HEARING OF THE IDAHO WATER RESOURCE BOARD
ON STATE Water Plan POLICY 32

TRANSCRIPT OF AUDIOTAPED PROCEEDINGS

January 30, 1985, 7:00 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

2. Before the Idaho Water Resources Board

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1. If everyone has a copy of the Currents, you
might take a look at page 2 and page 3. Page 2
and page 3 deals with the revision of Policy 32 of
the Water Plan. Page 4 through 7 deal with the
legislative package, which I'm sure you've all
heard about. Policy 32 is kind of the kingpin
that goes into the implementation of the
legislative package. And it's your public input
that we're seeking. When we put the final touches
of Policy 32, we will then give it to the
legislature. The legislature will have final
review on anything that you had to say through
your word to us.

2. If you look at page 7 on the right-hand
side, you'll see the things that are supposed to
occur by May 15th for implementation under the
entire package. Let's just kind of read down
through those. No. 1 is the State Water Plan is
to be amended. That's why we're before you
tonight is to get your input for the amending of
the Policy 32 of the State Water Plan.

3. Secondly, the legislative package is to be
passed. Thirdly, the appropriate action by the
PUC commission or legislature, as called for in
the agreement -- that is from page 4 to page 7 --
is to be taken. Four, there should be an
appropriate order from the Federal Energy
Regulatory Commission which is acceptable to all
parties. Five, the Idaho PUC must dismiss the
1977 lawsuit petitioned by the Idaho ratepayers.
And if applicable, the Oregon PUC must also
approve the package. And lastly, enactment of the
legislature of the subordination language is set
forth in Exhibits 7-A and 7-B. And those are also
found on page 4 through page 7 of the Currents.

4. What we'll do tonight is we'll have our
State hydrologist or our Department hydrologist --
introduce yourself, Frank. Mr. Sherman will give
you an overview of Policy 32. The suggested
changes that we're bringing for you. After that,
we will have public input. We'll then close the
formal meetings with the public input and have a
question and answer session.

5. Mr. Sherman introduce yourself.

6. MR. SHERMAN: I'm a geologist.

7. THE CHAIRMAN: Ooh, geologist.

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1. ** * * * * *

2. THE CHAIRMAN: This is a recording the State
Water Plan hearings on January 30th at Burley,
7:00 p.m.

3. Good evening ladies and gentlemen. My name
is Gene Gray. I'm chairman of the Idaho Water
Resource Board, and would like to welcome all you
newcomers and all you recaps. Good to see
everybody here.

4. With me tonight is Don Kramer, board member.

5. Don is a farmer in the Castleford area. Dave
Rydalch. Dave is a farmer in the St. Anthony
area, also member of Committee 9, And Jim Shawver
from Eden. Jim farms over in Eden. We have Wayne
Haas from the Department of Water Resources. We
have a director of the Department of Water
Resources, Ken Dunn, and Frank Sherman,
hydrologist for the Department of Water Resources.

6. And we're here tonight to talk to you about
revisions of Policy 32 of the Idaho State Water
Plan. The function of the Idaho Water Resource
Board is develop water policy and keep the Idaho
State Water Plan up to date. So what we'll be
talking to you about tonight is revisions to the
existing Policy 32, which is the State Water Plan.
The text you have on pages 2 and 3 of the current newsletter contains everything that will be part of the policies directed towards the Snake River Basin. Some of those policies are really the same things that already appear in the existing State Water Plan. I'll skim through all of them very quickly and tell you which ones are changes and why or how they're changed, and some of it will just say it's existing language, basically.

What we try to do is take everything that was in the old policy, highlight it where it's really a policy decision or statement by the Board. Now, why are we changing the Policy 32 at this time? Clearly because the agreement that the governor and Idaho Power Company entered into called for changes. They specified certain changes and why they wanted the Board to make. If the Board can't make those changes in good faith, it is conceivable that the agreement would fall through.

One other reason that I like to cite for changing the Water Plan now even though it will be up for readoption in a few years is that the old -- the policy as it exists today allocates water to specific uses in the basin. Those allocations were based on the assumption that the river flow could go down to 3300 CFS. That existing State Water Plan for the Snake River Basin says the minimum flow at the Murphy Gage below Swan Falls shall be 3300 CFS year-round. That went in because at that time it's all we could take Idaho Power's Water right down as low as we wanted to, that it was subordinated. The Idaho Supreme Court has said it's not subordinated. There's a question about how far we could take it down under this current plan.

The very first thing, it's really the management criteria for the whole basin, is that the policy of the State shall be at the flow at the Murphy Gage during the irrigation season shall be 3900 CFS. During the nonirrigation season, it should be 5600 CFS. This is a change both in the fact that we're raising the flow, raising the minimum flow established for that point, and we're splitting it between the irrigation and nonirrigation season.

Certainly not precedent setting in that most water rights hit a time limit associated with them. Because there's so much water going past the Murphy Gage in the wintertime, particularly spring, it would spell that the difference between the historic minimum flow of 4500 CFS and whatever the Water Plan and the State were trying to negotiate about. The difference between that and, say, 33 or 39 is the difference between the wintertime flows that sometimes are in the tens of thousands of CFS, 12,000, 15,000, 17,000 CFS. You could afford to raise it a little more in the wintertime. So it's length of season on the minimum flow as well as raise it.

You'll note that, in this particular policy, it talks about zero flow of Milner Dam. That's in the current Water Plan, continuation of that. Talks about a flow of Weiser of 4750 CFS. That's in the current Water Plan. We're also adding or proposed to add flows for Johnson's Bar and Lime Point. These are two places in the river below the Hells Canyon complex. These flows are actually specified (unintelligible) license that Idaho Power has to operate in Hells Canyon complex.

In the Water Plan today, it says "these flows are recognized as a valuable resource," and actually lists that part of the license. Let me repeat it again, saying the Board thinks that's a good idea. The intent here is to make it actually State policy that those flows should be maintained. What it does is guarantees those flows in case the license -- the operational license at Hells Canyon complex will never be changed.

That's basically Policy 32 as it states here. And that's the criteria that says how you're going to manage the rest of the river.

Now the policy 32A, Water Held in Trust by the State. It's a new concept. And the language is very brief here for several reasons, particularly reciting things that the legislature is supposed to do. You've got an existing plan. You've got proposed revisions. We've got things that the legislature is supposed to accomplish by (unintelligible).

This a policy of Idaho that water held in trust by the State pursuant to Idaho code 42-203B -- and that's the piece of code that reflects compromise agreement in Idaho Power giving up part of their water right.

They reallocated some of the uses in accordance with the criteria established by Idaho...
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1. code 42-203A. Those are the existing criteria the
2. Department uses for annual water right, beneficial
3. use, nonspeculative, and 42-203C.
4. The water that's being held in trust by the
5. State is that water that Idaho Power had claimed
6. and they are now, through the agreement,
7. relinquishing use of. They're giving that water
8. to the State. So that water is being held in
9. trust. We always use the Swan Falls example
10. because that's where the lawsuit started. That's
11. where the minimum flows are critical. And at Swan
12. Falls, Idaho Power claimed 8400 CFS. They
13. actually claimed more than that, but they only
14. proved beneficial use of 8400 CFS.
15. The Water Plan called for 3300 CFS.
16. Historic daily low had been 4500 CFS. In the
17. compromise agreement, the State agreed to set the
18. flow of 3900 CFS in the summertime. Idaho Power
19. would not protest any existing use as long as
20. 3900 CFS were going through that gage during the
21. summertime period. The difference between
22. whatever Idaho Power claimed and this minimum flow
23. is being held by the State to be used for other
24. purposes.
25. Now, because that water had been

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1. appropriated, Supreme Court recognized the valid
2. claims on at least some portion of Idaho Power.
3. The State does not have to give it out as they
4. would the unappropriated water in the State. We
5. all know that the right of the citizen to
6. appropriate the unappropriated water shall never
7. be denied. This water is water that had already
8. been appropriated, and it's being given back to
9. the State so the State can reallocate it. Idaho
10. Power can use it until somebody else starts to use
11. it. Idaho Power won't protest anybody else using
12. that water, as long as it meets existing State
13. law.
14. Part of the deal was they're going to put
15. some extra hoops to go through before you can get
16. that water to use. And those are shown in the
17. back of the agreement. I forget which exhibit
18. number it is. I think it's called public interest
19. at one time. It's basically a checkoff list that
20. the Department or someone has to go through and
21. say this is good for the economy of the state;
22. this impacts the hydropower base good or bad;
23. family farm could be impacted. Once they meet the
24. existing criteria and these new proposed criteria,
25. then the director can allocate that water or

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1. adverse the water right.
2. Policy 32B, Domestic, Commercial, Municipal
3. and Industrial. The Water Plan today talks about
4. allocating the volume of water for municipal and
5. industrial uses. Negotiators have put the
6. agreement together to find the minimum CFS. If
7. you convert the allocation that's in the Water
8. Plan from municipal and industrial, it comes out
to about 144 CFS. By including domestic users, it
9. was felt appropriate for us to raise that to a
10. nice even number of 150 CFS.
11. Now, any and all domestic users to the DCMI,
wed tend to refer to it, is not particularly
12. important in that domestic users, in terms of
13. consumption, really consume a very small part of
14. the water. If you take today there are about 400
15. CFS diversion on an average day for domestic,
16. commercial, municipal and industrial uses in the
17. basin.
18. You stop and think about where the water is
19. actually used up, it comes down greatly it gets
20. used up for watering lawns in the community. Most
21. of the industries in the basin not particularly
22. water-consomptive. (Unintelligible) the water
23. goes back to the river or it goes to the seepage

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1. pond, soaks into the ground, recharges the
2. groundwater. We're not consuming of much of that
3. water. So 150 seems like a reasonable number to
4. set aside out of this block with new water the
5. State has to allocate the new uses.
6. The other thing that's important to remember
7. about this one is that State Water Plan does get
8. reviewed and updated every five years. If this
9. number's a bad guess, and certainly
10. (unintelligible), it can be changed in the future.
11. Policy 32C, Agriculture. Policy of the
12. State, according to this, would be that we set
13. aside this water we have now to manage, we set
14. aside some for domestic, commercial, municipal and
15. industrial. You want the rest to go to
16. agriculture. But because this is water that's
17. already been claimed by Idaho Power and being
18. relinquished to the State, it will have to go
19. through the same set of criteria, the family farm
20. tradition, effect of hydropower, the benefit of
21. State economics (unintelligible).
22. In the old -- in the existing Water Plan,
23. the plan specifies that it would like to see so
24. much minimum new agriculture development. That
25. of course, was based on driving the river down to

3 (Pages 9 to 12)

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policy of Idaho shall be that water sufficient for commercial and recreation navigation is provided by the minimum flows in the Snake River. The commercial allegation they're referring to here is basically that this takes place below the Hells Canyon complex by people running through Hells Canyon itself. If 3300 was a target value, by raising it to 39, the Board feels there's going to be enough water (unintelligible) for recreation purposes.

Aquaculture. This really contains two policies. One, first part of it, policy of Idaho shall be that water necessary to process aquaculture products be taken from the Hells Block of water. Person wants to wash, prepare fish for market or whatever, that's a commercial venture. Someone wants to apply for a water right for that purpose, that should come under the domestic, commercial, municipal and industrial use.

Second part is a little more complicated, but it's actually in the existing Water Plan. It states that the minimum flows provided at the Murphy Gaging Station should provide an adequate water supply for aquaculture. However, it is recognized that it may be necessary to construct different diversion facilities than presently exist.

A good portion of trout farmers in the state rely on spring flows in the Hagerman reach, the Thousand Springs area. With a zero flow set for Milner Dam during the summertime, conceivably, most of the water in the river by the time it gets to Murphy Gage is going to be water that came out of Thousand Springs. We have to keep 3900 going down there for the Murphy Gage. It's going to be a fair block of water coming out of Thousand Springs because (unintelligible) gage.

However, a water right does not necessarily guarantee a citizen the need for diversion. It allows you to use the water of the State at that location. Conceivably, if the spring flows continue to increase as they have for the past 30 years, a trout farmer, for example, may have to change the diversion structure (unintelligible) springs. In worst case situation, might have to dig a well. His priority date, his water right would be unchanged, but his means of diversion might have to change. As I say, it appears at this time fairly unlikely because of the requirement of the 3900 CFS minimum flow.
I think the negotiators and the Board both feel that by raising the minimum flow in the Water Plan, we are helping those values out. They would -- Board would still not claim that these are optimum values. They're better than what the Water Plan is now. And they will protect those kind of resources to some degree.

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Policy 32G, fish, wildlife and recreation.

It is he policy of the State that the minimum flows are sufficient and necessary to meet the minimum requirements for aquatic life and wildlife and to provide water for recreation in the Snake River below Milner Dam.

When the State Water Plan was originally adopted in 1976, that, of course, was a real sticking point about the minimum flow at Murphy Gage. It balanced future developmental uses versus fishery and wildlife situation. At the time, in '76, the Board finally gets compromised on 3300, and acknowledged that that is not the optimum flow for fish and wildlife, even for recreational purposes.

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Policy 32H, Water Quality and Pollution.

Policy 32I, New Storage. There are two policies incorporated in what's basically one policy here. It's fairly complicated. There are required by the agreement. The water Board has already received conflicting testimony about this particular policy.

Let's go with the very first part of it. It is the policy of Idaho that maximum use must be made of the existing storage facilities in the basin. New storage upstream from the Murphy Gage should only be approved after it is determined that insofar as possible, maximum use of existing storage is being made. The intent is that that determination would be made by the Director of the Department of Water Resources.

Why have this policy in here? I think the real reason is we're claiming to be and are, in fact -- our position in the Snake River Basin where we can't meet Idaho Power's water right. It's a legitimate claim that's been on the bill for years and we can't meet it. If we're so water-short, we should be making the best use we can out of the water that's in the system.

Now, we all know that, in most years, October 1st, the flow over Milner Dam increases dramatically. This happened to be a good rain year, so we went up to 12,000 CFS past Milner Dam on October 1st. That's because the water master has to make space for next year's runoff.

There are waters up there that sit in the reservoirs that could be used, in theory, but are not. Why aren't they? There are really some legal and social barriers to using that water.

The negotiators asked the Board to put this in the Water Plan, and asked the Board to accept the responsibility to ask the questions. Is there a way we can make better use of our water. I think under the laws and rules and regulations that are in place today, the director would find that we can't do much else.

There are some unallocated waters (unintelligible) that are available. But once that water's taken up and it's (unintelligible), there really isn't much more water in the system that's not allocated. Then why is it the excess most years? It's because a man who has water behind the federal reservoir cannot sell that water as property. State has a water bank and rules and regulations to move water around. We can sell it and buy it. Committee 9 uses it to some degree in the eastern part of the basin. But a person who can't sell his water for a profit (unintelligible).

There's another reason a person cannot sell or lease water from behind a federal reservoir for more than one year at a time. If he wanted to go in and start some kind of new kind of development, be it agriculture industry or whatever, you could only be assured of the water supply in a year-to-year basis, you wouldn't put much money in. I don't think any banks would back you either. So even though there's a lot of water up.
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1 there that sits there sometimes for year after
2 year after year, remember, one can have a full
3 flow right and a full stored right for the same
4 piece of ground.
5 An irrigator could not meet that water
6 one year in 10, one year in 20. The City of
7 Pocatello has water in storage for an emergency
8 situation, provided an increase in population of
9 Pocatello. Right now if it calls for that water,
10 they'd have to have pumps in the river to try to
11 catch it as it went by because there's physical
12 way for them to get that water. But they own
13 water that they've never called.
14 There are barriers that the State puts up to
15 more efficient use of this water. You don't use
16 your water once in five years, you could lose here
17 in Idaho. If you have water, and beneficial use
18 is irrigation on a piece of property, you can't
19 sell that water to another consumptive user
20 because that's (unintelligible). Only way you
21 could sell that water if it would be to agree to the
22 amount of water you use for proven beneficial use.
23 Serves as a big social barrier. These
24 one-year restrictions tend to protect the
25 agricultural interests in the area because no

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1 operation system schedule. It's key to Idaho
2 Power. Plenty of demand for power in the west
3 coast in the wintertime because there's so much
4 winter heating going on in that area. Nights like
5 tonight are going to put a load on Idaho Power for
6 electric heating in Idaho. And they can, during
7 the wintertime, of course, fill Brownlee
8 Reservoir, the only storage reservoir that's
9 encumbered. So they wanted to assure themselves a
10 continued flow during nonirrigation season.
11 The policy reads, "approval of new storage
12 projects that would divert water from the main
13 stem of the Snake River between Milner and Murphy
14 during the period November 1 to March 31st should
15 be coupled with provisions that mitigate and
16 impact such depictions would have on the
17 generation of hydropower."
18 The text that tries to explain it can't go
19 very far for several reasons. Principally, the
20 negotiators who put the agreement together
21 couldn't agree on the mitigation question. They
22 did agree that the word mitigation should be used.
23 Mitigation being lessening the adverse impact, not
24 necessarily compensating Idaho Power dollar for
25 dollar or volume of water for volume of water.

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1 commercial guy can come in and buy that water on
2 one-year, one-year basis. And if you want to
3 protect the agriculture economy and the basis of
4 this portion of State, and maybe that's a good
5 idea. So that's a social barrier to the more
6 efficient use of the water.
7 What the Board has agreed to do is try and
8 ask your reclamation, congressional delegation.
9 Some of the keys to these people, can these laws
10 be changed so that on October 1st, a big rush of
11 water goes into the mouth of the river, we're
12 going to shut it off sometime. People that wanted
13 water and couldn't get it.
14 As I said earlier, if the director had to
15 make a determination right or not right away, he'd
16 probably have to say we're doing the best we can
17 under the existing rules and regulation of the
18 laws. If we can't change those laws, then there's
19 still going to be a determination, I'm sure.
20 The second part of this proposal policy --
21 proposed policy -- I turned it around -- applies
22 only to the reach of river below Milner Dam and
23 above the Murphy Gage. As part of the trading off,
24 back and forth between the State and Idaho Power.
25 Idaho Power wanted to protect their winter

6 (Pages 21 to 24)

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We can always be on the safe side, we think. If we can manage this whole system down to average daily flow and river rights. An cupid the Department must look at the aquifer and how many new applications, how much water in the river is unallocated. So the Board has to look at the river flow and river rights. And he has to look at the aquifer and how many new applications, how much (unintelligible) do you draw from up there. You try and balance those so we tend to be even part way liberal and start selling it off in small chunks.

Now, if we wait until we get to that kind of situation here in Idaho and this unallocated water is already gone, it's going to be very hard for the individual groundwater pumper to come in and acquire some kind of insurance to cover up for his negligent act in spring flows. The State has a big block of water, the State could lease it off, sell it off in small chunks.

So the Board is recommending that through some mechanism, the State acquire some water so that we don't have to be ultraconservative in issuing water rights.
of time in the groundlaying of it. It's been going on longer than I've been involved in the farming. So it's something that's been coming a long time.

If anybody who's worried about their water right hasn't heard about it or doesn't understand it, they better get with it right away, 'cause, like it's been presented to me, all you have to do is go through some simple procedures and get yourself down as being known that you have your water amount of acres water coming to you, and that you have a water right for however many acres primary. Maybe you've bought some since then that are at an -- any time up until the adjudication takes place. If it's all made clear and on paper by March 1st of '85 or October of '85 or whenever it takes place, those people shouldn't have anything to worry about. And that seems to me to have something to do with Swan Falls the way it falls in with the groundwater and new permits. Everybody, if they have taken care of it, it seems like that should go on. Just from my own use, I'm for it. And what I learned a couple weeks ago in Boise is it's not that involvement. It's a small price for those who do have to come up with the amount of money, which seems to have been determined long before I was on the scene. As far as the Swan Falls, the number 4500 or 4600 acre feet -- is that right -- that continues to come up as being the lowest amount of water ever recorded, am I right?

UNIDENTIFIED VOICE: 4600 CFS.

MR. McMANUS: CFS, okay. And that's 50, 60,
70 years, basically. At 3900 feet, you get 600 feet or better of leeway. Or anybody who doesn't look for conserving their water, from here on out, water's getting squeezed pretty tight. That's just going to be another thing to give everybody the initiative to work towards conserving that water. So even though we have 600 feet of barrier between 3900 and 4500, some people don't like that idea. I heard quite a bit of that in Boise. Everybody's opposed to going -- letting it come up in 3300 to 3900. That just, to me, seems like there's nothing the matter with the way it's been proposed. I know I could probably get into a pretty good battle with some local water users over that, but if it's gone on for this long and it's never gone below 4500, what's to worry about at 3900?

And like you say, there might, after the adjudication, be a few permits issued, a little here and a little there, and with all the things that you're looking at as far as extra water in storage, and if we can keep all our storage at a hundred percent -- brought that up earlier, you know, some of our water we've lost at Jackson is down a little bit. That's for service water use, but eventually, that's water that's in the whole upper Snake River area. So as long as all those waters are up 3900 feet, to me, seems like a good figure.

That's really all I wanted to state.

THE CHAIRMAN: Well, let's see if we have any questions from the Board.

MR. KRAMER: No.

MR. RYDALCH: No.

MR. SHAWVER: I don't have any.

THE CHAIRMAN: Thank you, Bill.

MR. McMANUS: Frank have anything? You kind of looked at me like maybe I had something I missed there. Okay.

THE CHAIRMAN: We'll get our testimony over and we'll get into some questions and answers here.

Is there anyone else who would like to testify at this time?

If not, we'll close the public testimony portion. And I'd like to -- you might make note that the Board will receive written testimony until February 22nd. And that can be sent to the Water Resource Board here at State House, Boise, Idaho 83720.

So we'll now open it up to questions.

Yes, sir.

UNIDENTIFIED VOICE: You may have answered this before we came, but what was the main reason for raising it from 33 to 39?

MR. SHERMAN: That's a long drawnout answer if you really start at the beginning. I guess that's the best way to do it.

As you know, the Supreme Court of Idaho said that Idaho Power Company had an unsubordinated right at Swan Falls. And they sent back to District Court the question of how much that water right amounted to. Idaho Power had claimed 8400 acre feet.
people would have -- many people would think Idaho Power could at least have won the amount of water they had that been receiving. (Unintelligible). So it was a compromise. And it was a 50/50 split compromise. But in order to stick with that, each side gave up something (unintelligible).

The other thing, besides starting the court case all over again, which could have been another five, ten years, the Department of Water Resources had declared a moratorium on issuing any permits in the basin above Swan Falls until this question was resolved because the Department was thrown in the same awkward situation Idaho Power was. If they had to go back and try and somehow find water for Idaho Power's claim of 8400 CFS, the Department (unintelligible) shut off (unintelligible). So the Department said, clearly, we can't be going around issuing new permits until this thing's solved. And if it took five or ten years, that was another five or ten years nobody in the basin could get a new water right.

(Whereupon, Tape 3 concludes and Tape 4 begins.)

THE CHAIRMAN: And the Board will take care of that if that --
The magic number is 1900. I guess the answer is whatever beneficial use you can prove you're covered.

MR. SHERMAN: Well, I was just going to ask about that adjudication and that day of October 24th; is that right?

MR. McMANUS: Yes, sir.

MR. McMANUS: The signing of the agreement.

The language in the agreement specifies that users who can prove beneficial use before October 25th, 1984 will be protected by the agreement and Idaho Power has agreed not to call the water from them.

The mechanics of adjudication are fairly straightforward. Part of the Water Resources goes to court, and the Court directs the Department to proceed with the adjudication. Department takes its records. And in either -- through the Court sends notices to either all people in the district or the basin or water rights in the basin or landowners in the basin. Not clear yet which of those mailing techniques or forms are used. But in theory, everybody in the basin who is or could be using water is contacted by the Department.

The Department has staff that goes around every little county courthouse and in other places, actually. And they have the water rights for that area with them. And they ask the

THE DIRECTOR: Sure.

MR. SHERMAN: I don't know if they're going to say, you know, well, that wasn't in use, because we'll have gone through the process of identifying all those, and yes, it has been. Those uses, then, would not be subjected to that 3900 CFS rule.

MR. McMANUS: That's a good point. 1900 is a magic number.

MR. SHERMAN: I guess the answer is whatever beneficial use you can prove you're covered.

UNIDENTIFIED VOICE: Mr. Chairman, that -- covering all those uses that are presently being made in an additional reason for the general adjudication of the Snake Basin, because all those users are identified and they're proven. And the power company and everybody else will have to live with all those uses. They can't come in and say, well, that wasn't in use, because we'll have gone through the process of identifying all those, and yes, it has been. Those uses, then, would not be subjected to that 3900 CFS rule.

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<td>1 landowner and water user to come in and talk to</td>
<td>1 any reasonable time, it's going to take more than</td>
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<td>2 them about their water right. The Department</td>
<td>2 one or two people.</td>
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<td>3 shows the individual what they have on record for</td>
<td>3 So proposed legislation would provide that</td>
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<td>4 Boise and in Twin Falls (unintelligible) about</td>
<td>4 those water users in the area being adjudicated</td>
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<td>5 your water right and your use of water.</td>
<td>5 would have to pay some fee to help fund the</td>
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<td>6 . The key things, of course, are you want land</td>
<td>6 adjudication. The other thing that's different</td>
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<td>7 irrigated, you want water you divert, when that</td>
<td>7 about the Snake Basin is that it's one of the</td>
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<td>8 diversion first took place, and when you proved</td>
<td>8 first steps the State is going to seriously take</td>
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<td>9 beneficial use of it. And then the farmer guy</td>
<td>9 in forcing the federal government to quantify</td>
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<tr>
<td>10 sits down and says, yeah, this looks -- agrees</td>
<td>10 those so-called reserve rights.</td>
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<td>11 with what we have. And if you're happy, we're</td>
<td>11 The Water Plan asks that the Federal</td>
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<td>12 happy, and this is how we're going to file with</td>
<td>12 government and Indian tribes quantify the amount</td>
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<td>13 the Court, providing you're not using twice as</td>
<td>13 of water they claim. (Unintelligible) in '76 even</td>
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<td>14 much water as you're legally entitled to or</td>
<td>14 provides that the Department of Water Resources</td>
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<td>15 something like that.</td>
<td>15 will provide technical assistance to the Indian</td>
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<td>16 The Department compiles all this information</td>
<td>16 tribes. Never been asked for. If I recall, they</td>
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<td>17 that's been checked with the individual people.</td>
<td>17 have been for the last two years trying to</td>
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<td>18 In some cases a field staff will actually go out</td>
<td>18 determined their own water needs. But the only</td>
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<td>19 and verify the amount of acreage their irrigating</td>
<td>19 way you can force them to participate in State</td>
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<td>20 (unintelligible), make sure the work is completed</td>
<td>20 adjudication in State Court is to do what's called</td>
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<td>21 and as accurate as can be. And then give it to</td>
<td>21 system adjudication, a general systems</td>
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<td>22 the Board and to the Court, and they are listed in</td>
<td>22 adjudication. The other thing that's different</td>
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<td>23 chronological order so that once the water</td>
<td>23</td>
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<td>24 master -- or if a water master were ever in place</td>
<td>24</td>
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<td>25 you'd know your shutoff as a junior user in the</td>
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<tr>
<td>1 area.</td>
<td>1 Federal government participate. Now, you realize</td>
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<td>2 Payette river system is just ending up in</td>
<td>2 that the federal government claims they have a</td>
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<td>3 adjudication. And there were 9,000 some water</td>
<td>3 reserved water right for all the national forests</td>
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<td>4 users in that system. And we're down now to about</td>
<td>4 in the basin (unintelligible) and Indian</td>
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<td>5 11 people who have not agreed or compromised with</td>
<td>5 reservation itself. Federal government claims</td>
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<td>6 the department about their water right. Anybody</td>
<td>6 they had a water claim. They have not yet told</td>
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<td>7 who objects to what the Board finds tells the</td>
<td>7 the State what it is for those lands. Priority in</td>
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<td>8 Court this is a bunch of nonsense, and I claim</td>
<td>8 that claim in general in all court cases has been</td>
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<td>9 something different. And it ends up being decided</td>
<td>9 settled as the date that land was withdrawn from</td>
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<td>10 by the Court. Like I said, we had 9,000. We're</td>
<td>10 the public domain. For a formal Indian</td>
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<td>11 down to some handful yet which are not satisfied.</td>
<td>11 reservation that's 1860's. That's a pretty good</td>
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<td>12 And that's what's theoretically going to</td>
<td>12 priority date.</td>
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<td>13 happen in the whole Snake basin. Things that are</td>
<td>13 What we've got to do now is find out how</td>
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<td>14 different from Snake basin from previous</td>
<td>14 much water they claim. We've never had to do</td>
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<td>15 adjudication the Department has done is, one,</td>
<td>15 that. (Unintelligible) river for the max on to</td>
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<td>16 adjudications have always been paid for out of the</td>
<td>16 the point that the Department would surely like to</td>
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<td>17 State general fund. But when we're talking about</td>
<td>17 see (unintelligible) access water we can call on</td>
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<td>18 doing something that's massive as the Snake Basin</td>
<td>18 when we make a mistake. We'd like to know how</td>
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<td>19 with an estimated cost of $28 million. State's</td>
<td>19 much water would fit in the Indian Swan. If we</td>
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<td>20 took (unintelligible). More the reason it takes</td>
<td>20 start at Lewiston as the proposed adjudication</td>
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<td>21 ten years to do an adjudication on a single small</td>
<td>21 does, we're including the Salmon and Clear Water</td>
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<td>22 river like the lowell (phonetic) is because the</td>
<td>22 and all the Snake range from where it basically</td>
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<td>23 general fund gives the Department enough money for</td>
<td>23 leaves the State. That, to us, is the system</td>
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<td>24 one or two people per year to work on the project.</td>
<td>24 water adjudication.</td>
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<td>25 We're going to get the whole Snake Basin done at</td>
<td>25 And we think the Feds have to participate in</td>
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1 our forum under those stipulations. Now, if
2 they'll agree to participate, and we can start at
3 Weiser, or we can start at Swan Falls itself, the
4 Murphy Gage, so much the better. I don't -- I can
5 agree with somebody who using the Salmon River
6 drainage, the Clear Water drainage, that the water
7 rights problems at Swan Falls Dam doesn't have
8 much to do with that. And why should we
9 participate? And why should we have to pay? If
10 we can get the Swan Falls Dam, fine.
11 But I think that the adjudication is going
12 to be really valuable. And if we're going to try
13 to manage the river down to some minuscule amount
14 of water, we have to know what the Feds want out
15 of that system, because they may put a claim in at
16 some later date. And it would be really nice if
17 we could resolve this in State Court rather than
18 Federal Court.
19 So that's why the adjudication, at least, is
20 proposed to start at Lewiston. Because it's so
21 big, that's why we really need help to pay for it.
22 3TH CHAIRMAN: Next question.
23 UNIDENTIFIED VOICE: I think we ought to
24 have a little more clarification on these
25 two words insubordination as subordinate between

1 Idaho Power and agriculture.
2 UNIDENTIFIED VOICE: Okay. I'll try. What
3 the present picture is -- what is it? Has there
4 been any consensus reached in that?
5 MR. SHERMAN: Okay. I don't think you can
6 get three different water lawyers that agree what
7 the word subordination means. I don't pretend to
8 give you a legal definition. But I will say that
9 the general population in Idaho assumes that
10 subordination means you can take away someone's
11 water right to another specified use and not
12 compensate him for it. That's the general
13 understanding of most people of what subordination
14 means.
15 Now, Idaho Power had subordinated the right
16 at Hells Canyon. They agreed that they would not
17 protest upstream development in agricultural,
18 municipal, whatever against the -- their water
19 right at Hells Canyon complex. And for 25 some
20 years, both Idaho Power and the State of Idaho
21 operated under the assumption that the
22 subordinated their right to own a structure
23 upstream. Now, Supreme Court said, no, they
24 didn't subordinated it. They only subordinated
25 their right at those specific dams in Hells

1 Canyon.
2 In part of the agreement, in trying it to
3 reach a compromise, the negotiators introduced the
4 word subordinator. I think it was a bad decision
5 on their part. But as lawyers, it just didn't
6 necessarily make good sense. So they introduced
7 this new term. And what the agreement, I think,
8 basically testifies -- let's start at Swan Falls,
9 first of all. It says that the 3900 and 5600 arc
10 going to be protected by the State Water Plan.
11 Therefore, Idaho Power's water right is not
12 subordinated below that level. That means that
13 Idaho Power will be assured those flows forever.
14 Now, negotiators introduced the term
15 subordinatable with anything Idaho Power claimed
16 above the agreed flows. And what that is intended
17 to mean is that the State holds this water in trust.
18 It's still Idaho Power's water. When the State
19 wants to give it to somebody else and subordinate
20 it, and that person has the right to that water,
21 no cost to him in terms of the fact it used to
22 belong to Idaho Power or no cost to the State in
23 terms of the fact it used to belong to Idaho
24 Power.
25 Now, in terms of Idaho Power's claim at

1 other structures up the river, at some of the
2 dams, their water rights were clearly
3 subordinated. No question in the State's mind,
4 and probably in the legal sense, that those dams,
5 they were not guaranteed their flow, and they
6 couldn't do much about it. But at a couple of the
7 other structures, they had nonsubordinated rights
8 still.
9 And the agreement says that as long as 3900
10 CFS goes past the gage at Murphy in the
11 summertime, Idaho Power won't complain about how
12 much water we're getting at any of the other
13 structures. So in essence, what it's done is
14 taken some unsubordinated rights instructions and
15 subordinated them.
16 Now, I know that didn't answer your
17 question. I can tell just by looking.
18 UNIDENTIFIED VOICE: As I understood it,
19 that was brought up because of the drought areas
20 or the drought years that might come along when
21 maybe all of us would have to give up a little
22 bit.
23 MR. SHERMAN: No.
24 UNIDENTIFIED VOICE: The argument, as I
25 heard it sometime ago, was that we had to
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<tr>
<td>I guarantee that 33 -- the figure 33 going over Swan</td>
<td>Federal government.</td>
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<td>Falls, if that's all there was in the river, that</td>
<td>MR. SHERMAN: Oh, you mean the reserve water</td>
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<td>would be delivered that way.</td>
<td>right claims?</td>
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<td></td>
<td>UNIDENTIFIED VOICE: ’Mm-hmm.</td>
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<td>MR. SHERMAN: No. That's an incom-- oh,</td>
<td>MR. SHERMAN: Oh, boy. Okay. That's a</td>
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<td>whoever was telling you that story was totally</td>
<td>complicated problem. And what part of the problem</td>
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<td>wrong. For example -- I'm trying to think of a</td>
<td>has been is that this has been decided in Federal</td>
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<td>good way to deal with it. I guess the best way to</td>
<td>Court. And Federal government has said that when</td>
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<td>deal with it is to say that the agreement clearly</td>
<td>we withdrew this land from the public domain, we</td>
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<td>specifies that Idaho Power will take no action</td>
<td>had some special use in mind for that land. And</td>
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<td>against anybody who has a water right older than</td>
<td>at that time we, therefore, assumed and claimed</td>
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<td>October 25th, 1984. If the flow goes below 3900,</td>
<td>that we had the water for (unintelligible).</td>
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<td>they will only come after the new people who come</td>
<td>Now, Indian tribes have been back and forth</td>
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<td>after them. I mean, junior's to the signing of the</td>
<td>in court a good many times. And the Federal</td>
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<td>agreement. Because, what the State is basically</td>
<td>Courts have ruled that when an Indian reservation</td>
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<td>doing is saying as of the signing of the</td>
<td>is withdrawn, waters sufficient to irrigate all of</td>
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<td>agreement, we will protect that flow of 3900.</td>
<td>these irrigable lands on their reservation taken</td>
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<td>It's not against people who are senior in time.</td>
<td>up at the same time. INEL is a good example.</td>
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<td>I think that was the same thing that was</td>
<td>That reservation was withdrawn to test nuclear</td>
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<td>true with the State Water Plan when it was</td>
<td>reactors. And maybe come in and keep showing they</td>
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<td>originally put in place. They said 3300 minimum</td>
<td>were testing nuclear reactors. I suppose they</td>
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<td>flow year-round. If it came to a water shutoff</td>
<td>have to have some kind of claim for water for that</td>
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<td>problem and we weren't meeting the 3300, the</td>
<td>purpose.</td>
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<td>priority date of the (unintelligible) flow would</td>
<td>They have refused to quantify those rights</td>
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<td>only have been '76. People who were in place with</td>
<td>unless they got called into the system's</td>
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<td>an older water right probably would have been</td>
<td>adjudication, general adjudication</td>
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<td></td>
<td>(unintelligible). And as I said, we've asked</td>
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<td></td>
<td>them, since the Water Plan was first put in place,</td>
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<td></td>
<td>and we've asked them through different forums, to</td>
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<td>quantify their water right for years and years and</td>
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<td>years. And I think this is one of the only the</td>
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<td>ways I can see it happening -- well,</td>
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<td>(unintelligible).</td>
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<td></td>
<td>For a long time it looked like they were</td>
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<td>never going to quantify. And we were going to try</td>
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<td>never quite, and manage the water in the State without knowing</td>
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<td>what they might take at some future date. This</td>
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<td>adjudication is one way to force them. It's the</td>
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<td>only way to force them into our State Court</td>
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<td>system. That's no guarantee we're going to like</td>
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<td>the results of the adjudication in terms of what</td>
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<td>they claim and get. But I think it's better that</td>
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<td>a State judge does it than a Federal judge.</td>
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<td>I think the threat is hanging over Idaho</td>
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<td>right now that the Indians, for example, of the</td>
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<td></td>
<td>forest service, because I know the</td>
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<td>(unintelligible) people look at theirs. I know</td>
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<td>that the forest service, at least in some of the</td>
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<td>forest areas, has looked at the amount of water</td>
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<td>that they actually need for management of the</td>
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13 (Pages 49 to 52)
14 (Pages 53 to 56)

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1.  to be taken of the water going out to the recharge area as well as from wells in here. It's a real concern then.
2.  You know what, anybody who wants to pay for irrigation artificial recharge will be involved in it. Certainly doesn't want to be liable if somebody gets sick drinking water down from the aquifer (unintelligible). It's expensive to get the water out there. You're not sure you're going to get all the benefits out of it. And you're liable for anything that's wrong.
3.  The only way we're going to see any big artificial recharge will probably be at the State or one of the major districts (unintelligible).
4.  And if you can't use existing facilities, you probably can't justify it. Certainly can't justify, well, you could go by a well for $2.50, and you're putting out at the water bank.
5.  Well, I think -- Swan Falls thing did nothing else but forced us to recognize we're running out of water. We've got to get more careful about how we use it. We better use it better if we can. I think it also says that things aren't going to get any better down the road. We may be entering into one of these climatic cycles. And the people at Mud Lake are going to get more and more water. And we may have lots of water available in the reservoir (unintelligible). That would be really nice in terms of what things are going to be like for a few years. I don't think we can count on that. We certainly can't count on it for the next 50 or 60 years. Sometime we're going to be water short. And sometime the water's worth more money than it should. Artificial recharge probably should get more consideration.
6.  UNIDENTIFIED VOICE: Just suggest another thought or idea. Who's paying the bill to recharge all of these oil reservoirs underground, aquifiers to -- with all this oil we're buying up and storing underground in the old basins of oil? The taxpayers is doing that, right? Taxpayers are doing that.
7.  MR. SHERMAN: Two different situations. In the so-called neighbor petroleum reserves, taxpayers are doing it. In some instances, it's conceivable that an oil company could be doing it. But I don't know of any case that's going on. The only ones that I have out are (unintelligible) that land service and put back in the ground so the Federal government is stockpiling these prices.
8.  UNIDENTIFIED VOICE: We've got enough -- we've almost got enough storage -- oil storage there to last us, what, 90 days? We buy in reserve. Now, what I'm saying, what I'm looking at is this. If that's being paid by the taxpayers, then the taxpayers could help recharge these aquifers.
9.  MR. SHERMAN: And that's a good point. You bring up two points. One, all this Federal money can only put 90 days worth of oil in there. It shows the problems with trying to recharge water also in terms of volumes of water.
10.  UNIDENTIFIED VOICE: Sure, there's problems there, but --
11.  MR. SHERMAN: But the other point is legitimate. I think -- I think at some point in the future the State may want to take general fund monies for artificial recharge of the water. Certainly, they won't do it today. They won't fund (unintelligible) resources today for artificial recharge.
12.  UNIDENTIFIED VOICE: Question on the Oakley project. Now, if that's going down, and which we situation in Idaho, or I guess you can't say any specific state, because they get in trouble when they pump dollars into one state and all the other states want their share of pic. The overall aquifer was structured (unintelligible) in Texas is the one that's been going down in terms of hundreds of feet over the last ten years or so. And there are farmers in Texas going out of business. Farmers in other areas along that whole geologic formation are concerned among others. The federal government's appropriated I think it's $5 million to take a look at artificial recharge feasible. I would certainly hope that the Water Board and the legislature can do a better job of planning than we're in that situation in the near future. I could see (unintelligible) when water gets more expensive and its benefits are recognized more and more, the State may well take it out of general funds, either contribute towards these artificial recharge projects or do them. And I know the Water Board has given grants (unintelligible).
13.  THE CHAIRMAN: Yes, sir.
14.  UNIDENTIFIED VOICE: Question on the Oakley project. Now, if that's going down, and which we
| 1 | all know it is constantly, what -- is there any   | 1 | close together, cones and depressions overlap.   |
| 2 | cutoff? Is there any protection for anyone above | 2 | And the effect in the overlap area is to add the  |
| 3 | the other? What's going to happen if that keeps  | 3 | two together and it goes down like gangbusters.  |
| 4 | going down where those wells go dry? Because,   | 4 | So the ideal way to develop any aquifer is        |
| 5 | used to be, when we drilled those wells, there   | 5 | to have what's called well spacing regulations to  |
| 6 | was a date on there. And they took the log of it  | 6 | keep the wells spread out as far apart as you can  |
| 7 | so forth. Is there anything now to protect the   | 7 | (unintelligible) aquifer. It's the little I       |
| 8 | early drillers, or so to speak?                 | 8 | know -- and I've not worked directly in the area   |
| 9 | MR. SHERMAN: Yes, there is. It's not a very     | 9 | except when I first came to work for the          |
| 10 | nice thing. It's very likely to happen. The     | 10 | Department, head of omissions and observation, I   |
| 11 | Department has met with the people down there   | 11 | worked on it a couple of times. The geologist is   |
| 12 | said, basically, we had a recent US geological  | 12 | fairly new to the problem. Don't see too many     |
| 13 | survey study, our own records indicate the      | 13 | geological things controlling it within the area   |
| 14 | water levels continuing to decline. We'll give  | 14 | that's been identified. I think one well is as     |
| 15 | you more grace period. But if you can't get this | 15 | bad as another. The problem is that we get them   |
| 16 | artificial recharge, some kind of a water       | 16 | too close together. And you really see the       |
| 17 | imporation in place in the next couple years,   | 17 | dramatic decline because they interfere with one   |
| 18 | then problem's going to (unintelligible) and     | 18 | another.                                        |
| 19 | that's going to be adjudication.                 | 19 | UNIDENTIFIED VOICE: It doesn't seem to me        |
| 20 | The numbers in that USGS report really scare   | 20 | that in my -- in referring to those in the tests  |
| 21 | us in terms of overdraft that's going on. And   | 21 | that they've taken, it's only a short distance    |
| 22 | that happens, the Courts are probably going to  | 22 | from some of those wells to the other. And there's | |
| 23 | order over half the users in the basin to be shut| 23 | really a difference in the level of the water.    |
| 24 | off. And it will be strictly in a time priority | 24 | MR. SHERMAN: I don't know what you're             |
| 25 | date.                                           | 25 | talking about. I can say that there's an actual   |
| 26 | Speaking as the groundwater geologist,          | 26 | boundary between the Cottonwood area, for example,|
| 27 | there's not a found good way to do it. I'd love | 27 | and the West Oakley fence we call it where there  |
| 28 | to see them shut off so that I spread out my    | 28 | appears to be no intercommunication at all between |
| 29 | existing pumps over the whole area, so I kind of| 29 | the two. And a function of water level in a well   |
| 30 | balance out the declining aquifer. The Idaho    | 30 | depends, to some degree, upon well construction    |
| 31 | law provides, and the directors have said, talk  | 31 | and the actual depth of two wells adjacent to each |
| 32 | with the people. Seriously concerned about asking for| 32 | other. So that -- well construction -- even if    |
| 33 | adjudication, specifically in that area         | 33 | two wells are constructed the same depth and      |
| 34 | (unintelligible).                               | 34 | perforated against the same portion of the       |
| 35 | UNIDENTIFIED VOICE: Question. Is there any     | 35 | aquifer, if the one does a better job on one than  |
| 36 | way in your geology study that tells whether one | 36 | the other, you get more water and less decline.   |
| 37 | area in that area is particularly source on that | 37 | THE CHAIRMAN: Any more questions?                 |
| 38 | more than another? Could you govern any by your | 38 | We'd like to stress once again that we will       |
| 39 | study of that and tell which ones are the ones   | 39 | take written testimony until February 22nd. And    |
| 40 | that are the major ones for doing this?          | 40 | the testimony should be sent to the Idaho Water  |
| 41 | MR. SHERMAN: No, I don't think that I can do   | 41 | Resource Board, State House, Boise, Idaho, zip   |
| 42 | that. I think it's a very serious problem when   | 42 | 83720.                                          |
| 43 | you put three or four wells within a mile of each| 43 | And we thank you very much for coming. We thank   |
| 44 | other and the next well is three miles away. He's| 44 | you very much for your questions and your         |
| 45 | not doing as much damage as these guys close     | 45 | testimony.                                      |
| 46 | together. What actually happens when you pump an | 46 | (Whereupon, Tape 4 concludes.)                   |
| 47 | individual well and get the cones and depression,| 47 |                                                 |
| 48 | because you're trying to lower the pressure head | 48 |                                                 |
| 49 | or the water in the system in the extra circle   | 49 |                                                 |
| 50 | around the individual well. If to get two wells  | 50 |                                                 |

(Tucker and Associates, Boise, Idaho, (208) 345-3704  
www.etucker.net)
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
CSR No. 754
Idaho Water Resources Board

3/1/1985

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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.

[Signature]
Debora Kreidler, Court Reporter Pro Tempore
CSR No. 274