Public Information Meeting on
the Swan Falls Agreement
Boise, Idaho

TRANSCRIPT OF PROCEEDINGS
Held on November 1, 1984
before Don Kramer, Chairman

Transcribed by
Heidi Blodgett
and Dianne E. Cromwell, CSR No. 21
Appealances

Present:

Tom Nelson, Idaho Power Company
Pat Kole, Counsel for Attorney General
Pat Costello, Counsel for the Governor
Frank Sherman, Department of Water
Ken Dunn, Director of Idaho Department of Water Resources
Charles Jones, District 11, Water Users Association
Gene Gray
Hob Hummest
Mr. Young
Bill Ringert, Senator
Gail Bray, Senator
Harold C. Miles, Golden Eagle Audobon Society
Marjorie Hayes, Idaho Consumer Affairs
Sheryl Chapman, Idaho Water Users Association
Al Fothergill
Pat Ford

* * * * *
MR. COSTIELLO: Chairman Kramer, Members of the Board, legislators, and members of the public.

The governor did ask the Board to put on these meetings around the state and is very appreciative of the Board providing this opportunity to explain to you the details of the agreement that we have reached with Idaho Power Company.

To give you the governor's perspective on this agreement, as I think almost all of you are aware, the governor for two years sought an enactment by the legislature of a subordination bill which would have by law imposed a subordination condition at Swan Falls. We weren't successful with that.

The governor never intended by pursuing subordination to create a climate where we could take the river down to zero or down to the minimum flow or anything else. But he did feel very strongly, as he said repeatedly, that the state should be in control of making the decisions as to the allocation of a very precious and ever more scarce natural resource. And that was the motivation in seeking subordination legislation.

But with the help of Senator Noh and Senator Ringert and others who are here, despite that help I should say, we weren't successful in getting that done.

And after the 1984 session, Idaho Power Company approached the governor again with an offer to enter into a partial settlement of the Swan Falls litigation, under the authority of legislation passed in the '83 session, called Senate Bill 1180.

The governor responded with an invitation to enter into negotiations to settle all of the litigation rather than just a partial settlement. And Idaho Power Company accepted that offer in July, and we commenced negotiations.

There were at least eight meetings among the three principals: Attorney General Jones, Mr. Bruce from the power company, and the governor. And in the meantime, the three of us met on virtually a daily basis trying to come to some meaning of the minds as to how we could best approximate what should be the balance between two competing uses: the need to produce hydroelectric...
power and the need to make water available for
agricultural development. And what we came up
with was the approach that Frank has outlined for
you.

The governor, after reflecting on where
we ended up with this agreement, feels that what
we have done is come very close to where we would
have ended up even if the legislation had been
allowed to pursue its course. Had either side won
a total victory in court, the political will would
have been there on -- in support of either side
that lost to bring the pendulum back to the middle
and to strike some kind of balance.

And just as I think the agricultural
community wouldn't have sat still for recognizing
that the power company had a right to virtually
all the water in the river, neither would the
ratepayers have sat still for the kind of
no-strings-attached development that could have
taken place had the state won the lawsuit.

So either way the legislature probably
would have answered this at some point down the
road with something like what we've done here,
which is to try to take a middle ground between
the two competing interests.

If you accept that thesis, then the
question becomes, isn't it better to try to come
to some approximation of a balance through
negotiation and compromise, or should we go
through the process of taking several years and
several million dollars to reach the same --
approximately the same position after years of
litigation and further efforts in the political
arena?

The governor feels very satisfied with
where we did end up. He does think that it
reflects a very reasonable balance between the two
uses.

And he would ask that you look at it in
that light and form your own conclusions on that
point. But he does think that it's important for
both groups to stop thinking in terms of achieving
some kind of total victory either in the
legislature or in the courts and begin to focus on
what mechanisms we can put in place to make sure
that while we leave open the opportunity for
further development of our agricultural interests
on the Snake River, that we do so in a way that
does take into account the effect that that
development has on all of us ratepayers.

And with that, I'd be happy to respond
to questions after my two colleagues have had
their chance.

CHAIRMAN KRAMER: Thank you, Pat Costello,
Pat Kole from the Attorney General's
Office.

MR. KOLE: Thank you, Mr. Chairman. I'll be
brief because I think you've all been sitting down
quite some time and probably want to ask some
questions.

The negotiation process that we went
through has brought Idaho water law into a
new phase, and that negotiation process quite
simply is to bring Idaho water law into the 21st
century. Our water law in the past has served us
well, but it needs to be updated and brought into
some sort of fine-tuning to last us into the next
century.

What we have tried to do with the
agreement that you have before you is to come up
with a proposal that will equitably balance the
competing interests for a very vital natural
resource. Within that context, we tried to focus
on certain absolute musts that we felt were
necessary.

The first one was is that a public
resource such as water has to be controlled by the
people of the state of Idaho. And the decisions
affecting that water have to be made in the public
forum as opposed to a private corporate boardroom.
Now, we were very pleased to find that Idaho Power
shared our concern in that regard and felt that
they did not want to be the water master for the
Snake River. So the agreement contemplates and is
predicated upon state control through the public
input process of our water resources.

Secondly, we wanted to focus on
protecting all of the individuals who are
currently using water. I think the agreement that
you have in front of you protects everybody who is
currently using water.

Third, we wanted to make sure that good
water users who have development projects that
benefit the state economically, and that includes
both agricultural, municipal, industrial, and
domestic uses, would be able to go forward. And I
think the agreement that you have assures that
good water users will be able to go forward into
the future.

Finally, we wanted to make sure that
The state wants the policies replaced.

We'll be in a position not only through the statutes to manage the resource, but hopefully we'll have the knowledge to make the resource meet the objectives that are planned for it.

But also when you read the agreement, it looks a little like a camel being defined I guess as a horse designed by a committee. But it makes a lot more sense if you remember what we were trying to do, that we're trying to settle some litigation.

And so in that regard, it looks a little different than it might if you were sitting down to devise a whole new water right system for a brand new state. Hopefully, that would look a little different than what we had to work with, which was an existing constitutional and statutory framework within which we had to settle this litigation.

When you look at it in that regard, then remember that the attempt was to settle all of the issues in the litigation and to settle them as a whole. So the agreement was approached on that basis. So it doesn't lend itself very well to picking at little pieces of it. You have look at it as a whole. If makes sense as a whole, that's the way it should be accepted. If it doesn't make sense a whole, then it should be rejected.

And that I think is the last point I want to make, is that this agreement can't be implemented by the governor, the attorney general, and the Idaho Power Company. It takes a lot of work by the real policy makers of the state of Idaho, being the Water Resource Board, the legislature, and some federal involvement also. So it's not a take-it-or-leave-it proposition, obviously, because we're not in a position to say that. But I can say that any changes in this agreement, since it was done as a whole, as an entirety, will open either the possibility that the agreement is never implemented in any form or that the agreement will have to be renegotiated.

So that's why I asked when you review it, that you look at it as a whole. And to me, when you do that, what comes out to me is what's actually, as a matter of fact, as a matter of practice, as a matter of legality, was never a water master; certainly had no interest in being one. But if the perception persisted that that was what happened, it had to be addressed, and I think that the agreement addresses that.

When you read the agreement, I wish you would keep in mind that there's a lot more to that agreement than just a couple of minimum flows at Murphy. The major part of that agreement in my mind and in the mind of the management of the company that's equally important with the minimum flow is the concept of a public interest review of all new water uses. Without that, I don't think the company would have been agreeable to entering into this particular agreement.

You have mitigation for certain kinds of new water uses that's required. You have an adjudication. You have studies that have to be performed. But basically what all that does is really shifts the focus and the direction of the state of Idaho water policy from one of development by he who gets there quickest to a question of what development should proceed and under what conditions. And that's a radical change of a hundred year history. That I think is really in summary what the public interests and other parts of that document do.

I the state would be in a position to take responsible management actions in the future. And so what we have set forth here is a basis upon which further studies, both of economic factors and of hydrologic factors, can take place so that we will be able to wisely manage the water resource that we have been blessed with.

In conclusion, I think it's fair to say that litigation has benefits for everybody. It makes a lot more sense if you remember what we were trying to do, that we're trying to settle some litigation.

And so in that regard, it looks a little different than it might if you were sitting down to devise a whole new water right system for a brand new state. Hopefully, that would look a little different than what we had to work with, which was an existing constitutional and statutory framework within which we had to settle this litigation.

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1    MR. GRAY: Yeah.
2    MR. NELSON: Basically, the technical
3    advisory committee to the legislative council
4    committee identified some immediate and pressing
5    deficiencies in technical information. As they
6    saw it, you should fund on-going studies.
7    But in order to ask the "what if"
8    questions that fall out of this program, what if
9    you develop land here versus what if you develop
10   it here, and so on, you had to spend that kind of
11   money to get yourself in a position to really
12   answer those questions. But hopefully the studies
13   go on afterward to make sure that what you think
14   you know is really true.
15    MR. GRAY: You know, Mr. Chairman, all week
16   we've heard Mr. Kole talk about the bang for the
17   buck or the buck for the bang, whatever it is
18   we're going to get. But it would appear to me
19   that if monies were going to appropriated for
20   studies, that they would possibly be appropriated
21   to the Department of Water Resources in lieu of a
22   technical advisory committee, because already it
23   would seem like we have a jump on the process.
24    So is there a reason that you're
25   filtering this through a technical committee in
26   lieu of taking the $200,000 and giving it to the
27   Department of Water Resources?
28    MR. COSTELLO: Well, I don't think there's
29   any -- I'm sure that whatever we do would be in
30   consultation and cooperation with the department.
31   But by having this advisory committee in the
32   governor's office, it was felt that it would give
33   it a higher level of visibility and also the
34   tendency if it were melded into the department's
35   budget, when it goes through the legislative
36   process, that kind of runs the risk of if you put
37   in a new 200 for that, that you might take out 200
38   somewhere else and the net wouldn't be there. And
39   we wanted this specifically earmarked to go for
40   these studies to put into place these new public
41   interest criteria.
42    MR. GRAY: Thank you.
43    Mr. Chairman.
44    CHAIRMAN KRAMER: Mr. Gray did this. He
45   knew it was his last chance to get the last word.
46    Do the Board members have any other
47   questions? Mr. Williams.
48    MR. WILLIAMS: Sure. I have one question.
49    This is the first time I've had an opportunity of
50   looking at Exhibit 7B, which is one of the
51   extensive exhibits that are attached to the
52   agreement.
53   As I read this, this appears that this
54   not only applies to the Snake River, but any other
55   river in the state. Is that true? And could one
56   of you just briefly review each of the sections
57   for the folks to explain what it is.
58    MR. COSTELLO: It would be easier to do it
59   at the blackboard in graph form. But it does
60   apply anywhere in the state where there is a --
61   either an unsubordinated hydro right or a hydro
62   right that it's not clear whether or not it's
63   subordinated.
64    And basically what we're saying here is
65    that the approach that we arrived at in settling
66    this lawsuit makes good public policy sense and is
67    -- can provide a comprehensive framework for the
68    legislature to regulate hydropower rights under
69    the authority of a 1928 constitutional amendment,
70    which said they could regulate hydropower rights
71    and that they would be treated consistently
72    throughout the state.
73    In other words, you would use the
74    minimum stream flow concept as the primary
75    mechanism for protecting in-stream uses, and that
76

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1    any hydropower rights that exist in excess of that
2    minimum stream flow would be held in trust by the
3    state, legal title to that water right in excess
4    of a minimum flow being in the state, for the
5    benefit of the power right holder and also for the
6    benefit of the people to allocate it up-stream
7    uses only which meet the public interest criteria.
8    In doing that you are using the
9    hydropower right to say that the river has, in
10   essence, been fully appropriated, because that
11   right exists, and it's the right to --
12   basically all the flow that gets down there.
13   And, therefore, the state is in a
14   position to impose rigorous public interest
15   criteria that it might not otherwise be able to do
16   on an unappropriated stream.
17    MR. WILLIAMS: Okay.
18    CHAIRMAN KRAMER: Any other board members?
19    UNKNOWN SPEAKER: Mr. Chairman.
20    CHAIRMAN KRAMER: First, I'd like to
21   recognize Mr. Bob Hammeth. He kind of got in here
22   without me seeing him. He's from St. Mary, and
23   he's also a board member. Mr. Hammeth.
24    MR. HAMMETH: I have a question about
25   Washington Water Power's rights in Coeur D'Alene.
1. Is there any subordination at all?

2. MR. KOLL: Well, those water rights at the present time are unsubordinated. It's our intent, in looking at Exhibit 7B, to provide a voluntary mechanism by which Washington Water Power will come in and negotiate with the state, much the same as Idaho Power has, and enter into a similar arrangement so that they would get the benefit of this format. And at the same time, the state would be able to protect people who are currently using water.

3. As you might know, that facility on the Spokane River really is very analogous to the Swan Falls situation, and because they were to assert their water right, current water users would have to shut their water use off.

4. MR. HAMMETH: How about their rights on Pend Oreille?

5. MR. KOLL: I don't think that's quite the same situation at the present time, though I think Norm Young from the department will probably have to answer that.

6. MR. KOLL: I've got a frog in my throat, Frank, and I'm having a little trouble with it.

7. MR. YOUNG: Well, I believe there is a facility on the lower end of the Pend Oreille, that during extreme low-flow periods, can use all of the water and then some.

8. MR. HAMMETH: In this agreement, it?

9. MR. NELSON: Well, let me have a cut at it. As Pat said, if we had a blackboard, it would be easier to show. The amount of water up to the minimum stream flow is unsubordinated. Okay. The amount of water representing current uses is subordinated.

10. Now, in theory, when you squeeze those together, you come to a block not addressed of 600 cfs. That's the difference between 4500 cfs and 3900, the new minimum flow. And if you look at that 600 cfs, that 600 is not immediately subordinated. It is subject to subordination by state action as new uses are approved.

11. So you have, as I say, kind of a three-level approach: some absolutely unsubordinated, some absolutely subordinated, and some subject to subordination as a result of state approval of new uses.

12. MR. HAMMETH: Is the 3300 an average daily --

13. MR. NELSON: Yes. We left it that way for several reasons. One, of course, is that people are used to it. And second, if you're looking at protecting in-stream uses that an average of a period longer than a day, a monthly average, for example, will give you a higher number at the Murphy Gauge. But the problem is zero for 15 days and 10,000 for 15 days is a 5,000 cfs average, but it's not a very good way to run a river.

14. So you need a narrower time period when you're looking at an absolute minimum. If you're looking at planning, probably the best data you have is on a monthly basis. And that may be where you're picking up your monthly information, is that the planning numbers are usually expressed in
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<td>1. a monthly denominator. 52, 53, 5400 cfs might be</td>
<td>1. Now, when we get to sometime in the</td>
<td>1. a monthly number at Murphy to correspond to the</td>
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<td>4. MR. KOLE: And the problem you have with the</td>
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<td>10. And the purpose of doing it this way is</td>
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<td>7. approximation we could come up with. That was the</td>
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<td>2. first question we asked and asked the department</td>
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<td>3. and outside hydrologist was, &quot;Where are we today?&quot;</td>
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<td>4. You know, &quot;What is the minimum flow today?&quot;</td>
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<td>5. And that's the best number they had.</td>
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<td>6. CHAIRMAN KRAMER: Mr. Dunn.</td>
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<td>7. MR. DUNN: Yeah. What we do is we take the historic record flows. And through the use of</td>
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<td>8. computers, we then superimpose on that today's development, 1984 development, and say, okay, now,</td>
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<td>9. with those historic flows and all of the development on top, what would be the lowest flow</td>
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<td>10. in the lowest day of the lowest year.</td>
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<td>11. And that's the reason for some of those studies, so we can further refine that to make sure we're right. And let's assume we go</td>
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<td>12. with a couple of years, or three years, some</td>
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<td>13. period of time, and do some studies when you find the implications of that are, not only</td>
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<td>14. do you have the force of law of the state water plan and its minimum flow with whatever priority</td>
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<td>15. date it has, you also have a private hydropower right with a priority date quite senior to shore</td>
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<td>16. up this minimum flow and make it much more protectable. This area in here between the 3900, 5600, and where we are today is unsubordinated</td>
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<td>17. today. Okay?</td>
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Mr. Nelson: No. We stipulated in the district court that that was the physical capacity of the works. In other words, we could have had a paper water right for 50,000 cfs at that site, but your water rights are only what you can use. And 8400 was always the physical capacity of the plant. So how that happened, I don't know.

Mr. Miles: Will this water right carry forward if you were able to raise the Swan Falls dam or improve the Swan Falls dam, according to your FERC license?

Mr. Nelson: No. There's a new application dated I think sometime in March of '83 or April of '83 for additional water against the possibility that that plant is enlarged. Then there's a new filing for the additional water.

Mr. Miles: Has that been granted by the FERC?

Mr. Nelson: No.

Mr. Miles: Thanks.

Ms. Bray: Gayle Bray from Boise, District 19.

Who does the review for that unsubordinated 600 to 900 cfs?

Mr. Kole: That review is accomplished by the director of the Department of Water Resources through an administrative hearing. And the process, as we contemplate it, the public interest criteria are attached as Exhibit 2 to the agreement here.

That review would be of course protected by all the administrative rights that anybody in the proceeding would have, including the right to have a district court judge review it to make sure that the director exercised his discretion appropriately.

Mr. Kole: No. The water -- if the water right is approved, there is no compensation to anybody, either to the power company or to any.
CHAIRMAN KRAMER: Mr. Director?

DIRECTOR: One of the other things that happens with the public interest criteria adopted on the back of the last sheet, in fact, if there's a provision allowing the department to adopt rules and regulations. And that's so that we can adopt some rules and regulations, implementing the public interest criteria, and they then will be reviewed by the legislature. So it sets some standards by which I'll be looking at the public interest criteria to determine whether I approve it from there.

CHAIRMAN KRAMER: Mr. Jones.

MR. JONES: I think I'm going to ask this of the director: Is there any reasons why some of these additional uses that might be made of the water above the minimum flow could be for a term and duration rather than perpetually?

DIRECTOR: Well, that's one of the unanswered questions. Hydro filings that I now think in the future we might look at other uses, irrigation or any other use, and issue it for a period of time subject to the public interest criteria at that time.

You know, if we issue a permit for 30 years or 20 years, 20 years from now we might wish we had done something else with it. If they were all subject to that review, and as long as they met it, you would continue them, I think that's where we could go. And that's probably where we will be, an appropriation doctrine, at least sometime in the future.

CHAIRMAN KRAMER: Ma'am?

MS. HAYES: I'd like to ask Mr. Tom Nelson, how much is this going to cost the consumers?

CHAIRMAN KRAMER: Could you give us your name, please?

MS. HAYES: I'm Marjorie Hayes for Idaho Consumer Affairs.

MR. NELSON: Well, Mrs. Hayes, the plan doesn't cost anything. If there is -- MS. HAYES: I mean, the implementation of the plan.

MR. NELSON: Oh, even the implementation doesn't. The only time you get any cost is if you get some substantial development, and the plan as presented does not require it. It permits development to proceed that meets the standards.

So my problem with your question is, and we have wrestled with it, is to try to come to some estimate of the cost. The problem is that the cost goes from zero to heaven knows what depending on your assumptions.

But the two University of Idaho professors did a study for the legislature, which came to a particular number. I've seen that one tripled as an estimate of the cost of this thing.

And that is basically fairly absurd, because the assumptions under which the University of Idaho economists proceeded I think may very well go out the window under this particular plan. So I really can't give you an answer.

My personal belief is that that particular study is very much the outside possibility, and that the actual cost will prove to be less than that within the time period that they looked at. But until we get some handle on what would be a reasonable assumption for the quantity and timing of development, I really don't know that anybody can give you a meaningful estimate of cost.

MS. HAYES: I'd like to pursue this further. Say there's a ban on hydro, and I've been to the PUC to listen to them debate this question back and forth. This is something that Mr. Swisher said is the most valuable (inaudible).

Now, assuming that you're planning to bring on a great deal more agricultural development, which we did all through this legislature, (inaudible) the hydro flow that we require new generation. Mr. Dunn told me this when we first discussed it, that it would require new generation. How can you not put an economic value (break in recording) the procedure.

MR. NELSON: Well, I think you can put -- you can obviously put a value on any generating source. That's not the problem. It's estimating the impact on generation that's the problem. Because if you don't have a viable assumption as to what type of development takes place, then while you can estimate how much an acre foot of water will generate in terms of kilowatt hours, you don't know how many acre feet are going to be gone or when. And the timing of those depletions is critical to an economic analysis.

It's not enough to say how much water...
is out of the river. The question is, when is it
out of the river. And I haven't yet seen anything
more than a wild guess as to how that development
will take place.

MS. HAYES: But you are, assuming that
you're going to need, bring on, what is it,
20,000 --

MR. NELSON: No. We're not assuming that.
That is the outside limit permitted as we had
proposed it. We're not assuming that will take
place.

MS. HAYES: But in your plan, you are
speaking to this, are you not?
MR. NELSON: Well, we're speaking to it.
That's a long way from assuming it's going to
happen.

MS. HAYES: So what do we buy, then, as a
consumer on this plan?
MR. COSTELLO: What you buy is a universe of
developable land that the state can choose to
allow to develop as it chooses.

MS. HAYES: Or not.
MR. COSTELLO: Or not, depending on what the
political will of the state is.

MR. NELSON: We also buy, I think, a higher
floor on the state's discretion. Right now the
state can run the river to 3300 cfs. What this
does is limit the state's discretion indefinitely
into the future to 3900.

Now, whether they choose to allow it to
go to that is a question of state policy, but
that's as far as they can go. So you're also
buying the comfort that you have 600 cfs left in
the river that may not have been there had the
state won the lawsuit.

MS. HAYES: But everyone assumes that when
this was settled, that this was inadequate. I am
wondering how this affects the anadromous fish
flow, and this sort of thing, that's been mandated
by a congressional act.

MR. NELSON: Well, all I can tell you is
that with my experience of anadromous fish
proceedings, and I've had considerable, 3900 cfs
is a lot better than 33.

MR. KOLE: Ms. Hayes, I think --
MS. HAYES: That may not be enough, is it
not?

MR. NELSON: It may not be enough, but it's
better. And we can't address that particular
problem in settling these lawsuits.

MR. KOLE: The problem I think that you have
is you can look at the glass as half-full or
half-empty. Now, what we were confronted with is
there is a real possibility that that river could
be depleted down to 3300, maybe even below that,
And in exchange for looking at this thing and
trying to compromise in the middle, we have ended
up at a position where the river is protected to a
higher degree but that the state can permit future
development.

And not just agricultural development.
We're talking about development of cities and
development of the domestic supplies, development
of new industry. Those are the types of interests
that we were trying to protect.

And if you look at it from a very
narrow perspective, you're going to say, this is
not necessarily good. But if you look at the
agreement totally, it's a very good agreement.

MS. HAYES: Of course, when you're thinking
of agricultural development over the other
development that you mentioned, why, that's rather
negligible, the water that --

MR. KOLE: It depends upon which studies you
look at, what statistics you use. Right now

agriculture uses the bulk of the water. If you
look at the new industrial development that, for
example, Colorado has, they've gone from 1 percent
to about 8 percent in a very short period of time,
consumptive use of water for the new types of
industries that people want to have come to this
valley. Now, you've got to look at the thing into
the future, because you can't just look at it as
it is right now.

MS. HAYES: Well, I think this is what we're
trying to do, see, and this is where we're having
problems with your plan, is that hydro development
is something that -- if you travel other places
where they don't have it, they would give their
eye teeth for it, you know, they're really envious
about hydro, and they will purchase it.

So in order to go ahead and develop new
agriculture, or wherever we plan to do, we maybe
depleting the sources that's worth a great deal of
money to Idaho.

But you see what has happened with the
Lucky Peak Project. California -- we were over to
an energy conference in Washington where
California was offering to pay anywhere from five
to nine cents a kilowatt hour for firm energy,
1. firm hydro energy. They didn't want our nuclear.
2. They wanted hydro.
3. So this is a resource that is very 
4. valuable. It's like having a diamond farm. And 
5. what are we going to use it with, just throw it away 
6. or --
7. CHAIRMAN KRAMER: One of the things you can 
8. do, if it's as valuable a resource as we say it 
9. is, you can build more dams and you can create 
10. more hydro energy. I don't think we necessarily 
11. want to do that either.
12. MS. HAYES: Well, you have to protect other 
13. resources. I'm not advocating --
14. CHAIRMAN KRAMER: That's why you can't talk 
15. and say hydro is the only use for that.
16. MR. NELSON: But I think, Mr. Chairman, one 
17. comment that if anadromous fish require more water 
18. for protection, then that interest is going to 
19. have to be separately developed. You can't expect 
20. the resolution of a dispute over hydropower rights 
21. to try to resolve a separate controversy over fish 
22. needs.
23. And if the anadromous fish require more 
24. water, the interests that are supporting that are 
25. going to have to come forward and make sure that 

26. that interest is addressed.
27. Second, one of the reasons for 
28. including the public interest criteria and one of 
29. the reasons that that's so important, we think, to 
30. this whole package is that, as you say, hydro 
31. energy on a cheap basis is important. In theory, 
32. if this program is properly administered, that 
33. importance will be recognized and will itself 
34. become a deterrent to the development which will 
35. impinge on hydro generation.
36. So that's reason for doing this, is to 
37. make sure that those kinds of concerns are 
38. addressed in the process, which we don't have now 
39. and no place to really address it.
40. CHAIRMAN KRAMER: Front row.
41. UNKNOWN SPEAKER: Gentlemen, I presume we 
42. have 600 cfs that, in effect, more or less, is the 
43. old Idaho water rights that we are going to sell 
44. to whatever is the most economically feasible 
45. development program that is brought forward to a 
46. Board.
47. Now, the question I have, is there a 
48. priority list as to what you would consider one 
49. above the other? Would you consider possibly a 
50. fish farm above an agricultural farm, a community 
51. development above a recreational use? Do you have 
52. outlined any priorities along that line?
53. MR. NELSON: I haven't seen any. I think it 
54. would depend -- that analysis as it's focused in 
55. the public interest criteria is initially largely 
56. economic. So on your examples, my guess is, on an 
57. economic basis, in other words, where you say an 
58. acre foot of hydropower will develop "X" kilowatt 
59. hours, which is worth so much money in this 
60. particular time period, that any non-consumptive 
61. use would result in a better economic analysis 
62. than a consumptive use.
63. So obviously a fish farm would impinge 
64. less on hydro development than would a standard 
65. dirt farm. And recreation use wouldn't be -- if 
66. you're looking at a reservoir, for example, you 
67. get some evaporation, but it's not consumptive in 
68. the usual sense.
69. So on your question, I would say if you 
70. had a priority economically, it would be that 
71. you're going to have to find non-consumptive uses 
72. have less of an economic detriment to hydropower. 
73. So they would be preferred that way.
74. UNKNOWN SPEAKER: Well, if I could continue 
75. to question a little bit, doesn't the constitution 

76. of the state of Idaho give water traditionally 
77. some sort of a priority for residential, 
78. individual consumption, and then down for 
79. communities, and then I believe agriculture in our 
80. state: 
81. Are those things going to be negated by 
82. this?
83. MR. NELSON: No. Those things are 
84. constitutional preferences, and all that means is 
85. that a more-preferred use can condemn and acquire 
86. a less-preferred use. So if you needed water for 
87. a city, you could condemn water off a farm, for 
88. example, but you have to pay for it. It's not a 
89. priority. It's a preference.
90. MR. KOLE: Part of this agreement is that 
91. you still have "first in time, first in right."
92. In other words, the best development that's first 
93. in time goes forward. So, for example, all the 
94. undeveloped permits that are out there that come 
95. back through the public interest criteria, they 
96. will still have their priority date of when they 
97. filed back in 1977, '78, and whenever. But that 
98. first in time is still a part of the system.
99. UNKNOWN SPEAKER: What would you say, then, 
100. that those people that are tremendously concerned
1 about their power generation, because they're elderly and on fixed incomes and they represent consumer groups, should also consider that the price of food would affect them also. And as far as agricultural is concerned, there are few people that are going to develop a farm that doesn't have an economic return on investment. So I think some of the concerns there are overstated.

9 CHAIRMAN KRAMER: Mr. Chapman.

10 MR. CHAPMAN: Mr. Chairman, I've got three questions: one for Pat, one for Tom, and then one for the panel, whoever wants to answer it.

13 Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general's office was adamantly opposed to the language that is now 7B. They were supporting the language that said "subordinated" but with opposed language that referred to "water rights shall be subject to subordination."

20 My question to you is, why the abrupt turnaround?

22 MR. KOLE: Well, every time you're in negotiations, you end up having to give up on some points. And what we ended up agreeing to was to in essence, have the water right placed in trust.

in the ownership of the state in exchange for

which we went with the concept of the subordinatable water right.

4 MR. CHAPMAN: So the attorney general's office feels that that is as protected as the earlier language, the subordinated language, since the water right is in trust.

8 MR. KOLE: Yeah. As best we can, we think so. You know, you never can predict everything, 50 years from now what a court will do. But as best we can see, we think we're protected.

12 MR. CHAPMAN: Thank you. Tom, the question I have for you, it's my understanding that Idaho Power has asked under the 11-80 contract that the existing water users be dismissed. If something goes awry and this agreement falls by the wayside, what happens to those people? Are they re-sued? Are they still left out? What happens?

20 MR. NELSON: No. The 11-80 contract says that once we dismiss, you know, the earth can tremble and the halls of government come tumbling down and they're still dismissed. And the dismissal was with prejudice. So to the extent that we could build a system which is a total sign-off by the company as the those folks, we did that.

Now, as we have talked before, you have to hasten to tell them that this is not a rose garden either. And if they have a problem with their neighbors or some other part of the system, they're still going to have those problems. But as far as the power company's water rights, they're out of the case for good.

10 MR. CHAPMAN: The last question I have is that the agreement refers to the full utilization of existing storage above Murphy. I've asked the question two or three times before in different meetings as to what is full utilization of the those reservoirs.

16 And I wonder if any of you have a better answer than you did in the past or whether you now can define what a fully utilized reservoir is. There are lot of people who would like to know.

21 MR. NELSON: Well, I don't think the answer is any different, Sheri, because our concept is still the same. As you know, the constraints on water use in a federal reservoir is pretty much a question of federal law, at least initially. And it's our intuitive belief, at least it's intuitive on my part, that there's some water uses built around excess storage, and that to the extent that within the boundaries of federal policy, the state can force the question to be asked, "Is this really the way we want to use the water," that those questions should be asked.

So my feeling is, what we have written, and I think by compatriots agree, is simply a system that asks the question. And once you run up against a federal policy or a state policy that says, "This is the way it's going to be," then you have fully utilized the water in the reservoir.

I have some real problems with the way the federal policy operates in conjunction with the water bank, where the city of Pocatello sits there with 40,000 acre feet of storage in Palisades Reservoir, which is largely unusable by anybody. They can rent it on a short-term basis year-to-year and yet the basis on which they bought it indicates that it's going to be years and years and years before they need it for exchange on their groundwater impact. There should be some system in place where that 40,000 acre feet gets put to use.
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<td>1 And that was what we intended to</td>
<td>1 would be if they gave away their rights.</td>
<td>1 lost the lawsuit, they could not be faulted by the</td>
<td>13 (Pages 49 to 52)</td>
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<td>2 enforce or to suggest was, let's ask the question.</td>
<td>2 If their rights were lost because they</td>
<td>2 lost the lawsuit, they could not be faulted by the</td>
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<td>3 And if we find out that it's an impossibility to</td>
<td>3 lost the lawsuit, they could not be faulted by the</td>
<td>3 lost the lawsuit, they could not be faulted by the</td>
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<td>4 change the federal policies that restrict that</td>
<td>4 PUC, and the PUC couldn't take that out of the</td>
<td>4 PUC, and the PUC couldn't take that out of the</td>
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<td>5 use, then that water is fully utilized, and we'll</td>
<td>5 shareholder's hide, and the shareholders in turn</td>
<td>5 shareholder's hide, and the shareholders in turn</td>
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<td>6 go on about our business. But it seems that's</td>
<td>6 couldn't take it out of management's hide for</td>
<td>6 couldn't take it out of management's hide for</td>
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<td>7 pretty good sense to have somebody ask the</td>
<td>7 having acted unreasonably.</td>
<td>7 having acted unreasonably.</td>
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<td>8 question.</td>
<td>8 But since this is to an extent a</td>
<td>8 But since this is to an extent a</td>
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<td>9 MR. CHAPMAN: Thank you.</td>
<td>9 consensual transaction in settling the lawsuit, it</td>
<td>9 consensual transaction in settling the lawsuit, it</td>
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<td>10 MR. COSTELLO: Don, could I just say a word</td>
<td>10 would expose the company to a claim that they had</td>
<td>10 would expose the company to a claim that they had</td>
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<td>11 on Sheri's first question?</td>
<td>11 arguably given something up. And the only way for</td>
<td>11 arguably given something up. And the only way for</td>
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<td>12 CHAIRMAN KRAMER: Okay. First, be sure to</td>
<td>12 us to induce them to give something up is to</td>
<td>12 us to induce them to give something up is to</td>
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<td>13 state your name, Sheri Chapman, Idaho Water</td>
<td>13 negate the possibility that they would be</td>
<td>13 negate the possibility that they would be</td>
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<td>14 Association.</td>
<td>14 penalized for that.</td>
<td>14 penalized for that.</td>
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<td>15 MR. COSTELLO: Sheri, you wrote to me or to</td>
<td>15 But in my view, had the suit gone</td>
<td>15 But in my view, had the suit gone</td>
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<td>16 the governor on behalf your Board a few weeks ago,</td>
<td>16 full-course, there is a very real possibility that</td>
<td>16 full-course, there is a very real possibility that</td>
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<td>17 and I've been out on these circuits and haven't</td>
<td>17 they would have ended up, in essence, giving up or</td>
<td>17 they would have ended up, in essence, giving up or</td>
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<td>18 had a chance to answer you. But on that first</td>
<td>18 having taken away from them much more than they</td>
<td>18 having taken away from them much more than they</td>
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<td>19 question, you asked whether this was going</td>
<td>19 have in this settlement.</td>
<td>19 have in this settlement.</td>
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<td>20 to become subordinated in the future, whether it</td>
<td>20 So looked at from that standpoint,</td>
<td>20 So looked at from that standpoint,</td>
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<td>21 would take individual subordination proceedings</td>
<td>21 there isn't a loss to the ratepayer, because had</td>
<td>21 there isn't a loss to the ratepayer, because had</td>
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<td>22 for each new user to have their right become</td>
<td>21 the state won the suit, as they very well might</td>
<td>21 the state won the suit, as they very well might</td>
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<td>23 senior to the hydropower right.</td>
<td>22 have done, we actually are arriving in this</td>
<td>22 have done, we actually are arriving in this</td>
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<td>24 Because of your concern we inserted</td>
<td>23 settlement at a position where more water is</td>
<td>23 settlement at a position where more water is</td>
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<td>25 language, that the old language said &quot;subject to</td>
<td>24 devoted to hydropower and other in-stream uses</td>
<td>24 devoted to hydropower and other in-stream uses</td>
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<td>1 subordination.&quot; The language now reads &quot;shall be</td>
<td>1 than would have been the case had it run its full</td>
<td>1 than would have been the case had it run its full</td>
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<td>2 subordinated to subsequent uses upon approval of</td>
<td>2 course.</td>
<td>2 course.</td>
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<td>3 such uses.&quot; So that it is automatic, that as soon</td>
<td>3 MR. FOTHERGILL: Just a follow-up just to</td>
<td>3 MR. FOTHERGILL: Just a follow-up just to</td>
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<td>4 as they clear the water department, subordination</td>
<td>4 make sure. Does not this agreement say that the</td>
<td>4 make sure. Does not this agreement say that the</td>
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<td>5 attaches automatically. There isn't any separate</td>
<td>5 Public Utilities Commission will not be enabled to</td>
<td>5 Public Utilities Commission will not be enabled to</td>
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<td>6 proceeding that they have to go through.</td>
<td>6 consider the rates from consumers asking for</td>
<td>6 consider the rates from consumers asking for</td>
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<td>7 MR. CHAPMAN: Thank you.</td>
<td>7 compensation for the loss of the hydropower</td>
<td>7 compensation for the loss of the hydropower</td>
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<td>8 CHAIRMAN KRAMER: Talk louder, though.</td>
<td>8 system?</td>
<td>8 system?</td>
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<td>9 MR. FOTHERGILL: Al Fothergill. Mr. Nelson</td>
<td>9 MR. COSTELLO: As a result of this</td>
<td>9 MR. COSTELLO: As a result of this</td>
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<td>10 has said that we don't know much this is going</td>
<td>10 settlement.</td>
<td>10 settlement.</td>
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<td>11 to cost, and maybe nothing. But as I read this,</td>
<td>11 MR. FOTHERGILL: Yes. Yeah, that's what I</td>
<td>11 MR. FOTHERGILL: Yes. Yeah, that's what I</td>
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<td>12 and maybe you can tell me, Mr. Costello, as I read</td>
<td>12 wanted to know. Thank you.</td>
<td>12 wanted to know. Thank you.</td>
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<td>13 this, the governor and Idaho Power have signed a</td>
<td>13 MR. MILES: I had another question. I</td>
<td>13 MR. MILES: I had another question. I</td>
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<td>14 piece of paper saying that the public utilities --</td>
<td>14 suppose this is for Mr. Sherman. First, what is</td>
<td>14 suppose this is for Mr. Sherman. First, what is</td>
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<td>15 they're asking for legislation, really, that The</td>
<td>15 going to be the determination of the groundwater</td>
<td>15 going to be the determination of the groundwater</td>
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<td>16 public Utility Commission not consider</td>
<td>16 case history, because as we know, the Snake River</td>
<td>16 case history, because as we know, the Snake River</td>
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<td>17 compensation for consumers for lost capacity in</td>
<td>17 has two sources. It has Jackson Lake, which is</td>
<td>17 has two sources. It has Jackson Lake, which is</td>
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<td>18 the hydropower system, effectively acknowledging</td>
<td>18 completely dried up at Milner. We have the</td>
<td>18 completely dried up at Milner. We have the</td>
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<td>19 it's going to cost the consumer something.</td>
<td>19 underground source that comes from Wyoming to</td>
<td>19 underground source that comes from Wyoming to</td>
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<td>20 Is that an accurate reading of this?</td>
<td>20 Oxford and comes out nearly four or five miles</td>
<td>20 Oxford and comes out nearly four or five miles</td>
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<td>21 MR. COSTELLO: No. I wouldn't say it's</td>
<td>21 upstream -- or downstream from Milner and</td>
<td>21 upstream -- or downstream from Milner and</td>
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<td>22 exactly accurate, Al. The reason -- well, let me</td>
<td>22 eventually at Feldman Springs. The Supreme Court</td>
<td>22 eventually at Feldman Springs. The Supreme Court</td>
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<td>23 back up a second. If you look at this from the</td>
<td>23 has ruled that groundwater comes under interstate</td>
<td>23 has ruled that groundwater comes under interstate</td>
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<td>24 point of view of the power company, as the only</td>
<td>24 commerce. So how does this agreement propose to</td>
<td>24 commerce. So how does this agreement propose to</td>
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<td>25 way they could lose out in this whole transaction</td>
<td>25 settle that knotty question?</td>
<td>25 settle that knotty question?</td>
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14 (Pages 53 to 56)
MR. KOLE: Yeah, it does. What that language is there for is that if we made a real bad mistake and we totally miscalculated so that existing uses took the river below 39, those uses would still have a subordinated -- or the company's water right would still be subordinated as to existing uses in place today. Okay?

We don't think we made that kind of mistake, but we wanted to make it crystal clear that as best we could, people who are currently using water will be protected by this agreement.

MR. FORD: Talking about in the state, you're talking in terms of the existing hydrologic data.

MR. KOLE: Yeah, if our computer model is wrong. Existing people will be protected.

MR. NELSON: From the power company.

MR. KOLE: From the power company. Now, that doesn't mean that those uses could not be precluded, for example, by a preexisting minimum stream flow. Okay?

MR. FORD: Okay. On D, could Ken or somebody tell me, have you got any estimate of the amount of water that's being beneficially used on

哪有 no application or any filing that we're talking about?

MR. KRAMER: Mr. Dunn, do you know that?

MR. DUNN: That's one of the reasons for the adjudication. We don't know how much water is being used without benefit of a permit. We know there's some because of the old constitutional method, you know, prior to the enactment of statutes that say normally to establish a right is by permit, all you've got to do is use the water and you had a right. There is some of that --

UNKNOWN SPEAKER: Have you got an adjustment, Ken, as to whether C and D are going to come into play and the likelihood of that?

MR. DUNN: No. We're confident it won't.

And we -- I don't know how much water is covered by permit. What I do know is that the water that's being used is not violating it. That's what we're trying to say is, uses that are presently there we ought to recognize, and that is one of the things that the power company has been saying since Swan Falls began, is that there needs to be some way to protect existing uses.

We're confident that C and D would never come into play, but rather than take the risk of, for whatever reason, that it would, we have to have those.

MR. NELSON: I think, Pat, too, was, there's a kicker in D that doesn't leap out at you, that some of these people have really got a Hobson's choice to make, if you have a clearly illegal water user.

I mean, a guy who has just gone out and punched a hole in the ground and started to use water, he has no water right at all against anybody today. So he comes in next April and files. He has an April 85 priority. He's got maybe a 1979 use experience, he's got to come back under public interest. And he might find that he doesn't have either a water right or a permit or any chance of getting one, depending on the specifics of his particular use.

Some of those people are going to be hard put to decide whether or not to file by the deadline. I can hardly wait.

CHAIRMAN KRAMER: Chuck.

MR. JONES: I'm Charles Jones. I represent District 11 of the Water Users Association, and my question is to Ken.

Under this agreement, the adjudication

of it, are you planning on re-adjudicating all the adjudicated rivers?

MR. DUNN: Yes. We would --

MR. JONES: Why?

MR. DUNN: Pardon?

MR. JONES: Why, is my next question.

MR. DUNN: Well, other than in the Snake Basin, other than the Payette and the Lemhi, virtually every other decree that was entered into either has a defect in terms of describing the water right or the uses have changed so dramatically that they don't recognize reality in terms of what that right is.

Whatever the uses are, wherever you find the uses are, that would be the water right there. And I know there's some concern in saying, well, gee whiz, if they come in and look at a stream that's adjudicated, they'll take away some of our rights. Well, if a user hasn't been using the water, he didn't have any anyway.

MR. JONES: Are you saying, then, if you re-adjudicate, any legitimate user isn't going to lose his right?

MR. DUNN: That's correct.

MR. JONES: If he's using the water, he's
1 going to keep it.
2 MR. DUNN: That's correct. And in addition, some illegitimate users may get a right because they have been using it for a long time. And you can find that they've got a right that they just never bothered to get a permit for, earlier users.
3 You finally tie down all those rights that we just don't know about.
4 MR. JONES: Why are you excluding the Lemhi and the Payette?
5 MR. DUNN: Because we've recently done a general adjudication of those. The Payette is in the final throws that we've been working on for a number of years, and the Lemhi was completed about two years ago finally. We started that in about '37.
6 MR. JONES: Are those the only two? Do they have any other rights.
7 MR. DUNN: Those are the only two general adjudications that we've done in my --
8 MR. JONES: Have you ever done any adjudication on the Snake River?
9 MR. DUNN: Not on the Snake River, not as a general adjudication. There's been some stipulated summary supplemental decrees issued on existing decrees, but the whole thing has never been done.
10 MR. JONES: Will they be redone?
11 MR. DUNN: Yes. All of the water rights on the Snake River will be done and its tributaries. Whether they're decreed, licensed, or permit or whatever it is, the court will finally say, this is the water right. And that's what we don't have right now. Going into the upper Snake, the Rexburg decree, for people who live up there, you know, it's a -- it's almost a holy document. But when you look at that thing, it doesn't define the water rights. It says that somebody has got the right to 50 cfs, but it doesn't describe where to. It doesn't describe the period or point of diversion. In effect, it has a defect in it. And those things need to be clarified for the protection of that water user against some future right.
22 UNKNOWN SPEAKER: I have one more question.
23 Mr. Chairman. I guess I don't know who it goes to -- Pat, I guess, one of the Pats. Under the subordination deal, the language, is it going to cover all rivers?
25 MR. COSTELLO: Well, it would -- yeah.
26 Prospective subordination, right. Yeah. (Simultaneous responses.)
25 MR. COSTELLO: Right. Except that it would cover old water to the extent that if there are un-subordinated rights out there, as there do appear to be, they would also be invited to come into this same kind of arrangement whereby in exchange for us recognizing an un-subordinated right to the level of a minimum stream flow, they would agree to place their rights above that in trust with the state to be subordinated over time.
25 UNKNOWN SPEAKER: New witness not old water.
26 UNKNOWN SPEAKER: No.
27 MR. JONES: Are those the only two? I'm sure there are other districts?
28 MR. DUNN: Those are the only two general adjudications that we've done in my --
29 MR. JONES: Have you ever done any adjudication on the Snake River?
30 MR. DUNN: Not on the Snake River, not as a general adjudication. There's been some stipulated summary supplemental decrees issued on existing decrees, but the whole thing has never been done.
31 MR. JONES: Will they be redone?
32 MR. DUNN: Yes. All of the water rights on the Snake River will be done and its tributaries. Whether they're decreed, licensed, or permit or whatever it is, the court will finally say, this is the water right. And that's what we don't have right now. Going into the upper Snake, the Rexburg decree, for people who live up there, you know, it's a -- it's almost a holy document. But when you look at that thing, it doesn't define the water rights. It says that somebody has got the right to 50 cfs, but it doesn't describe where to. It doesn't describe the period or point of diversion. In effect, it has a defect in it. And those things need to be clarified for the protection of that water user against some future right.
32 UNKNOWN SPEAKER: I have one more question.
33 Mr. Chairman. I guess I don't know who it goes to -- Pat, I guess, one of the Pats. Under the subordination deal, the language, is it going to cover all rivers?
35 MR. COSTELLO: Well, it would -- yeah.
36 Prospective subordination, right. Yeah. (Simultaneous responses.)
35 MR. COSTELLO: Right. Except that it would cover old water to the extent that if there are un-subordinated rights out there, as there do appear to be, they would also be invited to come into this same kind of arrangement whereby in exchange for us recognizing an un-subordinated right to the level of a minimum stream flow, they would agree to place their rights above that in trust with the state to be subordinated over time.
35 UNKNOWN SPEAKER: New witness not old water.
36 UNKNOWN SPEAKER: No.
37 MR. DUNN: Those are the only two general adjudications that we've done in my --
38 MR. JONES: Have you ever done any adjudication on the Snake River?
39 MR. DUNN: Not on the Snake River, not as a general adjudication. There's been some stipulated summary supplemental decrees issued on existing decrees, but the whole thing has never been done.
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1 to draw a line on a map, you can apply for a well
2 here and you can't apply for a well there, there's
3 tremendous political football.
4 The other thing -- when this is put
5 into practice, are we going to have three layers
6 of state agencies to go through: the water board,
7 the PUC, and a committee headed by the governor?
8 Or are we going to go through the same general
9 procedures that we do now?
10 CHAIRMAN KRAMER: Let's take that one at a
11 time.
12 MR. KOLE: I'll do the last one. You go
13 through the department, and there won't be any
14 committee through which you have to go to. And
15 it's our hope that what we have here will cut back
16 on red tape.
17 MR. STRIGGER: Very good.
18 MR. NELSON: I will say that you may see
19 some new faces at the department. I think now you
20 have an option for the in-stream flow interests
21 and come in and question the economics or the
22 public interest. You may see the PUC there on the
23 question of what is the lost energy. So you may
24 see some new faces when you get there, but I agree
25 with Pat, hopefully you'll only go one place just

1 Snake River Basin procedures.
2 In practice, it's really hard to find a
3 perched water table that's not tributary. If you
4 get the bathtub full, the water is going to run
5 out of it. And if you take the water out, the
6 water that would otherwise run out of it stays in
7 it. So a true perched water table that's not
8 tributary is pretty rare, but you could postulate
9 that they're there, and to the extent they are, 
10 they would be found not tributary.
11 CHAIRMAN KRAMER: It's time to break.
12 Did you have a question?
13 MR. FORD: I want to ask a question about
14 the proposed criteria, the public interest
15 criteria.
16 Mr. Nelson said that we can't expect a
17 resolution of a hydro-rights controversy to settle
18 issues relating to the anadromous fish
19 arrangement. I understand that point of view, but
20 it's also true that, in fact, the settlement does
21 impact all water users on the Snake River,
22 settling the conflict around particular uses, has
23 an impact on all uses.
24 MR. NELSON: Oh, sure. Yeah. That's why I
25 say that the minimum flow can't address anadromous

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1 like you do now.
2 MR. COSTELLO: And on the up-stream storage
3 I guess it's in here by omission, because by
4 maintaining the zero flow at Milner, it still
5 provides for any future up-stream storage projects
6 that become feasible above Milner.
7 MR. KOLE: The idea there is that
8 eventually, if you look at the federal
9 government's involvement in up-stream storage
10 projects, it's becoming less and less likely that
11 you're going to see any federal involvement of any
12 significant nature.
13 So what we're trying to do here is to
14 create some incentive for the state and private
15 parties to begin that up-stream storage
16 enhancement.
17 MR. NELSON: On the other question you
18 asked, Jack, I guess that's a question of what's a
19 tributary. And it's obvious that in order to
20 challenge somebody's use, you have to show that
21 he's tributary to your use and that he has the
22 potential for adversely affecting your use.
23 So if you have a true perched water
24 table, then you can say, I'm not tributary. And
25 in theory you could exclude yourself from the

1 fish concerns separately. But I think your point
2 on the public interest criteria is well-taken,
3 because the state presented bills to the
4 legislature last year that had fish and wildlife
5 concerns, for example, in those same criteria.
6 I lost the battle to include them this
7 time, the theory being that it's already in the
8 local interest criteria, which we left in the
9 statute. So there was some feeling it was
10 duplication, and that was one of the issues. The
11 tradeoffs was that I didn't get fish and wildlife
12 in there because the theory was it's already
13 there.
14 MR. FORD: Well, let me ask the other
15 parties. Did you consider, then, putting fish and
16 wildlife, other in-stream uses, as a part of the
17 criteria, and if you did, why did you decide not to?
18 MR. COSTELLO: Well, it's exactly as Tom
19 said because currently the environmental and
20 conservation community views the local public
21 interest prong of the determination as being their
22 opening to assert these -- the wildlife values.
23 If we had put them expressly in our
24 criteria, we would have had to repeal the local

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17 (Pages 65 to 68)
Mr. COSTELLO: And I would also say for one factor should be entitled to any higher consideration at both levels? Some points went the other way. Now, if you read it so you believe it's stacking the deck, then so be it. But the way we intended it is, it's neutral.

And if development can justify itself, it goes forward. If it can't justify itself, it doesn't. And you consider all the factors, but no one factor should be entitled to any higher priority than any other factor. And that's why we specifically wrote that in there.

Mr. COSTELLO: And I would also say for the governor's part, if the fish and wildlife interests aren't being -- aren't adequately protected under the current local public interest analysis, I'm sure he would not be opposed to including that in the new public interest analysis that we've proposed here.

Unknown Speaker: Senator?
Ms. BRAY: Gail Bray, Boise. For Notus can you tell me the intermeshing of the local and the state public interest there, when

Mr. FORD: But doesn't the local public interest also include all other local public interests: agriculture, hydropower, all the others that indeed you mentioned in the (inaudible). Maybe Ken needs to help me here.

And it seems to me this stacks the deck a bit.

You've got now a number of criteria already in place, and then you add these criteria to them. And the director makes a decision on water rights based on the existing ones plus these new ones.

Mr. KOLE: Well, Pat, I think you're getting precisely to the point where we sat down and we frankly negotiated back and forth. Some points went one direction. Some points went the other direction.

I think if you look at the package as a whole, it's a neutral package. It doesn't favor one set or another set. It's a neutral package.

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I thought and my predecessor thought that that was carrying public interest too far from my perspective -- from the director's perspective. And that went to court, and the court said no, it isn't, you have to consider everything. You have to look at the use of the land and how does that conform with other uses. So the courts have said that's very broad, and that's the way we've been using it.

MS. BRAY: I have just one last question, and I promise it will be the last. If you've left in place the local public infrastructure for use of local public interest and you have given to the director and the board the state public interest criterion, it seems to me you have excluded one of those interests to be considered at the state level in determining your water right. And I'm still curious as to how, if it was being valuable at the local level, how it's not being equally as valuable at the state level.

MR. KOLE: I really don't read it that way. You know, if you look at the Snake River as a whole, you know, the local public interest has been defined very broadly. I just don't --

MS. BRAY: I know you don't. Can I hear from him?

MR. KOLE: Sure.

CHAIRMAN KRAMER: Mr. Director.

MR. DUNN: The local public interest is not the public interest of a hundred feet along the stream. If that stream goes somewhere, that's the local public interest. Really, if it's a question of impact on Snake River, I think the local public interest is the effects on the Snake River. It's not something that's very, very narrowly defined.

CHAIRMAN KRAMER: Senator?

MR. RINGERT: Bill Ringert, Boise.

Senator, I think you have to understand the definition of local public interest.

MS. BRAY: I'm trying.

MR. RINGERT: Well, it says the people in the area that would be affected by the use, you know, and if that's the whole state, then the whole state is the local public interest. That's the way I read it.

MR. DUNN: Yeah. That's right.

CHAIRMAN KRAMER: Ladies and Gentlemen, it's 10 o'clock. We've been at it two and a half hours. We've cut it off at 10 o'clock at every other time.

19 (Pages 73 to 76)

REPORTER'S CERTIFICATE

I, Dianne L. Cromwell, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who transcribed 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 Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand July 25, 2007.

Dianne L. Cromwell, Court Reporter
CSR No. 21

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