Subject to the approval of the Natural Resources Interim Committee

MINUTES
NATURAL RESOURCES INTERIM COMMITTEE
September 23, 2010
9:30 a.m. to Noon
Capitol Building – East Wing – Room EW 40
700 West Jefferson Street
Boise, Idaho

Cochairman Representative Dell Raybould called the meeting to order at 9:30 a.m. Members present were: Senators Jeff Siddoway and Kate Kelly substituting for Clint Stennett; Representatives Bert Stevenson, Scott Bedke, Donna Pence; and ad hoc members Senator Steve Bair; and Representatives JoAn Wood and Jim Patrick. Co-Chairman Senator Gary Schroeder, Senators Charles Coiner, Lee Heinrich and Dean Cameron and Representatives Mike Moyle and Jim Clark were absent and excused. Staff members present were Katharine Gerrity, Ray Houston and Jackie Gunn.

Others present were: Senator Bert Brackett; Interim Director Gary Spackman and Rich Rigby, Idaho Department of Water Resources; Clive Strong, Steve Strack and Garrick Baxter, Idaho Attorney General's Office; David Hensley, Office of the Governor; Tom Perry, Idaho Governor's Office of Species Conservation; Lynn Tominaga and Brenda Tominaga, Idaho Ground Water Association/Idaho Irrigation Pumpers Association; Jim Tucker, Idaho Power Company; Randy MacMillan and John Simpson, Clear Springs Foods; Benjamin Davenport, Risch Pisca; Brad Iverson-Long, Idaho Reporter.com; Sharon Kiefer and Jim Unsworth, Idaho Department of Fish and Game, Norm Semanko, Idaho Water Users Association; Peter Anderson, Trout Unlimited; John J. Williams, Bonneville Power Administration; Matt Howard, Bureau of Reclamation; Teresa Molitor, Great Feeder Canal System; Jonathan Oppenheimer, Idaho Conservation League and Brian Bishop.

NOTE: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office.

Cochairman Representative Dell Raybould called for a silent roll call and then requested that the Interim Committee minutes for the December 15, 2009, meeting be approved. **Representative Stevenson moved to approve the minutes. Senator Siddoway seconded the motion. The motion carried by unanimous voice vote.**

Cochairman Raybould introduced **Interim Director Gary Spackman**, Idaho Department of Water Resources, to provide the Committee with an update on the Snake River conjunctive management orders.

As a matter of background, **Director Spackman** recounted that in July, 2009, prior to his appointment as interim director, he was presented a set of facts by colleagues at the Department relating to water use and deficiencies in a mitigation plan that was approved

by the former director. He noted that, as they talked through the matter, it was clear to them that the Department would have to issue a curtailment order due to those deficiencies in the plan.

Director Spackman stated that he appreciates the gravity of the orders issued in response to delivery calls by the Surface Water Coalition, which consists of seven surface water entities that deliver to a large number of acres and divert from approximately Minidoka to Milner Dam. He indicated that he would discuss two orders involving the consortium, as well as another relating to spring users.

Director Spackman noted that on September 5, 2008, the former director issued an order finding that there was material injury to the surface water coalition following a hearing by hearing officer, former Chief Justice Gerald Schroeder. **Director Spackman** told the Committee that the former director, in issuing an order determining material injury without including how the injury would be addressed, bifurcated the determination of material injury from the way in which that material injury would be addressed. He said that the former director anticipated issuance of an order addressing the way in which material injury would be addressed, or a methodology order, in the fall of 2008. That order, however, was not issued until June, 2009. In the meantime, the material injury order was appealed to the courts. Judge John Melanson then issued an order regarding the material injury order.

Director Spackman told the Committee that the language of Judge Melanson's order set the stage for the Director's order issued in May, 2010, regarding the Surface Water Coalition delivery call. Quoting from Judge Melanson's Order On Petition For Judicial Review of July 24, 2009, **Director Spackman** stated: "In this regard, although the Director adopted a "wait and see" approach, the Director did not require any protection to assure senior right holders that junior ground water users could secure replacement water." **Director Spackman** noted that in this regard, the judge was talking about reasonable carryover. He went on to explain that there are two components to consider - reasonable carryover and what the in- season demand would be. **Director Spackman** stated that in his opinion, the language applies to both. The Director continued to quote from the order: "While water may be available somewhere, the failure to require any protections for seniors is contrary to the express provisions and framework of the CMR. This does not mean that juniors must transfer replacement water in the season of injury, however, the CMR require that assurances be in place such that replacement water can be acquired and will be transferred in the event of a shortage. An option for water would be such an example. Seniors can therefore plan for the future the same as if they have the water in their respective accounts and juniors may avoid the threat of curtailment."

Director Spackman said that as he reads it, what the order is telling him as the Director, is that the former director had not put sufficient protections in place to protect senior right holders and those protections had to be in place prior to the beginning of the season so there would be assurances in place for seniors about the supply, and for the juniors as to what their possible obligation would be.

According to **Director Spackman**, this reasoning is also supported in Judge Schroeder's April 29, 2008, Opinion Constituting Findings of Fact, Conclusions of Law and Reconsideration. **Director Spackman** told the Committee that the opinion states, in part: "Replacement water in season may occur either by IGWA obtaining lease water before the beginning of irrigation season and transferring the right to the water to the SWC members or underwriting the affected SWC members in their acquisition of the water as needed with a year-end accounting. Either protocol supplies the water in season. Whichever process is adopted, it should be in place at the beginning of the time irrigation water will be applied to the fields so the effect will be the same as would result from curtailment." **Director Spackman** added that this is the standard he was handed by the Court.

Director Spackman went on to say that in the fall of 2009, the Department started evaluating the methods to be used and the things that they should be doing to comply with standards that are to be applied under the conjunctive management rules. He assigned a number of staff to review data within the record that had been created when Justice Schroeder held his hearing. Department staff stepped slightly outside the record due to additional data that they had from 2008 that wasn't available at the hearing, and wasn't part of the record. He said that staff added additional data to the record recognizing that the Department might be required to conduct a hearing, but also recognizing that they needed to consider up-to-date data.

Director Spackman told the Committee that in March of 2010, he issued an order that has been called the "Methodology Order." The Director said that the order finds there is material injury and sets forth the process whereby the Department would determine reasonable carryover and reasonable in-season demand prior to the irrigation season. The methodology employs an April 1 forecast developed by the Bureau of Reclamation and other entities looking at the Heise Gauge on the South Fork of the Snake River. The Director said that this forecast method has been a standard for many years. According to **Director Spackman**, shortly thereafter the Department had to apply the process to the 2010 water year. He stated that they looked at the water supply and determined that the snow pack would likely be the second lowest of record. He added that this was coupled with a very high reservoir carryover from the previous year. The Department took those numbers and applied the methodology. **Director Spackman** said that, at that time, they predicted a shortfall of 84,000 af and the "As Applied Order" was issued on April 29. The Director said that all parties wanted a hearing on both orders but that the Department knew they had to have the orders in place prior to the irrigation season. **Director Spackman** stated that the other anomaly was that April and May were very wet and cold.

Director Spackman said that he made a forecast trying to apply the standards from court orders but that forecasting is always a risky business. He went on to say that people needed some assurances as to what water supplies and obligations would be. On May 17, **Director Spackman** amended his determination and reduced the obligation to 68,400 af. He said that the obligation was reduced due to some sure supplies of water that had been taken by one of the surface water coalition members. Subsequently, in June, following a hearing, **Director Spackman** issued a final As Applied Order that reduced the obligation

to 56,600 af and, as the numbers continued to come in, he issued an interlocutory order in September 2010, in which the prediction went to zero.

Director Spackman said that he had staff review data where they found wild variations in applying the methodology based on what happens in irrigation season. He said the Department understands that predictions at the beginning of the year will never be completely accurate. **Director Spackman** told the Committee that he has to follow the directives and standards set by the court. He added that, in looking at what happened this year, because the ground water users incurred a significant obligation, perhaps this is an opportunity for the courts to look at the standards and determine whether they are really what should be required.

Cochairman Representative Raybould questioned whether the conjunctive management rules need to be revisited to perhaps provide for ground water users to supply water for artificial recharge when water is plentiful and, in turn, build up credits to apply when water is not plentiful, particularly as it pertains to spring users. **Director Spackman** responded that he is almost certain that the rules will need to be amended in some way. He went on to say that he is hesitant to suggest amendment until we see what the courts do. The Director added that recharge is generally recognized as a way in which ground water users can mitigate, the aquifer can be recharged, and ultimately that recharge will result in additional discharge. **Director Spackman** added that recharge that is ongoing is recognized through the modeling process. He said that he is not sure about credits because, through the model, the recharge is simulated and credit is given. He continued that there may need to be some refinement.

Representative Bedke inquired as to when the ground water users made their purchase. **Director Spackman** said that he didn't track all of the obligations of the ground water users but, at hearing, ground water users presented evidence that they had approximately 50,000 to 70,000 af that was obligated and leased. **Representative Bedke** followed up by inquiring whether ground water users have to go to the Director and show receipts and, if not, whether there is enforcement ability related to application of the standards. **Director Spackman** responded that the methodology contemplates that after the as applied order is issued, there is a period of time in which ground water users need to show the director that the quantity of water required is obligated. He said that, at the least, there have to be options in place to acquire the water. The Director said that he was contemplating, when issuing the orders, that ground water users would be developing the contractual ability to acquire the water if necessary. He said that at the hearing, the ground water users actually had signed leases for them to purchase or rent the water, rather than options.

Representative Bedke asked whether all the water the ground water users had obligated will be wasted or whether there is a place where it can be used this year. **Director Spackman** responded that, if we assume 70,000 af was rented at $20 per af, that would be $1.4 million expended for storage water. He added that we know the remaining storage this year is fairly high and there is a climatological prediction that we are on the fringes of a La Nina pattern which brings wet and cold weather over the

winter. **Director Spackman** said that if storage reservoirs fill, the storage water that was rented goes away unless it is put out on the ground for recharge or for some other purpose. He noted that ground water users are not space holders so it will go away unless the people that rented them water hold it. He said that changing the rules wouldn't fully address this issue, in that the issue is much broader due to the way in which contracts are written and the way the rental pool operates.

Director Spackman told the Committee that, with respect to the latest order, signed Friday, September 17, 2010, the Department tried to get it out early so ground water users would know the obligation was not there and could try to work with canal companies to put the water out for recharge or make some other arrangements. He said that he also asked staff to go to those holders of storage water that leased the water to the ground water users and talk with them about the fact that they received $20 per af early, where now it is only $6 per af, and encourage them to look at everyone's best interest.

Representative Bedke inquired as to whether we are in a position to put 70,000 af in the aquifer at some place in the ESPA. **Director Spackman** said that he doesn't know the answer yet, but he thinks they would like water out in lower canals where it gives them the best benefit.

Representative Stevenson, referring to the Blue Lakes call and the purchase of Pristine Springs by water users and the state, commented that there was an assumption the call was satisfied, but now the methodology has been changed.

In responding, **Director Spackman** said that another order was issued by Judge Melanson on June 19, 2009, regarding the spring users. One issue addressed in the order was the refusal of former directors to consider a number of water rights, one owned by Blue Lakes, with a 1971 priority date, and the other by Clear Springs, with a 1955 priority date. According to **Director Spackman**, the former directors had not required administration for delivery of those water rights. The reasoning for nonconsideration is that the rights were developed during a period of seasonal variability, and that the rights were still subject to seasonal variability. He went on to describe how the springs fluctuate over the period of a year. The fluctuation low is normally during the spring. Discharges increase as irrigation water is applied close to the Snake River canyon rim. The flows increase and often have a high in October through December and then they decline again. **Director Spackman** said that there was no requirement that ground water users mitigate for those rights in the previous decisions issued by former directors. He said that part of the rationale for the decision was that there was not sufficient evidence at the time of water right perfection that the flow was always available to satisfy those rights. Spring users appealed the decision through the courts. According to **Director Spackman**, Judge Melanson essentially said that the director improperly shifted the burden of proof from junior users to senior users and there was evidence, through the adjudication and through a license issued to Blue Lakes, that those flows were available and the burden was on the junior users to show that seasonable variability would affect administration to deliver water to the senior users. He said that was the standard handed back to the Department.

Director Spackman told the Committee that he was under pressure to get his order out this spring due to the order. He told the Committee that he had a couple of choices. One was looking at the order where there was evidence in the record that the rights were valid, perfected and there were flows sufficient to satisfy the rights at the time they were perfected. He said that the easy way out would have been to say that the burden was on the junior holders, that the junior holders didn't put any proof on at hearing and the senior holders deserve the presumption that the rights should be satisfied. Instead, the Department wanted to look at what water was available at the time the rights were perfected and what is happening now. **Director Spackman** stated that the Department did a statistical analysis because it didn't have actual data over a long period of time to show what the seasonable variability was. He said that in looking at the statistical models, he determined that the rights of Blue Lakes and Clear Springs were available year round when appropriated, and furthermore, diversions of ground water users were materially injuring those rights now. **Director Spackman** said that a hearing regarding the order is scheduled for January.

Representative Stevenson stated that his concern is that when the state and the ground water users put up the money for the purchase of Pristine Springs, it was assumed that would satisfy the call. Now two to three years later, the game plan changes. He told the Director that he realizes the Director is looking to the court's order, but what has occurred suggests that the rules can be changed at any time and, even though a hearing is scheduled, the perception is real. **Director Spackman** responded that he also feels frustration as he goes through the process. He added that the Department looked at everything it could before issuing the order.

Senator Siddoway said that he shares some of the same concerns regarding the springs. He inquired as to how far back we will have to look. He questioned whether we will be going back to the 1950's, before any ground water users were pulling water from the aquifer. **Director Spackman** responded that he knows arguments are set before the Idaho Supreme Court for the spring cases in December of this year where he hopes some of those questions will be answered and the Department will have a better directive. The Director stated that he knows the July 19th order that established additional obligation is significant, that he doesn't know where the water will come from, and that it is sobering to him.

Senator Siddoway also asked what acreage has the order called into curtailment and about quality of water issues for the fisheries operations. He questioned whether the Department gets involved in negotiations as to what water will suffice and whether a filtration system could be used to filter the water and make it less expensive and intrusive on the water users. **Director Spackman** responded that Mr. Rich Rigby from the Bureau of Reclamation is working for the Department and is being paid by the Bureau, and they are trying to find solutions to the calls and for these kinds of projects.

Representative Bedke asked whether we should expect new standards from the Supreme Court and also inquired about the issue of futile calls. **Director Spackman** stated that the issue of futile call has been raised and is making its way through the courts in relation to

the surface water users. He said that the intent of the methodology order is to establish an obligation before the irrigation season so that users know what they are obligated to provide and by so doing the parties can then react in how they operate and irrigate. He added that there is some skew in favor of seniors because part of the standard is that the seniors should not bear the burden of risk. **Director Spackman** said that anything else would conflict with the prior appropriation doctrine. He said that the obligation is intended to be fixed in the spring, but we don't know what the courts will do with it.

Representative Bedke stated that the take home message is that the methodology orders that will be issued on April 1 from now on probably are not going to be the stimulus that pushes the futile call issue through the courts or down the road. **Director Spackman** responded that the intent of both the methodology order and the as applied order is to set the obligation, require the commitment, and if the commitment is not made, then there is a curtailment at the beginning of the season.

Mr. Clive Strong, Office of the Attorney General, was the next speaker to address the Committee for an update regarding the ESPA CAMP. **Mr. Strong** initially commented on Director Spackman's orders. He stated that it is important to remember that we are in an adversarial system with senior water right holders and junior water right holders, both of which have protectable interests and property rights they are trying to advance. As issues come through the Director, they are framed through that process. He said that it is not that the Director is picking and choosing the issues, but rather answering questions as they come forward and this creates some uncertainty. **Mr. Strong** noted that the only certainty is the uncertainty as to how this process will evolve, ultimately requiring a decision by the Idaho Supreme Court. He indicated that in December, the first of three relevant cases will be heard by the Supreme Court. He went on to say that when we get some clarity as to rights and responsibilities it will help people order their relationships in a way that is predictable.

As to the CAMP funding process, **Mr. Strong** reminded the Committee that since the last session, they have been working with a proposal by the CAMP Committee to develop a funding mechanism centered on three key principles. Those principles involved the implementation of funding through a fee rather than a tax, without creation of a new entity, with the collection of fees either through water districts or through counties.

Mr. Strong recounted that previously, Mr. Phil Rassier, as counsel for the Department of Water Resources, developed draft legislation to be considered by legal representatives for the parties. He noted that concerns were raised about the proposal that would have imposed a uniform fee across the ESPA to fund phase one of the CAMP, estimated to be in the $70 to $100 million range. Given those concerns, there was direction to go back through the process in terms of how to fund and implement the CAMP.

Mr. Strong told the Committee that he participated with a group, composed of Senator Bair, Representative Bedke, staff and stakeholders, who met on a number of occasions to look at funding mechanisms. He stated that there were some immediate conclusions drawn. In an ideal setting, the perfect solution would be to have a fund of money that

could be used to select projects that would provide benefits throughout the aquifer, in an integrated way, that would provide the maximum, optimum benefit in terms of reaching a water supply balance. However, they found that there was a general, appropriate reluctance from the water user community to buy into a fee that would generate a fund of $70 to $100 million to implement projects that have yet to be defined. **Mr. Strong** stated that we have goals, but how to achieve those goals is uncertain. The questions of what the money would be used for, how benefits would be distributed, and in what order benefits would be distributed, created a reluctance to go forward with a broader, overall fee. He told the Committee that a lack of consensus on solutions and also a lack of consensus on the definition of the problem remain as impediments. **Mr. Strong** stated that the bottom line conclusion coming out of the meetings was that, absent a clearly defined implementation plan, where projects are defined in a way that people can evaluate the benefits and burdens associated with projects, it is unlikely a broad funding formula can be developed for the entire ESPA.

Mr. Strong stated that the second conclusion reached was that the method for collecting fees would not work in the way they thought it might. He told the Committee that if fees were collected by the counties, there would be an additional burden on the counties. In addition, in the event of failure to pay, there would be a shifting of responsibilities because when taxes and fees are not paid at the county level, they are prorated. He added that collection of the fee could be taking away from other funding sources within those counties.

Mr. Strong said that another concern involves the fact that in trying to get buy-in, there needs to be a consensus in terms of where to order and use the moneys. He said that there seems to be regional consensus in certain areas, but not basin-wide consensus. According to **Mr. Strong**, it was determined that they had to look at other alternatives.

Mr. Strong told the Committee that it is recommended that a better approach may be to work from the bottom up, rather than from the top down. Rather than looking at it as a public works project, **Mr. Strong** said that we need to ask how to develop consensus to move forward. He added that, as the cases proceed through the process, there will be more clarity. **Mr. Strong** stated that the message is, while we don't have an answer today, we think we have several pathways that provide opportunities. He also noted that Mr. Rigby will address a number of other alternatives.

According to **Mr. Strong**, the Governor and some Legislators met with water users and decided to go forward with some projects this year. He said that over the spring and summer, the Implementation Committee met to develop some recommendations that are now coming forward to the Idaho Water Resource Board. **Mr. Strong** said that they discovered a problem that has to be dealt with involving the moneys contemplated for use in implementing the projects. Those moneys, he said, are located in the Revolving Development Fund pursuant to Section 42-1750, Idaho Code, where moneys involving Pristine Springs are held. He went on to tell the Committee that the development fund was intended as a revolving fund, used to loan money out which is then paid back. In terms of the CAMP, a grant program is contemplated. He said that the disconnect is that

the moneys are in an account that, if they are granted out, have to be paid back, as opposed to the Secondary Aquifer Planning, Management and Implementation Fund pursuant to Section 42-1780(2), Idaho Code, which contemplates the funding of the CAMP. **Mr. Strong** said that a funding opinion letter they issued says that, to get moneys in the correct account, they need to go through the appropriation process to move the Pristine Springs money into the secondary account so it can be used for implementation of projects.

Mr. Rich Rigby, Idaho Department of Water Resources, was the next speaker to address the Committee. He reminded the Committee of some of the history relating to the ESPA. He stated that there are about 100,000 acres that are facing curtailment associated with spring calls unless proper mitigation can be provided. He added that, in a worst case scenario, in the second year of a drought, associated with the surface coalition call, that impact could be significantly greater. **Mr. Rigby** noted that spring users, surface water users, and some ground water users are all experiencing shortages to their water supply. He said that these problems didn't occur due to one action or set of actions, no one action or set of actions will solve the problems, they didn't happen overnight and they will not be solved overnight. He said that solutions will cost money and effort and that millions of dollars have been spent each year over the last five years relating to these water issues.

Mr. Rigby said that there is not presently an aquifer-wide acceptance of one approach. He said that there are, however, pockets geographically where people are working together to solve their problems and that we all have a stake in the outcome.

Mr. Rigby told the Committee that the CAMP Implementation Committee ran into a snag regarding funding aquifer improvements and they assigned a Funding Committee to work on these problems. From that group, a smaller Drafting Committee was established. The Drafting Committee tried to be realistic as to budget realities, regional politics and needs. **Mr. Rigby** went on to say that there is tension over how big an entity should be and that there was a problem for some with a region-wide group. He added that the conventional wisdom is that the bigger the entity, and the more resources it has, the easier it is to tackle problems. On the ESPA, however, there are not sufficient communities of interest to combine into one organization.

Mr. Rigby stated that on the ESPA, among the surface water entities, there are numerous irrigation districts, canals companies, ditch companies and other entities that operate surface systems. Ground water users are organized differently because they don't need a delivery organization. There are nine ground water districts on the ESPA. **Mr. Rigby** noted that these districts coordinate activities of the ground water districts to help them achieve common purposes. He added that it appears these nine ground water districts possess the necessary legal authority to work with others on aquifer improvement projects. **Mr. Rigby** stated that surface water entities are not as well-equipped.

Mr. Rigby stated that four options were considered by the Drafting Committee. Those options were the original CAMP model with an opt-in approach, the original camp model, where everyone was deemed to be in and subject to the fee, with an opt-out

option, the creation of aquifer improvement districts, and the use of joint powers agreements.

Mr. Rigby went on to tell the Committee that after review, there are two options that the Drafting Committee is recommending for further consideration. Both options revolve around the creation of aquifer improvement districts and will be brought before the CAMP Implementation Committee in October.

Mr. Rigby stated that both options involve smaller geographic areas with more localized districts. It is hoped that this approach would allow districts to achieve a common vision as to needs, priorities and funding allocation. He said that the first option would involve a series of separate surface water organizations across the ESPA and, if that proves not workable, they could default to pilot projects. He added that we have to create the opportunity for success, start doing things and make progress.

In further addressing the reason for the change in approach, **Mr. Rigby** said that first and foremost there is not uniform agreement across the ESPA and second, there do appear to be geographic areas where progress is being made and can be made. He said that we have a choice between continued stalemate or something with a chance for success. He added that we have to deal with scarce resources and we don't have the luxury of putting money into projects that don't have a clearly identified need that is being met. In describing the two options in more detail, **Mr. Rigby** reiterated the following:

> Option 1: There are nine existing ground water districts that are already equipped to act. With respect to surface water districts, there are nine members of the Committee of Nine that covers all surface water use on the ESPA. He said that, perhaps, each area represented by a member of the Committee of Nine is appropriately autonomous and has a community of interest to become its own district. Some feedback suggests we don't need nine. He indicated that these entities could be empowered to enter into joint power agreements with ground water districts and to assess members for costs of projects. He said that consideration is being given as to how to include spring users into an organization. Under this model, entities could work together under joint power agreements to work on projects and to approach the Idaho Water Resource Board for grants or loans. The extent to which ground water users get mitigation credits for projects would be a matter to be addressed as the projects are developed.
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> Option 2: Develop a pilot project and find a place where people are working together to give them the ability to move forward with projects and make progress. He said that it may be necessary to draft legislation for this option to allow proponents to levy assessments, issue bonds if projects require a significant capital outlay, and approach the Board for loans or grants. In addition, he said that ground water user mitigation credit would have to be addressed by participants.

In summary, **Mr. Rigby** stated that the state has the capacity to make it easier to pave a pathway for the parties to work together.

Representative Patrick inquired as to whether any part of the ESPA has stabilized or whether it is changing, either down or up. **Mr. Rigby** responded that the aquifer responds differently in different areas and we have to face the reality that climate makes a big difference. He said that we just went through a huge drought and that has caused problems which are not equal across the entire aquifer. **Representative Patrick** followed up by asking what areas have improved or stabilized. **Mr. Rigby** stated that we can identify the areas where there are serious problems. Those areas are where water calls have taken place, the area along the Thousand Springs, and the surface water coalition call is affected by the stretch from near Blackfoot to Milner Dam. **Mr. Rigby** said that he has also heard that there are some localized problems with perched aquifer levels in Rigby, for example.

Representative Bedke stated that he believes that as issues become clearer, and the Supreme Court decisions are made, the problems will be very well-defined and those problems are going to be local in nature. He added that everyone will want to know what is in it for them in terms of the money they will be spending. He thinks that while he was disappointed that there wasn't an easy solution, he is relatively confident that as the problems become more and more defined the entities will come together.

The next speaker to address the Committee was **Mr. Steve Strack**, Office of the Attorney General, for an update regarding the federal decision to return wolves to the endangered species list as well as an update on three additional cases.

As to the delisting case, **Mr. Strack** told the Committee that Judge Molloy basically held that when you have a distinct population segment, as we do in the Northern Rocky Mountains, that you can't split listing along state lines. Although the plaintiffs raised nine issues in that case, the judge issued his decision on only that one issue. According to **Mr. Strack**, the deadline to appeal the matter to the 9th Circuit is in early October. The state is waiting to hear whether the United States will appeal. **Mr. Strack** said that there is some information that they are leaning in that direction, but they don't have confirmation yet. In the event they do not appeal, the state is prepared to do so. The state of Montana is also prepared to appeal the matter. **Mr. Strack** noted that there is the potential for Judge Molloy to also determine the remaining eight issues, and that it is conceivable that there could be a series of cases going forward. He added that they are also looking to our Congressional Delegation to see whether there is a possibility of a legislative solution to the problem.

Mr. Strack told the Committee that there is another case in front of Judge Molloy relating to the 2008 modification of the 10j rule which eased standards for removing wolves to address impacts on ungulate populations. Plaintiffs challenged that modification, arguing that the easing of the standards is not consistent with conservation of the gray wolf population. He said that our position is that if there are more than 150 wolves in each of the three states, that is all you need to comply with original plan. The matter is on summary judgment and briefing will be completed by October 7. The hearing has not yet been scheduled. **Mr. Strack** said that even if we meet that

conservation standard there is also another NEPA question as to whether they had to do an environmental impact statement for this type of modification of the rule.

Mr. Strack told the Committee that we also have a case going on in the District of Idaho regarding Wildlife Services and their compliance with NEPA. Wildlife Services has been removing wolves for Fish and Wildlife and the state of Idaho since 1994, but they have never completed an environmental assessment or an environmental impact statement for those actions. **Mr. Strack** said that Western Watersheds and the Wolf Recovery Foundation are alleging Wildlife Services is in violation of NEPA. The plaintiffs want to stop all wolf control actions in Idaho until Wildlife Services is in compliance. Wildlife Services has completed an environmental assessment which is out for public comment, but that has not satisfied the plaintiffs to date. According to **Mr. Strack**, the case is in flux in that the environmental assessment was prepared when wolves were delisted. Now that they are back on the list, it is somewhat unclear as to what agency will be approving wolf control actions in Idaho and what the standards will be. He said there may be some delay in preparation of the environmental assessment because of this. A hearing is scheduled for December.

The final case that **Mr. Strack** addressed involves the Wyoming litigation before Judge Johnson where the state is challenging the delisting rule, but only as to those portions that found that the Wyoming Wolf Management Plan was not consistent with ESA standards. They have asked the court to remand the rule to Wildlife Services to approve the plan as it exists. Idaho is not involved in this case. The case may be moot because there is currently no rule to remand, having been vacated by Judge Molloy.

Mr. David Hensley, Office of the Governor, also addressed the Committee relating to the issue of wolves. **Mr. Hensley** told the Committee that no one was more frustrated with Judge Molloy's decision than the Governor. He stated that the Governor's frustration has been expressed in a letter to Secretary Salazar asking him to work with the state to do several things. **Mr. Hensley** said that first and foremost, we need to define the state's role going forward in the interim until we reach delisting and can manage wolves again under our approved state plan. In addition, he stated that we need adequate federal funding for the program itself so we don't have to use sportsmens' dollars in the management of the species. He added that the state also must have adequate flexibility to address the impact wolves are having on our ungulate herds.

Mr. Hensley told the Committee that the state is trying to enter into a new MOA with the federal government and will be sending Secretary Salazar a draft this week outlining the provisions that we think are necessary for the state to have a role in participating in management until delisting. He said that we are also engaging the Congressional Delegation on a congressional fix and are prepared to appeal Judge Molloy's decision. The state is proceeding with an administrative approach, a congressional approach and a judicial approach to try to resolve the issues at this time and to reach the Governor's goal of restoring state management as quickly as possible under our approved plan.

Mr. Hensley went on to say that the Governor has enlisted both the Office of Species Conservation and Fish and Game in the drafting process of the MOA and also with our Congressional Delegation to present some options that can help us in the long term. He said that there has also been an effort by some Legislators to go to Wyoming to talk with them about the concerns Idaho has, all in an effort to restore state management. He added that at this time the Governor is very concerned and engaged, and has set a deadline of October 7 to hear back from Secretary Salazar in terms of an agreement for the state; not to draw a line in the sand but to provide the Secretary with the assurance that we are willing to work to come to an agreement and that time is of the essence.

Senator Kelly asked what will happen if we don't hear back from the Secretary by October 7. **Mr. Hensley** responded that the hope is that by October 7 we will have an agreement with the federal government much like the MOA between Secretary Norton and Governor Kempthorne, which was signed in 2006, outlining the responsibilities and role of the state. He said that absent that, the Governor, OSC and Fish and Game will determine how the state will participate going forward.

Representative Raybould asked Mr. Hensley whether he perceives the need for legislation in the upcoming session. **Mr. Hensley** responded that the problems really lie in federal law and that it would be difficult for a state legislature to legislate a solution in that respect. He said that if it becomes necessary, they will bring it to the attention of the Legislature. He reiterated that at this time, they are focusing on an administrative approach, a congressional approach and a judicial approach.

Representative Stevenson asked whether there is a reason the state has never filed suit against the federal government for the value of the ungulates being lost based on values established through poaching laws. **Mr. Hensley** responded that we know the numbers and have an estimated value. He said that at this point, their path forward is to try to create an agreement that is good for Idaho until delisting and, if unsuccessful, then that approach could be on the table.

Ms. Sharon Kiefer, Idaho Department of Fish and Game, was the next speaker to address the Committee relating to an update regarding wolves in Idaho. The Committee was provided with a handout entitled "Wolf Management Update." **Ms. Kiefer** told the Committee that in the absence of the 2009-2010 hunting season, the Department estimates that numbers would have increased roughly 13% last year. Hunting season had the objective of stabilizing or reducing the numbers of wolves in Idaho.

Ms. Kiefer said that the Department has found wolf predation to be the leading cause of mortality for elk in the Lolo, Selway and Smoky Mountain elk management zones. She went on to tell the Committee that the Department received a categorical exclusion from the USFS to land a helicopter in the Frank Church River-of-No-Return Wilderness to opportunistically dart, capture, and radiocollar wolves encountered incidental to elk population surveys. They were able to capture four wolves during the survey in early March, 2010.

Ms. Kiefer stated that during the hunting season beginning in 2009, 181 wolves were taken legally by hunters and seven were killed illegally or incidentally. She said that hunters demonstrated they could be effective at taking wolves in open topography with high hunter density and/or high road density.

Ms. Kiefer told the Committee that the Department has taken more aggressive responses to depredations, including removal of entire packs. She said that, in response to the successful hunting season and more aggressive actions, livestock losses have declined in 2010. She also informed the Committee that, effective in September, Defenders of Wildlife ended their program to compensate ranchers for livestock losses confirmed to have been caused by wolves. The Office of Species Conservation manages the state wolf compensation program.

Ms. Kiefer recounted that in August of 2010, Judge Molloy relisted wolves in Idaho and Montana. She said that wolves north of I-90 are fully protected and private individuals cannot shoot wolves to protect their stock on public or private land. Wolves south of I-90 are classified as a nonessential, experimental population. Livestock and pet owners/operators can kill wolves in the act of attacking their animals and can be provided shoot-on-sight permits following confirmed losses.

Following Judge Molloy's decision, **Ms. Kiefer** noted that the Commission adopted a resolution to maintain the Department's role as lead wolf manager with conditions including restricting use of state license funds for enforcement and other purposes, to support an appeal of the judge's decision and to seek federal legislation to return full management authority to the state. She also stated that the Department received about 2,000 comments from the public on a proposal under Section 10j of the ESA to reduce wolf numbers in the Lolo elk management zone to address unacceptable impacts on the elk populations. A final proposal will be submitted to USFWS on September 23.

In response to a question about payments for depredation by **Representative Wood**, **Mr. Tom Perry**, Governor's Office of Species Conservation, responded that the state still has some federal funding. Every year OSC has about $100,000 set aside to reimburse livestock producers. He said that the Defenders of Wildlife were paying for confirmed kills and were also paying half for probable kills. Now that they are no longer paying, this will create a burden, but in the immediate future he believes they will be alright. He stated that they also have another fund called the Wolf Livestock Demonstration Project, through which the state received $140,000 this year. He added that in using this money, the state has to have a 50% match but they can use range rider time, Department time, etc., for the match. Going down the line, he said that the fund will get pinched more and more. Through the MOA they hope to receive a steady stream of funding for producers.

Representative Wood asked what kind of cooperation the Department has with USFW. **Ms. Kiefer** responded that Wildlife Services has been providing depredation control services, but the state has had lead management agency status and has been directing

Wildlife Services to take control actions. She said that we are trying to keep that in the MOA the Governor is working on.

Senator Siddoway commented that payments for losses do not come close to fully compensating people. **Mr. Perry** responded that is absolutely true. The state managed fund does not keep pace with the depredations that occur. He said that last year they paid 48 cents on the dollar. This year they don't know what the payment will be. It will be less due to Defenders of Wildlife backing out on their payments. **Senator Siddoway** also said this might be a time to sue the federal government to force them to remove the wolves that the state did not agree to. He went on to add that Idaho agreed to ten packs in each of the three states and now all of the states have far in excess of ten packs.

Representative Stevenson moved for adjournment with a second by Senator Siddoway. The motion passed by unanimous voice vote. The meeting was adjourned by **Cochairman Dell Raybould** at noon.