MINUTES
Approved by the Committee
Natural Resources Interim Committee
Wednesday, September 17, 2014
8:30 am to 5:00 pm
State Capitol - Room EW42
Boise, Idaho

Co-chair Senator Monty Pearce called the meeting to order at 8:30 a.m. Members present were Co-chair Representative Dell Raybould, Senators Steve Bair, Jeff Siddoway, Lee Heider, Michelle Stennett, Speaker Scott Bedke and Representatives Mike Moyle and Donna Pence. Ad Hoc Members present included Senators Dean Cameron, Bert Brackett and Roy Lacey and Representatives Paul Shepherd and Grant Burgoyne. Representative Marc Gibbs and Ad Hoc members Senator Shawn Keough, Representatives JoAn Wood, Ken Andrus, and Frank Henderson were absent and excused. Staff members present were Katharine Gerrity, Elizabeth Bowen and Toni Hobbs.

Others present included Bert Stevenson, Idaho Water Resources Board; Ron Abramovich, NRCS Snow Survey; Sharon Kiefer, Virgil Moore, and Don Kemner, Department of Fish and Game; Brent Olmstead, Milk Producers of Idaho; Don Smith, Dredge Miner; Bryan Hurlbutt, Advocates for the West; Jeffrey Root, Midas Gold; Elli Brown, Veritas Advisors; Tyler Mallard, Risch Pisca; Russell Westerberg, Rocky Mountain Power; Aaron Golart and Cynthia Clark, Idaho Department of Water Resources; Marie Callaway Kellner and Justin Hayes, Idaho Conservation League; Tracy DeGering and James H. Werntz, Environmental Protection Agency-Idaho; Jonathan Parker, Holland and Hart; Pat Barclay, Idaho Council on Industry and Environment; Colby Cameron, Sullivan & Reberger; Dustin Miller and Sam Eaton, Governor's Office of Species Conservation; Sarah Higer and Rich Hahn, Idaho Power; Neil Colwell, Avista; Norm Semanko, Idaho Water Users Association; Chris Iverson and Andy Brunelle, Forest Service; Russ Hendricks, Farm Bureau; and Lisa Smith.

NOTE: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office and are also available online at the Legislative Services Office website, http://www.legislature.idaho.gov.

The first speaker to appear before the committee was Mr. Ron Abramovich, Water Supply Specialist, USDA, NRSC Snow Survey, Idaho. His presentation was in regard to water supplies in 2014 and an outlook to 2015.

Mr. Abramovich advised the committee that if they understood what had happened in 2014 it may provide insight into what could occur in 2015.

He began by reviewing a forecast from Andrew, at the Weather Centre, which showed a warm spot that had developed off the Pacific Ocean last January, and was still present. This created a high pressure ridge, which caused the blocking ridge that kept storms from coming into the Pacific Northwest, and set the stage for the previous winter. This forecast also indicated that there was a distinct cold and warm spot off of the cost of Greenland. He noted that if that continues it may cause a major buckling of the jet stream, which would indicate there would be cold air over the Eastern and Central United States similar to last year's conditions. He said that the early bird forecast calls for colder than normal temperatures in the Mid-West and East, and slightly warmer than normal conditions in the Northwest due to the ridging off the coast of Washington. He added that Andrew's precipitation forecast at this time is not definitive but shows that it may be normal to slightly above average in our area.

Mr. Abramovich explained that in studying weather, the key is to understand the teleconnections, or climatic indexes, and their correlations and influence on current weather, snowfall, stream flow and more. The two primary teleconnections are the Pacific Decadal Oscillation (PDO), which changes every 20 to 30 years, and El Nino, or the Southern Oscillation (SOI), which flip-flops every

three to five years. He indicated that the SOI is more a measure of barometric pressure in the South Pacific Ocean, and sets up the trade winds, and that El Nino is a measure of Sea Surface Temperature (SST). He stated that these two normally work together and are in agreement; however a few years ago they were not always in agreement. He said that the key last year was the North Atlantic Oscillation (NAO) which threw a lot of meteorologists a curve ball as it went negative for a few months, and in May was declared back into the positive phase which opened the gates for storms to come in to our area.

Mr. Abramovich discussed the historic PDO cycles, and explained that in its cool phase it could have influenced the cooler weather that we have seen the last few years, and the abundant Salmon returns that live off of the colder water. He indicated that about 90% of the time the Coeur d'Alene River stream flows will be above average during the cool phase, and below average during the warm phase.

Mr. Abramovich told the committee that in our area it is normally wetter during La Nina years, and drier in El Nino years, and this winter there will likely be a slight El Nino. He noted that when these are in the extremes it is easier to make more accurate predictions. In discussing this he also explained that monitoring the weather today has gone global, so they are looking at what influences the weather patterns around the world. He then gave some examples of the models which some forecasters use and how close each came to being correct for the winter of 2013-2014. He cautioned the committee not to believe the first weather forecast they hear, but to wait until they have heard the same, or similar forecast, from two or more unrelated sources. He also pointed out that research is showing that more of our winter annual moisture is coming in fewer, but bigger, storms.

Mr. Abramovich indicated that sometimes the rate of change is the key to understanding what is happening. He said that if things change slowly they are able to figure them out and understand them. He went on to say that last year, a very large volcano was discovered in the Pacific Ocean which could have a massive effect if it goes off. He said that other factors that could influence the weather are some new islands developing off of Japan, a volcano near Iceland that they are watching, and the Arctic ice cap which grew by 29%. He explained that a reservoir of cold air allowed the ice cap to grow, which is a positive sign for those who would like a repeat of last winter.

Mr. Abramovich discussed several factors which he noted contributed to the 2014 water supply. The first, in January, were the 100 mph winds at Soldier Ranger Station that damaged the snow pack. Then later in January, the PNA started to go negative which brought moisture into our area. Also the SOI value went above 50 which would signal abundant moisture. He indicated that there is no fool proof method, but this is starting to show agreement with some of the longer term weather forecasters.

Mr. Abramovich advised that persistence is still the best forecast and wins in these types of weather patterns. In other words, he said, what you see is what you get until it changes, and you can't always predict when it is going to change. He then went through some other factors which influenced last years' water supply including precipitation in April which went from 50% to 90% of average in different portions of the state, and precipitation in May which was 50% of normal in the Pacific Northwest. He indicated when the May precipitation is low it also cuts down on the run off.

He then explained that for the upcoming winter they will continue to watch the persistent warm pool in the Pacific Ocean and the warm waters in the area west of Greenland. Referring back to the forecast from Andrew at The Weather Centre he said he would predict a cold spell in the Central U.S., and warm temperatures in the West. The precipitation outlook is still cloudy so it is currently a mixed bag across the county with normal to above normal precipitation in our area. He also reviewed a comparison of stream flow runoff between 1959 and 2014 and indicated that it was amazing how similar they were, and explained that is what they are currently looking at for this year.

Senator Siddoway said that it sounded like between the warm years, or the drought years, the water supply was lower. He asked if that correlated with the theories on global warming and the size of

the ice cap. Mr. Abramovich said that a warmer PDO, versus a cooler PDO, does correlate with the winter snow fall and stream flow run-off. He said that some think that they shift over time. He explained that there is still probably the same amount of water available; it is just available in different locations. He said that where that water is, and how it relates to theories on global warming, were not questions he could answer.

Senator Brackett indicated that things that happen many miles away can have an immediate effect on Idaho, and asked Mr. Abramovich to comment on the prospects for a drought in California. Mr. Abramovich said that California is looking towards El Nino so conditions will favor a slightly above normal storm track through California and into the desert southwest. He also indicated that they did not have much moisture in the ground so they will need a few wet years to fill up the reservoirs.

Co-chairman Pearce asked Mr. Abramovich to talk about the effectiveness of cloud seeding and how our surrounding states feel about our activities. Mr. Abramovich said that he has seen studies that show it can increase the water content in the snow pack by 5 to 15%. He indicated that right now Idaho Power is partnering with the National Center for Atmospheric Research to do a detailed analysis of the benefits, or negative aspects, of cloud seeding. In Wyoming they are comparing storms that are seeded and not seeded, and are seeing early results of about a 10% increase in water content in the seeded storms, with no negative effects of the silver iodine. He indicated that cloud seeding is also occurring in the Bear Lake area as well as in the Sierra Nevadas.

The next speaker was Mr. Donald Smith, providing a miner's perspective of suction dredge mining in the state. Mr. Smith explained that his first battle regarding suction dredge mining came in 2000 when the National Marine Fisheries Service shut down the Salmon River to suction dredge mining. He indicated that before the season opened, the State of Idaho allowed them back into the water under a new program that included consultations and a declaration by each miner as to where they would be operating. He said this was the beginning of the letter permit process. He advised that the consultations did not last very long, and recalled the last meeting where there was a disagreement with the biologists as to how the salmon get to the ocean.

Mr. Smith noted that although the consultations ended, the miners continued to meet with the staff of the Idaho Department of Water Resources annually, under the letter permit. He said that they did, however, go back to a more open system where the miners would advise them where they wanted to work their dredges, and at the end of the season they were to report if they had worked anywhere else.

Mr. Smith indicated that in February of 2012 he filed an exploration/location with the Idaho Department of Lands to lease a ½ mile strip of riverbed in the Salmon River. He said that in the spring of 2012, the EPA opened a 30-day comment period for rulemaking of the National Pollution Discharge Elimination System General Permit for Small Scale Suction Dredge Mining in Idaho. Although those commenting indicated that they wanted a public hearing, the EPA decided in the summer of 2012 to go ahead with the final rule without a public hearing. Mr. Smith additionally indicated that he did not believe he needed an NPDES permit as he was not operating a municipal sewer treatment plant or manufacturing with chemicals that needed treatment.

Mr. Smith then spoke briefly about the Administrative Procedure Act which governs the way in which administrative agencies may propose and establish regulations. He indicated that the first rule in rule-making is that the rule be science-based, and that to date the EPA can only say that suction dredge miners "could" affect listed species.

Mr. Smith also discussed what are known as the Tulloch Rules, which have attempted to define the scope of the Clean Water Act jurisdiction over excavation activities in waters of the United States. He said that even though both of these rules have been invalidated by the courts, the NPDES for Small Scale Suction Dredge Mining in Idaho is based on these rules.

Mr. Smith advised that under Section 402 of the Clean Water Act, an NPDES permit is required for the discharge (i.e. addition) of a pollutant from a point source into waters of the United States. He indicated that all four of these criteria must be met before an NPDES permit is required. He further indicated that the courts have ruled that addition means from the outside world, in other words adding something to the water that wasn't already in the water. He also explained that Judge Laurence Silberman has presided over some relevant cases and has provided a standard regarding what deposits can be regulated and what is incidental fallback. He noted that under that standard there are two primary factors. The first is the time that the material is held before being dropped back to earth, and the second is the distance between the place where the material is collected and the place where it is dropped. He pointed out the in suction dredge mining nothing is held, other than the heavies, and everything else is passed through and dropped essentially in the same place where it was seconds before.

Mr. Smith briefly discussed the status of dredge mining in the surrounding states, and pointed out that Idaho, with the NPDES through EPA Region 10, is the only state with this particular permitting scheme.

In concluding, Mr. Smith said that he would like to challenge the jurisdictional authority of the EPA to regulate suction dredge mining in Idaho on the grounds that the activity adds nothing into the waters of the U.S. He said that he is also asking for rejection of the EPA's revision of the Clean Water Act because he believes there is no apparent reason to do so.

Senator Siddoway asked if the material that came out of the back of a dredge left the river muddy. Mr. Smith stated that the plume from the back of his dredge would be localized to his particular area, would dissipate quickly, and would not be noticeable in the river twenty feet from where he was operating. Senator Siddoway asked if there were particular times during the year when dredge mining was allowed. Mr. Smith answered that there used to be times when they were allowed to dredge which had to do with the seasons, however now the EPA has completely prohibited suction dredge mining in the Salmon River. Senator Siddoway asked if the siltation would end up on any redds that were in the river behind a dredge, and if the permits dealt with that situation. Mr. Smith answered that there are only a few rivers that are still open to suction dredge mining; however he believed that natural occurrences such as spring run-off or summer storms that bring mud into the rivers actually caused more damage than man-made events.

Senator Siddoway asked how big the dredge mining industry is in Idaho and how many rivers are open to the miners. Mr. Smith said that the open rivers he was familiar with were Grimes Creek, Mores Creek, the South Fork of the Payette, the Salmon River, the South Fork of the Clearwater River, Lolo Creek in some seasons, and in some minor tributaries in the headwater of the Clearwater River. He stated that he has heard reports that there are other places but he is not familiar with those. He indicated that other than people who dredge recreationally there are very few people who seriously get into the water and dredge for gold in Idaho.

Speaker Bedke asked if there was an inconsistency in the way the EPA applied the permitting process across the states, and if it was more restrictive in Idaho than it is in other states. Mr. Smith said that as far as he knew it was only in Region 10 that there is an NPDES for small scale suction dredge mining, and even that was not applied consistently throughout the region. Speaker Bedke asked if the Idaho DEQ was helping the suction dredge miners with the EPA. Mr. Smith responded that he did not believe they had not been a help, and he believed that DEQ certified the NPDES erroneously by using junk science. Mr. Smith said he hoped the Legislature would provide increased oversight of DEQ.

Representative Burgoyne mentioned the conflicting uses of waterways and asked Mr. Smith if suction dredge mining was regulated as to times of the year they were allowed to work, or as to what they were allowed to take from the rivers. Mr. Smith said that he has never personally witnessed any conflicts. He indicated that Fish and Game, along with the Department of Water

Resources has established specific times for dredge mining to minimize any potential conflicts with salmon, steelhead, or bull trout.

Mr. Tim Luke, Water Compliance Bureau Chief, Idaho Department of Water Resources was the next speaker to address the committee with an update on suction dredge mining. He indicated that suction dredge mining in Idaho is regulated as a stream channel alteration (SCA) pursuant to the Stream Channel Protection Act and Idaho Administrative Rules. He stated that permits are required for most SCAs including suction dredges, and that rules address the minimum standards for suction dredging. The SCA standards apply to dredges with an engine rated at 15 HP or less, a nozzle intake diameter of 5 inches or less, and non-powered sluice equipment moving more than ¼ cubic yard per hour. He indicated that this applied to most of the dredge miners in the state who do this activity on a recreational basis. He noted there are a handful of people who do this regularly as a profession.

Mr. Luke said that on their website they have a fairly detailed list of guidelines including streams and seasons of use, as well as best management practices. He stated that they have streamlined the permit process to three pages that can be downloaded and completed by the miner. He advised that this process has been in place since 2010, and that the former process was lengthier in that it required IDWR review which took up to seven days. The new process also covers mining on navigable rivers, and was implemented due to zero-based budgeting as it was a fairly low priority program, and the process works well with reduced staffing. He added that the fees for the permit are very reasonable at $10 for an Idaho resident, and $30 for anyone from outside of the state.

He added that miners that are interested in using an engine above 15 HP, or a nozzle intake diameter of more than 5 inches are required to submit a regular SCA permit application for review. The permit can also be submitted for recreational mining in closed streams or for proposed extension of the season of operation. Mr. Luke indicated that they do not receive very many of these applications.

Mr. Luke pointed out that the number of recreational mining permits peaked in 2012 at 915, with the number of permits in 2013 down to 538, and in 2014, to date, 365. He indicated that there was likely some correlation in the decrease in number of permits with the EPA regulations and NPDES permit process that started last year. He did point out that each person that is going to operate a suction dredge is required to have a recreational permit, while the EPA permit covers anyone operating the dredge. This would then cause a discrepancy between the number of permits that the state and the EPA are approving. He noted that the revenue from recreation mining has followed the same pattern as number of permits with a high in 2012 of $16,255 down to $7,055, to date, in 2014. So far this year they have issued 264 in-state permits, and 101 out-of-state permits, which is fairly consistent with the numbers in 2013.

In discussing the differences between the EPA NPDES permit versus the IDWR permit, Mr. Luke advised that the EPA has closed all waters with ESA listed species. He indicated that several of those were popular with dredgers such as the Salmon River and the south fork of the Payette. He indicated that there are some areas that the EPA has closed, such as Lolo Creek in the South Fork of the Clearwater, and Moose Creek in the North Fork of the Clearwater, but they have approved a certain number of permits, in a defined season, based on Forest Service recommendations. He advised that the process used in these areas could apply to other areas; however it would take some work and some time. Mr. Luke also explained that there are some waters that are closed under IDWR instructions but are open under EPA NPDES permits, however a lot of those streams are not popular to dredgers, and he is not aware of any problems or complaints in those areas. He also pointed out that the IDWR does not enforce the EPA NPDES permit.

Mr. Luke concluded by saying that IDWR is not planning any changes in the program in the near future.

Speaker Bedke asked whether Mr. Luke saw the inconsistencies that Mr. Smith described within Region 10 and throughout the states. Mr. Luke explained that the EPA has a general NPDES permit in Alaska and Idaho. He said that in other states around Idaho, such as Montana, Oregon and

Wyoming, which are also in Region 10, the states have primacy in permitting, so he believes they have their own permitting process.

Representative Burgoyne asked who actually owns the gold found by the dredge miners. Mr. Luke advised that as far as he knows the miner owns the gold that is found.

The next speaker was Mr. Jim Werntz, Director, EPA-Idaho Operations. He explained that he is located in the Boise field office of Region 10 which covers Alaska, Oregon, Idaho, and Washington. He advised that Idaho is one of four states that do not have the Clean Water Act NPDES Program. However as the legislature decided last session to look into developing that program, Idaho could be part of the program in the future. He said that at this time, the NPDES is a general permit that allows a group of individuals, who do a very similar activity, to get protection to legally operate under the Clean Water Act if they follow the conditions. He advised that the permit is very much in parallel with the IDWR recreational permit as far as size as horse power, however if a miner wants to use larger equipment he would have to apply for a specific individual permit from the EPA. The general permit provides coverage in Idaho except for four categories; nationally protected areas, critical habitat under the Endangered Species Act, state protected waters, and all tribal reservations. He indicated that the majority of the conflict with what the EPA has done is largely because they closed some popular waters in the Salmon and the Payette because of Endangered Species Act concerns.

Mr. Werntz then briefly went over the history of the permit process from 2010 when they first took comments and held public meetings in Idaho, and explained that they had tried to engage the dredge miners as well as tribes, land managers, and state and federal agencies. He indicated that in 2013 the permit was finalized and implemented. He explained that his office provides technical assistance to the miners in filling out the one page application, helping them understand how to participate in the program, and explaining where they can dredge. In 2013 they issued 81 five-year dredge location permits. He indicated that they designed the permit so it would be dynamic and they are able to allow permits in certain areas as conditions change in popular dredge mining areas. He explained that the number of permits issued in 2014 is less than 2013; however he thinks this is due to the multi-year permits and that miners are more familiar with areas that are closed.

Mr. Werntz indicated that their ongoing efforts are to work with the miners on the permitting process, to process applications quickly, and to respond to complaints. He explained that to this point the inspections they have done have been conversational and educational with a follow-up warning letter. He also stated that they are working with the other agencies to coordinate permitted areas, as well as working with land managers and state and federal agencies to keep everyone informed of updates. He did point out that miners who continue to work in closed areas, or without a permit, could be open to civil or criminal penalties.

Mr. Werntz stated that they continually provide the most current information on their website, and showed where they highlight open and closed waters that are the most popular for miners. He also indicated that they are creating an online mapping tool that will allow the public to view the same GIS data layers that the EPA uses for permit decisions.

Senator Siddoway asked what the EPA's protocol was in addressing violations. Mr. Werntz indicated that their first approach was to work with the miners to educate them, and that he was unaware of any enforcement activities this year or last, however compliance would be more important moving forward. He said that penalties could go up to $32,000 per incident, per day; however these were not levied very often as they have discretion based on the severity of the activity. He also pointed out that if the miner is complying with an EPA permit they are protected from third-party lawsuits.

Senator Siddoway asked if the violations were mostly due to ignorance or due to a desire to find large deposits. Mr. Werntz explained that there are people who mine for various reasons and some of those people do not think EPA regulations are legal or appropriate. He said that they are doing their best to implement the permit program so that people can legally practice their craft in the least harmful way possible.

Speaker Bedke asked how the EPA applies the court cases which Mr. Smith alleged had not been followed in the permit granting process. Mr. Werntz said that there were differences in interpretation of the court cases. He advised that they had authority under the Clean Water Act, and under that act a pollutant was defined as a discharge. He indicated that sand and gravel that are discharged in the process of dredging would fit the definition of a pollutant, and needed to be permitted. He stated that there are court cases from the last forty years that people will cite to make arguments about this process.

Speaker Bedke asked if sand and gravel, which were removed from the river bed using the appropriate dredging machinery, then became pollutants once they were returned to the river. Mr. Werntz indicated that was correct as it would be a discharge from the back of the dredge. Speaker Bedke noted that when salmon spawn they tend to move the sediment in the same way, and indicated that there seemed to be some inconsistency in what a pollutant actually was. Mr. Werntz indicated that there were different regulatory authorities being applied at several levels so that was a fair observation. He indicated that they are regulating the discharge for this permitting program and that the consultation requirement for ESA related species came to bear because they are issuing permits. This is a federal action which comes with a duty to consult if there are listed ESA species or critical habitats. He noted that there are also concerns with disruption of the river bottom and reconfiguring of the river channel.

Representative Shepherd referred to a recent case in which the Oregon Supreme Court ruled that it was not necessary to have a permit to redirect runoff from logging roads to a culvert. He asked if that would change the EPA's definition of pollution, as he felt that was more polluting than the activities of the dredge miners, or if the dredge miners would have to file their own case. Mr. Werntz indicated that there had been many court cases since the Clean Water Act was passed in 1972, and amended in 1987. He said that the definition of pollutant had not changed, however that had not stopped the judiciary from weighing in with interpretations, including overturning EPA interpretations regarding pesticides on or near waters, and the forest roads. He indicated that as part of the executive branch the EPA followed EPA decisions, and not judicial decision. He said that there was already case law regarding suction dredging, however they did not have the latitude to interpret something that was not in statute.

Representative Shepherd said that to him it was logical that sucking up sand in a spawning bed could affect an endangered species, but it would not be a pollutant. He indicated that it seemed far reaching to tie the suction dredge permit to pollution when it was initially intended for sewer plants and factories that discharge.

Representative Burgoyne asked if the EPA viewed suction dredge mining as harmful to the environment. Mr. Werntz indicated that it could be harmful to the environment because it could be harmful to aquatic species. However, he noted, the reason for having a permitting framework was to allow the activity in places where it is not harmful.

Representative Moyle referenced a time, after the South Fork of the Salmon River was closed, when dredges were brought in to clean the sediment out of the spawning beds so it would be more conducive to salmon spawning. He asked if the EPA had ever looked into the possibility that if dredging was done correctly it could be beneficial to the endangered species and the environment. Mr. Werntz indicated that as they were stretched for resources to get the permit issued, and they were not a fisheries agency, or an ESA implementation agency they had not considered that. He said that it would not surprise him if studies had been done by the fisheries agencies, or by other interests, but he really could not speak to that question.

Co-chairman Pearce asked what the major reasons were for denial of 50% of the permits in 2013. Mr. Werntz indicated that the two major categories for denials were ESA critical habitat and state protected waters.

The next speaker was Mr. J. Brent Olmstead, on behalf of Idahoans for Sensible Water Regulation. He indicated this was a new organization and this was their first presentation. He explained that they were a coalition of industries, municipalities, and individuals looking at water regulations in Idaho using sound science and common sense. He indicated that they would be commenting on water regulations as they came up and would be completing cost benefit analysis on proposed regulations.

Mr. Olmstead advised that the EPA requires states to periodically review water quality standards, which is done on two fronts; designated use, and review of water quality to support that use. He indicated that Idaho is currently looking at rule making on the fish consumption rate, mixing zones, and in the future will probably be looking at temperature. He said that this mostly involves the NPDES and storm water permits, which covers a large segment of the population in Idaho.

Mr. Olmstead explained that the Fish Consumption Rate (FCR) is an estimate of how much fish a given population consumes in a year. This is important as it is a key variable in the formula to set the Human Health Water Quality Criteria (HHWQC) in the North West. The HHWQC drives water quality standards that dictate discharge and storm water permits for municipal wastewater and industrial facilities.

He indicated that the current standard in Idaho is about three cans of tuna per month, and the EPA's new guidance is about four cans per month as opposed to Oregon where it is now 30 cans per month. The Oregon standard equates to eating about 280 8 oz. trout filets per year, and the standards formula assumes that consumers will eat that much fish each and every year for 70 years. He explained that his group believes that unrealistic assumptions are used in calculating the FCR. He said that for example, salmon spend a small percentage of their lives in Idaho waters, and yet it may be considered that salmon are one of the fish eaten in Idaho on a regular basis, and the toxicity of that fish be determinate in Idaho's water quality standards. Additionally, studies have estimated that Chinook salmon accumulate 85% of all toxins while in the ocean, which is not impacted by state regulations. Also the standard-setting formula assumes that people consume 3 liters per day of untreated surface water such as water from lakes, ponds, or streams, which is equivalent to 289 gallons of untreated water per year.

In explaining how Idaho got to this point Mr. Olmstead indicated that the state had complied with the EPA's guidance of 17.5 grams per day in 2005, and then 6 ½ years later the EPA rejected that standard. He explained that negotiated rulemaking began in August of 2012, and is continuing at this time. He indicated that Oregon had started off with the 17.5 grams per day standard in 2004, and that the EPA had rejected that standard in 2010. The new standard, approved in 2011, is now based on 175 grams per day. He advised that other parts of Oregon's rule which are problematic for any business or anyone that has an NPDES permit or a storm water run-off permit are the cancer risk factor and the relative source contributions. At this time companies in Oregon do not think the standard can be met, and it could cost Portland up to $6.8 billion in capital costs for its sewage treatment system. This cost would be borne by citizens who use utilities in that city.

Mr. Olmstead advised that his group has taken the permits from various municipalities in Idaho and evaluated them under Oregon and Washington regulations. He indicated that based on initial work it appears that the average hook-up in Idaho would go up between $87 and $107 per month.

Mr. Olmstead indicated that under the new standards in Washington the PCB's are lower than the current ability to measure, and that they will unlikely be able to meet the arsenic levels due to the natural background concentrations. Additionally, businesses and industry in that state feel that significant investments in the treatment plants will not lead to compliance. He added that there is concern in Congress regarding this matter.

Mr. Olmstead stated that everyone wants clean water and to protect human health, however everyone also wants a thriving economy and job opportunities for Idahoans. He advised that Idahoans for Sensible Water Regulation looks at these regulations as putting a stranglehold on any type of growth in the economy.

Mr. Olmstead indicated that the fish consumption survey in Idaho is being funded by the EPA, and is being completed by the tribes. They are looking at heritage studies of how much fish their forefathers consumed, how much fish they anticipate eating in the future, and how much fish future generations will eat. His group feels that this anecdotal information should not be considered, as it should be science based. He explained that the survey will be available in January of 2015, and the proposed rule will be available for public comment next summer. It will be presented to the Board of Environmental Quality in November of 2015, and to the Idaho Legislature in the 2016 session. Then in May of 2016 the EPA will rule on Idaho's water quality standards.

Mr. Olmstead concluded in saying that Idahoans for Sensible Water Regulation support the DEQ's efforts to find a solution that works for all Idahoans. They also support the use of best available science, and they resist the EPA Region 10's pressure to force another state's approach onto Idaho. He indicated that they would be providing more information to the legislature as it became available.

Senator Stennett asked for further information about the assumption that people consume 3 liters per day of untreated surface water. Mr. Olmstead indicated that the EPA did not go into the source of that water, but it could be from such things as wells that are not treated or drinking from a stream bed.

Senator Bair moved that the committee approve the minutes from the August 6, 2013 meeting. Senator Siddoway seconded, and the motion was unanimously approved.

Next to address the committee was Mr. Roger Chase, Chairman, Idaho Water Resource Board. He indicated that during the 2013 session there had been some questions about the State Water Plan, and that the board had committed to review those concerns. He advised the committee that over the past year the Board's Planning Committee had held numerous public meetings to receive input regarding those concerns. He said that concerns included future funding, whether fish, wildlife and water quality policies created additional regulatory requirements, and instream flow issues.

He indicated that the State Water Plan recognized additional funding needs for water resources, and that the Board will explore options for securing funding from a variety of sources. Additionally the Board's review confirmed that the State Water Plan cannot bind the Legislature to future appropriations. In addressing the second issue, Mr. Chase indicated that the State Water Plan supports voluntary programs to conserve fish and wildlife and to preserve water quality. Also, the Board's review confirmed that neither the Idaho Constitution nor the Idaho Code granted the Board the authority to establish regulations without legislative authorization. Regarding instream flow issues Mr. Chase indicated that the State Water Plan supports the project in the Upper Salmon River Basin, and that the Board's review confirmed that these actions are being taken pursuant to legislative direction and the Idaho Code. Additionally the Board's review confirmed that these actions were assisting local water users cope with economic, environmental, and regulatory challenges associated with endangered species.

Mr. Chase stated that the Board agreed additional edits and clarifications of many policies would be beneficial, however the cost and effort of conducting statewide public hearings prior to adoption of changes outweighs any benefit. He advised that a letter had been sent to the Co-chairs of the Interim Natural Resources Committee, as well as to legislative leadership, which explained that the Board had concluded that they did not need to make any changes based on the issues which had been raised. He said that they would like the Legislature's continued support and they would try to do a better job of communicating.

Representative Burgoyne asked Mr. Chase if he was familiar with the changes that the Department of Water Resources was looking into regarding flood control releases which would affect storage rights in the Boise River Basin. Mr. Chase advised that Director Spackman was going to address that subject later in the day.

Mr. Chase expressed their appreciation of the $15M in one-time funds that had been appropriated by House Bill 479, and indicated that it was going to help everyone in the state. He then outlined the projects that the money has funded, and the status of those projects.

Mr. Chase then discussed the Eastern Snake Plain Aquifer (ESPA) recharge and noted that the recharge was needed to assist with resolving water use conflicts and their potential impact on Idaho's economy, as well as to ensure that Idaho can maintain minimum flows that have been established under the Swan Falls Agreement. He reminded the committee that they had received a call from the Rangen facility involving 157,000 acres and 11 cities, as well as the possibility of the Surface Water Coalition, along with several additional calls from the Hagerman Valley so this is a high priority for them.

He also said that he thought it was important to remember that the ESPA and the Swan Falls Agreement were connected, and that they have an agreement that they cannot drop their flows below 3,900 cfs from April 1st through October 31st, and 5,600 cfs from November 1st through March 31st. He explained that when the flow is zero at Milner Dam, the flow at the Murphy Gage is made up almost entirely of spring flows from the ESPA. Mr. Chase then reviewed the cumulative volume change of water stored within the ESPA and indicated that it is now going up, and they need to sustain that. He stated that a few times in the last few years the stream flows have reached near minimum lows, and that this is another reason that it is critical to restore the aquifer, so the agreement is not violated.

Mr. Chase indicated that the ESPA must be managed to sustain spring flows sufficient to meet the Murphy Gage minimum flows. He said that if they did have to start shutoffs there are relatively few junior-priority trust rights in the river that could be curtailed, and this is not a preferred solution as the effects of those curtailments don't reached the river when needed and can cause economic damage in the process.

Mr. Chase again thanked the Legislature for their support, and mentioned House Bill 547 which was passed in 2014 and allocates $5M annually from the cigarette tax to the Water Resource Board for statewide aquifer stabilization, as well as House Bill 479 that allocated $4M for ESPA recharge infrastructure. He indicated that the ESPA is a high priority because of the demands in the area, the number of fish hatcheries, and the number of other people that are lined up to file calls.

Mr. Chase then reviewed the last five years of the ESPA recharge below, and above, American Falls, and explained that location matters for recharge water availability. He indicated that they have not used the available water during the winter at Milner Dam, so they have adopted a winter recharge water delivery payment plan to incentivize canal companies that divert at Milner Dam to deliver available recharge water. He said that the canal companies have been very agreeable and they are negotiating delivery agreements to potentially start this winter. He also indicated that there are some infrastructure improvements that will be needed for winter recharge in these canals. He advised that if they can pick up an additional 100,000 acre feet, with the 75,000 that they are averaging, it would put them right on line for the next three to four years, and after that they can raise it up again because of agreements that they have with Idaho Power. Mr. Chase then reviewed other recharge projects they are working on, and indicated that they are moving in the right direction, and that eventually they will have water recharge going on the entire length of the Snake River as well as in North Idaho.

Next, to update the committee on wolves, sage grouse and raven control was Director Virgil Moore, Idaho Fish and Game. He began by emphasizing that their sage grouse activities are in partnership with the Office of Species Conservation, and the Governor's staff, with the end goal of meeting the needs of sage grouse so that the ESA is no longer needed. He indicated that they are assisting the BLM and the US Forest Service in development of their land use plan modification. He said throughout the 11 states that have sage grouse, there are 98 land use plans that have to be

modified so the Fish and Wildlife Service can review the plans and determine whether or not the Federal Land Use Management activities are sufficient to meet the needs of the bird.

Director Moore explained that the Fish and Wildlife Service determined that this was warranted, but precluded the bird from listing in 2009/2010. Adjudication then placed a deadline of September 2015 for them to make a decision on listing the sage grouse. As the western states became aware of the timeline they quickly realized that if they were going to be successful, as states, in keeping sage-grouse off of the list, they would have to get the federal land management agencies to modify their plans to address the needs of sage grouse. As a result of that Idaho's Governor's Office became involved with other state governors, and through those efforts the Idaho Sage Grouse Task Force was established to develop a state directed alternative to input into the BLM and Forest Service planning process. This was completed in 2011, and was forwarded into their process successfully. He said that at this time that alternative, along with some modifications, is the preferred alternative that is moving forward through the BLM process. The BLM process was supposed to be completed by September 2014, however they are behind and do not anticipate completion until April 2015.

Director Moore indicated that Idaho's plan is either the best, or the second best plan, amongst the eleven states, as it is progressive and looks at the needs of the sage grouse while being responsive to the use of the lands, and that they continue to look at aspects of the plan as they move forward.

He advised the committee that due to increased funding, Idaho Fish & Game has enhanced their counting of the leks in the state, and they have detected over 400 more leks that previously found.

Speaker Bedke asked Director Moore which state had the best sage grouse plan. Director Moore indicated that Wyoming has a plan that pre-dated the process which had Fish & Wildlife Service approval as being adequate to meet the needs of the sage grouse. He explained that they have some state management authority over oil and gas which they had implemented at the governor's level with an executive order along with some very creative management strategies relative to oil and gas well siting. He emphasized that their plan has already received clearance from Fish and Wildlife Services, and that Idaho's plan has nearly received this same level of clearance.

Speaker Bedke asked if Wyoming's plan was more oil and gas centric and not so much about other uses. Director Moore said that it was definitely oil and gas centric but it did address some of the other land use activities. He indicated that the Rocky Mountain States and the Great Basin States have totally different threats to sage grouse. Idaho's primary threats are invasive grasses, and the resulting fire regime that destroys sage grouse habitat, along with the loss of habitat due the development of infrastructure such as wind turbines and power lines. He explained that development of infrastructure was the largest threat in the Rocky Mountain States.

Senator Siddoway indicated that it was his understanding that an area with between a 15-25% sage brush canopy was good sage grouse habitat, and that 40% would be the maximum. He stated that once it reaches 60% it is impossible to run livestock as it takes all moisture from the ground and there is not any feed left.

Director Moore indicated that although he did not have a precise answer to those questions they had worked with the BLM and the Forest Service to develop forage standards that were necessary for height and density to meet the needs of the sage grouse. He stated that it was his understanding that those standards were compatible with managed grazing in those areas. He also indicated that management of sage grouse habitat with fire was a sensitive issue, but they were aware that there were habitats, particularly in higher elevations, that had enough soil moisture that fire didn't present the same level of risk as it is in lower elevations. He indicated that they were parsing those out now so that they could have some diversity in management across the different habitats.

Senator Siddoway stated he believed there was so much brush in that area that sage grouse habitat had been lost, and that as they had artificially restrained fires it was becoming highly combustible.

Senator Brackett, in referring to Idaho's primary threats for sage grouse, asked if there were instances in which fire came first and opened the door for invasives. Director Moore said that certainly the fire regime had resulted in the accumulation of invasives, which then perpetuate the fire regime. He indicated that fire alone, without the invasive component, had been a natural part of the ecosystems, however it is the cheatgrass and the annual or short cycle burning every two or three years that inhibits the recovery particularly in drier soils. He explained that as you go upslope where there are cooler and wetter soils the fire regime and the invasives regimes change so there is a different pattern. He stated that there is some new research relative to where they should focus their firefighting efforts for the most benefit. He said this is part of the strategy that they are putting together that is being implemented in the land use plans.

Senator Brackett asked what the consequences would be of the Fish and Wildlife Service not meeting the September 30, 2015 deadline to publish a proposed decision regarding the listing of sage grouse. Director Moore indicated that the consequences could be a possible lawsuit in which a judge could rule against the Fish and Wildlife Service and list the species judicially. He did point out that the Secretary of the Interior has flexibility to use an additional six months, so they anticipate that will be done. He said that he is also aware of Congressional efforts to allow an additional year of flexibility, and that there is also possible legislation that would postpone a decision for ten years. Director Moore stated that even though the BLM is not done with their land use plans, the Fish and Wildlife Service has enough to begin their analysis of what the land use plans are going to do for the sage grouse, so he believes they will be ahead of the game pursuant to the decisions that the BLM and Forest Service will make.

Co-chairman Pearce asked if Fish and Game had rethought their strategy regarding sage grouse hunting season. Director Moore indicated that had been a topic in the news, and that recently an article in the Times News in Twin Falls had said that closing the hunting seasons would be the right thing to do. He said they did not agree, and he had written an editorial response to that article. Director Moore indicated that their hunting seasons had been reviewed, and that their decisions were data driven based on population criteria that will not have any long-term effect on the viability of the population while maintaining the sportsmen's connection to the bird. He pointed out that since 2001 the state has spent $14M of the sportsmen's money in sage grouse management.

Regarding Raven control Director Moore referred to Senate Bill 1171 which allowed up to $100,000 in FY14 for them to work with the Department of Agriculture on a project to evaluate and monitor the impacts of raven control on sage grouse survival. He advised the committee that they had not been able to fully implement the structured evaluation because the USDA Wildlife Services had not been able to get through their own processes to allow the use of the control that they had intended to use. He explained that their permit gave them the authority to take 1,750 ravens and 250 eggs in both 2014 and 2015. He stated that they had done as much as they could in anticipating Wildlife Service's assistance, such as surveying and looking for habitat, so they had obtained a lot of very good baseline information, but they had not killed many birds. He noted that Wildlife Services has advised that they are getting through their process, so that they will be able to fully implement in 2015.

Director Moore advised that one of the interesting things they have found is what they call human subsidies to ravens, such as elevated platforms where they can nest and take shelter in the middle of sage grouse habitat. In one particular area they found many nests which were associated with the shelter belts they had installed 25 to 30 years ago. He added that they are considering removing some of those to reduce the number of birds in those areas. He also pointed out that it was interesting that in the Birch Creek area they were not able to locate any ravens, so they have removed that area from their treatment schedule.

Representative Moyle asked what they had planned if they did not get the permit for the control. Director Moore indicated that although it would be more expensive, they are looking into the possibility of getting the label on the poison changed so that they would be able to apply it. He

stated that in 2014 they weren't concentrating on the kill rate, however they did kill those that they encountered, but they were mostly trying to count the birds and establish monitoring routes for raven control purposes that Wildlife Services was going to do.

Co-chairman Pearce asked if it might be better to offer a bounty on the birds. Director Moore said that offering a bounty could be one option, but they did not have a permit for that activity. He indicated that they had looked into adding ravens to the crow hunting season, however if pursued, it would be a long process to get permission for a hunting season on a species that has never been hunted. Co-chairman Pearce suggested that could be part of their back-up plan.

Director Moore then moved on to the wolf update, and indicated that they had continued to liberalize wolf hunting season, and that they had also gone to a statewide bag limit of 5 wolves per hunter and 5 wolves per trapper to simplify things. He also stated that they had gone to year-round wolf hunting on private lands in the Panhandle and Clearwater areas, and that wolf tag sales continued to remain high. He said that with the hunting and trapping activities they had continued to move the bar down relative to the total population of wolves in the state.

Director Moore pointed out that one of the important trends they saw developing with their aggressive management of wolves has been the removal of collared animals at a high rate. He indicated that this results in their inability to count the actual number of packs, as they rely on the collared animals to verify that there is a pack (a male, a female, and two juveniles) present. He advised that they had increased their efforts at putting collars out, as it is a sliding scale at this point relative to their ability to demonstrate the presence of the 15 packs that are necessary during the five-year period of review with the U.S. Fish & Wildlife Service which ends in the spring of 2016. He stated that there are certainly more packs than that, however being able to meet the documentation criteria concerns him as the number of packs that they can document slides down. Director Moore said that he has issued direction to his staff that this is a high priority, and that they are not going to fail at counting the number of animals in Idaho because they are not trying hard enough. He noted that he believes they are on the right track; however they still have huge challenges relative to the back-country areas.

He stated that they are currently spending approximately $700,000 per year in monitoring, and $1.3M per year total on wolf management. He explained that as they have received the last of the federal funding for monitoring activities, and that wolf tags only generate $500,000 per year, that next year they will be funding this on their own.

Co-chairman Pearce asked how they document the number of wolf packs in the state, and how accurate these numbers were. Director Moore stated that they estimate that there are 107 packs based on pack territory and the known presence of wolves on the landscape. As to how accurate the information is he said they believed that number of packs, and likely more, were out there; however this was based on geography and other aspects. He said that they are narrowing in on the use of DNA from wolf scat as a population estimation tool, and with that they would be able to put an estimate precision on that number.

Following the lunch break the next speaker was Fifth Judicial District Judge Eric Wildman. Judge Wildman began with a review of the Snake River Basin Adjudication (SRBA) which took 27 years to complete. He indicated that the petition was filed in June of 1987, and the final decree, which covers 87% of the State of Idaho, was issued in August of 2014. He estimated that the decree is somewhere between 275,000 and 300,000 pages, and is made up of 158,591 partial decrees, of which 43,822 were contested. The signing of the final unified decree was on August 25, 2014 which was part of a two-day event which included a symposium, panel discussions, and a dinner at which Justice Scalia was the keynote speaker. He advised that 36 Idaho Supreme court decisions, 1 U.S. Supreme Court decision, and 8 Federal reserved water rights settlements came out of the SRBA.

Judge Wildman explained that there are 72 cases remaining, however he issued the final decree to end the adjudication, and cut off any further late claims. He indicated that the final unified decree

addresses all of the cases that are still pending, and they will be incorporated into the final unified decree when they are concluded. He then went through a breakdown of the remaining cases.

Senator Siddoway asked who the plaintiffs were in the claims involving the Wild & Scenic Rivers Act, and Judge Wildman indicated it was the Bureau of Land Management.

Judge Wildman also advised that in addition to the 72 remaining claims that the deferrable domestic and stockwater claims would continue to be adjudicated. He stated that there should not be any appeals from the final unified decree as any appeals should be from individual water rights claims, provided they are filed within the 42 day time limit.

Regarding the Coeur d'Alene Snake River Basin Adjudication (CSRBA) Judge Wildman explained that the petition was filed on July 8, 2008 and the court commenced adjudication on November 12, 2008. He advised that first and second round service had been completed, and the time for filing claims has expired. To date they have received 11,378 state law claims, and 447 federal law claims, of which the largest group are from the Coeur d'Alene Tribe. He then reviewed the sub-basin boundaries, the projected dates of the filing of the director's reports, and the number of claims by basin. Judge Wildman advised that the objection period for Basin 93 and Federal and Tribal claims closes on September 29, 2014, and that to date the court has received 874 objections, with more expected.

Representative Raybould asked if Judge Wildman would be moving his office from Twin Falls to Northern Idaho to facilitate better access to the people in that area. Judge Wildman indicated that the intent is to adjudicate the CSRBA claims from Twin Falls. He advised that they will primarily use video teleconferencing and telephone participation; however there may be instances where he will need to travel for various reasons. He also pointed out that his staff in Twin Falls is very experienced in these cases, and if the court were to move to the north they would likely not be able to accompany him.

The next speaker was Dr. David Tuthill, Idaho Water Engineering, LLC. Dr. Tuthill advised the committee that there were many good things happening with water in Idaho, however there were many challenges ahead. He indicated that the thrust of his presentation would be to propose a public-private partnership where the state would incentivize the private sector to move forward with water issues. Dr. Tuthill explained the four main points he would address; that a water crisis is brewing in Idaho, there is something that can be done about it, the Idaho Water Resource Board is already addressing the crisis, and that the Recharge Development Corporation has an idea to augment existing efforts.

He explained that there are many water users that have a greater ability to pay than agricultural users, so their focus is primarily on benefiting the agricultural users. He indicated that the Snake River Basin Adjudication now enables delivery of ground water for the first time, and that the state will now begin to see delivery calls against water.

Dr. Tuthill then spoke about the letter which had been sent from the Department of Water Resources on January 28, 2014 regarding the notice of potential curtailment of ground water rights in the Eastern Snake Plain Aquifer which went out to a 69 pages of recipients. He indicated that this was sent out due to concerns early in the water year that there would not be enough water. He explained that had the water picture not improved later on in the year, many farms would have gone out of business because they could not afford to have a year with no production. He stated that this illustrated how close Idaho was to the edge with only one year of drought in a very large area, and he advised that existing users of ground water need protection from curtailment calls.

Dr. Tuthill indicated that between 1997 and 2007 Idaho lost 234,916 acres of irrigated agriculture. However Idaho has a lot of opportunity to store water as over 95 million acre feet of water leave the state every year. He also pointed out that the median amount of acre-feet passing through Milner Dam is 942,000. Dr. Tuthill advised that the challenge is to use the water we have as effectively as we can, and that if we don't use it someone else will.

Dr. Tuthill advised that there are aquifer storage opportunities throughout the state, and he sees a great future for private enterprise in water, in Idaho, as it was 100 years ago. Dr. Tuthill also discussed a paper regarding managed aquifer recharge which is being prepared by a law student sponsored by Idaho Water Engineering. He then reviewed the history of private sector and government roles in Idaho water projects, and indicated that they believe that the federal government's role is waning, and that state government will have some involvement, but the private sector is poised to be able to develop water projects. He went on to say that the Idaho Water Resource Board is doing a lot to manage aquifer recharge, however more is needed and they think that privately sponsored managed recharge will make the difference. He indicated that the most efficient way to do this is through public-private partnerships, of which there are many gradations. He then shared the website of a national organization, Public Private Partnerships, where information is available regarding all types of such partnerships which are currently taking place in other places such as Arizona.

Dr. Tuthill indicated that currently there are two approaches to recharge. The first is when the state pays canal companies to recharge using state water rights. He said that although this is a good approach, they feel that the second approach would augment this activity. The second approach is when the state partners with private companies to incentivize recharge under private rights. Under the second approach the state pays less, and receives its return via uncaptured recharge. He advised that this offers the potential for a large return on investment in the state. He then reviewed the number and status of applications for private ground water recharge above American Falls.

Dr. Tuthill stated that Recharge Development Corporation is proposing that the State of Idaho implement public-private partnerships. He advised the committee that they will be making this proposal to the Idaho Water Resource Board on September 22, 2014 and he asked for the committee's support of the process as the board invests in these partnerships.

Senator Stennett asked Dr. Tuthill to explain how Recharge Development Corporation's partnership with agencies would work. He indicated that in the Wood River Basin they have filed five private water rights applications and are working on more. He explained that they must go before the department to seek approval of those applications. He indicated that they have 27 protests to their applications; however they are currently working through those protests. He advised that as a private company they are held to the same standards as any other private land owner in achieving a water rights permit. At this time they have not proposed a public-private partnership there, however they are open to that. He indicated that their proposal regarding the Snake River Basin is their first foray into a public-private partnership.

Senator Stennett asked Dr. Tuthill to explain what was likely to happen with their applications in the Wood River Basin over the next few years. Dr. Tuthill advised that they had filed applications as early as 2012. There had been a pre-hearing conference scheduled in February, however they asked to wait on that conference until they received the results of the Snake River hearing. He indicated that last week they had another pre-hearing conference and he would say that the acceptance of the process is improving as Commissioner Larry Schoen spoke in favor of ground water recharge. He explained that they are expecting a hearing in January or March, depending on when Fish and Game finishes their report, and they expect to receive a permit from the department which will be much like the draft permit which has been issued in the Snake River Basin.

Senator Stennett asked how the protests to their applications are resolved. Dr. Tuttle indicated that in the Snake River Basin they were able to handle the protests with a stipulated withdrawal; however the protests can go into the hearing process where a hearing officer is appointed by the department. The hearing officer will rule, and this ruling will be subject to review by the Director. A final ruling will then be issued, which can be appealed to the District Court.

The next speaker to address the committee was Mr. Chris Iverson, Deputy Regional Forester, Intermountain Region, U.S. Forest Service. Mr. Iverson reviewed the Congressional authorities that

are the foundation of the Forest Service Ground Water Directive which they have submitted. He explained that in addition to those authorities they have a policy system, or manual and handbook directive system, that further interprets statutes and regulations to create policies and procedures to implement statutes. He advised that the handbook is where the groundwater policy is being effected and implemented in agency policy.

Mr. Iverson told the committee that during the prior week the Chief of the Forest Service, Tom Tidwell, testified before the U.S. House Agricultural Committee on the proposed directives. Mr. Iverson advised that the Chief had made several important comments which he wanted to share with the committee. First he had pointed out that the water on National Forest System lands was important for many reasons including resource stewardship, domestic use, and public recreation. He indicated that water was critically important in the West, and that water from the National Forests provides 18% of the nation's fresh water, and over half of the fresh water in the West. He also cited a study in 2008 that estimated 68% of the fresh water in Idaho originates on National Forest System lands. Chief Tidwell had also advised that ground water plays a critical role in providing fresh water, and that activities that they permit, authorize, or fund on National Forest and Grasslands can impact that surface water, source water for drinking, as well as ground water.

Mr. Iverson said that the public has indicated that it expects the Forest Service to review and address potential impacts to ground water resources. Furthermore, recent court decisions have shown that the Forest Service has a legal obligation to do so. He then discussed a recent case in which U.S. District Court Judge Lodge decided that the Boise National Forest, in their environmental analysis of the CuMo Mine project near Idaho City was inadequate. Judge Lodge determined that the Forest Service's decision that the project did not have any effect on ground water resources was arbitrary. He explained that then set the stage for an obligation to conduct an effects analysis on proposed activities that they authorize, or permit, on ground water resources.

Mr. Iverson reminded the committee that on May 6, 2014 the National Forest Service published the public comment for a proposed directive on ground water management that had several objectives. The first objective was to establish a more consistent and required approach to evaluating and monitoring the effects of ground water resources from proposed activities on National Forest System lands. Additionally, the proposed directive does not specifically authorize or prohibit any uses and it is not an expansion of authority. The second objective was to improve the ability of the Forest Service land managers to make informed and legally defensible decisions with a more complete understanding of the effects of a proposed activity on ground water resources. The third objective was to support the management and authorization of various multiple uses by better allowing the Forest Service to meet its statutory responsibility to fully analyze and disclose through their NEPA process the potential impacts of uses or activities on ground water resources. An additional objective was to emphasize the cooperation with state, tribal and local agencies in compliance with their applicable requirements.

Mr. Iverson pointed out that the draft directive recognizes and specifically acknowledges the role of the states in allocation of water use and the protection of water quality. The proposed directive would not infringe upon state's authority, nor would it impose requirements on any private land owners. He indicated that the Forest Service currently evaluates the effects on ground water and surface water resources, however as this has not been applied consistently throughout the country this directive would provide a national measure of consistency. He explained that the ground water directive defers to existing Forest Service Manual direction which contains the Forest Service procedures for mineral activities on National Forest Service lands, and proposals to access water, and federally owned minerals, on these lands will require approval from both the state and federal governments.

Mr. Iverson advised that since they published the draft they have received a number of comments and concerns, and because of the magnitude of the issues that were demonstrated they have

extended the comment period until October 3, 2014. He indicated that they have received comments from the head of the Idaho Department of Water Resources and the Idaho Mining Association. He said that one of the recurring comments that their Chief had addressed in his testimony was the use of the word "managed" as it pertains to ground water. He indicated that although the term "managed ground water" was used several times in the directive, they specifically mean to inventory and evaluate data, and to monitor the effects of Forest Service approved activities with any potential to affect ground water resources on National Forest and Grasslands. Mr. Iverson indicated that he again wanted to emphasize that it is not the management of the water, it is the management of the activities that they permit, authorize, or fund, on the ground water resources, and that the proposed directive was in no way intended to suggest that the Forest Service will become involved in the allocation or appropriation of water for use, but rather the directive applies to the Forest Service actions to engage in, authorize and regulate activities on National Forest System lands that have the potential to affect ground water resources. He added that at the September 10th hearing in Washington D.C., Chief Tidwell said that they recognize without any question that they need to clarify the reality that the State has the water authority and that they are simply addressing management of actions that they would authorize, permit, or fund that may affect resources. He also said that they wanted to make it very clear that in discussing management they were talking about evaluating and inventorying information that has nothing to do with the allocation of water.

Mr. Iverson stated that the agency looks forward to reviewing all of the input received on this important proposal and that once they have evaluated all of the comments they will determine the path forward regarding the final directive.

Senator Siddoway indicated that his concern was regarding activities such as logging and grazing that could be in jeopardy because they could have an impact on ground water. Mr. Iverson advised that his understanding of the directive was that they were looking more at ground water levels and the depletion of those levels, and that in reading the directive he did not believe it impacted the type of examples that Senator Siddoway was concerned about, but perhaps they needed to make that more clear in the final draft.

Speaker Bedke asked if there was a void in Idaho law that the Forest Service needed to fill if someone's activities were going to negatively impact the water allotment of someone with a senior right. Mr. Iverson explained that not only would they analyze that proposed permit application for another water use, but they would also consider a senior water right, and they may condition the permit to recognize a senior right. Speaker Bedke asked if that conditional use wouldn't already be addressed under Idaho law, and if there was something lacking in Idaho law that the Forest Service felt they needed to fill. Mr. Iverson stated that his interpretation of the directive was that they would simply be verifying, through their analysis and in their decision to issue a permit, that any senior rights were reflected in that permit. He advised that this was not changing authorities; it was ensuring that their line officers recognized and incorporated senior rights in their permitting process.

Representative Burgoyne laid out an example of a watering hole on the Speaker's land, and one of the Speaker's neighbors submitting an application to the Forest Service to drill for water. He said that he could foresee a scenario where the Forest Service could decide that the neighbor's activity would impact the Speaker's water, and therefore deny the permit. He was concerned that if later on that neighbor decided to drill on their own land that a court could stop them under the Collateral Estoppel Doctrine. Representative Burgoyne said that he felt there were these types of legal issues that needed to be addressed so that Idaho law would be allowed to function without the overlay from the Forest Service.

Mr. Iverson indicated that there was room for improvement in their directive, and that this concern may be one item they needed to consider. He also indicated that they could condition a permit, instead of simply denying it, and that there was an administrative objection process that the applicant could use to challenge a denial.

Representative Burgoyne indicated that he remained concerned that what they were doing may require some amendment of Idaho Law to assure that the decisions that are made do not serve beyond the federally controlled land to adjudicate rights and preclude someone from coming in at a later time to an Idaho Court to adjudicate those rights separately. He suggested that their process take those things into account to try to lessen the impact on Idaho.

Speaker Bedke advised he could foresee a scenario where a party's permit for a water using activity is declined by the U.S. Forest Service, yet under Idaho law it is approved, thus leading to conflict between the U.S. and the state governments. He advised this would be something else for them to consider.

Mr. Iverson responded that Speaker Bedke was talking about a scenario in which they would categorically deny access to a legal water right, and although he did not think that was an interpretation of this directive he agreed they should redouble their efforts to make sure that was not an unintended consequence. He indicated that a denial would be a rare case, as if they found adverse effects on some other water or ground water resource they would try to mitigate that adverse effect and not simply deny the permit. He said that he heard the concern for a total denial of access to an authorized state water right and he thought that was something they needed to clarify in the directive.

Co-chairman Raybould suggested the addition of one sentence to the directive which would state: "the provisions of this directive are subject to the water laws of the state wherein this directive applies." He said that would clarify the directive to give the states jurisdiction over the water. Mr. Iverson indicated he would share that suggestion with the Chief.

In closing Mr. Iverson indicated that there were two elements of the directive which needed improvement. The first was the need for better communication, and second that the focus of the usage they authorize does not infringe upon the state's rights to manage water.

The next speaker was Mr. Norm Semanko, Executive Director, Idaho Water Users Association. He began by talking about the Forest Service Ground Water Directive, and indicated that he had listened to Chief Tidwell's testimony before the U.S. House Agriculture Committee. He noted that other than the Chief, he did not hear any testimony that was in favor of this directive. He pointed out that the Chief's testimony included wording such as, "we know the words say one thing, but we intended for them to say something else." Mr. Semanko indicated that was not a good place to be as a federal judge would look at the plain meaning of the words, and not at the record of any hearing where there was testimony that they were meant to mean something else. So, he said that it was important to look at what the words "manage ground water" meant. He questioned if they meant inventory and evaluate, or as in the dictionary, did it mean to control, be in charge of, administer, or run; which were a long way from inventory and evaluate. Mr. Semanko stated that he believes the directive was purposefully written using these words, and advised the committee that this directive needed to be pulled back and rewritten as it is the province of the states to manage ground water. He then reminded the group of the time that the Bureau of Reclamation made changes to their manual which came out very badly, and they had convinced them to pull it back and sit down with the affected parties to see if they could get to clearer language that everyone could agree on.

Mr. Semanko indicated that the real issue is that they do not agree with the Forest Service as to what the law is, so it is no surprise that they do not agree with the language in the proposed directive. He then cited two examples; one was trying to get the ski areas to sign their water rights over to the Forest Service as a condition of renewing their permits in Colorado, and they were all aware that the Forest Service filed many claims in the Snake River Basin Adjudication. As that adjudication was basically over, Mr. Semanko stated that if they did not get a federal reserved water right, or a beneficial use water right for ground water through that proceeding they couldn't create one through this directive. He also cited from the adjudication in Northern Idaho where the Forest Service is claiming surface and ground water on all National Forest Service land.

He also mentioned the question in the adjudication as to who owns stock grazing rights on federal lands, and cited one decision *(Joyce)* that said owning land is not a basis for beneficial use of a water right. That decision indicated that one can't create beneficial use by showing that they own the land upon which the water is used. Instead they have to show that they have the stock, that they brought the stock to the water, and that they own the stock that is drinking the water to show some proof of beneficial use. Mr. Semanko indicated that now in the North Idaho Adjudication the claims taking all occurred after the *Joyce* decision so it is really clear that land ownership is not enough to establish beneficial use for a water right, but apparently not to the Forest Service as the Forest Service has filed scores of claims in the Coeur d'Alene Basin Adjudication. Mr. Semanko then gave some examples of those claims, and indicated that the department has sent a letter to the Forest Service asking if they were aware of the *Joyce* decision, and asked them to provide information on the beneficial use of the water. He ended by saying that they look forward to seeing whether the Forest Service will change the wording in the directive.

In moving to a discussion of the EPA's new proposed rule, Mr. Semanko said he could not remember a time when there had been such an onslaught of proposed regulations, directives, guidance and manuals from all different directions. He explained that the deadline for commenting on the Waters of the U.S. – EPA's new proposed rule, was October 20th, which reflects an extension of approximately 90 days. He indicated that there had been a request from the Western Governors Association and others to add an additional period of time so that the extension would be an additional 180 days, and indicated that they hope this would be granted. He added that there are many calls for this to be completely withdrawn, including one from the Directors of the Departments of Agriculture from across the country, because of the confusion regarding it, and how it would affect farmers. He then reviewed an EPA map of the streams and waterbodies of the United States which included canals and ditches. He indicated that if the EPA did not mean for canals and ditches to be recognized as waters of the United States it was hard to understand why the map had been created to include those items.

Mr. Semanko indicated that in response to these maps, Tom Reynolds, from the EPA, had indicated that they did not show the scope of waters historically covered under the Clean Water Act or proposed to be covered by the EPA's proposed rule, which made him wonder if this was not enough. Then came a letter from EPA Deputy Assistant Administrator Nancy Stoner saying that the EPA was not aware of maps prepared by any agency, including the EPA, of waters that are currently jurisdictional under The Clean Water Act or that would be jurisdictional under the proposed rule, and added that the maps would have to be even more detailed to be used for that purpose. Mr. Semanko said that to him that indicates canals and ditches are in.

He then described a speaker from a water law seminar he attended this summer in Sun Valley who matter-of-factly stated that canals that return any water to the waters of the United States are themselves waters of the United States. He stated that this is a major issue that they have focused on, and they have started drafting their comments. He said that their major focus is the definition of a tributary to a navigable water not be so broad that it includes canals and ditches, and also that the exclusion from the definition of waters of the United States make it clear that canals and ditches are part of the exclusion. He indicated that they have worked with the National Water Resource Association and the Family Farm Alliance, and will continue to work with groups such as Western States Water Council, and others that are worried about the impact that this proposed rule could have on management of water resources under state law. He noted that there had been a fine line that had been drawn in the Clean Water Act in the early 70's that had been chipped away at over time, and that this rulemaking was the latest example of it. He also advised that there had been litigation where environmental groups had chipped away at exemptions for non-point sources for irrigation return flows and now they were seeing not only that canals and ditches would not qualify as irrigation return flows, but that those bodies of water be considered navigatable waters.

Mr. Semanko explained that if a canal, such as the New York Canal, is considered in the waters of the United States, it would have to have beneficial uses associated with it, and if those beneficial uses were not being met that would mean it becomes a water quality limited segment. If it is a water quality limited segment, total maximum daily loads would have to be developed. Mr. Semanko stressed that this threshold question is worth fighting, and the issue that they are focusing on is that ditches and canals are not waters of the United States.

Senator Siddoway asked Mr. Semanko's about a comment from the EPA Administer that if something had not been a water of the United States before the proposal, it wasn't going to be a water of the United States after the proposal. Mr. Semanko said that he believed the source of that comment was the 2001 *Swank* decision by the U.S. Supreme Court that said isolated wetlands or ponds were not waters of the United States, however before that decision the EPA and others thought that they were waters of the United States because the rule said that if birds fly from one end to the other then it is a water of the United States. He then pointed out that there are those that have tried to take the word "navigatable" out of the statute to reverse the *Swank* decision and return things back to the way they were. He pointed out that the *Rapanos* decision came along in 2006 to refine it even further when Justice Scalia said that waters of the United States were the permanent geographic features, and in a concurring opinion Justice Kennedy said it was more than that, and if there was a significant connection then it could be a waters of the United States. He said, however, that they all agreed that the decision was wrong and needed to be thrown out as that was not a water of the United States whether it was based on the permanent geographic feature or on the significant nexus. He indicated that if you listen carefully to the most exacting description of what they are doing they are not creating waters of the United States in areas that were not historically or previously administered as waters of the United States. So it really is about reversing or undoing those two decisions and what has flowed from those decisions to have a broader universe of the Waters of the United States as the EPA and the court thought they had before those decisions. In discussing how to do something like that, he noted one example was the idea that you could categorically decide a significant connection, so instead of going in to see if there is a significant nexus you do a connectivity study, which the EPA has done, and you say that in all these broad categories of cases there is a connection so in all of these scenarios there will always be a connection jurisdictionally by rule. He said that was not what Justice Kennedy said in his concurring opinion, so really it is about returning things back to the way they were before 2001 so they could make a straight-faced statement that they were not expanding the definition of Waters of the United States beyond what it historically has been.

The final speaker was Director Gary Spackman, Idaho Department of Water Resources. Director Spackman indicated that he would be using a power-point presentation and would leave the committee with copies of his presentation.

He indicated that it was his understanding that he was asked to speak about the Idaho Supreme Court Decision of *A&B Irrigation v. the State of Idaho*, and what the decision meant to the Department of Water Resources and the State of Idaho. He advised that this case revolved around what they call a basin-wide issue in the Snake River Basin Adjudication. This is an issue that affects all of the users in the basin, and these particular issues have been designated by the adjudication judges over the years as the Snake River Basin Adjudication Procedure, and that this one was number 17. He quoted the basin wide issue as: "Does Idaho Law require a remark authorizing storage rights to refill, under priority, space vacated for flood control?"

Director Spackman stated that Federal on-stream reservoirs are required under federal law to be operated for flood control purposes. He indicated that he wanted to emphasize that these reservoirs are operated for flood control by federal, not state, law. He explained that Dworshak Reservoir was constructed for flood control, however in the Snake River Adjudication the federal government refused to obtain a water right for storage and releases from storage of that reservoir while asserting that storage and release of storage for flood control was not subject to state regulation. He said that

the state of Idaho does not determine the timing of federal flood control releases or the timing of physical fill in the reservoir after a flood control release except as it may affect other state water rights. He stated that in addition to flood control, this reservoir has been operated for other federal purposes including flow augmentation down the river and for temperature control for migrating fish.

Director Spackman then discussed space vacated for flood control. He explained that there is space vacated for flood control in on-stream reservoirs when there is lots of snow in the mountains, and the reservoirs need empty space to hold the spring runoff. Storage water is not vacated for flood control in off-stream reservoirs or in years of low or average snow pack. He pointed out that most sizable on-stream reservoirs storing water for irrigation are owned or managed by the federal government; however there are a few that are owned by private entities. Additionally, the U.S. Bureau of Reclamation holds water rights to store and deliver water for irrigation, because in his opinion, they are required to follow state law with respect to storage for these purposes, but there is no requirement that they have a water right for flood control, and in fact there are no water rights, state or federal, for flood control on dual purpose reservoirs. He also pointed out that irrigation companies and irrigation districts contracted with the bureau, after the construction of these reservoirs, for storage water in the reservoirs to be beneficially used for irrigation. Additionally some reservoirs were built for flood control, and there is no state water right for storage or release of storage for flood control as this is a federally dictated operation.

Director Spackman explained that in an on-stream reservoir that is operated for irrigation and flood control which has a state based water right and a contractual obligation that is borne by the bureau to deliver water for irrigation space holders, that the federal government has a conflict as they must attempt to store enough water to deliver to the contract spaceholders their storage allocations, but they must also empty the reservoirs to make room for the predicted runoff resulting from a high snowpack or significant precipitation. He said that contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of releases from reservoirs to empty space for flood control. This is a requirement of the spaceholder's contracts and is an inherent risk that the spaceholders assume in relying on storage water from an on-stream reservoir that must be operated for flood control as flood control comes first. Director Spackman stated that regardless of whether there is a right to "refill" the reservoir space that is emptied to capture future flood water, the empty space may not refill. This is because the reservoir space is often emptied months ahead of the runoff. As a result, flood control operation is somewhere between a predictive and a best-guess science. Although the Bureau tries to predict what the water flows will be in the reservoir using various data models, the predictions are inaccurate.

The director said that some of the factors that contribute to the predictive uncertainly are: 1) how much snow there is; 2) how full the reservoirs are; 3) the long-term precipitation forecast; 4) the long-term temperature forecast; 5) soil moisture; 6) whether there are comparable years; 7) the water demand; and 8) risks of flooding vs. risks of not supplying sufficient irrigation water.

He explained that at that point the question becomes when there is a federal obligation in the reservoirs, where there is not a water right, and the federal government has unfettered ability to operate that reservoir for flood control, how does the director account for a water right that authorizes storage for irrigation, but does not authorize use for flood control. He emphasized that this only happens when there is abundant water in the system, and does not happen in low water years. The director then walked the committee through a series of graphs that illustrated this process over a year's time.

He then reminded the committee that any empty space in the reservoir at the time of maximum physical fill is the result of the inaccurate prediction of how much storage water must be dumped out of the reservoir to create empty reservoirs for flood control.

Director Spackman then went back to the question of, whether Idaho law requires a remark authorizing storage rights to refill in the original priority of the reservoir. He advised that the Idaho Supreme Court said that Idaho Code section 42-602 gives the director broad powers to direct and control distribution of water from all natural water sources within water districts. The statute gives the director a clear legal duty to distribute water. However, he said, the details of the performance of the duty were left to the director's discretion. He noted that the decision provides that the director's clear duty to act means that the director uses his information and discretion to provide each user the water it is decreed and implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

Director Spackman advised that because of the decision he reactivated administrative contested cases to determine when a water right to store and use water for irrigation is satisfied. He said that he anticipates gathering evidence and deciding this issue basin by basin. He noted that there are status conferences scheduled in these cases and they will try to define a path forward, however he anticipates that these hearings will gather evidence which will become record, and that any decision that comes out of this will be appealable to the courts. He stated that it is his opinion that these are unique issues that have to be determined basin by basin.

The director then discussed some of the complaints regarding the present accounting. One of the complaints is that it forces the storage space holders to take a drink when they are not thirsty. He indicated that this is only partially true, and explained that when water is being stored in the early winter, the bureau and the spaceholders predict thirst, and the water is being physically stored to the satisfaction of the water right and to satisfy the thirst of the user. He explained that when water is stored in a reservoir there is a perceived need to store the water. When abundant snows dictate that water previously stored because of a perceived need be dumped down the river, some argue that need be determined in hindsight after the initial determination of need, even thought the storage component of the water right has been exercised. The director then asked whether the passage of water downstream for a purpose not defined by a state water right, but by federal pre-emption, be excused and the satisfaction of the state water right reset to a lesser number. He also stated that some say that the issue of thirst can't be determined until after the storage season is over, or even after the irrigation season is over. He indicated that they had to determine whether those storage rights were satisfied or not satisfied during the storage season, and not in hindsight.

Director Spackman said that one of the other issues regarding the present accounting is that they want to be treated like any other water user. He advised that if they were to treat storage like any other water user it would result in reservoirs not physically filling and water flowing downstream, lost to downstream states and to the ocean.

Director Spackman went on to say that there would be risks to resetting the satisfaction of the right downward to equal the physical storage. Those risks include increasing the water reliability for some spaceholders while diminishing the rights of other spaceholders and those holding junior priority water rights. It would also upset the historical deliveries of water, although this would vary from basin to basin. Another risk is that it would allow the Bureau of Reclamation and the larger federal government to have greater control over flood control releases without consequences, including flood control for downstream interests or to satisfy treaties. It may also change the way that private and tribal reservoirs are operated to the detriment of natural flow right holders. Some examples of this would be the Chesterfield or Blackfoot Reservoir. He said that a further risk is that it may change the respective strengths and weaknesses of legal arguments of ground water and surface water users in the ongoing conjunctive management calls. He stated that this currently appears to be a major impediment to the settlement of the fill/refill issue.

Director Spackman also indicated that the determination of how rights are satisfied in each river basin is unique and dependent upon where reservoirs are located, where water is diverted, priorities of the various water rights, whether the river reaches gain or lose water, and local customs and

practices. He explained that is why the expertise of technical staff and an analysis of each river basin's needs are important to determine water delivery issues on a case-by-case basis. He advised that there is proposed draft settlement agreement language to establish decreed rights that would protect the historical practice of filling empty space in reservoirs vacated for flood control while protecting those who have relied on the present method of accounting. This draft language would also ensure that the federal government will be limited in its ability to use its flood control operations to control the river and take water from existing junior priority uses and from future uses.

Representative Burgoyne asked Director Spackman to address the current controversy in the Boise River Basin over the possibility that the historic practice in that area may be changing. Director Spackman said that he was aware that there were water users in the Boise Basin and the Upper Snake that were concerned about this. He indicated that the nature of their concerns was different to some degree, and that some of the differences related to the individual factors that he previously talked about as the reservoirs are unique in their locations and in the way water is delivered, and even in the threats for future water use. He used the Upper Snake as an example of this where there is a concern about additional water for recharge, and indicated that was not an immediate concern in the Boise Basin. He believes the concern in the Boise Basin is that the users feel the present method of accounting for water is an erosion and a devaluation of the basin water rights that are held by the Bureau of Reclamation for storage of irrigation water for which they hold contracts. They believe it is an erosion because they cannot divert the water under the priority of the rights once the space has been vacated.

Representative Burgoyne asked if there was anything in the Supreme Court or District Court's decision that Director Spackman believes mandates the change in the accounting of water as it relates to the Boise Basin. Mr. Spackman indicated that he did not.

Representative Burgoyne went through a hypothetical scenario in which a reservoir is full, and then due to a surprise storm they have to let some water out, and that water is not recouped later on. He asked whether the rights depleted proportionately, or did the senior holders keep their water, and deplete the juniors. Director Spackman explained that if there was 60,000 acre feet that did not fill, it would be backfilled by the bureau and taken out of the storage account. If more than 60,000 acre feet did not fill, the allocation of the users would be reduced according to their contracts. He also stated that Lucky Peak Reservoir is the latest priority reservoir as it was constructed for flood control. His understanding is that it comes out of the space of the Lucky Peak spaceholders and the allocation for the minimum stream flow in the Boise River.

Representative Burgoyne indicated that his question did not go to the contract, but rather to their accounting of the water right, and when storage rights were deemed filled even though the water is not physically present. He said he wanted to know if everyone would lose a little bit or if it would fall on the junior rights holders. Director Spackman explained that when they deem that the storage right is satisfied, and that the right is not entitled to any additional water, it moves to the end and all other junior water rights are satisfied, and that space is filled with the water that is predicted to come down as a result of the snow pack that is in the mountains. He said that is how they account for that right.

In response to a question by Representative Burgoyne and Speaker Bedke, Director Spackman indicated that the mixture of priority that was being referred to, and the attempt to call the spaceholders contract rights a priority was perhaps confusing him because the spaceholders themselves, although they have a beneficial use right, are not holders of the actual legal title to the water right. He said that they have a contract right to that space, so if there were 100,000 acre feet empty, then that 100,000 deficiency would be subtracted from the contractual allotment of the spaceholders according to what the bureau tells them is the contract provisions under which they operate. He further explained that they would show the water right as being satisfied, and that

deficiency is a result of flood control operations, so the bureau would then tell them, under the contracts, which would bear that deduction in their physical storage allotment.

Speaker Bedke asked if the situation they were talking about had only happened once since 1960, and the language in the recent Supreme Court case did not change anything, what the problem was. Director Spackman said that he was frankly mystified. Speaker Bedke asked Director Spackman to explain his 19th slide which illustrated "unaccounted fill." Director Spackman explained that the dotted line which indicated unaccounted fill was an exact mirror of the red line (reservoir contents) as it filled from April 17th until July 3rd. He stated that they had simply shifted that line up and said that on top of satisfaction of the water right they had received that much extra as that was how much came in and was physically placed in the reservoir after the flood control operation. Speaker Bedke stated that if the physical fill had stopped at the hypothetical 900,000 acre feet, then the water above that would not be available to satiate anyone's thirst, and the director agreed.

Speaker Bedke indicated that it had been the directive of the Senate Chairman at the end of the last session that the parties negotiate a settlement as opposed to having to legislate the matter. He said that it was his impression through the summer that this was close to being accomplished. He asked if the Supreme Court decision regarding Basin 17 was the triggering event for the parties to move away from each other, or was it something else that drove these parties further apart just as they were on the cusp of a negotiated settlement. Director Spackman said he didn't know how the Basin 17 decision affected the parties, and pointed out that there is a difference in the Boise River compared to the Upper Snake River because the storage rights in the Boise River have been decreed for years, and in the Upper Boise the storage rights are still being considered in the SRBA. So from his perspective there is not an opportunity for the people on the Boise to come in and reopen those decrees to address that issue, so that was why Basin wide 17 was brought because the Boise River people could not go back and litigate the way in which the rights were decreed. He stated that there is still an open forum for determination of the storage rights.

Speaker Bedke asked Director Spackman to put himself in the place of the side that was stalling in negotiations and explain their position. Director Spackman indicated that the surface water people fear that by establishing later priority dates that if there is a change in the way that the director administers conjunctively, by looking at the rights rather than full water supply, that the ground water users would be able to argue that all ground water rights prior to 1994 would somehow be exempt from a delivery call. He stated that the fear on the other side is that if they are protected back to the original priority date maybe the surface water coalition may be seeking to ask that the ground water users to make up the deficiencies when the bureau does not accurately predict how much storage needs to be vacated so that responsibility is borne by the ground water users. He explained that what has happened is that there are two conflicting paranoias and they have separated.

Speaker Bedke indicated that he was very optimistic as he had heard that the parties were very close to agreement, and now he was hearing that they were not. He said that he believed future members of the Committee should direct the parties to negotiate, and that they would not legislate clear winners and losers.

Senator Brackett asked if it was correct that the senior holders bore a greater risk in a shortfall under the present system. He also indicted that he believed that it was legitimate to want to get this issue settled so we would not be place in jeopardy from future developed, and he asked Director Spackman to comment.

Director Spackman said that he wanted to make sure that he did not misrepresent because what happens in the Boise River is not what happens in the Upper Snake, and because he was aware that Representative Burgoyne had an interest in the Boise River that he had spoken to that with him. He indicated that the way in which that allocation occurs, and the frequency of a shortfall being borne by the spaceholders is greater in the Upper Snake. The reason for that is that there is more storage, the uncertainty of prediction is greater, and there is no provision from the bureau that

guarantees a 60,000 acre feet backfill, or something comparable. As a result of this difference the water users in the Upper Snake incur a reduction in their allocation when the bureau misses its mark more often. This happened in 2012 and was fairly significant at 300,000 to 400,000 acre feet that was divided amongst the spaceholders.

Senator Brackett asked how many times this had happened in the Upper Snake, and also asked the director if the senior water right holders bore a disproportionate or greater risk from a shortfall. Director Spackman made it clear that he was talking about senior storage water rights in a reservoir that was operated for irrigation storage and flood control, and the users of that water, for irrigation, have contractual relationships with the holder of that right, and in that relationship they bear the risk of that space not filling. He explained that as they are senior spaceholders in a reservoir that is operated for a dual purpose, and because their contracts say what they say, they bear an inherent risk that is not borne by the others through the federal flood control operations that the space may not physically fill. He indicated that although they do bear that risk he did not want to call that a risk of a senior right holder that was somehow being subordinated to a junior right holder as that was not the way the contracts were set up, or the way that the reservoir space was allocated.

Senator Brackett expressed his opinion that future development was a valid concern in both the Boise Basin and the Snake River Basin, and asked if the director agreed. Director Spackman indicated that he agreed. He noted that they have said that in the Snake River Basin they will grant two water rights, one that will describe the current practice, which is that any time there is excess water, after they say that the right has been satisfied, that the water can be diverted to storage. The second water right, which is up to the maximum amount that they can identify, has been vacated for flood control and fill.

Senator Brackett asked if that was by application, or if it was an actual water right that was in place. Director Spackman indicated that there were beneficial use claims pending before the court at this time, and they have said in the negotiations, that they will agree to those two water rights and their ability to refill that empty space will be recognized by decreed water rights through the Snake River Basin Adjudication court. He indicated that they were making similar offers in the Boise Basin that would essentially protect them from future development downstream.

Director Spackman also advised the committee that they were actively pursuing extension of the adjudication of the water rights process into the Bear River Basin, and indicated that he would be speaking to legislators and some of the water users from that area the following week. He said they felt that it was important that since they had the adjudication court in place that these rights also be adjudication and be part of the success story of the adjudication in the State of Idaho.

Senator Stennett asked how many people had water rights, and how much water there was in the Bear River Basin area. Director Spackman told the committee that they believe there will be between 15,000 to 20,000 claims filed in that area. That compares to approximately 160,000 in the Snake River Adjudication. They believe that the level of effort in the Bear River Basin will be somewhere near the level of effort that is going on in the Northern Idaho Adjudication , and that the ultimate appropriation will be at about the same level also. He also indicated that if this goes forward there will be need for authorizing legislation.

Co-chairman Pearce adjourned the committee at 4:40 p.m.