STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

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RE: WATER ALLOCATION RULES AND REGULATIONS HEARINGS.

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TRANSCRIPT OF PROCEEDINGS REQUESTED BY

ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

January 15, 1986, 2:15 p.m.

MINI-AUDITORIUM, COLLEGE OF SOUTHERN IDAHO
TWIN FALLS, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696
APPEARANCES

ROGER LING
CHARLES BROCKWAY

*****
TWIN FALLS, IDAHO
January 15, 1986, 2:15 p.m.

THE HEARING OFFICER: Today is January 15th, 1986. The time is 2:15 p.m. This hearing is being conducted in the Mini-Auditorium at The College of Southern Idaho, Twin Falls, Idaho.

The roster of attendance indicates that Mr. Roger Ling wishes to make a formal statement for the record.

Mr. Ling, if you would come forward and get near the microphone and state your name and address, then you can proceed to make your statement.

MR. LING: Thank you, Mr. Young, Officials of the Idaho Department of Water Resources. I apologize for the cold that I have, and as a result of that, try to paraphrase some of my comments which I am at this time also presenting in writing. And I'll submit my comments in writing to you. But I think it may be worthwhile for this hearing to review those comments to some extent.

My name is Roger D. Ling. I am an attorney from Rupert, Idaho representing numerous water entities, not only those presently using water in Southern Idaho pursuant to valid permits and decrees, but also entities seeking to appropriate water in Southern Idaho for irrigation purposes.

In reading the proposed rules, my first concern is that perhaps we have avoided and ignored certain legal principles that have applied in the state of Idaho for some time. One reads Article 15, Section 3, as you well know, the constitution clearly provides that, when waters of any natural stream are not sufficient for the service of all those desiring it, that in an agricultural area of the state, those using the water for domestic purposes shall have the first right, and, of course, those claiming water for agricultural purposes shall have a preference over those using the same for manufacturing purposes.
enactment, it is my understanding, although I was not legislator, but I was active in presenting testimony and agreeing on the language, the words "significant impact" was meant to mean something. By placing a presumption that is a significant impact, then, of course, the legislative enactment could very well have said "then any impact" because you have presumed that there is a significant impact. And so really the word "significant" doesn't mean anything. A significant impact is a question of fact that should be determined on each individual application, not as a presumption because a presumption will, in most instances, especially as to groundwater, prevail.

If, in fact, there are groundwaters -- and I believe there are groundwaters in almost all of the Snake River drainage -- then, of course, we know that those groundwaters are there, but we don't know what the effect of those groundwaters are or their connection is with the Snake River. But by making the presumption it will be, in fact, considered trust water whether or not there is any evidence to show that they are, in fact, even tributaries of the Snake, and if there is no evidence that they are or are not, then the presumption prevails.

It's my understanding of Section 42-203C that not only was the words "significant reduction" important, but also the last section of that enactment provides that the burden shall be upon the protestant. Now, if, in fact, that meant anything, then it really is immaterial whether or not the state is the protestant or an individual is a protestant. If the burden is upon the protestant to show that there is a significant reduction, then that was the intent of the legislature. For the rules to say that the presumption is that it is a significant impact, a significant reduction, then, of course, we immediately have a situation that the burden is taken care of by the rule because the presumption, then, is given against the applicant. And so the burden -- obviously to say the burden is on somebody who has the presumption is an anomaly; it just doesn't make sense. You can't give somebody a presumption and turn around and say it's your burden to prove it. Because if you give him the presumption, he has proven it. He's met his burden with the presumption with everything else.

As to the specific rules, Rule 1,4,2,2 accurately states the law in the first sentence. But then the second sentence requires a determination of whether or not the proposed use will significantly reduce individual or accumulative with other uses of the amount of water available to the holder of the water right used for power production, and then goes on without giving the people of the state of Idaho, and particularly any applicant, a basis for the director's determination, makes a presumption that any application will, in fact, significantly reduce the flows available for downstream hydropower rights.

The intent of that legislative provision should be presented to the people of the state of Idaho. But those agreements would be inconsistent with that section of our constitution.

And if, in fact, that is the desire of the state of Idaho, then that constitutional provision should be presented to the people of the state of Idaho for amendment rather than amending it through rules and regulations.

In the Swan Falls controversy one of the ultimate goals of the legislation that was enacted and the agreements that were entered into was and has been agreed by all concerned, including Idaho Power Company and representatives of the state of Idaho. But those agreements would make a significant amount of water available for appropriation to promote family farming tradition, to create jobs and beneficial development. There is nothing in those agreements that I have been able to determine that provides that mitigation would be a requirement to obtain additional sources of water for these agricultural uses. The rules, however, as I will point out, have placed mitigation a major issue in determining future uses of water in Southern Idaho above Swan Falls.

To the extent that the rules do provide those type of criteria, although the legislature has never authorized such criteria to be considered, we feel the rules are inconsistent with the agreements that were negotiated and the legislation that's been passed by our legislature.

As to the specific rules, Rule 1,4,2,2 accurately states the law in the first sentence. But then the second sentence requires a determination of whether or not the proposed use will significantly reduce individual or accumulative with other uses of the amount of water available to the holder of the water right used for power production, and then goes on without giving the people of the state of Idaho, and particularly any applicant, a basis for the director's determination, makes a presumption that any application will, in fact, significantly reduce the flows available for downstream hydropower rights.

The intent of that legislative
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1. being equal. And then it is on the person who the
2. presumption goes against to then present evidence
3. to overcome the presumption.
4. So I think that the rule is
5. inconsistent with that provision of the enactment
6. of the legislature. If, in fact, the legislature
7. meant that the presumption or the burden of proof
8. on a significant reduction fact question is upon
9. the applicant, then I can see the presumption may
10. very well be justified in the rule. But it
11. doesn't say that. It says that the burden of
12. proof shall be on the protestant.
13. (Tape change.)
14. MR. LING: In regard to, again, Rule
15. 1,4,2,2, the other objection we have to the rule
16. is the arbitrary determination by the department
17. that the Snake River drainage above Murphy shall
18. be the area in which groundwaters will be
19. determined to be trust waters -- and if I
20. understand that -- and that generally is it. And
21. then you have the map within the rules that really
22. says that all groundwater, wherever located,
23. shall, in fact, be trust waters because they are,
24. in fact, tributaries to the Snake River above
25. Murphy. This rule takes away the opportunity for

any person as an applicant to come in and say
these are not, in fact, trust waters; these are
not, in fact, waters tributary to the Snake River,
because he has a burden now of not only showing
that they are not, but he must overcome the
presumption. And, again, as all evidence is equal
or there is no evidence, of course, we then have a
situation that the presumption prevails, and the
presumption is they are trust waters.
That is not what ordinarily would be
considered as a person who has a right to come in
and appropriate water. He would not ordinarily
have to overcome a presumption that the water
belonged to somebody else -- in this case, the
state of Idaho -- under a trust doctrine. I am
particularly concerned, also, that, as a result of
the Swan Falls negotiations, future water users of
the state of Idaho or future applicants have lost
considerably.
During the time that the Swan Falls
suit was pending, Idaho Power had made a
determination as to where they felt groundwaters
may affect their rights. And they had drawn an
arbitrary line through the middle of the area. In
fact, as I recall, that line was just a little bit

east of the city of Minidoka which is about one
half of the area that the department has
determined are trust waters. That arbitrary line
was determined, and any applications above that
line, the department -- or the Idaho Power Company
had, in fact, recognized that they would allow
those people to get power if it was within the
Idaho Power Company service area and appropriate
water in those areas. If permits were pending
above that arbitrary line, Idaho Power did not
attempt to prevent those people from using water
from that groundwater source. It was only in that
area that they had determined was an area, again,
approximately the city of Minidoka on the west
that they felt they had to protect by issuing a
moratorium on hookups and refusing to grant power
to those people.

Now, we have the director and the
department coming in with rules that say that
those trust waters go much further beyond what
Idaho Power had determined back in those days. We
now say trust waters apply to all waters, in
essence, within the Snake River drainage east of
Swan Falls.
Rule 1,4,2,3 provides that an

unprotested application proposing DCMI uses are
determined to satisfy the public interest
criteria. And I recognize this is a result of
certain negotiations that took place. The
question is, though, is this rule in conflict with
Article 15, Section 3, where, in fact, you are
granting industrial uses, manufacturing uses, a
preference to agricultural uses. And I think that
we have a problem even though they were talking
about trust waters and not merely just waters of
the state.

If one looks at your DCMI provisions,
it provides that a person can, in fact, get
730-acre feet of water per year, actual
consumptive -- water consumed each year. Doesn't
limit the amount that they might take, but that
they can get up to 730-acre feet of consumptive
use each year without meeting any criteria. That,

of course, as you would know, would, in fact, be
sufficient to irrigate over 300 acres because the
consumptive use in irrigation, 300 acres would be
substantially less than two-acre feet per acre.

Rule 5 -- excuse me. Rule 1,5,1,2
establishes, again, the presumption the
groundwater existing within the geographic area

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1 described in the rules is tributary to the Snake River, and this area shall also include the entire surface water drainage. And yet we don't know what evidence, in fact, the director used to make that arbitrary determination. We do not believe that these presumptions should exist in the rules. And no determination should be made until there is an application with the authority of the court or the hearing officer. And, then, of course, the other party ought to have an opportunity to present evidence to the other, and no presumption should be in the rules which defeats the applicant. And that's exactly what the presumption does, especially when the hearing officer may very well determine that the other evidence, none of which is preponderance and is a prepondering proof, and therefore they will say, all things being equal the presumption must prevail. And yet the presumption really maybe had no more basis than, in fact, the evidence as presented to that hearing officer. It may all be equal. If it's all equal, then, of course, we ought to be able to allow applicants, unless there is some showing that it, in fact, is trust water.

2 Rule 3,2,1 imposes a presumption based upon a presumption against the applicant who seeks to appropriate water. This rule incorporates the presumption that all waters in the Snake River and its tributaries above Swan Falls not previously appropriated are trust waters. That's a presumption that must first be overcome. Then it says all groundwaters within the Snake River drainage by the Swan Falls that have not been previously appropriated are trust waters. Again, a presumption that must be overcome. And then that all proposes to appropriate water from these sources will significantly reduce the amount of water available to Idaho Power Company. So you have two presumptions that the applicant immediately must overcome to avoid certain provisions of the rule. And I respectfully submit that those presumptions will, in many cases, be the determining factor of whether or not that person is seeking to appropriate trust water or, in fact, they are unappropriated waters. Again, I think that they have done away with the provisions of Section 42-203C which says the burden of proof shall be on the protestant in determining whether or not 42-203C is applicable.

1 waters are subject to an existing water right that has been subordinated. So we have to change the provision in the ordinary application, otherwise the director immediately has the right. Because it doesn't say that he will only deny it if the proposed use will reduce the quantity of water under an existing water right that is not subordinated and, perhaps, if the words reduce a water right on an existing water right that is not subordinated would, in fact, cure that. But if you say that it is going to reduce the amount to a water right, and the trust water concept, as I understand, is a concept in which that is, in fact, water under a water right but it's been subordinated and placed into the trust, the director, if he decides to deny an application of any trust waters, can use that section to deny it. And I don't believe any court would overturn that unless he determined the rule was arbitrary and capricious.

Rule 5,2,1, again, as I said, creates a presumption that all permits being reprocessed and all applications which propose a use that will deplete trust water as those waters are defined by the record will cause a significant reduction in water available to hydropower rights. Again, I object to that presumption being in the rule. I think that it should only be that if, in fact, proposed application would do that, and then the burden of proof would be upon those persons protesting the application.
Rule 5,3, the criteria for evaluating the public interest proposes that criteria which, according to Tucker and Associates, Boise, Idaho, (208) 345-3704
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1. Rule 5,3,1, sets out direct project benefits, and that is, of course, one of the criteria the legislature mandated would be considered, both direct and indirect. But the director, in his proposed rules, goes beyond that criterion, and, under Rules 5,3,1,3 and 5,3,1,4, will consider direct and indirect project costs including verifiable reductions in net revenue resulting from losses to other existing instream uses and the cost of replacement of hydropower generation. In my opinion, this is an attempt to give the director a second opportunity to consider the economic impact of the proposed use.

2. Economic impacts are one of the criteria to be considered, and we know that. But it's interesting to note, though, that

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1. to say that in direct project benefits you will consider economic impacts, and, then, in looking at the second factor the legislature set out, it then asks you to look at the economic impacts again. Well, the director said we are going to look at them under both factors. And, to me, that appears to be an effort to say, 'I am going to use the same criteria in two factors because that's one criteria that the applicant may not be able to meet.'

2. And the interesting thing is that the legislature said under 42-203C that one factor will not be given greater weight than another. No single factor will be given greater weight. But the rules have added factors into factors. So that, when you look at direct project benefits, you're looking at economic impacts. Then you look at economic impacts which is another factor, and you look at it again. So if you say that in direct project benefits you have failed because of the economic factors in direct project benefits, and then you come back and look at economic factors again, and you fail there, well, then, you've lost two out of the four criteria or five criteria. Again, it allows the hearing officer

3. and the director only to stack complaints to meet the criteria that no one factor will be considered greater weight than another factor. The legislature seemed to say that economic impact is a single, separate factor that should be weighed alone, and it should not be weighed in direct project benefits.

4. As I have pointed out in my written comments, Rule 5,3,2, again, sets out the economic impact factor in the criteria which is really a restatement of Rule 5,3,1,4 on indirect project costs.

5. Rule 5,3,2,2 imposes mitigation as a factor to be considered in determining the economic impact. Again, we believe that that is beyond what the legislature has stated.

6. Mitigation was not, and is not, included in any legislative enactments. And by mentioning it in this Rule 5,3,2,2, we believe was a stepping stone to ultimately get mitigation and other rules in determining the public interest criteria. And I'll discuss those provisions in the other rules as well.

7. It's interesting to note, though, that this is the first place in the rules where you say
that in determining economic impact, mitigation is a factor. So now you have not only economic impacts, but you have mitigation to determine what those economic impacts are.

Rule 5,3,6 is a rule consistent with legislative enactment in Rule 42-203C which provides that no single public interest criteria as set out by the legislature will be entitled to greater weight than any other public interest criteria. But that rule is negated by the inclusion of the same criteria in several of those areas instead of keeping them separate as the legislature did.

Rule 5,3,9 establishes an arbitrary presumption that a proposed diversion of water for irrigation purposes from the Snake River between Milner and Swan Falls Dam, including groundwater within four miles of the nearest edge, are not in the public interest. Now, this presumption is apparently based on a conclusion that says proposed versions would not promote full economic and multiple-use development of the water resources of the state of Idaho, one of the five criteria set forth by the legislature. But this rule would allow the director to unilaterally reject such applications without considering the other factors. And the legislature did not say that those other factors should not be considered and given equal weight. In fact, the opposite is true. The legislature said those other factors, all those factors, would be considered. It's therefore respectfully submitted that this rule is arbitrary and capricious, and, if enacted, will deny due process to an applicant to whom the rule might apply. There is no basis that I can see that the director has made the determination on anything except on that one single criteria to make that presumption.

Rule 5,3,10 presumes, again, the commercial or industrial use of up to 730-acre feet per year is in the public interest. Again, that gives me some concern in view of our constitutional provisions.

Rule 6,2 then provides, I believe again, an arbitrary provision. This rule says that you must, and, in fact, it requires mitigation for the approval of any proposal to appropriate trust water between Milner and Murphy for offstream storage during the period of November 1 to March 31. Now, the first concern is mitigation is not a criteria that the legislature said will be a sole factor in determining whether or not an application will be approved.

Next is, if you have Rule 5,3,7 and Rule 1,5,2, they are inconsistent. Rule 5,3,7 indicates that you can, in fact, have diversions and they do not -- the public interest criteria doesn't apply. Then you turn around and say mitigation does apply. Well, the only place mitigation could possibly apply is if the public interest criteria applies. And I don't even think it applies even if the public interest criteria applies. But you're saying that mitigation, the public interest criteria may not apply in some instance, but you turn around and say mitigation does. Well, to me, mitigation, if you have mitigation, then, of course, the public interest criteria is usually fully met because, in that instance, you haven't lost anything, especially determining, of course, the type of mitigation that may be proposed. But if it is, in fact, exchange of water for water, then it would be pretty difficult to show why the public interest criteria doesn't apply because that's exactly what you're doing is meeting the public interest criteria.

My other concern about Rule 6,2 is that it seems to indicate that it will require mitigation of all hydropower plants downstream in Idaho, and that is, in fact, an inclusion of the Hells Canyon Complex of Idaho Power Company. Now, we know from the licenses that were issued in the Hells Canyon Complex and our decision from the Idaho Supreme Court, those water rights are fully subordinated without any requirement for mitigation. And those water rights can, in fact, be reduced to zero, and no mitigation would occur. That was a condition for the Hells Canyon Complex. Now, the department and the director has sought to protect the Hells Canyon Complex by saying that you shall, if you want to divert water from November 1 to March 31 between Milner and Murphy for offstream storage, you shall mitigate. And one of the areas of mitigation will be Hells Canyon Complex, an impossible standard for anyone to meet. And we think that is, in fact, arbitrary and capricious and not supported by legislative enactments.

Finally, I'd like to mention -- and I believe my comments do -- that we object to the...
Mr. Brockway, I believe you're next. You can be assured your comments will be considered and taken into account.

Mr. Brockway, the meeting is yours.

MR. BROCKWAY: Thank you very much. My name is Charles Brockway. I am a hydrologist with the University of Idaho. I appreciate the opportunity to comment on the proposed rules and regulations.

THE HEARING OFFICER: Thank you, Mr. Brockway. I will be submitting it by 3:00 this afternoon. I won't submit it today.

THE HEARING OFFICER: Okay. Thank you. MR. BROCKWAY: Okay. Mr. Ling has gone over very well the requirements of the new legislation in Chapter 2 of Title 42 and indicated a concern that as a written statement?

What I would like to do initially is to comment specifically on certain sections of the proposed rules and regulations. Let me point out --

THE HEARING OFFICER: Mr. Brockway, may I interrupt for a moment? Will you be submitting that as a written statement?

MR. BROCKWAY: I will be submitting it by the time you close the time for submitting.

THE HEARING OFFICER: Okay. Thank you.

MR. BROCKWAY: Okay. Mr. Ling has gone over very well the requirements of the new legislation in Chapter 2 of Title 42 and indicated a concern that as a written statement?

THE HEARING OFFICER: Okay. Thank you. 

Mr. Brockway's comments were specific criteria identified in the legislature by which the director could evaluate public interest. I think many of these rules have gone beyond those specific criteria, especially in the area of the economics and benefit costs ratio requirements for public interest.

Section 1,4,2 dealing with the determination of whether or not a significant reduction in flows available for hydropower generation makes, again, the presumption that any diversion or any consumptive use, either individually or in total, is a significant reduction or makes a significant impact. Again hydrologically, nothing is defined or nothing is put forward to define what is meant by "significant." So it really means any consumptive use is determined to make an impact.

I don't believe that was the intent. Although it does ease the administrative burden of the department, it was not, in my opinion, the intent of the legislature. Their intent was to ensure equity and equality and not decrease the time or cost of administration.

I think it's significant that Rule 1,5,2 indicates that diversion to surface storage is in the public interest. That particular rule

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<td>1. conflicts with some subsequent rules which I will point out at a later time.</td>
<td>1. Section 5,1,1 deals with the determination of availability of water supply.</td>
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<td>2. Section 4,2,2 requires that permit applications which have been held without action pending the resolution of the Swan Falls matter are to be re-advertised at the applicant's expense to allow opportunity for protests to be entered. There are numerous applications for permits which have been held without pending action of certain federal and state government agencies prior to the inception of the Swan Falls matter. It doesn't seem equitable that those applicants be subjected again to the additional administrative expense when the failure to process resulted not from anything that they did but from what some government agency did or failed to act in a timely manner.</td>
<td>2. And it indicates that the determination of some unreasonable modification of existing method of application of water or an unreasonable effort or expense to divert water on an existing user will be sufficient to determine that the water supply is not available. I really believe that those terms &quot;unreasonable modification&quot; or &quot;unreasonable effort or expense&quot; will be very difficult to define and might ultimately be defined by the courts. We have had experience with defining and determining reasonable pumping levels which are under the current statutes. I think we are going to have the same ball of wax with this designation as we have had with reasonable pumping level.</td>
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<td>3. The requirements for permit application under Section 4,5,3 seem excessive for the proposed -- for the small user in particular. It appears to require, in determining the adequacy of the water supply, flow frequency relationships, aquifer properties, and other information which the small applicant or small user is not going to have available without the services of a professional requiring, then, additional financial burden in the application process. I believe that this requirement may be deemed to -- or construed to be excessive and may be even administrative harassment.</td>
<td>3. Section 5,3,1,4, again, deals with the economic criteria under the public interest criteria and indicates that an indirect cost will include the cost of replacing reduced hydropower generation from hydropower generation facilities located in Idaho. If you include reduced revenue from Idaho Power generation, in my opinion, it will prevent any further irrigated agricultural development in the Snake River Basin above Swan Falls. A benefit cost ratio including those costs, certainly at the present economic climate, would never satisfy the criteria. And I believe it's contrary to the legislative intent under the agreements and the statutes.</td>
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<td>4. Section 4,5,3,2,3 requires applications appropriating more than 25 cfs or 10,000-acre feet of storage or to generate more than 500 horsepower be prepared by a registered professional engineer or geologist. I would point out that most geologists receive little or no training on water requirements, hydraulics, surface hydrology, irrigation, crop water requirements, all of which are required in order to prepare the required information. It seems inappropriate to specify that a geologist be required to perform that service. A more appropriate requirement might be for a registered professional engineer or a geological engineer. But an individual with a geology degree, in my opinion, is not capable of performing the required studies and determinations for that application.</td>
<td>5. I don't really think that the legislature had the intent of stopping all additional irrigated agricultural development. And, again, I would point out, as Mr. Ling did, that these rules seem to give unequal weight to the economic criteria for satisfaction of the public interest criteria. We see the costs for mitigation coming in here for hydropower generation loss over and over. And I don't -- and it really appears to be giving greater weight to the economics than to any other single factor.</td>
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<td>6. THE HEARING OFFICER: Mr. Brockway, would you give that citation again?</td>
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<td>7. MR. BROCKWAY: I believe it's 4,5,3,2,3.</td>
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1 studies.
2 Section 5,3,9 which arbitrarily finds applications or permits to be reprocessed not to be in the public interest under 203C, appears to be proposed in the name of administrative efficiency and not in accordance with legislative intent.
3 Now, the impact of direct diversion between Milner and Swan Falls on the hydropower is easy to determine. Hydrologically I think we can do that, certainly easier than we can with some upstream diversions that interact with the Snake Plain aquifer and make it more difficult to determine the timing of impacts on the river at Swan Falls and the quantitative impacts. That, however, is not sufficient to arbitrarily exclude proposed projects in that reach, and that's what that rule will do.
4 The determination that direct groundwater diversions within four miles of the Snake River or tributary is any less in the public interest than a direct groundwater diversion 4.1 miles from the river is hydrologically indefensible. Now, you can set up hydrologic criteria as to a percentage of water returning to the stream from a diversion or a percentage of water returning in a specific time limit from a previous diversion and make an estimate of how far away from the stream you would have to be in order for that effect to occur. Any of those criteria that you set up, in my opinion, are arbitrary. And so whether it's four miles or one mile or 40 miles, I don't think you can defend any of those hydrologically. I think that rule should be eliminated.
5 Section 6,2, again, which requires the mitigation of the impact of flow depletions on downstream generation of hydropower by those appropriators proposing to use offstream storage in the winter months was never intended by the legislature. Again, if this rule is adopted, it will, in effect, guarantee Idaho Power Company replacement revenue for any acre foot of water diverted for wintertime offstream storage, not just down the Swan Falls, but through Hells Canyon Complex because it includes all hydropower facilities on the Snake River reach. That was not intended.
6 There is some question as to what "mitigation" means. I believe Idaho Power Company indicates that it would mean compensation. And I think ultimately that's what it would come to because there aren't many other ways you can mitigate the loss of water in the river except by compensation for lost power generation.
7 Again, it relates to the economics, not the technical aspects of putting a project together in the Milner/Swan Falls reach. If you hang another $50-per-acre or per-acre-foot for mitigating or compensating for hydropower losses on that user, he's not going to build the project, so you've eliminated the problem. And I really think that this penalty for offstream storage, if, in fact, this rule is adopted is contrary to what the department's policy has been in the past which encouraged offstream storage to mitigate the impact of low summer flows on the river at Swan Falls, which, in fact, is what it does. This section would penalize the individual who is trying to comply with what the department has encouraged in the past.

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user will be forced to change his method of use and application toward greater efficiency to accommodate a new applicant and push him toward less wasteful practices. I think that's commendable and should be encouraged, but I don't think the existing law allows you to do that. The water master can only ensure that the various users are within their decreed rights. He can't examine their internal uses to determine whether these criteria are being satisfied. So 5.1,1 doesn't do anything, in my opinion, to protect existing users as is required in the statutes, but it creates, again, a justification for the department to allow permits for present diversion practices precluding the applicant from receiving water. It also seems to me to be contrary to existing department policy which has determined that several streams in the state are currently fully appropriated based upon existing diversion practices, not on use practices. And until there is some legal basis for IDWR to limit actual deliveries based upon beneficial use, this one is going to be a difficult one to administer. Thank you very much.

THE HEARING OFFICER: Thank you, Mr. Brockway. Appreciate your comments, and they will be taken into account. Anyone else that wishes to be heard today? Anyone else that wishes to have an opportunity to testify? Okay. Seeing no volunteers, we won't draft anybody to do it. You do have the opportunity to attend this evening's hearing here in this room at 7 o'clock. There are hearings in Boise at 2 o'clock and 7 o'clock in the Len B. Jordan building, third floor conference room tomorrow. The record will remain open, as we have said before, until January 27th for written comment. So we will close the record for this portion of the hearing at this time. Thank you for coming.

(End of proceeding.)

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

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 Twin Falls, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this ___ day of ___ 2008.

Frances J. Morris, Court Reporter
CSR No. 696