RESOURCES AND ENVIRONMENT COMMITTEE

Public Hearing 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 21, 1985, 7:00 p.m.

before Chairman Noh

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Transcribed by
Debora Ann Kreidler
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APPEARANCES

PRESENT:
Chairman Noh
Senator Beitelspacher
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Peavey
Senator Ringert
Senator Sverdsten
14 Members of the House Resources Committee
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Marjorie G. Hayes, Idaho Consumer Affairs
Harold C. Miles, Golden Eagle Audubon Society
Ben Cavaness
Fred Stewart
Forrest Mykhas
John Hatch, Farm Bureau
John Runft, Attorney for Salmon River Hydro Company
Pat Ford
Al Fothergill
Art Martins

* * * * *
JANUARY 21, 1985
THE CHAIRMAN: We have a sign-up sheet here.
And we will hear witnesses in the order of those
that have signed up. And when we're finished with
that, why, we'll invite anyone else who would like
to testify to do so.
The purpose of the hearing tonight is to
deal explicitly with two of the multi-bill package
of legislation that accompanied the Swan Falls
agreement for several pieces of legislation. And
for the benefit of our committee, we aren't going
to be at all opposed, if testimony gets over into
the areas of the other bills which relate to this
particular package, because it is a package, all
of which fits together, and of course, all of
which need to pass in order for the agreement to
be consummated, or basically, I guess, we're back
in court.
And the two bills that we have tonight are
Senate Bill 1008, which is the bill that has to do
with the new public interest criteria, the trust
agreement in
which the waters which are to be
subordinated and available for future
diversions -- future diversions throughout the
state system -- or, will be
placed.
We also have
the other bill, S1006, which relates to the
authority of the director of the Department of
Water Resources to establish moratoriums on the
issuance of permits under certain issues, and
grants him authority to establish rules and
regulations for the department.
We've invited Representative Chatburn,
Chairman of the House of Resources Committee and
his committee members to sit in with us tonight.
Many of those -- any of those committee members
are welcome to come up here and sit with us. If
we run out of chairs, just bring some more chairs
along with you.
If you have copies of your statements, we
would appreciate your providing at least one copy
for the benefit of Bev Mullins, our hard-working
committee secretary.
In this particular legislation, there is
more than the usual interests in establishing
background as to what might be legislative intent,
or what, in fact, was involved behind the
legislation that may pass. Hence, written
statements are of particular benefit. We will try
to preserve, as best as we can, the committee
records of the hearing and the testimony that has
1 On behalf of the Governor, I would like to 1 That there has to be some kind of balance between 2 thank you for holding this hearing and providing 2 the two.
3 this forum to discuss the Swan Falls agreement as 3 And I would like to just point out, very
4 well as the bills that are before the committee. 4 briefly, some of the major features of the
5 The bills are part of the larger compromise 5 agreement, which are incorporated in the bills
6 package that was arrived at between the Governor 6 that are before the committee. The one that's
7 and Idaho Power and Attorney General Jim Jones 7 received the most attention, and the one that's
8 this summer and late fall. 8 easiest, I think, for people to grasp, is the new
9 I'm sure all of you are aware that the 9 more realistic minimum stream flows that we've
10 agreement arose from a controversy over -- really, 10 proposed in the agreement.
11 it boils down to two very important sectors of the 11 People in the agricultural community, in the
12 Idaho economy. And those are agricultural 12 development community, have felt that, if Idaho
13 industry, which is Idaho's largest industry and 13 Power, or any power generator, wished to acquire
14 has been, and continues to be, and likely will be 14 additional rights to a guaranteed amount of
15 on into the future, and our hydroelectric asset, 15 in-stream water, that they ought to be required to
16 which truly is an essential asset to Idaho and our 16 purchase those rights from people upstream.
17 entire region, one of the unique things that we 17 On the other hand, ratepayers and other
18 have to offer to the people and the businesses 18 consumer and conservation interests have felt
19 that are already here, as well as to people and 19 that, if there is to be further development which
20 businesses that might consider coming to Idaho in 20 depletes the in-stream flows, that there ought to
21 the future. 21 be some compensation from those developers to the
22 For the past several years, these two 22 in-stream user, which is primarily the power
23 interests, both of which are crucially important 23 company. Our recommended solution to this is not
24 to our people and our way of life, have been at 24 to -- is to give each of those interests some of
25 odds over how we should allocate the waters of the 25 what they were looking for in the litigation.
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1 We have raised significantly the base amount of water that's available in the stream, or have proposed to do that through the state water plan. And at the same time, we have identified a significant block of water that should be made available for development. And we've not contemplated, under this arrangement, that either side would receive or have to pay compensation for getting, essentially, half a loaf.

10 Another major feature of this, which is included in Senate Bill 1008 is recognition for the first time of hydropower as a beneficial use of water. This is a major change in state law and policy. In the past, hydropower has not been recognized as a beneficial use to the extent that you could say that the water was being fully utilized if it was passing through the turbine to generate electricity.

19 There's a number of advantages, we feel from a management standpoint, to recognizing hydropower as a beneficial use of water. Among them are the ability to manage the system as the fully appropriated system, and to be, therefore, somewhat selective about what future uses will be approved.

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1 The other significant advantage is that, by being able to say that the water is currently being put to a beneficial use, it is, therefore, not available for appropriating for out of basin uses.

6 Next feature is that, before any new development can take place upstream, the proposed uses will be reviewed against criteria which take into account the impact such use would have on downstream hydropower generation. This impact has never before been a factor in the approval of water rights applications.

13 All -- I guess the final major benefit I see to this package, and to this legislation, is that we can achieve these things without enormous litigation costs, both to the state and to the power company, and ultimately to the ratepayers, and also, without inordinate delay.

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1 be able to begin the processing applications for water uses on the Snake River under the new management criteria that we have proposed. And there will be a degree of certainty, both for the power company, which will have a firmer expectation as to the amount of water that will be available, and to those people who currently have water rights for other uses, and who propose to develop water uses in the Snake Basin.

10 So with that, Mr. Chairman, I would conclude my remarks. And I'd be happy to respond to questions. Otherwise, turn it over to Mr. Nelson or Mr. Kole.

14 THE CHAIRMAN: Fine.

15 Perhaps we should hear from those two gentlemen first, and then see if there are questions of the three of you.

18 Mr. Kole -- Pat Kole, who now handles legislative affairs -- that must be a real headache -- from the Attorney General's Office.

19 And was head of the Natural Resources Division, who was one of the key negotiators.

23 Mr. Kole?

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

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1 The remarks that I will make tonight will be brief. And I know whenever you hear a lawyer say that, that causes a lot of concern. But in going into the negotiations, what we tried to do was to accomplish three results. The first one was to give effect to the philosophy that Idaho water belongs primarily in the State of Idaho, and should be used here. Secondly, that decisions as to the use and allocation of Idaho water must be made here in Idaho by Idaho public officials. And third, in the future, in order to protect Idaho from potential threats from not only the federal government, but from our downstream sister states, we needed to get this issue resolved, and to present a united front to protect our water uses.

16 I believe that the agreement that we have arrived at achieves all three of those principles. The important thing is, as Mr. Costello has pointed out earlier, is that where we draw the line is not magic, but what we have achieved is the embodiment of a philosophy that if we have drawn the line in the wrong spot, you as legislators will be able to come back and redraw the line in the future at a different spot. And that's the important element of this package.
resources and environment committee

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1 and 7:00 in the evening, if you're interested.
2 But basically, as I said, this is presented for consideration and approval as a package. And I believe that, while there are parts of it that varying pieces of the processes we're not particularly in love with, I think as a package, that it's a rational, well-balanced resolution of the litigation that calls for the negotiation.
9 Thank you, Mr. Chairman.
10 THE CHAIRMAN: Thank you, Mr. Nelson.

11 I might mention, too, that we were advised today that the State Affairs -- Senate State Affairs Committee plans to consider the two pieces of legislation dealing with the Public Utilities Commission this Friday. And also, Mr. Gene Grey of the Idaho Water Resources Board is here tonight.

18 Gene, would you like to stand, please, and maybe quickly announce the schedule for your hearings on the change in the water plan?
20 MR. GREY: Thank you, Mr. Chairman.

22 We'll start our hearings a week from tonight -- or a week from today in Idaho Falls. It will be in Idaho Falls at 2:00 p.m., starting one meeting, 7:00 p.m. that evening the second

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1 those are. The petition has been filed with the Idaho Public Utilities Commission by the Idaho Power Company. The Public Utilities Commission has deferred action on that petition until the legislature has acted.

6 A petition has been filed with the Federal Energy Regulatory Commission. The time for intervention has run. There has been, to my knowledge, one intervention by the National Marine and Fishery Service at the Federal Energy Regulatory Commission.

12 The bill on adjudication was introduced for printing today in the House. The bill on the authority of the Public Utilities Commission is in the Senate State Affairs Committee on the form. The company determined that no filing was needed with the Public Utility Commissioner of the State of Oregon, so none has been made.

19 The amendments to the State Water Plan have been proposed to Water Resources Board. The Board has come up with proposed amendments to Policy 32 of the State Water Plan. Those are going to public hearing next week and the week -- first week in February. The Boise hearing is the 5th of February here in Boise at 2:00 in the afternoon

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1 restores control over Idaho water to you, members of the legislature.
2 Thank you very much, Mr. Chairman.

4 THE CHAIRMAN: Thank you, Mr. Kole.
5 Mr. Nelson -- Tom Nelson of Nelson, Roscolt, et al., the chief negotiator for Idaho Power.
6 MR. NELSON: Mr. Chairman, thank you, members of the committee, ladies and gentlemen. I too will be brief.

10 One thing I think that would be well to keep in mind as we go through this is the approval of this package is necessarily somewhat chopped up. And so you only see pieces of it now and then in the legislature. But I think it's important to remember that it was negotiated by us, and should be accepted or rejected as a package. I don't think it's fair to the intent or the spirit of what's been done to pick at pieces of it without seeing how that particular piece fits in with the whole.

22 For the information of the members of the audience who may be reading the agreement and wondering where the rest of the conditions for implementation are, I'll quickly tell you where those are. The petition has been filed with the Idaho Public Utilities Commission by the Idaho Power Company. The Public Utilities Commission has deferred action on that petition until the legislature has act!

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4 (Pages 13 to 16)

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1 ramifications that would ensue from a taking of a
2 water right from the Idaho Power Company. He
3 warned that a circuit court judge in San Francisco
4 would be making the determination upon the subject
5 about which he had very little knowledge. That
6 judge would be determining the future of our water
7 in Idaho.
8 After he left, the lawyer who had earlier
9 identified himself as the legal counsel for a
10 group of irrigators called out that Mr. Swisher
11 did not know anything about water. And this was
12 picked up and repeated all around the room.
13 THE CHAIRMAN: Mrs. Hayes, if I might ask
14 you to please hold your testimony to the
15 legislation and the issues in question, please.
16 MRS. HAYES: I'm getting to it.
17 I couldn't quite believe my ears, for water
18 is the base of our hydroelectric system in Idaho.
19 And Mr. Swisher is one of our three commissioners
20 on energy. To show his ability to assess a
21 problem, we now only have to look at a case that
22 is on file at the Public Utilities Commission. A
23 declaratory order there is awaiting the outcome of
24 this legislative session. It states, "regarding
25 the agreement dated October 25th, 1984, among the

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1 State of Idaho, by and through the Governor Johnny
2 Evans, in his official capacity as Governor, Jim
3 Jones in his official capacity as Attorney General
4 in the State of Idaho and the Idaho Power Company,
5 it would appear that the Idaho Power Company
6 officials are putting public notice that any
7 effect upon the Idaho Power Company's
8 hydrogenation, by this process, will not be
9 grounds for a finding or an order reducing Idaho
10 Power Company's present or future --
11 (Testimony cuts off on recording.)
12 MR. CHAPMAN: Members of the audience, for
13 the record, my name is Sheri Chapman. I'm
14 executive director of the Idaho Water Users
15 Association. Our organization represents some 154
16 irrigation districts and canal companies across
17 the state. We are in place. We have existing
18 water rights. And in many cases, those
19 water users have a great deal to gain, and a great
20 deal to lose with the initiation of the negotiated
21 settlement.
22 However, at our annual convention that we
23 just held here in Boise, we held long discussions
24 on these issues on the negotiated settlement and
25 on the legislation that goes with it. And with

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1 the exception of a few of our members, voted to
2 support the negotiated settlement and the
3 legislation that goes with it. The two bills
4 before you tonight are part of that negotiated
5 settlement. And we do support them in total and
6 as they are at the present time.
7 It's our feeling that it's time to settle
8 the controversy. As you well know, I fought long
9 and hard for the last couple of years. The Idaho
10 Power and I went head to head in many committee
11 meetings such as this. But we feel that the
12 agreement as it's established now is the best
13 answer for both Idaho Power and our water users.
14 We've heard a great deal of criticism
15 immediately upon initiation and announcement of
16 the negotiated settlement that it would cost the
17 ratepayers some $52 million, or that fish and
18 wildlife values were not adequately protected.
19 But we think that this is merely a way of trying
20 to stop the negotiated settlement, and keep us
21 from doing anything for the next 10 or 15 years.
22 For those of you not familiar with the panel
23 report that talked about $52 million increase, I
24 would suggest that you take a look at that. I
25 would also suggest that you read another analysis

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1 of the Hamilton report, which is entitled Comments
2 on an Investigation Into the Economic Impacts of
3 Subordinating the Swan Falls Hydroelectric Water
4 Right to Upstream Irrigation, which was put
5 together by a Brian McGrath, assistant professor
6 of economics at Boise State University.
7 Therein, Mr. McGrath goes through much the
8 same exercise as was done on the first study, and
9 comes out with a 29 and a half million dollar cost
10 of lost electricity or additional consumption with
11 a $78 million return to the economy. I don't want
12 to get into the details of that, but I would
13 suggest that you read it if you have the time. We
14 have copies of it available if you would like to
15 see it. I'd be more than happy to furnish it.
16 Senate Bill 1008 in particular is the real
17 heart, I think, of the negotiated settlement.
18 It's also the bill which I personally had the most
19 problem with initially, the establishment of new
20 criteria for the approval of water rights. The
21 idea of going back and reviewing existing permits
22 or existing applications in light of that new
23 criteria gave me some problem. Additionally, I
24 had some concerns over how the new criteria would
25 be interpreted.
We all are reluctant to give a lot of power or interpretation to a single man when we don't know how that's going to be accomplished. We now feel quite comfortable with the bill and do urge its approval.

The bill in itself establishes a trust mechanism to allow water to be appropriated, even though it is subordinated down to a minimum flow of 3,900 cubic feet per second in the summer time and 5600 CFS in the wintertime. The water below 3900 in the summer and 56 in the winter is still unsubordinated. Therefore, even if the state decides that it's going to change its policy on minimum stream flow and not call for the water right, for example, in a drought year, or decides that it's going to move it downward, the power company still has the right to demand that water, and maintain at least 3,900 CFS in the river during the summer months.

We feel that that is appropriate, that it does give protection to our hydropower base. And it does give protection to fish and wildlife values as well. That water over and above the 3900, which is about 600 CFS, will be parceled out in accordance with the additional criteria. And that additional criteria will allow the state to determine which projects are best, which are most viable, and which are in the public interest, and approve those permits while watching to make sure that we don't have some fly-by-night or speculative-type projects that don't have much of a chance of succeeding.

The local public interest is still retained in the law. And that allows additional protest authority and protest capabilities if there's concern over aesthetics or fish and wildlife values, or if it's felt that it is not, in fact, in the public interest to initiate some sort of project.

The section 6 in the legislation, while not absolutely necessary to solve the Swan Falls water right controversy -- this is section 6, under section 3. That's not absolutely necessary to solve this controversy, but it's a mechanism to keep us out of this kind of war in the future. It allows subordination of future water right permits for hydropower. And also allows the department to excuse me, the Water Resources to issue term permits so that low head and small hydropower projects can be amortized before they are

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6 (Pages 21 to 24)
THE CHAIRMAN: Okay. Fine. The main thing is our good secretary has a copy. Bev, would you pass a couple of those back here, please?

MR. MILLS: Mr. Chairman, and members of the committee, and members of the audience, my name is Harold T. Miles, residing at 316 15th Avenue, South Nampa, Idaho, and I am representing the Golden Eagle Chapter of the National Audubon Society and Idaho Wildlife Federation -- national -- of the National Wildlife Federation.

I won't be representing Idaho Consumer Affairs 'cause Mrs. Hayes showed up. I thought she was out of town, so she (unintelligible). UNIDENTIFIED VOICE: They give you two a lot of latitude, don't they?

MR. MILLS: I guess I lost my place.

Anyway, at this hearing concerning Senate Bill 1006 and Senate Bill 1008 in particular, consequently, we wish to submit the following.

changes and comments to these proposed pieces of legislation. But first, thank this committee for allowing us to present testimony concerning our views regarding --

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waters of the state will never be denied." And that that would allow the first person, regardless of how beneficial this development was to the state, to develop, regardless of a later development that would be more beneficial. Since the issue of subordination has been resolved and we are using that as the basis of adding additional criteria for the presently undeveloped permits. And what this is is the director was given a set of criteria which is listed in the bill on the new 42-203(c) section that was added to add public interest criteria and balance the interest that -- the benefits that would accrue for the state versus the costs that would accrue for the state in allowing the development to proceed.

Additionally, the bill would establish a public trust for the unappropriated water for the surplus waters of the state at this time, pending these waters being applied to a beneficial use in accordance with the newly developed criteria. As a water user and an attorney who works extensively in the water area, I feel that the overall settlement package is a fair one for all concerned, and as fairly as is possible,
reconciles the competing and conflicting uses for
our very limited resource of water in this state
in the most equitable fashion as possible. I
commend both bills to you, and ask for your
favorable passage and reporting out of them.
Thank you. I will stand for questions.
THE CHAIRMAN: Thank you, Mr. Cavaness.
Are there questions?
If not, we appreciate you coming here to
testify.
And I might point out too, someone advised
me that Governor Evans is absent from the state
tonight. So we have here with us tonight the
Governor of the State of Idaho, Mr. David LeRoy,
on the job 8:00 o'clock in the evening. It's a
rare event when the Governor shows up to a
legislative hearing.
Do you have any comments that you want to
make here, Dave?
GOVERNOR LeROY: I'm excited to listen
tonight. I understand that this evening's
proceedings are going to be a lot more
entertaining than this afternoon's inaugural
parade.
THE CHAIRMAN: Yes, I suspect that's true.
Okay. Mr. Fred Stewart. Fred, you have
established a record at these committee hearings,
too, so we're going to want you to be on your
quick toes tonight.
MR. STEWART: Thank you, Mr. Chairman. I
find myself at these hearings (unintelligible)
been five minutes long from the other hearing,
which is a little more lengthy.
Mr. Chairman, members of the committee,
ladies and gentlemen of the legislature, I come
with an entire opposite viewpoint of the prior
speakers. It is in complete contradiction to what
Mr. Kole said where he said that this will protect
the Idaho waters from being taken over, primarily
California. I submit that this sets up the
vehicle to take our water to California. Is that
Mr. Costello said it was a balance between the
two -- one development and the other's chief Idaho
Power. I submit to you there's a third
alternative. And that is the exporting the water
to California.
Now, in 1963, after the US Supreme Court
ordered half of California to adjudicate its right
to Arizona, there was all kinds of water plans
that was put on the market, so to speak, and to

Take Idaho water to California, and that the
population of Idaho got so excited, that Governor
Smiley (phonetic) in 1964 called an extraordinary
session. That's all the members of the House and
all the members of the Senate. And it was such an
issue that the whole state was upset about it.
They were going to lose their water to California.
So they called an extraordinary session. Now,
that's quite an event.
Now, today, there doesn't seem to be any
concern about water going to California. And
that's amazing to me, because it's the old wolf
story that all sudden the wolf's at the door and
people are recognizing it. But Senator Church at
the time recognized the danger of the planning,
and so he, along with some of the senators from
Washington and Oregon, got a 20-year moratorium.
It was actually a ten-year starting in '68. And
in '78 came a ten-year extension of the
moratorium. This last year, the representatives
from California put a bill in to the congress
there that they terminate that moratorium now.
Now, that should be soothing to people.
That's a fact.
In 1977, the City of L.A. passed a
resolution and sent to congress demanding that
they pass the Snake River water now. It's at this
special legislative session that Governor Smiley
called, they created the State Water Barter -- set
the steps to create the State Water Barter. It
was created by initiative. It was 10 years later
they came out with their State Water Plan, 1976.
And I first became aware of it in that article
(unintelligible) messengered by Senator Reid
Budge.
And I know I can't quote it exactly, but
correct me if I'm wrong, Senator Budge. It's the
effect that ten years prior to then needed to
upgrade the State Water Board, and charged them to
protect Idaho water. Now, when they received the
State Water Plan Part 2 that was adopted by the
Board in December 1976 and (unintelligible) in
January of '77, that they had done diametrically
opposite, that they had provided the tools whereby
we could lose all of Idaho's water. And the whole
legislation felt the same thing.
So they passed HB14, which gave them their
legislative overview of the State Water Plan. And
Senator Budge for the Senate and the
Representative Chatburn for the representative of
Resources and Environment Committee

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1 the House, when all of the state got input, the
2 input was just the same as the legislature felt,
3 that it was the worst thing that hit the State of
4 Idaho.
5 And so in the legislative session in 1978,
6 they spent the whole session correcting that State
7 Water Plan. Now they studied the policy, and the
8 committee chairman, Mr. Chatburn, appointed a
9 committee chairman for each of the policy. And at
10 the end of the legislative session, they met, the
11 House and the Senate together. And the chairman
12 of each of the subcommittee got up and presented
13 these policies. And they voted, the conjoined
14 House, and passed it. And they thought that they
15 had something to protect Idaho water. But low and
16 behold, all of a sudden you've got a lawsuit by
17 Idaho Power that's back again. It's the
18 signatures for the petition to the IPUC, which is
19 known as Swan Falls 1.
20 Now, Swan Falls 1 has two parts to it. And
21 I don't want you to mistaken Swan Falls 1 for Swan
22 Falls 2 and the second part of Swan Falls 1 for Swan
23 the Falls 2. The first part of Swan Falls 1
24 addressed the flow of the water over Swan Falls.
25 Everybody who played with that attracted the

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1 attention of the world.
2 The second part of Swan Falls 2 -- that's
3 why I say the second part, because the two parts
4 were handled in court at separate times. Said --
5 and this is part of the complaint, said that the
6 state lawyers plan proposed to build a high-head
7 dam, the shoestring band just above King Hill, and
8 that this dam would undulate for their power
9 plant. They that recognized the power of the
10 Water Board to do this, and that they wouldn't
11 oppose this. But by the law of eminent domain,
12 that they wanted to be paid for those power
13 plants. And I don't believe anybody disagreed to
14 that.
15 But -- and this is a big important thing.
16 They said that if the State Water Board has the
17 power to do that, then they had all inclusive
18 power, and so therefore, HB14 that gave the
19 legislative overview which they had utilized to
20 correct these things that they found as a whole
21 body wrong was unconstitutional.
22 Now, those two went into court separately.
23 Swan Falls 1 was attended by -- I don't know how
24 many lawyers they consolidated to -- I know
25 Senator Ringert was there, and quite a few

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1 lawyers there. Swan Falls 2, when it went to
2 court -- and it would have not gone to court if I
3 hadn't called a meeting in Wayne Wells' (phonetic)
4 House, when all we know who Wayne Wells was. And we had all of this legislature that sits
5 right here at that meeting. And the upshot of all
6 of it was it is the speaker of the House, Alan
7 Morrison, came down and insisted the attorney
8 general to file in his name and the president
9 (unintelligible) Senate, Phil Batsmane (phonetic)
10 against this. Now, if we hadn't have done that,
11 no one would have appeared on it.
12 So the day came in court. And Idaho Power
13 wasn't even mentioned in the proceeding. And that
14 was amazing to me. I'm not smart enough, maybe,
15 to understand why they didn't bring Idaho Power
16 in. When they came into court, it was Idaho Water
17 Resource Board against the resource agency and the
18 legislature. And the resource board, being
19 represented by Phil Barber out of the law firm of
20 Eva and Jelson Evans and Boyd (phonetic), and the
21 legislature by Josephine Demen (phonetic).
22 Josephine Demen, all she took in was Wayne
23 Skidwall (phonetic), whose attorney general's
24 opinion in 1814 interjected between the word

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1 formulate and implement, which created the Safe
2 Water Board's work adopted by the legislature.
3 Phil Barber brought in half of the pickup
4 post. The District Court ruled against the
5 legislature. They wanted to kill it. I got ahold
6 of Wayne Wells. He came up and met with Senator
7 Budge and said you can't kill it. She didn't have
8 anything to begin with. So they directed her to
9 get more information. And she did. She got a
10 whole bunch of affidavits from the legislature
11 that said this was her intent. They had
12 legislature. But primarily in her brief, she
13 submitted a brief from Professor Peterson who
14 worked with the legislature at the time. The
15 preamble history said that the legislature should
16 have the overview there. But the conclusionary
17 remarks said in as much as it's created by
18 constitutional amendment, that the legislature did
19 not have.
20 Now, the day in court came where Phil Barber
21 got up and said for some reason he could call a
22 mistrial, but he wouldn't. But he used counsel's
23 brief. And he turned to the conclusionary remark
24 and read it. And she was very amazed at it. But
25 anyway, the judge in the District Court ruled

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Against them. It went up to the Appellate Court.

The Appellate Court ruled against them. So everything that these two bodies did for what whole year 1978 was thrown out the window.

Now, the state lawyer claims it stands and just as it was adopted with these things in there. Now, one of the -- is policy 4 in there, which qualified -- and those that have this handout -- and Mr. Winchester, there's a bunch of those handouts there you might hand around that don't have -- is that code 542245 say there's a file claim where any person may relinquish his right. "Any person claiming the right to divert or withdraw and use waters of the state can fail to file a claim provided in section 42243 Idaho code should be conclusively deemed to have waived and relinquished any right, title and interest in said right." Now there's some sort of protection in that, the legislature did, but the protection they put in was thrown out.

Now, we've got a condition right here now is they gave people until June 30th, 1983 to file. It was extended to June 30, 1984. It's now extended to June 30th, 1985. Now, the director of the water resource Ken Dunn (phonetic) says that he'll start adjudication on July 1st. Now, that's got to be spooky, because they say that there's somewhere between 20,000 and 2,000 people out there who should have filed claims who haven't filed claims. Now, that's got (unintelligible).

Now, we think we've seen a lawsuit before on this Swan Falls 2. We haven't seen anything. And my mention about Swan Falls 2, the minute this agreement was signed, they released everybody who had up to December of '82. And they had to release them. They never should have been enjoined in the first place. And the reason why is that their license on Swan Falls expired in 1970. It was issued in 1920. 50-year license.

That's the maximum that the FPC, which was then, which is now the first FER seen condition. They did not receive another license until December of 1982. So anybody who had license, whatever, up until then, should never have been enjoined. And they enjoined them only for one thing, and that's to create this great payoff that we've seen the last two years up here. It's been the one consumptive users against the people who considerably desire a cheaper deal, the cheaper hydro (phonetic).

And therefore I say we have a third alternative, which I claim completes the very last part of my dissertation is that we're going to lose this water to California. And I'd like to go through a little bit the town. Over there, if everybody can see (unintelligible) those are half. The Supreme -- the District Court in Swan Falls was -- that's the first part of Swan Falls 1 -- said that the whole system was subordinated, starting at the Lower Hills Canyon and clear on up through their whole (unintelligible) private system.

Now, Senator Reid and some of the other lawyers there had said that even if Swan Falls 1 was not subordinated, that they had lost their right to (unintelligible) whatsoever. The District Court said that's a moot question, because I'd subordinate the whole thing. When it got to the Supreme Court, the Supreme Court affirmed the District Court on the three lower dams. That's the Brownlee, the Oxfall (phonetic) and Lower Hills Canyon Dam.

Now, the three of them generate 19,345,000 KW. The rest of this hydrosystem 446 KW. They reversed this decision on Swan Falls. They said that Swan Falls was not subordinated. They remanded back to the Court the issue of loss by forfeiture and so forth. Now that's never gone back into court. In fact, this agreement said that they would put a stay in motion on that, which they did. Billed seven days after the end of this legislative session, and that they would also put a stay in motion on Swan Falls 2, which is the action against the 7,000.

I want to point out once again that 90 percent, near as I can figure out, of the defendants on Swan Falls 2 have been released. They never should have been enjoined, and they've been released now. Now, there's a lot of the legislature who didn't realize that, but they had been released. A lot of them don't know it because they've joint different organizations and things, retired lawyers. And I got entered into the Swan Falls 1, Swan Falls 2 (unintelligible), so I get all the materials there. And it shows the releases by the names and by the volume numbers. And anybody that needs to know that should get ahold of their lawyers, or else, perhaps, come over, whoever.

Is that -- so what you got now, you got a situation that the water is forced down through
1. Swan Falls. But with the exception of the 4700 Figure 4700
2. CFS, which is provided at a minimum stream flow at
3. the Weiser Gauging Station, which is above the
4. back waters of the Brownlee, that is if California was to come in -- which I submit they will.
5. And in the handout I've got, I've submitted the plat of what's known as the Dunn plan, or the
6. modified Snake Colorado Plan that came out in
7. 1965. And it pumps the water out of the back waters of the Brownlee, and takes on down to Lake
8. Mead, with an aqueduct going over to Ovum's River Valley, which you all know was dried up in 1930 by
9. L.A. (unintelligible). And they devastated that valley. All the towns that was there basically are an exempt (unintelligible) stayed there (unintelligible) is that the subordination thoughts that be subordinated to any future upstream consumptive use.
10. I've approached one of the US attorneys on that. Raised the question there's water coming out the back waters of Brownlee. They go into California, meet that criteria. Certainly, it's just the same as the waters coming out of the back waters of the Melonary (phonetic) Diversion Reservoir and going down to Castleford, just maybe another thousand miles further than Castleford, but it's the same thing.
11. In the contract -- and those that have the papers that the Water Resources put out, you might turn to page -- page 4, second column, and right at the bottom of the second column there, is that if the legislature has the contract itself -- it's also page 4, and E there. And I'd like to read it. It says, "(unintelligible) a bill," that's, of course, out of our company's ability, "to purchase, lease, own or otherwise acquire water from sources upstream of its power plants, then convey it to and past its power plants below the river and the dam, shall not be limited by this agreement. Such flow shall be considered fluctuations resulting from operation accompanied facilities." Then drop back down to the paragraph just above C there. It says, "any fluctuations resulting from the operation of a company, per say, shall not be considered in the calculations of the minimum stream flow set forth herein.
12. Now, what this sets up is, if on July 1st these 20 to 200,000 people haven't filed, their water's gone. Just didn't listen. Now, the legislature corrected that. But their HB14 that due to the Idaho Power lawsuit, that's thrown out the window. There is no protection.
13. Now, just like you, I set my cruise control the last few trips between here and Jerome at 55.
14. Man, everybody passes me on the road. Now, everybody recognizes that that was the law passed. That isn't an enforceable kind of law.
15. This is a law that was passed, whether by design or by accident, that on June 30th, we're going to have this thing devasted. Anywhere from 20 to 200,000 people who have an easement receive claim jumper claim for this loss. The director will have to shut it off. Now, when the director said it might have taken 10 years to adjudicate, I say it might take a month, because everybody has had to record their rights, so it's set up on the computer. When Idaho Power got ready to file Swan Falls 2, they just went to the District -- to there and got the computer readout and took everything from 1950 up there. And it was really easy. And they can do just the same thing.
16. Now, California, everybody knows they want the water. They're going to lose their water.
17. And the -- Dr. Bloomsberg (phonetic) testified at the Water Users Association meeting the other day that -- (unintelligible) not Dr. Bloomsberg.
18. Anyways, the head of the Water Reclamation testified that the Central Arizona project would be completed next year.
19. Now, next year, when they take the water out of the Colorado that's been going to California, now, they're a powerful company. They got 18 million people in Southern California. Is the power structure down there, lies within 20 corporations -- there's a book there that's less than 10 years old put out by Ralph Nader. It shows where about two, three dozen big corporations control most of the water in California. They paid 30 some dollars a year per share. And they're subsidized by taxpayers -- 130 (unintelligible). The biggest of these being the Southern Pacific Railroad. Is that the Southern Pacific Railroad, Bectel Engineers, Wells Fargo, Stanford University, they're all one in the same.
20. When the Transcontinental Railroad went across the United States, the Union Pacific came west, the Central went east. The Central was started by an engineer, a good honest man, but four high buyers
MR. STEWART: My name is Mr. Stewart. I'm going to have to ask you to wrap this up fairly soon.

MR. STEWART: All right.

THE CHAIRMAN: We're flying 20 minutes into your testimony now and --

MR. STEWART: That leaves me 10 minutes, right? You told me 30 minutes.

THE CHAIRMAN: Hurry right along. You'll make it in 30 minutes.

MR. STEWART: All right.

But anyway, then they put their Central -- or the Southern Pacific down through California, and they got a tremendous lot of ground given to them by the government. They were supposed to divert it in three years and they didn't.

Now, the water that went out of Orange River Valley did not go to the City of L.A. It went to the desert. And it made these guys, Central -- the Southern Pacific, Bectel billions of dollars.

Now, Arizona and California can use every drop of water from Idaho. And in the bill, Idaho Power can purchase, lease, own or otherwise acquire.

When these people lose their water, the 2 -- 20 to 200,000, who's going to get that water? Even if they don't buy it, it's got to flow down the stream. But it does not have to flow through those three lower dams.

Now, just a year ago, the Corp of Engineers -- and that was testified at the Water Users by Dean Heller at the US Core of Engineers -- up until a couple years ago, the Walla Walla district and the Corp of Engineers had the form area, the back waters of the Brownlee. A year or two ago, they transferred the west side of that to the Corp of Engineers in Sacramento, California. And you couple that that to the -- they're wanting to get the termination the memorandum, the resolution they sent to Congress to pat the Snake River down, the tremendous power they have, the Secretary of State Sherl, Secretary of State Blineberg (phonetic), right out of Bectel. Engineers, who's one in the same Southern Pacific -- they were the great power that helped put President Reagan in. And I voted for him and am for him.

But ladies and gentlemen, I think we stand on the threshold of being devastated. To those of you who have gone down to Bishop, California, in 1930 that was a beautiful valley, 120 miles long, 24 miles. The same people that took that water out of there devastated it. The towns all disappeared (unintelligible). The turn of the century, we were a desert. Now it's that same group. And who they've used to implement it is immaterial.

But anybody is to mesmerize the whole state -- this action, Swan Falls 2 is to mesmerize the state where they were so excited and walked a special session. Then why are we mesmerized today? Why can't we think that this is what they gonna. And if anybody can show me a fault in how they're going to get that, I'd appreciate them doing it. Anybody, any time, please approach me and show me.

And I conclude my remarks with that, except for one thing. My advise on this agreement is to throw it in the trash can where I think it belongs. Purchase Swan Falls to eminent domain.

Now, the last two, three years what they've been saying is subordinate Swan Falls. And there's a world of difference. I've heard testimony that that is repelling to a lot of people, subordination, because that takes without paying.

But the power of eminent domain -- and that's only a 12,000 KW dam. Again, it's almost 2 million KW, the whole system.

Now, eminent domain is used -- about how much goes here and how much there, perhaps using the same formula as Mr. Costello used. But it will not go to California, because when it goes to California, the power users aren't going to get it. And the water users aren't going to get it.

But let me tell you, the multibillionaires in California and Arizona, they're going to make more multibillions.

And I thank you, Mr. Chairman.
1 you've given us.
2 Is your problem a philosophical problem, or
3 have you read the agreement, and read the six
4 pieces of legislation, and actually could give us
5 a problem with what we have in front much us
6 tonight, 1006 and a 1008?
7 Can you shoot holes in those two pieces of
8 legislation? Or what you're basically saying is
9 you, philosophically, have a problem with the
10 agreement and think we ought to buy the dam?
11 MR. STEWART: Yes, (unintelligible)
12 Mr. Chairman, Senator, I'd like to expound that as
13 the Chairman will allow us to. I'd like to start
14 out with Senate Bill 1005, if I may. And that's
15 an acceptance of the agreement. And of course, I
16 spoke for one half hour to that.
17 But the bottom half of that speaks to the
18 Public Utility Commission. Part of this enabling
19 action says, that Mr. Nelson referred to, states
20 that "the Public Utility Commission will never,
21 from now on, until time in eternity" -- and I'll
22 read it to you -- section 2 of 1005, "Public
23 Utility Commission jurisdiction. The Idaho Public
24 Utility Commission shall have no jurisdiction to
25 consider in any proceedings, whether instituted

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1 time." It's real hard to catch you people.
2 You're going back and forth, and you're so busy.
3 And after a while, I tell you, I feel like a nut.
4 SENATOR HORSCH: Well, I tell you, you're
5 still the best legislative catcher around.
6 THE CHAIRMAN: Okay. Thank you.
7 Forrest Hymas, followed by John Hatch, and
8 Mr. Runft, and Pat Ford.
9 MR. HYMAS: Mr. Chairman, committee members
10 and guests, my name is Forrest Hymas, and I'm from
11 Jerome.
12 I'm here tonight representing the Idaho
13 Water Rights Defense Group. And this is a group
14 that was formed out of people with a general
15 common bond, because they were sued by Idaho Power
16 Company. And so we tried to form a group to
17 answer and respond to the summons as it prepared
18 for litigation. Our group is made up of business
19 people, people with recreational interests,
20 agricultural interests, industrial interests,
21 professional interests, and domestic interests.
22 Let me clarify one misconception and one
23 misunderstanding. After the negotiations were
24 signed, a lot of people felt that Idaho Power
25 released all of the people from this suit.

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1 before or after the effective date of this act,
2 any issue as to whether any electric utility,
3 including Idaho Power Company, should have or
4 could have preserved, maintained, or protected its
5 water rights and hydroelectric generation in a
6 manner inconsistent with the contract entered into
7 by the governor" --
8 SENATOR HORSCH: Mr. Chairman?
9 THE CHAIRMAN: Yes.
10 SENATOR HORSCH: Mr. Chairman, in the effort
11 of expediency, Fred, if you would give me and the
12 Chairman and the rest of the committee members
13 from both the House and the Senate a section by
14 section of -- I can tell you've read the bills,
15 you've read the agreement. If you would go
16 through that and, in your time sometime in the
17 next couple weeks, and give this -- shoot holes in
18 these pieces of legislation as I can tell you're
19 going to here, rather than take the time tonight.
20 I would appreciate it.
21 MR. STEWART: Mr. Chairman, Senator, yes,
22 I'd be glad, perhaps, to speak you on an
23 individual, person-to-person basis. I'd welcome
24 that, especially if you senators and legislature
25 would say, "Mr. Stewart, I have a moment or two

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1 Unfortunately, they did not. And those who were
2 left in the suit realize that they'll have to live
3 by the new negotiations. However, as a group, we
4 feel it is essential that this issue be resolved
5 in this session. It has been extremely costly to
6 individuals who have been sued. And in some
7 cases, basically, financially devastating.
8 It has also had a tremendous negative
9 impact, an economic impact -- a negative economic
10 impact on our communities and our State of Idaho.
11 It's approximately 51 percent of the privately
12 held land in the state of Idaho that's affected by
13 this issue.
14 I'd like to illustrate a couple of examples.
15 In our community in Jerome, two particular issues
16 were industries that wanted to come into our
17 community during this last two years, but they
18 needed one element, and that was water. Both of
19 them happened to be in manufacturing of a product
20 which we develop and we produce in our area. One
21 of them, to my knowledge at this time, has given
22 up on coming into Idaho and into Jerome. The
23 other one is a dairy manufacturing facility. And
24 they're having a very difficult time sticking to
25 Jerome where they want to be, and acquiring an
are you talking specifically 1008, or all of them together, or any specific one?

3 SENATOR HORSCH: Mr. Chairman, Mr. Hymas, I would assume that that would be under public -- best public interest, probably speaking of 1008.

4 I would assume that would be where the hole would be.

5 MR. HYMAS: Mr. Chairman, Senator Horsch, 1008 certainly carries -- counters along variety of areas. And we do not see that that is a problem. First of all, you have the public interest criteria that we believe would protect that particular area.

6 Does that answer your question?

7 SENATOR HORSCH: Yes. Thank you for your input.

8 MR. HYMAS: Any other questions?

9 THE CHAIRMAN: Thank you very much.

10 MR. HYMAS: Thank you.

11 THE CHAIRMAN: Thank you, Mr. Hymas, for coming here tonight.

12 Mr. Hatch from the Idaho Farm Bureau Federation.

13 MR. HATCH: Mr. Chairman, members of the Senate Resources Committee and guests of the House...
I would like to stress the idea that the compromise has been stated before that it is a compromise. Compromise, of course, means that not everybody is satisfied with all elements of the package. I can vouch for this very candidly, that I would doubt that any party to the agreement is wholly satisfied with all elements of the package. That is the reason it is called a compromise. That is why it is so delicate.

I would urge the committee to resist the temptation of tampering too much with the individual pieces of legislation from the desire to maybe put a stamp of legislative -- kind of a legislative stamp on the package.

I would like to read the policy that was adopted at our convention. We had our convention -- state convention in December. And after a great deal of discussion and debate, and weighing all of the alternatives that were before the group, we adopted the following resolution. "We support a State of Idaho negotiated settlement with Idaho Power as a solution to the Swan Falls issue. This should include a contractual appropriation of water for upstream development down to the statutory minimum flow of 39 cubic feet per second summer, and 5600 cubic feet per second winter at Murphy. This should also include a complete adjudication of the Snake River and its tributaries above Lewiston to be paid for by an equitable distribution of the costs among all the beneficiaries."

Again, I would like to reiterate that we do support the compromise as a whole. And we would urge the legislature to look at it that way, and adopt all elements of the compromise as has been presented to them. And thank you for this opportunity to testify.

THE CHAIRMAN: Thank you very much, Mr. Runft. Are there questions?

If not, we appreciate very much your testimony.

Mr. John Runft, followed by Pat Ford.

MR. RUNFT: Mr. Chairman, members of the committee, my name, for the record, is John Runft. I'm a lawyer here in Boise. I represent the Idaho Power Company. In fact, if this goes on longer, this bill may become known as the Idaho Lawyer's Relief Bill. I'm sure.

But let me suggest that perhaps a few comments would be appropriate. And that would, of course, conform with the purpose of this hearing, would be to make some comments without destroying or attempting to destroy the fabric of the agreement that has been woven here tonight and heretofore.

The fresh perspective that might come from the viewpoint of a small hydro developer on the reaches of the Salmon River could be, of course, quite different than that which would be presented by a water user on the reaches of the Snake River above Swan Falls.

Now, in general, I would like to make one overall observation upon my reading of the bill, and then go from there to some specific comments about the language of the bill. Again, merely, hopefully, to, perhaps, add to the finalization of this process, which has been ongoing.

I have a general impression that what we have here in Bill 1008 a hybrid that might have been better left, perhaps, in two parts. The one part, I would suggest, to take care of the -- addressing the settlement that had been reached regarding the Swan Falls controversy, and perhaps...
1 Bill 1008. It struck me in reading section 1

2 that there are two different elements

3 here that are fundamentally attempted to be --

4 brought together this bill. I'm not sure they

5 entirely mix at all times. On the one hand the

6 bill attempts to establish rules and procedures

7 and criteria for the issuance and handling of

8 water rights throughout the State of Idaho for all

9 sorts of uses everywhere. On the other hand, of

10 course, the (unintelligible) is made by this bill

11 to address the settlement of the Swans Falls

12 controversy which relates to only certain waters

13 in Idaho.

14 Let me now go to the specific comments

15 regarding the bill, and perhaps would ask members

16 of the committee to follow me along on these

17 specific provisions and make specific comments

18 versus them. I only have -- so you can get a

19 feeling of timing on this. I only have nine

20 points to make. So you can follow me through. 21

Number one is on the first page of Senate

22 Page 61

23 Page 62

1 a second bill addressing the small hydro and other

2 uses and the permits for overall permits in the

3 state. In other words, both consumptive and

4 nonconsumptive uses throughout the state, a bill

5 regulating the granting of the water rights.

6 I think there are two different elements

7 here that are fundamentally attempted to be --

8 brought together this bill. I'm not sure they

9 entirely mix at all times. On the one hand the

10 bill attempts to establish rules and procedures

11 and criteria for the issuance and handling of

12 water rights throughout the State of Idaho for all

13 sorts of uses everywhere. On the other hand, of

14 course, the (unintelligible) is made by this bill

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23 feeling of timing on this. I only have nine

24 points to make. So you can follow me through. 25

Number one is on the first page of Senate

26 Page 61

1 extremely broad criterion, State action. I would

2 recommend, perhaps, that consideration be given to

3 language that would say State action should be

4 specifically designated to mean Water Resource

5 Board approval with legislative revocation.

6 Going on, now, down that same page, on page

7 3, to subsection 6. This again is Senate Bill

8 1008. And let me emphasize that it is in

9 subsection 6 that my clients' principal concern

10 (unintelligible) is located. First of all, the

11 last sentence of subsection 6, which is the

12 portion that is underlined, at least in my copy,

13 reads as follows. "The director shall also have

14 the authority to limit a permit or license for

15 power purposes to specific term."

16 Now, the limiting of a right or a license to

17 a specific term would appear to me, at least from

18 the reading of this bill, to place in jeopardy any

19 reasonable financing of a small hydro project.

20 These projects, as many of you know, are based

21 upon a 35-year financing, and also generally have

22 a -- frequently have a 35-year contract with the

23 power company. Not only would havoc be wreaked

24 with the financing, but also, under the present

25 day Idaho Power contracts, you'd be placing in

26 Number one is on the first page of Senate

27 Page 62

1 Bill 1008. It struck me in reading section

2 42-203(a)(2) and (3) that we've got, perhaps here

3 an excessive notice provision, perhaps leading to

4 excessive costs, in that you already have a

5 subscription right from the Department, that is

6 any person wanting to know where these notices

7 come up, the Department can mail in the ordinary

8 mail any application that is sent in for a water

9 right to any person subscribing to the Department.

10 That's in subsection 3. Subsection 2 provides

11 that the director of the Department shall cause

12 notice to be published in a newspaper in the

13 county. Now, on top of that, then, you have a

14 statewide notice to be published, which seems to

15 me to be somewhat (unintelligible) cost.

16 Going right along over to page 3 of the

17 Bill 1008, I'd like to draw your attention to

18 42-203(b) right in the middle of the page there,

19 No. 3. That's in subsection 2 there. The

20 statement sentence -- first sentence of number sub

21 3 is "water rights for power purposes not defined

22 by agreement with the State shall not be subject

23 to depletion below any applicable minimum stream

24 flow established by State action."

25 I would submit to you that that is an

26 Page 62

1 jeopardize the developer in that he may be faced

2 with recapture -- the recapture provisions of the

3 contract.

4 For example, if the term of the license went

5 out only, say, for five years or ten years, just

6 long enough for the developer to get his money

7 back his investment, and then it were terminated,

8 and he were unable to perform the recapture

9 provisions of the standard Idaho power contract,

10 would be costing a lot more money than he ever put

11 in the project in the first place. He'd be unable

12 to perform.

13 Thirdly, there is also the possibility that

14 the FERC, Federal Energy Regulatory Commission,

15 might not grant licenses to developers if, indeed,

16 the underlying water rights were subject to terms

17 to be determined by -- at some time in the future

18 by whatever administrator were in office.

19 I think those three -- those three -- those

20 three worries that my clients have are very, very

21 serious. One, that you cannot get financing if

22 you do not have an absolute water right for a --

23 granted to you as a developer. Secondly, that

24 your Idaho Power contract, or even possibly

25 Washington Water Power and the other companies,
1. your contract would be placed in jeopardy on the recapture clause. And thirdly, that maybe even FERC would not grant your license.

2. Now, in this same section 6, in the very first sentence, the language reads, "the director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses." That's an extremely broad authority, I suggest to you, members of the committee. How is this authority to be exercised? It is done by rule making. What are the standards? What are the criteria of beneficial use?

3. Then there's also a worry, I believe, about possibility of taking rights without due process of law. In other words, the language reads that the director shall have the authority to subordinate rights, which I presume are already existing. And if you can subordinate rights, property rights, simply by bureaucratic fiat, then you may run afoul of the due process of law requirements for anybody having a property right.

4. Going on now to the next page of the bill, page 4, I would call your attention to section 42-203(c) near the top of the page, and sub 1.

1. First sentence reads, "if an applicant intends to appropriate water which is or may be available for a preparation by a reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203(a) Idaho Code," and so on.

2. I want to draw your attention to the first line of that sentence on the bill. If an application -- "if an applicant intends to appropriate water," I would suggest there that this particular type of criteria would be best applied to the upstream consumptive uses from the -- from the Swan Falls dam, and would suggest language that effect in that. That would be section 1. 402 -- 42-203(c), "if an applicant intends to appropriate water," and I suggest the language for upstream consumptive use right there as a possible constructive addition.

3. I would like now to go through 42-203(b), which is on page 4 also. And in the first sentence of that section which reads, "the department shall review all permits," I presume that, under the statute, that, of course, means all water permits. And I presume that it is limited to permits granted by the Department and the Department only.

4. The final comments I could make regarding some of the criterion, I will go over, because I think the concern there for some of the criterion utilized in the bill, there are a number of listed criterion for a decision. One of the thoughts that occurred to me was exercising the decision -- or entering decision-making process, how much value would you give to the various criterion? Which -- how would you weight them. I think there's a question there.

5. But moving on, as I promised to do, I'd like to go through Senate Bill 1006, which is the last page. And essentially concerns --

6. THE CHAIRMAN: Mr. Runft --

7. MR. RUNFT: Yes.

8. THE CHAIRMAN: -- if I might interrupt, the language read .. , "the director shall have the authority to grant a permit or license for power purposes."

9. I'm sorry, I'd like now to go through 42-203(c) of that sentence on the bill. If an applicant intends to apply, whether one applied, whether one could be given greater weight than another one, or how they might be implemented by the director.  

17 (Pages 65 to 68)
1 MR. RUNFT: I believe there is a problem,
2 which of course, with some redrafting, I'm sure it
3 could be handled. But I believe there is a
4 problem as to what weight to give to which
5 criterion. I believe that the -- I meant to
6 address that briefly in an effort, of course, to
7 move forward, when I said I'd leave -- just
8 leaving Bill 108 -- or 1008, that I felt there
9 were some criterion in the bill, and I
10 specifically meant these, which were not
11 designated as to how much impact or weight were to
12 be given to those criterion by the director. I
13 think that's a problem. You don't have direction
14 here.
15 There is authority to use these criterion,
16 but how much weight would you give to the
17 promotion of family farming tradition, for
18 example? How much weight would you give to the
19 promotion of full economic and multiple use
20 development? One could put these criterion,
21 perhaps, in order of preference. There's a number
22 of things to be done. I do believe that is a
23 problem. Again, I don't think it is an
24 insurmountable problem. I believe that the
25 counsel have spent many, many hours on this have
26...
perspective of my clients up on the Salmon River, we would ask that the moratorium not be applied to them. Again, I suggest to you that this is another aspect of this hybrid bill, that there were two fundamental purposes of this legislation. One was to settle the Swan Falls controversy, and the other was to develop a comprehensive set of rules and regulations for handling water rights, and the granting of them. And they don't always, I suggest, mesh.

For example, in No. 7, which says, "after a notice to suspend the issuance of further action on permits or applications as necessary to protect the existing vested water rights or to ensure compliance with the provisions of chapter 2," and so on. I would suggest that after the word "water rights" in the second line there, "existing vested water rights," that the language be added "upstream from Swan Falls Dam on the Snake River."

And that would -- that would distinguish and separate out to folks who were not involved in the Swan Falls controversy of any necessity of a moratorium on their applications for water rights, and leave them free of that particular problem.

Mr. Chairman, I could go on and on. I think I've covered the -- perhaps the salient points after a review. And let me conclude by stating that my clients certainly commend the untold man hours of lawyers, experts and people that have gone forward to forge this legislation and the compromise and reliant. And we come not here to destroy, but to perhaps help clarify and to add something to it.

THE CHAIRMAN: Thank you, Mr. Runft. We appreciate your testimony.

Any other questions? Guess not.

Okay. Pat Ford.

MR. FORD: Thank you, Mr. Chairman.

Chairman Chatburn, members of the committee, members of the legislature, my name's Pat Ford. I've followed this issue and been involved in it in the past as working for the Idaho Conservation League, but I no longer work for them. I want to emphasize tonight that I'm speaking for myself alone in my comments on the proposed legislation. This will be, for the first time, the real, unrestrained Pat Ford.

I do support Senate Bill 1006. The rest of my comments are about Senate Bill 1008. I'd like to look at that bill from the point of view of necessarily, that work has created a product which the legislature should adopt intact if, in its wisdom, it decides there are things that could be done with it.

I'd like to look at the proposed criterion from the point of view of two major existing uses of Snake River water, namely fish and wildlife and recreation. Obviously, this is a partial view.

Those are not the only uses of the river. Indeed, they're not the primary uses in terms of economics or quantities. The legislature, obviously, must and will look at the whole picture. But I think the partial view that I'm going to try to speak to is justified, one, by the fact that's my expertise, two, by the fact that the parties, in making, in putting together the agreement, didn't really consider those two uses.

Mr. Costello, in his opening comment said something he had said before, that they were looking at two major uses of the river in trying to reach an agreement about those. I understand why that had to be done, but there are more than two uses of the river. And I would like to address two of the ones that were not particularly considered. I think they should be. And I hope.
1 benefit cost analysis that would be neutral
2 regarding the uses, would not automatically favor
3 any use, particular use, but would subject each
4 application, whatever was being applied for, to
5 the same economic analysis, the same economic
6 tests. Each proposed use would be judged on the
7 same terms. That, at least, makes sense to me.
8 And it seems to me the proposed criteria are
9 weighted to favor just two uses, the two in
10 dispute in the lawsuit, Idaho Power and
11 agriculture. Both of those uses are specifically
12 mentioned in the new criteria, while all of the
13 uses are not. Instead of a complete economic
14 accounting, then, that covers all uses, the
15 impacts on all uses, the director is told to make
16 a partial accounting, emphasizing those two uses
17 downplaying any others that may be affected.
18 Aside from helping settle the lawsuit, which
19 I agree is good thing to do, I don't see the
20 logical or legal grounds for directing automatic
21 preference to those two uses in the law,
22 regardless of what the actual economic
23 circumstances are, the particular time, particular
24 place of the proposed use.
25 Let me look specifically at the proposed

1 criteria. The first one, No. 1, directs
2 consideration of potential benefits of the
3 proposed use. But then the second criteria
4 directs consideration of potential costs of only
5 one use, namely hydropower. I don't see why, as a
6 matter of law and economic fairness and equity and
7 efficiency, all potential costs to other existing
8 uses are less important than the costs of that one
9 used.
10 No. 3 directs consideration of a single
11 tradition, the family farming tradition. There
12 are many traditional economic uses of Idaho water,
13 recreation, fishing, Indian fishing, cetera. I
14 question, I guess, the whole notion of requiring
15 explicit consideration of traditions in the water
16 rights decisions. But if they were to be
17 considered, I'm not sure I understand why one
18 tradition is to be given consideration and other
19 traditions are to be excluded.
20 Criterion 4 is a very general one. And
21 conceivably as Mr. Chapman said in his testimony,
22 Fish and Wildlife and Recreation and other unnamed
23 uses could be accounted for in that one. But it
24 seems to me so could agriculture, which is
25 specifically named twice.
No. 4 is -- I'm not sure No. 4 is the best language, but it is the kind of general economic criterion that makes no automatic prior judgments that some uses are better than others, and that it seems to me, would make more sense than mentioning some specific uses and not mentioning others. The last criterion, No. 5, it seems to me, is an apple among oranges. And I think it's entirely out of place. I don't see why one particular use should have an annual target enshrined in the law, regardless of the particular economic sense of applications that will help meet that target. I don't see the legal or the economic logic to doing that. There has -- the parties have made an argument that that is not a target, that it is a cap that is intended to prevent development above that level, but it is not intended to mandate development to that level. If that's their intention, fine, but in consulting dictionaries, to look at the words that are stated there, I consulted four, all four of them, I think, favor my interpretation that it is the target more than the interpretation that it is a cap. If you look up the word conform, if you look up the word policy, if the intention is for it to be a cap, then I think it needs to be redrafted to state that more specifically rather than leaving it the way it is where two fairly different interpretations are possible which will have different practical consequences, depending upon which one the director chooses to go by. It would be very simple, I think, to amend it to make it clear that it is meant to be a cap allowing no development above that rather than to be a target to that level.

There have been a few arguments made previous to tonight and tonight about some of the questions I raised. And I want to briefly mention them. The argument's been made that fish and wildlife and recreation interests are already covered by the local public interest language in the existing water right criteria that are in 42-203(a).

But I make three responses to that. The first is that the specified use of agriculture is also covered by that language, yet it receives two specific mentions in using the criteria. Second, the local public interest language does not cover nonlocal fish and wildlife and recreation impacts. An example would be salmon and steelhead flows downstream at the local area where the application was made for diversion. And the third point -- I'm not an attorney, but it seems to me that, in judging local public interests to include fish and wildlife and recreation, which is the interpretation that is now used by the Department, and in, then, defining public interest in the new criteria in the way that they are defined, you're setting up within the space of about a page in the Idaho Code two different definitions of public interest. I don't know if that has any legal merit, but it doesn't seem to me -- it just didn't seem to quite make sense to have the same words mean two different things a page apart in the code.

There's an argument that fish and wildlife uses are covered, essentially, by the hydro protection given in the legislation, that, to the extent that hydro is an instream use, fish and wildlife is an instream use, when you protect hydro, you, at the same time, are protecting fish and wildlife. And certainly that would be true in many cases. But again, it wouldn't be true in all cases. There are cases, actual ones, as well as potential ones, where hydro protection and fish and wildlife protection would be in conflict.

And secondly, it's my feeling that the hydro language in this criterion, that how much weight it has is going to be considerably dependent upon the force with which Idaho Power Company makes its case about them to the Director of the Department of Water Resources on a case-by-case basis. That being the case, I think saying that hydro protection is what the authority covers fish and wildlife, to me is someone interested in fish and wildlife, makes Idaho -- puts Idaho Power in a position of defending my interests in a way that I don't think is either a part of their job as a company, nor do I feel comfortable having them take that lead on it.

I think that there are some possible amendments that could be considered that the parties might agree to that would not scuttle the package. It seems to me logical that the best way to do these criterion would be to mention no specific uses at all, and again, have a general economic test. I doubt if that's acceptable to the parties or to the legislature given the history of this. If that's the case, then I would suggest...
and urge your consideration for adding the criterion that does mention fish and wildlife and recreation in the same way that No. 2 mentions hydro power, that same sort of language. And I would urge consideration of deleting entirely the last criterion, criterion 5. Again, it seems to me that it's an apple among oranges and doesn't really belong in this list of other criteria.

I think that's all. Thank you for listening to me.

THE CHAIRMAN: Thank you, Mr. Ford.

Are there any questions?

If not, we appreciate your sharing your thoughts with us.

That concludes the list of witnesses who had signed up earlier in the day. Are there other individuals here who like to present testimony? If so, we'll be glad to hear from you at this time.

UNIDENTIFIED VOICE: (Unintelligible).

THE CHAIRMAN: Fine.

Well, are you -- now, are you also representing the Idaho Consumer Affairs tonight?

UNIDENTIFIED VOICE: No, I'm not.

THE CHAIRMAN: Okay.

MR. FOTHERGILL: Mr. Chairman, members of the committee, my name is Al Fothergill. I'm the director of the Idaho Associates Coalition, which is a consumer-oriented organization. I have provided the secretary copies of the testimony I've made. Included in that are two other items. One of those is a letter written by Joel Hamilton of a personal letter to Don Reading (phoning) with the Idaho Public Utilities Commission, as a part of which he advises Mr. Reading to make that available to me and others who might be interested. I also have both letters that I've written to Governor Evans and to Attorney General Jones asking if they'd initiate an amendment of the agreement which would provide compensation for consumers. The -- part of my testimony, and I'm not going to belabor it, is that the key provision of the Swan Falls agreement is a reduction of 600 cubic feet per second in the summer flow of the Snake River. And the result of that is to reduce the production -- reduce the flow of the river, obviously, and add production of low cost energy from existing dams in the river and to rate people's power -- power bill. In addition, as you know, the agreement is applicable to all other rivers and streams in the state. But I don't have any knowledge of what the impact might be on them. The study done by Hamilton Lyons was done for the Interim Committee, Legislative Committee on Swan Falls, and presented -- oh, I've forgotten the exact date. I think it was a couple years -- couple summers ago. It was paid for by the State. It was authorized by the Committee. And as far as I know, it is the basic document that the legislature has for analyzing the effect of the Swan Falls agreement or subordination at that time on the electricity rates.

As Mr. Hamilton's letter to Don Reading of the Public Utilities Commission indicates it is his belief that $2 million cost -- annual cost to consumers as a result of this agreement is in place. It also indicates that that assumes 195,000 acres of development over the course of the agreement. And it could be higher.

Our only request in this is that we should make this fair. And consumers are consumers of all kinds, farmers, residential consumers, business consumers are being asked or are going to be asked to pay a large part of this implementation of this agreement as in the -- part of the Hamilton Lyons study, up to possibly 80 percent unless the cost is charged to the irrigation pumpers -- the plants of irrigation pumpers for a reduction in the energy produced.

We think that once implemented, would help.

And that amendment would require the other consumers, that is the existing consumers, to be fully compensated for the cost of reducing the Snake River flow, and the cost of serving new irrigation or other major additions to energy man created by reducing the river's flow.

As I understand the proposed legislation, quite just the contrary is recommended. And we're curious as to why those persons who are at detriment in this are being asked to provide compensation for the losses for the development.

There are really very few developers that will be involved in changes from Snake River through the -- should this agreement be implemented. That's really all I have, Mr. Chairman.

THE CHAIRMAN: Fine, sir?

Any questions of Mr. Fothergill?

If not, we appreciate your testimony.

Anyone else who has something for the good of the people's power -- power bill.
Mr. Martins: Art Martins.

The Chairman: Yes, Art. Would you like to come forward, please?

Mr. Martins: Very short and very brief.

The Chairman: That's what we like.

Mr. Martins: I don't have a legal degree.

The Chairman: That's a shame.

Mr. Martins: Many of you people in that back row, plus the negotiators that have more -- I'll leave a few copies. I didn't bring that many of the feasibility study.

I represent a new development, the Little Pilgrim irrigation company, proposed development laying south and southwest of the Bell Rapids project, they own more in Owyhee and Twin Falls County. Now, I'm going to chop the rest of this, and I would just briefly hit on the main points of the plan.

We have applications back in late '75 for water, though, we feel we got a little leeway if any new applications become available or permits signed. I think the impression I'd like to leave -- and I said I didn't have a law degree, and I did not go to the legal -- I've been through the agreement many times, but to represent each one of the pieces of legislation, I'm not in a position to do that.

The one thing I'd like to impress is the fact that our project is blessed with three things, due to some burning midnight oil by engineers and whatever, we are able to live with a year-round pumping schedule of which can be worked around the Murphy Gauge. And it never hurt anybody. The main assets, that would be one. In or out, two. And maybe I should come up with the next ingredient. It's a 35,000-acre of storage of which makes the year-round pumping schedule very flexible.

The other thing, en route to this reservoir, or on the inlet side -- and by the way, there's maps, there are -- Laird Noh got one, Lloyd Chatburn, and the most of the negotiating team -- I will deliver that last one as I walk by, Jim, in just a moment.

But anyway, with the year-round pumping making a little water year-round go a long ways, the proposed power plants on the inlets of the reservoir will produce over a net of a million dollars a year of which there should be some credits there that would apply to a power bill for the entire project. And I'm sure Idaho Power is probably in a position that they would be more than willing to use some of that power that they've got that they claim they're happy to sell cheap back to the irrigators.

Concluding, we would like to -- and this is tough to do, because these people have put in numerous hours. They worked, I feel, for the State. I cannot see any real compensation coming from the negotiators to this agreement. I think it's the best thing that could be had. It may be minor --

(Recording ends.)

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REPORTER'S CERTIFICATE

I, Debora Ann Kreidler, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed 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.

IN WITNESS WHEREOF, I have hereunto set my hand February 23, 2007.

Debora Ann Kreidler, Official Court Reporter
CSR No. 754