RESOURCES AND ENVIRONMENT COMMITTEE

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Meeting on

SB 1006 - To provide that the director of the Department of Water Resources shall have the power to promulgate rules and regulations

SB 1008 - Water rights for hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on January 18, 1985, 1:30 p.m.

before Chairman Noh

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

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Peavey
Senator Ringert
Senator Sverdsten
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ward Conley, PUC
Mr. High, PUC
Mr. Swisher, PUC
Ken Dunn

* * * * *
JANUARY 18, 1985

SENATOR BUDGE: Mr. Chairman, before you start, would you care to accept the minutes as written?

CHAIRMAN NOH: I'd be glad to do that.

SENATOR BUDGE: I so move.

CHAIRMAN NOH: It's been seconded by Senator Budge, seconded by Senator Ringert.

Accept the minutes of the last meeting, all in favor say aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no? The minutes carry.

So we'll start first then with S bill 1008, the main bill, but don't worry about it if questions come up moving from one bill to the other or any other aspect of this agreement. It might fit together because it all fits together as part of the puzzle.

MR. COSTELLO: Thank you, Mr. Chairman.

First of all, I'm standing on a broken foot, so if I pass out, that's the reason. I want to keep this --

UNKNOWN SPEAKER: Mr. Chairman, why doesn't
Mr. Costello just sit down if he'd rather.

    MR. COSTELLO: Maybe I will. I'll do that.

    CHAIRMAN NOH: That would be fine. Good suggestion.

    MR. COSTELLO: The attorney general's office has provided detailed testimony outlining what each of these provisions does, so I'm not going to go into great detail other than to note how all of this fits into the overall picture. The main bill, to take it just section by section, for those of you who followed the agreement, Section 1 here originated in Exhibit 1 to the agreement, which is part of the legislative package.

    Section 2 was all the -- subparagraph 6 of Section 2 was Exhibit 7B to the agreement, which is not part of the legislative package, but it's one of the contingencies, the distinction there being the agreement does not take effect without this taking place, although the parties were not bound necessarily to actively support it. The reason for that being 7B is the one that imposes this new trust concept on the portion of the hydropower right that is in excess of the minimum flow, and we wanted to keep this as far away from being a transfer as we could. So it's
being imposed by operation of law through this
rather than the power company agreeing to it by
contract.

Subsection 6 of that Section 2 is what
was called Exhibit 7A to the contract, which is
the authority to impose subordination conditions
on new permits. That's so that we won't hopefully
get into this position in the future where there's
a question whether or not a hydropower right has
been subordinated. It does not mandate
subordination conditions on all future hydropower
rights. It is permissive and would give the
director the authority to impose such conditions.

UNKNOWN SPEAKER: Chairman?

CHAIRMAN NOH: Yes.

UNKNOWN SPEAKER: Could you, Mr. Chairman,
have Mr. Costello please repeat the exhibits of
Subsection 6?

MR. COSTELLO: Subsection 6 was Exhibit 7A
to the original Swan Falls contract.

UNKNOWN SPEAKER: And Mr. Chairman?

CHAIRMAN NOH: Yes.

UNKNOWN SPEAKER: Section 1, that was
exhibit what?

MR. COSTELLO: Section 1 was the first part
of Exhibit 1 to the contract.

UNKNOWN SPEAKER: Thank you, Mr. Chairman.

MR. COSTELLO: Section 3 is the public interest criteria which was the second half of Exhibit 1 to the contract. This is part of the legislative package. These are the new criteria the director must consider in granting new water right applications for water that may be available due to the imposition of a subordination condition.

And the Section 4 is -- I'm not sure which exhibit that came from or if it was in an exhibit, but it gives the department the authority -- Exhibit 7A -- in any event, okay, it was a separate exhibit, Exhibit 4, I believe, to the contract. This is the one that will give the department to go through the pending application, permit applications, and also the end develop permits to apply the new public interest criteria to those.

And the reasoning for that is that on paper the existing permits are sufficient to exhaust the 600 cfs that has been identified as available to meet the needs of future development, and so it is necessary to be selective in deciding
which one of those -- ones of those are going to go forward and which ones should not go forward because they don't meet the public interest test.

And if I could move on now to the second bill, which is much simpler. You can turn straight to page two of the bill. All we've added is two new sentences to the authority granted to the director under Section 42-1805 Idaho Code.
The first sentence which was added is No. 7, line four of page two, which is the so-called moratorium authority.

The historical background is that we've been operating under an informal moratorium that the director imposed after the Supreme Court decision in the Swan Falls case because he could not determine at that point whether water was in fact available to be appropriated on the Snake River above Swan Falls.

What the intention of this new section to this new No. 7 is to confirm that power and to expressly authorize him to do that should the circumstance arise in the future.

The final bullet there, No. 8, is the authority to promulgate rules. And the director currently has specific authority to promulgate...
rules for a number of different areas of
department operations, but he does not have
authority to promulgate rules to do such things as
detail what's in the public interest under the new
public interest criteria to deal with water
markets and some of the other aspects of the
processing of applications to appropriate water as
is envisioned by the new management regime this
agreement will put in place.

That is just a brief summary of the
bill, and I think at this point I would turn it
over to my two fellow negotiators for anything
they would like to add.

CHAIRMAN NOH: Which fellow negotiator is
next?

MR. KOLE: Thank you, Mr. Chairman, members
of the committee.

CHAIRMAN NOH: Mr. Kole from the attorney
general's staff.

MR. KOLE: I would like to just add a few
comments. If you look at Senate Bill 1008, the
negotiators were faced with two questions. One
would be to try and rewrite 42-203 or the other
would be to try and clean it up and then graft
onto it some new criteria for the protection of
hydropower interests.

In taking a look at this issue, initially we did think that it might be advisable to try and redraft the entire section, but once getting into the process we discovered that it was not and would be better to try and work within the experience of what we had on the books. So that's what we did. As we went through, we did make some minor changes just to make the thing read a little bit clearer. And if you look at page one, that's all we're doing.

If you looked at page two of the bill, you can see that there is a new requirement there of statewide notice if there is going to be a large diversion. And as part of this administrative process, there are groups that do like to become aware of various applications that are being considered by the department, so we've provided a procedure whereby they could get on a mailing list and receive notice in all cases. The rest of the section was about the same, other than to renumber and redesignate some of the provisions.

You get down to the bottom of page two, the authority to subordinate water rights and
limit the term of permissible licensing. And what we tried to do here was to not only address the Idaho Power/Swan Falls controversy but also provided a method by which other controversies could be addressed.

I'm sure members of this legislature are aware of the fact that there is potentially a similar problem on the Spokane River out of Lake Coeur d'Alene. We wanted to provide a mechanism by which the governor would have the authority to enter into a negotiation to resolve that problem before we get the same type of crisis coming up down the road.

Also, you might notice on line 49 and 50 of page three that Subsection 6 of this section does not apply the licenses which have already been issued as to the effective date of the SAP (phonetic). What that does is that just makes it clear that we won't have any problems. There will only be prospective application of this particular law.

Turning to Section 3 of the act and the public interest criteria, I think it is important as we note in our written testimony that it was never the intent of the negotiators nor do we
believe that we have altered any protection that currently is in existence for fish and wildlife and other instream guidance. The purpose here was not to change the local public interest standard. It's not to alter that in any way, shape, or form. But rather just to graft on a balancing test in the case of hydropower water rights.

The criteria that we have here is capable of being implemented without rules and regulations. Or if the legislature deems fit to pass SB 1006, there would be the authority to adopt rules and regulations. But we thought that was a policy choice that the members of the legislature should be able to make.

Then looking at Section 4 on the bottom of page four, as Mr. Costello has indicated, there are a large number of permits out there. The question that concerns the attorney general's office and of course you as legislators is what would the effect be if the state was held responsible for denying one of those permits? Would there be some liability that could be imposed against the state?

After researching this area and taking a look specifically at the Hidden Valley Springs
case, we believe that our research, at least as disclosed to us, what we have in 42-203D meets the criteria, and we believe that we can review those permits without creating liability for the state.

Section 5 is just existing law, and Section 6 is your standard severability clause.

I believe Mr. Costello has gone into SB 1006 quite adequately, so I think that would conclude my comments. And I turn the floor over to Mr. Nelson.

CHAIRMAN NOB: Mr. Nelson.

MR. NELSON: Mr. Chairman, members of the committee, I might just give you a little bit of an overview of where the entire process is. It's obvious that given the things that have to be done, no one entity can do it. But if you have read the contract, you've seen that certain things were required as a condition to the effectiveness of the agreement. I might just tell you briefly where those are.

The filing with the Idaho Public Utilities Commission has been done, and the commission has entered an order deferring its decision to the legislature since that degree it was a parallel decision, at least in part. The
FERC filing has been made. The time for intervention has either run or is close to running. So far as I know the date, there's one intervention by the National Marine Fisheries Service, which is an agency of the Department of Commerce. That intervention on its face seems to relate to the water budget under the Northwest Power Planning Act.

The bill on adjudication and adjudication funding is up for introduction in the house.

The bill on PUC jurisdiction is here I believe in the State Affairs Committee.

The company made the determination that no filing was needed with the public utilities commissioner of Oregon, so that was not done. I understand that the agreement was filed in the sense it was given to the commissioner and his staff, but there was no formal request for any action.

The state water plan amendments have been prepared in draft form. The water resource board had information meetings prior to Halloween, which I thought was big, since I had to go to all of them. The proposed amendments are now drafted.
and set for public hearing before the Water
Resource Board commencing the 28th of January in
Idaho Falls and continuing to the 6th in Lewiston.
The Boise hearing for your information is set for
the 5th in the Supreme Court meeting room at
2 p.m. and 7 p.m.

So the other matters that are running
concurrently to the extent we can. I don't -- so
far we have not seen any insuperable hurdles to
(tape inaudible) things that divide the
unappropriated water at Murphy. 600 or half remain
instream, 600 to be available for appropriation.
That part of the settlement is in the state water
plan amendments, which according to the
constitutional amendment if adopted by the water
board will come back to the legislature.

Given the authorship of that
constitutional amendment, I hesitate to say that
it's not clear, but it isn't at all sure right at
the moment how that process will work, other than
the legislature has the final say. So that part
will come back assuming further action by the
water board.

To me there are a lot of elements to
this plan, and I don't want you to get the
impression that the only important part of what 
was done of the part of the settlement was the 
minimum stream flow. That is an important part, 
but an equally important part in view of the 
company are the public interest criteria which you 
have in Senate Bill 1008.

The company thought and still thinks 
that it's critical that hydropower be recognized 
as an element in consideration of new water uses 
that affect the river above Murphy. And that is 
important. The statute and the contract don't 
prohibit development. They're not intended to and 
they don't. They simply say, look, you may have 
an adverse impact on hydropower generation. That 
element of the public interest has to be addressed 
before you have further development. And if it's 
addressed and it's found to be in the public 
interest that you have that impact on hydropower, 
that it's in your state's overall best interest to 
proceed with development, you proceed with 
development. But that is a very important element 
of this plan, not just the river flows but also 
the public interest.

So with that overview, Mr. Chairman, I 
would yield to questions as they come up.
CHAIRMAN NOH: I might first impose upon one of the three of you or anyone else who wants to do that to explain just where we are in settling the question of the Idaho Falls cost in the adjudication that cropped up yesterday in the House Resources Committee.

MR. COSTELLO: Yes, Mr. Chairman. I would be happy to do that.

CHAIRMAN NOH: Explain what happened there, what has transpired since then so we don’t have a lot of rumors circulating.

MR. COSTELLO: Okay. And I also thought the committee members would like to have this, if they don't already have copies of the proposed changes to the state water plan. They are included in this issue of the currents as well as the text of the full Swan Falls agreement. So I guess I'll pass those around if anyone would like to have one.

And that details in the amendments how they are going to implement the new minimum stream flows and some of the other provisions affecting the state water plan in this agreement.

The question was raised in House Resources yesterday regarding the fee to be
charged on hydropower generation to fund the adjudication of the Snake River. It was pointed out by several legislators from Idaho Falls as well as the mayor of Idaho Falls that the $25 per cfs charge worked a -- had the result of placing a disproportionate amount of the fee on the city of Idaho Falls because they have roughly 20,000 cfs of hydropower right there, which had the result of them paying 10 percent of the overall hydropower share of the adjudication when they only generate about 1 percent of the power.

CHAIRMAN NOH: (Tape inaudible.)

MR. COSTELLO: Right. It's low head, about 20 feet of head going through ball turbines.

Right now we are looking at changing that formula to provide for rated capacity as being the measure of the fee to be charged for hydropower. The overall amount to be generated for the adjudication from hydropower would remain constant at about 7.4 million overall for hydropower, which is roughly equivalent to the amount that agricultural users will pay, but it will be based on the number of cents per kilowatt of rated capacity.

CHAIRMAN NOH: As I understand the original...
formula had been reviewed by the city of Idaho Falls. They declared okay, and they went back and recalculated, and they made some mistakes. So this really shouldn't be blamed on a lack on the part of the people who put this together. It's just one of those human errors.

MR. COSTELLO: Yes, that's correct.

Mr. Chairman.

SENATOR CRAPO: Mr. Chairman?

CHAIRMAN NOH: Yes, Senator Crapo.

SENATOR CRAPO: Is there available anywhere a breakdown of this schedule?

CHAIRMAN NOH: The new schedule?

SENATOR CRAPO: Well, the old one.

CHAIRMAN NOH: The old schedule is in the bill. You I think probably have copies of that bill which we introduced as an RS and is now at the House Resources Committee.

MR. COSTELLO: It's also in this tabloid.

SENATOR CRAPO: What I'm referring to is not really the schedule then but how the schedule is broken down.

CHAIRMAN NOH: We'll get that for you.

MR. COSTELLO: I have that here.

CHAIRMAN NOH: You have that here. Fine.
Great. This is not the new formula. This is the --

MR. COSTELLO: Yes. There would be no difference. The $25 per claim for hydropower here is listed as yielding 7.2 million if you add the two hydropowers together. And the rated capacity, it will yield the same amount.

CHAIRMAN NOH: Okay. Do you have other questions for these gentlemen? I heard there are lots of them. Senator Ringert.

SENATOR RINGERT: Gentlemen, I'd like one of the negotiators to tell us just what is the public interest that you're referring to that's in -- that will be important to 203C. How is it defined?

CHAIRMAN NOH: Who wants to take a shot at that? Mr. Kole?

MR. KOLE: Thank you, Mr. Chairman, Senator Ringert. The public interest determination required pursuant to 203C is defined in 42-203C, 2A, one through five. Those are the only factors that the director will be considering in this particular determination.

It's actually a two-tier process. What happens is the director initially considers all of
the factors listed on page two, in paragraph five, beginning at line 21. Those are the factors with which we're all familiar: reduction in quantity of water, whether or not the water supply is sufficient, whether or not the application's made in good faith or for delay or speculative purposes, and of course the local public interest standard.

After that determination has been made, the director then goes over to 203C. And if the water is water that is available because of this subordination condition, he then is required to make an additional public interest determination as specifically defined in paragraph 2A.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Kole, are you saying then that the director does not have authority if the other bill passes, the regulation authority, that the director will not have authority to expand the test of public interest and the standards of public interest beyond what you have stated here in 2A?

MR. KOLE: Mr. Chairman, Senator Ringert, as I understand it he would have the ability to more closely define what those factors are if that bill
would have passed giving him rule and regulation authority. He would not be able to adopt a rule and regulation that was in conflict with the specific criteria established here. If that bill did not pass, it would just have to develop those criteria on a case-by-case basis as each individual application came before him.

SENATOR RINGERT: Mr. Chairman, another question. Would the negotiators explain why it is necessary to establish a trust for the 600 cfs of water above the minimum stream flow that's available for appropriate operation.

MR. NELSON: Mr. Chairman, Senator Ringert, in the course of the negotiation, at least in the final stages, we got lager-headed on the question of whether the company's water rights say at Murphy or at Swan Falls, just to pick an easy example, would be immediately subordinated by operation of the implementation agreement or would remain in place unsubordinated until such time as the state allocated that water to somebody else's use. It was the company's position then and still is that you have an additional argument under the Constitution that the river is fully appropriated if you leave that hydro right in place until such
time as it's reallocated pursuant to the statute.

But it became somewhat of a political
problem, so in order to get around it, the trust
concept was adopted whereby that water is placed
in trust. The agreement clearly says it's
unsubordinated, so as far as the agreement goes,
it's an unsubordinated block of water. The state
then takes that water, places it in the trust,
subject to reallocation, which had the effect of
doing two things. It made clear the state's
control over the allocation of the water, clearer
if you will, and it left the water unsubordinated.

So the company retains its right to
urge the state or force the state in the proper
case to use that argument. And that's all it is
is an argument under Article 15, Section 3 of the
Constitution. The river's fully appropriated;
 ergo, the state does not have to allow the water
go to the first guy who comes down the pike.

So the trust concept got around that
problem and I think tied it together to a point
where it's a little more effective as a mechanism
to accomplish the purpose of the agreement.

SENATOR RINGERT: Well, Mr. Chairman and
Tom, do you feel that this provision will be an
effective end run on Article 15, Section 3?

MR. NELSON: Mr. Chairman, Senator, I don't know. I can't obviously predict that it will carry the day, but our position was the argument is worth preserving because I'm morally certain as I stand here that some person with an undeveloped permit who would be adversely affected by this way of doing business is going to challenge it, and we think it's an argument worth having.

CHAIRMAN NOH: In other words, Mr. Nelson, this is also considered to be an effective way to protect the minimum flow from appropriation?

MR. NELSON: Mr. Chairman, that's correct. The minimum flow is itself subject to challenge by those people as being effectively a new recognized instream use with that priority date. And somebody with a prior permit could also say, "Hey, I'm prior. I could take the water in spite of your new minimum flow."

CHAIRMAN NOH: Do you want to continue the same line of questioning, Bill, or do you want to yield to --

SENATOR RINGERT: Well, along the same.

CHAIRMAN NOH: All right.

SENATOR RINGERT: I think I should direct
this to Mr. Costello because he is leading the discussion, and that is, if you feel that the trust theory is necessary because the existing permits appropriate all the water that apparently the department feels is left for appropriations, does not the state have any obligation to the people who took those permits out years and years ago and have been waiting patiently for matters to resolve (tape inaudible) and all that?

MR. COSTELLO: Mr. Chairman, Senator Ringert, certainly to the extent that they have detrimentally relied and developed, then they can argue that it's a taking if you extinguish their rights. But we are talking primarily about remassaging those undeveloped permits that they have not made -- have not developed to this point.

SENATOR RINGERT: So I take it then that the state feels no obligation unless somebody spent money directly on the construction and diversion (tape inaudible)?

MR. COSTELLO: Mr. Chairman and Senator Ringert, we certainly owe them the obligation to treat them fairly, and they will be treated fairly. But they'll be treated fairly under the new regime of the public interest criteria rather
than under the old straight appropriation.

CHAIRMAN NOH: Mr. Kole.

MR. KOLE: Mr. Chairman, Senator Ringert, a couple of additional points here. I think it is clear in the Hidden Valley Springs case that the state does have the authority to recall those permits and take a look at that without creating liability, particularly where in this situation we have provided a grandfathering in of anybody who has actually applied water to the land as of the last irrigation season.

Secondly, and I think concurrently with that, if you look at 203D on page four, each one of those persons prior to having any property right taken from them will have an opportunity for a hearing and an opportunity to explain why their particular project or permit should be permitted to go forward. So there is procedural due process being applied for those people.

CHAIRMAN NOH: Senator Crapo.

SENATOR CRAPO: Just a comment (tape inaudible) that I realize -- (tape inaudible) State of Idaho one, that relates specifically to water and hydropower and two, that refers to farming, the family farming tradition and then the
state bill policy which refers to acres. It seems to me that it's not clear, but it could be argued that from this there is a bias against nonagricultural uses in the future, such as development, the National Engineering site here in Idaho Falls, or a major manufacturing outfit that came in and wanted to use water.

I guess I just wanted to know how a significant request for water by a nonagricultural user would be dealt with, particularly under roman numeral well 2A, roman numeral 5, which says that the development must conform to its staged development policy in developing number of acres.

CHAIRMAN NOB: Who would like to take a shot at that? Mr. Nelson.

MR. NELSON: Senator, the criteria as written and as we have understood them, and of course we're probably too close to the (tape inaudible) (tape silent) -- consumption of most industrial use is pretty difficult. Let's say they had to cool the power plant for a major use. Then you would merely look at I on the potential benefits and II depict the utility rates. In an industrial setting, that analysis, at least the ones I've seen, would compel you to grant it.

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Obviously it would have no impact on the family farming tradition. You might argue that it comes under 4, promotion of full economic and multiple use development of the water resources and would have no effect on the 20,000 acres.

So in that case, as we see it you would ignore the agricultural-related factors and (tape inaudible) remain. At least that was our intent, that the director would only apply ones that obviously made sense.

CHAIRMAN NOH: Mr. Crapo.

SENATOR CRAPO: If I understand you then correctly, Mr. Nelson, roman numeral 5 could not be used to say that as to industrial uses the amount of water utilized could not exceed the state's plan for agricultural?

MR. NELSON: Mr. Chairman, that would be correct. You also have the policy statement that's coming out of the proposed water plan amendment which allocates 150 cfs to industrial uses. So with that public policy statement in the water plan, you've probably gone a long ways toward approval under this standard in any event.

CHAIRMAN NOH: Mr. Crapo.

SENATOR CRAPO: With regard to the 150 which
is being allocated for industrial uses, that's out
of the 600, 450 cfs of the 600 available?

MR. NELSON: Mr. Chairman, that's correct.

SENATOR CRAPO: Would that then be
determined as a limit or is that a specified
minimum? Or what exactly is intended by this
specification of 150 cfs?

MR. NELSON: Mr. Chairman, Senator, as I
understand it, it's essentially a reservation of
that much water for those purposes and subject
always to change by the water board as it finds
out if it's too high or too low or whatever. But
the race is not to the swift for industry as to
that 150 cfs. It's there and when they need it,
it will be available.

CHAIRMAN NOH: Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, to one
of the three negotiators, much along the lines
that Senator Crapo just enumerated on, on line 27
and 28 of the same section, we're referring to "No
single factor enumerated above shall be entitled
to greater weight by the director in arriving at
this determination."

Does that not in itself preclude some
further development of industrial development
because of lines 23 through 25 of roman numeral 5?

MR. NELSON: Mr. Chairman, senator, as I say, that isn't the intent certainly, and to me if you have a solely agricultural factor, such as roman -- as little B, you simply couldn't apply it to an industrial use. So in making that analysis, the director when he got to that one would have to ignore it as I see it. Otherwise the system doesn't make sense. You would only be entitled to develop agricultural uses, which wasn't the intent.

SENATOR BEITELSPACHER: Okay. Thank you, Mr. Nelson. Thank you, Mr. Chairman.

CHAIRMAN NOH: Mr. Costello.

MR. COSTELLO: If I could just follow up on 5. The policy referred to, the staged development policy, is more fully spelled out in the water plan amendment as drafted, and it's clear from that, the text accompanying that we're not saying here that there is a mandate to go out and develop any number of acres. All we're saying, there's a cap at 20,000 so you cannot -- I think what I'm hearing here is that you're afraid that if this would prevent us from developing up to 20,000 or 80,000 in a four-year period that it would somehow
conflict with No. 5, and that's not the case. The policy referred to is more fully addressed there. This is simply a cap and not a direction to go forward in and develop at least that much.

CHAIRMAN NOH: Mr. Crapo.

SENATOR CRAPO: May I ask one further question for clarification?

CHAIRMAN NOH: Certainly.

SENATOR CRAPO: Let's suppose that industrial uses came along in a given year and used up 50 cfs and that enough agricultural applications were made to develop 20,000 acres. Would both of those be able to be done in a single year?

MR. COSTELLO: Mr. Chairman.

CHAIRMAN NOH: Mr. Costello.

MR. COSTELLO: Senator Crapo, yes, there would be no conflict.

CHAIRMAN NOH: Senator Peavey.

SENATOR PEAVEY: Mr. Chairman and any one of the three negotiators, maybe Pat Costello, was there any room for consideration of fish and wildlife values in arriving at these criteria? Why were they left out?

MR. COSTELLO: Mr. Chairman, Senator Peavey,
the original reason they were left out is because
we were going to -- we had two versions, one which
supplanted the old local public interest and had a
comprehensive public interest determination
similar to what was in a bill promoted last year
by the governor and the attorney general, which
would have subordinated everything and put it
through a new public interest review.

We found that there was resistance even
from among some conservationists who felt that
they did not want the old local public interest
wiped out because they felt that did give them a
tool with which to challenge this. So we had
option two, which was to leave the local public
interest as is and simply add the new criteria
that relate to the balance with hydropower and
felt that we certainly did not intend to make the
ability to take fish and wildlife into account any
less available than it was before but that that
was a separate issue since we're dealing here with
protecting hydropower, water for hydropower
because after all that's what was at issue in the
lawsuit.

Having said that, I would go further to
say it certainly is not the governor's intention
to imply that by leaving fish and wildlife off this list that it is somehow not in the public interest. And if it needs to be stated more clearly in 42-203A that fish and wildlife can be considered under the local public interest, we would support doing that. However, we are bound to and do support existing 42-203C as written.

CHAIRMAN NOH: Any of the other two gentlemen have any comments on that?

MR. NELSON: Senator, Mr. Chairman, Senator Peavey, I would agree with Mr. Costello. I think that the parties are not committed to preservation of 203A in its present form as a part of these proceedings. However, if there is going to be an attempt to change that, I think it should be in a separate bill because we're tied to this program and we're committed to it, and as soon as we start amending it we get in a real mess.

CHAIRMAN NOH: Senator Peavey.

SENATOR PEAVEY: Another concern that I had, and I don't know where to fit it into the overall settlement without --

CHAIRMAN NOH: Senator Peavey, if you're going on to a different consideration, I think Mr. Kole had a comment on your first question.
SENATOR PEAVEY: Okay.

MR. KOLE: Thank you, Mr. Chairman, Senator Peavey. I would agree with the comments of the other two negotiators. It was our thought that that really was not an issue that was directly involved in the lawsuit. While there may be concerns on that score, that should be addressed separately by the legislature so as to not reopen a lot of demands that came up last year in relationship to this particular bill.

CHAIRMAN NOH: Senator Peavey.

SENATOR PEAVEY: In other words, what we're saying is that any of us can propose additional criteria outside of this package and it will go on its own merits and that won't change things one way or another, I guess. One of the things I thought we should look at is critical livestock range. It's real easy to go out, for the BLM to give that range away, but the state doesn't have to give the water away if it's a valuable piece of winter range or turnout range. I guess a separate bill would be the place to address that.


SENATOR RINGERT: Mr. Chairman, can we turn

to the other bill, the 1006, the second page, line five refers to "existing vested water rights."
Now, in making this determination, is the director going to be able to consider the entire gamut or is he just going to look at adjudicated rights?

The rights at Swan Falls, whatever they might be that precipitated the present situation, as I recall had been adjudicated between the two parties back in 1907 or 1909 or something like that. As far as I can tell that was the only final judgment of adjudication that we had with respect to any of those water rights. The whole process was shut down because there was a determination of some sort made in a pending lawsuit that has not reached -- that has not reached final judgment.

So what's the standard we're looking at when we use the term "existing vested water rights" in this bill?

CHAIRMAN NOH: Mr. Nelson.

MR. NELSON: Mr. Chairman, Senator Ringert, the language was chosen in order to include a constitutional right not represented by an adjudication, a statutory right represented by
license, or in my judgment you can get into a vesting question at a proper stage in a permit process. So my understanding of why we selected "vested" was to pick up water rights that fell into those categories.

Now, as far as Swan Falls is concerned, as an example, there are I think three water licenses at Swan Falls. In my parlance that's clearly a vested water right. There may be the adjudication as you point out. Probably at least as we understand adjudication now it is probably too narrow to be much more than a statement of a constitutional right that's contemporaneous with the use. But I think all of those water rights would be considered vested as I understand how that term is used here.

You may also have -- since this is broader than Swan Falls, the director would be entitled to protect a well, a permit on a well if the well were drilled, the water was in use. I think that's vested to the point the director could try to protect it by putting a moratorium in an area while they looked at say a critical groundwater designation.

UNKNOWN SPEAKER: (Tape inaudible.)
SENATOR RINGERT: It seems to me that this procedure in effect will force the applicant then to go through the administrative appeal procedure, perhaps take it on up to court if dissatisfied (tape inaudible). And it further seems to me that -- well, it sort of puts the state in the position of saying we are no longer going to have free-wheeling appropriation. We are going to put the front end burden at least more so than in the past on the intending appropriator.

MR. NELSON: Mr. Chairman, Senator Ringert, I think that has that potential in the given factual setting. Certainly I think among my clients one of the things they like the least about the present system is the fact that if they're a senior appropriator, they have the burden of shutting off the junior. And they say why do I have to do that? I was here before he was. Why is it my problem?

UNKNOWN SPEAKER: (Tape inaudible.) (Tape silent.)

MR. NELSON: -- directing how development took place, which I think is probably a better way. The people can fight with the director on his moratorium the scope and timing of it a little
easier than they can go back into court and convince a judge they should be relieved.

CHAIRMAN NOH: I have a question for any of you that would like to shoot at it. Under this agreement, what is to preclude a utility from if they can generate sufficient resources to buy up or lease whatever water they can get their hands on and in effect take up all of the remaining waters? As I read this, they're pretty well home free on all purchases -- purchased water and leased water.

MR. COSTELLO: Mr. Chairman, that's correct. They can acquire through purchase upstream stored water which they can run down the river. They are entitled to that and they can't of course be appropriated between the storage site and their hydro site. So they would be free to do that.

CHAIRMAN NOH: But this would not cause a problem on unappropriated water. How about waters that are, for instance, lost because someone failed to file a claim as of a cut-off date? Now, is that water in a situation where another party would have to file on the water? You can't go buy or lease water that's lost for failure to file a claim; can you?
MR. COSTELLO: Mr. Chairman, no, there would be no right, no property right to acquire in that case. They would have difficulty establishing a right anywhere upstream from their facility because they would not be able to apply it to a beneficial use until down below. It's difficult really for me to conceive of them acquiring a right other than a right to a certain amount of storage water in storage in the stream itself.

SENATOR BUDGE: Mr. Chairman.

CHAIRMAN NOB: Senator Budge.

SENATOR BUDGE: Pat, is that true presently, though (tape inaudible)?

MR. COSTELLO: Mr. Chairman, Senator Budge, that is what --

SENATOR BUDGE: (Tape inaudible.)

CHAIRMAN NOB: One more question. Where are we say up in the Spokane River system, if the governor goes to Washington Water Power and says we want to negotiate a minimum flow so we can have further development and Washington Water Power says no, no, I won't negotiate, then where are we?

MR. KOLE: Mr. Chairman, first off, I think it's probably not well known, but we have already opened up discussions with Washington Water Power.
and they have indicated that they do want to negotiate. So I would think that the possibility of them absolutely refusing to negotiate is small.

But if they did, we would of course be in the same type of situation as we were with Idaho Power Company. We'd be in a lawsuit. But they have indicated that if this program passes, if they have the authority to negotiate with the governor, they intend to so do.

CHAIRMAN NOH: Now, is it possible, looking at future hydro development, say whatever it is, a hydro development on the Bruneau River or on the Salmon River or wherever it might be, is it possible for the director of the State of Idaho to subordinate those future hydro rights without officially establishing a minimum flow on the stream? How would that work? In other words, does the future subordination authority buy anything other than these waters placed in trust through minimum flow?

MR. COSTELLO: Yes, Mr. Chairman.

Subparagraph 6 found under Section 2 of the main bill authorizes the director to impose this subordination condition on new permits and licenses for power purposes. And that is not in
any way tied to the preceding five paragraphs, so it would just be a straight subordination condition.

I think the real question that you raise, though, is if he does that in the absence of a minimum flow, where is that right in terms of this regime established in the preceding paragraphs where it talks about the rights below the minimum flow being unsubordinated and the ones above it being held in trust, which is clearly that regime contemplates that there would be a minimum flow there, and we did not really intend that it would apply across the board if there were no minimum flows in place at that time?

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Why is the provision, Mr. Costello, that's on that same subsection that authorizes the director to limit a permit or license for power purposes, why is that any part of this Swan Falls settlement?

MR. COSTELLO: Mr. Chairman, with the senator's permission I defer to Pat Kole.

CHAIRMAN NOH: Yes.

MR. KOLE: Mr. Chairman, Senator Ringert, with the qualification of that, I'm not sure I can
answer the question in terms satisfactory to you.

But basically there's always been a question as to what the state's authority is pursuant to the 1928 constitutional amendment. And in taking a look at that issue, while there is good authority for the proposition that amendment was self-executed, as part of the settlement negotiations the attorney general believed that there should be specific authority given to the director to subordinate hydropower water rights, and that's what paragraph 6 does.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: This agreement is being promoted very heavily, I feel. The local newspaper is telling us through its editorial that the legislature should not mess around with the settlement in any way, shape, or form. And I don't see any reason at all for that particular provision which will affect a great deal of small hydro permits and applications to be in this tagging along on the emphasis that's been raised by the rush to settle the Swan Falls controversy.

The last one I saw like this was a rider on an 1888 appropriation bill in the United States Congress that tied up all the water in the
western United States and all the land for the western United States for the next three years until they got the 1891 amendment of the present land law.

Now, would somebody tell me why this has to be in this Swan Falls settlement?

CHAIRMAN NOH: Any other comments?

MR. KOLE: Mr. Chairman, Senator Ringert, basically all paragraph 6 does is grant authority. It does not require the director to subordinate hydropower water rights, nor does it make it mandatory. In certain situations where there is productive upstream land that could be developed, the director will have to sit down and take a look at whether or not he should subordinate the hydropower license. Obviously if the director's determination is arbitrary or capricious or contrary to the policy set down by the legislature, then this decision could be appealed in court.

But I think the reasoning why it is here is because it was felt that the Swan Falls situation would not have arisen had the legislature enacted similar laws back in 1928.

And the effort here was to make sure that as best
we can foresee, we do not get ourselves into another Swan Falls situation in the future. That's the reason why it's in the agreement and why we think it's necessary.

CHAIRMAN NOH: In other words, we might head off a lot of court case and legal costs at some time in the future by acting now?

MR. KOLE: Mr. Chairman, that's correct.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: I can't let that go without one more comment. I think I know why it is here in this bill, but nobody has yet said that it's essential to settlement of the Swan Falls controversy.

CHAIRMAN NOH: Mr. Dunn.

MR. DUNN: Mr. Chairman, the primary reason I see it there is to avoid Swan Falls from recurring again. Without that, if Idaho Power Company decides to build one of the dams they have proposed on the Snake River, we're back in Swan Falls if there isn't clear subordination authority for any other group. It isn't just the small hydros. It's virtually all the small hydros that are high enough up in the basin that there is no development occurring above them.
CHAIRMAN NOH: Questions? I might then with your permission, even though the legislation having to do with the Public Utilities Commission isn’t before this committee, just for our edification, if I could call upon one of the commissioners, whoever would like to be the spokesman, or perhaps we might ask several of them to speak because often there’s a difference in agreement among them on various issues as to how they’re viewing this agreement, and particularly I’ve heard the question raised that if they adjudicate the legislation as drafted protecting Idaho Power from claims for failure to defend their water rights, would it apply to all waters rather than just those placed in trust through these kinds of agreements?

Do you gentlemen feel that you’re going to have sufficient authority under the legislation to assure that the company doesn’t dispose of or sell its water rights other than those which have been properly dealt with through this settlement legislation? Gordon (phonetic)?

UNKNOWN SPEAKER: Mr. Chairman, I haven’t taken a look at that lately. I brought over the two bills that were on the agenda, so I really
haven't given any thought to that. Commissioner High may have.

CHAIRMAN NOH: Mr. High, would you want to speak to that?

MR. HIGH: Yes. I think the crucial issue with respect to your question is not the bill before you but Senate Bill 1007.

CHAIRMAN NOH: Correct.

MR. HIGH: And that I might -- if you don't have it before you, it's a bill.

CHAIRMAN NOH: It was introduced through our committee.

MR. HIGH: Fine. That I think is extremely essential because in effect it clarifies the legal status of gains from sale and dedicates the level of the benefits from the sale to the customers of the company rather than to the shareholders of the company. It in fact sets the title of the water in the hands of the rate payers rather than the shareholders. And I might add that I think whatever happens to all these other bills, that bill should pass.

CHAIRMAN NOH: How about the other bill that affects -- that protects Idaho Power from claims by rate payers?
MR. HIGH: I see no problem --

CHAIRMAN NOH: I heard it argued that that bill is too broad, that in effect it would free Idaho Power from failure to protect even their unsubordinated water rights inclusion within the minimum flow and wouldn't just protect them from claims by rate payers for that water which is in effect subordinated through the agreement process. Have you had a chance to examine that?

MR. HIGH: Well, perhaps in the bills you have before you and speaking to that water below the 3900 minimum flow, I would think the power company would have no incentive to deal with that water if all the benefits went to the rate payers. In other words, I can see where in response to Senator Crapo's question you could really deplete the water down to 3900 second feet. Remember this 3900 second feet was established by negotiation process taking into account historic flows, updated current projected conditions, and that there's nothing more uncertain than stream flows. And that uncertainty, and perhaps the committee would like to take into effect and set aside something more than 150 second feet for industrial future municipal uses. There's a protection...
against that uncertainty factor. And the
uncertainty isn't just the demand kind of things
(tape inaudible). Maybe I'm not responsive.

CHAIRMAN NOH: Senator Crapo, excuse me,
then Senator Beitelspacher.

SENATOR CRAPO: Mr. Chairman, if I could
address one more question in that regard.

CHAIRMAN NOH: Certainly.

SENATOR CRAPO: Were you suggesting, sir,
then we as a committee specify or can the
legislation specify certain amounts to be set
aside as dedicated to industrial uses and
specifically subordinate other uses in that
amount?

CHAIRMAN NOH: Mr. High.

MR. HIGH: Yes, Mr. Chairman, Senator Crapo.

In designing this package, I think as Mr. Nelson
indicated, the minimum flow has to be tied to the
public interest criteria. And if you take the
minimum flow as something in the public interest,
the minimum flow is rather meaningless if the
process gets you down to 3900 second feet and
suddenly the long-term climatic conditions change
and you have a need to supply new municipal or
other needs. And we all know that will deplete
the minimum flow of those prior to the first priority.

And as a factor in your deliberations on public interest, I would suggest a paragraph be put in recognizing uncertainties and perhaps reserving something more than the 3900 second feet to recognize that uncertainty.

MR. SWISHER: Mr. Chairman.

CHAIRMAN NOH: Yes. Mr. Swisher is here, too.

MR. SWISHER: Chairman.

CHAIRMAN NOH: Yes, sir.

MR. SWISHER: With respect to the uncertainty with respect to the reality (tape silent) --

UNKNOWN SPEAKER: To the extent the director needs a moratorium while he's (tape inaudible).

MR. SWISHER: As for Senator Crapo's concern, historical water development has been based on the ability to assess the charges awarded to those who gain from a project, a fast way of oversimplifying the history of water development. But having watched three successive years of surplus run down the river and in watching the Boise River, for instance, be full bank to bank
eight to nine months of the year for three successive years, it certainly occurs over and over again that some state law, I mean statewide, not just the Snake River Basin, needs to be put in place for water retention other than pure diversion for downstream use. That is to say when the Boise River is running that full, the Owyhee on the southwestern end and the aquifer of the Mountain Home desert is going down, that doesn't make sense when water is rushing down the Henry's Fork and nothing's being added to the creek. When the water is flooding Pocatello on the Portneuf and may put the temple under water in Salt Lake, it doesn't make sense (tape inaudible).

So following on this parcel, there is concern (tape inaudible) legislative policy with respect to statewide actions under a bonding program or under something in concert with additional reclamation sort of projects, treat the water in the future in the same manner that we have in the past.

CHAIRMAN NOH: Thank you, Mr. Swisher.
Okay. Are there any other questions that we want to delve into? Senator Beitelspacher?

SENATOR BEITELSPACHER: (Tape inaudible.)
MR. WARD: Mr. Chairman, I thought I would try to answer your original question now that I had a little time to look at it.

CHAIRMAN NOH: Done your homework.

MR. WARD: SB 1005 again. It seems to me there's probably not any question of the defense provided in 1005 being used for anything other than the matters specifically touched on in the contract. You have more lawyers here than you need. But it's what lawyers call an affirmative defense. It would deprive the PUC of jurisdiction, but it first must pertain to something relating to the contract. But it looks fine to me.

CHAIRMAN NOH: Thank you. Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, since we have so many attorneys here, if we could go to page three of 1008, you'll surely recognize my limitations being from Northern Idaho. I'm just trying to get the water off the roads.

Page three between No. 5 and No. 6 we have the governor is empowered to enter into agreements defining that portion of a water right as being unsubordinated. And then on 6 you have

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the director having the authority to subordinate rights.

As I recall, the director works for the water board, which the Constitution and the Supreme Court case we touched upon over the last few years is set up as another entity, so to speak. Do we have a conflict there? Do we have another constitutional body in a sense that is outside of the reach of the governor that has the authority to subordinate water and another constitutional entity that has the authority to --

MR. COSTELLO: Mr. Chairman, Senator Beitelspacher, the authority granted under paragraph five is to enter into contracts which are not self-executing. Any contracts -- all this does is really authorize the governor to go out and negotiate contracts to bring to the legislature for ratification. None of them take effect unless they are ratified by law.

And because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water board, particularly given the passage of the constitutional amendment this November.
CHAIRMAN NOH: Along those same lines, would you care to outline briefly just exactly what are the limits and the extent of a governor's power to grant water rights through the trust agreement. Sometimes -- this trust agreement has sometimes been interpreted as granting of the governor an inordinate amount of authority saying who gets water and who doesn't get water.

MR. COSTELLO: Yes, Mr. Chairman. As a matter of fact, when I was glancing through the attorney general's testimony I was a little troubled by a statement here that the governor would be empowered under this to approve of water to be allocated under the trust. That's not really what was contemplated here at all. This is strictly a passive trust over which the governor will not exert any active discretion. It's modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The governor is named as trustee just because you need an individual to be sued in the event of some squabble over the trust assets.

And beyond that, it's automatic that water rights flow out of the trust into private
hands if they are granted in accordance with state law. So it simply was a mechanism to sever, in lawyer's terms, to sever the legal and equitable title to the water immediately so there's some immediate change in position of the parties, that as soon as this agreement becomes binding and this statute takes effect, legal title to the water will go to the state, and the company retains the beneficial use of the water as long as the trusts last. But it's a passive trust. No active role is taken by the trustee.

CHAIRMAN NOH: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

MR. KOLE: Mr. Chairman, I do. In looking at page three, I think that is slightly inaccurate. The governor of course is a passive trustee. The intent here was that the director would be the individual who would make the reallocation determination. So I think that basically the last paragraph, it should not read the "governor will be empowered" but probably the "director will be empowered" to release water. And I'm referring to our prepared testimony.

CHAIRMAN NOH: You're referring to the testimony rather than the release?
MR. KOLE: Yeah, that's correct, Mr. Chairman. That's really just an oversight that should have been corrected.

CHAIRMAN NOH: Fine. Mr. Nelson, is that the way you understand it?

MR. NELSON: Mr. Chairman, members of the committee, that's correct. And I think it's clear on page three the senator referred to lines looks like it's to 20, but it's about 16 through 19, the rights have to be acquired pursuant to state law. Under state law unless you change it, the governor plays no part in that process.

CHAIRMAN NOH: Okay. Other questions? Mr. Crapo. Excuse me. Did you want to comment further on that, Mr. Kole?

MR. KOLE: Mr. Chairman, thank you. Excuse me, Senator Crapo. Just on that trust provision it should be noted that the ultimate control over those trusts does rest with the legislature. They created those trusts, and of course they can alter them or take whatever steps are necessary.

CHAIRMAN NOH: Yes, Mr. Crapo.

SENATOR CRAPO: Mr. Chairman, my question relates primarily to one of procedure here in committee. Perhaps everybody knows the answer but...
me because I'm a freshman senator. But it seems
to me that we need to leave a very good track of
legislative history on this set of legislation
because at least as I study it it needed some
clarification in my mind. And I am sure there
will be a lot more testimony and evidence
presented with regard to the hearing.

Is it already set up by some mechanism
that the testimony which is recorded here today
and the prepared testimony and so forth becomes
part of the written or prepared record that we
direct it be maintained so that in the future
there can be reference made and we can ensure that
the intent of the legislature is followed?

CHAIRMAN NOH: Well, Senator Crapo, we might
defer to Senator Budge. My understanding is that
we have no financial provisions or procedures in
precedent to do that. All I personally had in
mind was to ensure that these tapes are -- that
there's more than one copy of the tape and that
they're placed in the records in the Department of
Water Resources to create as good a record as we
can.

I presume it would be possible to get
an appropriation or some way or other have tapes
transcribed if we could. But certainly written
testimony, those sorts of things, I intend to
attempt to preserve as best we can.

But is that correct, Senator Budge, we
have no formal means of doing that?

SENATOR BUDGE: No, we don't have that. I
think you're accurate in the tapes, keeping a
record of the tapes, and also accurate notes.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Chairman, members of the
committee, there is a problem even with the tapes
because that is merely a record of the committee
proceedings and does not necessarily reflect the
intent of the other 30 senators who will vote on
the floor. So it's a very nebulous job in Idaho
to determine what is the intent.

CHAIRMAN NOH: Senator Crapo.

SENATOR CRAPO: Mr. Chairman, I'm aware of
that. I guess as an attorney I do a lot of
searching through legislative history where it's
available to figure out what laws mean. But it
definitely in my opinion would be beneficial to
have as much preserved as possible.

For example, the written statement by
Attorney General Jones, Jim Jones, was helpful and
perhaps maybe we can just encourage those who
appear before the committee in the future that if
they would like to ensure that their understanding
of the bill at least as represented in the
legislative history as being something that would
at least be considered that we make an avenue
available for that to be done.

CHAIRMAN NOH: That's a good point. We
certainly want to in the future cut down all the
time we have to invest in attorney services
searching through records. Senator Budge.

SENATOR BUDGE: Mr. Chairman, members of the
committee, I think the nature of the legislation
itself justifies very accurate records to be
referred to in the future to be available.

CHAIRMAN NOH: Senator Horsch.

SENATOR HORSCHE: Mr. Chairman, similar to
Senator Crapo, I must defer my years because of my
freshman status over here on the Senate side, but
in the House by majority vote we have spread upon
the pages of the journal a letter of intent.

CHAIRMAN NOH: Yes.

SENATOR HORSCHE: And you can make that as
long as you want. If you can get a majority vote,
you can put every bit of the notes in the journal.
CHAIRMAN NOH: That is correct. Senator Beitelspacher.

SENATOR BEITELSPACHER: Yes. Thank you, Mr. Chairman. Back to No. 6, if I might, 42-203B, "The director shall have the authority to subordinate the rights granted in a permit," et cetera. Where are we at with compensation then for the holder of a hydropower right at a later date? In the event that -- let's assume that I invest 5 or 6 million dollars or 10 million dollars, whatever it might be, in a small hydropower right, have it producing. PUC and FERC in their wisdom determine I should receive some compensation from a power company for that. And Senator Peavey buys a sheep allotment above me and decides to water the grass up there for those little lambs. Where am I going to be with my investment once he starts pulling the water out of the creek for his sheep?

MR. NELSON: Mr. Chairman, senator.

UNKNOWN SPEAKER: Do I have a paddle?

MR. NELSON: You don't have a paddle and it's all downhill. If as is the practice now your permit was subordinated when issued, you would be subject to Senator Peavey's lambs. Now I
understand that lambs don't actually keep much of the water you run through them, so you may not be hurt too badly. But you would be -- if your permit had been subordinated, you would be subject to his depletion. If it were not subordinated, if the director decided in his wisdom that you should have a chance to get your project paid out before the subordination took effect, then you might have a right to compensation in that situation.

CHAIRMAN NOH: Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman,

Mr. Nelson, is it all entirely up to the director as to whether or not I receive compensation or not? And is there anything in here that sets up criteria by which he shall determine how much I shall be compensated, or is that to be promulgated by rules and regulations at a later date?

MR. NELSON: Mr. Chairman, senator, the compensation issue would follow the subordination issue initially. If you were subordinated, you would have no right to compensation. And it is solely the director's discretion as this is written to implement the constitutional provision. So he has no guidance. My guess is that hen's teeth and unsubordinated power rights from now on
are going to be about on a parity.

CHAIRMAN NOH: Mr. Dunn, do you care to comment on hen's teeth?

MR. DUNN: Mr. Chairman, I found a hen's tooth. One of the things that we're trying to do on small hydro and it would be one of the things we would define in the rules and regulations is that if those small hydros where just a small amount of water makes a drastic change in economic effect of it is to issue the permit for a period of time. We would look at the payout period of the project and at that time then look at subordination. Where it's necessary, we can protect that plan for a time so there isn't a major economic disaster. But they don't have protection in perpetuity.

CHAIRMAN NOH: Thank you, Mr. Dunn. Okay. Anything else? Are you ready to call it quits for the day? And I look forward to our 7 o'clock Monday evening public hearing where we'll take testimony. Anything else for the good of the order?

I want to thank you all for being here today. Depending on the wishes of the committee, we may have another session. I guess we're
adjourned.

(Meeting concluded.)
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I, Patricia J. Terry, Certified Shorthand Reporter, Registered Professional Reporter by testing, a Notary Public, do 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 reporter's transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

I further certify that I have no interest in the event of the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of February, 2007.

Patricia J. Terry
Court Reporter
CSR No. 653

PATRICIA J. TERRY
NOTARY PUBLIC
STATE OF IDAHO