Official Report of Proceedings
Before the Idaho Water Resources Board

HEARING OF THE IDAHO WATER RESOURCE BOARD
ON STATE WATER PLAN POLICY 32

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

January 30, 1985, 2:00 p.m.

Burley, Idaho

Before Board Members:
GENE GRAY, Chairman
DON KRAMER
JIM SHAWVER
DAVE RYDALCH
WAYNE HAAS

Transcribed by
Debora Ann Kreidler
CSR No. 754
Idaho Water Resources Board 1/30/1985

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over the changes as are indicated in the paper.
After that, we will take the public testimony.
We'll close the public testimony. Then we'll open
it up for some brief questions and answers if you
have something on your mind that might be
bothering you.
So if you look at pages 2 and pages 3,
you'll find proposed draft changes of Policy 32.
Going on to pages 4, 5, 6 and 7 is the proposed
legislative package. Now, that particular section
is devoted to what our legislators are now working
on in Boise. Policy 32 plays a very important
role in the development of that legislative
package. And it's very important to us that we
hear what you have to say.

Now, if you look at the right-hand side on
page 7, you'll see some actions that must be taken
by May 15th of 1985. And I'll just kind of read
down through those with you. Number one, the
"State Water Plan is to be amended." And that's
the purpose that we are in front of you today. We
want to hear your comments and things that you
think we should do, revise, change, delete,
whatever, of the proposed Policy 32.

No. 2, "the legislative package is to
be passed by May 15th." No. 3, "appropriate
actions by the PUC or the legislature called for
in the agreement must be taken." No. 4, "the
appropriate order by the Federal Energy Regulatory
Commission acceptable to the parties to the
agreement is to be issued." "The Idaho PUC must
dismiss the 1977 petition by the Idaho
ratepayers." No. 6, "if required, the Oregon PUC
must also approve the entire package." No. 2nd --
No. 7, "enactment by the legislature of
subordination language as set forth in 7A and 7B,"
which you find from pages 4 through pages 7.

So with that -- let's see, I better
introduce everybody. We've got Don Kramer, board
member from Castleford. Don farm's over there.
Dave Rydalch is from the St. Anthony area. He's a
farmer, and also a member of the Committee 9. On
my left is Jim Shawver. Jim's a farmer from the
Eden, Idaho area. And Wayne Haas on end of the
table.

Frank Sherman will be -- from the Department
of Water Rights Resources will be discussing the
32 revisions. And we have a director of the
Department of Water Resources with us today.

Kenneth A. Dunn.
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<td>1 Frank?</td>
<td>1 because the Idaho code sections refer to the proposed revisions do not exist. They do exist in the form of the legislative package that the negotiators put together, and are asking the legislature to pass.</td>
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<td>2 MR. SHERMAN: Thank you, Mr. Director.</td>
<td>3 Because these waters that are being held in trust once belonged to Idaho Power, they are not the unappropriated water from the State. Therefore, the State can put special criteria on anyone who wishes to use those waters. And that's what at one time was called, quote, interest criteria. It's hopefully going to be referred to as Idaho Code Section 42-203C. It's what's in the agreement.</td>
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<td>3 It gets a little bit complicated. There's an existing State Water Plan. There's the proposed revisions to one of the policies of the plan. And there's the agreement itself. I'd like to go through the proposed revision very quickly with you.</td>
<td>4 This is where the discussion about the family farm (unintelligible) hydropower, that kind of thing. Those are criteria for the State to let someone else take this water that Idaho Power claims for their own use. The Board acknowledges that this, perhaps, is best established (unintelligible). Should be part of Idaho code, just the requirements for a person who applies for unappropriated waters are in the Idaho Code.</td>
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<td>5 The existing Water Plan deals with water allocations in the Snake River Basin. It has to be changed for two reasons. Quite clearly, the agreement specifies changes to the State Water Plan that negotiators felt were necessary. But there's another reason. And that is when the 15 Idaho Supreme Court ruled that Idaho Power Company, in an unsubordinated right to water at Swan Falls Dam, it made those allocations wrong, because they were based on the idea that the State protects Idaho policy water rights as low as they wanted. But the whole plan stays around a flow of 3300 CFS. And that's what we gauged for Swan Falls Dam.</td>
<td>6 Now, the compromise and negotiations, whatever, specified that, as part of the tradeoffs between the State and Idaho Power Company, that whatever, specified that, as part of the tradeoffs between the State and Idaho Power Company, that</td>
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1. Idaho Power. They can certainly use it as long as it's available to them. But they agree not to protest if the State wants other people to use that water providing they meet the laws in the State of Idaho, including the new criteria.

2. Policy 32B, "domestic, commercial, municipal and industrial." The existing Water Plan when it made its allegations for specific uses in the basin set aside -- at that time we were talking in terms of acre feet, but it converts to about 144 CFS in water on average flow for municipal and industrial uses.

3. The proposed revision keeping the CFS designation as negotiators reached -- were used in reaching their common laws, we plan, or we suggest or we suggest at 150 cubic feet per second of water be set aside for domestic, commercial, municipal and industrial uses. You note we're including domestic as part of this. It's not too painful an inclusion, because a person who drinks water, his waste products generally don't leave the basin. So each treatment plant puts it back in the river or out on the land. The water budget for a human, basically, what he sweats is lost to the Snake River Basin ground water system and the river system. The rest of it is bad. So the inclusion of domestic doesn't really amount to much.

4. If you want to get a feel for how much water is going to be set aside out of this water, right now in the basin we divert approximately 400 CFS in average. Going to set aside 150 CFS. You'll note that this policy very specifically says 150 CFS of consumptive use. Now, that 400 CFS that gets diverted, that part that's used to water people's lawns, keep the golf course green, some of that, most of that water probably is consumed.

5. But the water that's used for cooling purposes, wash water, that water gets back in the system in a real consumptive use, very close management approach.

6. You need to know how much of the water anybody is diverting is actually consumptively used and lost to the system. So if you take 150 CFS consumptive use, that's pretty close to what's probably being consumptively used today by domestic, municipal, commercial and industrial use.

7. "Policy 32C, Agriculture. It is the policy of Idaho that appropriated water held in trust by the State pursuant to Policy 32A, less the amount of water set aside to be domestic, commercial, municipal and industrial use, shall be available for agricultural purposes."

8. Problem there, of course, is that a new agriculture use has to meet these new criteria the legislature's going to establish if they're going to get that water the State is holding in lieu of Idaho Power plan.

9. Policy 32D, Hydropower. It acknowledges that hydro -- use of water for generation of electricity is beneficial use. That's already law in the State of Idaho. What they do here, though, is say, "and that depletion of flows below the minimum average daily flow set forth in Policy 32 is not in public interest."

10. So what they're doing is part of the tradeoffs here is saying that we'll recognize that 3900 and 5600 are necessary. And it's in the public interest that that water is available to Idaho Power for power storage. We're taking some of the water away from them, but we're guaranteeing them water hopefully in perpetuity, saying it's not in public interest to know what (unintelligible) the minimum flow is.

11. Now, the existing Water Plan will take the role that the rate -- if the legislature passes the (unintelligible) bill, (unintelligible) below that. So they get something new, and the State gets some of the water.

12. Policy 32E, Navigation. This is basically the same language that's in the existing Water Plan. And it says that, with these minimum flows, the State feels there's enough water in the river at all times to satisfy recreational interests and those commercial motives (unintelligible).

13. Agriculture Policy 32F. This again is a repeat of the language that's already in the State Water Plan. It does testify, however, that if a trout farmer or agriculturist wishes to process his product, that's a commercial or manufacturing type (unintelligible). Waters for that purposes should be accounted for in DCMI withdrawal allocation. And then says that the minimum flows established by the plan should supply water to the trout farming industry. That's because the water in the river below Milner Dam, at least in the low-flow periods of the year, is frequently mostly (unintelligible) Mountain Springs. Many of the fish cultures in the state (unintelligible).

If we're going to have 3900 going past where somebody may dump into the river (unintelligible) is a beneficial use of water.

The person has -- waste waters are so bad you can't meet the federal and state requirements, you shouldn't be dumping into the river. You should change what you're doing. There are laws to make this happen. We shouldn't take our good water and mix it with bad water (unintelligible). This policy is basically already in the existing Water Plan.

Policy 321, New Storage. This policy is a direct outcome of the agreement. Negotiators spelled it out in the agreement and asked the Board to address the problem to include this language or very similar language in the State Water Plan. The Swan Policy really has two policies in it. See with the first one -- which may be easier to explain, but it may not be easier to picture it.

The first policy is that before new storage is developed in the basin above Murphy Gage, a determination should be made that we're making maximum use of the existing facilities in the system. It's hard to accept that in an area of the state where we can't meet water claims for water in the river at this stage and we haven't for Idaho policy 8400 claim (unintelligible) that on October 1st, the water master chose 12,000 CFS or something along those lines over Milner Dam. And it goes on down the river.

It would be more beneficial to the State if that water were used rather than just dumped in the irrigation system. So the negotiators asked the Board and to the Board of Director to examine this problem. In fact, put the burden on the director to make determination as to whether maximum use is being made of the system. There are today unappropriated waters in the (unintelligible). I think it would be very hard for the director to say we need a new dam when there are nonappropriated waters in the system.

If you were asked today to approve the preparation of that water and then someone came in and ask for new construction, you might have a bit of problem reaching a decision. The things that the negotiators want the Board to look at are really legal institutional barriers to the use of this water which sits in the reservoir during irrigation season, then is dumped. There are a lot of barriers, a lot of legal barriers, some...
There are several barriers at the State level. A person can have a full natural flow right and full storage water right for the same piece of ground. But a person can’t sell off his water if it would be a dissension in use. Your water right entitles you to put so much water in so much ground for agricultural purposes, for example. If you have more water than that, you can’t sell it to another person that’s going to consume it. Many potential sales get caught in this trap. It would require changing the State law.

The same thing sort of applies to all the rules and regulations for the water bank on Kutalis (phonetic). Person doesn’t put his water to use where it’s supposed to go once in five years, he can lose his water right.

There are plenty of reasons why this water sits in there year after year and it gets dumped. City of Pocatello, for example, has a water right to be used in emergency situations, which the only way they could use would be to throw (unintelligible) in the river tell the water master (unintelligible) try and catch it when it goes by. They’ll never using that water.

November 1st, March 31st, should be coupled with provisions that mitigate and impact such depletions we have on the generation of hydropower.

Mitigate, very specifically identified in the fine as lessening the impact. It doesn’t mean that if you’re going to take so many, someone wants to take so many, there could be water around for storage. He has to give Idaho Power a dollar value for that. It means he has to lessen the impact.

The rules and regulations for how it’s going to be calculated will only be in place if the agreement ever gets through. It’s going to be a complicated procedure. Quite honestly, each diversion project will probably be evaluated within the basin. You’ve got to calculate the mitigation. You have to know the details and the specifics of when the water’s coming out and when it’s coming back in, that kind of thing.

The last Policy 32J, Storage Water for Management Purposes. This is a policy that’s not specifically called for in the agreement. When some of the things the agreement calls for makes this a record as a policy. As I said earlier,
Mr. Chairman, (unintelligible).

THE CHAIRMAN: Thank you, Mr. Sherman.

We'll start the formal public hearing.

process. And the chair would first call Dr. Brockway.

Thank you. State your name, address and telephone number. It would be most appreciated, Dr. Brockway.

DR. BROCKWAY: Chuck Brockway. I'm with the University of Idaho at Kimberly Research Station.

And the telephone number is 423-4691.

Am I the only one signed up, Mr. Chairman, to speak?

THE CHAIRMAN: No, sir. We have one more.

DR. BROCKWAY: A whole bunch of them. Good.

Then I won't take the whole period.

THE CHAIRMAN: But if you would like to take the full hour --

DR. BROCKWAY: I would like to address some of the things that concern me regarding implementation of the proposed Policy 32. One of them deals with the 32B for DCMI allocations. It seems like, and maybe it's inevitable, that whenever a policy's changed, or new statutes adopted, it places additional burdens on the State agencies for regulation and/or administration.

This one seems to do that in that if we are allocating or proposing to allocate 150 CFS of consumptively used water, which could translate into anywhere from 150 to a thousand CFS of diverted water, depending on the percentage of the diversion which is deemed to be consumptively used.

The determination for all of the various DCMI uses of what is actually consumptively used is difficult, technically. I'm not sure that we have the kind of data to allow the director to make those kind of determinations, at least currently. There could be some problems with that kind of an evaluation of what is consumptively used for the DCMI uses. Maybe -- maybe the director feels differently about that, but I could see some problems that might arise there.

Another concern that I had was with 321. And that was addressed by Frank. And that is the determination by the director of whether the upstream storage is currently on-line. We are making the maximum possible use of the existing storage. There has to be some criteria defined for what is meant by maximum possible use.
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<td>1. That -- to me, that's another term like reasonable</td>
<td>1. some liability under all cases for maintaining</td>
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<td>2. pumping level that has yet to be defined.</td>
<td>2. that minimum flow of 3900, because they have this</td>
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<td>3. And technically, it's going to be difficult,</td>
<td>3. pot, I'm not sure we need -- we want to do that</td>
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<td>4. again, to evaluate whether you are talking about</td>
<td>4. within the agency.</td>
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<td>5. optimal use to meet certain objectives, or some</td>
<td>5. That involves some legal implications, I</td>
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<td>6. other criteria for maximum possible use. It might</td>
<td>6. think, that ought to be evaluated by the staff to</td>
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<td>7. be well to put some of those criteria in the</td>
<td>7. see if the State would be incurring some kind of</td>
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<td>8. policy rather than leave it entirely up to the Board and to the</td>
<td>8. responsibilities or obligations that we don't want to</td>
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<td>9. director.</td>
<td>9. have.</td>
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<td>10. Another thing on Policy 321 that seems a</td>
<td>10. I think that's all, Mr. Chairman, that I</td>
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<td>11. difficult one to get over, and that's the</td>
<td>11. have specifically on Policy 32. I understand</td>
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<td>12. mitigation aspect of wintertime storage between</td>
<td>12. there will be an opportunity to at least ask</td>
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<td>13. Milner and Murphy, and determination by the Board</td>
<td>13. questions on some of the other aspects of the</td>
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<td>14. of what is reasonable mitigation to decrease the</td>
<td>14. agreement.</td>
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<td>15. impact on power rights within the Snake River.</td>
<td>15. THE CHAIRMAN: Thank you, Dr. Brockway. In</td>
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<td>16. If I'm reading the write-up under 321,</td>
<td>16. case we have some questions for board members,</td>
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<td>17. provision 2, it states that &quot;there are no current</td>
<td>17. would you stand for them, please?</td>
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<td>18. proposals for new storage projects that would</td>
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<td>19. divert Snake River water between the Milner and</td>
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<td>20. Murphy gaging stations. I don't think that's</td>
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<td>21. true. I think there are proposals that have been</td>
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<td>22. on the books for 10 years that contemplate</td>
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<td>23. wintertime storage on the Bruneau Desert by</td>
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<td>24. pumping from the Snake River between Milner and</td>
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<td>25. Murphy. So it may be that whoever wrote that</td>
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<td>3. intent here is really evaluate how the water bank</td>
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<td>4. and those provisions can be made more flexible to</td>
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<td>5. get better use of the storage facilities that we</td>
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<td>6. have on-line, and to help evaluate the needs for</td>
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<td>7. new storage in the system. That should have been</td>
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<td>8. done a long time ago. And perhaps now this could</td>
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<td>9. be the impetus to do it.</td>
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<td>11. management purposes, I'm not sure that's a good</td>
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<td>12. deal from this standpoint. One of the rationale</td>
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<td>13. is to allow the State, then, to mitigate a mistake</td>
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<td>14. in management, perhaps. If we make a mistake and</td>
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<td>15. that flow goes below 3900, we just reach in the</td>
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<td>16. sugar bowl and make it up. That would give the</td>
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<td>17. director some flexibility. It could also induce</td>
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<td>18. the director to be a little lax in management in</td>
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<td>19. that he wouldn't have a strict line to adhere to</td>
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<td>20. if he had someplace or some way to bail him out.</td>
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<td>21. The other problem is where are you going to</td>
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<td>22. get the money to buy the storage? Are you going</td>
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<td>23. to take that out of the adjudication fund?</td>
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<td>24. Storage is not inexpensive. And whether the State</td>
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<td>25. needs to get into that, and to assume, perhaps.</td>
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Tucker and Associates, Boise, Idaho, (208) 345-3704  
www.ctucker.net
MR. NYERMAN: May we get the money for
the research to get these answers the same place
we can get the money to buy it over in
(Dr. Brockway, unintelligible).
DR. BROCKWAY: That could be. I'd vote for
that.
MR. NYERMAN: If you have some thoughts or
something on 32B that you might write down for us
between now and the 22nd day of February, we'll
accept your testimony until that day, would you
please get them to us? We'd certainly appreciate
it.
DR. BROCKWAY: I'll do it.
MR. NYERMAN: Thank you very much.
THE CHAIRMAN: Chair would call Elmer
McDaniels, please.

M. McDaniels, manager,
A & B Irrigation District, Box 675 in Rupert,
Idaho. Phone number is 436-3152.
We have some concerns about some -- well,
much of the areas, really. Maximum use of storage
we feel should be more defined. And are you going
to make those assumptions and those regulations on
water years that we've had in the last year or
two, or are you going to go back to '77 and the
early '30's when we had dry years. And I guess
what I'm trying to say is people have short
memories. Let's don't sell the rest of the farm.
The other thing that I want to just touch
on, and I'm not known for long statements, in your
deliberations of the minimum stream flows, I would
like to be sure that you tie this in to the rest
of the package that is in the legislative process.
Don't get yourselves in the box of increasing
minimum stream flow, and the rest of it goes down
the tube, and then you've got to go through the
loops of more things to get them back where they
were. Let's not sell the rest of the farm.
And I think as far as I'm concerned, Idaho
Power got the big end of the stick. Let's not
give them the rest of it. That's two main things.
I wanted to touch on.
THE CHAIRMAN: Thank you, Mr. McDaniels.
Is there any questions, Mr. Kramer?
MR. KRAMER: No.
THE CHAIRMAN: Mr. Rydalch?
MR. RYDALCH: No.
THE CHAIRMAN: Mr. Shawver?
MR. SHAWVER: No.
THE CHAIRMAN: Okay. Thank you.
Is there anyone else who at this time would
like to testify?
Okay. We'll close the official testimony.
And we will open it up for questions and answers.
Who's first?
Dr. Brockway.
DR. BROCKWAY: I have a question regarding
what Exhibit 3 -- and that deals with the part of
the agreement that would require the allocation of
monies for hydrologic and economic studies. The
number in there is $200,000, I think, at least
that's published.
Is that firm? Or are we talking about a few
more dollars than that?
UNIDENTIFIED VOICE: Well, within my
perspective, we're talking about a lot more

dollars. Now, in yours, it may be a few more
dollars. Total number, what I have, is a half
million instead of 200,000. In the budget that
was submitted to Dave Raths, it calls for a half a
million dollars for those studies, to begin the
studies. What that number comes out to be, we
don't know. That is put together subsequent to
that exhibit.
(Whereupon, Tape 1 concludes and Tape 2
begins.)
THE CHAIRMAN: Other questions for us?
Yes, sir.
UNIDENTIFIED VOICE: With regard to
adjudication, does the Water Board have any affect
on -- or will they take a stand on how the money
is to be appropriated based on communication?
UNIDENTIFIED VOICE: What was that?
UNIDENTIFIED VOICE: Will you have any
effect on it? Let me ask you that.
UNIDENTIFIED VOICE: We hope that what will
happen is the input that we receive from these
public hearings will have an effect on the total
overall package. And we haven't heard too much
about the adjudication as far as the monetary
input is concerned. What we have heard to this
1 point is, so far, everyone's pretty much in favor
of the adjudication idea.
3 Does that answer your question?
4 THE CHAIRMAN: Yes.
5 UNIDENTIFIED VOICE: Another question.
6 Suppose during the summer, the flow falls -- the
7 flow at Murphy Gage falls below 3900. What
8 happens?
9 MR. SHERMAN: Two things could happen. One,
10 Idaho Power Company could ask the State for
11 (unintelligible) water guaranteed to them,
12 providing no new users have been placed, nothing
13 would happen if the flow stayed below 3900. Idaho
14 Power's agreed to protest only new applicants for
15 water in place after the signing of the agreement.
16 If people are in place and the director shut off,
17 Idaho Power would not go after continued shut-offs
18 of people who were in place before the agreement
19 was signed.
20 So, yes, conceivably, the flow will be at
21 some time below 3900. The Department can only
22 take action under the agreement against the new
23 users.
24 THE CHAIRMAN: You might, Mr. Sherman, if
25 you would point out what the recorded historic low
flows have been winter and summer.
2 MR. SHERMAN: You're asking me
3 (unintelligible) it gives me an embarrassing
4 question, because I don't know what historic low
5 in the wintertime is. I think it's around 6100,
6 some number fairly high, well above 56. In fact,
7 the compromised values would sort of fall between
8 historic low and what was what the
9 (unintelligible) was.
10 UNIDENTIFIED VOICE: What was that figure,
11 please?
12 MR. SHERMAN: 6100 CFS.
13 UNIDENTIFIED VOICE: How many?
14 MR. SHERMAN: 61.
15 UNIDENTIFIED VOICE: 61.
16 MR. SHERMAN: The summertime flow has been
17 as low as 4500 CFS on a daily average. And that's
18 Grecway Catholic (phonetic). No one trying to do
19 it on Isa Canyon's (phonetic) flows. Anything
20 modern day, you have to wait -- you have a good
21 day before you take any action. So daily average
22 is the number we're talking about here in Boise.
23 UNIDENTIFIED VOICE: Over what period of
24 time do you take that average?
25 MR. SHERMAN: One year. On any one day, the
1 average is less -- it's never been less than 4100.
2 And the plan would say any one day it should never
3 be less than 3900.
4 UNIDENTIFIED VOICE: Does that go back to
5 1977?
6 MR. SHERMAN: No.
7 UNIDENTIFIED VOICE: (Unintelligible) it
8 goes back past it.
9 MR. SHERMAN: Well, yeah.
10 UNIDENTIFIED VOICE: It didn't occur in '77.
11 MR. SHERMAN: It didn't occur in '77, no.
12 UNIDENTIFIED VOICE: What was the minimum
13 flow back in '77?
14 MR. SHERMAN: I honestly don't know. And I
15 didn't even bring that information with me on this
16 trip. I have to admit.
17 UNIDENTIFIED VOICE: But you say it was
18 above 39?
19 MR. SHERMAN: Well, I'll say it was above 45
20 in '77.
21 UNIDENTIFIED VOICE: In '77?
22 MR. SHERMAN: Yes.
23 UNIDENTIFIED VOICE: Oh.
24 MR. SHERMAN: '77 wasn't -- in terms of
25 operation of the river, it wasn't that big a year.
1 The lowest it's ever been at Murphy on a one-day
2 average 4500.
3 (Unintelligible).
4 MR. SHERMAN: That's fine.
5 It could really happen. Two different
6 times. It happened in 1981, I think, and it
7 happened back, if you run a computer model back of
8 current development, back in the sixties. I
9 think it happened once in the sixties on the
10 computer model.
11 UNIDENTIFIED VOICE: It happened in '61 or
12 '62.
13 MR. SHERMAN: And I'm not saying that's
14 relation (unintelligible) that water's always
15 going to be there. Because, as a ground water
16 man, I always point out that if that flow is
17 Thousand Springs discharge, what's happened at
18 Thousand Springs in the last thirty years. It is
19 sure that Thousand Springs has trickled down in
20 thirty years. But there should be -- because
21 we've never been below 4500, there should be some
22 room to play.
23 UNIDENTIFIED VOICE: What if it does go way
24 below?
25 MR. SHERMAN: If it ever goes way below.
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1 anybody who's got a water right that's younger
2 than the signing of the agreement --
3 UNIDENTIFIED VOICE: That includes the wells
4 up through there!
5 MR. SHERMAN: Absolutely. That's why I'd
6 like to see us have the storage water that Dr.
7 Brockway suggested may be a problem, because
8 shutting off the wells up through here doesn't do
9 us a bit of good in terms of our flows. But
10 according to State law, the director would have to
11 shut off everybody junior, whether they were
12 ground water pump or water systems.
13 THE CHAIRMAN: Dr. Brockway.
14 DR. BROCKWAY: I'd just like to comment on
15 that.
16 Isn't it true that he would have to shut
17 them off only if he could show they were impeding,
18 the current deficiency?
19 MR. SHERMAN: Yes.
20 DR. BROCKWAY: Which would be obviously hard
21 to do in the aquifer.
22 MR. SHERMAN: Right. Yeah, but I think --
23 well, I don't think it would. I couldn't show the
24 individual ones, but I think I could show a trend
25 in decline in spring. And that's -- you show that

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1 absent the ability to shut the well off right now
2 and have an effect, I'd have to say you can never
3 (unintelligible). Because, that could then might
4 reoccur itself.
5 By law, you've got to protect 3900. That's
6 why I'm not proving right now is I have to protect
7 the power company water bill. So in order to make
8 sure 3900 doesn't violate, I've got the manifest
9 system to make sure it doesn't. So instead of
10 saying we've got 600 CFS to appropriate, I'm
11 really going to have to be substantially less than
12 that to make dang sure we go farther than 3900.
13 That's why we've said if you've got some
14 storage, you can make the decision of how much
15 you're going to. And then from that point on
16 the user's going to (unintelligible).
17 UNIDENTIFIED VOICE: Scary, isn't it?
18 MR. SHERMAN: Yeah.
19 THE CHAIRMAN: Mr. Shaver.
20 MR. SHAWVER: Joe, you do understand, when
21 you said wells, that's only the wells since last
22 October that would be drilled, not anything prior
23 to October.
24 JOE: What if this Thousand Springs drops
25 real bad. Where are they going to get the water

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1 to fill that 3900?
2 MR. SHERMAN: If the person has screwed up
3 on his water before the agreement was signed, we
4 can't touch him under the terms of the agreement.
5 JOE: Wells included.
6 MR. SHERMAN: Wells included.
7 MR. KRAMER: Mr. Chairman.
8 THE CHAIRMAN: Mr. Kramer.
9 MR. KRAMER: Let's talk a little bit about
10 what Dr. Brockway mentioned about the off-stream
11 storage that has been on the books for 10 years
12 between Milner and Murphy. A little pilgrimage
13 project, I think, was filed on years ago. And
14 they have a plan to pump water out of the Murphy
15 area to an off-stream storage. And right here it
16 says "no water will be pumped out."
17 Where does that project stand? And do they
18 have any more right than a person that is fighting
19 today on that particular water? Can you answer
20 that?
21 UNIDENTIFIED VOICE: 30, 40 grams is 48. I
22 have to apologize. There's a mistake on the
23 photo stat. We wrote that and they were looked at.
24 And there's a pretty good reason why we didn't --
25 what we struggled with that is the negotiators who

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1 put the compromise agreement together couldn't
2 agree on how to calculate communication.
3 The Board approached the negotiators with
4 some proposal items (unintelligible), and we
5 couldn't agree to that. So we said, please, delay
6 this problem. We have to see the whole thing go
down too slowly. Calculation mitigation for an
7 off-stream wintertime storage in one relatively
8 small (unintelligible). So we haven't really done
9 a good job on that one, but there's some reasons
10 for that.
11 In terms of little pilgrimage, where they
12 stand, they stand, as far as I can tell, with any
13 new appropriator of water, because they have not
14 put water to beneficial use before signing the
15 agreement.
16 UNIDENTIFIED VOICE: Mr. Chairman.
17 THE CHAIRMAN: Mr. Kramer, so what you're
18 saying is that particular filing and right will
19 have to be mitigated between them and the Idaho
20 Power water use the block of water that they're
21 going to pull out?
22 MR. KRAMER: With the director of the Board
23 or Board acting as referee, I would
24 (unintelligible). With the director in the rain,
and the water (unintelligible) judge
(unintelligible).
UNIDENTIFIED VOICE: Dr. Brockway, I have a
question. We've heard some concern on Policy 32
item, referring to storage. We also see a trend
in the State of Idaho -- and let's just take
agriculture and set it aside, because it is the
backbone of Southern Idaho, and it needs to be
protected, obviously. But do we have changing
demands on water. And with that, no doubt, we'll
have changing water laws within the State of
Idaho.

Do you see a problem with new storage when
it comes to future recreational uses, fishery
uses, wildlife uses, etcetera? 'Cause, we are
hearing a lot of comments in that direction as
we're coming (unintelligible).

DR. BROCKWAY: Well, there will be problems
with new storage. Those problems won't be
problems to everybody. They won't be problems to
the irrigating people. But they'll be problems to
fish, recreation and wildlife. I think we need to
take another good hard look at new storage in the
upper Snake system. I think there's potential for
additional storage that can be managed and revised

better management of the total resource.
It will be more difficult now to implement
any new storage because of the competing concerns
that we didn't have 30 years ago and 40 years ago.
But I really believe that we need to look harder
at the new storage as a procedure for helping us
optimize the use of the total water resource.
And that needs to be coupled with aquifer
storage and regulations and management as well.
We can't just manage the surface waters of the
State, or the surface waters of the Snake River
and neglect the aquifer systems that are
intimately related with the river systems. And we
need to do that. And we need to have, in my
opinion, better data and better tools to do it
with.

That's why I asked the question about the
hydrologic studies and economic studies funding
that, to me, are the backbone of providing the
ability for the department to make evaluations of
how beneficial this new storage, how can you
better manage the aquifer river system and not
global all 3900. There are some things you can
do, management-wise, with the river to regulate it
and to keep the 3900 there. And new storage would
help.

Because I commented on the State buying
storage and using it as a slush fund, that doesn't
mean I'm not saying that it shouldn't be for
storage value. I think there should. My comment
is I don't think that the State ought to be in the
position of owning storage as a buffer for many.

THE CHAIRMAN: Mr. Dunn?
MR. DUNN: I'd like to, on Chuck's comment,
one of the things we're looking at in terms of
owning new storages or owning some allocated
storage, wherever it is, if the Board, the
State own that, and they're able to pay for that
to lease to the power company for power sampling,
and then we get to the point where development has
occurred and we are in jeopardy of violating the
3900, and have to make revisions.

One of the thoughts is that the new
appropriators would end up paying (unintelligible)
fee for that water use. If you're going to
use water that will cause the 3900 to get in
trouble, the people that are doing that ought to
pay for storage, because nobody's -- even you
nobody knows exactly what happens when you take
water out of that aquifer. You have to make some
assumptions. You make the assumptions that the
guys appropriating it know there are some
(unintelligible), and knows the risk of their
being wrong and you've got to pay in the future.
That's some of the things we're looking at
in terms of (unintelligible).

UNIDENTIFIED VOICE: Well, if you got into
the storage business, I would say that's an
equitable way to (unintelligible), if you got into
the business.

I don't know. It certainly is not
traditional for the State of Idaho. That doesn't
mean it shouldn't be looked at pretty close.

UNIDENTIFIED VOICE: The problem is that
nobody can go out and buy a couple acre feet at a
time. You've got to go out and buy a chunk of the
reservoir and just, you know, get it. So
somebody's got to be the catalyst, be it the State
or whoever. Somebody's got to buy a chunk so
people can buy bits and pieces of it.

UNIDENTIFIED VOICE: What happens, though?
Can we get down -- you know, we're right in the
brink there, 3900, and whoops, we made a mistake.
And for three years or five years, whatever, the
projected flow is only 3700. So that means you've
got to draw on that storage. And maybe if we
overshot too far, you've got to draw on it
perpetually. It no longer becomes a buffer. It
becomes hard-wired in the system.
Would you manage any different if you had
that?
UNIDENTIFIED VOICE: Certainly. You end up
cutting people off. I mean, the water supply is a
finite number. You make the best estimate you
can. You can't say, well, we can't make a
decision if we don't have all the data. That's
not the way life operates. You take the best data
you have. You make the best decision you can.
And if you're wrong, you're wrong. You have to go
back and correct it. Then, you know, given all
the variables, the chances of being exactly right
are nil.
It's like in Congress, people make a
projection, it's probably going to be wrong, but
you may be close. And that's about all you can do
in that hope we get close enough that we've got
some kind of commission to compensate for it. You
know, without any storage, don't look for 600.
We'll have some lesser number, I can guarantee it.
We don't dare get to exactly 600 based on our
estimates of depletion. We need to stretch it out
or you shorten it up.
UNIDENTIFIED VOICE: Well, Mr. Dunn,
wouldn't it be in the public interest to have
other upstream storages. Dr. Brockway talks about
covering mismanagement of water. But it would
appear to me that if somehow, through the process,
we actually did mismanage water, that's not going
to be done on purpose. It may be because of the
state of the art at the time that caused it. But
wouldn't it be in public interest to have other
new storages just to cover those contingencies?
MR. KRAMER: Mr. Chairman?
THE CHAIRMAN: Mr. Kramer.
MR. KRAMER: Jeff, don't you think that it
might be easier to build new storage once you get
everyone involved? Problem with the storages we
have built up until now, it's been agriculture and
power. And they're the only two that have put the
bucks in to build the storage. Any storage that's
going to be built from now on, I think everybody
will participate in. Therefore, there will be
more people that owns the water. And maybe there
will be a bigger buffer.
We hear as we go up and down here, we want
more water for fish, more water for recreation.
It's high time that those people start putting up
the bucks if we're going to build storage, because
those are the people that are doing the yelling.
So we may have an easier time to build storage
than we've had up until now. It's going to be
tough for agriculture to build anymore storage.
DR. BROCKWAY: Mr. Chairman?
THE CHAIRMAN: Dr. Brockway.
DR. BROCKWAY: Well, I think you'll find
that certainly the demands are greater from a
wider segment of the populous than they ever have
been. I think you'll also find, if you look at
the record, that those who cry the loudest have
the least money.
I don't call it that will continue forever,
but that's historically the way it's been. And so
you may have a lot of people crying, but not
willing to really share the load like the
agriculture has in the past. I don't know.
UNIDENTIFIED VOICE: All right. That could
be. Of course, the farmers that going broke's
doing a lot of crying.
Gene?
THE CHAIRMAN: Yes, Mr. Haas.

MR. HAAS: Chuck, on your comment about
major consumptive use on -- for DCM, I agree with
you on all of the difficulties. It seems to me
that the only alternative to that is to have
an allocation. Is that what you were suggesting,
that there not be an allocation, specific
allocation made to DCM?
DR. BROCKWAY: Well --
MR. HAAS: Seems to me you have two choices.
Either you allocate or you don't. If you
allocate, you have to measure something or try
your best.
Wore you suggesting no allocation?
DR. BROCKWAY: I don't think I'm saying you
shouldn't have some sort of allocation. I don't
know how you came up with the 150 CPS.
MR. HAAS: It was in part of the agreement
package, negotiations --
UNIDENTIFIED VOICE: That means some lawyers
put it together.
DR. BROCKWAY: Well, how that worked doesn't
matter. Certainly the State could have gotten the
policy of a certain amount of designated
consumptive use required for DCM. My problem is,
through regulation, the determination of -- a guy
comes in with an application for a water right or a permit and he says I want to divert 4 CFS for my fish processing group subsequently, What guidelines would we use to determine what part of that 150 CFS consumptively allocated that guy's going to use.

MR. HAAS: Well, I'm not disagreeing at all, Chuck. And I guess we would use the best guess we had.

DR. BROCKWAY: Whatever you've got, yeah.

UNIDENTIFIED VOICE: Whatever the university provided.

MR. HAAS: Well, I think our choice, you know, either -- forgetting whether it's 150 or the number. I think that's not important. But you're saying that -- I'm not sure what your testimony is there, I guess. I agree with the difficulty, but doesn't seem to me like you have a choice. Either you make an allocation, or you don't. If you make an allocation, then you have to some way try to measure something.

The alternative to make an allocation is to say there will be no allocation for any types of uses. And whoever gets there first, fine. And when the director thinks the total is close enough to -- where we're getting the 3900, we shut it off.

MR. HAAS: Okay.

DR. BROCKWAY: Let me pose a question, then, in opposition to the allocation procedure.

And I come in and I need 2 CFS and you say, no, you can only have one CFS, because we've determined that that's all you need. But low and behold, after you add up all the figures, that comes out to 151 CFS. And so you deny the permit.

On what basis can you really make that stick as compared with an irrigator or with some other user?

In the defense, to set up an arbitrary allocation for specific uses when everybody in the state's supposed to have equal opportunity for diversion and use -- beneficial use of water.

THE CHAIRMAN: Mr. Haas, do you have anything else?

MR. HAAS: I'm not going to answer that when the director's here to handle it.

THE CHAIRMAN: Mr. Dunn.
Mr. Chairman?

MR. SHERMAN: It's very likely. Your next board meeting is not scheduled until early March. If you can't read the legislation by then, maybe you shouldn't be on the Board. Maybe the legislation will be so deadlocked you can reach a decision that way too.

The other thing that happens, of course, is with passing of the addition of last November, the Water Board no longer has the real final say in the State Water Plan. They can adopt 3900, and the legislature isn't making any moves to implement the agreement, the legislature can change it back to 3300 like that.

So people might ask the question why is the Board going to all the trouble coming out for public hearings, and we hold information hearings and all the rest. That's because the Board still is responsible for forming the policy with the State. Legislation now can review and change the Water Plan. The Board even -- feels even more strongly that they need public input to the Water Plan. So it's less likely that the legislature will change the plan.

But if they adopt the 39/56 and the agreement's not going anywhere, I feel fairly confident the legislature would change that back to 33. And, in fact, the Board themselves could change it back, but it would be faster if the legislature would do it. They do it in one day.

The Board would probably hold some more public hearings.

THE CHAIRMAN: Thank you, Frank.

UNIDENTIFIED VOICE: Mr. Chairman?

THE CHAIRMAN: Yes, sir.

UNIDENTIFIED VOICE: There's a lot said about everybody giving all they can and that. But there's nothing said about beneficial use and the proof of beneficial use and the efficient user. I wonder why that's not been addressed.

UNIDENTIFIED VOICE: I think I'll try that explanation to Emor's concerns here that we're saying weFrank?

THE CHAIRMAN: Yes, Mr. Shcrl.

MR. SHERL: I'd like Frank to help me explain something to Elmor's concerns here that we're saying we couldn't do it. We're saying we may not do it. But it seems they're not written in blood.

As that gets flushed out, it may be possible that we can see changes in the law which really -- as I said earlier, as an example, the person who -- well, this would be a different example. But if a person is now diverting five acre -- feet per acre and he figured out he only needs three, those two extra feet are really part of his water right there. He can't sell them to somebody else and put it on new ground, because that's expanding the number of acres being irrigated with that same use of water.

And that's one of the laws that -- it sounds easy to change, but it really isn't. That's sort of a guaranty about how things work in the system.

THE CHAIRMAN: (to Frank)

MR. SHERMAN: I think I'll try that explanation.

THE CHAIRMAN: (to Frank)

MR. SHERMAN: I think I'll try that explanation.

THE CHAIRMAN: Thank you, Frank.

UNIDENTIFIED VOICE: Mr. Chairman?

THE CHAIRMAN: Thank you, Frank.

UNIDENTIFIED VOICE: Mr. Chairman?

THE CHAIRMAN: Thank you, Frank.

UNIDENTIFIED VOICE: Mr. Chairman?

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UNIDENTIFIED VOICE: Mr. Chairman?

THE CHAIRMAN: Thank you, Frank.
I do not understand that.

And that's the question. And I'll try and answer it. And maybe the director can scream at me if I don't satisfy you.

In terms of generating power with existing water, you're going to a nonconsumptive use of water. If a ditch company, an irrigation district, whatever, were to run that water through the generator rather than putting it on the lands, that is not what their original water right was for.

And they'd be jeopardizing that water right if they start at Lewiston and include the Clear Water and the Salmon Rivers, you're doing a systems adjudication.

I think the hope would be that we can negotiate with the federal government and Indian tribes, and perhaps start the adjudication at Swan Falls, a more realistic point in terms of the water rights controversy from the south. If that were to happen, Payette people would be out of the picture.

Why should they pay if they're included?

Historically, adjudications have been done at the general expense of the State. The Payette adjudication was paid with the general funds. The water users in that area contributed no money towards adjudication, per se.

This Swan Falls agreement, the Snake River Basin adjudication is so large and so complicated, that it shouldn't be paid out of State general funds unless we stretched it out over 40 or 50 years instead of the 10 directly (unintelligible) optimistically estimated.

They're going to get the benefit of the adjudication. They're going to be incorporated into the whole basin-wide picture. Their rights are going to be quantified along with everyone else in the basin. In terms of what they would have to do except help support the adjudication in their part of the state, they won't have to do anything. That Court decree will be incorporated into the new Court decree. They get a free adjudication. They don't want to pay now to help solve a major regional picture of the problem.

UNIDENTIFIED VOICE: And they won't. They won't being paying. Payette, with the (unintelligible) and the two general adjudications (unintelligible). And the statutes that have been...
UNIDENTIFIED VOICE: It's the general adjudications.

UNIDENTIFIED VOICE: Everything else has been done in a sweetheart deal between the Butch and the water users. There are only two general adjudications that the State's had.

UNIDENTIFIED VOICE: And refers to general adjudication.

UNIDENTIFIED VOICE: Yes.

THE CHAIRMAN: Dr. Brockway.

DR. BROCKWAY: I have a question, I guess, for the director. And that addresses this gentleman's concern about expansion of the water right, new lands. Is there provisions in the agreement for grandfathering those individuals who have expanded their right prior to the agreements, albeit illegally?

MR. DUNN: There is a House Bill 71 which is being considered which would provide a — where an expansion occurred under a valid water right that was unadjudicated, that that expansion could be taken care of. And it would be with the priority date as of the expansion.

So somebody didn't file the claims as they should, and they go on ahead and expand. It says

"expansion of use after acquisition of the valid unadjudicated water right in violation of the mandatory permit requirements."

Remember the ground water, if you did that after 1963, by law, you had to have a permit. So we're saying if it was done in 1963 — in expansion in violation of the manager permit requirements, it shall be presumed to be bound and to have created a water right with a priority date as of the completion of the expansion in the absence of injuries or other appropriate" —

So House Bill 71 takes care — tries to take care of anyway, that expansion that occurred in violation of mandatory permit system by giving it a date of priority as of expansion. It also talks about the expansion where the water right had been previously adjudicated, where the Court, in, like, the Rexburg decree, and various other of the 30 or 40 small decrees that have gone on in the system, where the Court at one time adjudicated it. And in the passage of time, the irrigated acres may have shrunk or grown or there are all kinds of different contractions of the amount of land that's actually irrigated with water.

And we say that once the adjudication is
started, that the lands that were presently being
irrigated would be considered to have the same
priority as the original adjudication. We won't
worry about when they came in. That will, I
think, take care of the question of whether a
canal company has a water rights of -- some arc
1890, and some are 1892, and some are 1896. And
you got a whole array of priority dates. If the
original decree said 1890, we'll look at how much
irrigating's done, and that's what the right would
be. Right or wrong, that's what the law would
say.

THE CHAIRMAN: Joe, did you have a question?

JOE: Yeah. I was wondering what ever
happened to that here a few years ago that's
talking about recharging the aquifer. I never
heard more about it. Doesn't surprise me. I
just heard about it once.

THE CHAIRMAN: Dr. Brockway --

JOE: I was kind of hopes they'd fill it up,
so they'd come out and move that bump.

DR. BROCKWAY: It's more involved
(unintelligible) about the technique
(unintelligible) because he's been working with
those people. In fact, that spring, the first

pilot test was done out in the Jerome area there.
And data was collected on how fast water would go
into the ground, where it wanted to travel to.
Some water quality data was going because there
are lots of barriers that seem to be
(unintelligible) to this kind of operation. But
we anticipate water will be going in the ground
out there next year. But -- this year, now, I'm
sorry. We're in '85. This year again,
In terms of why we see more artificial
recharge in the State and in some parts
(unintelligible), you have to realize that once
that water goes in the ground, the person who's
putting it there loses control over it. You can
spend a lot of money putting water in the ground
and not get any of it back, except from local
reduction (unintelligible) perhaps.

Now, a project that's been going on is
funded to a large degree by the trout farm
industry. And they're concerned about the water
that comes out of Fountain Springs. They know
that water gets in the ground; at least no less is
going to come out (unintelligible). So they are
willing to support in that sense.

There's some real barriers in terms of water
quality in that the only kind of places you can
cut big volumes of water down in the ground
basically where you dump (unintelligible) salt. A
lot of salt does (unintelligible) filtering and
purifying. The river (unintelligible).
The people down in Oakley are certainly
looking very hard at artificial recharge. They're
in the fortunate situation -- or unfortunate
situation they've drawn water levels so down, you
can hardly put the pump in there.

UNIDENTIFIED VOICE: (Unintelligible) last
spring.

UNIDENTIFIED VOICE: They're fortunate in
the sense they have probably pretty good cone and
depression underneath their property. If they can
get it in there, it's not going to get out,
because they're drawing water in all the richest
parts. So they -- it takes a real unusual set of
circumstances before it becomes economically
attractive.

THE CHAIRMAN: Mr. Dunn.

MR. DUNN: I'd like to ask Chuck Brockway
for his comments on the natural or at least
semi-natural recharge that's occurring on
Egin Bench (phonetic), and what he thinks the

cut would be on the State plan if that were
halted, in other words, if that converts to
sprinkler irrigation as opposed to precedent.

THE CHAIRMAN: Dr. Brockway?

DR. BROCKWAY: Well, the Egin Bench.
(Whereupon, Tape 2 concludes.)
AUTHENTICATION

This is to certify that the attached
transcription of audio recording of proceedings
before the Idaho Water Resource Board, in the
matter of State Water Plan Policy 32, were held as
herein appears, and that this is the original
transcript thereof.

IN WITNESS WHEREOF, I have hereunto set
my hand November 15, 2007.

Debora Ann Kreidler, Court Reporter
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Tucker and Associates, Boise, Idaho, (208) 345-3704
www.etucker.net
REPORTER'S CERTIFICATE

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

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 19th of November, 2007.

Debora Kreidler, Court Reporter Pro Tempore
CSR No. 274