STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

RE: WATER ALLOCATION RULES AND REGULATIONS HEARINGS.

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

January 16, 1986, 2:17 p.m.

before NORMAN YOUNG, HEARING OFFICER

LEN B. JORDAN BUILDING
BOISE, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696
SENATOR TOM LOWRY (phonetic)
SENATOR MIKE CRAPO

* * * * * *
STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Re: Water Allocation Rules and Regulations Hearings.

THE HEARING OFFICER: My name is Norman Young from the state office of the Department of Water Resources in Boise. I will serve as the hearing officer in this matter.

The purpose of this hearing is to provide an opportunity for formal testimony for statements, either orally or in written form, concerning the department's proposed rules and regulations for water allocation in the state of Idaho.

This hearing is required by the provisions of Administrative Procedures Act, Title 67, Chapter 52, Idaho Code and will be conducted pursuant to the department's rules of practice and procedure.

Cross-examination or questioning of the witness, other than clarifying questions by the hearing officer, will not be allowed. All who wish to testify will be allowed to do so before anyone will be heard a second time.

The rules implement the provisions of Section 42-203, Idaho Code, which were amended during the last legislative session. Authority for adoption of these rules and regulations is provided by Section 42-1805(8), Idaho Code.

I have given a brief background prior to going on record as to the department's actions and holding public meetings concerning draft rules. The proposed rules were prepared and distributed in December with notice of this hearing given on December 5th, 12th, and 19th in the Post Register, the Idaho Statesman, the Times News, and the Coeur d'Alene Press. Notice was provided to all those asking to be provided with notice of rule-making, and over 6,000 copies of the rules and regulations were mailed in The Current's tabloid. I have indicated that this record will remain open for written comment through January 27, 1986. A copy of the rules as proposed in The Current's tabloid will be made a part of the hearing record.

After the last date for written comment, the rules will be revised as appropriate. Rules adopted will be -- adoption target date being February 10, 1986. When those rules are filed in the central office of the department and with the law library and transmitted to the

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legislature, there will be an opportunity for

legislative review.

Today is January 16, 1986. The time is
2:17 p.m. This hearing is being conducted in the
Len B. Jordan building in Boise, Idaho.

The roster of attendance has been
circulated, and no one has indicated a desire to
testify or present any testimony.

Is there anyone who has entered the
room that would like to make a statement for the
record to give to the director about this
adoption?

Senator Tom Lowry (phonetic)?

SENATOR LOWRY: I would like to ask a
question for my information.

THE HEARING OFFICER: That would be fine.

Won't you come to the table and — Senator, while
I'm willing to answer questions, this is really
for expository statement. So I may be a little
brief with my answer. Once we are off the record,
we will just discuss it fully.

SENATOR LOWRY: Just for question, my
question to my answer is, how many people have
participated in the hearing process so far?

THE HEARING OFFICER: I'd have to add that

up for you, but it's been like six citizens at
Moscow; I believe we had probably 30 to 35 total
in Idaho Falls; maybe 25 to 30 total in Twin Falls
last night; and then I haven't counted today.
That's total attendance. I believe we have had a
total of nine people make statements at this
point. Ten counting you. Some of these
statements have been extremely detailed and very
helpful.

Senator Crapo?

SENATOR CRAPO: Yes, I'd like to make a
brief statement, if I could.

THE HEARING OFFICER: We'd appreciate that.

SENATOR CRAPO: Should I sit here and speak
into this microphone?

THE HEARING OFFICER: Yes, all of these are
live. So...

SENATOR CRAPO: My name is Mike Crapo. I am
senator from District 32A from Idaho Falls, Idaho.
And I realize that the senate will have an
opportunity to go into more detail on this as the
rules are submitted to the legislature, but I
wanted to give some input at this point just in
generality for the department to consider in
establishing the proposed rules with some concerns

that I have.

I apologize that I don't have
specifies -- I can't identify specific sections on
some of my comments, but I am going to talk to
topics that I think they should concern themselves
with.

There are three things that I'd like to
discuss. The first is, as I understand the
proposed rules -- and please correct me if I have
a misunderstanding here -- they establish a
presumption that all consumptive uses are going to
have a significant impact on trust waters. And I
may not have stated that accurately, but I believe
there is a presumption in the regulations.

As a senator who was very involved last
year in the negotiations of this settlement and of
the legislation which these rules are
implementing, I do not believe that it was at all
the intention of the legislators who supported the
legislation that there be any kind of a
presumption of a significant impact. In fact, I
think if it had been assumed there would be a
significant impact, we wouldn't have put that into
the legislation.

I believe and I know very strongly, from the perspective of the people who were coming
at it from my point of view last year, that we
perceived the requirement of proof of a
significant impact to be a very significant
safeguard from the point of view of water users
who wanted to develop the water such as cities,
farmers, and people from industry. And it appears
to us that these rules essentially take away that
first safeguard which we felt was very
significant. I don't believe that it can be
presumed that every use, when coupled with all
other uses, therefore constitutes a significant
impact. I think that particularly is true above
Milner given the fact that zero flow at Milner was
very heavily discussed and was the basis upon
which the legislation was passed. And certainly
with regard to surface flow, there are no trust
waters above Milner, as my understanding of it
goes.

And with regard to groundwater, the
proof of a significant impact, it would seem to
me, would be a very significant factor.

So the first comment that I would like
to make is that I am very concerned about the
presumption relating to significant impacts.
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The second comment relates to --

THE HEARING OFFICER: Senator, could I ask a clarifying question on that?

SENATOR CRAPO: Yes, you may.

THE HEARING OFFICER: Do you recall from any of the discussions, was there any kind of definition of "significant impact" that was presented in any of the discussions?

SENATOR CRAPO: I was going to go back through and check the minutes from the senate hearings, because right now you're asking for information that specifically asked about "significant impact," and we didn't get a very clear definition.

So to answer your question, I guess I would say, first, no, I do not think that the tape reflects my understanding. But my recollection from a year ago, and I do have a recollection, but I'm not sure if it's accurate.

We did tape those hearings, and I have not had an opportunity to go back and see, first, whether the quality of tapes is good, and, secondly, whether the tapes reflect my understanding. But my understanding is that on the senate side we specifically asked about "significant impact," and we didn't get a very clear definition.

So to answer your question, I guess I understand that is directly contrary to the intent of the legislature that it just be defined away by a presumption.

THE HEARING OFFICER: Thank you.

SENATOR CRAPO: The second aspect of my concern relates to figure 1 which shows in the darked-out areas the trust water flows, as I understand the regulations. And it talks about surface water flows in the Snake River upstream from Swan Falls.

I guess what I am saying is, I understand figure 1 to be stating that all of the groundwater and surface water in the darked-out area would be trust water flows. My first concern about that is that, as far as surface flows, I think that is directly contrary to the legislation. Because it was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner. And I don't even think that Idaho Power would take the position that above Milner they are entitled to any trust water in the flow of the river.

My second concern is that, as to groundwater, although an argument could be made that that water above Milner in the groundwater is theoretically connected to trust water, or if some hydrologic connection could be established to the river below Milner from a groundwater use above Milner, then perhaps you could get into the area of getting into the remaining criteria. But I am concerned that we just have a map here that seems to blanketly include all of these trust waters or all of these waters above Milner. And I think that needs to be addressed very carefully. And at least it needs to be made explicitly clear that surface flow above Milner is not trust water.

My third concern is that last year another of the safeguards that we put into the legislation was that the burden of proof was to be placed on the protestant. And I realize that these regulations do not specifically change that in that they do recognize that the burden of proof is on the protestant. However -- and this is where I'm not at this point prepared to go through all of these specific sections, but I think at a later date I could or at a subsequent time I could note this -- but it seems to me that there are a number of places in the regulations where additional burdens are placed upon the applicant to provide information which is not now necessarily required to obtain a permit and which was not contemplated by the statute, which, in effect, places an additional burden on the applicant which was not there before, and, which, again, in effect, has the result of making the applicant carry a burden of proof that pertains to these trust waters which was not intended by the legislature.

And, again, I apologize for not having the specific sections here. I got busy today. I was going to get those together because I do have some notes of my own. But I just -- I had to rush over here, and I was late. But, again, I would just encourage the department, as they go through...

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about it, and I recall it being made very clear, with regard to representatives from the department and from Idaho Power and from the other negotiators, that a process must be gone through whereby geologically or hydrologically it was established somehow that there was a significant impact before the necessity for going to the remainder of the four criteria was required. And I guess perhaps what we may need to do is as a legislature is to define "significant impact" even further. But I don't think that it was at all the intent of the legislature that it just be defined away by a presumption.

THE HEARING OFFICER: Thank you.

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And, again, I apologize for not having the specific sections here. I got busy today. I was going to get those together because I do have some notes of my own. But I just -- I had to rush over here, and I was late. But, again, I would just encourage the department, as they go through...
the regulations, to be sure that the applicant
does not have to prove anything more to obtain a
water permit now than the applicant had to prove
before, other than the significant impact as a
first step. And, then, if the significant impact
problem is reached, then the four remaining
criteria, but that the burden of proof on a
challenge based on those criteria still remains
with the protestant.

THE HEARING OFFICER: Okay. Thank you. I
will try and formulate a question relative to the
burden of proof.

SENATOR CRAPO: Yes.

THE HEARING OFFICER: Do you recall, as the
legislation was debated, how an application was to
be treated if it was not protested? There is
where the department is having a bit of trouble
interpreting the statute. Was it simply to be
assumed it was in the public interest, or was the
director to consider those factors?

SENATOR CRAPO: It was my understanding
that, if there was no protest, then the department
was still to make the determination as to whether
there was a significant impact. But it was
understood pretty much in all of the discussions
we had, at least from my perspective, that, unless
there was some pretty solid evidence, the
department was probably not going to find a
significant impact. In other words, unless there
was something pretty solid indicating to the
department that they had a concern there that they
needed to face and no one protested it, that the
application would proceed. If the department,
however, determined from its own understanding of
the aquifer that there would be a significant
impact, then the department on its own was to
evaluate the criteria and to make a determination.

So I guess the answer is, my
understanding is that a protest is not necessary
to trigger the evaluation of significant impact
and the criteria. But by the same token that,
asent a protest, the department was to be quite
flexible in not placing all kinds of burdens and
roadblocks in the way of an applicant. It was the
specific intent of this legislation that trust
water would be liberally available, in my opinion,
and that the department and legislation was
not intended to place roadblocks in the way of
development of that water. Rather it was intended
to protect Idaho Power's rights to utilize this

1 trust water for power purposes subject to the
understanding that, any application that did not
cause a significant impact, or, that, if it did
cause a significant impact, was still in the
public interest would be permitted to proceed.

THE HEARING OFFICER: Okay. Thank you.

SENATOR CRAPO: Thank you.

THE HEARING OFFICER: Appreciate the
testimony.

Senator?

SENATOR LOWRY: Shall I call you Mr. Hearing
Officer or Mr. Young?

THE HEARING OFFICER: Either one. Both of
them sound real good.

SENATOR LOWRY: Mr. Young and Hearing
Officer Person, I'd like to thank for the ability
to be able to come today. I am also like Senator
Crapo. I have a lot of notes scribbled down and
nothing in final form. And I also, too, have the
ability to have legislative overview in the Senate
Resource and Environment Committee, and so I will
hold my comments to a basic couple of points that
I saw. And hopefully, if I still see those kinds
of problems later in the rules and regulations, I
will bring up more specific points on the
different parts of the rules and regulation.

I agree with Senator Crapo on most of
these points. Another thing that I think he
failed to stress was that, in the rules that are
being promulgated right now, I think he
believes -- and I do, too -- that the assumption
is that any consumptive beneficial use of water is
not of a benefit to the state. And I would tend
to disagree with that, that any beneficial use of
water does bring business and jobs and everything
of that nature to the state of Idaho. And there
should be more of an emphasis placed upon that
beneficial use.

The other that I saw that I had some
problems with or a great difficulty with is,
usually there was no recourse or chance for appeal
of a director's decision once it's been made other
than going to the courts. If the director asked
for a lot of expensive hydrologic information or
other information that's very expensive to get and
then the applicant is turned down, then the only
recourse that person has is to go to the courts
and start that process all over which makes it
twice as expensive for the applicant to do again.

And so I was wondering if there was a possibility
of being able to put an appeal process, either to
the water resource board or to some other person
also, to make that claim without having to go
through that expensive process of going through
the court system to make an appeal for that
process.

It might not be possible. It might
take a judge to be able to do that. But I feel
that, if a person spends enough money in trying to
get his permit through and spends a lot of money
on studies and information he should have some
outlet of appeal if there is decision -- if the
person thinks it's just an arbitrary decision and
not a decision made on hard facts and information.

With that, again, I will say I will
have more information when the senate will have a
chance to overview the rules and regulations at
another time.

THE HEARING OFFICER: Thank you, Senator
SENATOR LOWRY: Thank you.
THE HEARING OFFICER: Appreciate your
comments.
Anyone else like to make a statement
for the record?
Okay. Apparently no one else desires
to do so. So we would simply note that the
hearing will be held again this evening at
7 o'clock in this room. The hearing record will
stay open for written input, and I would encourage
the senators, if possible, to give that
information to us so we could incorporate that
into the rules as they are promulgated so we don't
have to make another round if you find it
necessary to reverse the director on the rules.

So the record will stay open until the
27th, and then these comments will be used to
revise and adopt the rules.

So thank you for coming, and we will be
happy to stay here and answer any questions that
you do have.

(End of proceeding.)
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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 Boise, Idaho.

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

Frances J. Morris, Court Reporter
CSR No. 696