember that memo,
17 yes, it was from Kara and I.
18 Q. (BY MS. McHUGH) Yeah. So sometime between
19 that memo and April 21st, when the Director signed the
20 order, was when the decision was made to use the ESPAM
21 model in a transient mode to determine the curtailment
22 date; is that what you're saying?
23 A. I think that I said that it was after the
24 technical working group comments were received.
25 Q. Okay. And do you know approximately when

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1 those technical working group comments were received?
2 A. I think they were due around January 16th.
3 Q. Okay. So sometime between January or after
4 January 16th and April 21st the decision to use the
5 transient mode for the ESPAM model was made?
6 A. I think. I think that's approximately the
7 time frame.
8 Q. And was the determination to use the transient
9 mode for the ESPAM model, is that a policy decision?
10 A. I think that's a legal and a technical
11 question, together, and a policy. I lump policy and
12 legal together. Maybe not the best plan, but I do.
13 Q. So who made the technical determination to use
14 the model of the transient mode to determine curtailment
15 date?
16 MR. BAXTER: I'm going to object to the
17 question.
18 Once again, Matt, to the extent your answer to
19 the question requires you to disclose information
20 regarding the Director's deliberative process on a
21 decision, policy decision -- well, I guess you
22 characterized it as both legal and policy decision --
23 relating to change to this, you are instructed not to
24 answer the question.
25 THE WITNESS: I think that question could be

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1 better answered by Jennifer Sukow.
2 Q. (BY MS. McHUGH) Do you know who made the
3 decision to move to the transient mode?
4 A. The Director made the decision.
5 Q. Was that decision made in a meeting?
6 MR. BAXTER: Again, to the extent your answer
7 to the question would require you to disclose
8 information relating to the Director's deliberative
9 process, you're instructed not to answer the question.
10 THE WITNESS: I don't know the answer to that
11 question.
12 Q. (BY MS. McHUGH) Were you in any meetings
13 where the decision was discussed -- where the use of the
14 model in the transient mode was discussed?
15 A. Yes.
16 Q. And was Mat Weaver in that meeting?
17 MR. BAXTER: Again, I'm going to object to the
18 question.
19 To the extent it would require you to disclose
20 information regarding the Director's deliberative
21 process -- and that includes who was helping advising
22 the Director -- Mr. Anders, you are instructed not to
23 answer the question. And so if something you were
24 thinking of would be responsive to it and disclose that
25 deliberative process, you are not to answer that

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1 question.
2 THE WITNESS: Okay. That goes into the
3 deliberative process of the Director; that's my opinion.
4 Q. (BY MS. McHUGH) Okay. Was Jennifer Sukow in
5 that meeting?
6 MR. BAXTER: Again, the same objection.
7 THE WITNESS: I don't know on that. I don't
8 know all the meetings Jennifer was in.
9 Q. (BY MS. McHUGH) Were you in that meeting?
10 MR. BAXTER: Objection. Once again, a list of
11 who was participating, Candice, in the Director's
12 deliberative process is included in that coverage. I'm
13 instructing the witness not to answer the question.
14 It's time to move on from seeking lists of everybody who
15 was participating. Thank you.
16 MS. McHUGH: And I am just making a record,
17 Garrick. I understand you're going to object.
18 Q. (BY MS. McHUGH) Was Shelley Keen in the
19 meeting?
20 MR. BAXTER: Objection.
21 I'm going to instruct the witness to not
22 answer the question on the grounds I previously stated.
23 Q. (BY MS. McHUGH) Was Brian Patton in the
24 meeting?
25 MR. BAXTER: Objection.

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1 I'm going to instruct you not to answer the
2 question on the grounds previously stated.
3 Q. (BY MS. McHUGH) Moving on from whether there
4 was a meeting or not that, apparently, may or may not
5 have occurred, separate from any such meeting where the
6 Director was involved, was there -- were you in any
7 discussions with any other Department staff, excluding
8 the Director, on changing the recommendation to go from
9 using the model in a steady-state mode to a transient
10 mode?
11 MR. BAXTER: I'm going to instruct the witness
12 not to answer the question.
13 As we discussed, I think it was on Wednesday,
14 Candice, participation of employees and their
15 discussions of information leading up to what they
16 recommended the Director, we believe is covered under
17 the deliberative discussion issue identified here and is
18 excluded from the scope of this deposition. So I'm
19 going to instruct the witness not to answer the
20 question.
21 MS. McHUGH: Can the witness disclose whether
22 or not a meeting occurred and not who's in the meeting?
23 MR. BAXTER: Once again, I'm going to instruct
24 the witness not to answer that question. Who's in
25 meetings implies whether or not there was meetings.

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1 Again, that's going to the whole Director's deliberative
2 process.
3 MS. McHUGH: So if I understand your
4 objection, Garrick, you're saying that we can't find out
5 if there was a meeting among staff members that excluded
6 the Director on whether to recommend a change from using
7 the ESPAM model from a steady-state to a transient mode?
8 We can't know if there was a meeting of staff,
9 excluding the Director?
10 MR. BAXTER: Correct.
11 Q. (BY MS. McHUGH) Who made the decision to
12 accept Twin Falls Canal Company's report of the acres
13 that they irrigate?
14 A. The Director.
15 Q. And is that a policy decision?
16 A. That's a difficult question for me. I --
17 could you repeat the question?
18 Q. The question was, who decided to accept Twin
19 Falls Canal Company's report of their acres, and you
20 said, "The Director."
21 My follow-up question that you were
22 considering is, "is that a policy decision?"
23 A. I think it is based on a technical analysis.
24 Q. Is it also a decision based on the fact that
25 the Director believes the Department doesn't have time

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1 or the resources to analyze those acres outside of
2 accepting what Twin Falls Canal Company provides the
3 Department?
4 A. I can't speak for what the Director is
5 thinking there.
6 Q. Have you ever been told that part of the
7 reason that you don't scrutinize the amount of acres
8 that Twin Falls Canal Company claims to be irrigating is
9 because it's a resource issue?
10 A. No, I don't remember that ever happening.
11 MR. BAXTER: Matt, I'm going to ask you to
12 raise your voice, too.
13 THE WITNESS: I'm sorry. I do not remember
14 being instructed, as you stated.
15 Q. (BY MS. McHUGH) Maybe I misunderstood your
16 testimony earlier. I thought one of the reasons that
17 the Department accepts Twin Falls Canal Company's
18 reporting of their acres is that if you were to analyze
19 them, in your opinion, in order to analyze what's
20 actually been irrigated, it would take you, like, a year
21 or some period of time in order to ground truth the
22 number of acres irrigated under Twin Falls Canal
23 Company's system with its surface water rights and
24 storage water rights?
25 A. Yeah, I think that's what I said. That sounds

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1 accurate.
2 Q. Okay. And so, I guess, what I was going
3 towards is one of the reasons you accept what Twin Falls
4 Canal Company provides the Department is because the
5 Department has limited resources, personnel, time, to do
6 anything else?
7 A. I think that that's also accurate.
8 Q. Okay. Whose decision was it to not change the
9 way the forecast supply is utilized in the Fifth
10 Methodology Order?
11 A. The Director's decision. Sorry, that wasn't
12 very loud. The Director's decision.
13 Q. So it was the Director who decided that you
14 wouldn't include other inputs from, like, the Portneuf
15 River Basin or from other supplies that go into the
16 Snake River and to rely exclusively on the Heise Gage?
17 A. Our recommendation to him was to wait and see
18 what happens to the regressions, you know, the R-squared
19 portions of those regressions. He, ultimately, decided
20 to not update and sign the order with the old -- or not
21 old, but the current, to carry over the regressions from
22 the Fourth Methodology Order.
23 Q. And was that a policy decision?
24 A. I think so, yes.
25 Q. You had mentioned, and I don't exactly know

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1 when, but you mentioned in response to somebody's
2 question that Brian Ragan is the person at the
3 Department who compiles, I think, the list of water
4 rights that would be curtailed under the Fifth
5 Methodology Order; is that correct?
6 A. Yeah, that is what I stated.
7 Q. Okay. And do you know who instructs Brian
8 Ragan to do that?
9 A. I think -- I assume it's his supervisor.
10 Q. And who is that?
11 A. Rob Whitney.
12 Q. And do you know if there was any discussions
13 within the Department about the timing of when that list
14 of curtailed water rights would be sent out to those
15 people that were not part of mitigation plans?
16 A. Could you restate the question, please.
17 Q. Sure. It was probably a poor question. Let
18 me give you a little bit of context.
19 So do you understand that the order came out
20 on April 21st, the Fifth Amended Methodology Order came
21 out on April 21st?
22 A. Yes.
23 Q. And as a part of that order it had a
24 curtailment date of December 31st of 1953, would be the
25 date that anybody junior to that date would be

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1 curtailed.
2 Do you understand that?
3 A. Yes.
4 Q. And do you also understand that that means
5 that there's water right holders out there that are
6 junior to December 31st, 1953, who are at risk for
7 curtailment this season if they are not part of a
8 mitigation plan?
9 A. Yes.
10 Q. And my question is: Was there any discussion
11 within the Department as to the timing of when those
12 people, the people that are not part of the mitigation
13 plan but junior to 1953, would receive notice that
14 they're at risk for curtailment this season?
15 A. I hate to do this, but could you repeat the
16 question, just the last part, not the whole
17 step-through.
18 Q. Fair enough. Are you aware that they -- that
19 the people who are not covered by mitigation plans did
20 not receive notice of the Fifth Methodology Order?
21 A. I was not aware of that.
22 Q. Are you aware -- did -- are you aware if there
23 was any discussions within the Department on when notice
24 would be provided to the people who are at risk for
25 curtailment this season would be provided notice?

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1 A. I am unaware because that is outside the
 2 normal function that I do for the methodology. That's
 3 done by the other group.
 4 Q. And who is the other group?
 5 A. I'm sorry. Brian Ragan, it's done by the
 6 group that he's in.
 7 Q. Would you agree it would be important for
 8 people to know that they're going to be curtailed this
 9 season, to know that they're going to be curtailed this
 10 season prior to the hearing in this matter?
 11 MR. BAXTER: Objection. I think it calls for
 12 a legal conclusion.
 13 Q. (BY MS. McHUGH) You can answer.
 14 A. I think we would want to give them as much
 15 notice as we could.
 16 Q. Do you know when the notice has gone out to
 17 those people?
 18 A. No, I don't normally know.
 19 Q. Okay. Who would know that beside Brian Ragan?
 20 Would Tim Luke know that?
 21 A. I would assume that he would know that, but
 22 I'm not for sure.
 23 Q. Okay.
 24 A. Am I talking loud enough? Too much? I feel
 25 like I'm --

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1 Q. You're doing fine.
 2 A. I feel like I'm getting quieter as we talk.
 3 MR. FLETCHER: Candice, can we go off the
 4 record just a second?
 5 MS. McHUGH: Just bear with me for a moment.
 6 MR. FLETCHER: Can we go off the record a
 7 second, Candice?
 8 MS. McHUGH: Sure.
 9 (Discussion held off the record.)
 10 MS. McHUGH: Thanks, Matt. I have no further
 11 questions.
 12 THE WITNESS: You're welcome. Thank you.
 13 MS. McHUGH: Well, and I will just say, as
 14 with everybody else, I haven't had a chance to review
 15 all the information that was provided today, so because
 16 your deposition is left open, I may, too, have some
 17 follow-up questions later.
 18 THE WITNESS: Okay.
 19 MS. McHUGH: Thank you.
 20 THE WITNESS: Thank you.
 21 MR. ANDERSON: I didn't say that, but I assume
 22 it's the same.
 23 MR. BAXTER: Yes.
 24 You guys?
 25 MR. FLETCHER: I don't have any questions.

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1 MR. SIMPSON: No questions.
 2 MR. BAXTER: I do have -- it works out to two
 3 questions for you, Mr. Anders.
 4 EXAMINATION
 5 QUESTIONS BY MR. BAXTER:
 6 Q. So you might recall Mr. Budge asked you some
 7 questions related to your work on the Methodology Order
 8 in 2021?
 9 Do you recall those questions?
 10 A. I do.
 11 Q. How would you characterize the work that you
 12 did at that time in 2021?
 13 A. I would characterize it as a check-in, as a
 14 time where we looked at the methodology to try to
 15 evaluate if it needed to be updated.
 16 MR. BAXTER: Okay. Thank you. That's
 17 actually my only questions.
 18 All right. It looks like we are done for the
 19 day.
 20 MS. KLAHN: Do we want to set a -- hi,
 21 Garrick, this is Sarah. We can go off the record. I
 22 want to ask about the next scheduling.
 23
 24 (Deposition adjourned at 4:51 p.m.)
 25 (Signature requested.)

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1 CERTIFICATE OF WITNESS
 2 I, MATTHEW ANDERS, P.G., being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 220;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto.
 11 DATED this ____ day of _____, 20__.
 12
 13 _____
 14 MATTHEW ANDERS, P.G.
 15 SUBSCRIBED AND SWORN to before me this ____ day of
 16 _____, 20__.
 17
 18
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

1 CHANGE SHEET FOR MATTHEW ANDERS, P.G.
2 Page ___ Line ___ Reason for Change _____
3 Reads _____
4 Should Read _____
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6 Page ___ Line ___ Reason for Change _____
7 Reads _____
8 Should Read _____
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10 Page ___ Line ___ Reason for Change _____
11 Reads _____
12 Should Read _____
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14 Page ___ Line ___ Reason for Change _____
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16 Should Read _____
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18 Page ___ Line ___ Reason for Change _____
19 Reads _____
20 Should Read _____
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22 Page ___ Line ___ Reason for Change _____
23 Reads _____
24 Should Read _____
24 Use a separate sheet if you need more room.
25 WITNESS SIGNATURE _____

1 REPORTER'S CERTIFICATE
2 I, ANDREA L. CHECK, CSR No. 748, Certified
3 Shorthand Reporter, certify;
4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;
7 That the testimony and all objections made
8 were recorded stenographically by me and transcribed by
9 me or under my direction;
10 That the foregoing is a true and correct
11 record of all testimony given, to the best of my
12 ability;
13 I further certify that I am not a relative or
14 employee of any attorney or party, nor am I financially
15 interested in the action.
16 IN WITNESS WHEREOF, I set my hand and seal
17 this 15th day of May, 2023.
18
19 
20 _____
21 ANDREA L. CHECK, CSR No. 748, RPR, CRR
22 Notary Public
23 P.O. Box 2636
24 Boise, Idaho 83701-2636
25 My Commission expires July 20, 2028.

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<p>7 (3) 84:24;137:11;138:7</p> <p>70 (2) 86:25;87:1</p> <p>71 (1) 87:2</p> <p>7101 (2) 88:9,15</p> <p>7102 (3) 88:9,15,15</p> <p>72 (1) 152:17</p> <p>73 (2) 194:7,12</p> <p>732 (1) 106:1</p> <p>75,200 (3) 180:17,18;181:11</p> <p>78 (1) 87:13</p>			
<p style="text-align: center;">8</p>			
<p>8 (11) 22:20;52:25;59:15;77:11; 78:14,15;84:25;136:24,24; 140:13;152:17</p> <p>8:20 (2) 165:12,12</p> <p>83 (1) 152:16</p> <p>84 (1) 152:16</p> <p>86 (1) 152:16</p> <p>8-year (5) 77:17,20;78:3,13;86:10</p>			
<p style="text-align: center;">9</p>			
<p>9 (11) 23:11,22,23;83:12;84:16; 85:6;88:5;136:25;140:16; 141:5;152:8</p>			

Attachment 3

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO VARIOUS WATER RIGHTS)
HELD BY OR FOR THE BENEFIT OF A&B) DOCKET NO.
IRRIGATION DISTRICT, AMERICAN) CM-DC-2010-001
FALLS RESERVOIR DISTRICT #2,)
BURLEY IRRIGATION DISTRICT,)
MILNER IRRIGATION DISTRICT,)
MINIDOKA IRRIGATION DISTRICT,)
NORTH SIDE CANAL COMPANY, AND)
TWIN FALLS CANAL COMPANY)
_____)

DEPOSITION OF JENNIFER SUKOW, P.E., P.G.

May 10, 2023

REPORTED BY:

COLLEEN P. DOHERTY, CSR 345

Notary Public

Page 2

1 THE DEPOSITION OF JENNIFER SUKOW, P.E., P.G.
 2 was taken on behalf of the Various Water Users, at the
 3 offices of the IDWR, located at 322 E. Front Street, 6th
 4 Floor, Boise, Idaho, commencing at 8:00 a.m., on May 10,
 5 2023, before Colleen P. Doherty, Certified Shorthand
 6 Reporter and Notary Public within and for the State of
 7 Idaho, in the above-entitled matter.
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 16 Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield,
 17 Rupert, Shoshone, and Wendell:
 18 MCHUGH BROMLEY, PLLC
 19 BY MS. CANDICE M. MCHUGH (Present Remotely)
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 23 ALSO PRESENT: Alan Jackson
 24 (Present Remotely) Sophia Sigstedt, Thane Kindred,
 25 Jaxon Higgs, Bryce Contor, Erick Powell

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 7 Examination by Mr. Simpson 159
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 14 Exh 2 - Copy of Fifth Amended Final Order 42
 15 Regarding Methodology for Determining
 16 Material Injury to Reasonable In-Season
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 18 Exh 3 - Copy of Final Order Regarding April 43
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1 JENNIFER SUKOW, P.E., P.G.,
 2 having been called as a witness and duly sworn to tell
 3 the truth relating to said cause, testified as follows:
 4 MR. BAXTER: Candice, before we get started, I
 5 just want to lay a little foundation here today. You
 6 might recall that on May 5th, 2023, the Director entered
 7 an order limiting the scope of the depositions in this
 8 particular matter. And he said he was limiting the
 9 scope of the deposition to preclude questions regarding
 10 the Director's deliberative process on legal and policy
 11 considerations.
 12 Now, as the Director discussed at our recent
 13 status conference, he relied upon staff to help with
 14 technical matters. So the Director has made staff
 15 available to answer questions related to technical
 16 matters. But please be aware that if counsel starts
 17 asking questions about the Director's deliberative
 18 process on legal and policy matters, I may instruct the
 19 witness not to answer the question.
 20 Also, with regards to the documents that have
 21 been requested, the Director has identified and asked
 22 staff to identify the documents that they have relied
 23 upon in analyzing and assisting the Director on creating
 24 the methodology order those documents have been
 25 identified and posted on IDWR's website. And I believe

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1 it looks like we might have copies of some of those
 2 today here that you anticipate answering questions with
 3 regards to. So those are the documents that Ms. Sukow
 4 is providing with regards to answering the requests in
 5 your subpoena for documents. And those are the only
 6 documents we're providing at this point in time.
 7 So I just wanted to lay that foundation,
 8 Candice, before we started.
 9 MS. McHUGH: And that's fine, Garrick. But
 10 I'm going to go through each one and have the deponent
 11 answer those questions. You can feel free to object.
 12 But I think we have the right to ask the question. She
 13 can answer that she is not providing any documents for
 14 whatever reason. But, you know, I'm going to ask the
 15 questions I'm going to ask. If you feel like you have
 16 to object, because somehow it goes outside the scope,
 17 then that's what you are going to have to do. But I am
 18 not limiting my questions. Because I don't know that I
 19 understand that instruction entirely. And I don't know
 20 that I understand what is in and outside the scope. But
 21 I do understand, and I can read the order for myself,
 22 and understand that the Director has limited it.
 23 I would like to understand when you make the
 24 objection, what your basis is for instructing her not to
 25 answer the question.

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1 MR. BAXTER: I will lay that foundation.
 2 MS. McHUGH: But maybe we can do that on a
 3 question by question basis. And that will end up
 4 prolonging the depo. But I mean, I guess that's all I
 5 can do at this point.
 6 MR. BUDGE: Hey, Candice, can I ask a
 7 clarifying question for Garrick?
 8 MS. McHUGH: Yes.
 9 MR. BUDGE: Garrick, this is TJ. The order
 10 that the Director issued just pertains to evidence at
 11 the hearing. It doesn't impose a protective order on
 12 discovery that would prevent us from asking questions in
 13 discovery. And as you know, depositions are much
 14 broader in terms of what you can inquire into.
 15 And so are you taking the position, Garrick,
 16 that we can't even in a deposition, ask any questions
 17 that you believe might go outside the bounds of what's
 18 admissible at the hearing?
 19 MR. BAXTER: Well, TJ, let me read the
 20 Director's order. It says, "It is further ordered that
 21 the scope of any deposition of a Department employee
 22 will preclude questions regarding the Director's
 23 deliberative process on legal and policy
 24 considerations." And so I think that clearly applies to
 25 this circumstance.

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1 MS. McHUGH: And, Garrick, is the Director and
 2 the Department asserting some sort of privilege?
 3 MR. BAXTER: Candice, as the order outlines
 4 the Director's legal authority to do this, and it speaks
 5 for itself.
 6 MS. McHUGH: I'm asking if you are asserting
 7 some sort of privilege. I understand that Rule 521 is
 8 cited. I'm asking if the Director and the Department is
 9 also asserting any kind of privilege?
 10 MR. BAXTER: Again, Candice, the order speaks
 11 for itself.
 12 MS. McHUGH: So the Director is not asserting
 13 any sort of privilege?
 14 MR. BAXTER: Candice, I'm not under
 15 questioning here today.
 16 MS. McHUGH: Okay. I was just trying to
 17 clarify, Garrick, I mean.
 18 MR. BAXTER: And I answered your question
 19 twice, Candice.
 20 MR. BUDGE: Hey, Garrick, this is TJ. Just
 21 another point of clarification. I'm looking at a notice
 22 of materials the Department witnesses may rely upon at
 23 the hearing, and intent to take official notice. I
 24 think you are referring to it in a different order; is
 25 that right?

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1 MR. BAXTER: Yes, it's the May 5th, 2023,
 2 order denying appointment of an independent hearing
 3 officer, and motion for continuance, and limiting the
 4 scope of depositions.
 5 MR. BUDGE: Okay. I'll review that. And then
 6 if I have further questions about that order, I can ask
 7 you later. But I do think Candice's point is an
 8 important one. Well, let me review that order and then
 9 I can ask any questions later on.
 10 (Exhibit 1 marked.)
 11 EXAMINATION
 12 QUESTIONS BY MS. McHUGH:
 13 Q. All right. Ms. Sukow, I think there is a
 14 document that is the Notice of the Deposition Duces
 15 Tecum, and I think it's been marked as Deposition
 16 Exhibit 1. I understand Garrick's objections. The
 17 questions that I'm going to ask you today relative to
 18 the documents right now, are just whether or not those
 19 documents have been provided. I understand they are all
 20 uploaded on the Department's website.
 21 But this isn't your first deposition. I think
 22 you understand the process. If I have asked a question
 23 that's not clear to you, feel free to stop and tell me I
 24 didn't make any sense or whatever. Your attorney gets
 25 to make objections, which I think you understand. Just

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1 by way of introduction, I think it would be helpful for
 2 the record, so everybody understands who is here today.
 3 I'm Candice McHugh. You and I know each
 4 other. I represent the Coalition of the Cities. I'm
 5 going to go ahead and let everyone else introduce
 6 themselves, so I think you know everybody that's in the
 7 room or maybe not. And then we will introduce who is on
 8 the Zoom call. And then we will go forward with
 9 questioning starting with Exhibit 1.
 10 So again, can the people in the room just for
 11 the record, identify themselves.
 12 MR. BAXTER: This is Garrick Baxter, attorney
 13 for the Department of Water Resources.
 14 MR. JOHNS: Skyler Johns attorney for
 15 Bonneville-Jefferson Ground Water District.
 16 MR. JACKSON: Alan Jackson for Bingham Water
 17 District.
 18 MR. ANDERSON: Dylan Anderson, attorney for
 19 Bingham Ground Water District.
 20 MR. FLETCHER: Kent Fletcher, attorney for
 21 Minidoka Irrigation District and American Falls
 22 Reservoir District No. 2.
 23 MR. SIMPSON: Good morning. John Simpson,
 24 attorney for the Surface Water Coalition, including the
 25 Twin Falls Canal Company, North Side Canal Company, and

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1 Milner Irrigation District, A & B, Burley Irrigation
 2 District.
 3 MS. McHUGH: Is that everybody in the room?
 4 MR. BAXTER: That's everybody in the room.
 5 MS. McHUGH: Okay. Just so people in the room
 6 understand, I can see only Jennifer. I can't see
 7 anybody else. So if it is frustrating to you that I
 8 don't know that, that's the reason.
 9 For those of us that are on the Zoom call, you
 10 want to just introduce yourself, starting with TJ.
 11 MR. BUDGE: Yes, this is TJ Budge, attorney
 12 for the Idaho Ground Water Appropriators. I have with
 13 me Eleisheva Patterson, also an attorney for IGWA.
 14 MR. BROMLEY: This is Chris Bromley, attorney
 15 for Coalition of Cities. I might not be on the
 16 deposition the entire time.
 17 MS. SIGSTEDT-LYNKER: Sophia Sigstedt, I'm a
 18 technical consultant for IGWA.
 19 MR. KINDRED: This is Thane Kindred, technical
 20 consultant for Bonneville-Jefferson.
 21 MR. CONTOR: And Bryce Contor also for
 22 Bonneville-Jefferson.
 23 MR. HIGGS: Jaxon Higgs with IGWA.
 24 MS. McHUGH: I believe Sarah Klahn is also
 25 listening in as time allows her to, for the City of

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1 Pocatello, but she might not be on right at this moment.
2 Q. (BY MS. McHUGH) Okay. So, Jennifer, you have
3 in front of you what's been marked as Deposition Exhibit
4 1. It is the Notice of Deposition Duces Tecum. Have
5 you seen this document before?
6 A. No.
7 Q. Okay. So today's your first time of seeing
8 this Notice and the request that are contained therein?
9 A. That's correct.
10 Q. Okay. If you could turn to page 4, in this
11 Notice, we had asked that you produce the following
12 documents for deposition. And I understand from
13 Garrick's comments that the documents that we have been
14 told, the Director said you can rely on, and that we can
15 look on are uploaded. And I just want to go through
16 each one of these requests and see if any of these
17 documents are part of those to your knowledge.
18 Request No. 1, "Any and all documents
19 reflecting your involvement in the issuance of the Fifth
20 Amended Methodology Order." To your knowledge are all
21 those documents uploaded?
22 A. Yes.
23 Q. Does that include emails between you and the
24 Department, and other Department staff?
25 A. No.

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1 Q. So not all documents reflecting your
2 involvement are uploaded to the Department's website?
3 A. Not if you are talking about all emails, no.
4 Q. Okay. Are there any other documents or
5 memorandum that you have among you and Department staff
6 that show your involvement in the issuance of the Fifth
7 Methodology Order that are not uploaded?
8 A. All the technical work that I did for the
9 Fifth Methodology Order are uploaded. So all the
10 technical work I did was presented at the technical
11 working group meeting in 2022.
12 Q. What other documents are responsive to Request
13 No. 1, that show your involvement in the issuance of the
14 Fifth Methodology Order outside of the technical working
15 group documents that you've just described?
16 MR. BAXTER: Jennifer, I'm going to object to
17 the question. To the extent your answer to the question
18 would require you to disclose information regarding the
19 Director's deliberative process on legal and policy
20 considerations, you are instructed not to answer the
21 question. Okay?
22 THE WITNESS: Okay.
23 Q. (BY MS. McHUGH) You may answer the question.
24 What other documents do you have that show your
25 involvement in the issuance of the Fifth Amended

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1 Methodology Order that are not uploaded or part of this
2 technical working group information?
3 A. I don't have any other documents that aren't
4 part of the deliberative process.
5 Q. So I'm not asking for documents that you have
6 between you and the Director. What about you and other
7 staff?
8 MR. BAXTER: Candice, I'm going to just object
9 with regards to that. Asking questions about
10 communications with other staff is part of the
11 Director's deliberative process. So again, I'm going to
12 instruct the witness to not answer that question.
13 Q. (BY MS. McHUGH) So if the documents didn't
14 include the Director, I'm not understanding how those
15 documents are part of the Director's deliberative
16 process. The Director didn't look at them. How are
17 they part of this process?
18 MR. BAXTER: Candice, as the Director
19 indicated at the last status conference, he relies upon
20 agency staff to help support him in his efforts. And
21 there are communications that go into that between
22 agency staff. For example, Jennifer communicates with
23 other staff about having QA/QC testing take place. And
24 from the Department's perspective, all those
25 communications relate to the Director's deliberative

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1 process, and the information they provide ultimately to
2 the Director.
3 So again, to the extent, Jennifer, that the
4 question asks for information related to the Director's
5 deliberative process as I've defined it here today, you
6 are instructed not to answer that question.
7 MS. McHUGH: I think we're allowed to find out
8 whether the documents exist. Whether or not we're
9 allowed to see the documents, or ask her about contents
10 of the documents is something different.
11 Q. (BY MS. McHUGH) My question to you, Jennifer,
12 is, are there documents between you and the Department
13 staff that are not uploaded, that have not been
14 disclosed, that show your involvement in the issuance of
15 the Fifth Amended Methodology Order?
16 MR. BAXTER: And, Candice, I will just point
17 out that Jennifer has already answered that question,
18 and she said, "yes."
19 Q. (BY MS. McHUGH) Okay. And what kinds of
20 documents are those?
21 A. You know, I did not go back and look through
22 my emails in preparation for this deposition. So I
23 can't accurately answer that question. I suspect if I
24 went back and looked, that I have some email
25 correspondence related to the Fifth Methodology Order.

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1 However, I don't know other than that.
2 Q. Did you prepare any analysis, memos, those
3 kinds of things that you would have shared?
4 A. The only --
5 MR. BAXTER: Again, Candice, I'm going to
6 object to the question. It's asking Jennifer about what
7 she prepared to support the Director in his deliberative
8 process. We've identified the documents, the technical
9 documents that she relied upon. And again, this witness
10 is being provided for you to answer questions with
11 regards to the technical analysis she provided the
12 Director.
13 MS. McHUGH: Well, my understanding, Garrick,
14 is that she actually didn't look at the Deposition
15 Notice at all before today. So she actually provided
16 nothing. The Director told her what she could provide.
17 But what I'm asking for her today is the kinds
18 of documents that exist out there. Whether or not we
19 ask about the content of those documents is a separate
20 question. But actually, Jennifer has not provided any
21 documents, because the Director apparently told her what
22 document. So she hasn't even looked at this Notice. So
23 I think we're entitled to ask if the document exists.
24 MR. BAXTER: Candice, I think you are
25 mischaracterizing the documents that have been provided.

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1 The question was identified to Ms. Sukow, what documents
2 did you rely upon? She provided those documents that
3 have been posted. And questions with regards to the
4 memos, and other things that she prepared with regards
5 to this matter, those go directly to the Director's
6 deliberative process.
7 MS. McHUGH: The content of the memo might.
8 The existence of it does not.
9 MR. BAXTER: And she affirmed their existence,
10 but -- well, actually, I'm going to even say, that the
11 existence of those are part of the deliberative process.
12 So I'm going to the instruct the witness not
13 to answer the question.
14 MR. BUDGE: Candice, can I ask a question?
15 MS. McHUGH: Sure, TJ.
16 MR. BAXTER: TJ, are we just bouncing around
17 to all the attorneys at this point in time?
18 MS. McHUGH: Sure.
19 MR. BUDGE: Well, rather than come back to it
20 later. And so, Garrick, one important distinction that
21 I think we need to have a discussion, because it's going
22 to affect the whole deposition, is the difference
23 between information that was provided to the Director
24 for consideration, and his deliberative process. So
25 those are two different things.

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1 And what Candice is trying to find out is just
2 what information was provided. And we need to
3 understand if you are going to prevent the deponent from
4 even identifying information that was provided to the
5 Director, that significantly limits what we can do here
6 today. But that is an important distinction.
7 Everything, you know, the stuff that was
8 posted to the website, that's just information. And
9 other analyses or memos that Jennifer may have created,
10 that's information. What the Director did with that,
11 you know, his deliberative process.
12 So by your objections, I'm understanding that
13 you are not even going to let us ask about the
14 information that was provided; is that correct?
15 MR. BAXTER: TJ, Candice's question was with
16 regards to emails and memorandums provided to the
17 Director. That was --
18 MS. McHUGH: Actually, I think my question was
19 any emails that reflect her involvement in issuance of
20 the Fifth Methodology Order. And then the next question
21 I asked is, did she prepare any memos that show her
22 involvement in the Fifth Methodology Order that have not
23 been uploaded to the website?
24 MR. BAXTER: Jennifer, why don't you go ahead
25 and answer the question.

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1 THE WITNESS: No, I did not prepare any memos
2 that are not posted to the website. I prepared the
3 presentations of the technical working group that is
4 posted to the website. And that contains the technical
5 information that was provided to the Director.
6 Q. (BY MS. McHUGH) Did you prepare any analysis,
7 graphs, those kinds of things that show your involvement
8 in the issuance of the Fifth Methodology Order that are
9 not uploaded?
10 A. I don't recall.
11 Q. Okay. We'll move down to Question No. 2. Are
12 you aware of any documents, whether or not they were
13 authored by you, that reflect other Department employees
14 input on the Department's decision to move from the
15 steady state to transient modeling in the Fifth
16 Methodology Order that are not uploaded to the website?
17 MR. BAXTER: Candice, I'm going to object to
18 the question. Again, you are asking this witness about
19 communications authored by other people that were
20 provided that employee's input. And that employee's
21 input relates to the Director's deliberative process.
22 So I'm going to instruct the witness not to
23 answer the question.
24 Q. (BY MS. McHUGH) So for on our Request No. 2,
25 you are saying she can't say whether or not she knows of

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1 any other documents relating to other people's input?
2 MR. BAXTER: The existence of those documents
3 gets into the Director's deliberative process.
4 Q. (BY MS. McHUGH) Jennifer, are all the
5 documents that you relied on or that you understand
6 reflect the analysis to go from city to state to
7 transient modeling in the Fifth Methodology Order, are
8 they uploaded to the website?
9 A. I'm sorry. Can you specify what you mean by
10 "documents"?
11 Q. I would say, memos, analysis, written
12 communication, presentations.
13 A. So that the only work product I prepared was
14 the presentation I gave to the technical working group.
15 If you tagged me before when you asked that. But then
16 you said, well, documents includes emails. So,
17 obviously, there is no email posted to the website.
18 Q. Jennifer, would you look at Request No. 3.
19 You can just read it to yourself. And answer whether or
20 not that information has been uploaded to the website?
21 A. I am not aware of any memoranda or reports
22 authored by myself or others -- well, okay. So authored
23 by me, there is the presentation that shows the change
24 in curtailment dates likely to be curtailed, or examples
25 of past years as a result of the change to transient

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1 modeling. In the model files, there is a POD file that
2 has water rights and their priority dates.
3 Q. And have those been provided to us?
4 A. Those were posted with the -- yeah, that POD
5 file is posted on the website. And specifically there
6 is a copy of it in the files that were posted with the
7 as-applied order.
8 Q. And are you aware of any other documents
9 relating to the number of water rights to be curtailed,
10 the comparison authored by others?
11 A. No, not that I'm aware of.
12 (Dave Colvin joining deposition via Zoom.)
13 Q. (BY MS. McHUGH) if you can look at Request
14 No. 4?
15 A. I believe those files are all posted in the
16 supporting files that were posted with the as-applied
17 order. I believe those were also put in the materials
18 that myself and Matt Anders would rely on for this
19 hearing.
20 Q. And if you could look at Request No. 5?
21 A. So when we calculate the curtailment date,
22 there is a little bit of trial and error. And we do
23 calculate other curtailment dates that don't end up
24 being the one that goes in the order. And there
25 are -- I do not include those files in what's posted,

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1 just because I don't want there to be confusion about
2 which -- you know, which one was the final. But those
3 files do exist for the other priority dates. And, no,
4 those were not included.
5 Q. And can you provide those in a separate file
6 so that there isn't any confusion?
7 A. I don't see any reason why I could not include
8 those, no. And those are -- yeah.
9 Q. And that's just limited to the files and
10 output relative to the models. What about communication
11 and notes relative to those other curtailment runs?
12 A. There would not be communications about those
13 other curtailment dates. It's just part of the process
14 that I do to find the appropriate curtailment date.
15 MS. McHUGH: Okay. We would request that
16 those get posted. You can clarify that that's what they
17 are referring to, Request No. 5.
18 MR. BAXTER: We'll make a note of that,
19 Candice.
20 Q. (BY MS. McHUGH) Okay. No. 6, if you could
21 look at that?
22 A. The only steady state runs I did were for the
23 only -- yeah, the only steady state runs, I did were for
24 the December 10, 1953, curtailment date. And those, I
25 honestly don't recall if I included those in the

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1 materials that went online. I think I did, but I would
2 have to check.
3 Q. Okay. And that was to Request No. 6. If you
4 could look at Request No. 7?
5 A. Yeah, I was not around when the
6 Department -- when the previous Director made the
7 decision to use steady state. And I am not aware of any
8 documents related to that.
9 Q. Okay. No. 8?
10 A. What is "paragraph 1 above" referring to?
11 Q. It's any and all documents reflecting your
12 involvement in the issuance of the Fifth Amended
13 Methodology Order. This is asking for any internal and
14 external communications pertaining to that information?
15 MR. BAXTER: So once again, Jennifer, to the
16 extent the answer to the question would require you to
17 disclose information regarding the Director's
18 deliberative process on legal or policy considerations,
19 you are instructed not to answer that question.
20 Q. (BY MS. McHUGH) Jennifer, did you have any
21 conversations with anybody outside of the Department
22 regarding the Director's Fifth Methodology Order?
23 A. Not that I recall.
24 Q. If you could look at Request No. 9?
25 A. I am not aware of any notices or announcements

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1 outside of the presentations we gave to the technical
2 working group and the Fifth Methodology Order.
3 Q. Okay. If you can look at Request No. 10. And
4 paragraph No. 3 is any memorandum or reports authored by
5 you describing the change in the number of water rights.
6 That's Request No. 3.
7 A. There is an internal communication where I
8 request our GIS analyst to update the POD file for me.
9 And then that staff member sent it to me.
10 Q. And has that been provided?
11 A. No.
12 Q. Has the GIS POD file been provided?
13 A. Yes.
14 Q. If you could look at No. 11?
15 MR. BAXTER: Again, Jennifer, to the extent
16 your answer to the question would require you to
17 disclose information regarding the Director's
18 deliberative process on legal or policy considerations,
19 and specifically it's asking about the Director's
20 decision to transition. The question that Ms. McHugh
21 just asked specifically pertains to the Department's
22 decision to transition is how the question is framed.
23 To the extent that information would require you to
24 disclose that deliberative process, you are instructed
25 not to answer the question.

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1 Q. (BY MS. McHUGH) Jennifer, do those documents
2 exist? Are there documents that exist that are
3 responsive to Request No. 11?
4 A. I don't know.
5 Q. Were you part of the Director's deliberative
6 process to determine whether or not to move from steady
7 state to transient state?
8 MR. BAXTER: Candice, I'm going to the
9 question. I think even just understanding who was
10 involved in the Director's deliberative process is in
11 and of itself getting to that deliberative process. So
12 I'm going to instruct the witness to not answer the
13 question.
14 The Director has, as he indicated at the
15 status conference, said he relied upon technical staff
16 to provide him technical data. And, you know, for
17 example, as he identified in the notice of materials the
18 Department witnesses may rely upon at hearing, and
19 intent to take official notice.
20 He's identified Ms. Sukow to testify with
21 regards to steady state and transient modeling and
22 simulations for the Eastern Snake Plain Aquifer Model,
23 and calculations of curtailment priority dates. So
24 she's able to answer questions as to her involvement as
25 to that. But your question as to Director's

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1 deliberative process, again I'm going to instruct the
2 witness not to answer the question.
3 MS. McHUGH: So she's been instructed to not
4 answer the question whether or not she was part of the
5 Director's deliberative process, that she was part of
6 that process?
7 MR. BAXTER: Yes.
8 Q. (BY MS. McHUGH) Jennifer, did you provide
9 documents and technical analysis relating to the
10 transition from steady state to transient?
11 A. Yes.
12 Q. And who did you provide that information to?
13 A. I provided it to the technical working group,
14 and other IDWR staff in the hydrology section, and to
15 the Director.
16 Q. And who in the hydrology section did you
17 direct it to?
18 A. Matt Anders.
19 Q. Anyone else?
20 A. Well, the other hydrology staff that
21 participated in the technical working group were
22 also -- also saw that presentation.
23 Q. And is that information that you provided to
24 Matt Anders and the other hydrology, has that all been
25 disclosed and uploaded?

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1 A. Yes, it's the same information I presented to
2 the technical working group.
3 Q. Is there any other information that you
4 provided that's not in those documents?
5 A. No.
6 Q. If you could look at Request No. 12?
7 A. Well, Request No. 12 appears to me to be
8 redundant to the Request No. 5. Because Request No. 5
9 includes communications. So I have already answered
10 that.
11 Q. Okay. And did you have any communications
12 with people outside of the Department, other than the
13 technical working group people, relative to the ESPAM
14 transient curtailment runs?
15 A. Not that I recall.
16 Q. Okay. If you could look at Request No. 13?
17 A. I don't understand what credits for accruals
18 is referring to. I don't think there are any credits
19 for accruals.
20 Q. So in looking at Request No. 13, to the extent
21 that you understand the request, do you believe that the
22 documents have been provided or they don't exist?
23 A. I don't think credits for accruals exist,
24 so...
25 Q. Okay.

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1 A. I guess my answer would be, no, I don't
2 understand the request.
3 Q. Okay. No. 14, if you could look at that.
4 A. It would be the same as my answer to No. 7. I
5 was not employed by the Department at the time that the
6 former director made the decision to use steady state.
7 Q. Okay. Request No. 15?
8 A. That information is included in the supporting
9 documents that were provided.
10 (Erick Powell joined deposition via Zoom.)
11 Q. (BY MS. McHUGH) Okay. No. 16?
12 A. Sorry. I'm still trying to figure out what
13 you are asking for here.
14 Q. Let me see if I can help you out here. That's
15 relative to the Department's announcements of moving
16 from steady state to transient state.
17 A. I think what my answer was that the notices
18 and announcements that I am aware of are the
19 presentation to the technical working group and the
20 Fifth Methodology Order. So I think I've already
21 answered this question.
22 Q. Okay. If you could look at No. 17?
23 A. I included the predictive uncertainty analysis
24 for the current version of ESPAM. I included that
25 report in the materials that were provided.

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1 Q. Okay.
2 A. There is currently no trim line for the
3 Surface Water Coalition delivery call.
4 Q. Was a trim line discussed?
5 A. No.
6 Q. Is there any documents or reports or analyses
7 at all that would ever relate to a trim line or the
8 possible use of a trim line?
9 A. That was not one of the issues identified to
10 be revisited in the preparation of the Fifth Methodology
11 Order. The list of issues to be looked at was set forth
12 prior to when the technical working group was convened,
13 and that was not an issue that was brought up.
14 Q. And who prepared that list?
15 A. I don't know.
16 Q. And has that list been provided?
17 A. That list was sent out by Matt Anders to the
18 technical working group at the beginning of the
19 technical working group, when it was convened last fall.
20 Q. And who developed that list?
21 A. I don't recall.
22 Q. Sorry. You answered that question. Do you
23 know whether or not there was -- did you provide input
24 on that list to anybody?
25 A. No.

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1 Q. Are you aware of any documents or drafts of
2 the list before it was sent out?
3 A. No.
4 Q. How was the list provided to the technical
5 working group?
6 A. I don't recall.
7 Q. If you look at Request No. 18?
8 A. So the analysis I did for this, I did the
9 analysis you are asking about here for years 2021 and
10 2022, and that was presented to the technical working
11 group in the fall of 2022. I do not recall whether or
12 not they asked us to provide the model output files to
13 them. And I did not include those model files in the
14 materials that were sent out just recently as part of
15 this proceeding.
16 Q. Can you provide those model files?
17 A. Yes.
18 MR. BAXTER: Yes, we can provide those.
19 Q. (BY MS. McHUGH) Okay. And since the issuance
20 of the order on April 21st, have you done any analysis,
21 model analysis relative to this upcoming irrigation
22 season?
23 A. After the as-applied order was issued?
24 Q. Yes.
25 A. No.

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1 Q. Okay. If you could look at Request No. 19?
2 A. There is a report comparing the curtailment
3 scenario for ESPAM2.1 and ESPAM2.2. And that is in the
4 ESPAM documentation that I included in the files. The
5 model files associated with that are posted on the ESPAM
6 website. I did not include all of the model files in
7 what was posted for this. It's a large amount of files.
8 But it is out there available publicly.
9 Q. And it's on the Department's website somewhere
10 else just not in this?
11 A. Just not on this.
12 Q. Okay.
13 A. If you wanted to add that to this, we could.
14 Q. Or if you could provide a link just so people
15 understand where it's located, that's fine. Would that
16 work?
17 A. I believe there is a link in the report.
18 Q. Okay. Fair enough. If you could look at
19 No. 20?
20 A. Yeah.
21 MR. BAXTER: So, Candice --
22 THE WITNESS: That doesn't exist.
23 Q. (BY MS. McHUGH) Okay.
24 A. Sorry.
25 MR. BAXTER: That's okay. I was slow.

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1 Q. (BY MS. McHUGH) I'm sorry. Say that one more
2 time?
3 A. I just said that that doesn't exist. I have
4 not compared differences between modeled project
5 efficiencies between ESPAM2.1 to 2.2.
6 Q. (BY MS. McHUGH) I thought someone said my
7 name, but maybe I misheard that.
8 Have you done analysis for model efficiencies
9 for the Surface Water Coalition entities?
10 A. No.
11 Q. Would you look at Request No. 21?
12 MR. BAXTER: So again, Candice, I'm going to
13 object to the question in that it's asking for the
14 Department's determination reasoning used in steady
15 state modeling.
16 So, Jennifer, to the extent your answer to the
17 question would require you to disclose information
18 regarding the Director's deliberative process regarding
19 legal and policy considerations, you are instructed to
20 not answer the question. But if there is other
21 information that you can identify that is not related to
22 the deliberative process, you can answer the question.
23 MS. McHUGH: Just to the clarify that. This
24 is reasoning to use steady state modeling in previous
25 as-applied orders, not moving from steady state to

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1 transient in this order.
2 THE WITNESS: And I've already answered this
3 question I think twice. I was not here when that
4 decision was made. And I am not aware of any
5 documentation of that.
6 Q. (BY MS. McHUGH) Okay. Request No. 22?
7 A. And again, item 18 says, communication. So
8 this is redundant. I've already answered this question.
9 Q. And Question 18 is using the model evaluation
10 to apply into transient model as a hindcast. How are
11 you instructed to perform that analysis?
12 A. I was instructed by Matt Anders that that was
13 one of the issues identified that they wanted to discuss
14 in the 2022 technical working group. And I was the one
15 who made the decision that modeling, what would have
16 happened in 2021 and 2022, would be a good example of
17 showing, you know, what the effect of changing to
18 transient modeling would be on the curtailment priority
19 dates.
20 Q. And did Matt Anders ask you that orally or was
21 that in an email?
22 A. I believe orally, yes.
23 Q. Was it in a meeting where other people were
24 present?
25 A. No.

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1 Q. If you could look at No. 23? Did I Skip 22?
2 No, 23.
3 A. So in addition to the report that I identified
4 in item 19, there were communications with the Eastern
5 Snake Hydrologic Modeling Committee about those
6 differences. So they had the opportunity to review
7 those differences before we rolled out the model.
8 Q. And are those communications with the Eastern
9 Snake Plain Hydrologic Modeling Committee available on
10 the Department's website?
11 A. Well, the presentations to them would be -- I
12 know I sent out a draft copy of the report to them and
13 gave them the opportunity to make comments on it. And
14 there was an email sending that out to them, and
15 soliciting their comments. I don't recall receiving any
16 comments on that report from the ESHMC, but I would have
17 to be able to go back to my email and check.
18 Q. Okay. Can you do that?
19 A. Yes.
20 Q. No. 24?
21 A. Well, again, I told you the analysis that you
22 asked about in paragraph 20 hasn't been done.
23 Q. Okay.
24 A. So nothing exists.
25 Q. And No. 25?

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1 A. Okay. So for the fourth time, I was not here
2 when the former director decided to use steady state
3 modeling. And I am not aware of any documentation of
4 that decision.
5 Q. Okay. Thank you. And normally, Jennifer,
6 that would have been given to you. And so that would
7 have been a little less onerous, because you would have
8 been able to say, there is no documents to Request 5 to
9 say, 12, 15. But since you haven't seen it before, we
10 had to make a record of what was clear on that. So
11 thank you for walking through that.
12 Now, that we have gotten that kind of cleared
13 up. I would like to just have you explain a little bit
14 of who you are, and what your background is, and what
15 your role is with the Department. And then I will go
16 forward with the questions.
17 So, Jennifer, what is your background? Can
18 you give me your educational background?
19 A. I have a bachelor's degree in environmental
20 geology and technology from the University of North
21 Dakota. And a master's degree in civil and
22 environmental engineering from Utah State University.
23 Q. And how long have you worked for the
24 Department?
25 A. I've worked in my current position in the

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1 ground water modeling group since June of 2010. So not
2 quite 13 years.
3 Q. And what is your current position?
4 A. My position title is Engineer, Technical 2.
5 Q. And do you supervise people?
6 A. No.
7 Q. And who is your immediate direct supervisor?
8 A. Sean Vincent.
9 Q. And what is your main function at the
10 Department?
11 A. My main function is calibrating ground water
12 flow models, and providing technical analyses with those
13 models to address various issues that come up.
14 Q. Do you consider yourself an expert on ground
15 water modeling?
16 A. Yes.
17 Q. And do you act in that capacity for the
18 Department as their ground water modeling expert?
19 A. Yes.
20 Q. And are you an expert on the various models
21 used for the Eastern Snake Plain Aquifer, that are
22 sometimes referred to as "ESPAM"?
23 A. I'm not sure what you mean by "various
24 models."
25 Q. Fair enough. Do you see yourself as an expert

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1 on the ESPAM model --
2 A. Yes.
3 Q. -- and its multiple divisions? Okay.
4 When was the decision made that the Fourth
5 Methodology Order needed to be amended?
6 A. I don't know.
7 Q. You don't know if the decision to amend the
8 Fourth Methodology Order happened before the technical
9 working group or after?
10 A. I don't know. I did not make the decision to
11 amend it.
12 Q. When were you told that it was going to be
13 amended?
14 MR. BAXTER: Candice, I'm going to object to
15 the question. I think that's getting to the Director's
16 deliberative process with regards to the Director's
17 decision to amend the methodology order.
18 I'm going to instruct the witness not to
19 answer the question.
20 MS. McHUGH: So let me understand this,
21 Garrick. You are saying that the Director's
22 deliberative process includes when there was a decision
23 to be made, that it was going to be amended?
24 MR. BAXTER: Yes, the temporal aspects of the
25 Department's or the Director's decision-making is

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1 directly related to the deliberative process.
2 Q. (BY MS. McHUGH) Jennifer, was there a meeting
3 to your knowledge within the Department to discuss
4 whether or not to amend the Fourth Methodology
5 Order?
6 MR. BAXTER: Again, Candice, that gets to the
7 Director's deliberative process the Department having a
8 meeting on a specific issue. Now, to the extent you
9 were asking her to reveal internal discussions? I'm
10 going to instruct the witness not to answer the
11 question. To the extent there are -- I can't
12 specifically remember Candice's questions if it asked
13 about external meetings to amend the methodology order.
14 If that was the question as you understood it,
15 and there were such meetings, you can answer that aspect
16 of it.
17 THE WITNESS: I -- yeah, the first thing I'm
18 aware of, Candice, is when Matt Anders told me that they
19 were going to convene the technical working group in the
20 fall of 2022. And asked me to prepare for the
21 presentation I ultimately gave on application of steady
22 state modeling and transient modeling to calculate a
23 curtailment priority date.
24 Q. (BY MS. McHUGH) So was it your understanding
25 when Matt Anders asked you to prepare that information

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1 that the Department was considering amending the Fourth
2 Methodology Order?
3 A. I believe that's what was communicated to the
4 technical working group as the purpose for convening.
5 So, yes, that was my understanding.
6 Q. What was your understanding of the purposes
7 for the technical working group? It sounds like one of
8 the purposes was to consider amending the Fourth
9 Methodology Order? What were all the purposes that you
10 understood that group was convened for?
11 A. My understanding is there is a statement
12 somewhere in the methodology order that says the
13 Director has the obligation to review the methodology
14 periodically as new information becomes available.
15 Q. And what portions of the Fourth Methodology
16 Order did you understand were being looked at and
17 considered to be amended or updated?
18 A. So I was only tasked with looking at the
19 calculation of the curtailment priority date. I am
20 aware that there were other items that were identified
21 to the technical working group. But I did not
22 participate in those, so I cannot recite those for you.
23 Q. And who identified those other purposes to the
24 technical working group; do you know?
25 A. I don't know.

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1 Q. And who decided to look at whether or not a
2 move from steady state to transient modeling should be
3 something looked at when amending the Fourth Methodology
4 Order?
5 A. I don't know.
6 MS. McHUGH: Could we hand, Jennifer, Exhibit
7 No. 2, which would be the final order regarding -- no,
8 it would be the amended Fifth Methodology Order would be
9 Exhibit 2?
10 MR. BAXTER: Do you guys have that one?
11 MR. ANDERSON: I do.
12 (Exhibit 2 marked.)
13 MR. ANDERSON: And, Candice, what was going to
14 probably be No. 3?
15 MS. McHUGH: Exhibit 3 is going to be the
16 April forecast.
17 MR. ANDERSON: The as-applied order?
18 MS. McHUGH: Yes.
19 Q. (BY MS. McHUGH) Jennifer, do you have Exhibit
20 No. 2 in front of you?
21 A. Yes.
22 Q. And can you tell me what it is?
23 A. It's the "Fifth Amended Final Order Regarding
24 Methodology for Determining Material Injury to
25 Reasonable In-Season Demand and Reasonable Carryover."

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1 Q. Have you seen this document before?
2 A. Yes.
3 Q. Have you read it?
4 A. Parts of it.
5 Q. Did you review any specific paragraphs or
6 provide information for specific paragraphs in this
7 order?
8 A. Yes.
9 Q. Okay. Perhaps we could take, just to make
10 this more efficient, maybe we should take a brief break
11 while Exhibit 3 is being copied. And then Jennifer can
12 look at Exhibit 2 and like mark the paragraphs that she
13 had input on or drafted, and then we can come back, and
14 then we can make it more efficient?
15 THE REPORTER: We already have Exhibit 3, I
16 think.
17 MS. McHUGH: Oh, we do. Fair enough.
18 (Exhibit 3 marked.)
19 Q. (BY MS. McHUGH) Okay. Jennifer, do you know
20 what paragraphs?
21 A. I am looking for them.
22 Q. Okay.
23 A. There is a lot of stuff in here I did not work
24 on.
25 Q. Well, that will make it easier.

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1 A. Yes.
2 MR. BAXTER: So because the Director has
3 identified Jennifer as a witness to talk about
4 determination of curtailment data, I think that starts
5 on page 29, Jennifer.
6 THE WITNESS: Yes, so findings of fact section
7 F.
8 Q. (BY MS. McHUGH) Okay. Findings of fact
9 section F have paragraphs numbered 81 through 89. Did
10 you draft these paragraphs or what was your role?
11 A. These paragraphs, I participated in drafting
12 these paragraphs. I think some of the wording was
13 edited by others to hopefully make it more accessible to
14 people that are less involved in the technical aspects
15 of modeling. But I think you will find that the
16 information conveyed in these paragraphs was conveyed in
17 the presentation of the technical working group in 2022.
18 Q. Okay. If you'll look at paragraphs 82 and 83.
19 First of all, paragraph 82, it states that "ESPAM
20 simulations can be either steady state or transient."
21 Do you see that?
22 A. Yes.
23 Q. Hasn't that always been true?
24 A. Yes.
25 Q. So what was the impetus to now use ESPAM

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1 simulations in a transient mode to determine curtailment
2 date versus steady state, what changed?
3 A. I was -- the question that was posed to me is
4 does the steady state analysis -- you know, does doing a
5 steady state analysis to calculate the curtailment date,
6 does that practice result in getting water to the senior
7 in the time of need, or would a transient analysis be
8 better? So it wasn't a change in the technical
9 information. It was a change apparently in the
10 understanding of the administration. But I don't know
11 what the impetus for that was.
12 Q. When you say that it was a change in
13 administration, was there an understanding that the
14 orders prior to the Amended Fifth Methodology Order were
15 flawed?
16 A. Again, I don't know what the impetus for the
17 change in understanding from by administration was,
18 other than what they identified on a previous page in
19 this order. Yeah. So on page 2, it says, "Further the
20 Department now has multiple years of experience with the
21 methodology to better understand the impact of applying
22 steady state modeling versus transient modeling to
23 determine a curtailment priority date that would supply
24 adequate water to the senior water right holders."
25 Q. So did the methodology orders 1 through 4

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1 properly address material injury to senior water right
2 users?
3 A. I don't know. That's a legal question, or a
4 policy question, one or the other. It's not a technical
5 question.
6 Q. In the Fourth Methodology Order, did you
7 understand whether or not a transient model run would
8 provide a different answer on the amount of water that
9 the senior could expect?
10 A. Yes, I did.
11 Q. Did you share that information with the
12 Department, anyone else at the Department?
13 A. When I first was involved with doing the
14 analysis for the earlier method diversions of the
15 methodology order, my role at that time was to do the QA
16 checks for Allan Wylie, who was the senior modeler at
17 that time.
18 Q. Did you -- go ahead.
19 A. At the time that I did the first QA check for
20 him, I asked him, I said, "Well, what time frame are we
21 looking for the shortfall to be addressed under? So
22 what time frame are we looking for those benefits to
23 accrue to the reach?" And he said "Oh, we don't do
24 that. We're doing a steady state analysis even though
25 that won't get the water to the reach during the time of

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1 need." And he told me that that was what he was
2 directed to do by a former director by Karl Dreher. And
3 so this is just hearsay, I guess. But my understanding
4 was that was a decision made by Karl Dreher. And that's
5 the way we had done it since then.
6 Q. And do you remember what methodology order
7 that was that you first had that conversation on?
8 A. I do not.
9 Q. Had you done any transient model runs for
10 methodology of prior methodology orders?
11 A. No.
12 Q. Had you seen any transient model runs done on
13 prior methodology orders?
14 A. Not for the -- not to calculate the
15 curtailment priority date, no.
16 Q. What were they done for?
17 A. There was in one of the methodology orders a
18 transient analysis that was used to reduce the ground
19 water users obligation for the reasonable carryover and
20 allow them to phase that in. And that was removed
21 because it was remanded by the court as being an
22 inappropriate application.
23 Q. Did you work on the Amended Fourth Methodology
24 Order?
25 A. Did I -- sorry. Say that again.

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1 Q. Did you work on the Fourth Methodology Order?
2 A. No.
3 Q. Was that prior to your time?
4 A. I was here, I believe, at the time that they
5 issued that, but I did not work on it.
6 Q. How many years does it take to understand that
7 there is a difference between the impact of applying a
8 transient model run versus a steady state model run, and
9 what that will get you as far as output?
10 A. I'm sorry. I'm not sure -- I don't understand
11 the question.
12 Q. If you look on page 2 that you refer to, it
13 says, "The Department now has multiple years of
14 experience to understand the impact of applying steady
15 state modeling versus transient state modeling." And
16 I'm just asking you, how many years does it take to
17 understand the difference?
18 A. I didn't write that statement, and I can't
19 answer that question. I --
20 Q. Well, it sounded like you understood it when
21 you first got there, when you were working with Allan
22 Wylie; right?
23 A. Yes.
24 Q. And ESPAM has always been a transient model;
25 correct?

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1 A. Correct.
2 Q. So understanding that transient model output
3 and steady state model output seems to be kind of just
4 understanding the words makes it possible to understand
5 the difference in the output; correct?
6 A. It does for me. I'm not sure that's true for
7 everybody.
8 Q. Okay. And your role at the Department is
9 their expert in modeling; right?
10 A. Yes.
11 Q. And is that what Mr. Wylie's role was prior to
12 you?
13 A. Yes.
14 Q. Did Mr. Wylie understand the difference
15 between transient and steady state output?
16 A. Yes.
17 Q. So what is the difference relating to the 2023
18 ESPAM model output than was different in 2010?
19 A. The difference would be that in 2010, the
20 Department was still using ESPAM1.1, which was
21 calibrated with six-month time periods and stress
22 periods. In 2023, we're using ESPAM2.2, which is
23 calibrated with one month stress periods and half-month
24 time steps.
25 Q. And when did the calibration between ESPAM1.1

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1 and ESPAM -- when the did ESPAM calibration change to
2 the half month time step?
3 A. With ESPAM2.1.
4 Q. And when did that happen?
5 A. I believe that was rolled out in 2013.
6 Q. So did you understand in 2013, the difference
7 between the model output for transient versus steady
8 state?
9 A. Yes.
10 Q. So what is the difference between relating to
11 the ESPAM model output in 2013 versus 2023?
12 A. Well, I mean there is some changes between
13 ESPAM2.1 and 2.2. But they were both calibrated with
14 using the same time discretization.
15 Q. And the time discretization is the key piece
16 for how fine the transient model prediction can occur;
17 is that true?
18 A. Probably the -- tell me how you said that
19 again.
20 Q. Okay. And I probably said it less articulate
21 than you would want me to. So the time step, the half
22 month time step in predicting like when -- that time
23 step is important I guess to determining in a transient
24 model run, like when water, or when the output is going
25 to be realized; is that true?

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1 A. Yes, that's true.
2 Q. So in 2013, the time step being a half month
3 is the same time step as in 2023 under the same current
4 version of the model?
5 A. Yes.
6 Q. And there were curtailment orders issued
7 between 2013 and 2023 by the Department; correct?
8 A. Yes.
9 Q. And those all use steady state?
10 A. Yes.
11 Q. Even though the model was a transient model
12 and had the half month time step since 2013?
13 A. Yes.
14 Q. And the first time you understood that the
15 Department was considering moving from a transient model
16 output for curtailment purposes was last year when Matt
17 Anders tasked you with the runs that you were going to
18 present to the technical working group; is that true?
19 A. I had been asked questions about it earlier in
20 the year.
21 Q. And who asked you those questions?
22 MR. BAXTER: I'm going to object. Again, this
23 gets to --
24 Let me frame it this way, Jennifer. To the
25 extent the question is going to have you get to the

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1 deliberative process that the Director related to this
2 policy decision of transitioning from transient to
3 steady state, and that includes communications between
4 you and other IDWR employees that would then support the
5 Director's, and be used in the Director's determination.
6 Ultimately, you are instructed not to answer the
7 question.
8 THE WITNESS: Yeah, I can't answer the
9 question.
10 Q. (BY MS. McHUGH) Did you have any
11 conversations with people outside the Department
12 relative to using transient model versus a steady state
13 model to predict curtailment dates?
14 A. Not outside of the technical working group.
15 Q. Okay. Back to Exhibit No. 2. If I could have
16 you look at page 2 of that same paragraph that we had
17 talked about earlier. And there is a sentence in there
18 that starts with "in contrast." It says, "In contrast,
19 the current version was calibrated using monthly stress
20 periods and half-month time steps. A refinement that
21 facilitates in-season transient modeling for calculating
22 the response for curtailment in ground water use." Do
23 you see that sentence?
24 A. I do.
25 Q. And that actually occurred in 2013?

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1 A. Yes, it did.
2 Q. I'm sorry. I'm just flipping through, I have
3 the order to make sure I got my other questions done.
4 I'm going to set aside Exhibit 2 for now.
5 If we could look at Exhibit 3, which is the
6 "Final Order Regarding April 2023 Forecast Supply." Do
7 you have that in front of you?
8 A. Yes.
9 Q. Have you seen this document before?
10 A. Yes.
11 Q. Did you author, or review, or edit any
12 paragraphs within this order?
13 A. Yes.
14 Q. Can you identify those?
15 A. Well, they would be the ones that are related
16 to the modeling. So I inserted the curtailment date,
17 and the proportionate share volumes in Footnote 5.
18 Q. So on page 5, you would have inserted for
19 paragraph 6, the December 30th, 1953 date. And then
20 what information in Footnote 5?
21 A. The proportionate share calculated for A & B
22 Irrigation District and the proportionate share
23 calculated for IGWA.
24 Q. And as to Footnote 5, how you came to those
25 proportionate shares, is that information included in

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1 the information that's been uploaded to the Department's
2 website?
3 A. Yes.
4 Q. And then did you do anything relative to the
5 reasonable carryover shortfall --
6 A. No.
7 Q. -- calculation?
8 A. I did not calculate any of the other -- well,
9 there is no reasonable carryover shortfall in this
10 order.
11 Q. Fair enough.
12 A. But, yeah.
13 Q. It just recites the shortfall from the prior?
14 A. Oh, yeah. Yeah, I did not work on any other
15 parts of the order other than the curtailment date and
16 the proportionate shares.
17 Q. Have you discussed this Exhibit 3 with anyone
18 outside of the Department?
19 A. No.
20 Q. Have you done any analysis relating to this
21 final order since the issuance of this order on April
22 21st of this year?
23 A. No.
24 Q. Have you been asked to do any analysis?
25 A. No.

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1 MS. McHUGH: Can we hand Ms. Sukow what's been
2 marked as Exhibit 4, it's the December 23rd, 2022
3 summary of recommended technical revisions to the Fourth
4 Amended Final Order. It's a one-page document. Do you
5 guys have that?
6 MR. ANDERSON: Probably.
7 MR. BAXTER: Dylan is digging that up for us.
8 MS. McHUGH: Sure.
9 MR. ANDERSON: You said "Summary of
10 Recommended Technical Revisions to the Fourth Amended
11 Final Order."
12 MS. McHUGH: Yes, okay.
13 MR. ANDERSON: And maybe if you wouldn't mind
14 just showing it in front of your face and making sure
15 that that is the correct document. Just so she can see
16 it and make sure it's the correct one that she is
17 thinking of.
18 (Exhibit 4 marked.)
19 THE WITNESS: I'm not sure she'll be able to
20 see anything.
21 MR. BAXTER: I think that was upside down.
22 Q. (BY MS. McHUGH) I mean, that was upside down?
23 A. Well, that's not going to help; is it?
24 Q. That was okay. Yes, that's it. So, Jennifer,
25 you've been handed what's been marked as Exhibit 4. Can

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1 you identify that document?
2 A. It's the "Summary of Recommended Technical
3 Revisions to the Fourth Amended Final Order Regarding
4 Methodology." Do you want me to read the whole thing?
5 Q. No, that's fine. We're on the same page as
6 far as --
7 A. Dated December 23rd, 2022, authored by Kara
8 Ferguson and Matt Anders.
9 Q. Have you seen that document before?
10 A. Yes.
11 Q. Did you review or give any input on that
12 document?
13 A. I think I reviewed it, but I don't think I had
14 any significant input on it.
15 Q. And if you move down to the middle, it starts
16 with the paragraph, "Based on the information presented
17 at the meetings and distributed to the technical working
18 group, IDWR staff have the following preliminary
19 technical recommendations." Do you see that there?
20 A. Yes.
21 Q. And at that point was IDWR staff recommending
22 that the Director use a transient model run to determine
23 curtailment date?
24 A. As it says in the memo, at this time staff do
25 not have recommendations on using transient model

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1 simulation for determining curtailment date. So staff
2 did not make a recommendation one way or the other.
3 Q. So we can assume that the determination to use
4 the transient model simulation was done sometime after
5 December of 2022; correct?
6 A. Well, the determination was not made by staff.
7 The determination of whether or not to switch to
8 transient modeling was made by the Director.
9 Q. Would the Director have told the staff if he
10 had determined that prior to December 23, 2022?
11 A. I don't know when the Director made his
12 decision. I know we provided this information that we
13 provided to the technical working group to him, as well
14 as the technical working group.
15 Q. Do you know why the staff was not making a
16 recommendation as of the date of this memo to use a
17 transient model simulation for determining curtailment
18 date?
19 A. Yes.
20 Q. What was the reason?
21 A. Because, you know, the technical analysis is
22 very straightforward. If you want to simulate a
23 curtailment that will resolve -- if you want to simulate
24 the type of curtailment that's prescribed in the
25 methodology order which is a short-term curtailment,

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1 just for this irrigation season. You can only simulate
2 that with a transient model simulation. You can't
3 simulate that with a steady state model simulation. And
4 the only way you can get to what will get to the reach
5 during this irrigation season is to use a transient
6 simulation.
7 You cannot get that resolved with a steady
8 state simulation. The technical part of that is very
9 straightforward. The reason staff did not make a
10 recommendation to the Director on what his decision
11 would be is that the Director has to decide what the
12 purpose of the curtailment is. And if the purpose of
13 the curtailment is to get the water to the senior during
14 the time of need, that irrigation season then the
15 technical information shows that the transient analysis
16 is the appropriate method to use.
17 However, we didn't feel it was up to staff to
18 make that legal conclusion that that is the purpose of
19 the curtailment. That's a conclusion of law for the
20 Director to make.
21 Q. So was the purpose of curtailment in the
22 Fourth Methodology Order and earlier, something
23 different?
24 A. Well, I mean, apparently Karl Dreher had a
25 different interpretation of that, because he chose to

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1 use an analysis that did not result in getting water to
2 the senior during the time of need.
3 Q. How long has Director Spackman been the
4 director; do you know?
5 A. I don't know.
6 Q. Has he been the director and been implementing
7 any of the methodology orders to your knowledge?
8 A. Well, certainly they've been implemented while
9 he's been Director, yes.
10 Q. And so the Fourth Methodology Order has been
11 in place for how many years?
12 A. I don't know.
13 Q. Has Director Spackman been implementing the
14 Fourth Methodology Order?
15 A. Yes, he has.
16 Q. And have you assisted him in doing that?
17 A. I have done the steady state calculations that
18 we were directed to do. Yes.
19 Q. But the technical analysis as to whether
20 steady state or transient model output is necessary, as
21 you said is very straightforward. But that hasn't been
22 done until this year?
23 A. That's correct.
24 Q. But nothing has changed as far as the model
25 capability on doing that; correct?

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1 A. That's correct.
2 Q. And nothing has changed in your understanding
3 on what a transient output would provide; correct?
4 A. In my understanding, that's correct. I mean,
5 for myself, yes, my understanding of what an output
6 transient has changed. I can not speak for other's
7 understanding.
8 Q. Right. So the only thing you can come up with
9 is why there has been a change, is because the Director
10 sees a different purpose for curtailment?
11 A. Yes, I was -- I was told by Allan Wylie that
12 Karl Dreher did not want to use a transient analysis,
13 because he did not like the additional volume of water
14 that would accrue to the reach in future years. I don't
15 know if that -- again, that's hearsay, but that's my
16 entire knowledge of why Allan explained to me, we were
17 doing the steady state.
18 Q. And I'm going to come back to that. But
19 because I have to take a hard break here in about ten
20 minutes. I just want to get one more exhibit Exhibit
21 No. 5 which is the frequently asked questions that was
22 from the Department's website, Dylan?
23 MR. ANDERSON: Okay.
24 MS. McHUGH: Is something happening.
25 MR. ANDERSON: Yes. I'm looking for the

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1 frequently asked questions.
2 MS. McHUGH: It's a three-page document and
3 the north methodology Fifth Methodology Order as-applied
4 and it says FAQs.
5 MR. ANDERSON: I have it digitally.
6 MS. McHUGH: You have it digitally, but you
7 don't have it here on paper.
8 MR. BUDGE: Candice, this is TJ. I'm looking
9 through materials. It was supposed to be with the news
10 release. But I don't have that. And so it looks to me
11 like a few of the documents didn't make it with Dylan
12 yesterday. So we have to copy that.
13 MS. McHUGH: Can we take a 15, 20-minute break
14 right now. And get a copy of that, and then I will just
15 jump off here and do my 10:00 status conference, which
16 really should only take five minutes, because we are
17 just letting it out. So should we plan on coming back
18 on like 10:10?
19 MR. BAXTER: I can do that. Does that work
20 for you guys?
21 MR. ANDERSON: Yes.
22 MR. BAXTER: We'll be back on at 10:10.
23 (Recess.)
24 Q. (BY MS. McHUGH) We're back on the record.
25 Thank you for accommodating that a brief hiatus I

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1 needed.
2 I think, Jennifer, you have been handed what's
3 marked as Exhibit 5.
4 MR. BAXTER: Dylan is handing it to her right
5 now.
6 (Exhibit 5 marked.)
7 Q. (BY MS. McHUGH) Do you have Exhibit 5 in
8 front of you now, Jennifer?
9 A. Yes.
10 Q. Can you identify that document?
11 A. It says "Surface Water Coalition Delivery Call
12 Delivery Fifth Methodology and April 2023 As-Applied
13 Orders, FAQs."
14 Q. Have you seen that document before?
15 A. No.
16 Q. Has anybody told you about that document?
17 A. No.
18 Q. Okay. This is a document that I downloaded
19 and printed from the Department's website that is under
20 a link here. I wanted to have you look down at bullet
21 No. 1. Why did IDWR change the methodology? Do you see
22 that? Can you just review that answer?
23 A. Okay.
24 Q. Is the transient model analysis new
25 information?

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1 A. New information to whom?
2 Q. To the Department.
3 A. To whom within the Department?
4 Q. To the Director.
5 A. It might be. I provided that to the Director
6 at the same time I provided it to the technical working
7 group. I don't know what the Director knew prior to,
8 you know, last year.
9 Q. I guess what I was asking is, the fact that
10 the model is a transient model, is that new information
11 to the Department?
12 A. It's not new -- I mean, I don't know what the
13 Director knew. But I -- it's not new information
14 though. I guess we've used the transient modeling in
15 previous. We used transient modeling in evaluation of
16 the Rangen mitigation plan. So, no, it's not new
17 information.
18 Q. Wasn't ESPAM2.1 wasn't there a final report
19 furnished?
20 A. Yes.
21 Q. And in that report does it talk about ESPAM2.1
22 having half month time steps, and that is a transient
23 model?
24 A. Yes.
25 Q. And that was published by the Department;

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1 right, that final report?
2 A. I would have to look again. I don't recall.
3 Q. Okay. We can re-visit that in a minute. And
4 if you look to bullet point No. 3, it says, "Why did
5 IDWR change the methodology to transient model?" Do you
6 see that?
7 A. Yes.
8 Q. And could you read their answer?
9 A. I'm sorry. Did you ask me to read the answer?
10 Q. Just review the answer.
11 A. Okay. Yeah, I did that early when you asked.
12 Q. Okay. And it says that the Director has
13 concluded that using the ESPA model in steady state mode
14 is no longer legally supportable, because steady state
15 does not provide water at the time, place, and quantity
16 needed by the senior water user. Is that the answer?
17 A. That is what this says, yes.
18 Q. And what do you know about what legal
19 information occurred between the Fourth Methodology
20 Order and the Fifth Methodology Order that's changed?
21 Do you know anything?
22 MR. BAXTER: I'm going to object. It calls
23 for legal conclusion with regard to the witness.
24 But, Jennifer, go ahead and answer the
25 question.

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1 THE WITNESS: I mean I am aware that there
2 were some legal decisions issued I believe during that
3 time frame, that provided some direction to the Director
4 on, you know, providing water at the time, place, and
5 quantity needed. But, you know, the specifics of that
6 are like Garrick said, beyond the scope of my position.
7 Q. (BY MS. McHUGH) And when you say you are
8 aware of some legal decisions made during that time
9 frame. What time frame are you referring to?
10 A. During the 2010s, I guess. I don't know -- I
11 don't recall specifically.
12 MS. McHUGH: Okay. Can we hand her Exhibit 6,
13 which would be the PowerPoint presentation that she
14 prepared for the technical working group?
15 MR. BAXTER: All right. Dylan is digging that
16 out.
17 (Exhibit 6 marked.)
18 MR. BAXTER: All right. Jennifer has been
19 handed the exhibit.
20 Q. (BY MS. McHUGH) Okay. Jennifer, you've been
21 handed what's been marked as Exhibit 6. Can you
22 identify that document for me?
23 A. It's a presentation titled "Surface Water
24 Coalition Methodology - Calculation of Priority Dates
25 for Curtailment of Junior Ground Water Users."

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1 Q. And did you prepare that document?
2 A. Sorry. You broke up during the question. Can
3 you repeat it?
4 Q. Sorry. Yeah. Did you prepare that document?
5 A. Yes.
6 Q. And when did you start working on that
7 document; do you know?
8 A. I don't recall.
9 Q. And did you provide this document via a
10 PowerPoint to the technical working group?
11 A. I don't recall if I personally provided it. I
12 think Matt Anders provided it to the technical working
13 group.
14 Q. Okay. Was it provided as a PowerPoint
15 presentation, or was it just provided as a printout of a
16 PowerPoint presentation?
17 A. I believe it was provided electronically.
18 Whether it was a PowerPoint or a PDF, I don't know.
19 Q. Okay. But you prepared the entire
20 presentation? That's all your work?
21 A. Yes.
22 Q. And it's dated November 28th, 2022. But that
23 doesn't mean that that's the date that you actually
24 presented it or it was provided to the technical working
25 group? Am I understanding that correctly?

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1 A. I believe that's the date I presented it to
2 the technical working group.
3 Q. Okay. So you do recall that you presented it?
4 A. Oh, I recall presenting it, yes.
5 Q. Okay. Maybe my prior question wasn't clear.
6 So you did present this to the technical working group?
7 A. Yes. I'm sorry. I thought you were talking
8 about providing the digital file to the technical
9 working group.
10 Q. Okay. Fair enough. But this PowerPoint, you
11 presented to the technical working group?
12 A. Yes.
13 Q. Okay. And to be clear, on the second page of
14 that, where it says methodology referenced. And it says
15 off to the side page 36, the methodology, or page 38.
16 Is that referring to the Fourth Methodology Order?
17 A. Yes.
18 Q. And I'm just scrolling down to the graph that
19 I thought was here, but doesn't appear to be. So if you
20 look at page 13 of that presentation, the title of the
21 slide is "Comparison of Priority Dates Calculated For
22 April DS Forecast (May 1 Curtailment)." Do you see
23 that?
24 A. Sorry. There is no page numbers in the
25 exhibit here.

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1 Q. Yeah, I know because I didn't alter how it
2 came out to you?
3 A. Tell me again what the header is on the side
4 that you want to talk about.
5 Q. Yes. It's a graph. And it says, "Comparison
6 of Priority Dates, calculated for April DA forecast (May
7 1 curtailment)." The graph, itself, says "Shortfall
8 volume and curtailed acres versus priority date for
9 Surface Water Coalition call."
10 A. Okay. I think I'm on that page.
11 Q. Okay. And is this color for you?
12 A. Yes.
13 Q. And so can you describe for me what this graph
14 is showing?
15 A. Okay. So this graph is showing -- is that our
16 message bar is running low.
17 MR. BAXTER: Hold on real quick.
18 (Off the record.)
19 MS. McHUGH: It's slide 13 of 22 in the
20 presentation.
21 MR. BAXTER: We're good to go now. Sorry,
22 Candice.
23 Q. (BY MS. McHUGH) So, Jennifer, let's go back
24 to that. Could you explain what this graph on this
25 slide is showing?

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1 A. Yeah, so it's showing the shortfall volume and
2 curtailed acres versus priority date for the Surface
3 Water Coalition delivery call. So on the X axis, it's
4 showing the water right priority date that is the date
5 that everything junior to is curtailed. And then on the
6 Y axis, it's showing the simulated value for acres
7 curtailed, which is the blue line. And that is the same
8 for both a steady state model simulation and a transient
9 model simulation, because that's just the input to the
10 MODFLOW model, or part of the input to the MODFLOW
11 model.
12 And the yellow line shows what would be the
13 predicted response at the near Blackfoot to Minidoka
14 reach at steady state, which would be if ground water
15 use was curtailed to that same priority date, every year
16 for an infinite number of years. So that's what the
17 yellow line is showing.
18 And then the red line is the predicted
19 response at the near Blackfoot to Minidoka reach between
20 May 1st and September 30th of the first year of the
21 curtailment, which is what the curtailment prescribed by
22 the methodology order allows for, is just a single year
23 curtailment.
24 Q. Okay. And just to clarify a few things to
25 make the record clear. So when you talk about

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1 curtailment between May 1st and September 30th, what you
2 are talking about is the non-pumping of ground water
3 rights during that period of time; correct?
4 A. Correct.
5 Q. And it's the volume or acre-feet under those
6 ground water rights that wouldn't be pumped between May
7 1st and September 30th; correct?
8 A. That volume is not shown on this graph. No,
9 that's not correct.
10 Q. Okay. But it's the input into the model is
11 what?
12 A. This graph doesn't show that. This graph
13 shows the response at the near Blackfoot to Minidoka
14 reach.
15 Q. Okay. But the idea is is that during that May
16 1st through September 30th date, that ground water is
17 not being pumped during those months; correct?
18 A. Yeah, ground water junior to the given date is
19 not being pumped during those months, yes, that's
20 correct?
21 Q. And the given date is represented by the X
22 axis?
23 A. Correct.
24 Q. Okay. And on the blue line and as it relates
25 to the axis shows the number of acres curtailed. But

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1 there is also a volume that is shown by the Y axis. Can
2 you explain that relationship?
3 A. Yeah. So the volume is the response at near
4 Blackfoot to Minidoka resulting from curtailing that
5 many acres of ground water use junior to that given
6 priority date.
7 Q. Okay. And the near Blackfoot to Minidoka
8 reach, I mean it's not on this graph, but I want to make
9 the record clear. The near Blackfoot to Minidoka reach
10 is important because why? Can you explain that?
11 A. That has been the reach of the Snake River
12 that has been identified as the source of supply that's
13 relevant for the Surface Water Coalition delivery call.
14 Q. Okay. And when you look at this graph, this
15 year, do you recall the shortage that is predicted to
16 Twin Falls Canal Company or roughly the shortage?
17 A. 5200 -- I'm not sure just Twin Falls Canal
18 Company the total in-season demand shortfall prediction
19 was is 75,200 acre-feet. I don't recall if there was
20 one or more entities that were part of that shortfall.
21 Q. And just for using that as a number purpose.
22 Just so we can talk about this graph, so I make sure I
23 understand it. Where on this graph would 75,000
24 acre-feet like roughly fall, as far as that volume goes
25 under the three line?

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1 A. It would fall where 75,200 acre-feet would
2 fall on the Y axis. So the first line here, we've got
3 zero, and we've got 200,000 acre-feet. So it would be,
4 you know, less than halfway -- it would be between the
5 zero and 200,000 acre-feet, and less than halfway of.
6 Q. Okay. And just for discussion purposes, is
7 there a line or a dot on here that you can identify that
8 you think represents 75,000 acre-feet roughly?
9 A. Well, yeah I mean we -- we specifically
10 calculated the curtailment date for the as-applied order
11 using this same method. So the place it would fall on
12 here would be December 30th, 1953, which would be
13 between the January 1950 and January 1960 priority dates
14 and closer to 1950, so...
15 Q. So can we use the third dot over on the red
16 line as an approximate that would be approximate, that
17 would be approximately 75,000 acre-feet, and that
18 correlates to the approximately 1953?
19 A. It would be close. I would imagine it is
20 probably January 1954 or January 1955. I don't recall
21 which date I ran, but it's close.
22 MR. BAXTER: Just for -- I'm sorry.
23 Q. (BY MS. McHUGH) Okay.
24 MR. BAXTER: Just for clarification on the
25 record. You said third dot, third dot from which side

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1 Candice, left or right?
2 MS. McHUGH: Third dot from the Y axis going
3 across.
4 MR. BAXTER: Thank you.
5 Q. (BY MS. McHUGH) Is that where you were
6 referring to Jennifer?
7 A. Yeah.
8 Q. On the red line?
9 A. Yes.
10 Q. And if you look at that location, and then you
11 also and then look at the number of acres curtailed
12 relative to getting that, you know, that priority date,
13 which is currently under the curtailment order roughly,
14 and the number of acres curtailed. The blue line shows
15 the number of acres curtailed; would that be true?
16 A. Yes.
17 Q. Okay. And the quantity of water expected for
18 that date is roughly the 75,000. And the number of
19 acres curtailed if you were to draw just a straight line
20 up, is roughly between 600 and 800,000 acres?
21 A. Yes. And the files that were provided with
22 the as-applied order, it was about 700,000 acres.
23 Q. Okay. And if you look at the yellow line,
24 which is the steady state response. Is there a dot, and
25 this time we'll go from the right-hand page since that

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1 is maybe a little easier. Is there a yellow dot that is
2 roughly the 75,000 acre-foot level on that? Do you see
3 that?
4 A. Yeah.
5 Q. And by mine, I would count all the yellow dots
6 from right to left as being maybe the ninth or tenth
7 dot?
8 A. Yeah, probably somewhere in there.
9 Q. Okay. And if you look at that dot under the
10 steady state response, the relationship between the
11 75,000 acre-feet and the number of acres curtailed, that
12 curtails roughly 75,000 acres is what it looks like
13 predicted under this -- in this graph? Does that kind
14 of -- the relationship is pretty close?
15 A. Yeah, it would be in the ballpark.
16 Q. Yeah. So it's safe to say that when you run a
17 transient curtailment run, the number of acres curtailed
18 to produce the same amount of water as would be produced
19 under a steady state model run is significantly more?
20 A. Yes.
21 Q. In this case, it goes from roughly 75,000
22 acres to 700,000 acres?
23 A. Roughly, yes.
24 Q. Were you asked to do any analysis on whether
25 or not that was a reasonable amount of acres to be

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1 curtailed for that amount of water?
2 MR. BAXTER: I'm going to object. It calls
3 for a legal conclusion as to the reasonableness.
4 But, Jennifer, go ahead and answer the
5 question.
6 THE WITNESS: No, I was not asked to do that.
7 Q. (BY MS. McHUGH) Were there any discussions
8 about that?
9 MR. BAXTER: I'm going to object, Jennifer, to
10 the extent the answer to the question would require you
11 to divulge or disclose information regarding the
12 Director's deliberative process on these legal issues as
13 to legal and policy issues with regard to which action
14 to choose in which to -- let me rephrase that as to
15 steady state or transient analysis. I'm going to
16 instruct you to not answer the question. But if there
17 is information that you can relay that does not disclose
18 the deliberative process, you are free to answer.
19 THE WITNESS: Yeah, I don't have anything I
20 can answer on that.
21 Q. (BY MS. McHUGH) Is it because you don't know,
22 or because it was considered part of the Director's
23 deliberative process?
24 A. Because it would be considered part of the
25 deliberative process.

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1 MS. McHUGH: And, Garrick, as an FYI, you are
2 very faint. And you weren't before, but are now, faint,
3 as the FYI.
4 MR. BAXTER: I will speak up closer.
5 Q. (BY MS. McHUGH) Jennifer are you familiar
6 with the concept of futile call?
7 A. Yes.
8 Q. Was there any discussion about whether or not
9 using the transient model might impact analysis of
10 futile call?
11 MR. BAXTER: I'm going to object. Jennifer,
12 again to the extent the answer to the question would
13 require you to disclose information regarding the
14 Director's deliberative process, specifically as to
15 futile call and whether you implemented it.
16 You are instructed not to answer the question.
17 THE WITNESS: I don't think I had any
18 discussions with anybody about futile call.
19 Q. (BY MS. McHUGH) Do you know if anybody looked
20 at this order and, for example, using the kind of
21 information that is depicted on this graph, did any kind
22 of reasonableness analysis and whether this made any
23 sense?
24 MR. BAXTER: Again, I'm going to object to the
25 extent the question would require you to disclose

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1 information regarding the Director's deliberative
2 process as to reasonableness, specifically here in this
3 question, you are instructed not to answer the question.
4 But if you can answer the question without disclosing
5 the deliberative process, you can answer the question.
6 THE WITNESS: Well, I mean, I can say that in
7 this presentation, I talk about, you know, what happens
8 with water that accrues during the future years. And I
9 don't make any recommendations about how that should be
10 considered in the legal or the policy decision. But I
11 do outline the technical facts of, you know, what the
12 implications are of going to the earlier priority date,
13 when the water accrues, and what are the potential fates
14 of water that accrues in future years during dry years
15 and wet years. So that information was provided to the
16 decision-makers to make the decision.
17 Q. (BY MS. McHUGH) Okay. So let's look at the
18 yellow line for a moment. We kind of discussed that
19 about yellow dot No. 9 from the right-hand side is
20 roughly 75,000 acre-feet of water that would be
21 produced. Can you give an approximate priority date
22 that that amount from the yellow line would correspond
23 to?
24 A. It would be in the mid-1980s.
25 Q. And a curtailment in the mid-1980s does give

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1 some amount of water in the May 1st to September 30th
2 time period; correct?
3 A. Correct. Some water, yes.
4 Q. Okay. Now, if you take the amount of water
5 this year, for example, if you curtail back to roughly
6 the 1953 priority date, and you do it for this May 1st
7 to September 30th date, I'm going to get back to this
8 comment you made about what you heard Karl Dreher's
9 concern was, because I have a question about that. That
10 what do you do with the additional water in future
11 years?
12 So if next year there is a demand shortfall of
13 75,000 acre-feet, and you use a transient model run, how
14 do you think that's going to work? Can you explain that
15 process?
16 A. It depends on, you know, what ends up
17 happening this year. If there were no mitigation
18 provided by any of the water users, and the curtailment
19 actually occurred, then the benefits that accrue to the
20 reach between the end of the season in April
21 would offset the -- would reduce the shortfall
22 prediction, because they would be realized in the
23 variables they use to predict the shortfall. We would
24 then have to account for water yet to accrue from last
25 year's curtailment during this season. And that would

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1 work to reduce the curtailment date that would be
2 required in the upcoming season. However, if all of the
3 water users mitigate instead of being curtailed, then
4 there is no benefit yet to accrue, you know, from
5 mitigation by providing delivery of storage water. So
6 then we would just be looking at a single year
7 curtailment again.
8 Q. Does the 1953 date in the order account for
9 the accrual of water that has been re-charged to the
10 aquifer benefiting the near Blackfoot to Minidoka reach
11 that has been done by the municipalities?
12 A. To the extent that it has accrued by April 1,
13 yes.
14 Q. And does it account for the recharge done by
15 the Idaho Water Resource Board?
16 A. Yes.
17 Q. And does the 1953 priority date that's
18 proposed in the current order for the upcoming season,
19 does it account for the fact that some of that water is
20 going to be accruing from past recharge activities
21 during this irrigation season?
22 A. No, it does not.
23 Q. So those mitigation activities that are
24 undertaken by the cities for recharge purposes, and the
25 recharge that's done through the Idaho Water Resource

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1 Board, does have benefits that will accrue to the near
2 Blackfoot to Minidoka reach this summer; correct?
3 A. Yes.
4 Q. And I believe under the ground water
5 appropriators, they also do recharge, and that recharge
6 is it expected to have benefit for this coming season
7 for the near Blackfoot to Minidoka reach; correct?
8 A. Possibly. A lot of that recharge accrues
9 close enough to the river that I can't say without
10 analyzing it whether or not there is still water yet to
11 accrue to the reach.
12 Q. But there has been no analysis of that; is
13 that my understanding? You haven't done that analysis?
14 A. No.
15 Q. And the methodology order doesn't take that
16 into account relative to the amount of water that's
17 going to be available to Twin Falls or the Surface Water
18 Coalition this season?
19 A. It's really a question of whether or not the
20 shortfall calculation takes into account -- takes that
21 into account, because we're just calculating the
22 priority date based on the shortfall. So you would have
23 to look at whether or not the predictive variables they
24 use to make the shortfall prediction include the impacts
25 of that recharge or not. I think in a lot of cases,

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1 they do.
2 Q. And who does that calculation?
3 A. Matt Anders.
4 Q. Looking back at this graph, we've established
5 that the steady state response for providing
6 approximately 75,000 acre-feet would include a
7 curtailment of approximately 75,000 acres, and that
8 priority date would be roughly in the mid-1980s.
9 So if there was a curtailment of -- what would
10 you expect to happen if there was just a permanent
11 curtailment of, let's say, the mid-1980s. We'll pick a
12 date to say, the mid-1980s, so a 1982 priority date.
13 What would happen to the amount of water that would
14 accrue to the near Blackfoot to Minidoka reach if the
15 mid-1980s water rights were curtailed going forward?
16 A. So you are saying the mid-1980 water rights
17 would be curtailed every year in theory even though
18 that's not what the methodology allows for?
19 Q. Yes, I'm just trying to understand --
20 A. You are just asking as a technical question.
21 Q. -- what this graph would look like if that was
22 going on.
23 A. So if that occurred for decades continuously,
24 then the annual average response would be similar to the
25 steady state response, which would be the yellow line on

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1 here.

2 Q. And if the junior ground water rights, if the

3 mid-1980 ground water rights were never developed, like

4 they didn't -- they just weren't developed, would that

5 have the same impact to the near Blackfoot to Neeley

6 reach? Would there be the roughly 75,000 acre-feet in

7 that reach this year?

8 A. Yes, that's what we would predict would have

9 happened if those water rights had never -- if all the

10 water rights junior to the mid-1980s had never been

11 developed.

12 Q. Do you know whether or not there is a

13 transient run that shows monthly accruals to the near

14 Blackfoot to Minidoka reach with the 1953 priority date?

15 A. Yes.

16 Q. And have those been provided?

17 A. Yes.

18 Q. And is that in an output file, or is that in a

19 graph, or that could that be made into a graph?

20 A. Well, it's both in the model output file

21 format and in an Excel spreadsheet that was provided.

22 Q. Okay. And if our consultant had a question on

23 specifically where this is at, would you be able to

24 point him to that exact file if for some reason we can't

25 find it?

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1 A. Yes, it's in the -- yes, I can. Do you want

2 me to tell you the location now?

3 Q. Sure.

4 A. Okay. So it's in like SWC April ESPAM zip

5 folder, and there is a file, subdirectory that says

6 Junior 12-30, 1953. And within that there should be an

7 Excel -- well, there is one Excel spreadsheet for the

8 city municipal users, and one Excel spreadsheet for the

9 irrigation use, and then one that sums them together.

10 Q. Okay. I wanted to go back to the question

11 about what happens in consecutive years of transient

12 curtailment? So if this year we curtail May 1st to

13 September 30th, back to 1953. And then next year, there

14 is a demand shortfall, let's say, the exact same, 75,000

15 acre-feet. And maybe you explained this to me already

16 but I need to understand it again. What would you

17 expect next year to happen?

18 A. I'm sorry. Repeat that. What would I expect

19 to happen next year if what happens this year?

20 Q. So I'm trying to understand what happens in

21 consecutive years of transient curtailment. So this

22 year, we curtail May 1st through September 30th. And we

23 expect what's on this graph to occur. Next year, if

24 there is a demand shortfall of 75,000 acre-feet again,

25 and we expect the exact same time period to be

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1 curtailed, May 1st to September 30th. What would you

2 expect to be the outcome for next year, a curtailment

3 date, or is every year just a brand new date, or how do

4 you account for this year's benefits next year? Does

5 that make sense?

6 A. Well, yeah. I guess what is happening this

7 year with the curtailment, though? Is there mitigation

8 provided --

9 Q. Let's assume --

10 A. -- or is it --

11 Q. Let's assume no mitigation for the first

12 answer.

13 A. Okay. So that would be the same answer I gave

14 you before. We would need to -- if all of the junior

15 ground water users are actually curtailed, we would need

16 to set up next year's simulation so that there would be,

17 you know, the simulation would start with this

18 curtailment. We would simulate that stress. And what

19 would be accruing between May 1 and September 30th based

20 on the year before, would be part of the benefit that

21 would accrue from, you know, curtailment into this

22 season. Whatever accrued prior to, you know, prior

23 to -- well, and I guess I should say, April 1. So

24 whatever accrued prior to April 1 would be the benefits

25 of that would be included in the predictive variables

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1 for the calculation of the shortfall volume. So as I

2 stated in the presentation, it would reduce the

3 shortfall volume. So what that means is if the

4 shortfall volume ends up being 75,000 acre-feet, it

5 would have been larger without the previous year's

6 curtailment.

7 Q. So would that require a change in how the

8 supply side, the supply available to the Minidoka reach

9 is calculated?

10 A. No.

11 Q. It would just require a change in the input

12 and the variables to that prediction equation?

13 A. No, I'm saying that it would affect those

14 variables physically. So they would be different than

15 they would have been otherwise.

16 Q. So in your opinion, the way that the demand

17 shortfall is currently calculated and proposed to be

18 calculated in the Fifth Amended Methodology Order allows

19 for the variables to be changed next year based on this

20 year's transient curtailment?

21 A. Well, what I'm saying is, if there were a

22 transient curtailment this year, then that would be

23 realized in water that accrues to storage over the

24 winter it would be realized in discharge at Box Canyon

25 Spring. It would be realized at the water level in a

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1 well that they look at to make the prediction. So those
2 values would all be higher. So it would be inherent in
3 their prediction, because the data they use will have
4 changed in response to the curtailment.
5 Q. Okay. That was helpful. Do you understand
6 what the 75,000 acre-foot quantity is predicting, and
7 can you explain that?
8 A. Well, it's predicting their demand shortfall.
9 So it's predicting what the difference will be between
10 their -- what the difference is between their predicted
11 supply and their predicted demand.
12 Q. And who gave you that number to input into the
13 model in order to analyze the priority date?
14 A. Matt Anders.
15 Q. I'm just looking through your presentation to
16 see if I have any other questions. Just one second. Do
17 you have an understanding of the amount of water that
18 would accrue to the near Blackfoot to Minidoka reach if
19 there were no ground water pumping?
20 A. Yes, we use the model to estimate that.
21 Q. And do you remember what that number is?
22 A. It would be close to on the chart we were
23 previously looking at, that would show you what the
24 estimate is using the ESPAM2.2 data set. We only go
25 back to the priority date in 1900 on this graph. So

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1 that's not quite all of the ground water use. There is
2 a little bit junior or senior to 1900. But that would
3 get you in the ballpark, because there is not a lot
4 senior to 1900. So you would be looking at that yellow
5 dot.
6 Q. The yellow dot that's close to the 1900 range,
7 is that what you are telling me?
8 A. Right. So it would be over a million
9 acre-feet per year.
10 Q. Okay. So if there were no ground water
11 pumping, it's your understanding the amount of water
12 that would accrue to the near Blackfoot to Minidoka
13 reach would be a million acre-feet?
14 A. Approximately, yes.
15 Q. So if I look at the transient line, and I'm
16 going from left to right again. And it is kind of a
17 straight line from 1900 to approximately, it would
18 appear to be like 1949. What is that telling us?
19 A. Well, the line is dashed because I did not
20 model any dates between 1900 and January 1, 1949.
21 Q. Uh-huh.
22 A. So it would not necessarily be a straight line
23 if we model dates in between. That just wasn't done as
24 part of this analysis.
25 Q. Okay. So are you saying that that's like

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1 a -- is it an unknown?
2 A. Yes, we have not calculated those values for
3 the dates in between 1900 and 1949. It could be
4 calculated, but we have not done it.
5 Q. Okay.
6 A. So the only data points you can rely on in
7 this graph is the dots. The dashed line in between is
8 just to help you visually.
9 Q. I see. I see.
10 A. Yeah.
11 MS. McHUGH: Okay. Can I take a break, and I
12 would like to just confer with kind of the ground water
13 user attorneys. And I will just call them on the phone
14 I think, do a conference call real quick. And then we
15 can reconvene here. So can we have just like a
16 five-minute break just to have a conferral.
17 MR. BAXTER: I have 11:05 right now. So 11:10
18 be back?
19 MS. McHUGH: Yes.
20 (Recess.)
21 MS. McHUGH: We are back on the record. Can
22 we go back on the record?
23 MR. BAXTER: Colleen is nodding her head.
24 Q. (BY MS. McHUGH) Okay. We're back on the
25 record, Jennifer. And I just wanted to explore a little

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1 bit about the time frame between the staff memo, dated
2 December 23rd, 2022 and the April 21st, 2023, Fifth
3 Amended Methodology Order. And I just need to be clear
4 on your answers. So when did you become aware in that
5 time period that the Director was going to amend the
6 Fourth Methodology Order?
7 A. I'm sorry. You lost me there.
8 Q. Okay.
9 A. What staff memo are you talking about?
10 Q. The December 23rd, 2022 staff memo that had
11 the recommendations from the technical working group?
12 A. So that was one of the exhibits.
13 Q. Yes, that is Exhibit No. 4.
14 A. Okay.
15 Q. The time period between Exhibit No. 4 and
16 Exhibit No. 1.
17 A. Okay.
18 Q. What I'm asking is, when did you become aware
19 that the Director was going to amend the Fourth
20 Methodology Order, and then come up with a Fifth
21 Methodology Order?
22 MR. BAXTER: I'm going to object to the
23 question. It is attempting to get to the Director's
24 deliberative process as to modification of the
25 methodology order.

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1 So, Jennifer, to the extent your answer would
2 reveal discussions related to that deliberative process,
3 you are instructed not to answer the question. If you
4 are aware of communications outside of internal
5 deliberative processes, you are free to answer the
6 question as to those publicly available discussions.
7 THE WITNESS: Yeah, I mean, I'm not aware of
8 anything other than what's outlined in the first
9 paragraph of this memo. And then actually, I was not
10 even aware of -- I was not even aware of the dates that
11 were listed in this memo. It says that in a status
12 conference on August 5th, 2022, the Director issued a
13 directive to convene a committee of experts to review
14 and provide comments on potential technical changes to
15 the Fourth Amended Final Order Regarding Methodology.
16 So that's the extent of my awareness of the timing of
17 the Director's intent is what's outlined here.
18 Q. (BY MS. McHUGH) And between the December
19 23rd, 2022 memo and the issuance of the Fifth
20 Methodology Order, on April 21st, 2023, were you aware
21 of any meetings that occurred within the Department to
22 amend the Fourth Methodology Order?
23 A. Not that I can discuss.
24 Q. Not that you can discuss. But were you aware
25 that there were meetings?

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1 A. Garrick already directed me not to answer that
2 question.
3 Q. Okay. I'm going to ask you questions about
4 these meetings on who was in the meeting. Was Mat
5 Weaver in those meetings; do you know?
6 MR. BAXTER: Again, to the extent the answer
7 of the question would require you to disclose
8 information regarding the Director's deliberative
9 process on legal or policy issues, including the
10 changing of the methodology order, and that includes
11 discussions of IDWR staff, Jennifer, you are instructed
12 to not answer the question. If you cannot answer the
13 question, you can respond that way.
14 THE WITNESS: Yeah, I've been directed not to
15 answer the question.
16 Q. (BY MS. McHUGH) Okay. Was Shelley Keen in
17 those meetings?
18 A. I've been directed not to answer that
19 question.
20 Q. What about Tim Luke?
21 A. I've been directed not to answer that
22 question.
23 Q. What about Brian Patton?
24 A. I've been directed not to answer that
25 question.

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1 Q. What about any meetings with the Idaho Water
2 Resource Board?
3 A. I've been directed not to answer that
4 question.
5 Q. Is the Idaho Water Resource Board part of the
6 Director's deliberative process?
7 MR. BAXTER: Just a second here. Let me think
8 this through for a minute. I'm going to instruct you,
9 Jennifer, to go ahead and answer the question.
10 THE WITNESS: Okay. I'm not aware of any
11 discussions with the Idaho Water Resource Board relative
12 to the Fifth Methodology Order.
13 Q. (BY MS. McHUGH) Any of the Idaho Water
14 Resource Board members?
15 A. Not that I am aware of.
16 Q. In your opinion, Jennifer, is it fair that the
17 ground water users who are subject to the curtailment
18 under an Amended Fifth Methodology Order for them to not
19 be able to even know if there has been meetings, let
20 alone who is in the meetings, do you think it's a fair
21 process?
22 A. It's a legal process. I don't think fairness
23 is usually considered.
24 Q. So in your mind, the Director's deliberative
25 process is a legal process?

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1 A. That's my understanding.
2 Q. Do you understand why the Director's
3 deliberative process is not allowed to be discussed with
4 the water users?
5 MR. BAXTER: I'm going to object. It calls
6 for a legal conclusion based on the witness' answers.
7 But, Jennifer, to the extent you know the
8 answer, you can answer it.
9 THE WITNESS: Yeah, I don't know.
10 MS. McHUGH: And, Garrick, if I understand
11 what you are saying. Are you asserting a privilege?
12 MR. BAXTER: No. You asked her for a legal
13 conclusion.
14 MS. McHUGH: I'm asking you, Garrick, are you
15 asserting a privilege as to why she can't answer whether
16 or not there has been any meetings that occurred between
17 December 23rd, 2022 and April 21st, 2023 regarding
18 amending the methodology order?
19 MR. BAXTER: So if I'm understanding it
20 correctly, Candice, you are asking me that same question
21 you started with twice, and asking whether or not we're
22 making an argument about a deliberative process
23 privilege? Is that your question?
24 MS. McHUGH: I'm asking you if you are
25 asserting a privilege.

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1 MR. BAXTER: Again, the Director's orders
2 speak for itself.
3 MS. McHUGH: Okay.
4 Q. (BY MS. McHUGH) So back to my question to
5 you, Jennifer. Is it your understanding that the
6 deliberative process at the Department is not to be
7 disclosed to the ground water users?
8 A. I think as Garrick said, the Director's order
9 says that I'm not supposed to answer questions about
10 that in this deposition.
11 Q. And it's your understanding that you are not
12 even allowed to answer questions as to whether the
13 process occurred?
14 MR. BAXTER: Candice, I'm going to object to
15 the question here. I believe you are getting
16 argumentative with regards to this particular issue.
17 You've asked the question. She has answered the
18 question.
19 But to the extent you can answer the question
20 that was just asked, Jennifer, please go ahead and
21 answer it.
22 Q. (BY MS. McHUGH) Maybe one last try, and then
23 maybe I'll move on. So, Jennifer, were you part of the
24 Director's deliberative process?
25 MR. BAXTER: Candice, I'm going to object to

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1 that to the extent the answer requires a discussion of
2 who participated in the Director's deliberative process,
3 I believe that is addressed by the Director's order,
4 saying that he is not going to allow questions with
5 regards to his deliberative process. Asking who
6 participated in that discussion is directly in
7 contravention of the Director's order. So I'm going to
8 instruct the witness not to answer the question.
9 MS. McHUGH: Okay. Well, Jennifer, I think
10 that's all the questions I have for you today. I know
11 that other attorneys for other users do have questions,
12 so I will sign off. I mean, I will still participate,
13 but I'll be done for now.
14 MR. BUDGE: Garrick, this is TJ. I'm going to
15 ask questions of the deponent next. But I do have one
16 housekeeping matter and would ask that we go off the
17 record for a moment.
18 MR. BAXTER: Colleen just nodded her head.
19 We're off the record.
20 (Off the record.)
21 MR. BAXTER: We're back on the record.
22 EXAMINATION
23 QUESTIONS BY MR. BUDGE:
24 Q. Hi, Jennifer. I'm TJ Budge. I represent the
25 Idaho Ground Water Appropriators. They are commonly

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1 known by their acronym IGWA, or IG-WA. And we've met
2 before, and it's good to see you here. I appreciate you
3 being here.
4 I am going to ask you a number of questions.
5 And many of the topics that I had planned to ask you
6 about, Ms. McHugh has already asked you questions. So I
7 am going to do my best not to duplicate questions that
8 she has asked. But there is some that will seem
9 similar, because I want to clarify the record and make
10 sure I understood your answers properly. Okay?
11 A. Okay.
12 MR. BUDGE: Garrick, just for you, just to
13 follow up on the last exchange you had with Candice.
14 Your instruction to Jennifer not to answer questions is
15 based on the Director's order, not based on the
16 assertion of an independent privilege; correct?
17 MR. BAXTER: TJ, the order speaks for itself.
18 MR. BUDGE: But your instruction not to answer
19 questions, are you relying upon the order, or are you
20 asserting an independent privilege?
21 MR. BAXTER: TJ, I indicated that we were
22 relying upon the Director's order, and the Director's
23 authority there.
24 MR. BUDGE: Okay. Thanks, Garrick. I just
25 wanted to confirm that. That's what I understood. I

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1 appreciate that.
2 Q. (BY MR. BUDGE) Jennifer, if you would please
3 pull out Deposition Exhibit 1, that's the Notice of
4 Deposition. And once you have that, you can turn to
5 page 3. If you look at the top of page 3, there is a
6 definition of "document." It's really long. So I'm not
7 going to ask you to read it carefully. But if you just
8 skim through it, you'll see that it includes essentially
9 every type of written communication, whether it's paper
10 or digital. And I just want you to understand that my
11 next couple of questions, when I refer to "document,"
12 I'm using that broad definition.
13 There was some questioning early on in your
14 deposition related to this Notice about what documents
15 you had brought, and what you had considered. And I
16 just want to make sure that the record is clear.
17 Jennifer, did you provide to Matt Anders any
18 documents relating to the Fifth Methodology Order or the
19 April 2023 As-Applied Order that was not yet uploaded to
20 the Department's website?
21 A. To Matt Anders, not that I recall, no.
22 Q. Okay. Thank you. Did you provide to Mat
23 Weaver any documents relating to the Fifth Methodology
24 Order or the April 2023 As-Applied Order that have not
25 been uploaded to the Department's website?

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1 MR. BAXTER: I'm going to object to the scope
2 of the question. Documents that have been provided to
3 IDWR staff that have not been identified to testify in
4 this particular matter, I think are outside the scope of
5 proceeding here. And it goes to specifically the
6 Director's deliberative process in which he identified
7 at our last status conference that he does rely upon
8 IDWR's staff to help and assist him in this matter.
9 And so because that question goes to
10 communications that ultimately result in the Director's
11 deliberative process, Jennifer, I'm going to instruct
12 you not to answer that question.
13 Q. (BY MR. BUDGE) Jennifer, did you provide to
14 the Director any documents relating to the Fifth
15 Methodology Order, or the April 2023 As-Applied Order
16 that have not been uploaded to the Department's website?
17 THE WITNESS: Do you want me to answer it?
18 MR. BAXTER: Yes.
19 THE WITNESS: Okay. I mean, you say documents
20 including emails. I think I had some email
21 correspondence that he was included on.
22 Q. (BY MR. BUDGE) Anything other than email
23 correspondence?
24 A. No.
25 Q. Jennifer, did you have any conversations with

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1 Matt Anders related to the Fifth Methodology Order or
2 the April 2023 As-Applied Order?
3 A. I'm sorry. Did I have what?
4 Q. Did you have any conversations with Matt
5 Anders related to the Fifth Methodology Order or the
6 April 2023 As-Applied Order?
7 MR. BAXTER: And, Jennifer, to the extent an
8 answer to that would reveal communications related to
9 the Director's deliberative process, I'm going to
10 instruct you to not answer the question. But to the
11 extent you can talk about factual issues in which you
12 participated in related to the issues you've been
13 identified to testify here today about, the steady state
14 and transient modeling, the calculation of curtailment
15 priority dates, you can answer that question.
16 THE WITNESS: So, yes, I provided him the
17 technical presentation that is Exhibit 6. So that he
18 could disperse that to the technical working group. I
19 also, prior to the issuance of the as-applied order, he
20 sent me the shortfall demand volume. And I reported
21 back the curtailment date that I calculated when that
22 work was completed.
23 Q. (BY MR. BUDGE) Are those the only
24 conversations you had with Matt Anders about the
25 methodology order or the as-applied order?

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1 A. They would be the only conversations that
2 would not fall under the deliberative process.
3 Q. So you are declining to identify other
4 conversations you've had with Matt Anders based on your
5 counsel's instruction?
6 A. Yes.
7 Q. Okay. And have you had conversations with Mat
8 Weaver relating to the Fifth Methodology Order or the
9 April 2023 As-Applied Order?
10 MR. BAXTER: Jennifer, to the extent your
11 answer would require you to disclose information
12 regarding the Director's deliberative process,
13 specifically information you've shared with Mat Weaver
14 that ultimately might have become part of the Director's
15 deliberative process, you are instructed not to answer
16 the question. If there are communications not related
17 to the deliberative process, you can answer the
18 question.
19 THE WITNESS: Yeah, I don't -- I can't think
20 of anything I can share with you that would not be
21 considered part of the deliberative process.
22 Q. (BY MR. BUDGE) Okay. And I may ask you other
23 questions that you can't answer. It's not necessary
24 that Garrick repeat his instructions. So if there is
25 any questions I ask that you are just unable to answer.

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1 If you would please answer that you are not able to
2 answer that question based on the instruction of
3 counsel, we'll understand the basis for your refusal.
4 Jennifer, did you have any conversations with
5 the Director about the Fifth Methodology Order or the
6 April 2023 As-Applied Order?
7 A. I'm unable to answer that based on
8 instructions of counsel.
9 Q. Okay. And did you participate in any meetings
10 involving Mat Weaver, or meetings with Mat Weaver or the
11 Director involving the Fifth Methodology Order or the
12 April 2023 As-Applied Order?
13 A. I'm unable to answer that on the instruction
14 of counsel.
15 Q. Okay. Thank you. Jennifer, I'm going to
16 switch gears to the Fourth Methodology Order. Did you
17 contribute in any way to the development of the Fourth
18 Methodology Order?
19 A. Not that I recall, no.
20 Q. Okay. You mentioned earlier that when Matt
21 Anders advised you that Department staff were going to
22 begin reviewing the Fourth Methodology Order, that you
23 were given a list of issues that staff were considering.
24 Do you recall that discussion?
25 A. Yeah, I believe I said that I was aware there

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1 was a list of issues. And that I was told that the
2 steady state versus the transient modeling issue was one
3 of the issues that had been identified. And that that
4 issue was assigned to me.
5 Q. Got you. Do you recall seeing a document, an
6 internal document of the Department that identified the
7 issues that would be considered?
8 A. No, I don't recall seeing a list.
9 Q. And I believe you said that Matt Anders is the
10 person that communicated to you that you would be
11 assigned the transient state versus steady state issue?
12 A. Yes.
13 Q. Do you recall what month that was communicated
14 to you?
15 A. No.
16 Q. Earlier, and you can review this, Deposition
17 Exhibit 4, which is what I call the preliminary
18 recommendations of Department staff. That first
19 sentence, which you noted refers to a status conference
20 on August 5th of 2022. Do you recall whether Matt
21 Anders asked you or assigned you to review the steady
22 state versus transient state issue before or after
23 August 5th?
24 A. I'm pretty sure it was after August 5th.
25 Q. Okay. And when did you begin your analysis in

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1 that regard?
2 A. I don't recall exactly when I began it.
3 Q. Just the best of your recollection?
4 A. Sometime in the fall of 2022.
5 Q. Okay. Sometime between August 5th and your
6 presentation of the technical working group on November
7 28th, I guess?
8 A. Yeah, and I -- yeah. I don't think it
9 was -- I don't think I began it in August. I think it
10 was sometime in the fall.
11 Q. Did you do any modeling work related to the
12 Fifth Methodology Order or the April 2023 As-Applied
13 Order, after December 23rd, 2022?
14 A. Can you repeat the question?
15 Q. Yes. After what I call the preliminary
16 recommendations of staff, after that was issued on
17 December 23rd of last year, did you do any modeling work
18 after that date related to the Fifth Methodology Order
19 or the April 2023 As-Applied Order?
20 A. Well, there is two separate documents there.
21 Related to the Fifth Methodology Order order, no, I did
22 not do any more technical analysis for the Fifth
23 Methodology Order. For the April 2023 applied order, I
24 obviously did technical analyses, because we did not
25 know the shortfall volume until, you know, the first

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1 week of April. So, obviously, I'm doing that technical
2 analysis during that time frame.
3 Q. Okay. Thanks. Did you do anything related to
4 the April 2023 order, other than identify the
5 curtailment date needed to produce the demand shortfall
6 volume?
7 A. Yeah, just work I needed to do that,
8 including, you know, updating some of the input data,
9 the POD file, and the municipal diversions that are used
10 in the analysis.
11 Q. Did you review the comments that Sophia
12 Sigstedt and Greg Sullivan submitted to Matt Anders on
13 January 16th of 2023 in response to the staff
14 recommendation issued December 23rd of 2022?
15 A. The portion that related to the transient
16 modeling, yes.
17 Q. And in response to those comments, did you
18 have further discussions with Matt Anders concerning
19 those comments?
20 A. To my recollection, there were not any
21 comments on the technical method. I don't recall Greg
22 Sullivan commenting on that issue. I recall Sophia
23 reiterated some of the technical information I
24 presented, and then commented that it would be a big
25 change for the ground water users, which is also, you

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1 know, consistent with the information that was presented
2 to the technical working group. But there were not any
3 comments on the technical methods I was using to do the
4 transient calculation.
5 Q. Do you know if any Department staff members
6 prepared any type of documents for use by the Director
7 based on the feedback that Sophia Sigstedt and Greg
8 Sullivan provided in their January 16th comments?
9 MR. BAXTER: TJ, could you restate your
10 question?
11 Q. (BY MR. BUDGE) Yeah, let me ask it this way.
12 How were the comments that Sophia and Greg considered on
13 January 16th, how are those considered in the
14 Department?
15 MR. BAXTER: Jennifer, to extent that the
16 answer to the question would require you to disclose
17 information regarding the Director's deliberative
18 process and how he how he evaluated the information that
19 was provided, you are instructed not to answer the
20 question. The Director's conclusions are listed in the
21 methodology order, and they speak for themselves.
22 THE WITNESS: Okay.
23 MR. BAXTER: To the extent that there are
24 communications that are not related to the deliberative
25 process that have been made public, you are free to

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1 answer the question.
2 THE WITNESS: Yeah, I mean, I can only speak
3 for myself. And as I already stated, I reviewed the
4 comments that were submitted, and did not see any
5 comments about the technical method that I outlined for
6 doing the transient analysis. So for my piece of it, I
7 did not see any technical recommendations that needed to
8 be addressed, and I did not work on any of the other
9 issues that were addressed in Exhibit 4, so I can't
10 speak to those.
11 Q. (BY MR. BUDGE) Were you involved in any
12 meetings with the other Department staff members, where
13 the comments of Sophia or Greg Sullivan were reviewed?
14 A. I think I'm unable to answer that based on the
15 instruction of counsel.
16 Q. Okay. Were you involved in any way in
17 reviewing the forecast supply component of the Fourth
18 Methodology Order?
19 A. No.
20 Q. I want to follow up on a dialog you had with
21 Ms. McHugh relating to the effect of a curtailment in
22 future years under the Fifth Methodology Order. My
23 understanding is that this Fifth Methodology Order's use
24 of a transient state model will show how much of the
25 curtailed water will accrue to the target reach near

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1 Blackfoot to Minidoka or Neeley in each successive water
2 year; is that correct?
3 A. The model output outputs -- yeah, I mean, it
4 outputs time series data for as long a period as you
5 program it to do.
6 Q. Maybe to help me ask this question. If you'll
7 turn to Deposition Exhibit 6. That's your presentation
8 to the technical group in November.
9 A. Sorry. Which page?
10 MR. BAXTER: I think he said page 6.
11 Q. (BY MR. BUDGE) It's Deposition Exhibit 6, but
12 it's got a bar page that looks like this, if you can see
13 that. Did you prepare that bar chart, Jennifer?
14 A. Yes, I did.
15 Q. And can you explain what that shows?
16 A. It shows the predicted response to a May 1
17 curtailment of water rights junior to October 11th, 1900
18 at or near Blackfoot to Minidoka reach. And I've
19 summarized it by different time periods. So the first
20 bar shows the volume that would accrue between May and
21 September of the same water year is the curtailment.
22 And then the second bar shows the volume that would
23 accrue during the next water year. The third bar is the
24 third water year. And then the water year after that,
25 and so on and so forth. And a water year is October

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1 through September.
2 Q. Okay. I understood from your conversation
3 with Ms. McHugh that a portion of the accruals in future
4 water years may be realized in the measurements that go
5 into predicting the forecast supply, such as Box Canyon,
6 and others you've mentioned; is that right?
7 A. Yes.
8 Q. Based on your understanding of the forecast
9 supply, does it account for accruals that would happen,
10 you know, after April 1?
11 A. No, I don't think it would.
12 Q. Okay. Did you have any involvement in
13 reviewing the acreage component of the Fourth
14 Methodology Order?
15 A. No.
16 Q. Did you have any involvement in reviewing the
17 baseline year component of the Fourth Methodology Order?
18 A. No.
19 Q. Did you have any involvement in reviewing the
20 crop water need component of the Fourth Methodology
21 Order?
22 A. No.
23 Q. And did you have any involvement involving the
24 project efficiency component of the Fourth Methodology
25 Order?

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1 A. No.
2 MR. BUDGE: Okay. Can we go off the record
3 for a moment?
4 MR. BAXTER: Colleen, is nodding her head yes.
5 (Lunch recess.)
6 MR. BUDGE: Back on the record.
7 Q. (BY MR. BUDGE) Jennifer, welcome back. I
8 want to just continue with the deposition. And ask you
9 to explain to me how the ESPA model works once you are
10 given a demand shortfall number. For example, this
11 spring you were given a demand shortfall model of 75,200
12 acre-feet. Can you explain how the model then predicts
13 how much curtailment is needed to offset that dimension
14 or fall?
15 A. I can explain the process which involves both
16 the ESPAM model and some pre-processing software that we
17 use. We're using the methods that were documented in
18 the curtailment scenarios that have been published with
19 every version of the model. And for this delivery call
20 we clip everything to the area of common ground water.
21 We have a point of diversion file that has points of
22 diversions for all of the water rights with their
23 priority dates, and the locations of the PODs, and the
24 authorized irrigation rate that's associated with each
25 water right, divided by the number of PODs. That's one

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1 of our inputs. Another input is the most recent
2 delineation of irrigated lands.
3 Those files are input into the curtailment IAR
4 tool, which is published as part of the ESPAM2 recharge
5 tools that are available online. And that does a
6 computation that determines the number of junior
7 irrigated acres in each model cell junior to a
8 curtailment date that you input into the tool.
9 And then that writes out a file with junior
10 acres by model cell. That file is then put into the
11 preprocessing program called Make MOD, which then takes
12 that input file and input files with ET and
13 precipitation, and calculates consumptive use by model
14 cell associated with those junior ground water rights.
15 And then that writes an input file that goes into the
16 module ESPAM model. So Make MOD writes what we call the
17 well file or the stress file that goes into the ESPAM
18 model. And then we run that input model through the
19 MODFLOW model, and that gives us an output of response
20 at the near Blackfoot to Minidoka reach over time.
21 And so I've run, from what I presented to the
22 technical working group, that chart we talked about,
23 you'll see that I've run various number of dates over
24 time, priority dates over time. So I have that as a
25 starting point. And I can say, okay. We need to look

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1 in between these dates. And it's just an iterative
2 process where I start with a best guess for a date in
3 between. And then if that results in more water than
4 the demand shortfall in the time frame we're looking at,
5 I, you know, change the priority date accordingly to a
6 later date. If it doesn't result in enough, then I
7 change it to an earlier date.
8 And then there is also a process for the
9 municipal water rights that was outlined in a staff memo
10 for related to the Rangen delivery call. And we used
11 that process to calculate the estimated benefit of
12 curtailing municipal water rights, along with updated
13 five-year average diversion data, annual volume
14 diversion data from what's submitted into IDWR's water
15 measurement information system.
16 Q. You did a nice job of explaining that in a way
17 that even I could kind of follow. So how many different
18 data sets go into then generating the curtailment
19 scenario? Can you just summarize those again? We had
20 the irrigated lands and some --
21 A. The irrigated lands, the point of diversion
22 file, a ten-year average evapotranspiration on ground
23 water irrigated lands, ten-year average precipitation on
24 irrigated lands. And for the municipal, it's a
25 five-year average of their diversion data.

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1 Q. Are these data sets being updated annually
2 just as a matter of course?
3 A. The POD file and the municipal diversions are
4 updated annually. The other data sets are not updated
5 on an annual basis.
6 Q. Is it on an as-needed basis or just less
7 frequent intervals?
8 A. Less frequent intervals.
9 Q. Can you just tell me the intervals that are
10 used for the other data sets?
11 A. On the irrigated lands, we're using whatever
12 the most recent data set we have is. And that
13 just -- you know, that interval just varies on when
14 those data sets are completed. At this point the most
15 recent data set we have is 2017 that's been completed.
16 The ten-year average evapotranspiration and
17 precipitation have just only been updated. It's the
18 last ten years of the model calibration period. So for
19 ESPAM2.2, it's currently a ten-year average of water
20 year, 2009 to 2018. It was an earlier interval for
21 ESPAM2.1. And it was something different than that for
22 ESPAM1.1. I don't recall what it was.
23 Q. Is the irrigated lands data set, is that a GIS
24 shapefile?
25 A. The version I use is a raster that was made

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1 from a GIS shapefile.
2 Q. And how was that created?
3 A. It's created -- that was created by our GIS
4 staff that digitized field boundaries, and manually
5 reviewed satellite imagery, and aerial photography, and
6 possibly some other data sources to then delineate the
7 status of each within each field boundary of whether it
8 was irrigated or non-irrigated or semi-irrigated.
9 Q. And they do this within the entire ESPA?
10 A. Yes, they do it for an area slightly larger
11 than the ESPA.
12 Q. Do they do this for surface water irrigated
13 lands as well?
14 A. They do not distinguish between surface water
15 and ground water irrigated lands. It's just whether or
16 not they are irrigated. So it includes both surface
17 water and ground water irrigated lands.
18 Q. And then how do you separate those apart for
19 modeling purposes, or does someone else do that?
20 A. In the model input files, we have what we call
21 an average ground water fraction raster, and that has a
22 delineation of whether or not an area is irrigated by
23 only surface water, only ground water, or if it's mix
24 source, an estimate of on a ten-year average, how much
25 of the supply comes from surface water for lands in that

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1 area.
2 Q. How is that determined?
3 A. Well, I guess can you be more specific? How
4 is what, which part --
5 Q. How does the Department determine whether
6 lands are surface, ground, or, you know, mixed use with
7 the fraction that you mentioned?
8 A. Okay. So whether they are surface water, or
9 ground water, or mixed use was determined by IWRRI
10 during the development of ESPAM1.1 using water right
11 data, so water right place of use data.
12 Q. Okay. Can you explain further what they did
13 with that water right data to determine the mixed use?
14 A. To determine where there was mixed use or the
15 fraction on the mixed use?
16 Q. Yeah, the fraction. I'm sorry.
17 A. Okay. So the fraction on the mixed use,
18 that's something we have updated when we've rolled out
19 new model versions, so I can speak to that. We
20 estimated that -- well, let me back up.
21 IWRRI, there is some areas where IWRRI did an
22 estimate for model calibration. And then there were
23 other areas where they increased the fraction to avoid
24 computation of deficit irrigation during calibration.
25 So those ground water fractions are used for calibration

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1 were higher than the average. So for those areas in the
2 average ground water fraction file, those areas have
3 been adjusted from IWRRI's fraction based on surface
4 water availability.
5 So for those areas, I took the available
6 surface water supply, assumed a duty of four acre-feet
7 per acre, figured out how many acres that would be able
8 to irrigate on average during that ten-year period. And
9 then the remaining acres were assumed to be covered by
10 ground water. And that's how we estimated that fraction
11 for those areas.
12 Q. When was the original IWRRI database
13 generated?
14 A. I don't know before I started here.
15 Q. Okay. Do the irrigated acres then get linked
16 to the water rights for the point of diversions?
17 A. No, because the water rights are aggregated by
18 model cell before the priority date is linked to a
19 number of acres.
20 Q. So the model at some point in this process,
21 for each model cell it's calculating how many irrigated
22 acres exist with ground water by priority date?
23 A. The curtailment IAR tool is doing that, yes.
24 Q. Okay. We're getting above my pay grade at
25 this point. But I may come up with some follow-up

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1 questions after I visit with Sophia. Let me shift gears
2 a little bit.
3 If I go back to your technical working group
4 presentation, that's Deposition Exhibit 6. And if you
5 look at page 5 the heading on that page is "Steady State
6 Versus Transient State Model Simulations." Do you see
7 that?
8 A. Yes.
9 Q. At the bottom part of that slide, explains
10 that steady state model simulations predict long-term
11 responses to continuous curtailment of ground water use
12 at a constant rate. And then it says, there is a bullet
13 that says, "Curtailments ordered as prescribed in the
14 methodology order are not continuous or long term." And
15 "Ground water use does not occur at a constant rate
16 throughout the year."
17 And then if you flip two pages back, there is
18 another slide labeled "Steady State Versus Transient
19 Model Simulations." And the second main heading says,
20 "Transient ESPAM simulation for calculation of
21 curtailment priority date." And then there is two
22 subheadings that say, "The transient state predicts
23 timing and magnitude of response to time-varying changes
24 in aquifer stress resulting from short-term curtailment
25 of ground water use."

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1 I understood from this presentation that the
2 point you were making was that steady at transient state
3 use of the model is more technically accurate for the
4 type of curtailments that result under the Surface Water
5 Coalition delivery call; is that right?
6 A. Yes.
7 Q. And when you were in discussions with Matt
8 Anders about the staff's preliminary recommendations,
9 which is Deposition Exhibit 4, did you discuss including
10 the change from steady state to transient state in that
11 recommendation?
12 A. Yes.
13 Q. And do you have any knowledge as to why it was
14 not included?
15 A. Yes, I answered that question for Candice, but
16 I can answer it again. So again, you know, the
17 technical analysis is, you know, needs to be related
18 back to what question you want the model to answer. So
19 if the question you want to ask the model is, you know,
20 how much curtailment is needed to get this demand
21 shortfall volume to the near Blackfoot to Minidoka reach
22 during the time of need this irrigation season? Then
23 it's clear that you need to run a transient analysis.
24 However, what the purpose of the curtailment is, and
25 what that question that you want to ask the model is, is

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1 ultimately a legal or policy decision that the Director
2 needs to make. And, you know, staff, we did not think
3 it was appropriate for us to tell him what the purpose
4 of the curtailment is. We provided the information for
5 him to make a decision on what was appropriate after he
6 has made a decision on what the purpose of the
7 curtailment is.
8 Q. Were you instructed not to include that in the
9 recommendation that was made on December 23rd, 2022?
10 A. Well, I didn't -- I was not an author on that
11 memo. So I wasn't instructed on what to include in it.
12 Q. Okay. Was there any discussion about
13 including at least the technical aspect of transient
14 state versus steady state, and then flagging the, you
15 know, legal policy question, you know, for the Director
16 to decide?
17 A. Not that I recall specifically. I mean, we
18 had already presented all this information to both the
19 technical working group and the Director, so...
20 Q. Okay. Let me ask a few follow-up questions.
21 And I know Candice asked you a few questions just about
22 historical use of the model in transient state. You
23 mentioned that the model with utilizing a transient
24 state is part of the Rangen delivery call; is that
25 right?

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1 A. Yes.
2 Q. Have you or other Department modelers done
3 transient state model runs of the ESPA model for other
4 purposes?
5 A. For other purposes, yes.
6 Q. Please explain.
7 A. Other purposes that transient simulations have
8 been done for, include evaluating the impacts of managed
9 recharge, and evaluating the properties of managed for
10 recharge sites, or potential sites. Modeling the impact
11 of pumping reductions that were reported by IGWA in its
12 performance reports. That wasn't an analysis I did, but
13 other staff did that analysis for presentation to the
14 Water Resource Board. There may be others. I'm not
15 sure that's an inclusive list, but that's a couple of
16 examples I can think of.
17 Q. Okay. And you started to work at the
18 Department in 2010, I believe; is that right?
19 A. Yes.
20 Q. When did you begin working with the ESPA model
21 within the Department?
22 A. I don't recall exactly, but pretty shortly
23 thereafter.
24 Q. Okay. I think my other question Candice
25 covered. Okay. Let me turn your attention to

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1 Deposition Exhibit 2, which is the Fifth Methodology
2 Order. And I'll have you turn to page 31. Actually,
3 you can turn back one page to 29. There is a heading
4 there that is labeled as "Determination of Curtailment
5 Date." And if my recollection is correct, you
6 participated in drafting this section of the methodology
7 order; is that right?
8 A. Yes.
9 Q. Okay. Let's flip back to page 31. And I'll
10 draw your attention to paragraphs 88 and 89 at the top
11 of that page. I'll just read for the record what it
12 says in paragraph 88. "Steady state simulations are
13 appropriate for evaluating the average annual impact of
14 aquifer stresses that have been, or will be, applied for
15 decades (i.e., ground water pumping year after year) or
16 continuous curtailment to the same date every year. The
17 steady state simulation of continuous curtailment
18 applied in the Fourth Methodology Order does not
19 simulate the short-term curtailments prescribed in the
20 in methodology. The methodology prescribes curtailment
21 only in years with predicted IDS or carryover shortfall
22 and prescribes the determination of a curtailment
23 priority date that varies the magnitude of the predicted
24 shortfall."
25 The technical analysis supporting that

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1 paragraph 88, that would have been true when the Fourth
2 Methodology Order was adopted in 2016; correct?
3 A. Correct.
4 Q. And Department modeling staff would have to
5 understand it, the technical support for that finding
6 when the Fourth Methodology Order was adopted in 2016?
7 MR. BAXTER: Objection. It calls for
8 speculation on behalf of the witness.
9 But, Jennifer, go ahead and answer the
10 question.
11 THE WITNESS: Yeah, again, I can only speak
12 for myself. But, yes, I understood that at the time.
13 Q. (BY MR. BUDGE) Okay. And then if we turn to
14 paragraph 89, it reads "Transient simulations are
15 necessary to evaluate the impacts of aquifer stresses
16 applied for short periods of time (i.e., short-term
17 curtailments with varying priority dates). Transient
18 simulations are necessary to simulate the short-term
19 curtailments prescribed in the methodology."
20 The technical rationale for paragraph 89 would
21 have been true when the Fourth Methodology Order was
22 adopted in 2016; correct?
23 A. Correct.
24 Q. Okay. Let me have you turn to page 35 in that
25 same order. Paragraph 19 on page 35, talks about

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1 application of the model in transient state versus
2 steady state. And halfway through there is a sentence
3 that says, while the first version of the ESPA ground
4 water flow model was not calibrated at a time-scale that
5 supported in-season transient modeling, the current
6 version was calibrated using monthly stress periods and
7 half-month time steps, a refinement that facilitates
8 in-season transient modeling for calculating the
9 response to curtailment of ground water use.
10 I think Candice asked you this question. I
11 just want to make sure I didn't misunderstand it. Was
12 it in 2013, that the ESPA model was calibrated using
13 monthly stress periods?
14 A. Yes, I believe that was the year that ESPAM2.1
15 was released.
16 Q. Okay. And then Version 2.1 also was
17 calibrated with half-month time steps?
18 A. Yes.
19 Q. Beginning in 2013 then?
20 MR. BAXTER: Was that a question, TJ, or --
21 Q. (BY MR. BUDGE) Yeah. Just to confirm, that
22 began in 2013?
23 A. I believe that's correct, yes.
24 Q. The next question. I have sometimes heard
25 references to the model being run to predict reach gains

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1 from near Blackfoot to Minidoka, and sometimes being run
2 to predict reach gains from near Blackfoot to Neeley.
3 Under the Fifth Methodology Order, which of those
4 reaches are you utilizing as the target reach?
5 A. Near Blackfoot to Minidoka.
6 Q. Is that the reach that's been used in all
7 prior versions of the methodology order?
8 A. To my knowledge that has been the reach,
9 but --
10 Q. Does that -- sorry. I didn't mean to cut you
11 off. Go ahead.
12 A. To my knowledge that's been the reach. But I
13 can't speak to what was used before I started working,
14 doing analyses for this delivery call.
15 Q. Does the model predict that curtailment, you
16 know, throughout the ESPA as has been ordered here, that
17 it will generate reach gains between below Minidoka and
18 above Neeley -- excuse me -- between Minidoka and
19 Milner?
20 A. Yes, there will also be additional reach gains
21 to other reaches of the river as a result of a
22 curtailment.
23 Q. And why aren't reach gains between Minidoka
24 and Milner considered in the Surface Water Coalition
25 delivery call in the Fifth Methodology Order?

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1 A. Oh, I'm sorry. There will be reach gains to
2 other reaches of the river, but not from Minidoka to
3 Milner.
4 Q. Okay. There is no reach gains between
5 Minidoka and Milner?
6 A. No, the aquifer is not in direct hydraulic
7 connection with the Snake River in that reach. And
8 there is no interaction in the model between the aquifer
9 and the river between Minidoka and Milner.
10 Q. Okay. Thank you. I have heard it said before
11 that the reach gain predictions for the near Blackfoot
12 to Minidoka reach have a relatively high degree of
13 uncertainty compared to other model predictions for
14 other reaches; is that correct?
15 A. I don't think that's correct.
16 Q. Okay. Have you or anybody else in the
17 Department done an analysis of model uncertainty with
18 respect to each designated reach that the model
19 utilizes?
20 A. Yes, that's in the predictive uncertainty
21 report that was published with ESPAM2.2 and was included
22 in the materials that we submitted.
23 Q. Okay. Let me draw your attention back to the
24 presentation you gave in November to the technical
25 group. That's deposition Exhibit 6. And I'm going to

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1 have you flip to page, Slide 14. That slide, the
2 heading is "Predicted response to May 1 curtailment of
3 water rights junior to October 11, 1900." Do you see
4 that?
5 A. I don't think I'm on the correct page. Okay.
6 Q. I don't know if you can see this, but this
7 (indicating) is the one I'm looking at.
8 A. Yes, I'm there now.
9 Q. What's the significance of the October 11th,
10 1900 date?
11 A. Matt Anders told me that would be the
12 controlling priority date. So basically, we would not
13 curtail anybody senior to October 11, 1900, because the
14 water right that -- the natural flow rights that are
15 associated with the shortfall are dated October 11th,
16 1900.
17 Q. Okay. So also on that slide in the middle of
18 the graph, there is a little window that says, April to
19 September volume, 97,700 acre-feet. Am I understanding
20 correctly that if there was actual curtailment of all
21 rights junior to all rights junior to October 11th,
22 1900. The model predicts that 97,700 acre-feet will
23 accrue to the near Blackfoot to Minidoka reach in April
24 to September of the first year of curtailment?
25 A. Yes.

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1 Q. So does that mean then in the absence the
2 mitigation plans in a year where Twin Falls Canal
3 Company had a demand shortfall, or any member of
4 the -- I guess Twin Falls, of 97,700 acre-feet or
5 greater, you would curtail every water junior to that
6 1900 date?
7 A. Well, as Candice brought up, if there were
8 multiple years in a row of curtailment, then this volume
9 could increase. So if there was a curtailment -- if
10 there was a shortfall 20 years in a row, and there was
11 curtailment 20 years in a row, then this volume would
12 get larger, and the curtailment date would be adjusted
13 accordingly, so not necessarily.
14 Q. But in any given year where the April
15 as-applied order predicts a demand shortfall greater
16 than 97,700 acre-feet, that would result in curtailment
17 of every ground water right junior to 1900?
18 A. If there have not been previous curtailments,
19 previous actual curtailments, then I think the answer
20 would be, yes.
21 Q. Wouldn't previous curtailments just affect the
22 demand shortfall figure?
23 A. Well, yeah, that's a good point. The demand
24 shortfall should go down. But there would also be some
25 water accruing over time as well. So you would have

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1 both effects.
2 Q. Let me have you turn to the prior slide, which
3 is labeled "Comparison of priority dates calculated for
4 April DS forecasts (May 1 curtailment)."
5 Actually, Jennifer, I'm going to skip that
6 right now. Instead, I'm going to ask Dylan to provide a
7 table titled, "Summary of Hindcast SWC Delivery Call
8 Demand Shortfall Calculations 2022."
9 MR. BUDGE: Dylan, do you have that?
10 MR. ANDERSON: Yes.
11 MR. BUDGE: I believe we're on Deposition
12 Exhibit 7; is that right?
13 THE REPORTER: Yes.
14 (Exhibit 7 marked.)
15 Q. (BY MR. BUDGE) This table has become
16 Deposition Exhibit No. 7. Do you recognize this table,
17 Jennifer?
18 A. I think I've seen a version of it. I'm not
19 sure if it was this version.
20 Q. Okay. Did you contribute to the creation of
21 this table?
22 A. No.
23 Q. Okay. I'm going to move on then. I've got a
24 couple technical questions that I hope I can ask
25 clearly. In the documents that are uploaded to the

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1 Department's website, there is a data folder that
2 contains a file labeled JR12301953/ag/super transient.
3 Are you familiar with that data file?
4 A. Yes.
5 Q. My understanding is that data file has monthly
6 stress periods. And then there is another file on the
7 same place labeled crop share/IGWA/ag_IGWA/super
8 transient ANNAV. Are you familiar with that data file?
9 A. Yes.
10 Q. My understanding is that latter data file has
11 a single stress period with an average value. Can you
12 explain why the first data file I mentioned has monthly
13 stress periods, whereas, the second data file has a
14 single stress period with an average annual value?
15 A. Yes. So it's going back to the question we're
16 asking the model. So the question I'm asking the model
17 in calculation of the priority date is, what priority
18 date would we need to curtail to predict that we would
19 get 75,200 acre-feet to the near Blackfoot to Minidoka
20 reach between May 1 and September 30th of this year,
21 assuming that the curtailment starts on May 1st? That's
22 the question I'm asking it. So I'm doing the transient
23 analysis.
24 For the calculation of proportionate share,
25 we're asking a different question. Because we're asking

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1 what a different -- we have a couple different
2 mitigation parties that we needed to calculate their
3 proportionate share of the shortfall. So the shortfall
4 is the result of decades of ground water pumping.
5 So the shortfall is caused by decades of
6 ground water pumping. So when we look at their
7 proportionate share of the shortfall, it is more -- it
8 is actually appropriate in that case to look at the
9 steady state analysis. And as I mentioned in the
10 presentation, and as mentioned in the order, a steady
11 state analysis is appropriate when you are looking at
12 the average annual impact. You are looking to find the
13 average annual impact of something that's been going on
14 for decades like the ground water pumping has.
15 Q. I appreciate that explanation. That's really
16 helpful. I want to follow up on that and just ask a few
17 questions about the proportionate share calculation.
18 And there is a document that I'll ask Dylan Anderson to
19 give to you. It's an email between myself and Garrick
20 Baxter. The parties to the case are copied on the
21 email. But it contains a table showing each of the
22 ground water districts proportionate share of the demand
23 shortfall.
24 MR. BUDGE: Dylan, can you find that?
25 MR. BAXTER: He's looking for it.

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1 MR. ANDERSON: To who, TJ?
2 MR. BAXTER: I think it's to me.
3 MR. BUDGE: It's a one-page document. It's an
4 email between Garrick and I. The other parties to the
5 case are copied in the email. And it has got a table in
6 the email that shows the proportionate share for each
7 district.
8 MR. SIMPSON: Do you have a date, TJ?
9 MR. BUDGE: It's Wednesday, May 3rd, 2023.
10 (Exhibit 8 marked.)
11 Q. (BY MR. BUDGE) Jennifer, in that table there
12 is a table, and it shows each ground water districts
13 proportionate share of the projected demand shortfall
14 for 2023 and from the April as-applied order. Do you
15 see that?
16 A. I see the table.
17 Q. Did you generate that table or the data that's
18 in the table?
19 A. Yes, I did.
20 Q. A moment ago you were explaining the file one
21 of the data files that the Department has uploaded that
22 used an annual stress period instead of a monthly time
23 step. Maybe I'll just have you explain again how you
24 calculated each districts proportionate share of the
25 demand shortfall?

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1 A. It was calculated using -- it was calculated
2 by -- well, first of all, it was calculated from a
3 preliminary list of water rights flagged as being
4 mitigated by IGWA, and then with preliminary information
5 on which ground water district they are a member of.
6 And this was not part of the order.
7 This information, my understanding, it was
8 provided as a courtesy to IGWA at your request. But
9 it's calculated the same way as I just described IGWA's
10 proportionate share being calculated. Except that for
11 each district, it's done by looking at the water rights
12 that are flagged as being participating in their
13 district, as opposed to the water rights that are
14 flagged as being mitigated by IGWA as a whole.
15 Q. Okay. And the method that you used to
16 generate the data in this table, is that the same method
17 that you used to calculate the proportionate share of
18 A & B Irrigation District as shown in Footnote 5 of the
19 April as-applied order?
20 A. The MODFLOW modeling portion of it is the
21 same.
22 Q. Which portion is different?
23 A. The pre-processing is different. So in this
24 case, I used the curtailment IAR tool we had talked
25 about earlier, to calculate junior irrigated acres by

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1 model cell. Whereas, for A & B, we don't need to do
2 that, because their water rights are very
3 straightforward. And we know exactly how -- and they
4 have filed a mitigation plan that identified their water
5 rights, and how many acres are associated with each
6 water right. So in their case, we don't have to use the
7 curtailment IAR tool. We just take the number of acres
8 associated with their junior water rights directly, and
9 multiply that by the consumptive use, and then run that
10 through the MODFLOW model. So the MODFLOW modeling part
11 is the same. It's just the pre-processor that's
12 different.
13 Q. I understand. Thank you. So in Footnote 5 of
14 the April 2023 As-Applied Order, it states that A & B
15 Irrigation District's proportionate share of the
16 predicted demand shortfall of 75,200 acre-feet is 458
17 acre-feet. If A & B's water right was curtailed this
18 year, does the model predict that an additional 458
19 acre-feet would accrue to the near Blackfoot to Minidoka
20 reach from May through September?
21 A. No, it does not.
22 Q. Do you know the volume that the model predicts
23 would accrue to that reach for that target period?
24 A. It would be considerably less than that.
25 Q. And can you explain the difference, why that

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1 would be less?
2 A. Because as I said, with calculating the
3 proportionate share of the shortfall, the question I'm
4 asking the model is, you know, what has been this user's
5 contribution to the shortfall resulting from decades of
6 their ground water pumping? So I'm using a steady state
7 analysis. And that's --
8 Q. Okay.
9 A. Yeah.
10 Q. And so if we turn back to the table that's in
11 Deposition Exhibit 8. Is the same true for the
12 districts that are listed there, if they were actually
13 curtailed this year back to December 30th, 1953 -- well,
14 let's look at one district, in particular.
15 We'll look at North Snake. That table assigns
16 to the North Snake a 3,262 acre-foot share of the demand
17 shortfall. If curtailment occurred within North Snake
18 this year junior to December 30th, 1953, does the model
19 predict that 3,262 acre-feet would accrue to the near
20 Blackfoot to Minidoka reach?
21 A. In the case of North Snake, no, it would be
22 less than that.
23 Q. Do you know what the model does predict for
24 North Snake?
25 A. No, I don't think I ran that as a transient

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1 analysis.
2 Q. Okay. Are there other ways that the demand
3 shortfall could be apportioned out among the various
4 ground water user groups?
5 A. I'm sure there are other ways.
6 Q. I mean, is there a way to calculate it so that
7 for each district curtailment would -- let me rephrase
8 that question.
9 For each ground water district, are you able
10 to run the model in a way that would predict how much
11 water would accrue from near Blackfoot to Minidoka under
12 the 1953 curtailment date for the May to September time
13 period?
14 A. Yes, those model runs could be done.
15 Q. Okay. Were you instructed not to use that
16 approach?
17 A. No, I was not instructed.
18 Q. The method that you utilized was that solely
19 of your own making?
20 A. Yes.
21 Q. That was not based on discussions with other
22 Department staff members?
23 A. I believe I presented it and did not receive
24 any comments.
25 Q. Did you or anyone else at the Department

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1 calculate the total number of water rights junior to
2 December 30th, 1953, that would be curtailed in the
3 absence of mitigation plans?
4 A. I did not go into the POD file and count up
5 the water rights that were junior, no.
6 Q. Do you know the total diversion rate under
7 water rights junior to December 30th, 1953 that would be
8 curtailed in the absence of mitigation plans?
9 A. There is a total consumptive use rate
10 estimated in the files that were provided. But that is
11 not the same as the diversion rate on the face of the
12 water right. It would be less than that.
13 Q. I see. Do you know what that number is
14 offhand?
15 A. No.
16 Q. Have you or anyone else at the Department
17 calculated the total volume, authorized diversion volume
18 of water rights junior to December 30th, 1953, that
19 would be curtailed in the absence of mitigation plans?
20 A. Similarly that same spreadsheet has a
21 consumptive use volume, which is not the same as the
22 volume that would be listed on the water right, if there
23 is a volume listed.
24 Q. Did you or anyone else at the Department
25 attempt to quantify the projected or estimated crop

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1 loss, or any other adverse effect to Twin Falls Canal
2 Company as a result of the forecast demand shortfall of
3 75,200 acre-feet?
4 A. I am not aware of -- I did not do that, and I
5 am not aware of it.
6 Q. Okay. And I believe Ms. McHugh asked you
7 whether you gave any consideration to the development or
8 implementation of a trim line in connection with your
9 analyses related to the Fifth Methodology Order. And if
10 I remember right, your answer was that you had not done
11 anything in that regard?
12 A. No.
13 Q. Did you have discussions with any Department
14 staff members about potential use of the trim line?
15 MR. BAXTER: Jennifer, pause there for a
16 second, if you would. To the extent your answer to this
17 question would require you to disclose information
18 regarding the Director's deliberative process on legal
19 and policy considerations, you are instructed not to
20 answer the question.
21 THE WITNESS: Okay. So I've been instructed
22 not to answer questions about what discussions we may or
23 may not have had.
24 Q. (BY MR. BUDGE) Have you personally thought
25 about possibilities for use of a trim line under the

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1 Fifth Methodology Order or the April 2023 As-Applied
2 Order?
3 A. No.
4 Q. Given your familiarity with the model and the
5 aquifer, are there any geologic features within the
6 aquifer that you think may justify a trim line based on
7 geology, similar to the Great Rift trim line that was
8 imposed in the Rangen delivery call?
9 A. No, not in the case of the near Blackfoot to
10 Minidoka reach.
11 Q. No, meaning you have not identified any
12 features that you think may serve as an appropriate
13 basis for a trim line?
14 A. I mean, no, I don't think there are features
15 that would be appropriate for a trim line for the near
16 Blackfoot to Minidoka reach. If you look at the steady
17 state response functions for that reach, they extend.
18 There are significant contributions in the long-term
19 from both sides of the Great Rift.
20 Q. Okay. Separate from development of the Fifth
21 Methodology Order, have you done any analysis of
22 potential trim lines in the context of application of a
23 transient state model to the Surface Water Coalition
24 delivery call?
25 A. No.

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1 Q. Have you been directed not to do those types
2 of analyses?
3 A. No, I haven't been directed not to do them.
4 Q. It's just that nobody has asked you to do
5 them, it sounds like?
6 A. I have not been asked to do them either.
7 Q. Okay. Are you aware of any aspect of the
8 Fourth Methodology Order that would have precluded the
9 Department from utilizing it in the 2023 irrigation
10 season?
11 A. That seems like more of a legal or policy
12 question to me.
13 Q. Are you aware of any technical shortcomings of
14 the Fourth Methodology Order that would have prevented
15 the Director from utilizing it in the 2023 irrigation
16 season?
17 A. I mean, I think the -- again, I think that's a
18 technical or policy question is for whether or not that
19 would prevent the Department from using it. The
20 technical information that was presented and was
21 incorporated into the Fifth Methodology Order, you know,
22 it was incorporated into the Fifth Methodology Order,
23 you know, because the Department thinks it's valid
24 technical information. So whether or not that
25 information precludes him from using the Fourth

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1 Methodology Order this irrigation season? I don't think
2 that's a technical question. I think that's a legal or
3 policy issue in my mind.
4 Q. Are you aware of any technical aspects of the
5 Fourth Methodology Order that are so problematic that
6 from a technical standpoint, they needed to be resolved
7 immediately?
8 MR. BAXTER: I'm going to object to the
9 question. TJ, I think that's essentially, you know, a
10 restatement of your earlier question. And I think
11 Jennifer has already answered it.
12 But to the extent, Jennifer, you believe it's
13 a different question, go ahead and answer the question.
14 THE WITNESS: No, I was going to say, again, I
15 think how problematic they are, is a technical or policy
16 question, not a technical question. I'm sorry. A legal
17 and policy question, not a technical question. I
18 believe I misspoke there.
19 Q. (BY MR. BUDGE) Prior to when Matt Anders
20 advised you that Department staff were undertaking a
21 review of the Fourth Methodology Order, had you
22 identified problems with the Fourth Methodology Order
23 that you felt needed to be reconciled by the Department?
24 A. No, I did not initiate any of the review of
25 the Fourth Methodology Order.

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1 Q. Are you aware of any emergency-type situations
2 or technical reasons that would require an immediate
3 change from the Fourth Methodology Order to the Fifth
4 Methodology Order?
5 A. Again, I think that's a legal or policy
6 question.
7 Q. Well, what I'm asking, are there technical
8 issues that created an emergency? Some new technical
9 data or analysis that you felt compelled an immediate
10 change to the methodology order?
11 A. I mean I am aware that in 2021 and 2022, I
12 believe the end of season calculated shortfall was
13 larger than at least some, or perhaps all of the
14 predicted shortfalls, which I do think may have led to,
15 you know, a technical basis for -- you know, for a
16 reason to review the methodology.
17 Q. And where did you gather that information?
18 A. That information was in the as-applied orders
19 issued in April, July, August, and over the winter for
20 the reasonable carryover and final in-season demand
21 shortfall for both 2021 and 2022. So those numbers are
22 in those eight orders. And the reason I'm familiar with
23 them is because I used them when I did the hindcasting
24 of the curtailment dates for those two years.
25 MR. BUDGE: Okay. I think that's all the

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1 questions I have for you right now, Jennifer. I think
2 you may be questioned from some of the other witnesses.
3 But I do just want to let you know that we are not able
4 to close your deposition today, because we have not
5 completed discovery in this matter. There is still
6 information that we are waiting on from the Department.
7 And we have not had adequate time to prepare for the
8 deposition given the volume of data that's involved in
9 the Fifth Methodology Order, and the April 2023
10 As-Applied Order.
11 So there is a possibility that we'll have to
12 call you back for further questioning. But that's all
13 the questions that I have for you at this time.
14 MR. BAXTER: We are going to need to take a
15 break. How about a ten-minute break?
16 MS. KLAHN: So ten minutes, is that what we're
17 doing?
18 MR. BAXTER: Yes.
19 (Recess.)
20 MR. BAXTER: I think we were going to let
21 Dylan go next.
22 EXAMINATION
23 QUESTIONS BY MR. ANDERSON:
24 Q. Thank you for being here. Dylan Anderson for
25 the record. I'm going to pick up a little where TJ left

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1 off. He was talking to you about the model. It was
2 getting a little bit technical. And there is a lot of
3 people who read these, and need a little bit of base.
4 So just really quickly, I am going to have a little bit
5 of base on the model.
6 So currently, the most correct version of the
7 model is Version 2.2; correct?
8 A. Correct.
9 Q. And 2.2 is fully employed and used by the
10 Department as of this date?
11 A. Yes.
12 Q. The previous version, 2.1, when was that
13 finalized and used?
14 A. I believe it was sometime in 2013.
15 Q. And then prior to that, the Version 1.1,
16 that's the genesis of this model; correct, the first
17 iteration?
18 A. That was the version that was being used when
19 I started work here.
20 Q. Okay. From your understanding of that Version
21 1.1, it was a single layer model; correct?
22 A. Correct.
23 Q. Is Version 2.2 that we currently employ, is it
24 also a single layer model?
25 A. Yes.

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1 Q. In Version 2.1, and maybe I'll admit that to
2 the record just so you have something to reference.
3 It's whatever the next exhibit is, Exhibit 9.
4 (Exhibit 9 marked.)
5 MR. ANDERSON: Do you need to look at it?
6 MR. BAXTER: Is it one of the documents that
7 Jennifer provided on the IDWR's website?
8 MR. ANDERSON: I am not sure.
9 THE WITNESS: No, it's not.
10 MR. ANDERSON: No, it's just a final report
11 version.
12 MR. SIMPSON: That's Version 2.1?
13 MR. ANDERSON: Yes, 2.1 finalized in 2013.
14 MR. FLETCHER: What is that document called?
15 MR. BAXTER: Do you want to read the name of
16 the document?
17 MR. SIMPSON: Exhibit 9, what is it called?
18 THE WITNESS: "Enhanced Snake "Plan Aquifer
19 Model, Version 2.1, Final Report, January 2013."
20 MR. FLETCHER: Thank you.
21 Q. (BY MR. ANDERSON) Okay. And would you mind
22 turning to page 4 of that document. There is a
23 paragraph there at the end. I can share, if you want to
24 look at it. Would you mind just reading into the record
25 that last paragraph?

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1 A. "It is anticipated that the next five to ten
2 years will see an evolutionary progression through
3 Version 2.2, and 2.3, et cetera, as moderate revisions
4 are made to the ESPAM. When a significant change to the
5 model conceptual design is implemented, it will be
6 released as ESPAM3.0. This will likely include
7 significant conceptual model changes or broadening of
8 scope and purpose (e.g., multiple aquifer layers,
9 changes in modeling software or algorithms, internal
10 incorporation of surface water processes in the
11 modeling, linkage to surface water models)."
12 Q. Okay. Thank you. And so in 2.1, it's been
13 roughly ten years. We haven't gotten to that point; is
14 that correct?
15 A. We --
16 Q. At least --
17 A. Yeah, what they are saying is they anticipated
18 what would happen here has ultimately not been what has
19 happened within the last ten years. Yeah.
20 Q. Thank you. And I'm not doing this as a rebuke
21 or anything. I'm not trying to call it out. I just
22 want to more understand the process. So I'm not trying
23 to accuse anybody of anything. Well, let me go back and
24 just talk about another aspect.
25 In 1.1, it was a confined aquifer model;

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1 correct?
2 A. It's a time constant transmissivity
3 representation of an unconfined aquifer.
4 Q. And that was the case in 2.1. Do you recall
5 if that was the case in the 1.1?
6 A. Yes, it was.
7 Q. That was the same?
8 A. Yes.
9 Q. So in 2.1, it does use as you say, the time
10 constant transmissivity of the aquifer. Can you explain
11 a little bit about that?
12 A. Yeah. It's a simplification that's very
13 commonly used in ground water aquifer models to improve
14 the numeric stability of the computations. And as
15 discussed in this report, you know, it's considered to
16 be an acceptable simplification when the aquifer is
17 thick enough that the change in saturated thickness with
18 time is not an excessive percentage of the total
19 saturated aquifer thickness.
20 Q. And am I correct in stating that it's
21 generally considered an unconfined aquifer?
22 A. Yes.
23 Q. And there is parts that are confined; is that
24 correct?
25 A. The model representation is a specific yield

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1 consistent with an unconfined aquifer is applied
2 everywhere. And the time constant transmissivity is
3 also applied everywhere. So that's what I'm saying,
4 it's not really a confined representation because it
5 doesn't have a confined storage value. But it has the
6 time constant transmissivity assumption to promote
7 numeric stability.
8 Q. And that's how you could apply inputs in one
9 part of the aquifer and determine how they would
10 influence the other part of the aquifer; correct? Would
11 that be more difficult if you were using a model that
12 was completely unconfined?
13 MR. BAXTER: I'm going to object. The
14 questions are compound. You are coming with a question,
15 and then you are jumping to another question before
16 she's had an opportunity to answer your first question.
17 MR. ANDERSON: I apologize.
18 Q. (BY MR. ANDERSON) Let me restate that. So by
19 doing that, you are allowed to measure the inputs on one
20 part of the aquifer, and see how it affects another part
21 of the aquifer; is that correct?
22 A. It's correct that we can do that with this
23 model, yes.
24 Q. Would that be more difficult or easier with a
25 model that was unconfined?

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1 A. It could also be done with a model that's
2 unconfined. That a time-varying transmissivity
3 unconfined representation might preclude us from using
4 the super position version of the model, which makes
5 analyses quicker and more convenient. But they can
6 certainly be done in a fully populated model as well.
7 Q. Do you think that that would be giving a more
8 accurate or less accurate depiction of the current
9 aquifer?
10 A. I think it would give a very similar
11 depiction.
12 Q. What about multi-layer, would a multi-layer
13 model give a more accurate representation of the
14 aquifer, and I guess the differences among the aquifer?
15 I didn't ask that very well. But do you want to answer
16 that?
17 A. On a very local scale, there are some areas
18 where a multi-layer model might, if we had the data to
19 support calibrating it, which we probably don't. If
20 there were more data collected to the support that in a
21 local area, that might provide a more accurate ability
22 to match heads and simulate local conditions. But this
23 is a regional scale model. And we are looking at
24 regional scale predictions and impacts. That's what it
25 was designed to do. And I think an overall regional

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1 scale of the aquifer, those kind of refinements would be
2 a lot of investment into something that would not make
3 much difference on a regional scale.
4 Q. So do you feel like the directive, at least
5 stated here in 2.1, to move towards those is no longer a
6 mission for the Department?
7 A. The Eastern Snake Hydrologic Modeling
8 Committee has discussed, both when we finished 2.1 and
9 when we finished 2.2, have discussed options, things
10 that we might do to improve the model. And though a
11 number of potential improvements have been discussed by
12 the ESHMC after completion of 2.1, the potential
13 improvements were prioritized by the ESHMC. And those
14 are the improvements that got included in ESPAM2.2. And
15 then we did the same thing when we concluded ESPAM2.2,
16 we discussed potential improvements that we're working
17 on now for the next version of the model. And those
18 were prioritized by a vote of the committee members.
19 And those are the improvements that we're working on
20 now. And multiple layers has been discussed, but it has
21 not become one of the priorities. And part of the
22 reason is because nobody has been able to identify
23 specific areas where we have data to support it or
24 specific benefits that would.
25 Q. Understood. So when you are talking about the

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1 decision to go from steady state to transient, the model
2 has the ability to run both transient and steady state;
3 correct?
4 A. Yes.
5 Q. So when you are making that decision, you are
6 not really changing the model at all, you are just
7 changing how you run it?
8 A. Yes, you are just changing the input you give
9 it and the time discreditation that you tell it to read
10 input and produce output at.
11 Q. And you mentioned earlier, I believe you said,
12 that Director Tuthill had made the determination to use
13 steady state as a policy decision rather than transient?
14 A. I don't believe I said Director Tuthill.
15 Q. Oh, I'm sorry. Who did you say?
16 A. Director Dreher.
17 Q. I'm sorry.
18 A. Director Karl Dreher.
19 Q. I'm sorry. That's correct. So you said
20 Director Dreher made that determination to use steady
21 state instead of transient. And you understood that it
22 was a policy decision?
23 A. I said that Allan Wylie told me that Director
24 Dreher had made that decision, and that it was a policy
25 decision.

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1 Q. Because of the amount of acreages that would
2 be curtailed under transient versus steady state would
3 be a bigger hardship; is that what you understood?
4 A. What Allan Wylie told me was that, you know,
5 as we discussed, there will be additional water. If
6 there is curtailment, there will be additional water
7 that accrues during the next year, and the year after.
8 And what Allan Wylie said was that Director Dreher was
9 concerned that, well, we don't know whether those future
10 years are going to be dry years or wet years. And that
11 water might not be needed in that future year.
12 Q. Understood. So any decision to change the
13 model, are those decisions technically driven or are
14 they policy driven?
15 A. To change the model, the intent of the Eastern
16 Snake Hydrologic Modeling Committee is that the modeling
17 committee is comprised of technical consultants and
18 university people that -- but all technical people. And
19 that the revisions to the model are intended to be
20 technical improvements.
21 Q. So in improving the model, it's safe to say,
22 that's a technical decision how using the model can be a
23 policy decision in how it's used? Is that accurate to
24 say?
25 A. Well, the policy decision is, yeah, what

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1 question did you want to ask the model. That's the
2 policy decision.
3 Q. Thank you.
4 A. And then you tailor your simulation to address
5 that question.
6 Q. I wanted to just ask real quick. You
7 mentioned that you had heard or that you understood,
8 that the shortfall in 2021 and 2022, was greater at the
9 end of the year than it was in the predictions in April;
10 correct?
11 A. Correct.
12 Q. So when you look at a prediction, is it more
13 important to be an accurate prediction, or is it more
14 important to overpredict?
15 MR. BAXTER: Objection. It calls for a legal
16 conclusion. I'm assuming you are framing the question
17 of, is it more important from the Department's
18 standpoint?
19 Q. (BY MR. ANDERSON) I just mean a technical
20 standpoint. If you are creating a prediction, a
21 technical prediction, what are the parameters of a
22 technical prediction? What are you trying to achieve
23 with a prediction?
24 MR. BAXTER: Go ahead and answer the question,
25 if you understand the question.

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1 THE WITNESS: I understand the question. The
2 technical prediction -- the courts have answered your
3 question with regard to the April forecast supply
4 prediction.
5 Q. (BY MR. ANDERSON) That's not what I asked. I
6 just mean in a technical sense, if you are creating a
7 prediction, what does that mean? What are the
8 parameters of a prediction? How do you create a good
9 prediction in a technical world? I assume you do this a
10 lot.
11 A. Well, I mean your -- you create a prediction.
12 But whether or not you apply some sort of, you know,
13 factor of safety to it to make it a more conservative
14 prediction, that's, you know, a policy decision. And it
15 depends on the situation.
16 Q. Okay. I understand that. Still, I'm going to
17 ask the question again. What are the parameters of
18 making a prediction? I'm not talking about anything
19 with the legal world. I just mean, when you want to
20 make a prediction in your technical expertise, what
21 makes a good prediction? What are the factors or
22 aspects of a good prediction?
23 A. I'm not sure what you mean by parameters or
24 factors of a good prediction.
25 Q. What makes a good prediction? Is it accuracy

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1 to what actually happens or --
2 A. Well, I mean, if a -- you know, when you are
3 making a prediction, it's a prediction. And there is
4 some uncertainty. And whether or not it reflects what
5 actually happens, depends on -- I mean, you have to make
6 assumptions when you make a prediction.
7 So, you know, what makes the best prediction
8 possible is if you can, you know, use the best available
9 science to make that prediction. And that's what we
10 attempt to do with the ground water flow model. There
11 is uncertainty on those predictions. And how that
12 uncertainty is applied, that is a policy decision or a
13 legal decision.
14 Q. Okay. I understand that. I understand the
15 policy and legal aspect of it. I guess I just want to
16 better understand the purpose of the prediction. For
17 example, is it more important to be close to the actual
18 number or well below? Because it seems like the way you
19 stated it, if you went above what the actual number was,
20 all of a sudden that was an invalid prediction. Does
21 that make a prediction invalid if it understates what
22 the actual number is?
23 A. Well, in the specific case that you are asking
24 about, which was the difference between the April
25 forecast prediction of the demand shortfall and the end

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1 of season calculation of the demand shortfall, the
2 direction on what's important there was provided by the
3 court, and it is a legal directive not a technical
4 directive.
5 Q. I understand the legal directive, and I
6 understand the legal directive in choosing a baseline.
7 I guess my question is, is in that baseline, does it not
8 allow for it to ever be underreported?
9 MR. BAXTER: Objection. It calls for a legal
10 conclusion on behalf of the witness. The witness has
11 answered now, at least by my count, three times your
12 question with regards essentially the same question that
13 is being reframed, but still trying to get to the same
14 analysis. And the answer has been the same each time.
15 MR. ANDERSON: I'll move on. You know what, I
16 don't think I have any further questions.
17 Do you want to go ahead, Skyler?
18 MR. JOHNS: Yes, is that all right? I'm a lot
19 simpler.
20 MR. ANDERSON: Yes.
21 EXAMINATION
22 QUESTIONS BY MR. JOHNS:
23 Q. Hi, Jennifer. My name is Skyler Johns. Nice
24 to meet you. I don't believe I have any technical
25 questions. And some of these are just kind of follow

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1 up. So if you've already answered them, I don't mean to
2 be redundant. I maybe missed them as I was writing
3 questions down. It kind of goes back a little bit to
4 the technical working group that was brought together.
5 For this Fifth Methodology Order, is it correct that
6 that was after a May 2022 directive from the Director?
7 I remember you testifying about that, but was that --
8 A. I think I read that out of Exhibit -- is it
9 Exhibit 4?
10 Q. Yeah, I think it was an order or something you
11 had read.
12 A. Yes, Exhibit 4. So this says, "In a status
13 conference on August 5th, 2022, the Director of the IDWR
14 issued a directive to IDWR staff to convene the
15 technical working group."
16 Q. Yes, so I was just off a couple months. So I
17 apologize for that. Thank you for clarifying that.
18 Do you recall who was in charge of organizing,
19 scheduling, making assignments for this technical
20 working group?
21 A. Matt Anders.
22 Q. Matt Anders was in charge of that. Was he
23 also in charge of extending invitations for folks to
24 attend and participate?
25 A. To my knowledge, I believe he was.

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1 Q. Do you recall who was invited, or is that just
2 something Matt has? Do you recall who was invited and
3 who actually participated in the technical working
4 group?
5 A. I recall some people, but I'm sure I don't
6 recall an inclusive list of the people, no.
7 Q. But you believe Matt would be able to answer
8 that?
9 A. I believe he would, yes.
10 Q. I'll make a note of that. Thank you. Did you
11 have any discussions with Matt about particular invitees
12 you would like to be a part of the technical working
13 group?
14 A. No, I had no input on that.
15 Q. Okay. Do you know if people from the public
16 were allowed to participate, or was it by an invitation
17 only thing to participate in the technical working
18 group?
19 A. I don't know.
20 Q. That checks off a whole list of questions. I
21 will just save those from Matt. So the information that
22 was prevented during the technical working group, was
23 that made available before April 21st, 2023?
24 A. I don't know.
25 Q. Do you know if it was posted on IWDR's website

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1 anywhere before April 21st, 2023?
2 A. I don't know.
3 Q. Do you know who would know the answer to that
4 question?
5 A. Matt Anders might know the answer to that
6 question.
7 Q. Okay. I'll make a note of that. Do you know
8 if public comment was sought on any of the technical
9 working group findings, or anything that was done in the
10 technical working group?
11 A. I'm not aware of comment outside of the
12 comments by coalition members of the technical working
13 group.
14 Q. During the technical working group, did anyone
15 ever specifically represent that the transient state
16 would be implemented in 2023?
17 A. I don't think that we discussed when it would
18 be implemented.
19 Q. And I guess I'm asking you to recall just the
20 broader conversation. So you specifically, did you ever
21 represent that the transient state would be implemented
22 in 2023 during the technical working group meetings?
23 A. No, I only presented the technical information
24 that is in the presentations.
25 Q. And you may have said this. But again, I have

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1 you back in May. So instead, it's since August. How
2 long did it take I guess for you, personally, to gather
3 and review, and formulate opinions on all the
4 information that was put forward in the technical
5 working group?
6 A. Well, again, I only participated in the part
7 that was related to this one presentation on the
8 calculation of the curtailment priority date. I do not
9 recall exactly how much time it took me to do the
10 analyses that resulted in the data that I presented.
11 Q. Was that a couple of months?
12 A. Oh, it was less than that.
13 Q. A couple weeks?
14 A. I doubt it was a couple weeks.
15 Q. Were you working on it full-time, like that
16 was the only project you were working on, or were you
17 working on other projects?
18 A. I was working on other things at the same
19 time, but...
20 MR. JOHNS: So I think that is all the
21 questions that I have.
22 MR. BAXTER: Are we ready to move over to the
23 Surface Water Coalition?
24 ///
25 ///

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1 EXAMINATION
2 QUESTIONS BY MR. SIMPSON:
3 Q. Jennifer, hi. I'm John Simpson.
4 MR. BAXTER: Move over closer to the
5 microphone so they can hear you online.
6 Q. (BY MR. SIMPSON) I really have one question,
7 and that reflects Footnote 5 of the as-applied order,
8 where you calculated the proportionate shares of the
9 shortfall. Do you recall that testimony?
10 A. I recall that we discussed that.
11 Q. I think in Footnote 5, it identifies of the
12 75,200, that amount that is apportioned to IGWA, and
13 then an amount that is apportioned to A & B; correct?
14 A. Yes.
15 Q. And through your testimony today, you've
16 described how the A & B calculation was made. Do you
17 recall that testimony?
18 A. Yes.
19 Q. So if there is others out there that are
20 junior to December 30th, 1953, other water rights that
21 would be subject to administration, how would they go
22 about calculating their proportionate shortfall?
23 A. Well, and I guess I would say, first, that I
24 mean, in my opinion proportionate share applies to the
25 people that have -- I mean, proportionate share in the

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1 context of these orders is a specific term that refers
2 to the people that have approved mitigation plans.
3 Q. Okay.
4 A. But if your question is how could they
5 calculate the equivalent value.
6 Q. Right, fair enough.
7 A. If they can -- one way they could do it is if
8 they -- if they can determine the number of acres that
9 are associated with their water rights, or if they are
10 not irrigation rights, say, if they are municipal. The
11 volume of pumping that is associated with the water
12 rights that are junior to December 30th, 1953. One way
13 they can do that, is they can distribute that -- in the
14 case of acres, they can distribute those irrigated acres
15 amongst their points of diversion.
16 They can overlay that with a file available
17 online that gives an estimate of the annual volume of
18 consumptive use associated with those acres. So
19 multiply the consumptive use, and then they would come
20 up with a volume. And then they can overlay that with a
21 file available online that shows the steady state
22 response function at the near Blackfoot to Minidoka
23 reach. And they would come up with a number that they
24 could then divide by a number that's in the supporting
25 files for both A & B and IGWA, that shows the total

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1 steady state impact, which is 831,000-some acre-feet.
2 And that that would give them -- and then multiply that
3 by the 75,200 acre-feet, and that would give them an
4 equivalent value.
5 Q. Very clear.
6 A. And then, obviously, if it's a non-irrigation
7 use, like a municipal use, then they wouldn't need to
8 look up the consumptive use per acre. They would just
9 take that volume times the steady state response
10 function, and do the same thing.
11 MR. SIMPSON: Okay. Very good. Thank you.
12 That's all I've got.
13 MR. FLETCHER: No questions.
14 MR. BAXTER: Any redirect based upon John's
15 inquiry of individual --
16 MS. McHUGH: I don't have anything further to
17 add. We just agree with TJ about keeping the deposition
18 open.
19 MR. BUDGE: This is TJ. I don't have anything
20 further.
21 MR. BAXTER: All right. Well, thank you very
22 much everybody. And thank you, Colleen, for your work
23 here today, and getting us set up, and making it so
24 folks and everybody had no trouble.
25 THE REPORTER: Who wants a copy of the

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1 transcript?
 2 MS. KLAHN: I'll take a copy, Colleen, Sarah
 3 Klahn for Pocatello.
 4 MS. McHUGH: And the same for the coalition of
 5 cities.
 6 MR. BUDGE: Yeah, and the same for IGWA.
 7 MR. JOHNS: Hey, TJ, do you want to split the
 8 costs with Bonneville-Jefferson?
 9 MR. BUDGE: Yeah, that's fine.
 10 MR. SIMPSON: Just one for Mr. Fletcher and I.
 11 (Deposition concluded at 2:56 p.m.)
 12 (Signature requested.)
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1 CERTIFICATE OF WITNESS
 2 I, JENNIFER SUKOW, P.E., P.G., being first duly
 3 sworn, depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, Volume I, consisting of pages 1 through 162;
 6 that I have read said deposition and know the contents
 7 thereof; that the questions contained therein were
 8 propounded to me; and that the answers contained therein
 9 are true and correct, except for any changes that I may
 10 have listed on the Change Sheet attached hereto:
 11 DATED this ____ day of _____, _____.
 12 _____
 13 _____
 14 JENNIFER SUKOW, P.E., P.G.
 15
 16 SUBSCRIBED AND SWORN to before me this ____ day
 17 of _____, 20____.
 18 _____
 19 _____
 20 NAME OF NOTARY PUBLIC
 21
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

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1 ERRATA SHEET FOR JENNIFER SUKOW, P.E., P.G.
 2 Page ____ Line ____ Reason for Change _____
 3 Reads _____
 4 Should Read _____
 5
 6 Page ____ Line ____ Reason for Change _____
 7 Reads _____
 8 Should Read _____
 9
 10 Page ____ Line ____ Reason for Change _____
 11 Reads _____
 12 Should Read _____
 13
 14 Page ____ Line ____ Reason for Change _____
 15 Reads _____
 16 Should Read _____
 17
 18 Page ____ Line ____ Reason for Change _____
 19 Reads _____
 20 Should Read _____
 21
 22 Page ____ Line ____ Reason for Change _____
 23 Reads _____
 24 Should Read _____
 25
 24 You may use another sheet if you need more room.
 25 WITNESS SIGNATURE _____

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1 REPORTER'S CERTIFICATE
 2 I, COLLEEN P. DOHERTY, CSR No. 345, Certified
 3 Shorthand Reporter, certify:
 4 That the foregoing proceedings were taken
 5 before me at the time and place therein set forth, at
 6 which time the witness was put under oath by me;
 7 That the testimony and all objections made were
 8 recorded stenographically by me and transcribed by me or
 9 under my direction;
 10 That the foregoing is a true and correct record
 11 of all testimony given, to the best of my ability;
 12 I further certify that I am not a relative or
 13 employee of any attorney or party, nor am I financially
 14 interested in the action.
 15 IN WITNESS WHEREOF, I set my hand and seal this
 16 11th day of May, 2023.
 17
 18
 19
 20
 21
 22
 23
 24
 25



COLLEEN P. DOHERTY, CSR 345
 Notary Public
 P.O. Box 2636
 Boise, Idaho 83701-2636
 My commission expires September 7, 2023.

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Attachment 4

From: [Chris Bromley](#)
To: [Max C. Bricker](#)
Subject: FW: IRCP 30(b)(6) Notice of Deposition
Date: Thursday, May 18, 2023 11:36:53 AM
Attachments: [image001.png](#)

From: TJ Budge <tj@racineolson.com>
Sent: Tuesday, May 16, 2023 5:18 PM
To: Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>
Cc: Wood, Pete <Pete.Wood@idwr.idaho.gov>; Jenkins, Megan <Megan.Jenkins@idwr.idaho.gov>; Sarah A Klahn <sklahn@somachlaw.com>; Travis L. Thompson <tthompson@martenlaw.com>; Tschohl, Sarah <Sarah.Tschohl@idwr.idaho.gov>; John K. Simpson <jsimpson@martenlaw.com>; Jess Nielsen <jnielsen@martenlaw.com>; wkf@pmt.org; Elisheva Patterson <elisheva@racineolson.com>; 'David W. Gehlert (david.gehlert@usdoj.gov)' <david.gehlert@usdoj.gov>; Matt J Howard <mhoward@usbr.gov>; Diane Thompson <dthompson@somachlaw.com>; Diehl, Rich <rdiehl@pocatello.us>; Candice McHugh <cmchugh@mchughbromley.com>; Chris Bromley <cbromley@mchughbromley.com>; Rob Williams (rewilliams@wmlattys.com) <rewilliams@wmlattys.com>; Robert L Harris <rharris@holdenlegal.com>; rfife@idahofallsidaho.gov; sjohns@olsentaggart.com; nolsen@olsentaggart.com; staggart@olsentaggart.com; Dylan Anderson <dylan@dylanandersonlaw.com>; Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>; Skinner, Corey <Corey.Skinner@idwr.idaho.gov>; 'William Parsons' <wparsons@pmt.org>
Subject: RE: IRCP 30(b)(6) Notice of Deposition

Garrick,

Thanks for the email. As we discussed during the depositions, we disagree that the Director has authority to prohibit discovery of his deliberative process. Moreover, legal conclusions must be based on factual information, and we clearly have a right to discover all of the information the Director considered in developing the Fifth Methodology Order. The Director's orders, coupled with the Director's refusal to honor the Rule 30(b)(6) deposition notice and your instructions to Jennifer Sukow and Matt Anders to not answer questions, have prevented us from discovering all of the information the Director considered.

We understand that you interpret the Director's authorities differently. We asked Dylan Anderson to reach out to you to "meet and confer" pursuant to I.R.C.P. 37, which I understand he did this morning. Dylan reported that your meeting was not successful in resolving our disagreement over the scope of discovery. Thank you for taking the time to discuss this with Dylan.

On a related note, we are anxiously awaiting a decision on the Motion for Reconsideration filed May 5th. Given the compressed hearing schedule we were anticipating a decision before now. How soon can we expect that?

Thanks,

T.J. Budge

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From: Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>**Sent:** Tuesday, May 16, 2023 7:36 AM**To:** TJ Budge <tj@racineolson.com>**Cc:** Spackman, Gary <Gary.Spackman@idwr.idaho.gov>; Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Wood, Pete <Pete.Wood@idwr.idaho.gov>; Jenkins, Megan <Megan.Jenkins@idwr.idaho.gov>; Sarah A Klahn <sklahn@somachlaw.com>; Travis L. Thompson <tthompson@martenlaw.com>; Tschohl, Sarah <Sarah.Tschohl@idwr.idaho.gov>; John K. Simpson <jsimpson@martenlaw.com>; Jess Nielsen <jnielsen@martenlaw.com>; wkf@pmt.org; Elisheva Patterson <elisheva@racineolson.com>; 'David W. Gehlert' <david.gehlert@usdoj.gov> <david.gehlert@usdoj.gov>; Matt J Howard <mhoward@usbr.gov>; Diane Thompson <dthompson@somachlaw.com>; Diehl, Rich <rdiehl@pocatello.us>; Candice McHugh <cmchugh@mchughbromley.com>; Chris Bromley <cbromley@mchughbromley.com>; Rob Williams <rewilliams@wmlattys.com> <rewilliams@wmlattys.com>; Robert L Harris <rharris@holdenlegal.com>; rfife@idahofallsidaho.gov; sjohns@olsentaggart.com; nolsen@olsentaggart.com; staggart@olsentaggart.com; Dylan Anderson <dylan@dylanandersonlaw.com>; Olenichak, Tony <Tony.Olenichak@idwr.idaho.gov>; Skinner, Corey <Corey.Skinner@idwr.idaho.gov>; 'William Parsons' <wparsons@pmt.org>**Subject:** RE: IRCP 30(b)(6) Notice of Deposition

TJ,

I wanted to follow up with you to make sure there was no confusion regarding my response to your question on Friday regarding the ground water users' IRCP 30(b)(6) deposition notice. The Director issued an order on May 2, 2023, identifying Matt Anders and Jennifer Sukow as the witnesses that will testify on behalf of the Department. They are also the individuals designated by the Director to be deposed on behalf of the Department in response to the ground water users' IRCP 30(b)(6) deposition notice. No other employees were being identified to testify in response to the deposition notice.

Furthermore, I believe it is important to make a record regarding the issues identified and requests regarding documents in the IRCP 30(b)(6) notice. In his May 2, 2023 Order, the Director limited the scope of the depositions in this proceeding, ordering that "the scope of any deposition of a Department employee will preclude questions regarding the Director's deliberative process on legal and policy considerations." Also, at our April 28 status conference, the Director stated that this is an

evidentiary hearing and that he is making employees available to testify regarding evidentiary facts and data. Regarding the issues you identified in the IRCP 30(b)(6) notices for examination, the first five issues identified are issues related to legal conclusions which Department employees are not qualified to testify to, so no employees were identified to respond to those issues. With regards to issue 6, Jennifer Sukow is the employee that can testify regarding the change from steady state to transient modeling, and in fact testified extensively on this issue at her deposition. As to issue 7, Matt Anders is the employee that can testify regarding the technical working group and he in fact testified on this issue at his deposition. As to issue 8, issues of non-compliance by IGWA are outside the scope of this proceeding. Compliance with a mitigation plan is a separate administrative proceeding in a separate docket – Docket No. CM MP 2016-001. Moreover, non-compliance with a mitigation plan goes beyond the facts and data related to the amendment of the 5th methodology order so no employees were identified with regards to this issue. Regarding the documents you identified in the Notice, the Documents listed are also listed in the ground water users' *First Set of Request for Production to IDWR; Or Alternatively, Request for Public Records*. The Department is still in the process of gathering the relevant documents. We have left open the depositions of Jennifer and Matt so you will still have the opportunity to depose them further if you have additional questions after receiving the documents.



Garrick Baxter | Lead Deputy Attorney General

Idaho Department of Water Resources | Energy and Natural Resources Division

Office of the Attorney General | State of Idaho

208-287-4811 | ag.idaho.gov

NOTICE: This message, including any attachments, is intended only for the individual(s) or entity(ies) named above and may contain information that is confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you are not the intended recipient, please reply to the sender that you have received this transmission in error, and then please delete this email.

Attachment 5

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

THE IDAHO PRESS CLUB, INC.,)	Case No.: CV 01-19-16277
)	
Petitioner,)	DECISION AND ORDER
)	
vs.)	
)	
)	
ADA COUNTY,)	
)	
Respondent.)	
)	
)	
)	
)	
)	
)	

The Idaho Press Club, Inc. is an association of working journalists from many different Idaho news outlets which brought this action seeking public records requested by four of its members from Ada County. Each request sought public records. None of the requests were responded to within the time periods required by the Idaho Public Records Act. Two of the requests were responded to with extensive claims of privilege and contained pages and pages of blacked out, heavily redacted material provided several months after the requests were made. The third request generated public records with information redacted. No specific statutory grounds for denial were provided in the letter advising the requesters of the denials. The final request was not responded to at all. The petitioner filed a timely petition for review of the denial of the requests as required by I.C. § 74-115. Ada County moved to dismiss the petition on the grounds of insufficiency of process, improper service and failure to state a claim upon which

relief can be granted. Ada County also provided the unredacted records for *in camera* review by the Court and filed a response. Because there was a verified petition and both sides have submitted declarations, the Court is required to treat the motion to dismiss as one for summary judgment. I.R.C.P. 12(d). The Court will address both the Motion to Dismiss and the Petition to Compel. The Court has concluded its *in camera* review of all documents. For the reasons stated in this Decision, the Motion to Dismiss is denied and the Petition to Compel is granted.

I.

The Framework of the Idaho Public Records Act

The right of the public to know, in depth, how its public servants handle the public's business is embodied in the Idaho Public Records Act. It gives the public broad access to the public records of Idaho government at every level, in every form—from state, to county, to city, to every type of commission and board. Public records are presumed to be open at all reasonable times for inspection by the public. I.C. § 74-102(1). The public's business is open to the public's view upon request with some specific detailed exceptions. The Act sets tight time lines for response. It places the burden on the governmental body to prove that a requested record is exempt from disclosure because it falls under the Idaho Public Records Act's express statutory exemptions. A "public agency" which is government at every level—state, county, city, commission, board or committee, or commission must comply with the public's right of access. I.C. § 74-101(4)(7)(8)(11)(15). The public's right is broad as to who may make a request. "Every person" has right to examine and copy any public record of the state at a reasonable time and place subject to certain exceptions. I.C. § 74-102(1). "Person" is defined broadly:

“Person” means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity.

I.C. § 74-101(9).

When a request is made, there are tight time requirements for response by the public agency. The request to view a public record must be granted or denied within three working days from its receipt. I.C. § 74-103. If the public agency needs more time to “locate or retrieve” the record, it is required to notify the person who requested the public record in writing that it will provide the record no later than ten working days after the request. *Id.* If an “electronic record requested” has to be “converted to another electronic format by the agency or a third party” and it cannot be done within the ten working days, then the public agency must work out a “mutually agreed upon” extension. *Id.* If there is no mutual agreement, if the requested records are not provided within the ten additional working days, the request is deemed denied. The public agency may grant part of the request and deny the rest provided it does so in writing. *Id.* “The notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person’s right to appeal the denial or partial denial and the time periods for doing so.” *Id.* When a request is denied or denied in part, the person who made the request is authorized to bring a proceeding in district court to make the record available for public inspection within 180 days. The deadline to file a petition runs from the date of mailing of the denial or partial denial. I.C. § 74-115.

The Idaho Public Records Act makes the first two hours of labor and 100 pages provided in response to a request free to the person requesting it. I.C. § 74-102(10)(a). Thereafter, the Act allows reasonable copying and labor costs, including certain attorney fee charges for redactions, provided that they are itemized. I.C. § 74-102(10)(e) and (g). The Act also allows for the waiver of all fees:

The public agency or independent public body corporate and politic shall not charge any cost or fee for copies or labor when the requester demonstrates that the requester's examination and/or copying of public records:

(i) Is likely to contribute significantly to the public's understanding of the operations or activities of the government;

(ii) Is not primarily in the individual interest of the requester including, but not limited to, the requester's interest in litigation in which the requester is or may become a party; and

(iii) Will not occur if fees are charged because the requester has insufficient financial resources to pay such fees.

I.C. § 74-102(10)(f). The district court also has a tight time line imposed on it by the Act. I.C. § 74-116(1).

II.

Undisputed Facts

1. The Idaho Press Club is an Idaho non-profit corporation which is a statewide association of working journalists from all types of media. It is a voluntary membership trade association with the mission of promoting "excellence in journalism, freedom of expression, and freedom of information." Petition, pg. 2.

2. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are Idaho journalists who are members of the Idaho Press Club. They each made specific requests for public records which were denied in full or in part and are the subject of this action. Each of the journalists who made a request for records under the Idaho Public Records Act in this case is a member of

the Idaho Press Club.

3. Cynthia Sewell, a reporter for the Idaho Statesman requested the following on February 15, 2019 through the Ada County Public Records Request Portal on the Ada County website asking for: “Any correspondence or documents pertaining to the lease of or purchase of Les Bois race track.¹ This request includes Expo Idaho and Ada County Board of Commissioners documents. The time period of this request is July 1, 2018 to present.” Declaration of Judy Morris. Ada County’s website allows a person requesting public records to designate whether the request routes to the Ada County Commissioners’ Office, the Sheriff’s Office or the Ada County Clerk. Ada County asks for the name of the requester, email address, and a description of the request which is to be as specific as possible. *Id.* Ada County replied in writing on February 20, 2019 that the request would take longer than three working days as specified in I.C. § 74-103 and that they would need the ten working day extension allowed for by the same statutory provision. *Id.* Ada County then notified Cynthia Sewell on March 4, 2019 that ten days would not be enough time and sent an additional email on March 19, 2019 saying that due to “unforeseen circumstances” it would take still more time to respond to the request. *Id.* It did not detail the “unforeseen circumstances.” There was no “mutually agreed upon” extension.

4. No records were provided in response to the request by Cynthia Sewell for months following her request for public records.

5. On March 27, 2019, Cynthia Sewell sent an email pointing out the statutory deadlines, which had been substantially exceeded, and asking for the reasons for the delay. On April 3, 2019, an employee of Ada County sent an apologetic email to Cynthia Sewell, which read in pertinent part:

¹ The Les Bois Racetrack and surrounding acreage is a significant tract of publicly owned property in Ada County.

“Cynthia:

We are sorry this is taking longer than normal. We still believe that we are in compliance with Idaho Law, and hope to get the records to you soon.”

6. Also after the statutory deadline, a formal letter was sent from the Ada County Commissioner’s Office on April 5, 2019 addressing its lack of compliance with the public records request and citing an unspecified “technological glitch” which delayed processing the public records request. The letter said that there were over 2,000 emails and that Ada County expected to need “an additional 16.5 hours” to review the “compiled records” to see what was responsive to the public records request. In the April 5, 2019 letter, the commissioner’s representative said that they would charge \$50.00 per hour for I.T. personnel to search and retrieve the emails, and \$42.14 an hour for attorney time to review the located emails. The letter asked for \$695.31(16.5 hours x \$42.14) made payable to Ada County. The \$42.14 per hour charge reflects attorney review time, not I.T. time. Verified Petition, Exhibit B.

7. On April 8, 2019, Melissa Davlin, on behalf of the Idaho Press Club made this public records request to Ada County:

From: Melissa Davlin
Sent: Monday, April 8, 2019 1:41 PM
To: Judy Morris; BOCC
Subject: [EXTERNAL] public records request

Dear Ms. Morris:

Pursuant to the state open records law Idaho Code Ann. Secs. 74-101 to 74-126 . I request access to and a copy of any and all written communications. including, but not limited to. e-mails and text messages, regarding the submission and pending fulfillment of Cynthia Sewell's Feb.15th public records request regarding Les Bois race track. This request includes any communications between you. the IT department, the commissioners’ office staff, and the county commissioners.

I agree to pay any reasonable copying and postage fees of not more than \$30. If the cost would be greater than this amount, please notify me before processing the request. Please provide a receipt indicating the charges for each document.

As provided by the open records law. I will expect your response within ten (10) business

days. See Idaho Code Ann. Sec. 74-1 03(1).

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Thank you for your assistance.

Sincerely,

Melissa Davlin
Idaho Press Club
208-410-7239

Verified Petition, Exhibit H. Ada County responded to this public records request by stating that it had been forwarded to the Prosecuting Attorney's office. *Id.* On April 26, 2019, Ada County provided some documents and denied producing other documents broadly asserting "attorney work product and attorney-client communications." Most of the 172 pages provided were blacked out in their entirety. Ada County made a very vague reference to the heavy redactions as being due to "Idaho decisional law, rules, statutes (e.g. Idaho Code § 74-104(1)), and the Idaho State Bar's Rules of Professional Conduct...." Verified Petition, Exhibit I. Referring to the letter as a "Notice of Partial Denial," the letter advised the Idaho Press Club of the deadline of 180 days in which to file an action under the Idaho Public Records Act. *Id.*

8. A letter was sent on April 11, 2019 from Ada County to Cynthia Sewell, signed by each Ada County commissioner, which apologized for the delay in responding to the public records request and explained the general complexity of retrieving emails and referred to "some coincidental glitches including a technical issue which significantly delayed our I.T. department's ability to conduct the search and promptly respond to your request." This letter was much more informative. The letter recited the large number of emails sent by county and state employees which utilize the Ada County email system and then provided additional information about how the search was conducted and the search terms utilized. It stated that an attorney would need to review each "captured email and any attachments" to ensure that they are

public records and then to decide “whether it is exempt from disclosure, if it can be released in a redacted form, or if it can be released in its entirety.” It also recited that an attorney had reviewed the request. It discounted the earlier fee request by 25% because of the delay. The letter somewhat inconsistently references an attorney review having already been conducted and one that would be conducted once the fee was paid. The letter then advised Ms. Sewell that she had “180 calendar days from the mailing of the notice” to file a petition under the Idaho Public Records Act. The letter was cc’d to Melissa Davlin, Idaho Press Club. Verified Petition, Exhibit C.

9. Cynthia Sewell responded on July 23, 2019 by email asking for waiver of the fees under I.C. § 74-102(10)(f) and, if the waiver request was denied, for more specific detail on the basis for the rates being charged and the reason for the amount of time necessary to respond to the request. Verified Petition, Exhibit D.

10. On July 26, 2019, in a letter signed by each of the three county commissioners, Ada County advised that the commissioners had agreed to a one time waiver of the fees for the Cynthia Sewell public records request as a “good faith gesture.” The letter stated that an attorney would begin reviewing the emails. Verified Petition, Exhibit E.

11. Ada County’s communications manager indicated that documents responsive to the Sewell public records request would be provided but contained redactions which were due to “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege Information.” Documents, a substantial portion of which were heavily blacked out, were provided. Verified Petition, Exhibit F. On August 26, 2019, 511 pages of documents were provided to Cynthia Sewell in response to her request for public records made on February 15, 2019. Many of the records are blacked out. Ada County said that the records which were

blacked out and not made available were due to: “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege.” *Id.* There was no citation whatsoever to any specific statutory ground for any denial as required by I.C. § 74-103(4).

12. On July 11, 2019, Jennifer Swindell, a member of the Idaho Press Club and editor of the Idaho Education News, made a public records request for all public records requests made to Ada County in 2019. The request was limited to only the actual requests and the county’s responses, not the documents themselves. On July 25, 2019, Ada County produced the requests but blacked out the addresses, phone numbers and emails of all the people who had made public records requests on the basis that personal contact information was exempt from disclosure but it cited no authority for that proposition. Verified Petition, Exhibit J.

13. On August 1, 2019, Katy Moeller, a reporter for the Idaho Statesman and also a member of the Idaho Press Club, made a request by email to Patrick Orr, the Public Information Officer of the Ada County Sheriff’s Office, for a recording of 911 calls reporting injuries sustained in a scooter accident in Boise on July 26, 2019. Mr. Orr replied by email that if it was still under investigation, the request would be denied. If not, the same email advised that Ms. Moeller would need to get permission from the individuals who placed the 911 calls before the calls would be released but, if she got permission, he would “pull” them. Verified Petition, Exhibit K. This was a catch-22 since the names of the callers were unavailable. Although Mr. Orr does act as a media contact and provides information to reporters, he is not actually one of the two people in the Ada County Sheriff’s Office who handles formal public records requests. There is no record of a formal public records request for the 911 calls.

14. The Idaho Press Club is a voluntary membership trade association. Betsy Russell is the current President of the Idaho Press Club. Melissa Davlin is the Vice President and First

Amendment Committee Chairwoman of the Idaho Press Club. The Idaho Press Club has had to spend its funds on the costs and expenses of this case and divert them from other aspects of the Idaho Press Club's mission. Cynthia Sewell, Jennifer Swindell and Katy Moeller are also Idaho journalists and members of the Idaho Press Club.

15. A petition under the Idaho Public Records Act was filed on September 3, 2019 by the Idaho Press Club on behalf of itself and its members. The unredacted documents were provided to this Court prior to the hearing on October 2, 2019² which was the hearing required under I.C. § 74-116(1).

III.

Ada County's Motion to Dismiss

A. Standards.

When a motion to dismiss is supported with factual allegations outside of the pleadings, the motion is treated as one for summary judgment. I.R.C.P. 12(d); *Paslay v. A & B Irrigation District* 162 Idaho 866, 868–69, 406 P.3d 878, 880–81 (2017). Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party has the burden of establishing that there is no genuine issue of material fact. I.R.C.P. 56(c)(1); *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). A verified pleading is treated as an affidavit if it satisfies the requirement of I.R.C.P. 56(c)(4), that is: it is made on personal knowledge, sets forth facts admissible in evidence and is made by one who is competent to testify to those facts. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 918, 188

² The hearing was initially set for September 25, 2019 as required by I.C. § 74-115 (1) but was continued to October 2, 2019 at the request of the parties.

P.3d 854, 860 (2008); *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984). Ada County has filed a number of declarations. The Idaho Press Club also filed a declaration. The verified petition from the individuals with personal knowledge about those facts and provides facts which are admissible in evidence.

Ada County contends that this action should be dismissed because of insufficiency of process or service of process and failure to state a claim upon which relief can be granted pursuant to I.R.C.P. 12(b)(4), (5) and (6). It challenges the designation of “Ada County” as the named defendant and its service. As far as its failure to state a claim argument, Ada County asserts that the Idaho Press Club lacks standing to bring this action on behalf of its members who made the requests which were denied or denied in part.

B. Insufficiency of Process/Service of Process

Ada County moves for dismissal under Rule 12(b)(4) and (5), insufficiency of process and insufficiency of service of process, because the Idaho Press Club failed to name the Ada County Board of Commissioners and the Ada County Sheriff’s Office as parties, instead only naming and serving Ada County as the defendant. The argument is without merit. The Act does not require that a sub-part of a public agency be named as the respondent. If a request is denied, then the “public agency” is the respondent. I.C. § 74-115 provides:

(1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. In cases in which the records requested are claimed as exempt pursuant to section 74-107(1) or (24), Idaho Code, the petitioner shall be required to name as a party and serve the person or entity that filed or provided such documents to the agency, and such person or entity shall have standing to oppose the request for disclosure and to support the decision of the agency to

deny the request. The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.

(emphasis added). A “[p]ublic agency” means any state or local agency as defined in this section.” I.C. § 74-101(11). A county is a local agency under the Idaho Public Records Act and therefore also a “public agency.” I.C. § 74-101(8) and (11). Exemptions pursuant to I.C. § 74-107 (1) and (24)³are not applicable in this situation, therefore it is unnecessary that the person or entity that provided such documents to the agency be named as a party and served. Ada County is properly named as the respondent.

C. Standing

Melissa Davlin’s request was made on behalf of the Idaho Press Club. Each of the requesters of public records in this case is a member of the Idaho Press Club which is a voluntary membership organization of Idaho journalists. Under the Idaho Public Records Act, any “person” may seek to inspect a public record. “Person” is defined broadly as “any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity. I.C. § 74-101(9). An association whose members, as well as the association itself, which made a public records request is a proper party to bring an action under the Idaho Public Records Act when there is a denial. I.C. § 74-115. Every time “person” is referred to in the Act, it is necessary to circle back to the broad statutory definition of that word. Each of the reporters who made a request for a public record which was denied could have filed a separate action. If they had filed separate actions, the preferred course of action would have been to consolidate them into one proceeding since it is the most reasonable and efficient use of

³ 74-107(1) exempts certain trade secrets and 74-107(24) exempts certain records relating to property tax assessments.

judicial and party resources at both the trial and appellate level.

There are a cluster of doctrines designed to ensure that the disputes brought before the court system are thoroughly developed and advanced by those with a driving interest in the just resolution of a real dispute. The doctrine of standing is designed to insure that a person advancing a legal theory is so directly concerned about the issues involved in a particular case that they will develop the facts and the law as strenuously as possible. Courts are not designed to resolve academic debates or to serve as commentators or talk show hosts. Courts are designed to resolve real disputes between parties who have a direct stake in the outcome of the case. Real litigants involved in real disputes have every motive to flesh out the case factually and legally with the goal of arriving at the most just and reasonable resolution of a controversy. “The essence of the standing inquiry is whether the party seeking to invoke the court’s jurisdiction has ‘alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.’” *Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 779, 405 P.3d 33, 38 (2017) (internal citations omitted).

Each of the reporters who made a request which was denied had standing to bring a separate action. Melissa Davlin specifically made her request on behalf of the Idaho Press Club. The Idaho Press Club also has associational standing. In its Verified Petition, the Idaho Press Club describes itself as:

...an Idaho non-profit corporation serving as a statewide association of working journalists from all facets of the media. Its mission is to promote excellence in journalism, freedom of expression, and freedom of information. For decades it has fought for open records and all aspects of freedom of the press, in the courts, in the legislature and in the public arena. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are all Idaho journalists and members of the Idaho Press Club. The Idaho Press Club brings this action on their behalf and on behalf of its other members.

The United States Supreme Court in *Hunt v. Washington Apple Advertising Com'n* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) held that where a state agency also acted as a traditional trade association which promoted the Washington apple industry, it was entitled to standing in an action challenging another state's restrictions on advertising the source and grading of apples shipped to the other state. The *Hunt* Court held that an association had standing to bring a suit on behalf of its members if:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Id., 432 U.S. at 344, 97 S. Ct. at 2442. The three part test in *Hunt* was adopted in Idaho in *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). In *Beach Lateral*, a case involving confirming a ditch easement, associational standing was found for injunctive relief but not for quieting title, as requested in the action, because it required the participation of the individual landowning members in the lawsuit.

In this case, each of members of the Idaho Press Club would have standing to sue in their own right. They are each members of the Idaho Press Club. The interests that the Idaho Press Club seeks to protect—freedom of expression and freedom of information are central to its purpose. The Idaho Press Club has a central interest in providing information to the general public about how elected officials and public employees handle public matters and perform their duties. The first and second prongs are present as Ada County concedes. The relief sought in this case is the compelling of public records. The Idaho Supreme Court in *Beach Lateral* provided the following guidance:

The question of associational standing often turns on the nature of the relief sought. When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any

need for individualized findings of injury that would require the direct participation of its members as named parties. *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394. “Indeed,” wrote the United States Supreme Court in *Hunt*, “in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.” *Id.* (quoting *Warth*, 422 U.S. at 515, 95 S.Ct. at 2213, 45 L.Ed.2d at 364).

142 Idaho 600, 603–04, 130 P.3d 1138, 1141–42. Generally, if an injunction is requested, then it serves the purpose of all the members equally and the third prong is met. The compelling of disclosure of public records which were the subject of a proper public record request is in the nature of injunctive relief. The relief sought in this case is the release of public records to the public. Since there is a presumption under the Idaho Public Records Act that all records maintained by a public agency are available to the public, Ada County bears the burden to show that an exemption applies. If Ada County does not, the public records are released. Because of the kind of relief sought, which is identical to injunctive relief, associational standing is proper. That being the case, it is unnecessary to address the Idaho Press Club’s argument regarding organizational standing.

The Idaho Press Club has a genuine stake in how the government responds to public records requests by its members. It has every motive to flesh out the case factually and legally. It has the personal stake in the outcome of the controversy and “the concrete adversariness which sharpens the presentation” upon which a court depends for the just resolution of disputes. The Idaho Press Club has standing to file this Petition.

D. Relief under the Idaho Public Records Act and Declaratory Judgment

The petition was brought under I.C. § 74-115 which allows the person whose request for the disclosure of public records to bring an action in district court in the county where the records are located. Nothing in the Idaho Public Records Act prohibits the joinder of similar claims. When it appears that a public record has been improperly withheld, the official who

withheld it must justify the non-disclosure. The Court can, as it has here, examine the records *in camera*, and order the disclosure of improperly withheld records. I.C. § 74-116. The process requires the court to scrutinize the reason for non-disclosure to determine if the public agency has the statutory authority for the denial. I.C. § 74-103(4). The statute creates a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute. The public agency bears the burden of proving that a document not disclosed fits within one of the “narrowly construed exemptions” *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) citing *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). The Idaho Public Records Act requires the court to examine the requests, the basis for the denials and declare the rights of the parties. In every case involving the application of a statute, the court is declaring the rights of the parties.

The coupling of the statutorily authorized right to petition the courts when a record is claimed to be exempt with a request for declaratory relief does not warrant dismissal of the action even though it may be redundant. A declaratory judgment action is authorized:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

I.C. § 10-1201. The Declaratory Judgment Act is remedial and designed to “afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. I.C. § 10-1212. The additional request for declaratory relief in addition to relief under I.C. § 74-115 and I.C. § 74-116 is not grounds for dismissal. In any event, this case already requires the Court to consider Ada County’s compliance with the statute and the rights of the parties directly involved in this case.

CONCLUSION

The Idaho Press Club has standing to bring this petition since it reflects public records act requests made by its members. There is no basis to dismiss the Petition. The motion is denied.

IV.

Idaho Press Club's Petition to Compel Disclosure

A. Introduction.

Whenever a public records request is expressly denied or deemed denied when it is not responded to within the timelines set forth by the Idaho Public Records Act, those requesting the records are authorized to file a petition in the district court of the county where the records are located to compel their production. I.C. § 74-115. The district court is then directed to set a hearing at the “earliest possible time” or not later than twenty-eight days from the filing of the petition. *Id.* The petition was timely filed. The issues which were asserted in the Motion to Dismiss are resolved. The Court has reviewed the records *in camera*.

Ada County failed to comply with the Idaho Public Records Act. Idaho law makes all public records available for public inspection at all reasonable times. I.C. § 74-102. The burden is on the public agency to justify any denial by pointing to the statutory authority for the denial. I.C. § 74-103(4). Any exemptions are narrowly construed. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). Ada County has the burden of establishing that any documents not disclosed fit within one of the “narrowly-construed exemptions.” *Id.*

Ada County did not timely respond to the requests. It did not follow the mandatory statutory timelines nor did it even seek a “mutually agreed upon” extension for any request.

When it did respond, it did not specify the specific statutory authority for any of its denials. Moreover, it has not met its burden in this Court of proving that the documents requested fit within one of the statutory exemptions. Ada County has not met its responsibilities under the Idaho Public Records Act. While it can be difficult to reply within the timelines established by the Legislature because of the number of public records being sought and the process needed to locate them, Ada County should have communicated with the requesters, been transparent about the challenges and worked on the statutorily required “mutual” extension. Ada County did not adequately detail its costs for production of the public records. Most seriously, the vague denials for: “Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege” do not satisfy Ada County’s burden under the Idaho Public Records Act.

1. **Timeliness.** None of the records requested in this case were timely supplied nor is there any evidence that there was ever any formal “mutually agreed upon extension” as specified by the Idaho Public Records Act. No record was supplied within three business days nor were any records provided within ten working days after Ada County’s written notice that three days was insufficient time. If there is not a mutually agreed upon extension, then the request is deemed denied and the person who made it may bring an action in district court. In this case, Cynthia Sewell, Melissa Davlin and Jennifer Swindell did receive heavily redacted documents as well as documents redacted in their entirety but substantially after the timelines required by the Idaho Public Records Act.

2. **Fees.** There is no charge for the first two hours of labor or for copying the first one hundred pages of public records. I.C. § 74-102(10).⁴ Thereafter, a fee may be charged which does not exceed the actual cost to the public agency of the copy, or the cost of conversion of electronic

⁴ The Ada County website for public records request did not contain accurate information on costs since it neglected to advise that the first two hours of labor and first 100 pages copied were free.

records to another electronic form. I.C. § 74-102(10)(d). Reasonable labor costs, after the first two free hours, may be charged at the rate of the lowest paid administrative staff and if redactions are required, by the per hour rate of the lowest paid attorney within the public agency or the usual and customary rate of attorneys retained for that purpose if the public agency does not have an attorney on staff. Statements of fees are required to be itemized to show per page costs for copies and the hourly rate of employees and attorneys involved in responding to the request and the actual time spent on the records request. I.C. § 74-102(10)(g). Lump sum costs cannot be assigned to any public records request. *Id.*

Cynthia Sewell's public records request was made on February 15, 2019. The first response for the request for public records about the possible sale of the Les Bois racetrack came on April 3, 2019. By letter dated April 5, 2019, Ada County did provide the information that there were a number of emails to review and that the free two hours of labor provided by statute had been exhausted. In the letter, Ada County estimated that 16.5 additional hours of work would be required with charges for an unspecified number of hours for IT professionals at \$50.00 per hour and for lawyer assistance at \$42.14. There was no cost breakdown beyond the hourly charges and the overall estimate for time required for the work. Ada County asked for payment of \$695.31 before the documents would be handed over. The letter indicated that the attorneys had "reviewed the request and the files." Petition, Exhibit B. On April 11, 2019, Ada County sent another letter, this time reducing the fee to be charged to \$521.48. Petition, Exhibit C. The April 11th letter did provide more detailed information about the work required to answer the request although, oddly, in light of the April 5, 2019 letter it refers to "beginning the review" and "finishing the review" of the requested documents and that a lawyer would look at the documents but it would be on top of the lawyer's regular duties. The clear implication of the

letter is that holding one's breath for a response could be fatal. The letter ended with the advice on the appeal period if Ms. Sewell viewed it as a denial.

A public agency is entitled to charge a fee up front for responding to a public record request that exceeds the free labor and page amounts provided by law. I.C. § 74-102(10)(e) and (12). The Idaho Public Records Act expressly requires that the costs be itemized and bars lump sum costs. I.C. § 74-102(g). The lump sum figure provided in the April 5th and 11th does not meet the statutory requirements. Cynthia Sewell did not treat the letters as denials and did not file a petition to compel the response to the request. On July 23, 2019, she asked for a waiver or a more specific breakdown of the rates, time required, and which staff would be performing charged services. On July 26, 2019, Ada County waived all fees in a "one-time waiver."

The costs related to the Sewell request were not itemized as required by Idaho law. The costs bill did not contain the itemization of who would perform the work, what their rate was and how many hours the particular employee would be required to spend to do it. The Idaho Public Records Act does not have any statutory exemption for attorney review whenever the attorney gets around to it. The Idaho Public Records Act imposes tight deadlines. If the deadlines cannot be met, then there is supposed to be a mutually agreed upon timeline, not a unilateral one. However, since the fees were eventually waived, the cost issue on the Sewell request is moot.

3. Procedure to make a Public Records Request. A public agency may designate a custodian or custodians for agency's records. I.C. § 74-102(16). The custodian includes any public official who has authorized access to public records and their delegates or representatives. *Id.* The public agency may require that requests be made in writing, including by email. I.C. § 74-102(4). The Sewell, Davlin and Swindell requests were made in accordance with the procedure set out on the Ada County website. The request for the 911 calls on the scooter accident was

made to the public information officer, Patrick Orr, but was not made under the formal procedure set out by Ada County. Unless the procedure for a public records request established by a public agency is followed, a petition to compel the disclosure of public records is premature.

4. Procedure for denial. If a public record is not provided because there is a specific statutory basis for an exemption, the Idaho Public Records Act requires the public agency to specify the statutory basis. I.C. § 74-103(4) states: ...[T]he notice of denial or partial denial also shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so." None of the denials or partial denials in this case indicated any statutory basis for the denial or partial denial.

5. Non-statutory denials.

a. Privacy. The Idaho Public Records Act has a number of specific statutory exemptions which address privacy concerns. For example, juvenile records are largely exempt, I.C. § 74-105(2). Records of the Idaho department of juvenile corrections "including records containing the names, addresses and written statements of victims and family members of juveniles, shall be exempt from public disclosure" pursuant to I.C. § 20-533A and I.C. § 74-105(3). Records collected as part of the presentence process are exempt from disclosure. I.C. § 74-105(4)(a)(iv). Many Department of Corrections records are exempt from disclosure. *Id.* Public employee personnel records are exempt from disclosure except for employment history, classification, pay grade, salary etc. I.C. § 74-106 (1). The home address and telephone number of current and retired public employees is exempt from disclosure without the employee's consent. I.C. § 74-106(1) and (2). Voter registration information which includes the voter's physical address, while generally available except for driver's license numbers and date of birth, can be withheld for crime victims or law enforcement officers. I.C. § 74-106 (25) and (30). Victims of stalkers or

domestic violence can have protection under the Idaho Public Records Act from disclosure of their home address. I.C. § 74-106(27) and I.C. § 19-5701 et. seq. Trade secrets and production records are exempt from disclosure along with archeological site locations, records of the books a patron has checked out of a library just to list a few. I.C. §§ 74-107, 108. While Ada County argues that privacy protections are important, it is abundantly clear that the Legislature is also aware of the need for privacy protection and has created specific statutory exemptions to maintain the privacy of many types of records. The concern that Ada County expresses that it might be subject to legal liability for disclosing private information is not persuasive since it has immunity under I.C. § 74-118. There is no basis for this Court to adopt the amorphous privacy exemption argued for by Ada County. The Idaho Public Records Act and the cases interpreting it have recognized that the Legislature has created specific exemptions which are to be narrowly construed. The broad “Privacy” basis for not providing public records information requested as argued by Ada County has no basis in any specific exemption or anywhere else in Idaho law. Ada County’s interpretation of I.C. § 74-104(1) which provides that: “[a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation” justifies its vague and unstructured right to exclude whatever information it deems as private is not supportable. First, if there is a specific state or federal law which precludes disclosure of a public record, then Ada County must cite to it. Secondly, such a broad, standard-less interpretation of I.C. § 74-104(1) would negate the entire Act. The policy of the Act is that records of the public’s business are open to examination by the public. No public agency has a right to create exemptions in addition to that already provided for by the Legislature. When the Legislature has chosen to create numerous specific statutory exemptions, it is a clear indication that they have created what they meant to create. *Bolger v.*

Lance, supra.; *Federated Publications, Inc. v. Boise City, supra.* Whether it would be a good idea to expand the law to include greater privacy protections is an argument which should be made to the Legislature.

Ada County's generic claim of "Privacy" without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." For that reason alone, all documents in response to each request which was denied because of "Privacy" must be provided. Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. The Idaho Public Records Act does not exempt the email or street addresses and names of people who submit public records requests, or ask for interviews with Ada County Commissioners or generally correspond with them. All information requested and gathered in response to Jennifer Swindell's public records request must be provided. All information redacted for "Privacy" alone must be provided to Cynthia Sewell and Melissa Davlin. Ada County's approach to this particular issue where it even deleted the reporter's own email address and emails asking about the status of their public records request because of "Privacy" is so lacking in good faith that it is striking. Whether those redactions were meant humorously, they are improper and not justified by any statutory exemption.

b. Redactions for "Personnel". Ada County's generic claim of "Personnel" as a basis for non-disclosure without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." I.C. § 74-106(1) does authorize the non-disclosure of the names of public employees or their positions. None of the personnel information involved "information

regarding sex, race, marital status, birth date, home address and telephone number, social security number, driver's license number, applications, testing and scoring materials, grievances, correspondence and performance evaluations." Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. While it cited a statutory exception which related to personnel and there are specific personnel information exclusions, none of them apply.

c. Deliberative Process Privilege. A considerable number of records were withheld because of Ada County's assertion of a "Deliberative Process Privilege." Nowhere in the Idaho Public Records Act is there a "Deliberative Process Privilege." The Idaho Public Records Act does protect some of the Legislature's own deliberative processes from public disclosure. Draft legislation and documents relating to it and research requests submitted to Idaho's legislative services office by a member of the Legislature are exempt from disclosure. I.C. § 74-109(1). However, there is no broad Idaho "Deliberative Process Privilege" even though the Legislature was presumably also aware of federal law which recognizes such a privilege. The federal Freedom of Information Act has had a specific exemption for the deliberative process privilege since its enactment in 1988. The purpose of the federal deliberative process privilege is to allow frank debate of options, "suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" or represent views that are being tossed around but are not the final policy of a federal agency. See, *e.g.*, *Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000, 1015 (9th Cir. 2019)(petition for writ of certiorari filed October 25, 2019). The deliberative process privilege has been the subject of considerable litigation. The federal FOIA also establishes a policy of open access to public records with exceptions narrowly construed. The debate in the federal cases over the tension

between FOIA's general principles mandating public access to information and the exclusion of records because of the application of the "deliberative process privilege" reflects considerable concern over the risk of the exception devouring the principle of public access. As Judge Winmill discussed in *Andrus v. United States Dep't of Energy*, 200 F. Supp. 3d 1093, 1105 (D. Idaho 2016), the purpose of the deliberative process privilege is to allow the exploration of possibilities, to engage in debate and explore ideas without fear, at the earliest stages of a policy discussion, that public scrutiny will dampen the discussion. Since the deliberative process privilege has been a part of the federal Freedom of Information Act since 1988, the Legislature's decision not to include it in the Idaho Public Records Act is significant. Had they wanted to include the privilege, they could have done so. Instead, they carved out a narrower exemption for drafts of proposed legislation and communication with the legislative services office. There is no deliberative process privilege in the Idaho Public Records Act. This Court declines the invitation to make one up. Idaho has opted for greater transparency. The decision to narrow the range of public records open to the public belongs to the Legislature.

d. Attorney-Client Privilege. The Idaho Public Records Act provides broad access to all public records. Because government at every level in 2019 maintains all sorts of records on many subjects, the Legislature carved out a number of specific areas where records that governmental entities maintain are not available to the general public. Those are the specific statutory exclusions which a governmental body is required to cite to justify non-disclosure.

The attorney-client privilege and the attorney work product privilege are not specifically protected in any statutory exclusion although they are long-standing privileges in Idaho law. They are referenced in the Idaho Public Records Act in two separate sections: I.C. § 74-105(18) and I.C. § 74-107(11). I.C. § 74-107(11) states that: "nothing in this subsection is intended to

limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic” which seems to imply that the attorney-client privilege and attorney work product privilege do protect public records that fall within their proper focus.

The United States Supreme Court has described the attorney-client privilege as “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The privilege protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Id.* at 390, 101 S.Ct. at 683. The privilege exists to “to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* at 389, 101 S.Ct. at 682.

In Idaho, the attorney-client privilege was first discussed in *Ex Parte Niday*, 15 Idaho 559, 98 P.845 (1908). The Supreme Court recognized that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to the lawyer to obtain legal advice or to the lawyer’s legal advice to the client. Letters disclosed to a third party and not written with respect to the employment of the lawyer nor for the purpose of obtaining legal advice, were not privileged. The Court said:

The rule is intended to promote justice and protect persons who are obliged to disclose their private business affairs to an attorney in order to be advised of their legal rights and duties. It is defensive, and not offensive. It is intended as a shield, and not a sword. The communication must have been confidential and so understood and intended. *Weeks on Attorneys*, § 153; *Sharon v. Sharon*, 79 Cal. 678, 22 Pac. 26, 131; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; 10 Ency. of Ev. 270; *State v. Kidd*, 89 Iowa, 54, 56 N. W. 263.

Id., 15 Idaho 559, 98 P. at 847–48. 2. An attorney cannot, without the consent of his or her

client, be examined as to any communication made by the client to the lawyer or to the lawyer's advice given in the course of the professional employment. I.C. § 9-203. Communications not solely between the attorney and client are not privileged. What matters as to whether a particular communication is privileged under the attorney-client privilege is to whom the statements are made, whether they were confidential and whether they involve the providing of legal advice. Communications by a client or the lawyer about non-legal matters do not fall within the scope of the privilege. See, generally, *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.*, 164 Idaho 738, 435 P.3d 518 (2019); 24 Federal Practice and Procedure § 5478 (Wright & Miller). The name of the attorney is not privileged. Wright & Miller have observed that lawyers employed by the public as public officers such as prosecutors owe their duty to the public at large and the "right of the public to know how the public business is conducted may override the policy the privilege is thought to serve." *Id.* at 6 citing *Coastal Corporation v. Duncan*, 86 F.R.D. 514 (D.C. Del. 1980).

The attorney-client privilege applies to confidential communications between the public attorney and the public agency client for the purpose of giving or receiving legal advice. Public agencies enter into contracts, assess their legal positions in connection with various types of litigation against the public agency and have the same need as private parties for frank disclosure of all of the relevant facts by the "client" in order to receive sound legal advice. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980).

However, in light of the strong policy of Idaho law requiring public disclosure to the public of the records of the public's business, the attorney-client privilege and attorney work product

privilege should be narrowly construed in the context of public agencies. Moreover, where an attorney is just responding to a public records request and is acting in an administrative or clerical capacity and there is neither a confidential communication nor any provision of legal advice, the attorney-client privilege and attorney work product privilege do not come into play. The attorney-client privilege attaches only when the attorney acts in that capacity, not in some other role. See, *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). Simply having an attorney act as the point person to gather a public records request does not convert everything he or she touches to a communication covered by the attorney-client privilege or to attorney work product. The privileges applies to confidential communications made for the purpose of seeking and providing legal advice, not to clerical or administrative functions performed by a public employee who is a lawyer.

Sewell Request/ In-Camera Review. Emails and correspondence from the Special Assistant to the Ada County Commissioners which refer to a prosecutor's name or general subject matter which the deputy prosecutor might be working on do not fall within attorney-client privilege. The fact that legal matters are referred to as being areas of interest or that there are funding needs does not fall within attorney-client privilege. Multiple copies provided to various public employees of Cynthia Sewell's public records request are in no way covered by the attorney-client privilege or work product privilege even though they may have been forwarded by someone working in the Ada County Prosecutor's legal department to another public employee. None of the emails and correspondence Bates stamped 000453-467 fall within any attorney-client privilege nor are they exempt under any other permissible basis. Drafts of letters from legal counsel to the Ada County Commissioners do fall within attorney-client/ attorney work product. Bates stamped documents 000468-000471 are exempt from disclosure. Bates stamped

document 000499 is not attorney-client or attorney work product and must be disclosed. Cover letter and draft legal documents fall within attorney client privilege thus Bates stamped documents 000543-000547 are not subject to disclosure. Legal documents disclosed to third parties lose the protection of the privilege. Bates stamped documents 000567-000572 must be disclosed. Bates stamped document 000619 is not covered by attorney client privilege or work product. Bates stamped document 000620-626 are copies of Cynthia Sewell's public records request and are not covered by the attorney client privilege. Bates stamped document 000627-000633 are not covered by the attorney client privilege or work product privilege. Except for the documents expressly found to be attorney-client or attorney work product, all other documents must be provided since there is no legal basis for their non-disclosure.

Davlin Request/ In-Camera Review. The Court has reviewed all documents in non-redacted form gathered in response to Melissa Davlin's request. Attorney names are not confidential. The body of Bates stamped documents 000023—000025; and 000035 are exempt from disclosure. Bates stamped documents 000043-48 do not fall within the attorney-client privilege and must be disclosed. It is absolutely remarkable that Ada County would claim a privilege for the name of an attorney and the stock confidentiality notice. Bates stamped document 000060 must be disclosed since it does not fall within the privilege. Bates stamped document 000062-67 falls within the attorney client privilege and will not be disclosed. Bates stamped document 000070-74 falls within the attorney client privilege and will not be disclosed. Correspondence about the retrieval efforts to respond to the public records request of Melissa Davlin are not confidential communications related to the provision of legal advice even though a lawyer may have corresponded with the IT expert. The search parameters are not in reference to the provision of legal advice but to the response to the public records requests and are not privileged.

Conclusion

The Idaho Public Records Act mandates broad, timely access to the records of the public's business upon request. A public record can only be withheld if there is a clear and statutorily-grounded justification. I.C. § 74-101(13). The Idaho Press Club has associational standing to bring this petition on behalf of the members of the association who made requests which were denied. Ada County is the properly named party-defendant. There is no basis to dismiss this petition.

Ada County's approach to handling the Idaho Public Records Act requests in this case was troubling. The Act favors timeliness, narrow exclusions and openness; Ada County's approach emphasized delay, unsupportable interpretations of privilege and secrecy. Ada County not only did not follow the Idaho Public Records Act, it acted as though a different Act had been enacted—a reverse image of Idaho law. No public agency is free to create its own Public Records Act. Vague, over-reaching denials for "Personnel" or "Privacy" without citing the Act's specific personnel or privacy protections is not permissible. There is no "Deliberative Process" privilege in Idaho law. While the attorney-client privilege can be asserted for confidential communications between a lawyer and the client for the purpose of legal advice, delegating the administrative/clerical function of gathering public records to a lawyer does not make everything the lawyer touches or copies other employees subject to the protection of the privilege. Ada County's refusal to provide records was frivolous and it has frivolously pursued its positions in this case. See *Hymas v. Meridian Police Dep't*, 156 Idaho 739, 747, 330 P.3d 1097, 1105 (Ct. App. 2014). With the exception of a few records, no privilege applies.

The Idaho Legislature has determined that, in this State, government business must

largely be conducted in public view with quick access to public records. The Legislature did not choose to create any “deliberative process privilege” even though that has long been a component of the federal government’s Freedom of Information Act. With the exception of the request for the 911 call which needed the formal public records request which the Act allows public agencies to require, the Court finds that the evidence is overwhelming that public records were improperly and frivolously withheld. The Idaho Press Club is the prevailing party and is entitled to its attorney fees and costs. The Petition to Compel is granted. The documents must be supplied forthwith.

It is so ordered.

Dated this 12th day of December, 2019.

A handwritten signature in black ink that reads "Deborah A. Bail". The signature is written in a cursive style and is positioned above a horizontal line.

Deborah A. Bail
District Judge