

To date, calls have been resolved through mitigation plans

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is acting as mediator in the discussions. "It's too important to not be successful."

The urgency to resolve the longstanding problem was heightened on May 1, when groundwater users failed to meet a deadline to acquire 89,000 acre feet Idaho Department of Water Resources Director Gary Spackman ordered in mitigation for this season's surface water injuries.

But Spackman stayed curtailment — which would have affected wells junior to 1982, including more than 86,000 acres of agricultural land, cities and industry — when the parties announced their intentions to negotiate a long-term settlement.

Agreement terms

The sides have agreed on broad concepts.

The Coalition has withdrawn its methodology order, which sets the rules governing curtailment. Idaho Ground Water Appropriators Inc., will provide 110,000 acre feet of mitigation water this season, which should now be feasible given heavy May rainfall.

Perhaps the hardest pill for IGWA irrigators to swallow is a proposed mandate that they reduce their water usage by roughly 13 percent in the future to conserve 240,000 acre feet annually, about equal to the aquifer's rate of decline. The reduction would be averaged out over a few years to accommodate rotations with higher-water crops.

IGWA would also provide the coalition a flat 50,000 acre feet of mitigation water annually. In wet years, mitigation water could be left to soak into the aquifer, called managed recharge.

IGWA will also spend about \$1.1 million per year to expand "soft conversions" that switch well users to surface water when possible.

To monitor progress, wells would be fitted with meters, replacing less accurate consumption estimates based on power usage. And water rights transfers would be scrutinized more closely.

A final term sheet addressing the finer points of the agreement is due to Spackman by July 1, and the sides have until Aug. 1 to get the plan approved by as many of their members as possible. Groundwater users who opt in will be granted safe harbor going forward; those who don't will remain subject to curtailment.

The state has also agreed to devote resources toward building aquifer levels, promising to build new infrastructure for conducting aquifer recharge, with the goal of injecting 250,000 acre feet of surface water into the aquifer annually.

"The good news is everyone is kind of willing to do their part, but they don't want to do the part their neighbor is



Brian Olmstead, general manager of Twin Falls Canal Co., kneels beside the Lowline Canal in Twin Falls County. Olmstead, whose company was one of two Surface Water Coalition members that stood to gain mitigation water this season under an Idaho Department of Water Resources order that was rescinded when negotiations toward a longterm solution began, believes it's critical that the state stop using more groundwater than is naturally replenished.



Kent Giddings, left, general manager of Idaho Milk Products, visits with Rick Onaindia, CFO of Bettencourt Dairies, and Jan Rogers, executive director of Southern Idaho Economic Development Organization, during an open house at the company's new technical center in Jerome, Idaho. Rogers says Magic Valley's food processing industry is amid a period of rapid growth.

responsible for," Bedke said prior to mediating negotiations in Pocatello on June 18.

Change on the horizon

Rep. Jim Patrick, R-Twin Falls, who farms with surface water, believes groundwater users could achieve much of the proposed water savings by removing pivot end guns and better maintaining sprinklers to reduce leaks.

"When there's accountability — and a 13 percent reduction creates that accountability — people will watch their crops and not over-water," Patrick said.

But Patrick fears large-scale curtailment would be economically devastating.

Brian Olmstead, general manager of Twin Falls Canal Co., predicts farmers will also

have to change crop rotations and farming practices. Olmstead, whose company was one of two Coalition members that stood to receive mitigation water this season under Spackman's order, anticipates well irrigators will shift from raising water-intensive forage crops to more water-efficient malt barley.

"This may very well have a limiting affect on expansion of dairy cow levels on the aquifer," Olmstead said.

He believes growers may opt to graze rather than plant their least productive ground.

"There are ways to conserve water and still make a profit," Olmstead said.

Olmstead hopes additional savings will be achieved by eliminating illegal diversions.

IGWA attorney Randy Budge expects most affect-

ed groundwater users will opt into the agreement, but agrees they'll have to raise fewer water-intensive crops and fallow some acres to meet the necessary reduction.

"We're at a crossroads where we can have chronic pain or acute pain," Budge said.

Gradual decline

Farming practices of the past, such as running canals during winter and flood irrigating crops, artificially enhanced aquifer levels through extra seepage.

The aquifer peaked around 1960. Then levels began a steady and continuing decline, largely because of the rise of efficient sprinkler irrigation and the expansion of groundwater pumping.

"There have been a lot of industries built up on the water levels that were at least tem-

porarily artificially enhanced by early irrigation practices of flood irrigation," said Lyle Swank, watermaster for the district that includes the Upper Snake River.

Nearly 30 years ago, Idaho was among the first states to acknowledge concerns with its major groundwater source when it commenced with the Snake River Adjudication — an exhaustive process to catalogue tens of thousands of water rights and establish how much water was available to be appropriated. The recent completion of that process, coupled with improvements to state groundwater models, has opened the door to water calls by senior users, in a state governed by the principle "first in time, first in right."

To date, calls have all been resolved through mitigation plans, but absent change, water managers fear the day will come when curtailment is the only option.

Lingering questions

The Coalition's call stems from spring declines at the center of the aquifer and encompasses well irrigators throughout the Snake Plain.

Growers in the aquifer's eastern portion are less experienced at dealing with water calls. Swank believes they face a steep learning curve but will be critical to the agreement's success.

"There are people who haven't been on the front lines of this who don't understand how big of a concern it could be if they don't get a permanent solution," Swank said.

Growers also eagerly await answers to questions regarding how much credit farmers should receive for their past

efforts to implement water-efficient farming practices and the amount of burden that should be placed on junior well users relative to pumpers with more senior rights. Bedke said such details will likely be addressed by individual groundwater districts.

There are even questions regarding whom should be at the table, based on a recent court ruling Fifth District Judge Eric Wildman rendered in a call filed by the Rangen, Inc., trout farm in Hagerman. Wildman disagreed with IDWR's justification for a trim line — a practice excluding portions of the aquifer from calls in which the injured party would derive relatively insignificant benefits from well curtailments.

A trim line was also applied in the Coalition's call, excluding about 20 percent of the aquifer below parts of Rexburg, St. Anthony, Bliss, Wendell and King Hill. Though the Coalition's trim line was based on different rationale, IDWR Deputy Director Mat Weaver said it's on shaky ground, given the Rangen ruling, and growers within the designated area of common groundwater but outside of the trim line could be affected by a future call.

Otter said he won't let such details derail the agreement.

"Reaching a consensus agreement that takes into account all of the competing needs and the limited resource is absolutely necessary for continuing development and economic growth in the watershed," said Mark Warbis, a spokesman for Otter. "We've long since passed the time when we can consider surface and groundwater as a separate resource."

Settlement negotiations faltered in 2012 and 2013

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UPGA was initially optimistic that its supply management strategy was protected by the Capper-Volstead Act, which provides farmers with some exemptions from antitrust law.

However, Chief U.S. District Judge Lynn Winnmill dealt the cooperative's legal defense a big blow in 2011 by ruling that "acreage reductions, production restrictions, or collusive crop planning" weren't shielded under Capper-Volstead.

Since then, the cooperative and potato companies have turned over more than 3.6 million pages of documents that were re-

viewed by the plaintiffs and their economic experts, according to court documents filed with the settlement.

Settlement negotiations faltered in 2012 and 2013, but the discussions were renewed after the plaintiffs asked for their case to be certified as a class action last year, which would allow other affected parties to join the lawsuit.

Wright said the settlement, which should be finalized by late this year, is not an admission of guilt by the defendants.

"Despite negotiating a settlement, potato growers steadfastly maintain they did not participate in any illegal activity

or wrong-doing," Wright said, adding the settlement "clarifies for growers nationwide protected activities under the Capper-Volstead Act and ensures a path forward for UPGA and its constituent members."

Wright said the agreement doesn't limit other UPGA functions such as data gathering, disseminating information and making recommendations.

The talks nearly fell apart again earlier in 2015 but ultimately proved successful, with the parties agreeing to postpone the litigation and eventually agreeing on the \$25 million payment and injunction against pre-planting supply management.

The potato cooperative's willingness to settle shows that it likely recognized the supply management strategy isn't legally defensible, said Peter Carstensen, a law professor specializing in agricultural antitrust at the University of Wisconsin.

"Private action to regulate output is inherently suspect," he said.

The production of other crops is legally managed through marketing orders overseen by USDA, but those are a "different animal" since a federal agency has the final say on supply restrictions, Carstensen said.

"You have to have both authorization and oversight," he said.

Rather than trying to directly restrict supplies, the agricultural industry would benefit from improved transparency about market conditions, Carstensen said.

If growers knew more about the anticipated demands of processors and retailers, they could make self-interested decisions without collectively attempting to influence the market, he said. "That's the kind of information that is needed."

University of Idaho Extension economist Paul Patterson, who has long studied the cost of producing potatoes in Idaho, believes acreage reductions noted by the plaintiffs were bound to occur regardless of UPGA's in-

fluence, following a string of bad years for potato prices.

"They're being blamed apparently for the entire price change, and I think that is not logical," Patterson said. "The whole allegation of price fixing doesn't seem to hold water under close examination because why would you set your price below your cost of production? It was below the cost of production in some of the years they're alleging price fixing took place."

Wright declined to discuss UPGA's plans to pay the settlement and costs associated with litigation, but said the funding will ultimately come from potato growers and the potato industry.

Washington farmers may end up hiring about 15,000 guestworkers this season

he still had more than 100 H-2A workers stranded at the border costing him \$30,000 in food and housing to keep them waiting for visas and costing his customers approximately \$1 million in fruit not picked and rotting.

Scaroni expects to hire and manage more than 3,500 H-2A

workers this year for farmers in the El Centro area.

The State Department said that urgent humanitarian cases and temporary agricultural workers are being prioritized for approval.

Basic questions remain concerning whether the government is capable of adminis-

tering a legal worker program that can meet the strict timelines set by Mother Nature, Fazio said.

"The State Department is not the culprit," he said. "The culprit is a system which requires seamless coordination by six government agencies."

WAFLA, with the help of

Tom Roach, a Pasco immigration attorney, petitioned for visa waivers. The State Department supported the petition but the Department of Homeland Security's Customs and Border Protection balked, asking for an additional \$591 per worker on top of fees already paid, Fazio said. The law provides for

waiver of fees in emergencies, he said.

Eventually, the State Department issued visas for about 90 percent of workers WAFLA had waiting at the border from southern Mexico.

Sens. Patty Murray, D-Wash., and Dianne Feinstein, D-Calif., and Rep. Dan

Newhouse, R-Wash., all helped to resolve the situation, Fazio said.

Washington farmers may end up hiring about 15,000 H-2A visa foreign guestworkers this season to get through a labor shortage, but it is difficult to navigate six separate government agencies, Fazio said.