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

July 21, 1986, 1:45 p.m.

before NORMAN YOUNG, HEARING OFFICER

LEN B. JORDAN BUILDING
BOISE, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696
APPEARANCES

CHARLES PACE
MR. FUNKE
MR. MILES
MS. HAYES
MR. CHAPMAN

*****
Water Allocation Rules and Regulations Hearings 7/21/1986

<table>
<thead>
<tr>
<th>Page 1</th>
<th>Page 2</th>
<th>Page 3</th>
<th>Page 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. STATE OF IDAHO</td>
<td>1. APPEARANCES</td>
<td>1. BOISE, IDAHO</td>
<td>1.clarifying questions.</td>
</tr>
<tr>
<td>2. DEPARTMENT OF WATER RESOURCES</td>
<td>CHARLES PACE</td>
<td>July 21, 1986, 1:45 p.m.</td>
<td>After the hearing is concluded, an</td>
</tr>
<tr>
<td>3.</td>
<td>MR. FUNKE</td>
<td></td>
<td>opportunity will be provided to discuss the</td>
</tr>
<tr>
<td>4.</td>
<td>MR. MILES</td>
<td></td>
<td>issues. The rules implement provisions of Section</td>
</tr>
<tr>
<td>5.</td>
<td>MS. HAYES</td>
<td></td>
<td>42-203, Idaho Code, and in a general way,</td>
</tr>
<tr>
<td>6.</td>
<td>MR. CHAPMAN</td>
<td></td>
<td>Chapter 2 of Title 42 of the Idaho Code of which</td>
</tr>
<tr>
<td>7.</td>
<td></td>
<td></td>
<td>Section 42-203 is a specific part. This section</td>
</tr>
<tr>
<td>8.</td>
<td></td>
<td></td>
<td>was amended during 1985 and 1986 session of the</td>
</tr>
<tr>
<td>9.</td>
<td></td>
<td></td>
<td>legislature. The authority and the duty for the</td>
</tr>
<tr>
<td>10.</td>
<td></td>
<td></td>
<td>adoption of these rules and regulations is</td>
</tr>
<tr>
<td>11.</td>
<td></td>
<td></td>
<td>provided by Section 42-1805(8), Idaho Code.</td>
</tr>
<tr>
<td>12.</td>
<td></td>
<td></td>
<td>The brief background on these hearings</td>
</tr>
<tr>
<td>13.</td>
<td></td>
<td></td>
<td>is that this represents the second round of formal</td>
</tr>
<tr>
<td>14.</td>
<td></td>
<td></td>
<td>hearings being conducted on these rules and</td>
</tr>
<tr>
<td>15.</td>
<td></td>
<td></td>
<td>regulations. The first hearings were conducted in</td>
</tr>
<tr>
<td>16.</td>
<td></td>
<td></td>
<td>January 1986 with rules being adopted pursuant</td>
</tr>
<tr>
<td>17.</td>
<td></td>
<td></td>
<td>thereto on April 8th, 1986.</td>
</tr>
<tr>
<td>18.</td>
<td></td>
<td></td>
<td>Shortly thereafter the Idaho Power</td>
</tr>
<tr>
<td>19.</td>
<td></td>
<td></td>
<td>Company alleged there was a general defect in the</td>
</tr>
<tr>
<td>20.</td>
<td></td>
<td></td>
<td>promulgation process and objected specifically to</td>
</tr>
<tr>
<td>21.</td>
<td></td>
<td></td>
<td>Rule 5,2 which provides the criteria for</td>
</tr>
<tr>
<td>22.</td>
<td></td>
<td></td>
<td>determining which applications and permits are to</td>
</tr>
<tr>
<td>23.</td>
<td></td>
<td></td>
<td>be processed under Section 42-203D, Idaho Code,</td>
</tr>
<tr>
<td>24.</td>
<td></td>
<td></td>
<td>and will therefore be reviewed under the new</td>
</tr>
<tr>
<td>25.</td>
<td></td>
<td></td>
<td>public interest criteria of Section 42-203C, Idaho</td>
</tr>
</tbody>
</table>

Tucker and Associates, Boise, Idaho, (208) 345-3704
www.etucker.net
Today is July 21, 1986. The time is 1:45 p.m. This hearing is being conducted at the Len B. Jordan conference room in the LBJ building in Boise, Idaho. The roster of attendance indicates that Mr. Charles Pace would like to make a formal statement for the record.

Mr. Pace, if you would state your name, address, and just proceed with your statement. MR. PACE: Do you want me to turn around?

THE HEARING OFFICER: If it would make you more comfortable, I could pick up either way. But why don't you just turn it around. Let's be sure. MR. PACE: Thank you, Mr. Young. My name is Charles Pace. I am working in the Office of Economic Analysis for the Shoshone-Bannock tribes at Fort Hall, Idaho. As you no doubt are aware, the tribes have prior and paramount water rights in the Snake River Basin. These are federally reserved for the tribes, and they will be separately managed and apart from the state system. However, when allocating new water under...
Subsequent developments in terms of the executive order by Governor Evans to Gene Gray instructing Mr. Gray to provide for public input, memorandum of understanding between the tribes and the state assigned at Fort Hall in August, the new adjudication statute, and the ongoing negotiations, all of these are part of the Swan Falls package. In fact, there may have been no agreement if it had not been for House Concurrent Resolution 16. The tribes could have attacked, and indicated that they would attack, on a number of issues, including the adequacy of the process, the scope of the adjudication, the burden of proof, and the public interest criteria. And it was determined at that time that it would be less costly, more efficient, less time involved to proceed with negotiations rather than adjudication.

The negotiations to date have been up front, fair, open; access has been provided for all interested parties to have a say. And the tribes are concerned that, in implementing these rules, that the department implement these in a similar manner. And yet, when you read over the regulations, there is nothing to indicate that there is any awareness on the part of the department of the need to avoid adverse impacts on the tribes' reserved water rights. It's almost as if the rules and regulations are being promulgated in a vacuum. And everyone, I think, recognizes that absent additional storage, there may not be enough water to go around. But the tribes do have prior and paramount rights under Winters. So given this historical context which the rules are being promulgated, the tribes would like to see the department inform people as to their federal reserve rights and do this right.

Now, in terms of how to do that, the tribes have suggested a disclaimer be inserted in the rules. And I have brought copies with me of those. I will pass those around. The tribes, I believe it was in the second negotiating session, suggested that this disclaimer be inserted into the rules so that, in new appropriations of unappropriated water or in reallocations of trust water, individuals that are applying for permits under the state system understand that the tribes do have these prior rights, and that there is a potential there for the tribes to exercise those in a manner that creates potential conflicts.

There is any awareness on the part of the department of the need to avoid adverse impacts on the tribes' reserved water rights. It's almost as if the rules and regulations are being promulgated in a vacuum. And everyone, I think, recognizes that absent additional storage, there may not be enough water to go around. But the tribes do have prior and paramount rights under Winters. So given this historical context which the rules are being promulgated, the tribes would like to see the department inform people as to their federal reserve rights and do this right.

Now, in terms of how to do that, the tribes have suggested a disclaimer be inserted in the rules. And I have brought copies with me of those. I will pass those around. The tribes, I believe it was in the second negotiating session, suggested that this disclaimer be inserted into the rules so that, in new appropriations of unappropriated water or in reallocations of trust water, individuals that are applying for permits under the state system understand that the tribes do have these prior rights, and that there is a potential there for the tribes to exercise those in a manner that creates potential conflicts.

Between state water appropriations and these separately managed rights.

I think this is consistent with the philosophy underlying the negotiations. If you look back, the Swan Falls package, the people that were negotiating the Swan Falls package, were well aware that, while they were discussing the relationship between the tribes, or rather between the state and Idaho Power Company, the focus of the discussions of the Swan Falls controversy had been on the claims and right of authority at that site. But the settlement of those issues necessarily involve putting in place legislation and policies which would govern the rest of the Snake River and the water resources of Idaho.

And specifically -- I believe it's page 4 of the framework -- negotiators say the ultimate benefit will be to allow and form state policy decisions on future growth and protection of hydropower generation. The definition and implementation of a known and enforceable state policy will make the Swan Falls controversy an asset in the history of the state. It's the tribes' feeling that, to realize that goal to make the Swan Falls controversy an asset, they need to be up front, frank, and honest, not only in negotiating, but also in implementing these rules, implement the rules in a similar fashion.

So the tribes are very concerned that, throughout the rules and regulations, there is not even a mention of the prior and paramount rights of the tribes. For example, in the definition of trust water and unappropriated water, the implication is that trust water, unappropriated water, and appropriated water exhaust all of the resources, water resources, of the state, over and above minimum stream flows. The tribes feel that there should be explicit acknowledgement that water reserved for the tribes may cut those water resources that can be reallocated or appropriated down.

So that's the first problem that the tribes have with that is that it's almost as if these regulations are being promulgated in a vacuum without an explicit acknowledgement of the potential for new appropriations to adversely impact the federally reserved rights of the tribes.

The second thing is the public notice in processing. When you're talking about
intergovernmental relationships, the tribes are very concerned that they not be notified in terms of a newspaper notice. The short time period there, two weeks, the first and second or the third and fourth Thursday of the month followed by a ten-day comment period, is not sufficient time for the tribes to work on an intergovernmental basis with the state to indicate if there are problems. So I think there needs to be direct and express notice to the tribes and the state needs to work directly with the tribes on any and all applications that could potentially impact the water rights reserved for the tribes. When we are looking at what kind of water rights we are talking about, you have to go back to the treaty, the executive order of 1867, the act which established the reservation in 1868, or the treaty, rather, in 1868, that established and then the subsequent executive orders spell out certain purposes for the creation of the reservation. These include agricultural as a major purpose, a permanent homeland for the tribes, continuation of subsistence hunting and fishing on unoccupied lands of the United States, preservation of traditional cultural values. So the tribes have rights under the Winters doctrine to use water for irrigated agriculture, domestic, commercial, industrial, mining, religious, instream flow uses in the Snake and Salmon River Basin. It's the tribes' feeling that they would like to work on an intergovernmental basis with the state, but that the public notice provisions are inadequate to nurture that kind of intergovernmental relationship.

Then we come to the public interest criteria. There needs to be some way devised for the state, in appropriating new water and in reallocation of trust water, to assess the impacts on the tribes' prior rights. The major provision in Section 42-203(8), of course, has to do with the question of prior rights. But, again, there is no indication that the state intends to address these issues. So the tribes' question there is how will the department assess the impacts on the prior rights and avoid appropriating water in a manner which adversely affects all of those rights that I have indicated.

In terms of 42-203C, a significant reduction in water available for hydropower, there needs to be more documentation on how exactly those will be evaluated. And, again, an indication of how the tribes will be protected and an appreciation on the part of the state that, when you're dealing with water-related issues in Idaho, we are not simply talking about state appropriations and hydropower, that the tribes have significant prior and paramount rights under Winters that need to be -- or that will be protected. And it's incumbent on the state to devise some sort of system so that they avoid those, avoid any adverse impacts on the tribes' reserved rights.

Those are the three major areas in which the tribes are concerned. I anticipate that we will submit much more detailed comments on specific provisions in the law or in the rules prior to the 31st. And the tribes also want to convey an ongoing attempt to work closely with the state on these issues.

Mr. Funke, the tribal attorney is with me and he may want to extend. Hopefully, he won't want to modify my remarks, but he may want to extend, enlarge on them.

THE HEARING OFFICER: Thank you, Mr. Pace. Before we hear from Mr. Funke, let me note for the record that we will include your suggested language for the disclaimer in the record. We thank you for your comment.

MR. PACE: Thank you.

MR. FUNKE: Mr. Young, just in recapping, we realize that the public interest criteria deals with trust water which is mainly the groundwater system in the Snake River Plain, as I understand it. And the tribes' reserved rights deal mainly with surface flow. But the tribe also has a significant interest in the groundwater resources of the plain, uses a significant amount of groundwater. So we have an interest in ensuring that any potential impacts on the groundwater resource, the tribe is made aware of that potential impact, and any potential impacts are assessed in light of the tribes' right.

Just an overview. The point being that -- and we had raised this in a negotiating session before -- that there is a separate federal law system for our water rights. What we are trying to do in the negotiation process is come up with a plan that realizes the tribes' water right, reserved water right, and to the greatest extent...
<table>
<thead>
<tr>
<th>Page 17</th>
<th>Page 19</th>
</tr>
</thead>
</table>
| feasible, minimize its impacts on the non-Indian water users. What I would like to see come out of the rules and regulations, although they are dealing mainly with groundwater, is that the non-Indian water users are aware of the fact that there are -- we are going through a new water allocation process here on supposedly freed up water. And since there is supposedly a finite amount of water in that system, probably insufficient enough to realize the tribes' unquantified right as the present water users, I think it's unwise, one, that we go through a water allocation process, a new water allocation process in light of the fact there isn't enough water in the system. But I understand the pressures and the politics of having to allocate new water rights under this Swan Falls agreement. So in light of that, and appreciating that pressure and that political situation, shouldn't we do this in an open and aboveboard, not suggesting that the director is trying to keep this under wraps or anything. I'm not suggesting that at all. I want to make that perfectly clear. But shouldn't we get this thing out on the table and make sure everybody understands that the water in the river is limited potentially or possibly it's fully allocated. A lot of people have suggested that. When we go through allocating new water rights under public interest criteria, a new trust water and this freed up water in the Swan Falls agreement, shouldn't the non-Indian water users, whether they are domestic, commercial, industrial, irrigators, whatever, shouldn't they be, one, fully aware of that, that there is limited water and probably not enough water in the system; and, No. 2, that the tribe has a large unquantified water right that we are in the process of determining what that is so that, when this agreement is -- whether adjudicated or negotiated to completion, those people that are being allocated new water are fully of the understanding that it's subject to defeasance by unquantified right. You know, just making sure that everybody knows what is occurring on all sides. The negotiation process itself, as Cheryl could attest to, has been a very open one, very frank exchange of information. Everybody's attempting to fully inform either side of what the give-and-take is. So I guess what we are asking for in here in part is that everybody seeking new water under the new water allocation rules understands what all the give-and-take is, what all considerations are, and the fact there is a large unquantified right yet to be placed on the system. Part of that would be that disclaimer just giving people notice, just making them aware of that. And the other thing is, in the rules it provides for, as Mr. Pace alluded to, direct notice to city and county governments of any potential impact on water rights that may be of interest to them. I think it's important that that notice also include the tribe in that process, direct express notice to the tribe of any new application for water that may affect their water right. THE HEARING OFFICER: We need to change the tape. (Tape change.) MR. FUNKE: So just in keeping with the philosophy of the negotiations and the progress being made there and the way we are going about that, I think it would be a good idea to include within the rules that disclaimer that puts people on notice that that, in fact, is occurring so that it doesn't raise its head later on after people come in and claim they were unaware of what the potentials were or what they were getting just so that everybody understands what's at issue and direct notice to the tribe of any potential or any applications that might affect their right. THE HEARING OFFICER: One clarifying question. In the rules of procedure for subscribing to seeking advanced notice, that particular procedure would allow whoever applied to that or subscribed to it -- and the cost is very minimal to be given direct notice at the same time that the application is sent to the newspaper -- have you considered that perhaps that might be a way of getting what you need. MR. PACE: Well, Mr. Young, that is one vehicle. But the tribes are concerned that even that might not be adequate in terms of working on an intergovernmental basis. Given the uncertainty surrounding the hydrology in the river, I think it's more than just a notice of application that needs to be accorded to the tribes. The tribes need to be able to work on an ongoing basis with the state. Certainly that would be a way of avoiding the problems that I mentioned in terms of...
just reading about it on Thursday in the newspaper. But the fact is you have an extremely short period in which to protest, and the failure to protest can potentially affect standing in subsequent proceedings. So I think it needs to -- while notification is one possibility, I think it needs to go further than that.

THE HEARING OFFICER: You’ve indicated you’ll probably submit additional comments in writing. Perhaps using specific language to help us on that would be useful. I’d appreciate that.

MR. PACE: I think, also, you can anticipate more detail than I went into on the public interest criteria, particularly 42-203A.

THE HEARING OFFICER: Very good. We will appreciate that.

Does anyone else wish to make a statement at this time?

MR. MILES: I don’t have a statement, but I would like to ask a question.

THE HEARING OFFICER: Well, this point Mr. Miles, it’s for statements. Now, if it’s decide whether you wish to make a statement or not, we’ll go ahead and let you answer the question. But if it isn’t a statement, we will conclude the record, and then we will --

MR. MILES: Well, I’d like to make a statement, then, that the federal unappointed -- unappropriated water rights to preserve the Dear Flat National Wildlife Refuge and the white sturgeon habitat that reaches the water at the Dear Flat Refuge be recognized under the Winters doctrine be provided. to protect the refuge since it was established in 1937.

THE HEARING OFFICER: So you’re suggesting a minimum flow in the Lower Snake River for that purpose?

MR. MILES: Yes, a minimum flow at least to protect the white sturgeon in the reach of Dear Flat National Wildlife Refuge, that is the Snake River reach of the Dear Flat National Wildlife Refuge.

THE HEARING OFFICER: Which is below Swan Falls but above Brownlee?

MR. MILES: That’s right.

THE HEARING OFFICER: Any other statements? Hearing none --

MR. CHAPMAN: Mr. Young, just a short general statement. The Idaho Water Users Association, of course, represents irrigation districts and canal companies that essentially are water right holders in the state of Idaho. We are in the position, at least to some extent of the Indian tribes, in that the water rights that we hold are much senior to many of the junior rights that are being considered and will be considered under the new allocation criteria. The department has a very difficult job to perform, I think: That, to protect the Indian water rights that will be established through the reserve water rights doctrine; the existing water rights that are established through the state law; the preservation of hydropower so that our people can afford to continue to pump, but at the same time trying to look at a maximum utilization of our water resources for all of the beneficial uses that are still yet to be considered, which include irrigation, instream flows, aesthetics, new hydropower development, and the other uses that Idaho citizens will need in the future.

It’s important, I think, that the department continue the communications effort that they have in the past. I know that it was unlikely that they would have been required to...
Mr. Chapman.

Any further testimony?

MR. PACE: Mr. Young, I'm Charles Pace again, Shoshone/Bannock tribes. I'm also an assistant or associate professor of economics at Eastern Oregon State College. I am working with the tribes on an in-house basis for a year. But in the public information meetings one of the issues that I tried to raise -- and I'd like to just amplify on the things that Mr. Miles has said -- is this question of the future of the white sturgeon in the middle reaches of the Snake River.

You have a very valuable genetic resource there. The best available information from Idaho Fish and Game indicates that you need 5500 cfs at Murphy to avoid impacting on those genetic resources. Those resources, while they are not exchanged in the market place, or even though they are not exchanged in the market place, should be viewed as very valuable. And there is very little in the rules that will indicate how those types of specific genetic resources will be protected in appropriating new water and allocating trust water.

I think there are a lot of regional considerations, also, that were mentioned in terms of water budgeting, and those are important. Idaho water policy, for better or worse, affects the Columbia Basin's ability to provide for downstream migration of salmon and steelhead. But in addition to anadromous fish, there is a number of the other things that are part and parcel of the power planning council's efforts, particularly the resident fish and wildlife resources. And the west slope cutthroat as well as the white sturgeon have been identified by the power planning council as species of interest. So I think it's incumbent upon the department to look out for those resources when they are allocating – making water allocations. In addition to that, there are a number of other regional concerns that I will just mention here. I won't go into them into any detail. There is the impacts on the federal Columbia River power system downstream from the investor-owned utilities in Idaho. Any reduction in flows will have significant impacts on the ability of the federal Columbia River power system to generate electricity. And then there are also impacts on lower river tribes that, I think, while it may not be necessary at this point to take into account, it would be wise to take into account.

For better or worse, the lower river people and the upper river people are chained together by that river, and I think there needs to be a cooperative effort. If the department would move in that direction, then I think that the region as a whole and Idaho as a state will reap significant benefits.

THE HEARING OFFICER: Thank you.

Anything further today?

I thank you for your good input. You've been most helpful. Again, the record will stay open until the 31st of this month for any further input you wish to put in. I thank you for coming today.

(End of proceeding.)

-o0o-

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 in the State of Idaho.

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

Frances J. Morris, Court Reporter
CSR No. 696
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.

[Signature]

Frances J. Morris, Court Reporter
CSR No. 696