IDAHO WATER RESOURCES BOARD

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Public Information Meeting on
the Swan Falls Agreement
Twin Falls, Idaho

TRANSCRIPT OF PROCEEDINGS

Held on October 25, 1984
before Chairman Kramer

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Transcribed by
Patricia J. Terry, CSR, RPR, CRR
CSR No. 653

COPY
Thank you, Chairman Kramer, this will be the first speaker. Who's been working on this for a month putting this together? Far end Tom Nelson, Idaho Power. In the middle, Pat Costello. And on the right-hand side, Pat Kole. I'm Jeff Silver and I'm running in the legislative district 25. (Tape inaudible.)

Mr. Cowen, I'm Jerry Cowen from Jerome, and I'm running in the legislative district 25. (Tape inaudible.)

Mr. Silver: I'm Jeff Silver and I'm running in the same district. We're glad to have all of you people here. On my left is the negotiating team who's been working for a month putting this together. Far end Tom Nelson, Idaho Power. In the middle, Pat Costello. And on the right-hand side Pat Kole.

Pat Costello from the governor's office will be the first speaker.

Mr. Costello: Thank you, Chairman Kramer, members of the board, legislators, and members of the public. As Tom pointed out, the governor did request the board to hold these meetings around the state. And he very much appreciates your interest in coming out to listen to what we have to say about the agreement that the attorney general, the governor, and the power company have reached.

We did negotiate this pretty much just between the three individual principals, and so now that we have arrived at a consensus at that level, we are anxious to get the word out to the public so they can evaluate what we've been referring to as a road map that we can use to get to a resolution of this whole controversy.

The governor's perspective on this problem -- I should begin about two years ago. I think most of you are aware that following the Supreme Court decision which recognized a claimed water right, unsubordinated water right at Swan Falls for the Idaho Power Company, the governor began leading a charge with the help of Senator Negg, who's here with us tonight, to legislatively subordinate those rights. And we fought that battle over two years in the Idaho legislature and fought it to a bloody standstill and weren't able to get that accomplished.

The governor never had the desire when he was seeking subordination to pursue a course that would lead to development with reckless abandon. In fact, he felt a little bit offended that the power company didn't feel like they could trust the state to protect their rights and wanted to put the state back in the driver's seat but to protect hydroelectricity.

But as I say, we weren't able to accomplish it through the legislative group, and following the last session, the power company approached the governor again with an offer to enter into an agreement for partial settlement of the water rights lawsuits under the legislation that passed in the 1983 session called Senate Bill 1180. The governor's response to that offer was a counteroffer to enter into negotiations for a total settlement of all the lawsuits and of all the surrounding issues involved in the Swan Falls controversy. The power company took us up on the offer, and the governor and the attorney general and the Idaho Power Company chief executive officer Jim Bruce sat down for the first time in July and just had a general discussion to kind of explore the things they could agree about and the general areas of disagreement.

And as I say, there wasn't really any...
unsubordinated rights. That was fairly easy to get through the process of (tape inaudible),

And they designated the three of us to work together to flesh out the ideas at that meeting and to come back to them with additional ideas to explore further. And we went on that way for oh, probably six, eight, ten meetings of the three principals and countless meetings of the three of us in between.

And that finally culminated this morning in the signing by the three principals of two contracts, the first one being the main contract that I think most of you got copies of tonight, which is the one that would resolve all of the outstanding issues in the litigation, and a second contract that was the old Senate Bill 1180 contract under which we identified several classes of use, current users who the power company had agreed from the start ought to be protected and hand out to you has been this water in the Snake River. And if we got away from the loaded word "subordination" and so forth that we could possibly arrive at some consensus as to how much water ought to be in the river, how we can manage the amount of water we feel can yet be developed.

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And the approach that would accomplish this is a statute that would create this system in carrying out the legislature's authority to regulate hydro power under a 1928 constitutional amendment. The system was designed to solve a lawsuit, but it would apply by its terms generally across the state. That's because we felt that this was not only an agreement that was appropriate for settling the lawsuits but also was based on sound public policy principles. And that is your role now as members of the public to evaluate that on that basis.

So the final point I would like to make is as I pointed out the governor started out pushing for total subordination. He ultimately after two long, hard years concluded that even if we were to get a total victory in the sense of getting total subordination, it would likely be short lived. If there were no restrictions and no more advanced management systems put into place and there was too rapid development, the pressure from the rate payers would be so great that the legislature would probably step back in and correct the balance. On the other hand, if the power company had achieved a total victory, pressure from the other direction probably would have come in and also given back some of the water for development.

So my view is that ultimately even if we pursued the litigation to its full course, the...
result of the litigation would not have been determinative for all times. There's going to be a political solution to this problem. There's going to be a balance found and struck at some point. It's the governor's firm belief that now is the time to strike that balance, and he believes that the approach that we've taken to striking that balance is a sound reasonable approach. And we commit it to you on that basis. And once again, thank you very much for your interest.

CHAIRMAN: Thank you, Pat Costello. Now we will hear from Pat Kole from the attorney general's office.

MR. KOLE: Thank you, Chairman Kramer, members of the board, legislators, members of the public. My comments tonight will be brief. I think the document that you have in front of you speaks for itself. We thought it was time to try and come throughout the negotiation process -- and I might say it's not been always a road without a few rocks and pitfalls in it as we've gone through the process -- is to do what has not been done in the past. And that is to put the issue of Idaho's battle over its water behind us. If you look at the history of Idaho in 1926, 1945, 1952, 1973, and 1976 and 1982, Idaho's water wars erupted continuously and more vigorously.

We thought it was time to try and come up with a solution that we could recommend to you that would put into place a system of responsible management that would guide us into the 21st century. In doing so, we wanted to create a system where there would not be any loopholes and to the best of our abilities put something that you can rely upon and that in 50 years you will still be able to rely upon to guide Idaho's water management.

In order to do that, we focused on the interests to be protected. The interests to be protected we saw were primarily these: First, all current users of water had to be protected. And I can tell you under this agreement all current water users will be protected in perpetuity. They will have a vested water right which is superior in nature to that of the power company even if, even if the calculations that we have made in arriving at the figures we have used are wrong. So the people that are currently using water as of this irrigation season will be protected.

Secondly, we had to make sure that future development proceeded in the most responsible fashion that it could so that we could get the most utilization of a scarce resource. I say that because in looking at the department's records, you cannot clearly see that Idaho's water resource is finite and it cannot last forever. So in managing that resource, you have to get the most bang for the buck. And the system that we have in place in this agreement achieves that result.

Third, in order to handle this approach, we have to bring Idaho's water law into the 21st century. Now the code has served us well in the past, but it needs some updating now. We're at that point in time when we have to take a hard look at it, and we think we have done so in the legislative package that you have before you. Finally, we thought it was time for the state to take responsible management actions to assure an adequate supply for multiple use of developers. And I think the agreement that you have before you achieves that result also. There is water to be allocated for various competing uses so that there will be a chance for all sectors of Idaho's economy to grow in the future.

In conclusion, I would like to say that litigation has benefits and it has its drawbacks. One of the drawbacks is that primarily lawyers tend to get a lot of money going into court, and that might not always be the best way that you could spend your money, because in the final analysis when you look at the money that you're going to eventually have to spend, it may make more sense to spend that money positively in trying to get something accomplished and in place as opposed to spending that money in court.

And on that subject, I'd like to point out that one of the things that we have indicated to you as being necessary is the Snake River adjudication. And there's going to be a lot of controversy about how to finance that adjudication. That's something that the legislature is going to have to address. I can tell you, though, as a lawyer that it is absolutely essential that that Snake River adjudication begin in the very near future. We have received notifications that the federal government will begin pursuing their reserved

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rights. We know that is a fact. Now, there's going to be one of two forums within which that litigation can occur. It can occur in federal court or it can occur in state court. I have not yet talked to a user who wants that litigation to proceed in federal court. So our option is to proceed immediately as quickly as possible to adequately finance an adjudication in state court. And I think it's incumbent upon the legislature to address that issue in this session. I think those conclude my remarks, and I'll be happy to answer questions.

CHAIRMAN: Thank you, Pat Kole. At this time I'd like to introduce Tom Nelson, Idaho Power. About the time I start to introduce Idaho Power, the lights start turning off. Is that part of your doing?

MR. NELSON: Thank you, Chairman Kramer. That's a service the company gives me when I try to tell everybody how important it is that we preserve the hydro base with the government. They used to do that in front of the PUC all the time. You know, being last here, I guess I'm going to spend the entirety of my life living on the end of the ditch. But I would like to say as a preliminary before we get to the questions that when the governor countered our offer to negotiate 1180 with an offer to negotiate the entirety of the dispute, we were delighted. It had taken a couple years to get everybody in a posture where that could happen. And I guess you have to go to war for a while before you appreciate some peace. Although I heard a man describe peace as a period of cheating between two periods of fighting. I don't know if that or not.

But in any event we were delighted because it's the company's business to make kilowatts, not to make water law for the world, nor to get in pitched battles with the executive branch of state government. Nor has it ever been the company's business to allocate water or be a water master. It never has been, and it doesn't want to be.

So what the company wanted to get out of this was a system where it was a water user, its rights as such were recognized, and the state was placed in a position to actually act as an allocator and manager of the state's water resources. You can't just write those words in a code and have a water management allocation system actually work.

So when you read this agreement, hopefully the intent is not too much buried in the legalese. I would ask that you remember that we approached the resolution of the litigation in this agreement, and we approached the resolution of the entirety of the controversy. So this agreement is presented as a whole. It's obviously not presented take it or leave it because the governor, the attorney general, and the Idaho Power Company cannot make this agreement work. It takes the Water Resource Board, the legislature, the Federal Energy Regulatory Commission to make it work.

But when you look at it, I do ask that you look at it as a whole and not pick at pieces of it, because it is a whole. The question is not how we got to a particular provision, who gave up what to get there, or who gained what to get there. The question is as a whole does this do what it should do? It is I think a responsible suggestion for a way to resolve the controversy. I think if you look at the potential results of the litigation, on one hand you have the power company effectively won about as clean a victory as you could postulate it would win. You'd have probably the result that people in place would remain in place. There would be no further development. Had the power company lost entirely and had no water rights at all, you would have the downside of a 3300 minimum flow year-round at Murphy.

So within those two constraints, this agreement puts us somewhat in the middle. The people who have developed will develop. Other people can still develop but under a different set of ground rules. But you don't run the risk that the river goes to 3300.

So regardless of your perspective, it's not so important that you look at what you think was given up from your side but to look at the question of what was retained. Because I think whether you look at it from the standpoint of too much development is permitted or from the standpoint that too much development was taken away, there is still a substantial benefit to the point of view that you represent. And so if you look at it in that standpoint, I think that we have a situation where
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1 development can continue, but it's not compelled.
2 And it will continue only if it meets the
3 standards which we recommend. They're not
4 impossible. There has been some criticism that
5 they're too loose. And I will leave that to later
6 discussion. They're the best we could do
7 remembering the interests that we represent and
8 remembering also that in the back of our mind we
9 had to present a package which we thought would
10 sell.
11 And so if you keep those things in
12 mind, it might give you a little better idea how
13 we got where we did. But I do commend it to you
14 as an entirety and ask that you look at it in its
15 entirety, and it should pass or fail on that
16 basis. Thank you.
17 CHAIRMAN: Thank you, Tom Nelson. Now it's
18 up to you as the public to ask questions. Be sure
19 to speak loud and clear because we like to get it
20 on tape. Also state your name.
21 Before I go to the public, first I'd
22 like to ask any members of the Water Resource
23 Board, do you have any questions? Greg.
24 Oh, Mr. Jones.
25 MR. JONES: When the question is asked,

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1 sometimes the audience doesn't hear it. Will you
2 make sure that the question is understood before
3 the answer is given.
4 CHAIRMAN: Thank you, Mr. Jones.
5 Greg.
6 GREG: Mr. Chairman, I have three questions
7 that I would ask, some of them probably by the
8 state hydrologist that need answers, the others by
9 the three principals.
10 Frank, you mentioned that the
11 adjudication of the Snake system, which I think
12 everyone realizes from the headwaters to its
13 juncture with the Columbia River is approximately
14 900 miles. If I understood you right, did you say
15 that maybe not all of the system would be
16 adjudicated?
17 My concern is the federal reserve
18 rights because the Clearwater system, the Lochsa,
19 Selway, et cetera, has a lot of federal lands
20 within it. So if we're going to adjudicate the
21 system, wouldn't we adjudicate the entire stream
22 system and not just say from the Murphy gauging
23 station up over in Lewiston up on the main stem?
24 CHAIRMAN: Mr. Sherman, would you like to
25 answer that?

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1 MR. SHERMAN: Certainly. The intent is to
2 adjudicate as much as is necessary to bring in the
3 federal reserve rights. Without the federal
4 reserve rights, the adjudication above Murphy
5 gauge, for example, becomes meaningless because of
6 the national forest, park, indian reservation. We
7 need to bring the federal people in. If they were
8 doing the adjudication from Lewiston up, then
9 that's what we'll do. If they will agree that
10 they may only have to do it above Murphy, then
11 perhaps at this time that certainly would be
12 cheaper to do it just above Murphy. Whatever it
13 takes to bring them in is what the state proposes
to do.
14 GREG: Okay. My second question will be to
15 you, too, Frank. Is the 4500 cfs the historical
16 low flow?
17 MR. SHERMAN: Yes, sir.
18 GREG: Okay. Then my next part of this
19 question will be to the negotiators. You're at
20 3900 cfs in the summer. You're at 5600 cfs in the
21 winter. Now, as human beings in areas possible
22 and whoever thought the great salt lakes would
23 have gone to an elevation of 4208, but we do know
24 the elevation of the great salt lakes is 15 feet

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1 higher than that. And I'm assuming that the flows
2 here are artificial in nature because of the
3 irrigation that has gone on in the Upper Snake.
4 In other words, we're getting a larger recharge to
5 the aquifer now than we were historically.
6 So why did you arrive at the 39/56
7 instead of going to the historic figure?
8 MR. COSTELLO: Well, if we'd gone to the
9 historic figure, then by definition there wouldn't
10 be any more development. I mean, if current
11 development already takes you to X and you set the
12 minimum streamflow at X, then you are saying there
13 will be no more development. We're going to
14 protect the flow. Do I understand the question
15 correctly?
16 Our aim was to provide something
17 between where we're at now and the existing
18 minimum flow so that there would be a block of
19 water identified as available for free
20 appropriation and at the same time to raise the
21 level of protection somewhat that already exists
22 for in-stream uses.
23 GREG: All right then, in other words, if on
24 a very dry year the minimum summer flow dropped to
25 3700 second feet, then that's just the way it is

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for the utility. No recourse on anyone?

1. MR. COSTELLO: To the extent that it's
2. caused by users who are currently in place or who
3. are grandfathered in here, they have no recourse.
4. To the extent that it is because of new users,
5. ones that come in after October 1st of this year,
6. they would have recourse and in fact can take
7. action to shut off upstream uses.
8. CHAIRMAN: I assume you mean appropriators.
9. GREG: My third question will be to the
10. principals. You're going to ask the legislature
11. to adopt public interest. In the western states
12. public interest is starting to be recognized as
13. public trust. Public trust then pushes itself
14. into the public trust doctrine.
15. Are you asking the legislature to adopt
16. a public trust doctrine? And if you are not, then
17. please define the two for me.
18. MR. COSTELLO: I think I'll defer to Tom on
19. that. The answer is no, but I don't know the
20. definition.
21. MR. KOLE: The answer is no and no and very
22. strong emphatic explicative deleted no.
23. GREG: That's not part of my question.
24. MR. KOLE: Well, first off, you know the

1. buzz word "public trust doctrine" I think is
2. something that concerns all water users because by
3. its very nature it implies a reallocation of a
4. vested appropriated water right. And what we are
5. doing here is absolutely the opposite. We are in
6. this system using the Constitution of the State of
7. Idaho which says that the right to appropriate the
8. quote, unappropriated, unquote waters of the state
9. shall never be denied by in effect saying that the
10. Snake River is an appropriated river and because
11. it is an appropriated river we can now begin to
12. use the water rights of the power company as a
13. shield to pick and choose which developments we
14. want to go forward. So the idea is to avoid and
15. in fact to head off the infiltration of the public
16. trust doctrine into the State of Idaho by going to
17. a responsible system that is clearly recognized by
18. the Idaho Constitution.
19. GREG: Thank you. Do you concur,
20. Mr. Nelson?
21. MR. NELSON: I concur that this agreement
22. does not rest on the public trust doctrine, and I
23. think it would be irresponsible in the extreme to
24. introduce a public trust concept to the law where
25. of the State of Idaho. There was an answer filed

1. on behalf of some of the state defendants in one
2. of the lawsuits which raised that doctrine. I
3. think that's one of the benefits of this agreement
4. is that perhaps we get the state to deter from
5. doing that.
6. But no, this agreement does not rest on
7. the public trust doctrine, and the results it
8. seeks can be obtained without reference to that
9. doctrine.
10. CHAIRMAN: Question from the audience.
11. AUDIENCE MEMBER: I was just wondering in
12. the legislative process how far could the
13. legislature go in tinkering with the different
14. items before you guys meet on May 15th and say
15. well, it's no go or go? And how do you warn the
16. legislature if they're going over the line and
17. tinkering with it so then you don't get to make a
18. tink and look at the packaging and say well, then
19. you're almost negotiating all over again?
20. MR. COSTELLO: If they mess with it too
21. much, it will destroy the bargain. We'll have to
22. renegotiate the whole deal. But we've got three
tiers to the specificity here. If you'll look on
pages two and three, items A, B, C, D, E, F, and
G, item A for example says "as set forth
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<td>1. MR. MARCATONI: Oh, okay. I'm with (tape inaudible) Jerry Marcatoni. As far as arriving at the 3900 of flow during the summer, was any other factor considered aside from power generation?</td>
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<td>2. UNKNOWNSPEAKER: Can we have you stand. We can't hear you.</td>
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<td>3. MR. MARCATONI: Aside from power generation concerns, were any other factors considered in arriving at 3900 cfs?</td>
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<td>4. MR. KOLE: Yeah, the framework spelled out plan was adopted, it was recognized that there was perhaps inadequate supplies of water for other uses. So we tried to incorporate those other uses as identified in policy 32 of the state water plan.</td>
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<td>5. MR. MARCATONI: Other uses such as?</td>
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<td>6. MR. KOLE: Environmental considerations, fish propagation, aesthetics, a whole myriad of other uses that are recognized in the state water plan as being beneficial.</td>
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<td>7. CHAIRMAN: Next question. Sir? State your name, please.</td>
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<td>8. MR. FERGUSON: Paul Ferguson, Shoshone.</td>
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<td>9. Will this run counter with the state Constitution?</td>
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<td>1. all your plans? Will the state constitutional water rights bring all this out? (Tape inaudible.)</td>
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<td>2. MR. COSTELLO: Are you referring to the appropriation doctrine?</td>
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<td>3. MR. FERGUSON: Yes.</td>
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<td>4. MR. COSTELLO: Okay. The question was whether this new scheme runs counter to the state constitutional provision saying the right to appropriate the unappropriated water so the state should never be denied. The key there is the right to appropriate the unappropriated waters.</td>
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<td>5. What we're doing here is saying all the waters in the Snake have been appropriated. All the water that's left to be appropriated from this point on is only available because it was previously appropriated by the power company, and the state has gotten control of it through an agreement which allows us to funnel it through a more rigorous set of public interest criteria than the state's ever used before, not only to protect and take into account hydropower benefits but also so that we can encourage those types of development that will get us the most development with the least amount of impact on the river so we make that water last as long as we can and go as far as we can.</td>
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<td>6. MR. FERGUSON: The one stipulation you have on new (tape inaudible) on this water right zone?</td>
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<td>7. MR. NELSON: The water plan target minimum flow at Milner Dam is zero, which is a condition realized in the summer all the time, and this agreement does not contemplate any change in that minimum flow. So short of a statement that before new storage is built we should fully utilize existing storage, what goes on above Milner is not affected by this agreement.</td>
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<td>8. And I might explain while we're touching on the full utilization, what we were trying to do there was simply get people to ask some questions about the way we use water in the Snake River basin. And full utilization is probably as much a federal question as it is a state question giving federal policies the use of its reservoirs. So the way we look at full utilization is you ask the questions and say is there any way we can free the water up for other uses, for different uses, for more intensive uses, and if the answer comes back no, within existing law and policy we're doing the best we can, then</td>
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1 message there that under any circumstance, any
2 attempt to take that water out of the Snake River
3 basin is going to be met by a united front of both
4 the power company and the State of Idaho and of
5 course all the water users in the state.
6 MR. COWEN: We only have two senators
7 against 48 -- or 98. I just wondered if you can
8 prove beneficial use.
9 MR. KOLE: Well, yeah, the water's being
10 used beneficially. It's been used to generate
11 electricity. So that's I think the argument
12 there.
13 MR. COWEN: Just so if you can prove
14 beneficial use (tape inaudible).
15 UNKNOWN SPEAKER: If Washington comes up
16 can Idaho Power use that water that's sitting
17 there's laying there? Are they going to give
18 us some of that (tape inaudible).
19 MR. COSTELLO: Well, under this arrangement
20 the governor acts as trustee for the state, and
21 we're going to try and nick them for a mill per
22 kilowatt for administering the trust.
23 MR. NELSON: All of which
24 will be passed
25 through to the rate payers.

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1 MR. STEWART: Yes, Fred Stewart. And it
2 goes along the same line as Jerry Cowen. I've
3 always been concerned about the water coming from
4 California recognized in many hearings.
5 Legislatively we have a lot of sincere people
6 wanting fire generation, a lot of sincere people
7 want to develop. My big concern is do we lose it
8 to California from Idaho Power 1,058 cubic feet
9 per second in addition to what they have so a
10 minimum streamflow. Anything I've seen as yet all
11 you've addressed is minimum streamflow at Murphy.
12 The minimum streamflow as adopted by the state
13 water plan was 3300 at Murphy, and then you have
14 different figures at Weiser and on down.
15 Now, as you increase this minimum
16 streamflow at Murphy, are you going to also
17 increase at Weiser and others on down? Is that
18 the deal? Are you going to leave a gap between
19 Murphy and Weiser so that the thousand cubic feet
20 per second can head on down to California down
21 through the Death pipe?
22 MR. NELSON: Well, Mr. Chairman, I might
23 try. Fred, this agreement does not propose any
24 change in any minimum flow except the one at the
25 Murphy gauge. Now, it's my understanding that the
26
27 (Pages 29 to 32)
I argument that that water has already been fully 1 appropriated.
2
3 Now, Mr. Cowen's point is very well 4 taken. If the federal government decides to use 5 the federal law to preempt state authority, 6 there's nothing that we as a state can do about 7 that, but we're going to make every effort we can 8 as a state to make sure our house is in order. 9 And that's the reason why this agreement is 10 drafted the way it is.
11
12 MR. COSTELLO: Except there is something we 13 can do because they can't take a vested property 14 right without compensation.
15
16 MR. KOLE: Right. That's what we're trying 17 to do.
18
19 MR. COSTELLO: So we're in better shape than 20 we were before.
21
22 MR. KOLE: Correct.
23
24 CHAIRMAN: Next question. John?
25
26 MR. PEAVEYCUP: John Peavey Cup. Gene may 27 have asked this, and I wanted to be real sure, but 28 if we run into a string of really dry years like 29 1977, and that 4500 was actually say 3600, those 30 water rights that were protected in 1180 are still 31 protected. I mean the power company's junior to 32 the primary way of addressing the minimum 33 streamflow. But I suppose you could posit a 34 situation between now and the time when the 35 department reaches that where through improper 36 planning or just extraordinary circumstances that 37 we can't conceive of somebody that an 38 unconditional water right which is junior to this 39 hydropower right might be found to owe 40 compensation in the event that we get into a 41 critical period that takes us down below the level 42 we now think we can go to.
43
MR. COSTELLO: Is that burden on the permittee or 44 on the State of Idaho?
45
BRUCE: Is that burden on the permittee or 46 on the State of Idaho?
47
MR. KOLE: Those legal rights as of November 48 19th, 1982. I think it's important to note that 49 in entering the negotiations, the issue of 50 expanded use and quote, unquote the illegals came 51 up. And those parties are treated in the 52 agreement you have before you by paragraph 7E. 53
8
9

MR. NELSON: D.
10
MR. KOLE: Yeah, 7D, which will require 11 those individuals who have an expanded use in 12 order to get a water right vis-a-vis the power 13 company are going to have to take action by 14 June 30th, 1985. And we'll hope to have an 15 administrative process set up in the very near 16 future to handle that problem.
17
18 CHAIRMAN: Questions?
19
20 BRUCE: In addressing the junior rights, 21 when you say the minimum streamflow in Caldwell is 22 3900 cfs in dry years and I have a well 80 miles 23 in Thousand Springs and the aquifer is theorized 24 to move one mile every four years and Idaho Power 25 and the State of Idaho said pretty much just shut 26 your water off, you really get no initial effect 27 of the streamflow in the Snake River for 3200 28 years under that hydraulic pressure. So when you 29 say -- are you going to like last night to me last 30 night you said that wouldn't be (tape inaudible) 31 the burden would be on the state to provide the 32 water (tape inaudible). Tonight I think Pat 33 Costello mentioned it would be just shut off. I 34 just wanted you to address that.
35
MR. COSTELLO: Well, first of all, the 36 primary of addressing that problem is that the 37 water resource department will do its planning 38 based on not granting any more rights or any kind 39 of rights that would take it down in the worst 40 case to below the minimum streamflow. And when 41 they have finished issuing that amount of rights, 42 which we say will take a few decades anyway, all 43 subsequent rights after that presumably will be 44 coupled with some kind of a condition that in 45 critical water periods they have storage rights or 46 something upstream that they could release water 47 down to protect that minimum flow.
48
Do you follow me?
49
BRUCE: You're saying until you reach that 50 critical period of time, then you would -- until 51 you pass a statute that says from now on, our 52 policy is that from now on when we reach the 53 critical point (tape inaudible).
1. study by Joel Hamilton (tape inaudible) also
2. delineates what they think are the most likely
3. 195,000 acres that could be developed in the
4. state. I think they worked in conjunction with
5. Chuck Broadway.
6. **CHAIRMAN:** Fred.
7. **MR. STEWART:** (Tape inaudible.) He stated
8. 1.4 million acre feet actually goes over Milner,
9. and that's all been plowed on, so to speak. The
10. controversy so far is between Idaho Power (tape
11. inaudible). But right here in the Twin Falls/
12. Jerome area there arises a real problem. You can
13. take that 1.4 million acre feet down to the
14. Bruneau project (tape inaudible) remnants of these
15. canal companies. Does this agreement in any way
16. have an impact upon the decision of that? You've
17. got the private power company, so to speak, is
18. wanting a hydropower dropover. Then you've got
19. many, many small hydropowers in the area. Then
20. you've got you're consumptive use. Now, is that
21. going to be decided by public interest? And if
22. so, who makes that decision? Who has the great
23. omniscient (tape inaudible).
24. The Constitution says very plainly that
25. consumptive use has the priority over Idaho

---

1. generation. Idaho Power of course has a prior
2. right. But with the canal companies now, I think
3. it's a real critical question because does the
4. canal company put on the 35, 60 million, I don't
5. know where the figures are now for these things,
6. and then all of a sudden they find that their
7. rights are going down to the Bruneau project?
8. Then we're in serious financial trouble here.
9. What ramification is this going to have?
10. **MR. NELSON:** The only place we touched that
11. Fred, is in Exhibit 7A, which is the authority of
12. the -- it's proposed to give the director
13. authority to subordinate hydropower rights. And
14. if that statute were passed and were applicable to
15. the Milner permit, then in theory the director
16. could subordinate that power right. So the
17. situation you postulate could take place, but the
18. power plant could be built and the water could be
19. run out on the Bruneau. But that's the only place
20. this particular agreement would touch on the
21. conflict between the hydropower right at Milner
22. and the Bruneau plateau gravity closest.
23. **CHAIRMAN:** Sir.
24. **MR. LEMON:** George Lemon. The lowest ever
25. recorded flow was July 9, 1949 by the USGS of

---

1. 3,900 feet at about Murphy, but the average flow
2. for the month of July 1949 was 7,702 feet. Now
3. (tape inaudible) say that somehow control of the
4. river had caused that low flow. What is to keep
5. Idaho Power from exercising their dams on the
6. river to drop the flow below the 3,900 feet and a
7. (tape inaudible) cutoff of upstream use?
8. **MR. KOLE:** Page four, paragraph 7B says that
9. the operation, any fluctuations resulting from the
10. operation of the company's facilities shall not be
11. considered in the calculations. So in other
12. words, if they hold back water at CJ Strike and
13. that causes the water level to go down, you don't
14. calculate that into the minimum streamflow.
15. **MR. LEMON:** So the streamflow runs between
16. six to eight thousand cubic feet per second from
17. the outflow of the (tape inaudible). Now how can
18. they get below that point in the Snake River below
19. there without control or manipulation?
20. **MR. NELSON:** Well, pumping out of the main
21. stem. The pumps on the main stem above Swan Falls
22. have a capacity in excess of a thousand second
23. feet.
24. **MR. LEMON:** That doesn't get you down
25. anywhere near the 3,900.

---

1. MR. NELSON: It gets you down to 45. It
2. gets you down to 45. In 1981 it occurred in about
3. three days for being well into the 7-8,000 cfs
4. range number 4500. So man's doing a lot of that,
5. George.
6. **MR. LEMON:** I realize man controls the river
7. (tape inaudible). In the '30s we diverted it all
8. through the aquifer from above Milner (tape
9. inaudible) maintain more water in the aquifer to
10. keep the minimum streamflows up above.
11. **MS. MARTIN:** Elaine Martin. I notice in
12. there that you talk about mitigation and leaving
13. it open for later discussion. Hells Canyon is
14. subordinated to upstream uses. Mitigation,
15. though, will allow you to work out a fee, I take
16. it, for Hells Canyon as well as the other dams for
17. winter storage?
18. And also, will that mitigation have to
19. be worked out even if the -- in other words, right
20. now, if someone wanted to do a project and it
21. didn't look like it would affect the 5600 per se,
22. would they still have to do the miti -- I mean,
23. you know that it's going to affect it. I mean,
24. there's no doubt about that. But would they have
25. to mitigate from right now immediately, or are we
talking a mitigation that only occurs when we get close to the winter 5600 cfs?

MR. NELSON: Elaine, the basic reason for the mitigation provision is when we were trying to wrestle with how to regulate the river using streamflows at Murphy, you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner. But you also have to recognize that winter flows above the critical period are of extreme importance to the company in meeting its load.

So the mitigation was put in in an attempt to recognize that value that even if you're not at 5600, you have to address the value of those flows for hydropower purposes. So rather than move to a number, the control mechanism is mitigation.

All we're addressing here in the terms -- for those of you who are lost on what we're talking about, it's Exhibit 6. And the control for the winter season below Milner and above Murphy states that if you want to divert to storage in that reach in the winter months, you have to mitigate for adverse effects on hydropower. Neutrality is that the parties have not suggested where you consider the mitigation as being calculated.

And you have to keep in mind the difference between a legal right to compensation and an analysis of economic damage. And that's what you address in mitigation. We avoided the word compensation for that reason. Mitigation in the sense of "making less harmful" or "lessening the effect of" can be effectively anything. So we just left it open to the policy maker in that case to resolve it if and when you ever get one of those applications.

We can tell in the negotiations we weren't going to solve it, that we were going to loggerhead, we were going to deadlock on that issue. So we said all right, we'll go to the board, suggest or remain neutral, and at such time as somebody presents one of those projects, then it will have to be addressed. Hopefully maybe there will never be one.

MR. COSTELLO: I might just indicate that the other important aspect of that determination was that the controlling mechanism was left in the hands of the state, and the state water board at any time does have the authority to address that issue and to make policy determination as to what mitigation means. It's just that on the first cut, the first time we go through this, we're agreeing that we're not going to try and get them to make that determination at this time.

MS. MARTIN: But we are going to allow Idaho Power without any bad feelings to come back and fight for as much as they could possibly get for water used during that period in all dams?

MR. COSTELLO: Corresponding with the other side will fight for nothing. And the state will get caught in the middle.

MR. NELSON: We just, actually, I guess when you come down to it, it was an issue where we had irreconcilable differences, if you will. It sounds like we're getting a divorce and we're not. We couldn't agree and it wasn't important enough to break the negotiations, so we said let's just not talk about it anymore.

MS. MARTIN: I looked at that, too, and I thought well, if they didn't pump the five months in the winter and they couldn't pump the two months in the summer, they had to put water in storage five months out of the year.

MR. NELSON: And they'll have to mitigate for it if they do it in that reach. But agreeing not to talk to avoid a fight, that's my wife does. She says do it my way or I won't talk to you.

UNKNOWN SPEAKER: I have a question on (tape inaudible). Do I understand that the overriding reason for the general adjudication is to force the federal government's hand in state court?

MR. COSTELLO: I should clear that up. That's only one of the reasons. There are a large number of other reasons that we have to begin an adjudication. Number one, we think just in a review of what we know now that there is potentially a large amount or large blocks of water available upstream that could be put to beneficial use.

Secondly, it's important I think for everybody to begin a quantification of their own water rights so that they know what they have with some degree of assurance. If you look at the history of the western United States, virtually well, in fact every other western state has begun or is in the process or has concluded adjudication of the water rights. And they hit this point 10, 20 years ago because of history. We're at that point now where history is kind of compelling us.
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<td>1. to begin that process even though it's going to be a painful process.</td>
<td>1. beneficial use still is a measure of the water rights. And that will have to be looked at. The state government at this time fully recognizes the value of trying to reach out to (tape inaudible) because of that over application of water. We're going to be reluctant to take away that recharge, free recharge and perhaps have to replace it with a recharge project that everybody pays for. We understand that. That will be considered.</td>
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<td>2. And finally, I think in order to manage the system that we're talking about here, you have to know what you've got. If you don't know what you've got, you can't manage it. It's like taking an inventory and having some idea of what's on the shelf. If you don't have that, you're not going to be able to manage it.</td>
<td>3. I've already had several calls from (tape inaudible) if they don't get the answer they like to see?</td>
<td>10. CHAIRMAN: Bill, do you have a question? Elaine?</td>
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<td>4. MS. MARTIN: We've already begun to make approaches at the federal government on this issue to see if we can get them to participate in the cost study because of the benefits there will be to their agencies, as well. And what was the second part of the question?</td>
<td>5. Mr. Nelson: Well, I am going to mail one if it hasn't gone out already to every lawyer that's appeared in the case and every defendant who has appeared pro se. And if somebody has a question they need to have answered outside of that, we'll be glad to try to respond. It's alphabetical. Our problem is we didn't always pick up all the names on the permit when we prepared the complaint. But we'll certainly cooperate with you</td>
<td>11. Mr. Nelson: We've already had several calls today wanting to know if they were one of those 3,000 people being released. Do you have an itemized list of those being released and could I please have one?</td>
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<td>5. Mr. Costello: Second one was can they go back?</td>
<td>6. But if you're anything but irrigation, you're probably out. If you were licensed prior to November of 1982, you're out. Or if you filed anything by way of proof of beneficial use prior to November 1982, you're out.</td>
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<td>7. Mr. Kole: No, you can't. The US Supreme Court I think has been pretty clear on that. Water law is primarily an area of state court jurisdiction. If the state is moving to handle that responsibility that the preferable forum is to go to state court. So that's one of the reasons for taking some responsible action in the very near future.</td>
<td>8. Mr. Ferguson: Paul Ferguson. When you talk about adjudication, will there be any attempt to quantify the amount of water that should be on the ground or will you leave those old finds as they are? We know there's a lot of them that take our water (tape inaudible). Will there be any disturbing of these water rights?</td>
<td>12. If you have a question. But you probably have a pretty good idea if your water right involves essentially anything but irrigation or an overstated domestic, in other words, if you filed a hundred acres and called it domestic, we'd probably dismiss you.</td>
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<td>9. Mr. Nelson: But the race is partly to the swift also because if the federal government gets to the federal court first, that's a major factor of where the case stays.</td>
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<td>11. Mr. Ferguson: Paul Ferguson. When you talk</td>
<td>12. Now, if you were actually in use by November of '82 or had a substantial investment already in your project as of that date, then we don't know about you, but you're entitled to be dismissed. So in that case you need to get with the department. We'll send you some written questions to answer. And based on those questions, then you'll be dismissed later. But we did dismiss all the non-irrigations and all of the known people in use as of November '82 today. So if you're in one of those categories, you're probably out.</td>
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MR. NELSON: You mean the people who are removed. It may come out of the politics. Well, we have to take Idaho Power’s water rights and prove that there was no injury to any other user by reason of the change in place of use or change in nature of use of that water right.

Now, when we get all that done, then the water is going to go someplace. But I suggest you and I will be a lot older before that happens.

UNKNOWN SPEAKER: I guess you don’t do that for grandchildren or great grandchildren (tape inaudible), but we do know that Idaho Power is in business of selling power. That certainly includes in order to sell power to the general public (tape inaudible). They can sell it to somewhere else and then on the side they can generate their power all the way down to the State of California and generate more power than they’ll ever generate to Swan Falls (tape inaudible.)

MR. NELSON: It’s a question ahead. But I think when our grand kids hit the turf, they’re going to be in the legislature, too. I think

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<td>1.</td>
<td>order for the power company to sell a water right,</td>
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<td>it would need the consent of the Idaho Public Utilities Commission, the Federal Energy Regulatory Commission, and the Idaho state legislature. When it got all that done, it would have to go to the Department of Water Resources and prove that there was no injury to any other user by reason of the change in place of use or change in nature of use of that water right.</td>
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1 water I think is for us to get our law and order
2 and to get everybody in Idaho pulling on the same
3 train. If we don't do that pretty quickly,
4 something like that could happen.
5 UNKNOWN SPEAKER: (Tape inaudible.)
6 CHAIRMAN: You will be last. Yeah, you.
7 MR. PETERS: Ralph Peters. (Tape
8 inaudible.) Now that they are dismissing claims
9 against nonagriculture users (tape inaudible),
10 where do we stand on it? Anybody else know where
11 we stand on it?
12 UNKNOWN SPEAKER: (Tape inaudible.) Prior
13 to whichever date it is, November 19th of '82 or
14 October 1st of '84, either way, will have to go
15 through a new public (tape inaudible). So before
16 we process it, correct me if I'm wrong here,
17 you'll have to have legislation worked out.
18 MR. COSTELLO: Well, that's not quite right
19 because it's covered by the contract, the 1180
20 contract which does say immediately subordinate to
21 nonconsumptive, domestic, commercial, municipal,
22 and industrial right out of the box.
23 MR. NELSON: By negative inference, Norm,
24 what we did was we simply didn't cover those kinds
25 of people in the interim with the suggestion that

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1 the department proceed to process them. And once
2 we get the public interest criteria in place, then
3 they will be subject to it. But it was our
4 thought because of the minimal impact of those
5 uses, the department could process while we're
6 getting this thing in place to get the backlog for
7 Jerome and Arco and Blackfoot out of the way.
8 But we didn't say so because that was
9 just kind of left open because we didn't say you
10 couldn't. We thought maybe you'd leap on it.
11 UNKNOWN SPEAKER: I want to congratulate
12 you, gentlemen, (tape inaudible), and you can come
13 to a compromise and I think although it may not be
14 perfect, I think we are on the road to getting the
15 Snake River working for all the people of Idaho.
16 And I want to congratulate you.
17 UNKNOWN SPEAKER: I'd like to follow up on
18 Jerry's comments I certainly agree that on
19 May 15th and the next few, if there are any
20 heroes, it will probably be these three fellows at
21 the table and some of their cohorts. In fact, a
22 couple of them will get paid in personal
23 satisfaction (tape inaudible). It certainly is a
24 fine map or opportunity to follow a route laid out
25 for us. On the other hand, I hope the people

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1 don't get the misimpression the condition is
2 settled. Clearly it isn't. We're halfway or a
3 little over from the final resolution we all hope
4 for, and I certainly hope the water board and the
5 public and the voters will look at this think
6 objectively. It's very complex. There's a lot of
7 interests at stake. A lot of people's rights are
8 at stake. So look at it with an open mind,
9 objectively, and critically. We do have a long
10 ways to go. I think it's very important the
11 public realizes (tape inaudible).
12 CHAIRMAN: Ladies and gentlemen, on behalf
13 of the Water Resource Board, we again appreciate
14 you taking your time to come out and listen. Give
15 us your comments. We will be holding public
16 hearings. The legislature will also be holding
17 public hearings in the near future.
18 If you want to go through another
19 session, we will be in Boise November 1st, the
20 gold room, fourth floor, 7:30. So if you are in
21 town, stop in. Thank you for coming.
22 (End of meeting.)
23
24 (Pages 53 to 56)

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**Tucker and Associates, Boise, Idaho, (208) 345-3704**

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REPORTER'S CERTIFICATE

I, Patricia J. Terry, Court Reporter Pro Tempore, County of Ada, State of Idaho, hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at , Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand of April , 2007.

Patricia J. Terry, Court Reporter Pro Tempore
CSR No. 653