

1 STATE OF IDAHO

2 DEPARTMENT OF WATER RESOURCES

3 ----- X

4 RE: WATER ALLOCATION RULES AND :
 5 REGULATIONS HEARINGS. :
 6 :
 7 ----- X

11 TRANSCRIPT OF PROCEEDINGS REQUESTED BY

12 ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND

13 MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

14 January 14, 1986, 2:20 p.m.

17 BONNEVILLE COUNTY COURTHOUSE
18 IDAHO FALLS, IDAHO

24 Transcribed by
25 Frances J. Morris
CSR No. 696



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BLAIR GROVER
LEO AVERY
DON CHINTEN
ELDRED LEE

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 2 DEPARTMENT OF WATER RESOURCES
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1 IDAHO FALLS, IDAHO
 2 January 14, 1986, 2:20 p.m.
 3
 4 THE HEARING OFFICER: (Tape begins in mid
 5 sentence) is to provide an opportunity for formal
 6 testimony or statements, either oral or written
 7 form, relative to the department's proposed rules
 8 and regulations for allocation of water within the
 9 state of Idaho. These are the first rules and
 10 regulations to be adopted in the history of this
 11 state regarding the procedures for the
 12 appropriation of water in the state.
 13 This hearing is required by the
 14 provisions of the Administrative Procedures Act,
 15 Title 67, Chapter 52, Idaho Code, and will be
 16 conducted pursuant to the department's rules and
 17 regulations for practice and procedure.
 18 Cross examination or questioning of
 19 witnesses will not be permitted. All those who
 20 wish to testify will be allowed to do so before
 21 anyone will have an opportunity to be heard a
 22 second time. The rules will implement provisions
 23 of Section 42-203, Idaho Code, which were amended
 24 during the last session of the Idaho legislature.
 25 Authority for adoption of the rules is provided by

1 APPEARANCES
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 3 BLAIR GROVER
 4 LEO AVERY
 5 DON CHINTEN
 6 ELDRED LEE
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1 Section 42-1805(8), Idaho Code.
 2 Briefly what the department has done
 3 regarding these rules is that, in May of 1985, we
 4 sought input from water users on suggestions as to
 5 what should be contained in the rules and
 6 regulations by holding several meetings throughout
 7 the state. Then in October of 1985, we conducted
 8 some public information meetings with draft copies
 9 of rules and regulations, again, seeking comments
 10 to what we had at that time proposed. We received
 11 several comments, and the rules that are before
 12 the hearing today reflect some 32 significant
 13 changes that were made in that initial draft.
 14 This hearing has been advertised on
 15 December 5th, 12th, and 19th in the Post Register,
 16 the Idaho Statesman, the Times News, and the
 17 Coeur d'Alene Press. Notice was provided to all
 18 those people who requested notice of rule
 19 adopting, and I've mailed over 6,000 copies of the
 20 rules to various people who are on our mailing
 21 list.
 22 After this hearing and the other
 23 hearings throughout the state, the record will
 24 remain open until January 27th of 1986 for any
 25 written information that you may wish to submit.

1 The rules and regulations are available here today
2 and also available in any of our offices or in the
3 format you see here, newspaper-type format, and
4 will be a part of the record for today's hearing.

5 A general procedure for adopting is to
6 hold this hearing under the Administrative
7 Procedures Act which is required by law. Then,
8 based on the testimony I receive here and at other
9 meetings, we will revise the rules as appropriate
10 and then adopt final rules. I expect to have that
11 completed by February 10th of this year. Then
12 I'll file the rules in the central office of the
13 department and also submit copies to the law
14 library who will then forward them to the
15 legislature for the legislative review and
16 hopefully approval during this session of the
17 legislature.

18 It's important, I think, to get these
19 adopted during this session of the legislature so
20 we are not faced with another year of not having
21 rules and regulations, especially given the
22 settlement to the Swan Falls agreement and the
23 public interest criteria that all water rights
24 have to now come under. I think it's important
25 that the rules and regulations be in place.

1 Upper Valley between Blackfoot and Rexburg.

2 I suspect that most of what I say you
3 have heard before, but I think it probably should
4 be a matter of record here. Obviously, there has
5 been a lot of discussion about whether or not the
6 rules should apply; particularly, the public
7 interest criteria should apply above Milner. And
8 The Protective Union, I think, wants to be on
9 record of opposing application of these rules
10 above Milner.

11 I am aware that the department's view
12 of the legislation is that it cannot fill that
13 kind of a request believing that the legislation
14 as passed requires the rules to apply to the
15 entire stretch of the river. I guess my position
16 would be on behalf of The Protective Union, it
17 doesn't say that, doesn't say that it has to apply
18 above Milner. On the other hand, it doesn't say
19 that it does not apply above Milner.

20 It's my understanding that several of
21 Eastern Idaho legislators believed, when the
22 legislation was passed, that they were not passing
23 it for application above Milner. And perhaps
24 legislative effort should be made to clarify the
25 legislation so that it does not apply above

1 Today is January 14, 1986. The time is
2 2:20. This hearing is being conducted in the
3 courthouse in the city of Idaho Falls.

4 There is a roster that has been sent
5 around, and we have asked you to sign that for two
6 purposes: One, if there are significant changes
7 that we make in these rules when they are
8 reprinted, if your name is on the list you will be
9 certain of receiving a copy of those; and, two, if
10 you wish to make formal testimony today, I need to
11 have some indication on the register.

12 Reviewing the sign-up sheet, I don't
13 see anybody who specifically said they wanted to
14 testify. Some of you may want to and just did not
15 put a check, or I can't find it. So absent that,
16 is there anybody here that does want to provide
17 some formal testimony today?

18 Mr. Grover, do you want to come forward
19 and be the initial person? And if you would state
20 your name when you begin your testimony that will
21 help my secretary sort out the comments.

22 MR. GROVER: My name is Blair Grover. I am
23 an attorney from Rigby, Idaho, and I am appearing
24 today on behalf of the Protective Union which is
25 an organization of canal companies located in the

1 Milner. But we want to be on record, I think, of
2 opposing the application of, particularly the
3 public interest criteria and the trust doctrine
4 water, above Milner.

5 One of the reasons for that, in talking
6 with people who have knowledge of water rights,
7 applying that doctrine above Milner really creates
8 some problems that I don't think were anticipated
9 nor intended by the legislation. Even with flood
10 waters, we get into difficult problems if we apply
11 trust doctrine above Milner, because technically,
12 the way water has been delivered and flood waters
13 have been treated, we are going to be treating --
14 procedure that's been followed will be dealing
15 technically with what, I guess, are trust waters
16 and will not be able to continue even with the use
17 of flood waters the way we have in the past. And
18 I don't think that the legislation was intended to
19 upset the procedures that have been followed in
20 the practice that's been followed here.

21 A second thing that bothers me with
22 regard to the rules is that Rule 5,3 where we talk
23 about the department considering many, many
24 factors and then determining, I think the language
25 is, "the greater public interest" in grant or

1 denial of an application. And I am aware that the
 2 department's view is that that's required by the
 3 language in the Trout-Co case or the holding in
 4 the Trout-Co case. I guess I disagree that the
 5 court intended that kind of a result from their
 6 holding in the Trout-Co case. We have, as
 7 everyone knows, well established in this state a
 8 doctrine of first in time, first in right
 9 established not only by legislation, I think, and
 10 case law, but also by constitutional provision.
 11 And I don't think that the supreme court, even if
 12 they had intended to interfere with that doctrine
 13 could lawfully do so. I don't think that they
 14 interfere with the first in time, first in right
 15 doctrine. And if we adopt a greater public
 16 interest criteria, the kind of thing where the
 17 department's going to weigh three or four
 18 applications instead of taking the one that was
 19 first filed and consider it and say if that meets
 20 all the criteria the water right is granted,
 21 rather than doing that, if it considers three or
 22 four applications on file and maybe deciding the
 23 third one is in the greater public interest and
 24 therefore that's the one that receives the water
 25 right, I think that's a significant change from

1 the practice and procedure that we have had in the
 2 past and do not believe that that is required by
 3 the decision in the Trout-Co case.
 4 THE HEARING OFFICER: If I might ask,
 5 Mr. Grover, on the trust water above Milner, are
 6 you talking only of surface water?
 7 MR. GROVER: Yes. Well, I guess I am
 8 talking about all the water, but primarily I think
 9 we are talking about surface water.
 10 THE HEARING OFFICER: I was wondering how
 11 you would handle the groundwater where it comes in
 12 below Milner, and it does create a problem.
 13 MR. GROVER: We'd like to see it apply
 14 across the board, but we would certainly be
 15 happier with just surface water.
 16 THE HEARING OFFICER: Thank you very much.
 17 Anybody else? Yes.
 18 MR. AVERY: I am Leo Avery, water manager
 19 for Rudy Canal, Rigby Canal, Harrison Canal, Clark
 20 Edwards Canal. I will talk on behalf of theirs.
 21 I'm wishing for more of a clarification of whether
 22 flood waters is what -- or relationship flood
 23 waters has with trust waters. Now, in the past,
 24 when we have been having flood waters, we use
 25 those flood waters, we could use all we could take

1 care of in the canal system. Now, then, if it was
 2 changed to the point where flood waters was --
 3 instead of using flood waters over any decreed
 4 water we have, if there is any change in that,
 5 then we would be using stored water at the time
 6 when the Bureau of Reclamation or the Water
 7 Resource Board was advertising on the radio there
 8 is flooding down around Shelley, Blackfoot, and so
 9 forth, use all the water you can.
 10 So this is why we would like to have a
 11 clarification on that because flood waters is
 12 very, very important to the canal systems, not
 13 only the ones that I am talking and mention I was
 14 managing, but all canal companies, due to the fact
 15 we need these flood waters to help string along
 16 and make it so that they are decreed water and
 17 stored water will last the full season. In other
 18 words, the longer that the flood waters can last
 19 for us, the more chances we have got of going
 20 through our growing seasons in the Upper Snake
 21 River Valley without running out of stored water
 22 or decreed water.
 23 And so I'd like to make my formal
 24 protest or clarification of what flood waters is
 25 in relation to the trust waters. And if it was

1 going to change anything that we have been doing
 2 in the past 30 or 40 years, it would be
 3 detrimental to our canal systems.
 4 THE HEARING OFFICER: If I might summarize,
 5 Mr. Avery, what you would like to see is the
 6 unrestricted use of water while the spills are
 7 going past Milner --
 8 MR. AVERY: Yes.
 9 THE HEARING OFFICER: -- which would mean
 10 water that would be in excess of --
 11 MR. AVERY: The same as we have had in the
 12 past. Now, then, I kind of got the idea that, if
 13 this particular thing went through, then even
 14 though there was water going and spilling over
 15 Milner, if we were using over our decreed water,
 16 we would be charged with stored water for that.
 17 And that would be what would be really damaging in
 18 killing canal systems.
 19 THE HEARING OFFICER: Thank you.
 20 Someone else wish to testify? Don
 21 Chinten?
 22 MR. CHINTEN: I really just had a comment to
 23 make, Ken. My name, however, is Don Chinten. I
 24 am a water master for Water District No. 31 and
 25 32C.

Page 13

1 I am somewhat embarrassed today because
2 I got down here without the piece of paper I had
3 my marks on and without my glasses. So I can't
4 get my glasses out to see what number I want to
5 refer to or what page.
6 THE HEARING OFFICER: I have a pair you can
7 borrow.
8 MR. CHINTEN: However, I think I can get my
9 point across here, or hopefully I can.
10 I noticed in there that somewhere in
11 there that you give a frost date. And along with
12 a frost date, you restrict the irrigation time on
13 the use of water. And this concerns me because,
14 with my experience in the field of distributing
15 water in the areas in which I distribute it, this
16 is absolutely just backwards.
17 Now, it looks to me like that you have
18 got Medicine Lodge and the Beaver Creek -- I can't
19 tell exactly on your map because it don't show
20 counties -- but you restrict them to usage
21 starting May 1 instead of April 1. And it looks
22 like the justification is frost date. But the
23 people that use the water first on all these
24 tributaries are the higher elevation peoples for a
25 number of reasons. Usually it's because of the

Page 14

1 gravel, the condition of the soil or something,
2 and they are never caught up. They are always
3 behind. And a lot of these people use this water
4 even April 15th in this area where you're trying
5 to limit this to May 1. And that's a concern to
6 me.
7 THE HEARING OFFICER: In the use of that
8 water, do you distribute that water on a priority
9 basis that early, or do they just take it and use
10 it?
11 MR. CHINTEN: Both. They take it and use
12 it, but I distribute it always on May 1, unless
13 it's a year that's like two years ago. But the
14 daily record books are kept May 1, and there is a
15 high consumptive use on these streams of Beaver
16 and Medicine Lodge, Camas, even before the Mud
17 Lake area which is at a later frost date. And
18 they also use it later into the year.
19 THE HEARING OFFICER: But you don't
20 distribute it on a priority basis after -- before
21 May 1 or after November?
22 MR. CHINTEN: Not normally. I have been
23 called on an April on a short year.
24 THE HEARING OFFICER: Sure, when there isn't
25 sufficient water need --

4 (Pages 13 to 16)

Page 15

1 MR. CHINTEN: But I distribute it, yeah, on
2 May 1. Very definitely. The daily record books
3 will bear that out --
4 THE HEARING OFFICER: Sure.
5 MR. CHINTEN: -- year after year. So that's
6 a concern of mine.
7 THE HEARING OFFICER: Our intent is not to
8 say that nobody can use the water. We were
9 putting that in for distribution purposes. I
10 think it's potentially saying that that's when the
11 system comes online in most years in terms of the
12 water master.
13 MR. CHINTEN: Well, that's not true in this
14 area. I think, also, in relationship, another
15 thing that concerned me a little bit -- I wish I
16 could just refer to it; I apologize for that --
17 but it says something in there that it could be
18 changed at the director's discretion or like
19 wordage, does it not?
20 THE HEARING OFFICER: Yes, yes.
21 MR. CHINTEN: Okay. But that don't really
22 say too much to me. I mean, you may want to be
23 conservative and Norm might want to be liberal,
24 you know, if one or the other, if he was the
25 director.

Page 16

1 THE HEARING OFFICER: Well, that's right.
2 And that's one of the reasons for adopting these
3 is, up until now, it's been the total discretion
4 of the director to set those. But, yeah, we will
5 look at that and see if we can get --
6 MR. CHINTEN: I'd like to ask that it be
7 moved up to May 1 as practice has been.
8 THE HEARING OFFICER: Sure. I would
9 appreciate, when you get home and find your
10 glasses, if you would jot something down so that
11 we make sure we have all the comments that you
12 wanted to bring in case you've forgotten any. I
13 appreciate that. Thank you.
14 MR. CHINTEN: Thank you.
15 THE HEARING OFFICER: Mr. Lee?
16 MR. LEE: My name is Eldred Lee. I am the
17 secretary of the Great Feeder. I just have a
18 couple of comments. I agree with those that have
19 been made. In my memory -- and I can't verify
20 this -- it appears to me that I've been at two
21 meetings in which I specifically asked the
22 question of whether the Swan Falls agreement would
23 affect the flow above Milner. And I was assured
24 that under no circumstances would the Swan Falls
25 agreement affect any of the diversion of water

1 under any circumstances above Milner.
 2 If I read the regulations correct, that
 3 the regulations applied to all waters in the Snake
 4 River rather than just from Milner down. Is that
 5 not correct?
 6 THE HEARING OFFICER: Correct.
 7 MR. LEE: Then just a comment. The water
 8 users that I have talked to feel as if they have
 9 been deceived by action -- and I don't know who is
 10 responsible. If it is the department, then I
 11 think we should be notified of that; and if it's
 12 the governor's office and those who drew those
 13 bills, then I think that should be clarified so
 14 that a person would know what appropriate action
 15 to take. There is really -- you know, after being
 16 promised one thing and here we come and we find
 17 that all of our water rights may be in jeopardy --
 18 or some of them, at least -- or that new
 19 development may be minimized because of the rules
 20 and regulations and the laws that are now made, it
 21 appears to us that it's pure deception. And I
 22 think, in my opinion, that that should be
 23 corrected and clarified. And I'd like to see the
 24 department propose legislation that would clarify
 25 that principle. Because if not, then there is

1 going to be a lot of fault-finding, unrest,
 2 dissatisfaction with the whole procedure that we
 3 are now attempting to set up and clarify.
 4 I don't think you realize how the
 5 farmers feel, how the people feel, about that very
 6 principle. Now, I don't know whose fault that is,
 7 and I'm not laying fault to anybody. But in the
 8 procedures that have been set up, it has come to
 9 pass.
 10 Another thing that I just jotted down,
 11 in reading those rules and regulations -- and you
 12 would correct me if I have read them wrong --
 13 there is no opportunity or procedure for appeal
 14 from your decision.
 15 THE HEARING OFFICER: You are wrong.
 16 MR. LEE: I am wrong?
 17 THE HEARING OFFICER: You are wrong.
 18 MR. LEE: Okay. Then I missed it.
 19 THE HEARING OFFICER: Without question, any
 20 decision of the director is appealable.
 21 MR. LEE: But it has to be done by the
 22 courts and not through -- where is the procedure
 23 in here for appeal?
 24 THE HEARING OFFICER: The statutes provide
 25 that, if there has not -- if you have not had a

1 hearing, and I make a decision, you're entitled to
 2 an administrative hearing. If there has been an
 3 administrative hearing and you're not satisfied
 4 with the results of that, then you can appeal it
 5 to the courts --
 6 MR. LEE: Now --
 7 THE HEARING OFFICER: -- in every decision.
 8 MR. LEE: Since all of the authority is
 9 given to you as the director, then, after the
 10 administrative hearing, then who makes the
 11 decision?
 12 THE HEARING OFFICER: After the
 13 administrative hearing, the appeal is to the
 14 district court. And that's the way it has been
 15 for a hundred years.
 16 MR. LEE: Well, I didn't read --
 17 THE HEARING OFFICER: Please don't change
 18 that.
 19 MR. LEE: But that's a court procedure.
 20 THE HEARING OFFICER: Yes.
 21 MR. LEE: That is the next --
 22 THE HEARING OFFICER: Oh, yes.
 23 MR. LEE: Well, I realize that you can
 24 always go to court, but I felt somewhere that --
 25 and I'm not faulting you or anything, but one

1 person should not have the responsibility of
 2 determining who should have a water right. I
 3 mean, there should be other procedures available
 4 to the common layperson. Sometimes it isn't worth
 5 it to go to court.
 6 THE HEARING OFFICER: Can I ask this? Have
 7 you been satisfied in the past the way it's
 8 worked?
 9 MR. LEE: Well, I haven't had anything to do
 10 with this since -- so I can't say whether I am
 11 satisfied or not. But that's the thought that
 12 came to me that everybody ought to have an
 13 opportunity to appeal any decision that is made by
 14 one individual --
 15 THE HEARING OFFICER: And that's --
 16 MR. LEE: -- whether it's you or anybody.
 17 THE HEARING OFFICER: The reason I asked
 18 that is because the procedures that we would
 19 follow after these rules are the procedures that
 20 we followed since the Department of Water
 21 Resources has been administering water law. And
 22 that is, if you're not satisfied with the
 23 decision, there is an administrative hearing held
 24 by the director. And if you're not satisfied with
 25 that, you can go to court. And that system has

1 served us for nearly a hundred years, and I would
 2 be reluctant to change it right now.
 3 MR. LEE: If it's worked, that's the thing I
 4 didn't get out of this. I couldn't read anywhere
 5 where there is an opportunity for appeal. As far
 6 as I am concerned, it should be clarified. I
 7 mean, it would be perfectly all right to write
 8 those procedures in here so that everybody knew
 9 that they had an opportunity.
 10 THE HEARING OFFICER: Sure. We will do
 11 that. I just wanted to clarify where we were
 12 going.
 13 MR. LEE: No, I'm not -- that's all that I
 14 have. Thank you.
 15 THE HEARING OFFICER: Thank you.
 16 Is there anyone else who wishes to
 17 testify today? Last chance.
 18 Well, hearing no other people coming
 19 forward to provide testimony, I'll again remind
 20 you that we will hold hearings in Twin Falls
 21 tomorrow and in Boise on January 16th and an
 22 additional hearing here in Idaho Falls tonight at
 23 7:00 p.m. Beyond that, the hearing record will be
 24 kept open until January 27th for anyone wishing to
 25 submit written testimony. And you can submit that

1 REPORTER'S CERTIFICATE
 2
 3
 4 I, Frances J. Morris, Court Reporter, a
 5 Notary Public, do hereby certify:
 6 That I am the reporter who transcribed
 7 the proceedings in the form of digital recording
 8 in the above-entitled action in machine shorthand
 9 and thereafter the same was reduced into
 10 typewriting under my direct supervision; and
 11 That the foregoing transcript contains a
 12 full, true, and accurate record of the proceedings
 13 to the extent they were audible and intelligible
 14 in the above and foregoing cause, which was heard
 15 in various cities at Idaho Falls, Idaho.
 16 IN WITNESS WHEREOF, I have hereunto set
 17 my hand this _____ day of _____ 2008.
 18
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 20
 21
 22 Frances J. Morris, Court Reporter
 23 CSR No. 696
 24
 25

1 to any office of the Department of Water
 2 Resources: The one here in Idaho Falls, Twin
 3 Falls, Coeur d'Alene, or Boise. And I urge you,
 4 if you do have comments, do that.
 5 There are no further people wishing to
 6 testify. This hearing is closed.
 7 (End of proceeding.)
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Water Allocation Rules and Regulations Hearings 1/14/1986

<p style="text-align: center;">A</p> <p>able 8:16 above-entitled 23:8 absent 6:15 absolutely 13:16 accurate 23:12 Act 3:14 5:7 action 17:9,14 23:8 additional 21:22 administering 20:21 administrative 3:14 5:6 19:2,3,10,13 20:23 adopt 5:10 9:15 adopted 3:10 5:19 adopting 4:19 5:5 16:2 adoption 3:25 advertised 4:14 advertising 11:7 affect 16:23,25 ago 14:13 agree 16:18 agreement 5:22 16:22,25 allocation 1:4 3:8 allowed 3:20 amended 3:23 anticipated 8:8 anybody 6:13,16 10:17 18:7 20:16 apologize 15:16 appeal 18:13,23 19:4,13 20:13 21:5 appealable 18:20 appearing 6:23 appears 16:20 17:21 application 7:9,23 8:2 9:1 applications 9:18,22 applied 17:3 apply 7:6,7,14,17,19,25 8:10 10:13 applying 8:7 appreciate 16:9,13 appropriate 5:9 17:14 appropriation 3:12 approval 5:16 April 13:21 14:4,23 area 14:4,17 15:14 areas 13:15 asked 6:5 16:21 20:17 assured 16:23 attempting 18:3 attorney 1:12 6:23 audible 23:13 AUDIOTAPES 1:12 authority 3:25 19:8 available 5:1,2 20:3 Avery 2:3 10:18,18 12:5 12:8,11 aware 7:11 9:1</p>	<p>based 5:8 basis 14:9,20 bear 15:3 Beaver 13:18 14:15 begins 3:4 behalf 6:24 7:16 10:20 believe 10:2 believed 7:21 believing 7:13 Beyond 21:23 bills 17:13 bit 15:15 Blackfoot 7:1 11:8 Blair 2:3 6:22 board 10:14 11:7 Boise 21:21 22:3 BONNEVILLE 1:17 books 14:14 15:2 borrow 13:7 bothers 8:21 Briefly 4:2 bring 16:12 Bureau 11:6</p>	<p>Coeur 4:17 22:3 come 5:24 6:18 17:16 18:8 comes 10:11 15:11 coming 21:18 comment 12:22 17:7 comments 4:9,11 6:21 16:11,18 22:4 common 20:4 companies 6:25 11:14 completed 5:11 concern 14:5 15:6 concerned 15:15 21:6 concerns 13:13 condition 14:1 conducted 3:16 4:7 6:2 conservative 15:23 consider 9:19 considering 8:23 considers 9:21 constitutional 9:10 consumptive 14:15 contained 4:5 contains 23:11 continue 8:16 copies 4:8,19 5:13 copy 6:9 correct 17:2,5,6 18:12 corrected 17:23 counties 13:20 COUNTY 1:17 couple 16:18 court 9:5,11 19:14,19,24 20:5,25 23:4,21 courthouse 1:17 6:3 courts 18:22 19:5 create 10:12 creates 8:7 Creek 13:18 criteria 5:23 7:7 8:3 9:16 9:20 Cross 3:18 CSR 1:24 23:22</p>	<p>5:13 8:23 17:10,24 20:20 22:1 department's 3:7,16 7:11 9:2,17 determining 8:24 20:2 detrimental 12:3 development 17:19 difficult 8:10 digital 23:7 direct 23:10 director 15:25 16:4 18:20 19:9 20:24 director's 15:18 disagree 9:4 discretion 15:18 16:3 discussion 7:5 dissatisfaction 18:2 distribute 13:15 14:8,12 14:20 15:1 distributing 13:14 distribution 15:9 district 12:24 19:14 diversion 16:25 doctrine 8:3,7,11 9:8,12 9:15 doing 9:21 12:1 Don 2:4 12:20,23 draft 4:8,13 drew 17:12 due 11:14 d'Alene 4:17 22:3</p>	<p>22:3 23:15 far 21:5 farmers 18:5 fault 18:6,7 faulting 19:25 fault-finding 18:1 February 5:11 Feeder 16:17 feel 17:8 18:5,5 felt 19:24 field 13:14 file 5:12 9:22 filed 9:19 fill 7:12 final 5:10 find 6:15 16:9 17:16 first 3:9 9:8,8,14,14,19 13:23 flood 8:9,12,17 10:22,22 10:24,25 11:2,3,11,15 11:18,24 flooding 11:8 flow 16:23 follow 20:19 followed 8:14,19,20 20:20 foregoing 23:11,14 forgotten 16:12 form 3:7 23:7 formal 3:5 6:10,17 11:23 format 5:3,3 forth 11:9 forward 5:14 6:18 21:19 four 9:17,22 Frances 1:24 23:4,21 frost 13:11,12,22 14:17 full 11:17 23:12 further 22:5</p>
<p style="text-align: center;">B</p> <p>backwards 13:16</p>	<p style="text-align: center;">C</p> <p>C 2:1 23:1,1 called 14:23 Camas 14:16 canal 6:25 10:19,19,19,20 11:1,12,14 12:3,18 care 11:1 case 9:3,4,6,10 10:3 16:12 caught 14:2 cause 23:14 central 5:12 certain 6:9 certainly 10:14 certify 23:5 chance 21:17 chances 11:19 change 9:25 11:4 12:1 19:17 21:2 changed 11:2 15:18 changes 4:13 6:6 Chapter 3:15 charged 12:16 check 6:15 Chinten 2:4 12:21,22,23 13:8 14:11,22 15:1,5,13 15:21 16:6,14 circumstances 16:24 17:1 cities 23:15 city 6:3 clarification 10:21 11:11 11:24 clarified 17:13,23 21:6 clarify 7:24 17:24 18:3 21:11 Clark 10:19 closed 22:6 Code 3:15,23 4:1</p>	<p style="text-align: center;">D</p> <p>daily 14:14 15:2 damaging 12:17 date 13:11,12,22 14:17 day 23:17 dealing 8:14 deceived 17:9 December 4:15 deception 17:21 deciding 9:22 decision 10:3 18:14,20 19:1,7,11 20:13,23 decreed 11:3,16,22 12:15 definitely 15:2 delivered 8:12 denial 9:1 department 1:2,13 4:2</p>	<p style="text-align: center;">E</p> <p>E 2:1,1 23:1,1,1,1 early 14:9 Eastern 7:21 Edwards 10:20 effort 7:24 either 3:6 Eldred 2:4 16:16 elevation 13:24 embarrassed 13:1 entire 7:15 entitled 19:1 especially 5:21 established 9:7,9 everybody 20:12 21:8 exactly 13:19 examination 3:18 excess 12:10 expect 5:10 experience 13:14 extent 23:13</p> <p style="text-align: center;">F</p> <p>F 23:1 faced 5:20 fact 11:14 factors 8:24 Falls 1:18 3:1 5:22 6:3 16:22,24 21:20,22 22:2</p>	<p style="text-align: center;">G</p> <p>general 1:12 5:5 give 13:11 given 5:21 19:9 glasses 13:3,4 16:10 go 19:24 20:5,25 going 8:13 9:17 11:19 12:1,7,14 18:1 21:12 governor's 17:12 grant 8:25 granted 9:20 gravel 14:1 Great 16:17 greater 8:25 9:15,23 groundwater 10:11 Grover 2:3 6:18,22,22 10:5,7,13 growing 11:20 guess 7:15 8:15 9:4 10:7</p> <p style="text-align: center;">H</p> <p>hand 7:18 23:17 handle 10:11</p>

Water Allocation Rules and Regulations Hearings 1/14/1986

<p>happier 10:15 Harrison 10:19 heard 3:21 7:3 23:14 hearing 3:4,13 4:12,14,22 5:4,6 6:2 10:4,10,16 12:4,9,19 13:6 14:7,19 14:24 15:4,7,20 16:1,8 16:15 17:6 18:15,17,19 18:24 19:1,2,3,7,10,12 19:13,17,20,22 20:6,15 20:17,23 21:10,15,18 21:22,23 22:6 hearings 1:5 4:23 21:20 held 1:12 20:23 help 6:21 11:15 hereunto 23:16 high 14:15 higher 13:24 history 3:10 hold 5:6 21:20 holding 4:6 9:3,6 home 16:9 hopefully 5:16 13:9 hundred 19:15 21:1</p> <hr/> <p style="text-align: center;">I</p> <p>Idaho 1:1,18,18 3:1,1,9 3:15,23,24 4:1,16 6:3 6:23 7:21 21:22 22:2 23:15,15 idea 12:12 implement 3:22 important 5:18,24 11:12 indication 6:11 individual 20:14 information 4:8,25 initial 4:13 6:19 input 4:4 intelligible 23:13 intended 8:9,18 9:5,12 intent 15:7 interest 5:23 7:7 8:3,25 9:16,23 interfere 9:12,14 irrigation 13:12</p> <hr/> <p style="text-align: center;">J</p> <p>J 1:24 23:4,21 January 1:14 3:2 4:24 6:1 21:21,24 jeopardy 17:17 jot 16:10 jotted 18:10 justification 13:22</p> <hr/> <p style="text-align: center;">K</p> <p>Ken 12:23 kept 14:14 21:24 killing 12:18 kind 7:13 9:5,16 12:12 knew 21:8</p>	<p>know 15:24 17:9,14,15 18:6 knowledge 8:6 knows 9:7</p> <hr/> <p style="text-align: center;">L</p> <p>Lake 14:17 language 8:24 9:3 law 5:7,13 9:10 20:21 lawfully 9:13 LAWRENCE 1:12 laws 17:20 laying 18:7 layperson 20:4 Lee 2:4 16:15,16,16 17:7 18:16,18,21 19:6,8,16 19:19,21,23 20:9,16 21:3,13 legislation 7:12,13,22,25 8:9,18 9:9 17:24 legislative 5:15 7:24 legislators 7:21 legislature 3:24 5:15,17 5:19 Leo 2:3 10:18 liberal 15:23 library 5:14 limit 14:5 list 4:21 6:8 little 15:15 located 6:25 Lodge 13:18 14:16 longer 11:18 look 16:5 looks 13:17,21 lot 7:5 14:3 18:1</p> <hr/> <p style="text-align: center;">M</p> <p>machine 23:8 mailed 4:19 mailing 4:20 MAINTAINED 1:13 manager 10:18 managing 11:14 map 13:19 marks 13:3 master 12:24 15:12 matter 7:4 mean 12:9 15:22 20:3 21:7 Medicine 13:18 14:16 meetings 4:6,8 5:9 16:21 meets 9:19 memory 16:19 mention 11:13 mid 3:4 Milner 7:7,10,18,19,23 8:1,4,7,11 10:5,12 12:7 12:15 16:23 17:1,4 mine 15:6 minimized 17:19</p>	<p>missed 18:18 Morris 1:24 23:4,21- moved 16:7 Mud 14:16</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1 name 6:8,20,22 12:23 16:16 nearly 21:1 need 6:10 11:15 14:25 never 14:2 new 17:18 News 4:16 newspaper-type 5:3 Norm 15:23 normally 14:22 Notary 23:5 notice 4:17,18 noticed 13:10 notified 17:11 November 14:21 number 13:4,25</p> <hr/> <p style="text-align: center;">O</p> <p>O 23:1 Obviously 7:4 October 4:7 office 5:12 17:12 22:1 OFFICER 3:4 10:4,10,16 12:4,9,19 13:6 14:7,19 14:24 15:4,7,20 16:1,8 16:15 17:6 18:15,17,19 18:24 19:7,12,17,20,22 20:6,15,17 21:10,15 offices 5:2 Oh 19:22 Okay 15:21 18:18 ones 11:13 online 15:11 open 4:24 21:24 opinion 17:22 opportunity 3:5,21 18:13 20:13 21:5,9 opposing 7:9 8:2 oral 3:6 organization 6:25 ought 20:12 ofo 22:8</p> <hr/> <p style="text-align: center;">P</p> <p>P 2:1,1 23:1 page 13:5 pair 13:6 paper 13:2 part 5:4 particular 12:13 particularly 7:6 8:2 pass 18:9 passed 7:14,22 passing 7:22</p>	<p>people 4:18,20 8:6 13:23 14:3 18:5 21:18 22:5 peoples 13:24 perfectly 21:7 permitted 3:19 person 6:19 17:14 20:1 piece 13:2 place 5:25 Please 19:17 point 11:2 13:9 position 7:15 Post 4:15 potentially 15:10 practice 3:17 8:20 10:1 16:7 Press 4:17 primarily 10:8 principle 17:25 18:6 priority 14:8,20 probably 7:3 problem 10:12 problems 8:8,10 procedure 3:17 5:5 8:14 10:1 18:2,13,22 19:19 procedures 3:11,14 5:7 8:19 18:8 20:3,18,19 21:8 proceeding 22:7 proceedings 1:11 23:7,12 promised 17:16 propose 17:24 proposed 3:7 4:10 Protective 6:24 7:8,16 protest 11:24 provide 3:5 6:16 18:24 21:19 provided 3:25 4:17 provision 9:10 provisions 3:14,22 public 4:8 5:23 7:6 8:3,25 9:15,23 23:5 pure 17:21 purposes 6:6 15:9 pursuant 3:16 put 6:15 putting 15:9 p.m 1:14 3:2 21:23</p> <hr/> <p style="text-align: center;">Q</p> <p>question 16:22 18:19 questioning 3:18</p> <hr/> <p style="text-align: center;">R</p> <p>R 2:1 23:1,1,1,1 radio 11:7 read 17:2 18:12 19:16 21:4 reading 18:11 realize 18:4 19:23 really 8:7 12:17,22 15:21 17:15</p>	<p>reason 20:17 reasons 8:5 13:25 16:2 receive 5:8 received 4:10 receives 9:24 receiving 6:9 Reclamation 11:6 record 4:23 5:4 7:4,9 8:1 14:14 15:2 21:23 23:12 recording 23:7 reduced 23:9 refer 13:5 15:16 reflect 4:12 regard 8:22 regarding 3:11 4:3 register 4:15 6:11 regulations 1:5 3:8,10,17 4:6,9 5:1,21,25 17:2,3 17:20 18:11 relation 11:25 relationship 10:22 15:14 relative 3:7 reluctant 21:2 remain 4:24 remind 21:19 reporter 23:4,6,21 reprinted 6:8 request 7:13 requested 1:11 4:18 required 3:13 5:7 9:2 10:2 requires 7:14 Resource 11:7 Resources 1:2,13 20:21 22:2 responsibility 20:1 responsible 17:10 restrict 13:12,20 result 9:5 results 19:4 review 5:15 Reviewing 6:12 revise 5:9 Rexburg 7:1 Rigby 6:23 10:19 right 9:8,14,20,25 16:1 20:2 21:2,7 rights 5:23 8:6 17:17 river 7:15 11:21 17:4 roster 6:4 Rudy 10:19 rule 4:18 8:22 rules 1:4 3:7,9,16,22,25 4:3,5,9,11,20 5:1,9,10 5:12,21,25 6:7 7:6,9,14 8:22 17:19 18:11 20:19 running 11:21</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 23:1 satisfied 19:3 20:7,11,22</p>
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Water Allocation Rules and Regulations Hearings 1/14/1986

20:24	talk 8:22 10:20	V	16th 21:21
saying 15:10	talked 17:8	Valley 7:1 11:21	19th 4:15
says 15:17	talking 8:5 10:6,8,9 11:13	various 4:20 23:15	1985 4:3,7
season 11:17	Tape 3:4	verify 16:19	1986 1:14 3:2 4:24 6:1
seasons 11:20	technically 8:11,15	view 7:11 9:2	
second 3:22 8:21	tell 13:19		2
secretary 6:21 16:17	terms 15:11	W	2:20 1:14 3:2 6:2
Section 3:23 4:1	testify 3:20 6:14 12:20	want 6:14,16,18 8:1 13:4	2008 23:17
see 5:3 6:13 10:13 12:5	21:17 22:6	15:22,23	27th 4:24 21:24
13:4 16:5 17:23	testimony 3:6 5:8 6:10,17	wanted 6:13 16:12 21:11	
seeking 4:9	6:20 21:19,25	wants 7:8	3
sent 6:4	Thank 10:16 12:19 16:13	WASDEN 1:12	30 12:2
sentence 3:5	16:14 21:14,15	water 1:2,4,13 3:8,12 4:4	31 12:24
served 21:1	theirs 10:20	5:23 8:4,6,12 9:20,24	32 4:12
session 3:24 5:16,19	thing 8:21 9:16 12:13	10:5,6,8,9,15,18 11:4,5	32C 12:25
set 16:4 18:3,8 23:16	15:15 17:16 18:10 21:3	11:6,9,16,17,21,22 12:6	
settlement 5:22	think 5:18,24 7:3,8 8:1,8	12:10,14,15,16,24,24	4
sheet 6:12	8:18,24 9:9,11,13,25	13:13,15,23 14:3,8,8,25	40 12:2
Shelley 11:8	10:8 13:8 15:10,14	15:8,12 16:25 17:7,17	42-1805(8) 4:1
short 14:23	17:11,13,22 18:4	20:2,20,21 22:1	42-203 3:23
shorthand 23:8	third 9:23	waters 8:10,12,15,17	
show 13:19	thought 20:11	10:22,23,23,24,25 11:2	5
sign 6:5	three 9:17,21	11:3,11,15,18,24,25	5th 4:15
significant 4:12 6:6 9:25	time 3:22 4:10 6:1 9:8,14	17:3	5,3 8:22
sign-up 6:12	11:5 13:12	way 8:12,17 19:14 20:7	52 3:15
Snake 11:20 17:3	Times 4:16	weigh 9:17	
soil 14:1	Title 3:15	went 12:13	6
somewhat 13:1	today 4:12 5:1 6:1,10,17	WHEREOF 23:16	6,000 4:19
sort 6:21	6:24 13:1 21:17	wish 3:20 4:25 6:10 12:20	67 3:15
sought 4:4	today's 5:4	15:15	696 1:24 23:22
specifically 6:13 16:21	tomorrow 21:21	wishes 21:16	
spilling 12:14	tonight 21:22	wishing 10:21 21:24 22:5	7
spills 12:6	total 16:3	WITNESS 23:16	7:00 21:23
starting 13:21	transcribed 1:23 23:6	witnesses 3:19	
state 1:1 3:9,11,12 4:7,23	transcript 1:11 23:11	wondering 10:10	
6:19 9:7	treated 8:13	wordage 15:19	
statements 3:6	treating 8:13	words 11:18	
Statesman 4:16	tributaries 13:24	worked 20:8 21:3	
statutes 18:24	Trout-Co 9:3,4,6 10:3	worth 20:4	
stored 11:5,17,21 12:16	true 15:13 23:12	write 21:7	
streams 14:15	trust 8:3,11,15 10:5,23	written 3:6 4:25 21:25	
stretch 7:15	11:25	wrong 18:12,15,16,17	
string 11:15	trying 14:4		
submit 4:25 5:13 21:25	Twin 21:20 22:2	X	
21:25	two 6:5,9 14:13 16:20	x 1:3,6	
sufficient 14:25	typewriting 23:10		
suggestions 4:4		Y	
summarize 12:4	U	yeah 15:1 16:4	
supervision 23:10	understanding 7:20	year 5:11,20 14:13,18,23	
supreme 9:11	Union 6:24 7:8,16	15:5,5	
sure 14:24 15:4 16:8,11	unrest 18:1	years 12:2 14:13 15:11	
21:10	unrestricted 12:6	19:15 21:1	
surface 10:6,9,15	Upper 7:1 11:20		
suspect 7:2	upset 8:19	I	
Swan 5:22 16:22,24	urge 22:3	I 13:21,21 14:5,12,14,21	
system 11:1 15:11 20:25	usage 13:20	15:2 16:7	
systems 11:12 12:3,18	use 8:16 10:24,25 11:9	10th 5:11	
	12:6 13:13,23 14:3,7,9	12th 4:15	
T	14:11,15,18 15:8	14 1:14 3:2 6:1	
T 23:1,1,1	users 4:4 17:8	15th 14:4	
take 10:25 14:9,11 17:15	Usually 13:25		

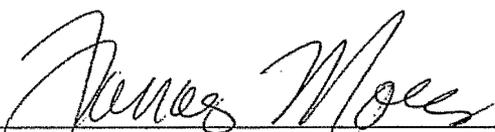
R E P O R T E R ' S C E R T I F I C A T E

I, Frances J. Morris, Court Reporter, a
Notary Public, do hereby certify:

That I am the reporter who transcribed
the proceedings in the form of digital recording
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
to the extent they were audible and intelligible
in the above and foregoing cause, which was heard
in various cities at Idaho Falls, Idaho.

IN WITNESS WHEREOF, I have hereunto set
my hand this 8th day of October 2008.



Frances J. Morris, Court Reporter
CSR No. 696

