



# Idaho State Senate

CAPITOL ANNEX  
BOISE, IDAHO 83720

## MEMORANDUM

April 17, 2009

TO: Clive Strong

FROM: Juanita Budell, Senate Resources Secretary

SUBJECT: Joint Meeting of House and Senate Resources Committees  
April 1, 2009 Room 316

Enclosed are copies of the following:

Agenda  
Sign In Sheet  
Transcription by Nancy Christensen, CSR  
Minutes (with transcription inserted) in required format

AGENDA - REVISED REVISED

SENATE RESOURCES & ENVIRONMENT COMMITTEE

1:30 p.m.

Room 316

Wednesday, April 1, 2009

JOINT MEETING WITH HOUSE RESOURCES & CONSERVATION COMMITTEE

<i>BILL NO.</i>	<i>DESCRIPTION</i>	<i>PRESENTED BY</i>
S 1167	Relating to the natural flow of water for specified managed recharge projects	
S 1169	Relating to the Public Utilities Commission and electric utility water rights	
S 1185	Relating to ground water recharge Presenters will be: Clive Strong, AG's Office; Jim Tucker, Idaho Power Company; and David Hensley, Governor's Office	

Public testimony will be taken.

(Please provide the secretary with a written copy.)

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Page - Katrina Clayson

COMMITTEE MEMBERS

Sen Gary Schroeder, Chairman  
Sen Steve Bair, Vice Chairman  
Sen Dean Cameron  
Sen Monty Pearce  
Sen Charles Coiner  
Sen Jeff Siddoway  
Sen Bert Brackett  
Sen Jon Thorson  
Sen Elliot Werk

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify? Yes/No	Pro	Con
Mitch Silver	State Dir	Sen Corps		No		
Susan Oldenkamp				No		
Jim TUCKER	Att	Idaho Power	SF Legis	Yes		
Jeff Malmon	<del>Att</del>	IPCO	"	NO	X	
Rich Hawk	Lobbyist	Idaho Power	"	NO	X	
Clive Strong	Attorney	Idaho AGOE	SF Legis	Yes	X	
MICHAEL ORR	ATTORNEY	" "	" "	No	X	
Shasta Kilminster-Hadley	Attorney	AG's Office	"	NO	X	
Candice Meyer	"	IGWA	SF Legis	NO		
Beth Markley		Idaho Council on Industry & Environ.	"	No		
Pat Barclay		"	"	No		
Peter Anderson	Attorney	Tract Unlimited	"	No		
Hal Anderson	ADMINISTRATOR	IDWR		NO	X	
Dave Tuttle	Dir	IDWR				

MINUTES  
**SENATE RESOURCES & ENVIRONMENT COMMITTEE  
HOUSE RESOURCES & CONSERVATION COMMITTEE  
JOINT MEETING**

**DATE:** April 1, 2009

**TIME:** 1:30 p.m.

**PLACE:** Room 316

**SENATE MEMBERS PRESENT:** Chairman Schroeder, Vice Chairman Bair, Senators Cameron, Pearce, Coiner, Siddoway, Brackett, Thorson, and Werk

**MEMBERS ABSENT:** None from the Senate or House

**HOUSE MEMBERS PRESENT:** Chairman Stevenson, Vice Chairman Shepherd, Representatives J. Wood, Bell, Barrett, Moyle, Eskridge, Raybould, Bedke, Andrus, F. Wood, Boyle, Hagedorn, Harwood, Sayler, Chavez, King, and Pence

**NOTE:** The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CALL TO ORDER:** **Chairman Schroeder** called the **Joint meeting** of the Senate Resources and Environment Committee and the House Resources and Conservation Committee to order at 1:30 p.m.

**The minutes of the Joint meeting were transcribed by Nancy Christensen, CSR.**

**CHAIRMAN SENATOR SCHROEDER:** I think that we'll get started. Now, for the committee members who don't normally meet in here, this is live, so if you start talking among yourselves, it will be recorded. Okay?

Pro-Tem, do you want to lead off?

**PRESIDENT PRO-TEM SENATOR GEDDES:** Thank you Mr. Chairman, and Mr. Chairman and members of the Joint Committee. It's my honor to be here. I'm not going to take a lot of your time because I have people -- or I don't have people, but there are people here who truly are qualified to speak to the committee and address the issues.

As is typical, you know, when Clive Strong from the Attorney General's Office is carrying a manila envelope we know that we're getting close to the end of the session. So, hopefully, this is a good indicator that that is the case.

But I think what you're deliberating over today, these three water bills, are

monumental and will establish not only the agreements that were made in the past from a historical standpoint but also have been addressed by our Supreme Court. And this will put, hopefully, a benchmark in place so that we never have to go back and revisit some of those decisions.

And Mr. Chairman, if I may, I'd like to defer the remainder -- or at least the next portion of opening debate, an introduction of these three bills, to David Hensley from the Governor's Office.

**CHAIRMAN SENATOR SCHROEDER:** Yes, you may.

And committee members, just so you know, the Agreement, copies of the bills in your folder. And I'm going to allow you to ask questions as we go. In other words, if you have a question, raise your hand and I'll allow you to ask it.

Welcome.

**MR. HENSLEY:** Thank you, Mr. Chairman, Chairman Stevenson, members of both committees. My name is David Hensley. I'm legal counsel for the Governor. I appreciate the opportunity today to be here.

**UNIDENTIFIED SPEAKER:** Mr. Chairman, (inaudible) could we get Mr. Hensley to put a microphone on his tie so that we can -- up close to the knot, Mr. Hensley, so it's being recorded and broadcasted properly.

**MR. HENSLEY:** Well, that's technology for you.

Mr. Chairman, Chairman Stevenson, members of the committee, again, my name is David Hensley, legal counsel for the Governor. I appreciate the opportunity today to be here on his behalf to share his insight into this historic occasion, his insight on the framework and the legislation that you have before you.

From the Governor's perspective, the framework is really a road map that settles the current litigation between the state and the company. And in addition to that, it is made up of various components that have to be completed in order for us to reach that settlement. One of the components is the legislation that you'll be considering today. And you'll hear more from Mr. Strong from the Attorney General's Office on that point.

I think it's also important to point out that the framework is an opportunity -- it's an opportunity to reaffirm the original Swan Falls Agreement and the principles that were set forth in that Agreement.

Moreover, it provides an opportunity for the state and the company to move forward on other aspects of its relationship, our relationship with the company, and other things that we need to work on. It really establishes a new day.

The Governor supports the framework and as a signatory to that, he supports the passage of this legislation. He believes that it's a great example of what people can do when they sit down and talk to each other, when they recognize the mutual interest that they have, and what can truly benefit everyone involved.

We believe that the framework and its components are the right thing to do, and the Governor believes it is the right time to do it.

With that, Mr. Chairman, I stand for questions or turn the time over to Mr. Tucker from Idaho Power.

**CHAIRMAN SENATOR SCHROEDER:** Any questions from Mr. Hensley?

All right. Mr. Tucker?

**MR. TUCKER:** Mr. Chairman, thank you. Chairman Stevenson, thank you, members of the committee. My name is James Tucker, I'm an attorney with Idaho Power Company. I've been before you before; I think you probably remember a few years ago when I was before you on a very contentious matter that we're going to resolve today.

I'm here to -- please don't be afraid. These are not my remarks. I'm not going to take that long, but I do have a copy of the framework in front of me, and if you have questions, I'll be happy to answer any questions you might have.

I want to start out by just kind of describing what this settlement is and what it is not. What it is not, it is not a change to the Swan Falls Agreement. We reaffirm the Swan Falls Agreement. We've sat down; we've looked at the matters that were in contest over the past several months and few years, and we've clarified those matters under the Agreement and come before you today to clarify, not only the Swan Falls Agreement, but matters that have been in contest.

So, it doesn't change the Swan Falls Agreement. What it does do, it addresses three primary issues that have been in contest, for at least some uncertainty, for a period of time. One relates to the -- what might be called the "Milner Divide." Now, there's been some concern by upstream water users that Idaho Power sought to assert its water rights above Milner Dam.

In my view, that has not been the case, but there has been uncertainty about that. And we clarify in this Agreement that Idaho Power does not intend and, in fact, cannot under 42-203B(6) assert its -- B(2), excuse me, its water rights above Milner Dam.

Now, the exception to that over the past few years has been the contest that we've had about recharge. And we also resolve that issue today.

We confirm that under the Agreement we put before you today that Idaho Power has no right to assert under the Swan Falls Agreement that recharge cannot occur, either above Milner Dam or below Milner Dam.

The other thing it does is it resolves the issues relative to the decrees for Idaho Power's Swan Falls water rights in conformance with the decision that was rendered by the SRBA Court in April of 2008. So, it does those three things, and it resolves those three things.

It also sets the table for continued discussions between Idaho Power and the State of Idaho on other issues that we think, and the state thinks, are critical to continued cooperation on the river and continued water management issues on the river. So, you'll see in this framework in Article III that there is essentially a laundry list of issues that the state and Idaho Power agree that we're going to sit down with other parties, other interested parties, and we're going to try to, at least, discuss those issues. And to the extent there are concerns, matters of uncertainty or matters in dispute, we will seek to resolve them through some type of collaborative process.

Not all of those, we don't believe, are going to be a matter where there is going to be any kind of contest between us. But we found that over the past few years that many of those issues that we've listed there are not really conducive to litigation. They're public policy issues. They're issues that the state water users and Idaho Power should try to sit down and try to resolve in unison, as opposed to taking them before a court. So, they weren't really subject to litigation. They weren't things that could be appropriately litigated.

So, it sets the table, if you will, for description, identification, and, hopefully, resolution of broader issues between Idaho Power and the state and any other water users that might be involved for other interests on the river, frankly.

So, the other thing we think it does is in the context -- or at least Idaho Power thinks it does, is it solidifies relationships and, hopefully, helps to build relationships so that we continue to work on common water management issues on the river. We found that this is important over the years.

Frankly, what I think happened between the Swan Falls Agreement in 1984 and when we came to contest again in the 2000s was really a lack of communication. We really quit communicating with each other. We walked away from issues and found that when issues did come up, we got in a contest about them rather than sit down and try to resolve them.

Now, another thing I just want to briefly touch on is why this Agreement is important to Idaho Power. Why we believe it's important to the state, and why it's important to the citizens of Idaho. Idaho Power is an investor-owned utility, as you well know. It serves over 400,000 customers in the state of Idaho, the largest utility in the State of Idaho.

We rely upon, if you will, for about 60 percent of our hydro-generation -- on our hydropowered projects on the Snake River. So, a large portion of the generation we get to serve the State of Idaho, it relies upon hydropower. That makes us a partner, if you will, on the river, with a large presence up and down the river.

As you also know through the CAMP process, which has been going through the legislature this year and has been before the Water Board for the last year and a half or so, there are serious water management issues that need to be addressed, not only on the Snake River Plain, but up and down the river as the quality -- as well as, water management and water use.

We have been involved in the CAMP process for the last year-and-a-half. We think it's been a wonderful vehicle for getting parties together in a collaborative way to try to resolve those issues. And in that context, this Agreement allows us to go forward, we think, and be more cooperative and really put contested matters behind us.

Idaho Power is also involved in relicensing up and down the river. We have a relicense pending in the Hells Canyon project. We just finished relicensing in 2004 for our mid-Snake projects. So, we have -- again, our presence on the river, we find -- we have a lot of issues on the river that we need not only to address ourselves, but we need to address in a cooperative manner with other parties. In the context of resolving this litigation, we are hopeful. In fact, we fully expect that this is going to facilitate those relationships up and down the river.

One of the issues we had pending in the Hells Canyon relicensing relates to a 401 certification process. In order to get a license for Hells Canyon, we have to get certification from both Idaho and Oregon that our water quality at Hells Canyon complies with each of those state's water quality standards.

One of the issues that we're dealing with, as far as water quality at Hells Canyon, is temperature. We have what is called a "temperature load allocation" below Hells Canyon Dam. We have two ways to resolve that. One way is to build a structure in Brownlee Reservoir -- which we believe is really not a good idea because of its impact on other water quality parameters, as well as fish and wildlife -- and address the issue of temperature that way. Or, another alternative is to move upstream and see if we can't do watershed measures that address temperature impacts up and down the river.

Now, to do that, we're going to be looking for cooperative relationships with people up and down the river, landowners, the state agencies, federal agencies. And, again, arguing having a wedge, if you will, between Idaho Power and people up and down the river, in that context, simply is not good business. So, this facilitates, we think, that relationship we're going to have to have up and down the river to address some of those other issues.

Our presence on the river, from not only below Milner Dam, but also up through American Falls, also makes us realize that this river system is one system. We, perhaps, better than anyone else know that. We have obligations, as I say, down in Hells Canyon. We have obligations in American Falls. This is the holistic -- we think we need to address the river problems in a holistic manner. This is something that CAMP realizes, and something, I think, in the coming years, we're going to have to all deal with.

Now, one of the questions that is probably in some people's minds is: How did we get to this process of resolving these issues two years after we had a rather contentious debate over recharge in this body?

Well, I have to say that one of the primary motivators, again, came from this body after that contentious debate with the issuance of Senate Concurrent Resolution 136. This body, in fact, is a motivator for getting more than 50 stakeholders together in that CAMP process through the Idaho Water Resource Board and getting them to sit down. And I would commend this body, as well Governor Otter, and also the Water Resource Board, for doing that, because in my 25 years of dealing with water management issues and water issues, I've not been involved with anything that has been more collaborative, that kept people at the table longer, and had a better interaction of interests than that CAMP process.

And that really brought us to the point where we started to talk about things in a more, again, collaborative manner, in a more -- educating each other with respect to what our interests were and what the needs of the system were and what recharge was and what recharge wasn't.

So, rather than argue about what we argued about in 2006 -- I won't go back to it, but we started to look at things a bit differently. And as you know, in this CAMP process, Idaho Power has been active. We support it. We are engaged in a pilot recharge project with seven canal companies in the Milner Dam area. And we found that there are ways to work together to solve these issues, as opposed to being apart.

So, this communicating, this broad stakeholder involvement, we think, has gone a long ways to bring the interests up and down the river together.

We also found, when we got into litigation, that the Swan Falls framework offered, really, kind of a pathway for us to get together. There was a framework that was done in 1984, about four or five months prior to the Swan Falls Agreement, that had a provision in it that recognized that recharge was a management tool that should be explored and should be considered by the state, should be considered by Idaho Power Company, and there should be communication between those interests as to the effect of recharge not only on the aquifer to benefit those interests up and down the river but also on hydropower. That created somewhat of a bridge between us, to allow us to sit down and start to ask questions as to why we were arguing about things that maybe we could find a pathway and come together on.

So, there is a myriad of things that happened, but after that 2006 debate that we had, the fact that we were essentially forced -- not forced by the standpoint that somebody forced us to be there, but because of the need to get matters addressed up and down the river, it brought parties together. And I think that was really the primary motivator that brings us here today.

So, I would commend the Governor's Office. I would commend the AG's Office and would thank them for their cooperation in putting this together. And with that, I'm going to defer to Mr. Strong to talk about the legislation, and I would stand for questions.

**CHAIRMAN SENATOR SCHROEDER:** Any questions?

Chairman Stevenson?

**MR. STEVENSON:** Thank you, Mr. Chairman. Mr. Tucker, I personally would like to thank you for your endurance the last two years as you sat through all those CAMP meetings and listened to the rhetoric -- sometimes that was not always complimentary -- but I do thank you for doing that and would appreciate it if you would take to Mr. Keen my personal appreciation for willingness to sit down and bring this document to us in these bills. Thank you very much. We appreciate it.

**MR. TUCKER:** Thank you, Chairman Stevenson. I would say that, really, the CAMP process has been a very worthwhile experience, and I wouldn't have missed it for the world in the context of meeting other people and having the interaction with other people and really establishing relationships up and down the river, as I say. I think it's going to really bring back many, many times to, not only Idaho Power, but also other interests on the river a lot of benefits. Thank you, though, for your comments.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

Mr. Cameron and then Senator Coiner.

**SENATOR CAMERON:** Thank you, Mr. Chairman. And Mr. Tucker, thank you for being here and for your comments, and I want to thank you for Idaho Power's role in helping reach this compromise.

You started your comments with three points that you thought were the major components or you believe are the major components of this framework. And I want to reiterate in my words what I thought I heard you say and have you indicate for us whether that would be the case.

First of all, I thought I heard you say that as part of this Agreement the issue of rights above Milner is resolved and that the company, the Idaho Power Company, recognizes that they no longer have any -- or recognized that they do not have any rights to water above Milner.

Third -- or, secondly -- and I don't know if I have these in the same order that you indicated, that water rights in the State of Idaho are issued decreed on the basis of the Snake River Basin Adjudication and that the water held in Idaho is held in trust by the State of Idaho.

And thirdly, that recharge is and was available under the Swan Falls Agreement -- in the initial Swan Falls Agreement and that nothing in this - this reaffirms that ability for recharge. That's kind of my interpretation what I heard you say.

Would you clarify that for me?

**CHAIRMAN SENATOR SCHROEDER:** Mr. Tucker?

**MR. TUCKER:** Mr. Chairman, and thank you Senator Cameron. That's essentially it. I think I'll just kind of add a little bit around the edges, if I might.

On the first issue, we do clarify that Idaho Power does not have the right to call out its Swan Falls water rights above Milner Dam. Now, there has been concern by some interests up above Milner Dam that Idaho Power was trying to assert its water rights below Milner Dam -- those associated with the Swan Falls Agreement -- to preclude the use of water above Milner Dam.

We had clarified that we don't have the right to do that. Now, that said, we, obviously, do have certain rights above Milner Dam at American Falls Reservoir. With respect to our storage rights, we have the flow right of American Falls Reservoir and, also, we think we have the right, and I think the state agrees with this, to bring water past Milner Dam in the event that we lease water or acquire water above Milner Dam and bring it downstream. So, subject to those kinds of qualifications, I think you're accurate in your comments.

On the issue of the decrees, the issue of the decrees is that's correct. The judge entered an order in April of 2008 and, essentially, defined how Idaho Power's rights were be going to be decreed, how they were going to be held. Idaho Power holds rights up to the minimum flows 39/56 CFS. The flows above the minimum flows are held by the State of Idaho in trust for Idaho Power and the benefit of the people of the State of Idaho.

Idaho Power has the right to use those flows above 39/56 until the state reallocates them, essentially, in accordance with state law. So, that is the confirmation of that issue. And the issue as to recharge, we are confirming that we do not have the right under the Swan Falls Agreement to preclude recharge. Now, we, like anyone else, if recharge affects us in any other way or it's not done in accordance with state law, we have all those other rights, but we are resolving that issue with respect to Swan Falls.

**CHAIRMAN SENATOR SCHROEDER:** Senator Cameron, follow-up?

**SENATOR CAMERON:** Thank you, Mr. Chairman.

Just one follow-up. I also want to make sure that we retain the right as the legislature through this Agreement to be able to adjust state law with regards to issues of recharge, et cetera, and that nothing in this framework precludes the legislature from that responsibility and/or opportunity.

**CHAIRMAN SENATOR SCHROEDER:** Mr. Tucker?

**MR. TUCKER:** Chairman, again, Senator Cameron, that's correct, Senator. We cannot bind this legislature, obviously, through any agreement that we have with the Governor's Office and the State of Idaho. The legislature retains that authority to change state law with respect to recharge, or anything else.

What we've talked about in the context of this framework is just a realization and an interaction with the state that the recharge, like any other use of water, should be done in the public interest. There should be broad public policy debates. There should be consideration of the public interest. And subject to that, obviously, this body has the ability to legislate and change laws, as necessary.

**CHAIRMAN SENATOR SCHROEDER:** Senator Coiner, and then Representative Chavez.

**SENATOR COINER:** Thank you, Mr. Chairman. My question was partially answered by Senator Cameron's question, so I'll hold for a minute.

**CHAIRMAN SENATOR SCHROEDER:** Thank you.

Representative Chavez, and then Representative Wood.

**REPRESENTATIVE CHAVEZ:** It has a life of its own. Thank you, Mr. Chairs.

And Mr. Tucker, in Article III, on page 5, No. 4 at the bottom, probably everyone in this room understands this, but I do not. "Resolution of water management issues associated with the trust and nontrust water areas."

Could you explain what "trust" and "nontrust water areas" are, please?

**CHAIRMAN SENATOR SCHROEDER:** Mr. Tucker?

**MR. TUCKER:** Mr. Chairman, Representative Chavez, that, obviously, opens up a lot of doors in people's minds. But what it's meant to capture in the context of what we put down, the state and Idaho Power. "Trust water" is that water that flows -- there is a trust water line that's associated with the Swan Falls Agreement where certainly water that is to -- I will say-- the west of that trust water line is considered to be tributary

to Idaho Power's rights below Milner Dam. Water that is associated to the east of that trust water line is considered to be nontributary to below Milner Dam.

Now, the reason that we put this particular article in here, this particular number in here, was because what we're finding is that -- in 1984, and let me assure people that we're not intending to redraw a trust water line here, but for the purposes of water management, in 1984 engineers drew a trust water line that was not necessarily based upon the best science. It was an estimation. We're finding after 25 years that there are modeling results. There are various data that's out there that calls into question exactly what is tributary and what's nontributary. And for the purposes of administration, all we're doing is capturing here what we think -- moving forward, we need to sit down and talk about these issues so we're all on the same page as to what is tributary and what's nontributary and see if we can't work that out. It's probably more complex than that, but that's simply what it's intended to address.

**REPRESENTATIVE CHAVEZ:** Simple is good for me. Thank you.

**CHAIRMAN SENATOR SCHROEDER:**

Representative Wood, Representative (inaudible).

**REPRESENTATIVE WOOD:** Thank you, \_\_\_\_\_

Mr. Chairman. I might follow-up on that. The question I'm asking is also on the trust water. You said that Idaho Power has some right to use those trust waters that are not allocated to other uses that you have the same right. I'm asking you: What does that right entail? Is that a continuous right? Is it a rental right or a year or a season or exactly what? Would you tell me what that is?

**CHAIRMAN SENATOR SCHROEDER:** Mr. Tucker?

**MR. TUCKER:** Mr. Chairman, Representative Wood. Yes, the reference there is -- at the time of the Swan Falls Agreement, Idaho Power -- well, even now Idaho Power has water rights associated with the Swan Falls Dam, for instance, of 8400 CFS.

What we agreed to in the Swan Falls Agreement was to subordinate our water rights on the river and at Swan Falls down in the 39/56 -- 3,900 CFS in the irrigation season and 5,600 CFS in the wintertime. Now, that portion of the water that's above those minimum flows was set aside and placed in trust and was available to the State of Idaho to -- essentially, to reallocate to new uses in accordance with state law. In other words, someone would come in and say, "I would like to irrigate 100 acres of land." And they would get a water right, what is called a "Trust Water Right," they would get a water right to irrigate, and it would deplete that trust water amount.

What I'm referring to is that we have the right to use the balance or the

overage -- is that until that trust water is used up, if you will, or allocated, we have the right to pass that through to our plants, and it's in perpetuity. I mean, if it's not ever used up, we have the right to pass through to our plants. In other words, we still hold that subordinatable right, what they call a subordinatable right, until the State reallocates it to someone else. I hope I'm being a little clear on that.

So, that's about the extent of it. If I'm not clear, please say so, and I'll be happy --

**REPRESENTATIVE WOOD:** Mr. Chairman, that answers my question. Thank you.

**CHAIRMAN SENATOR SCHROEDER:** Thank you.

Representative Hagedorn and Representative Raybould.

**REPRESENTATIVE HAGEDORN:** Thank you, Mr. Chairman. It appears that our Murphy gauging station is kind of central to determining our livelihood. Who owns the Murphy -- who owns and operates the Murphy gauging station? Who calibrates that and (inaudible) that calculation?

**MR. TUCKER:** Well, I'm not sure that I can answer that, specifically. Maybe ask that to Mr. Strong.

My -- I want to say it's owned by the USGS, but I'm not sure that is what I'm thinking. And they do the calibrations, but I think Mr. Strong or, perhaps, Director Tuthill could probably address that better.

But, you're right. It is central to these issues because that's where the measurement, the ultimate measurement is made.

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong, do I see your head saying affirmative on the USGS thing? Okay. Thanks.

Okay. Representative Raybould?

**REPRESENTATIVE RAYBOULD:** Mr. Chairman and Jim, I just want to add my thanks to you and your company for the good faith negotiations that have taken place here. This Agreement reflects, I believe, on the same grounds and the same philosophy that we did in the Swan Falls Agreement.

I was involved in that Agreement in putting together -- working with the Attorney General's Office and many of the things that went into that Agreement. And in looking this over, I believe that this does clarify a number of those questions that came up over the past two or three years from the Swan Falls Agreement. And I appreciate the Attorney General's Office, the Governor's Office, and your company in these good faith negotiations, and I believe this document that we have here and these three bills that are going to accomplish this, I think are a great advantage

to the State of Idaho. Thank you.

**CHAIRMAN SENATOR SCHROEDER:** Thank you, sir.

Mr. Strong, would you like to –

**MR. STRONG:** Mr. Chairman, Chairman Stevenson, members of the committee, it's a pleasure to be here this afternoon to address you on this framework agreement.

Before I get into my remarks, I would like to acknowledge two of my colleagues that are here in attendance with me today: Michael Orr and Shasta Kilminster-Hadley. They've worked tirelessly on this effort, and I wanted to give them acknowledgment on the work that they've done on that.

Turning to the Agreement, itself, my responsibility is to walk you through the Agreement. There are a lot of attachments to that Agreement, but the bottom line, and the ones that we need to look at are the framework, the memorandum of agreement, and, then, three pieces of legislation, so I'll kind of work through those in that regard.

With regard to the framework, Mr. Tucker has done an excellent job of describing what that is. It is what it's intended to be: A road map for how we would resolve the current and pending litigation over the interpretation of the Swan Falls Agreement. Itself is not a settlement document. The settlement constitutes the acts that are required under the executive and legislative and judicial branches.

With regard to the intent, I would echo Mr. Tucker's comments, as well, that the purpose here is not to change, alter, or affect in any way the original Swan Falls Agreement, but rather to, as noted in the title, to reaffirm those principles. And what we're really reaffirming is the fundamental policy decision that was made back at the time in the Swan Falls Agreement reflecting historic practice that we treat the river as a divided river at Milner. The water above Milner is intended to be administered as one source, and the water below Milner is administered as a separate source.

Now, having said that the river is divided, I would also concur in Mr. Tucker's comments that the river is united because regardless of the fact that whether we administer water rights below Milner to affect waters above Milner, the reality is that water flows past Milner and contributes to the flows that help in providing the generation necessary to provide the low-cost power we get from the company.

And so, in that regard, I think one of the fundamental characteristics of the original Swan Falls Agreement was to get the company and the state on a common footing to talk about how to effectively manage this resource in a way that achieves the many multiple benefits that we need to have as citizens of Idaho from this particular resource, both low-cost power and the opportunity for economic growth and development and

protection of the various recreational and aesthetic values that we get from the river, as well.

I would also concur with Mr. Tucker's comments that what likely has happened is the situation with many families where over time you have a common purpose, but as you grow up, your purposes change, and sometimes you don't come back and reconcile those as necessary and instead what happened after the Swan Falls Agreement there was this kind of sense of relief. Anybody that lived through that particular battle will recall that that was a pretty intense conflict. So, just the relief from having that conflict resolved, I think, led to us moving on to other issues and, unfortunately, not maintaining those relationships that we need to have within our families and within our business structures.

And what we're hopeful this Agreement will do today is restore that conversation we need to continue to have with the company and with our other citizens in the state to make sure that we're managing this resource in an effective way.

In that regard, the issues that were really at play are the three that were discussed. The idea of: Do we administer water above Milner to satisfy needs below Milner? How are the water rights intended to be decreed given the legislative trust that was created? And third, Was it the intent at the time of the Agreement to include aquifer recharge as one of those uses that could have the benefit-of-the-water made available through the Swan Falls Agreement?

And Mr. Tucker accurately represents that, in fact, we have resolved all three of those questions in the affirmative. And affirmative being in the sense that this acknowledges that under 42-203B(2) that the river is divided at Milner and that the company's rights do not extend above Milner for purposes of administration. And that the -- we agreed that the court's decision on summary judgment is the appropriate resolution of the ownership of the rights.

The decrees that are set forth in Exhibit 6, you will see that the initial rights for the Swan Falls facility up to 3,900 CFS -- during the irrigation season and 5,600 CFS during the nonirrigation season are to be held in the name of the company, subject to those subordinations that are contained in the original Swan Falls Agreement and the 1180 contract.

So, for example, water rights with the priority date earlier than 1984 are the ones that enjoyed the benefit of a subordination and would not be subject to call even if the flows fall below 39- and 56-. And, likewise, those water rights that were intended to be protected that were in the process of perfection at the time the Agreement would also enjoy the benefit of subordination.

The other water rights for Swan Falls, plus the water rights for other facilities, other than CJ Strike, upstream to Milner Dam, as you will see in the decrees, will be decreed in the name of the State of Idaho as trustee for the benefit of the citizens of the State of Idaho and for the benefit of

the power company. And correctly, Mr. Tucker reflected the fact that the company is entitled to use that water that's available at its facilities but that is a defeasible right. To the extent that we develop new water rights, these new water rights will then enjoy the benefit of the subordination that was provided for under the Swan Falls Agreement.

So, how do we go about reflecting that in the context of the settlement that you have before you? Well, the first place that we do that is in the framework. And there are four parts to the framework that serve distinctly different functions. The Article I is intended to provide the context of how we related the settlement that we're bringing to you today back to the original Swan Falls Agreement. And the "whereas" clauses that are contained in that article are drawn largely from the original Swan Falls Agreement, the Swan Falls framework, and the state water plan amendments that were adopted, as part of the original Agreement.

By referencing some, but not all, of those provisions, there is no intent to diminish or to suggest that the value of the other provisions that are contained in the original Swan Falls Agreement are no longer valid; rather, the objective here was just to isolate those provisions that are necessary to identify and put in context the resolution that we are reaching. So, for example, the recognition under the original Swan Falls Agreement about the importance of the family farm and the farming traditions continue to remain in Idaho Code and remain unchanged and are not affected by this Agreement.

Likewise, in Article I, we try to make the point that as we move forward, we're reaffirming these principles. We're not changing them. They're to remain unchanged. Now, as having said that, Article II, is actually the framework that will lead to the settlement. And it calls for certain actions to be accomplished by this body, by the judiciary and by the executive branch in order to fully effectuate the Agreement. The framework is that first step that has been signed by the company and the state. The second step is approval of a memorandum of agreement. And the contemplation is that memorandum of agreement will be executed once legislation has passed and decrees are moving towards the court.

That memorandum of agreement I'll talk about a little bit more, later. It would be between the Governor's Office and the Water Resource Board and Idaho Power Company.

Then there are three pieces of legislation that will be the next part of my presentation that are critical to effectuating the intent that we've discussed, and, finally, entry of the decrees. So, that's the road map that we're on and assuming that all of those actions are accomplished in a timely fashion within 90 days, then we will have an effective resolution of the pending litigation and it will provide the pathway forward in terms of implementation of other aspects in the Swan Falls Agreement.

Now, Article III is separate and apart from the Swan Falls Agreement. And it's not intended to identify any or suggest any changes to the original Swan Falls Agreement; rather, what it is is an acknowledgment that there

are certain issues that we need to discuss. And one of those was brought up in questioning Mr. Tucker. That is: How do we measure the flows at Murphy gauge? Because it is central to this Agreement that Murphy gauge is the place where we make the decisions on how to administer the water rights.

Presently, the USGS gauge is controlled by the United States Geologic Service, USGS. Other water measuring stations upstream, some of them are under USGS administration, some are under Idaho Power Company Administration. It's kind of a mix. And that's why one of the first issues we list in this Article III in terms of future discussions is making sure that we have a common understanding on how that administration is to occur. And an example of why we need to have that and why we need to make sure that everyone agrees on the gauging stations that are going to be applicable and how they are calibrated is that in the Swan Falls Agreement -- the original Swan Falls Agreement, it provided that the fluctuations and the operation of the company's facilities are not to be considered as part of the flows and the Murphy gauge.

So, for example, if the company is doing load following for one of its upstream facilities and that would cause the flow to fall below 3,900 CFS or 5,600 CFS, that doesn't constitute a violation of the Agreement. Likewise, if the company, as Mr. Tucker referenced acquires water above Milner, the intent is to make sure that that water is not counted towards those flow conditions that come through the facility. The original Agreement contemplated that those would be supplemental to those particular rights.

Other issues that are of need of immediate attention deal with the American Falls Dam. American Falls, like these facilities, has a long history of relationships between the power company and water users, and certain agreements and commitments were made, and so we need to get those reflected in the SRBA decrees that are coming forward. And so, we're committing ourselves to begin discussions with the water users, the Bureau of Reclamation, and the company to see if we can't amicably resolve those issues consistent with the principles of this Agreement.

The issue about reevaluating term permits -- one of the issues under the Swan Falls Agreement is: How is the state going to be able to effectively ensure or provide that that 39/56 CFS flow at the Murphy gauge? And one way we did that was in issuance of new trust water rights was to impose a term condition on those water rights of 20 years. Those terms are now coming due, so it's now time to evaluate how those water rights affect or play into the overall agreement, so we need have those discussions and the Department has begun its process evaluating those rights.

The water management issues with regard to the trust line -- Mr. Tucker is correct in his representation to you on that, as well. Nothing in this Agreement contemplates change in changing the trust line. The trust line will remain in place where it's at, but the practicalities are the water rights -- some of the water rights outside the trust water could affect the flows in

the river, and we need to take that into account in how we do our administration and achieve our particular flow conditions.

The next item, "Effective Water Marketing System." That was proposed as part of the original Swan Falls Agreement that there would be discussion of a water marketing system. I believe at the time of the Swan Falls Agreement that focused primarily on DCMI use. But as history has shown, our water use patterns have changed since the Swan Falls Agreement. We now have flow augmentation. We have water acquisitions to Bell Rapids, and there have been a lot of other factors that affect how we conduct our water marketing activity above Milner.

And so, the idea is that we need to sit down and have that conversation. But the important point to take away from this provision is that we're not predisposed to a particular outcome. We're not indicating that we're intending to change state law or any other aspect of agreements that exist now presently between the parties, but rather, we need to have a conversation to talk about how we globally take into account all of the various competing demands for water supply.

The next item, "Resolution of Idaho Power Water Rights and American Falls, and the American Falls Reservoir Contract." I've spoken to you about that. Those are issues that are pending, either in the SRBA or in federal district court that we'll need to work through.

And I thought Mr. Tucker did an excellent job of describing to you the importance of the state and the company and water users working together on the relicensing the Hells Canyon Dam. It is the facility that carries the lion's share of the load for us, providing us with dependable low-cost power supply. It's in the state's interest, as well as, the company's interest, to find an opportunity to relicense that facility in the most effective way.

And, we, in looking at some of the proposals that are coming forward from the company, see some opportunities where by enlarging the (inaudible) will have an opportunity to resolve not only the company's needs but some other water supply problems, as well. So, the contemplation would be that we would have water discussions.

This list is not intended to be comprehensive. It's intended to be suggestive on some of the things that we should be talking about. Again, it's not intended to be focused on a particular outcome or disposition, but rather a reaffirmation that is consistent with the Swan Falls Agreement; that we need to dialogue on these issues.

With regards to Article IV, it's what we call in legal parlance, "the general provisions." It's intended to set forth the understanding of the parties, specifically, the first paragraph of Article IV reaffirms all aspects in the Swan Falls Agreement. And I think that is critical because if we get down the road in terms of interpretation issues, we're making it clear that our intent of this Agreement should be interpreted consistent with the original Swan Falls Agreement.

We also set forth recognition -- Senator Cameron asked the question about the legislature's authority. This Agreement fundamentally contemplates that these issues with regard to water management, are public policy decisions that are committed to the Water Resource Board and the legislature. And so, by this Agreement, what we do is resolve the company's water rights and those are fixed and set. But in terms of the legislative policies that are set forth in statutory provisions, those are within your prerogative to leave in place or alter or amend as you see fit in the future. So, that's quickly what the framework does.

Turning to the Memorandum of Agreement, again, the "whereas" clauses are drawn from the original Swan Falls Agreement, Swan Falls framework, and the water plan amendments that were adopted at that time to provide context for this particular memorandum of agreement. The agreement does two things, really. First, it fundamentally acknowledges that the state and this body are in the process of making a decision that the way we're going to manage the Eastern Snake River Plain Aquifer is pursuant to the Comprehensive Aquifer Management Plan. And within that CAMP document is the recognition that recharge up to between 150,000 and 250,000 acre feet is in the public interest, and that we are going to implement that recharge through a phased-in approach, and you're being asked to consider during this session, Phase I.

And what we have set forth is an understanding that that is going to be the template for future recharge in this particular basin, absent an amendment or change by this body as required for any change to the state water plan.

There is language in here that contemplates a phase-in approach, the original contemplation under Phase 1 is that we would do 100,000-acre feet of managed recharge, but there is an acknowledgment that the Board may find it necessary in terms of Phase I to look at some amount of recharge in excess of that, so the idea is to build in flexibility. And so, up to 175,000 acre feet of recharge could go forward under CAMP without coming back to the legislative body. If we go above that within the first 10 years, then the contemplation is that we would come back not as an amendment to the state water plan but rather just to get the concurrence of the legislature that we need to move to a different amount of recharge.

We expect those decisions will be informed by the adaptive management program. We, in talking with the agency, feel that this is an appropriate way both scientifically and from a policy perspective to implement recharge in a way that we can evaluate its effectiveness as one of the tools. And I want to emphasize "one of the tools" for restoring the water balance in the Eastern Snake Plain Aquifer.

The other aspect of the Agreement is an acknowledgment that while the company doesn't have the right to assert the hydropower water rights as a basis for opposition to recharge that they haven't relinquished the rights

that any other citizen would have under state law to voice its concerns and work with the Board to take into account the impact of recharge. Frankly, it's good public policy that we have those discussions because where recharge is done can have dramatic effects in terms of the operation of the river, just like a reservoir would. So, from that perspective, we believe it's important that before we move forward that we have that dialogue and try to optimize the tools that are available to us to achieve the broader policy objectives we're after.

There is also a provision in there. And I think it's fundamental to the Agreement is that if we're going to make these decisions, if we, as a state, choose to take on this authority to make decisions about water policy that we be held accountable for those decisions. So, in the event that we're implementing recharge and we see that there is a direct effect of recharge on hydropower resources that they could be used to generate power. There is an acknowledgment that the Governor and the Water Board would so advise the PUC of those direct effects, but those are determinations made by the Board and the Governor. That's really the effect of the memorandum of agreement.

Now, let's turn quickly to the three pieces of legislation -- the part that we're asking you to handle today. And the --

**CHAIRMAN SENATOR SCHROEDER:** Excuse me.

Senator Coiner?

Before we move on, can we have some questions?

**CHAIRMAN SENATOR SCHROEDER:** Senator Coiner?

**SENATOR COINER:** Thank you, Clive.

Could you explain the zero flow at Milner and what that means and put that in context for us?

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong?

**MR. STRONG:** Chairman, Senator Coiner, I'd be pleased to do so.

There's probably few concepts of water law that are more misunderstood more than the zero flow at Milner. Conceptually, when we think about it, our minds go immediately to the idea that we're going to regulate the river down to no flow.

In reading historical documentation, though, the zero flow policy at Milner really relates back to a decision that was made back in the 1920s, interestingly enough, by the Bureau of Reclamation and the State of Idaho that because as the water enters the canyons below Milner, it wasn't accessible; that the maximum or optimal utilization of the resource would occur by optimizing the amount of water that could be diverted and

used above Milner.

So, the intent was, at least from my recollection and review of historical documents, was that we were not necessarily managing the river to zero, but, rather, the intent was to make it clear that we have the ability to divert water if we could make beneficial use above Milner, because there wasn't a contemplation that we would manage the river to zero, per se.

**CHAIRMAN SENATOR SCHROEDER:** Senator Coiner?

**SENATOR COINER:** Yes. And, then, could you address how the Swan Falls Agreement and this settlement has affected other water rights that are in the reach?

**MR. STRONG:** Mr. Chairman, Senator Coiner, the intent of the parties is for this Agreement to effectuate the relationship between the power company and the State of Idaho. It's not intended to affect other issues. So, for example, there is a current controversy over the permit for Milner Dam that is held by Twin Falls and North Side Canal Company, and whether the director appropriately imposed a subordination condition on that permit. That is a separate matter. It is not resolved by this issue.

Likewise, there are other interpretation issues with regard to the Swan Falls Agreement in terms of its effect on spring flows. Those are not intended to be resolved; rather, this Agreement is intended to focus exclusively on that relationship between the state and the power company.

**CHAIRMAN SENATOR SCHROEDER:** Senator Coiner?

**SENATOR COINER:** The other thing you addressed is the water marketing. And I've had concerns about this that you and I have talked about a lot. In looking at that into the future and being a part of this and working more on water marketing, what do you see in the development of adequate and transparent accounting and the prevention of injury to senior water rights by that marketing?

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong?

**MR. STRONG:** Senator Coiner, the reason I took some special time to talk about water marketing is because it is one of those types of lightning rod issues. There are a lot of expectations built around the water supplies in the Upper Snake River Basin. We're having more and more demands placed on us, the flow augmentation, the idea of trying to provide water for recharge, water for soft conversions from groundwater to surface water use, to address the (inaudible) aquifer. The point that I'm making is the demands on that supply are very intense; yet, how we administer that system can have dramatic effects on different people.

If there's more demand placed on the system in terms of storage water rights, it can create a bigger burden for the storage-space holders. On the other hand, if the storage-space holders have too much freedom to

move water below Milner it can have impacts on junior users that had come to expect the storage water to be used above Milner.

And so, from that perspective, I think we need to all take a step back, review the history of how we got to where we're at and then figure out how all of these various agreements come together. So, from that perspective, I think there is a need for a very serious dialogue on how we go about water marketing in terms of a particular outcome.

I'm not capable today to tell you what that might be, but I do know that that discussion needs to occur. And I think it needs to occur in the context where there is true transparency. More often than not, when you get into these types of controversies, it's because people are operating on what they believe to be the facts, as opposed to what somebody else may see as the facts. And oftentimes, neither one of them are quite accurate in terms what that outcome is.

And so, I know that's a long answer, but it's a true answer that we need to have that discussion so that we can get that transparency and that those who rely on those water supplies can have confidence that the water rights are being administered by the Department in a way that provides the opportunity to use the water without creating secondary impacts on other users.

**CHAIRMAN SENATOR SCHROEDER:** Thank you, Mr. Strong. Thank you, Mr. Chairman.

Representative Wood?

**REPRESENTATIVE WOOD:** Thank you, Mr. Chairman. Clive, just so that I'm clear in my mind on the issue that I did talk about on the trust water, and you mentioned that Department -- or that Idaho Power might prescribe to use those waters that are not allocated.

My mind went further to the question if the director were to -- the petition for a water right to use some of that, is Idaho Power able to then, I guess -- I don't know whether they would be in a lawsuit -- that they would be able to protest that in some way or are they bound by any agreement to not interfere with the Department of Transportation -- or Department of Water Resources if they are petitioned for another use for some of that water.

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong?

**MR. STRONG:** Mr. Chairman, Representative Wood. The ground rules for allocation of trust water were spelled out as part of the original Swan Falls Agreement. And it's a two-step process. You've got the normal process for issuance of a water right and then you have what's called 42-203C, Idaho Code 42-203C, that spells out the criteria for how to make the determination whether it's appropriate to issue a trust water right. Nothing in this Agreement changes that standard.

Now, having said that, the company wouldn't be able to come in and make the argument that this is somehow injuring their water right. On the other hand, the company would have a right, as any other citizen, to use the processes that are available to the Department to make their opinion known about the effect of that water right. But it's not based on a water right. It's based upon the public interest standards of the statute that is enacted.

**REPRESENTATIVE WOOD:** Thank you, Mr. Chairman.

**CHAIRMAN SENATOR SCHROEDER:** Any further questions?

Senator Siddoway?

**SENATOR SIDDOWAY:** Thank you, Mr. Chairman. Clive, Mr. Tucker talked about the 3,900 – and, I believe, 5,600 CFS at Milner. And we always talk about 3,900. And when you see the jeopardy that we can have over, say, 4 CFS at one of the fish farms in the state that 56 CFS could be significant.

Could you straighten that out for me?

**MR. STRONG:** Mr. Senator, Mr. Chairman, Senator Siddoway. The way the agreement is set up is that from April -- the original Swan Falls Agreement is from April 1 to November 1. The flow conditions, 3,900 CFS at Murphy gauge. From November 1 to March 31, the number is 5,600 CFS. That is a nonirrigation season. It's the storage season.

Because of the zero flow at Milner, there is nothing that impairs the ability to store water above Milner. That's what that zero flow accomplishes -- or the zero flow policy accomplishes. And so, there really aren't competing uses in which we should have conflict with the 5,600 CFS other than the issue that we have been dealing with which is recharge. And by the resolution today, the ability to continue to do recharge that is found in the public interest pursuant to state law would not be affected by this Agreement. In fact, what it does is it allows that to go forward. You are correct, though, in observing -- and it's a concern that I think that we, as a state, need to address is the 3,900 CFS flow.

The original intent of the Swan Falls Agreement was that in the future as we develop that trust water, we were going to rely principally upon the flows of the Thousand Springs reach to satisfy that 3,900 CFS. And at the time of the Agreement, the thinking of the Department, their understanding was that those spring water rights were not ones that had a right to call against the aquifer. That was a fundamental assumption of the Swan Falls Agreement.

What we know today, though, is that that assumption is incorrect. That those spring flow water rights do have a right to call against the aquifer. And so, as a practical matter, to me, the problem we're going to have is not so much 3,900 CFS at Milner -- I mean, at Murphy, but more the issue: How do we manage or deal with those spring flows? So, it's

critical from my perspective that we get the CAMP process in place, start addressing the impacts on the spring flows; that way we'll help ameliorate the problems that we're having right now serving those fish farm rights while at the same time it will enhance those spring flows and have the benefit to the power company. I think that is fundamental to why this Agreement makes sense to us today and work forward to try to solve that problem in a way that uses tools that don't require a sledgehammer to get to 2 CFS.

**CHAIRMAN SENATOR SCHROEDER:** Questions? All right. Let's go through the bills.

**MR. STRONG:** Mr. Chairman, the first bill that I would bring your attention to is Senate Bill 1167. And it's a rather simple bill, but what we're trying to do with 1167 is to acknowledge the fact that incidental -- not incidental, excuse me, managed recharge may have effects on surface flows similar to storage reservoirs.

For instance, as -- ironically, as you look back, one of the first fights that we had on the Upper Snake River was between the storage water holder -- storage space holders and the natural flow water users. We believe that the storage water rights were affecting their diversions of water. And that, ultimately, led to the committee of nine. Well, today we have that same issue coming back, but it's the spring users versus the surface water users and the storage-space holders. So, replaying history again here. But the idea is that since we know they can have those effects that we ought to be looking at these large managed recharge projects in the way that we take account of their effects up-front rather than waiting for the delayed effects.

And so, the idea is that under 42-1737, presently, we require reservoirs -- surface reservoirs of 10,000-acre feet or more to go through a public review process to make sure it's consistent with state law. We're proposing that we add that same requirement here for managed recharge projects that are in excess of 10,000 acre-feet an average annual basis.

And that way -- by doing that, hopefully, we can avoid creating an unintended problem by failure to consider how this private recharge project might affect the state water plan. That's really the only effect of that particular statutory provision.

**CHAIRMAN SENATOR SCHROEDER:** Do we have questions on Senate Bill 1167? Anyone?

Okay. Proceed.

**MR. STRONG:** The second bill that you have before you today is Senate Bill 1169. And Senate Bill 1169 is -- we're skipping 68. Sixty-eight is gone, and I'll come back to a new one in a second. Senate Bill 1169 deals with the PUC jurisdiction. And as part of the original Swan Falls

Agreement, this body passed Senate Bill 1005, I think it was -- or 115. And that was codified in Chapter 14 of the 1985 Session Laws. It's an uncodified section that what it was intended to do was to make it clear that the company wouldn't be subject to ratepayer actions for entering into the original Swan Falls Agreement. Why was that necessary? Because the original Swan Falls controversy arose out of a conflict over whether the company had taken adequate actions to protect its water rights at the Swan Falls facility.

By reaffirming the Agreement, what the company is asking for is to make it clear that that same protection that they received back in 1984 continues forward to this 19 -- or 2009 settlement agreement. It's not intended to create any new benefits or any new burdens, nor is it intended to deprive PUC of its jurisdiction to determine whether a petition by the company for inclusion of its rates of new resources acquired are reasonable and necessary. Those decisions are made. What it simply says is that the PUC will not go behind the framework of the Swan Falls settlement to say that entering into the agreement was a waste of the company's resources. So, that's the purpose for which it's intended.

**CHAIRMAN SENATOR SCHROEDER:** Questions for Clive on Senate Bill 1169? Anyone? Okay.

Do you want to tell them what we did with 1168?

**MR. STRONG:** Yes. Senate Bill 1168, we're withdrawing that and substituting in place of it Senate Bill 1185. And the only difference -- well, let me first describe what the bill is intended to accomplish and then I'll describe the difference between the two bills.

The purpose of Senate Bill 1185 is to confirm that the Swan Falls Agreement did not and does not preclude aquifer recharge. That is the first and primary purpose of that bill. And it does so by removing the reference to Idaho Code Section 42-234, which had the language in it that created the controversy during the House Bill 800 dispute a couple of years ago. It also would repeal Idaho Code Section 42-4201A, which contained similar language in it. But the reason that we're repealing Idaho Code Section 42-4201A is to consolidate all of the state -- or most of the state policies within Idaho -- the new Idaho Code Section 42-234, so there will be an easy reference to see what state policies are with regard to recharge. The legislation would reaffirm that recharge water rights will be issued in accordance with Idaho law and the State water plan, and it will reconfirm that the director has authority to regulate how recharge is implemented in order to avoid or prevent the creation of adverse effects on other beneficial uses.

A prime example of that is we certainly wouldn't want to be doing a recharge project that is causing a water quality problem that would thereby impact a water use that relies on water quality. So, it gives the director the authority to look at a broader basis and to make sure that as we do, as we implement the recharge project, we can avoid those kind of adverse effects.

The only real difference between the original bill that was before you and Senate Bill 1185 occurs in paragraphs 3 and 4.

In the original bill, we, as attorneys, were trying to consolidate and make things more concise, but there was a concern that in the process of doing that that somehow we may have lost some the intent, and that was expressed to us by the Idaho Water Users, some of the intent of the original bill. So, rather that create that kind of unintended consequence, what we agreed to do was to go back and include the express language from the current Idaho Code Section 422 – 4201A, subsections (3) and (4). So, those two sections that you see in the new bill substitute for the original section (3), and by doing so, this gives comfort that we are not changing the current recharge policy.

In addition, you'll see in this bill a couple of additional sections that are being referenced. That's only for the purpose of making it clear that since we're repealing -- we would be repealing 42-4201A and making the cross reference back now to 42-234 it's a way to do some housekeeping to make sure that we don't have inconsistent reference in those statutory provisions, but there are substantive changes by the inclusion of that particular provision.

So, Mr. Chairman, that is a quick summary.

**CHAIRMAN SENATOR SCHROEDER:** Just a note.

Committee, we suspended rules to reprint 1185, so you've probably noticed that the format of this is not like the other bills. 1185 you have in front of you. It's just a copy of the official bill that most of the time just the chairman sees.

So, anyway, question from Representative Wood?

**REPRESENTATIVE WOOD:** Thank you, Mr. Chairman. Just to be clear, Clive. I heard you say that you were now trying to consolidate all of the state policies for recharging into one place. And then if I got that correctly, would that be in the 42-25 or -- I didn't get the code section exactly right, I don't believe.

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong?

**MR. STRONG:** Mr. Chairman, Representative Wood, it would be consolidated in 42-234.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

Senator Hagedorn?

**SENATOR HAGEDORN:** This particular bill, 1185, page 2, paragraphs 3 and 4, was the director of the department (inaudible.) Is there built in somewhere a process where someone may protest that decision?

**CHAIRMAN SENATOR SCHROEDER:** Mr. (inaudible)?

**UNIDENTIFIED SPEAKER:** Mr. Chairman, Representative Hagedorn, yes, there is.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

Representative King?

**REPRESENTATIVE KING:** Thank you.

Mr. Strong, I'm concerned about recharge and how you measure it. And so, if a person that drills down to 100 feet this year and that goes dry into the aquifer, are we going to try to maintain 100 feet or 50 feet that they have to drill? I'm sure --

**CHAIRMAN SENATOR SCHROEDER:** Mr. Strong?

**MR. STRONG:** Mr. Chairman, Representative King, the question you ask is not so much about recharge. Recharge is a way to try to replenish that water supply; rather, it's a question about how do we maintain an aquifer level.

And there are statutory provisions that give the director the authority to establish what's called "a reasonable pumping level." Without getting too far afield today, let me just suggest to you that establishing a reasonable pumping level is extremely complicated, particularly by the fact that we have an aquifer that extends over an 11,000 square mile area and doesn't have homogeneity in the types of rock formations in which the water is flowing through.

So, that's one of the issues that is front and center right now in the A and B delivery call that Justice Schroeder just issued a decision recommending to the Department that they consider establishing reasonable pumping levels. I'm confident that the department hasn't had a chance to take a position on that yet, but that is an issue that we'll have to deal with because as a practical matter, if we draw the water down too far, it becomes an economic impact, and at some point an economic impact should not be visited on the existing user.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

Now, I understand that Norm (inaudible) from the Idaho Water Users Association has called and said 1185 is acceptable to them. I think it was Senator Coiner that related that to us.

Okay. So, further questions? All right. Thank you.

Anyone else here that wants to --

**UNIDENTIFIED SPEAKER:** I have one question for you, Clive, and that's

not on this legislation, but on your Agreement. It's based on the legislature passing House Bill 264. If for some reason that didn't pass, is that null and void there? Because that's the one that puts the CAMP process into the river -- or into the water.

**MR. STRONG:** Mr. Chairman, Representative Stevenson, that would be a potential outcome, not necessarily the outcome, but, certainly -- although we don't incorporate the CAMP legislation into this bill, if that were to change, then it affects some of the fundamental aspects of the Agreement, and we would have to sit down around the table and see if we can resolve that issue.

**CHAIRMAN SENATOR SCHROEDER:** It's scheduled for hearing on Monday.

Further questions? Representative Wood?

**REPRESENTATIVE WOOD:** Mr. Chairman, if I might, just be sure that I'm writing this down correctly, are you saying that House/Senate Bill 1185 replaces Senate Bill 1168?

**CHAIRMAN SENATOR SCHROEDER:** That's correct.

**REPRESENTATIVE WOOD:** Okay. Thank you.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

**UNIDENTIFIED SPEAKER:** Mr. Chairman, I guess the only other question that I would like to ask does not involve Mr. Strong but the director.

**CHAIRMAN SENATOR SCHROEDER:** Absolutely.

Mr. Director, would you answer questions of the Chairman?

**UNIDENTIFIED SPEAKER:** Mr. Tuthill, you have reviewed this. Have you found anything here that you wouldn't be able to administer or to live with?

**MR. TUTHILL:** Mr. Chairman, Representative Stevenson, through the process, there has been good coordination between those that were involved in developing this Agreement and the agency. We've had many opportunities to provide input and weigh in. The Department is very supportive, as is the Governor's Office, of this bill and the various provisions. And these elements are administrable in my view, so I'm very supportive.

Mr. Chairman, if I could add on to that one clarification. There was a question by, I believe, Representative Hagedorn about the entity that conducts the measurements at Swan Falls. And Mr. Strong asked me at the break if it really is USGS. I confirmed "yes." And while on one hand

at one time the USGS did for many years conduct a measurement. I might clarify I was told -- we just double checked, and that is one device that has been assigned to Idaho Power Company for measurement as a cost-saving measure.

And as Mr. Strong indicated up and down the Snake River system there are many measuring devices; some are monitored by USGS, others by Idaho Power. That particular one right now is monitored by Idaho Power Company, and it points out that we do want to beef up our measuring capabilities on the Snake River below Milner, as we move forward, and that is one provision of the Agreement.

**CHAIRMAN SENATOR SCHROEDER:** All right. Any questions for the director?

Representative Raybould?

**REPRESENTATIVE RAYBOULD:** Thank you, Mr. Chairman.

Director Tuthill, do you know if the Murphy gauge, if that measurement is by telemetry or if that has to be physically measured?

**MR. TUTHILL:** Mr. Chairman, Representative Raybould. I believe it's on the hydro method. Let me take a look at Mr. Anderson just for a moment to confirm. And he is nodding, "yes, it is."

**UNIDENTIFIED SPEAKER:** Mr. Chairman, just a comment. If that is by the hydro telemetry process, there would be a record of that all of the time then, automatically, wouldn't there?

**UNIDENTIFIED SPEAKER:** Yes, Mr. Chairman, Representative Raybould. For most of us, as we look at the device, it's transparent as to who was actually monitoring that gauge. It's a multi-year gauge measurement, and it's been continuous through many years as it's passed from USGS to Idaho Power Company.

**UNIDENTIFIED SPEAKER:** Thank you.

**CHAIRMAN SENATOR SCHROEDER:** Further questions?

All right. Thank you, Director.

Is there anyone else that wanted to testify on these bills?

Okay. What we're going to do at this time is we're going to allow the house members to leave and the Senate is going to consider the bills, and we can get this moving.

Chairman Stevenson?

**CHAIRMAN STEVENSON:** Mr. Chairman, for the House members of the

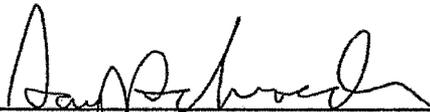
committee, these will then go through the process in the Senate? And when they're read back across the desk for the House, then we'll have to have a short meeting to vote on each one of these bills as they come back, and that's the intent.

**CHAIRMAN SENATOR SCHROEDER:** All right.

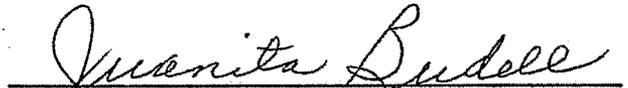
Thank you, everyone, for coming.

(End.)

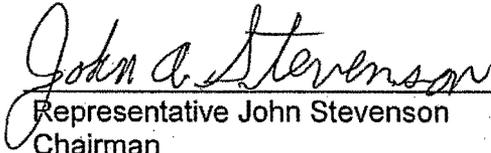
**ADJOURN:** The Joint meeting was adjourned at 2:45 p.m.



Senator Gary Schroeder  
Chairman



Juanita Budell  
Secretary



Representative John Stevenson  
Chairman

CHAIRMAN SENATOR SCHROEDER: I think that we'll get started. Now, for the committee members who don't normally meet in here, this is live, so if you start talking among yourselves, it will be recorded. Okay?

Pro-Tem, do you want to lead off?

PRESIDENT PRO-TEM SENATOR GEDDES: Thank you Mr. Chairman, and Mr. Chairman and members of the Joint Committee. It's my honor to be here. I'm not going to take a lot of your time because I have people -- or I don't have people, but there are people here who truly are qualified to speak to the committee and to address the issues.

As is typical, you know, when Clive Strong from the Attorney General's Office is carrying a manila envelope we know that we're getting close to the end of the session. So, hopefully, this is a good indicator that that is the case.

But I think what you're deliberating over today, these three water bills, are monumental and will establish not only the agreements that were made in the past from a historical standpoint but also have been addressed by our Supreme Court. And this will put, hopefully, a benchmark in place so that we never

have to go back and revisit some of those decisions.

And Mr. Chairman, if I may, I'd like to defer the remainder -- or at least the next portion of opening debate, an introduction of these three bills, to David Hensley from the Governor's Office.

CHAIRMAN SENATOR SCHROEDER: Yes, you may.

And committee members, just so you know, here's the Agreement, copies of the bills in your folder. And I'm going to allow you to ask questions as we go. In other words, if you have a question, raise your hand and I'll allow you to ask it.

Welcome.

MR. HENSLEY: Thank you, Mr. Chairman, Chairman Stevenson, members of both committees. My name is David Hensley. I'm legal counsel for the Governor. I appreciate the opportunity today to be here.

UNIDENTIFIED SPEAKER: Mr. Chairman, (inaudible) could we get Mr. Hensley to put a microphone on his tie so that we can -- up close to the knot, Mr. Hensley, so it's being recorded and broadcasted properly.

MR. HENSLEY: Well, that's technology for you.

Mr. Chairman, Chairman Stevenson, members of

the committee, again, my name is David Hensley, legal counsel for the Governor. I appreciate the opportunity today to be here on his behalf to share his insight into this historic occasion, his insight on the framework and the legislation that you have before you.

From the Governor's perspective, the framework is really a road map that settles the current litigation between the state and the company. And in addition to that, it is made up of various components that have to be completed in order for us to reach that settlement. One of the components is the legislation that you'll be considering today. And you'll hear more from Mr. Strong from the Attorney General's Office on that point.

I think it's also important to point out that the framework is an opportunity -- it's an opportunity to reaffirm the original Swan Falls Agreement and the principles that were set forth in that Agreement.

Moreover, it provides an opportunity for the state and the company to move forward on other aspects of its relationship, our relationship with the company, and other things that we need to work on. It really establishes a new day.

The Governor supports the framework and as a

signatory to that, he supports the passage of this legislation. He believes that it's a great example of what people can do when they sit down and talk to each other, when they recognize the mutual interest that they have, and what can truly benefit everyone involved.

We believe that the framework and its components are the right thing to do, and the Governor believes it is the right time to do it.

With that, Mr. Chairman, I stand for questions or turn the time over to Mr. Tucker from Idaho Power.

CHAIRMAN SENATOR SCHROEDER: Any questions from Mr. Hensley?

All right. Mr. Tucker?

MR. TUCKER: Mr. Chairman, thank you. Chairman Stevenson, thank you, members of the committee. My name is James Tucker, I'm an attorney with Idaho Power Company. I've been before you before; I think you probably remember a few years ago when I was before you on a very contentious matter that we're going to resolve today.

I'm here to -- please don't be afraid. These are not my remarks. I'm not going to take that long, but I do have a copy of the framework in front of me,

and if you have questions, I'll be happy to answer any questions you might have.

I want to start out by just kind of describing what this settlement is and what it is not. What it is not, it is not a change to the Swan Falls Agreement. We reaffirm the Swan Falls Agreement. We've sat down; we've looked at the matters that were in contest over the past several months and few years, and we've clarified those matters under the Agreement and come before you today to clarify, not only the Swan Falls Agreement, but matters that have been in contest.

So, it doesn't change the Swan Falls Agreement. What it does do, it addresses three primary issues that have been in contest, for at least some uncertainty, for a period of time. One relates to the -- what might be called the "Milner Divide." Now, there's been some concern by upstream water users that Idaho Power sought to assert its water rights above Milner Dam.

In my view, that has not been the case, but there has been uncertainty about that. And we clarify in this Agreement that Idaho Power does not intend and, in fact, cannot under 42-203B(6) assert its -- B(2), excuse me, its water rights above Milner Dam.

Now, the exception to that over the past few years has been the contest that we've had about recharge. And we also resolve that issue today. We confirm that under the Agreement we put before you today that Idaho Power has no right to assert under the Swan Falls Agreement that recharge cannot occur, either above Milner Dam or below Milner Dam.

The other thing it does is it resolves the issues relative to the decrees for Idaho Power's Swan Falls water rights in conformance with the decision that was rendered by the SRBA Court in April of 2008. So, it does those three things, and it resolves those three things.

It also sets the table for continued discussions between Idaho Power and the State of Idaho on other issues that we think, and the state thinks, are critical to continued cooperation on the river and continued water management issues on the river. So, you'll see in this framework in Article III that there is essentially a laundry list of issues that the state and Idaho Power agree that we're going to sit down with other parties, other interested parties, and we're going to try to, at least, discuss those issues. And to the extent there are concerns, matters of uncertainty or matters in dispute, we will seek to

resolve them through some type of collaborative process.

Not all of those, we don't believe, are going to be a matter where there is going to be any kind of contest between us. But we found that over the past few years that many of those issues that we've listed there are not really conducive to litigation. They're public policy issues. They're issues that the state water users and Idaho Power should try to sit down and try to resolve in unison, as opposed to taking them before a court. So, they weren't really subject to litigation. They weren't things that could be appropriately litigated.

So, it sets the table, if you will, for description, identification, and, hopefully, resolution of broader issues between Idaho Power and the state and any other water users that might be involved for other interests on the river, frankly.

So, the other thing we think it does is in the context -- or at least Idaho Power thinks it does, is it solidifies relationships and, hopefully, helps to build relationships so that we continue to work on common water management issues on the river. We found that this is important over the years.

Frankly, what I think happened between the

Swan Falls Agreement in 1984 and when we came to contest again in the 2000s was really a lack of communication. We really quit communicating with each other. We walked away from issues and found that when issues did come up, we got in a contest about them rather than sit down and try to resolve them.

Now, another thing I just want to briefly touch on is why this Agreement is important to Idaho Power. Why we believe it's important to the state, and why it's important to the citizens of Idaho. Idaho Power is an investor-owned utility, as you well know. It serves over 400,000 customers in the state of Idaho, the largest utility in the State of Idaho.

We rely upon, if you will, for about 60 percent of our hydro-generation -- on our hydropowered projects on the Snake River. So, a large portion of the generation we get to serve the State of Idaho, it relies upon hydropower. That makes us a partner, if you will, on the river, with a large presence up and down the river.

As you also know through the CAMP process, which has been going through the legislature this year and has been before the Water Board for the last year and a half or so, there are serious water management issues that need to be addressed, not only on the

Snake River Plain, but up and down the river as the water quality -- as well as, water management and water use.

We have been involved in the CAMP process for the last year-and-a-half. We think it's been a wonderful vehicle for getting parties together in a collaborative way to try to resolve those issues. And in that context, this Agreement allows us to go forward, we think, and be more cooperative and really put contested matters behind us.

Idaho Power is also involved in relicensing up and down the river. We have a relicense pending in the Hells Canyon project. We just finished relicensing in 2004 for our mid-Snake projects. So, we have -- again, our presence on the river, we find -- we have a lot of issues on the river that we need not only to address ourselves, but we need to address in a cooperative manner with other parties. In the context of resolving this litigation, we are hopeful. In fact, we fully expect that this is going to facilitate those relationships up and down the river.

One of the issues we had pending in the Hells Canyon relicensing relates to a 401 certification process. In order to get a license for Hells Canyon,

we have to get certification from both Idaho and Oregon that our water quality at Hells Canyon complies with each of those state's water quality standards.

One of the issues that we're dealing with, as far as water quality at Hells Canyon, is temperature. We have what is called a "temperature load allocation" below Hells Canyon Dam. We have two ways to resolve that. One way is to build a structure in Brownlee Reservoir -- which we believe is really not a good idea because of its impact on other water quality parameters, as well as fish and wildlife -- and address the issue of temperature that way. Or, another alternative is to move upstream and see if we can't do watershed measures that address temperature impacts up and down the river.

Now, to do that, we're going to be looking for cooperative relationships with people up and down the river, landowners, the state agencies, federal agencies. And, again, arguing having a wedge, if you will, between Idaho Power and people up and down the river, in that context, simply is not good business. So, this facilitates, we think, that relationship we're going to have to have up and down the river to address some of those other issues.

Our presence on the river, from not only

below Milner Dam, but also up through American Falls, also makes us realize that this river system is one system. We, perhaps, better than anyone else know that. We have obligations, as I say, down in Hells Canyon. We have obligations in American Falls. This is the holistic -- we think we need to address the river problems in a holistic manner. This is something that CAMP realizes, and something, I think, in the coming years, we're going to have to all deal with.

Now, one of the questions that is probably in some people's minds is: How did we get to this process of resolving these issues two years after we had a rather contentious debate over recharge in this body?

Well, I have to say that one of the primary motivators, again, came from this body after that contentious debate with the issuance of Senate Concurrent Resolution 136. This body, in fact, is a motivator for getting more than 50 stakeholders together in that CAMP process through the Idaho Water Resource Board and getting them to sit down. And I would commend this body, as well Governor Otter, and also the Water Resource Board, for doing that, because in my 25 years of dealing with water management issues

and water issues, I've not been involved with anything that has been more collaborative, that kept people at the table longer, and had a better interaction of interests than that CAMP process.

And that really brought us to the point where we started to talk about things in a more, again, collaborative manner, in a more -- educating each other with respect to what our interests were and what the needs of the system were and what recharge was and what recharge wasn't.

So, rather than argue about what we argued about in 2006 -- I won't go back to it, but we started to look at things a bit differently. And as you know, in this CAMP process, Idaho Power has been active. We support it. We are engaged in a pilot recharge project with seven canal companies in the Milner Dam area. And we found that there are ways to work together to solve these issues, as opposed to being apart.

So, this communicating, this broad stakeholder involvement, we think, has gone a long ways to bring the interests up and down the river together.

We also found, when we got into litigation, that the Swan Falls framework offered, really, kind of

a pathway for us to get together. There was a framework that was done in 1984, about four or five months prior to the Swan Falls Agreement, that had a provision in it that recognized that recharge was a management tool that should be explored and should be considered by the state, should be considered by Idaho Power Company, and there should be communication between those interests as to the effect of recharge not only on the aquifer to benefit those interests up and down the river but also on hydropower. That created somewhat of a bridge between us, to allow us to sit down and start to ask questions as to why we were arguing about things that maybe we could find a pathway and come together on.

So, there is a myriad of things that happened, but after that 2006 debate that we had, the fact that we were essentially forced -- not forced by the standpoint that somebody forced us to be there, but because of the need to get matters addressed up and down the river, it brought parties together. And I think that was really the primary motivator that brings us here today.

So, I would commend the Governor's Office. I would commend the AG's Office and would thank them for their cooperation in putting this together. And with

that, I'm going to defer to Mr. Strong to talk about the legislation, and I would stand for questions.

CHAIRMAN SENATOR SCHROEDER: Any questions?  
Chairman Stevenson?

MR. STEVENSON: Thank you, Mr. Chairman.  
Mr. Tucker, I personally would like to thank you for your endurance the last two years as you sat through all those CAMP meetings and listened to the rhetoric -- sometimes that was not always complimentary -- but I do thank you for doing that and would appreciate it if you would take to Mr. Keen my personal appreciation for willingness to sit down and bring this document to us in these bills. Thank you very much. We appreciate it.

MR. TUCKER: Thank you, Chairman Stevenson.  
I would say that, really, the CAMP process has been a very worthwhile experience, and I wouldn't have missed it for the world in the context of meeting other people and having the interaction with other people and really establishing relationships up and down the river, as I say. I think it's going to really bring back many, many times to, not only Idaho Power, but also other interests on the river a lot of benefits. Thank you, though, for your comments.

CHAIRMAN SENATOR SCHROEDER: Further

questions?

Mr. Cameron and then Senator Coiner.

SENATOR CAMERON: Thank you, Mr. Chairman.

And Mr. Tucker, thank you for being here and for your comments, and I want to thank you for Idaho Power's role in helping reach this compromise.

You started your comments with three points that you thought were the major components or you believe are the major components of this framework. And I want to reiterate in my words what I thought I heard you say and have you indicate for us whether that would be the case.

First of all, I thought I heard you say that as part of this Agreement the issue of rights above Milner is resolved and that the company, the Idaho Power Company, recognizes that they no longer have any -- or recognized that they do not have any rights to water above Milner.

Third -- or, secondly -- and I don't know if I have these in the same order that you indicated, that water rights in the State of Idaho are issued decreed on the basis of the Snake River Basin Adjudication and that the water held in Idaho is held in trust by the State of Idaho.

And thirdly, that recharge is and was

available under the Swan Falls Agreement -- in the initial Swan Falls Agreement and that nothing in this -- this reaffirms that ability for recharge. That's kind of my interpretation what I heard you say.

Would you clarify that for me?

CHAIRMAN SENATOR SCHROEDER: Mr. Tucker?

MR. TUCKER: Mr. Chairman, and thank you Senator Cameron. That's essentially it. I think I'll just kind of add a little bit around the edges, if I might.

On the first issue, we do clarify that Idaho Power does not have the right to call out its Swan Falls water rights above Milner Dam. Now, there has been concern by some interests up above Milner Dam that Idaho Power was trying to assert its water rights below Milner Dam -- those associated with the Swan Falls Agreement -- to preclude the use of water above Milner Dam.

We had clarified that we don't have the right to do that. Now, that said, we, obviously, do have certain rights above Milner Dam at American Falls Reservoir. With respect to our storage rights, we have the flow right of American Falls Reservoir and, also, we think we have the right, and I think the state agrees with this, to bring water past Milner Dam

in the event that we lease water or acquire water above Milner Dam and bring it downstream. So, subject to those kinds of qualifications, I think you're accurate in your comments.

On the issue of the decrees, the issue of the decrees is that's correct. The judge entered an order in April of 2008 and, essentially, defined how Idaho Power's rights were be going to be decreed, how they were going to be held. Idaho Power holds rights up to the minimum flows 39/56 CFS. The flows above the minimum flows are held by the State of Idaho in trust for Idaho Power and the benefit of the people of the State of Idaho.

Idaho Power has the right to use those flows above 39/56 until the state reallocates them, essentially, in accordance with state law. So, that is the confirmation of that issue. And the issue as to recharge, we are confirming that we do not have the right under the Swan Falls Agreement to preclude recharge. Now, we, like anyone else, if recharge affects us in any other way or it's not done in accordance with state law, we have all those other rights, but we are resolving that issue with respect to Swan Falls.

CHAIRMAN SENATOR SCHROEDER: Senator Cameron,

follow-up?

SENATOR CAMERON: Thank you, Mr. Chairman.

Just one follow-up. I also want to make sure that we retain the right as the legislature through this Agreement to be able to adjust state law with regards to issues of recharge, et cetera, and that nothing in this framework precludes the legislature from that responsibility and/or opportunity.

CHAIRMAN SENATOR SCHROEDER: Mr. Tucker?

MR. TUCKER: Chairman, again, Senator Cameron, that's correct, Senator. We cannot bind this legislature, obviously, through any agreement that we have with the Governor's Office and the State of Idaho. The legislature retains that authority to change state law with respect to recharge, or anything else.

What we've talked about in the context of this framework is just a realization and an interaction with the state that the recharge, like any other use of water, should be done in the public interest. There should be broad public policy debates. There should be consideration of the public interest. And subject to that, obviously, this body has the ability to legislate and change laws, as necessary.

CHAIRMAN SENATOR SCHROEDER: Senator Coiner, and then Representative Chavez.

SENATOR COINER: Thank you, Mr. Chairman. My question was partially answered by Senator Cameron's question, so I'll hold for a minute.

CHAIRMAN SENATOR SCHROEDER: Thank you. Representative Chavez, and then Representative Wood.

REPRESENTATIVE CHAVEZ: It has a life of its own. Thank you, Mr. Chairs.

And Mr. Tucker, in Article III, on page 5, No. 4 at the bottom, probably everyone in this room understands this, but I do not. "Resolution of water management issues associated with the trust and nontrust water areas."

Could you explain what "trust" and "nontrust water areas" are, please?

CHAIRMAN SENATOR SCHROEDER: Mr. Tucker?

MR. TUCKER: Mr. Chairman, Representative Chavez, that, obviously, opens up a lot of doors in people's minds. But what it's meant to capture in the context of what we put down, the state and Idaho Power. "Trust water" is that water that flows -- there is a trust water line that's associated with the Swan Falls Agreement where certainly water that is to

-- I will say -- the west of that trust water line is considered to be tributary to Idaho Power's rights below Milner Dam. Water that is associated to the east of that trust water line is considered to be nontributary to below Milner Dam.

Now, the reason that we put this particular article in here, this particular number in here, was because what we're finding is that -- in 1984, and let me assure people that we're not intending to redraw a trust water line here, but for the purposes of water management, in 1984 engineers drew a trust water line that was not necessarily based upon the best science. It was an estimation. We're finding after 25 years that there are modeling results. There are various data that's out there that calls into question exactly what is tributary and what's nontributary. And for the purposes of administration, all we're doing is capturing here what we think -- moving forward, we need to sit down and talk about these issues so we're all on the same page as to what is tributary and what's nontributary and see if we can't work that out. It's probably more complex than that, but that's simply what it's intended to address.

REPRESENTATIVE CHAVEZ: Simple is good for me. Thank you.

CHAIRMAN SENATOR SCHROEDER:

Representative Wood, Representative (inaudible).

REPRESENTATIVE WOOD: Thank you, Mr. Chairman. I might follow-up on that. The question I'm asking is also on the trust water. You said that Idaho Power has some right to use those trust waters that are not allocated to other uses that you have the same right. I'm asking you: What does that right entail? Is that a continuous right? Is it a rental right or a year or a season or exactly what? Would you tell me what that is?

CHAIRMAN SENATOR SCHROEDER: Mr. Tucker?

MR. TUCKER: Mr. Chairman, Representative Wood. Yes, the reference there is -- at the time of the Swan Falls Agreement, Idaho Power -- well, even now Idaho Power has water rights associated with the Swan Falls Dam, for instance, of 8400 CFS.

What we agreed to in the Swan Falls Agreement was to subordinate our water rights on the river and at Swan Falls down in the 39/56 -- 3,900 CFS in the irrigation season and 5,600 CFS in the wintertime. Now, that portion of the water that's above those minimum flows was set aside and placed in trust and was available to the State of Idaho to -- essentially, to reallocate to new uses in accordance with state

law. In other words, someone would come in and say, "I would like to irrigate 100 acres of land." And they would get a water right, what is called a "Trust Water Right," they would get a water right to irrigate, and it would deplete that trust water amount.

What I'm referring to is that we have the right to use the balance or the overage -- is that until that trust water is used up, if you will, or allocated, we have the right to pass that through to our plants, and it's in perpetuity. I mean, if it's not ever used up, we have the right to pass through our plants. In other words, we still hold that subordinatable right, what they call a subordinatable right, until the State reallocates it to someone else. I hope I'm being a little clear on that.

So, that's about the extent of it. If I'm not clear, please say so, and I'll be happy --

REPRESENTATIVE WOOD: Mr. Chairman, that answers my question. Thank you.

CHAIRMAN SENATOR SCHROEDER: Thank you.

Representative Hagedorn and Representative Raybould.

REPRESENTATIVE HAGEDORN: Thank you, Mr. Chairman. It appears that our Murphy gauging

station is kind of central to determining our livelihood. Who owns the Murphy -- who owns and operates the Murphy gauging station? Who calibrates that and (inaudible) that calculation?

MR. TUCKER: Well, I'm not sure that I can answer that, specifically. Maybe ask that to Mr. Strong.

My -- I want to say it's owned by the USGS, but I'm not sure that is what I'm thinking. And they do the calibrations, but I think Mr. Strong or, perhaps, Director Tuthill could probably address that better.

But, you're right. It is central to these issues because that's where the measurement, the ultimate measurement is made.

CHAIRMAN SENATOR SCHROEDER: Mr. Strong, do I see your head saying affirmative on the USGS thing? Okay. Thanks.

Okay. Representative Raybould?

REPRESENTATIVE RAYBOULD: Mr. Chairman and Jim, I just want to add my thanks to you and your company for the good faith negotiations that have taken place here. This Agreement reflects, I believe, on the same grounds and the same philosophy that we did in the Swan Falls Agreement.

I was involved in that Agreement in putting together -- working with the Attorney General's Office and many of the things that went into that Agreement. And in looking this over, I believe that this does clarify a number of those questions that came up over the past two or three years from the Swan Falls Agreement. And I appreciate the Attorney General's Office, the Governor's Office, and your company in these good faith negotiations, and I believe this document that we have here and these three bills that are going to accomplish this, I think are a great advantage to the State of Idaho. Thank you.

CHAIRMAN SENATOR SCHROEDER: Thank you, sir.

Mr. Strong, would you like to --

MR. STRONG: Mr. Chairman, Chairman Stevenson, members of the committee, it's a pleasure to be here this afternoon to address you on this framework agreement.

Before I get into my remarks, I would like to acknowledge two of my colleagues that are here in attendance with me today: Michael Orr and Shasta Kilminster-Hadley. They've worked tirelessly on this effort, and I wanted to give them acknowledgment on the work that they've done on that.

Turning to the Agreement, itself, my

responsibility is to walk you through the Agreement. There are a lot of attachments to that Agreement, but the bottom line, and the ones that we need to look at are the framework, the memorandum of agreement, and, then, three pieces of legislation, so I'll kind of work through those in that regard.

With regard to the framework, Mr. Tucker has done an excellent job of describing what that is. It is what it's intended to be: A road map for how we would resolve the current and pending litigation over the interpretation of the Swan Falls Agreement. Itself is not a settlement document. The settlement constitutes the acts that are required under the executive and legislative and judicial branches.

With regard to the intent, I would echo Mr. Tucker's comments, as well, that the purpose here is not to change, alter, or affect in any way the original Swan Falls Agreement, but rather to, as noted in the title, to reaffirm those principles. And what we're really reaffirming is the fundamental policy decision that was made back at the time in the Swan Falls Agreement reflecting historic practice that we treat the river as a divided river at Milner. The water above Milner is intended to be administered as one source, and the water below Milner is administered

as a separate source.

Now, having said that the river is divided, I would also concur in Mr. Tucker's comments that the river is united because regardless of the fact that whether we administer water rights below Milner to affect waters above Milner, the reality is that water flows past Milner and contributes to the flows that help in providing the generation necessary to provide the low-cost power we get from the company.

And so, in that regard, I think one of the fundamental characteristics of the original Swan Falls Agreement was to get the company and the state on a common footing to talk about how to effectively manage this resource in a way that achieves the many multiple benefits that we need to have as citizens of Idaho from this particular resource, both low-cost power and the opportunity for economic growth and development and protection of the various recreational and aesthetic values that we get from the river, as well.

I would also concur with Mr. Tucker's comments that what likely has happened is the situation with many families where over time you have a common purpose, but as you grow up, your purposes change, and sometimes you don't come back and reconcile those as necessary and instead what happened

after the Swan Falls Agreement there was this kind of sense of relief. Anybody that lived through that particular battle will recall that that was a pretty intense conflict. So, just the relief from having that conflict resolved, I think, led to us moving on to other issues and, unfortunately, not maintaining those relationships that we need to have within our families and within our business structures.

And what we're hopeful this Agreement will do today is restore that conversation we need to continue to have with the company and with our other citizens in the state to make sure that we're managing this resource in an effective way.

In that regard, the issues that were really at play are the three that were discussed. The idea of: Do we administer water above Milner to satisfy needs below Milner? How are the water rights intended to be decreed given the legislative trust that was created? And third, Was it the intent at the time of the Agreement to include aquifer recharge as one of those uses that could have the benefit of the water made available through the Swan Falls Agreement?

And Mr. Tucker accurately represents that, in fact, we have resolved all three of those questions in the affirmative. And affirmative being in the sense

that this acknowledges that under 42-203B(2) that the river is divided at Milner and that the company's rights do not extend above Milner for purposes of administration. And that the -- we agreed that the court's decision on summary judgment is the appropriate resolution of the ownership of the rights.

The decrees that are set forth in Exhibit 6, you will see that the initial rights for the Swan Falls facility up to 3,900 CFS -- during the irrigation season and 5,600 CFS during the nonirrigation season are to be held in the name of the company, subject to those subordinations that are contained in the original Swan Falls Agreement and the 1180 contract.

So, for example, water rights with the priority date earlier than 1984 are the ones that enjoyed the benefit of a subordination and would not be subject to call even if the flows fall below 39- and 56-. And, likewise, those water rights that were intended to be protected that were in the process of perfection at the time the Agreement would also enjoy the benefit of subordination.

The other water rights for Swan Falls, plus the water rights for other facilities, other than CJ Strike, upstream to Milner Dam, as you will see in

the decrees, will be decreed in the name of the State of Idaho as trustee for the benefit of the citizens of the State of Idaho and for the benefit of the power company. And correctly, Mr. Tucker reflected the fact that the company is entitled to use that water that's available at its facilities but that is a defeasible right. To the extent that we develop new water rights, these new water rights will then enjoy the benefit of the subordination that was provided for under the Swan Falls Agreement.

So, how do we go about reflecting that in the context of the settlement that you have before you? Well, the first place that we do that is in the framework. And there are four parts to the framework that serve distinctly different functions. The Article I is intended to provide the context of how we related the settlement that we're bringing to you today back to the original Swan Falls Agreement. And the "whereas" clauses that are contained in that article are drawn largely from the original Swan Falls Agreement, the Swan Falls framework, and the state water plan amendments that were adopted, as part of the original Agreement.

By referencing some, but not all, of those provisions, there is no intent to diminish or to

suggest that the value of the other provisions that are contained in the original Swan Falls Agreement are no longer valid; rather, the objective here was just to isolate those provisions that are necessary to identify and put in context the resolution that we are reaching. So, for example, the recognition under the original Swan Falls Agreement about the importance of the family farm and the farming traditions continue to remain in Idaho Code and remain unchanged and are not affected by this Agreement.

Likewise, in Article I, we try to make the point that as we move forward, we're reaffirming these principles. We're not changing them. They're to remain unchanged. Now, as having said that, Article II, is actually the framework that will lead to the settlement. And it calls for certain actions to be accomplished by this body, by the judiciary and by the executive branch in order to fully effectuate the Agreement. The framework is that first step that has been signed by the company and the state. The second step is approval of a memorandum of agreement. And the contemplation is that memorandum of agreement will be executed once legislation has passed and decrees are moving towards the court.

That memorandum of agreement I'll talk about

a little bit more, later. It would be between the Governor's Office and the Water Resource Board and Idaho Power Company.

Then there are three pieces of legislation that will be the next part of my presentation that are critical to effectuating the intent that we've discussed, and, finally, entry of the decrees. So, that's the road map that we're on and assuming that all of those actions are accomplished in a timely fashion within 90 days, then we will have an effective resolution of the pending litigation and it will provide the pathway forward in terms of implementation of other aspects in the Swan Falls Agreement.

Now, Article III is separate and apart from the Swan Falls Agreement. And it's not intended to identify any or suggest any changes to the original Swan Falls Agreement; rather, what it is is an acknowledgment that there are certain issues that we need to discuss. And one of those was brought up in questioning Mr. Tucker. That is: How do we measure the flows at Murphy gauge? Because it is central to this Agreement that Murphy gauge is the place where we make the decisions on how to administer the water rights.

Presently, the USGS gauge is controlled by

the United States Geologic Service, USGS. Other water measuring stations upstream, some of them are under USGS administration, some are under Idaho Power Company Administration. It's kind of a mix. And that's why one of the first issues we list in this Article III in terms of future discussions is making sure that we have a common understanding on how that administration is to occur. And an example of why we need to have that and why we need to make sure that everyone agrees on the gauging stations that are going to be applicable and how they are calibrated is that in the Swan Falls Agreement -- the original Swan Falls Agreement, it provided that the fluctuations and the operation of the company's facilities are not to be considered as part of the flows and the Murphy gauge.

So, for example, if the company is doing load following for one of its upstream facilities and that would cause the flow to fall below 3,900 CFS or 5,600 CFS, that doesn't constitute a violation of the Agreement. Likewise, if the company, as Mr. Tucker referenced acquires water above Milner, the intent is to make sure that that water is not counted towards those flow conditions that come through the facility. The original Agreement contemplated that those would be supplemental to those particular rights.

Other issues that are of need of immediate attention deal with the American Falls Dam. American Falls, like these facilities, has a long history of relationships between the power company and water users, and certain agreements and commitments were made, and so we need to get those reflected in the SRBA decrees that are coming forward. And so, we're committing ourselves to begin discussions with the water users, the Bureau of Reclamation, and the company to see if we can't amicably resolve those issues consistent with the principles of this Agreement.

The issue about reevaluating term permits -- one of the issues under the Swan Falls Agreement is: How is the state going to be able to effectively ensure or provide that that 39/56 CFS flow at the Murphy gauge? And one way we did that was in issuance of new trust water rights was to impose a term condition on those water rights of 20 years. Those terms are now coming due, so it's now time to evaluate how those water rights affect or play into the overall agreement, so we need have those discussions and the Department has begun its process evaluating those rights.

The water management issues with regard to

the trust line -- Mr. Tucker is correct in his representation to you on that, as well. Nothing in this Agreement contemplates change in changing the trust line. The trust line will remain in place where it's at, but the practicalities are the water rights -- some of the water rights outside the trust water could affect the flows in the river, and we need to take that into account in how we do our administration and achieve our particular flow conditions.

The next item, "Effective Water Marketing System." That was proposed as part of the original Swan Falls Agreement that there would be discussion of a water marketing system. I believe at the time of the Swan Falls Agreement that focused primarily on DCMI use. But as history has shown, our water use patterns have changed since the Swan Falls Agreement. We now have flow augmentation. We have water acquisitions to Bell Rapids, and there have been a lot of other factors that affect how we conduct our water marketing activity above Milner.

And so, the idea is that we need to sit down and have that conversation. But the important point to take away from this provision is that we're not predisposed to a particular outcome. We're not indicating that we're intending to change state law or

any other aspect of agreements that exist now presently between the parties, but rather, we need to have a conversation to talk about how we globally take into account all of the various competing demands for water supply.

The next item, "Resolution of Idaho Power Water Rights and American Falls, and the American Falls Reservoir Contract." I've spoken to you about that. Those are issues that are pending, either in the SRBA or in federal district court that we'll need to work through.

And I thought Mr. Tucker did an excellent job of describing to you the importance of the state and the company and water users working together on the relicensing the Hells Canyon Dam. It is the facility that carries the lion's share of the load for us, providing us with dependable low-cost power supply. It's in the state's interest, as well as, the company's interest, to find an opportunity to relicense that facility in the most effective way.

And, we, in looking at some of the proposals that are coming forward from the company, see some opportunities where by enlarging the (inaudible) will have an opportunity to resolve not only the company's needs but some other water supply problems, as well.

So, the contemplation would be that we would have water discussions.

This list is not intended to be comprehensive. It's intended to be suggestive on some of the things that we should be talking about. Again, it's not intended to be focused on a particular outcome or disposition, but rather a reaffirmation that is consistent with the Swan Falls Agreement; that we need to dialogue on these issues.

With regards to Article IV, it's what we call in legal parlance, "the general provisions." It's intended to set forth the understanding of the parties, specifically, the first paragraph of Article IV reaffirms all aspects in the Swan Falls Agreement. And I think that is critical because if we get down the road in terms of interpretation issues, we're making it clear that our intent of this Agreement should be interpreted consistent with the original Swan Falls Agreement.

We also set forth recognition -- Senator Cameron asked the question about the legislature's authority. This Agreement fundamentally contemplates that these issues with regard to water management, are public policy decisions that are committed to the Water Resource Board and the legislature. And so, by

this Agreement, what we do is resolve the company's water rights and those are fixed and set. But in terms of the legislative policies that are set forth in statutory provisions, those are within your prerogative to leave in place or alter or amend as you see fit in the future. So, that's quickly what the framework does.

Turning to the Memorandum of Agreement, again, the "whereas" clauses are drawn from the original Swan Falls Agreement, Swan Falls framework, and the water plan amendments that were adopted at that time to provide context for this particular memorandum of agreement. The agreement does two things, really. First, it fundamentally acknowledges that the state and this body are in the process of making a decision that the way we're going to manage the Eastern Snake River Plain Aquifer is pursuant to the Comprehensive Aquifer Management Plan. And within that CAMP document is the recognition that recharge up to between 150,000 and 250,000 acre feet is in the public interest, and that we are going to implement that recharge through a phased-in approach, and you're being asked to consider during this session, Phase I.

And what we have set forth is an understanding that that is going to be the template

for future recharge in this particular basin, absent an amendment or change by this body as required for any change to the state water plan.

There is language in here that contemplates a phase-in approach, the original contemplation under Phase 1 is that we would do 100,000-acre feet of managed recharge, but there is an acknowledgment that the Board may find it necessary in terms of Phase I to look at some amount of recharge in excess of that, so the idea is to build in flexibility. And so, up to 175,000 acre feet of recharge could go forward under CAMP without coming back to the legislative body. If we go above that within the first 10 years, then the contemplation is that we would come back not as an amendment to the state water plan but rather just to get the concurrence of the legislature that we need to move to a different amount of recharge.

We expect those decisions will be informed by the adaptive management program. We, in talking with the agency, feel that this is an appropriate way both scientifically and from a policy perspective to implement recharge in a way that we can evaluate its effectiveness as one of the tools. And I want to emphasize "one of the tools" for restoring the water balance in the Eastern Snake Plain Aquifer.

The other aspect of the Agreement is an acknowledgment that while the company doesn't have the right to assert the hydropower water rights as a basis for opposition to recharge that they haven't relinquished the rights that any other citizen would have under state law to voice its concerns and work with the Board to take into account the impact of recharge. Frankly, it's good public policy that we have those discussions because where recharge is done can have dramatic effects in terms of the operation of the river, just like a reservoir would. So, from that perspective, we believe it's important that before we move forward that we have that dialogue and try to optimize the tools that are available to us to achieve the broader policy objectives we're after.

There is also a provision in there. And I think it's fundamental to the Agreement is that if we're going to make these decisions, if we, as a state, choose to take on this authority to make decisions about water policy that we be held accountable for those decisions. So, in the event that we're implementing recharge and we see that there is a direct effect of recharge on hydropower resources that they could be used to generate power. There is an acknowledgment that the Governor and the Water

Board would so advise the PUC of those direct effects, but those are determinations made by the Board and the Governor. That's really the effect of the memorandum of agreement.

Now, let's turn quickly to the three pieces of legislation -- the part that we're asking you to handle today. And the --

CHAIRMAN SENATOR SCHROEDER: Excuse me.

Senator Coiner?

Before we move on, can we have some questions?

CHAIRMAN SENATOR SCHROEDER: Senator Coiner?

SENATOR COINER: Thank you, Clive.

Could you explain the zero flow at Milner and what that means and put that in context for us?

CHAIRMAN SENATOR SCHROEDER: Mr. Strong?

MR. STRONG: Chairman, Senator Coiner, I'd be pleased to do so.

There's probably few concepts of water law that are more misunderstood more than the zero flow at Milner. Conceptually, when we think about it, our minds go immediately to the idea that we're going to regulate the river down to no flow.

In reading historical documentation, though, the zero flow policy at Milner really relates back to

a decision that was made back in the 1920s, interestingly enough, by the Bureau of Reclamation and the State of Idaho that because as the water enters the canyons below Milner, it wasn't accessible; that the maximum or optimal utilization of the resource would occur by optimizing the amount of water that could be diverted and used above Milner.

So, the intent was, at least from my recollection and review of historical documents, was that we were not necessarily managing the river to zero, but, rather, the intent was to make it clear that we have the ability to divert water if we could make beneficial use above Milner, because there wasn't a contemplation that we would manage the river to zero, per se.

CHAIRMAN SENATOR SCHROEDER: Senator Coiner?

SENATOR COINER: Yes. And, then, could you address how the Swan Falls Agreement and this settlement has affected other water rights that are in the reach?

MR. STRONG: Mr. Chairman, Senator Coiner, the intent of the parties is for this Agreement to effectuate the relationship between the power company and the State of Idaho. It's not intended to affect other issues. So, for example, there is a current

controversy over the permit for Milner Dam that is held by Twin Falls and North Side Canal Company, and whether the director appropriately imposed a subordination condition on that permit. That is a separate matter. It is not resolved by this issue.

Likewise, there are other interpretation issues with regard to the Swan Falls Agreement in terms of its effect on spring flows. Those are not intended to be resolved; rather, this Agreement is intended to focus exclusively on that relationship between the state and the power company.

CHAIRMAN SENATOR SCHROEDER: Senator Coiner?

SENATOR COINER: The other thing you addressed is the water marketing. And I've had concerns about this that you and I have talked about a lot. In looking at that into the future and being a part of this and working more on water marketing, what do you see in the development of adequate and transparent accounting and the prevention of injury to senior water rights by that marketing?

CHAIRMAN SENATOR SCHROEDER: Mr. Strong?

MR. STRONG: Senator Coiner, the reason I took some special time to talk about water marketing is because it is one of those types of lightning rod issues. There are a lot of expectations built around

the water supplies in the Upper Snake River Basin. We're having more and more demands placed on us, the flow augmentation, the idea of trying to provide water for recharge, water for soft conversions from groundwater to surface water use, to address the (inaudible) aquifer. The point that I'm making is the demands on that supply are very intense; yet, how we administer that system can have dramatic effects on different people.

If there's more demand placed on the system in terms of storage water rights, it can create a bigger burden for the storage-space holders. On the other hand, if the storage-space holders have too much freedom to move water below Milner it can have impacts on junior users that had come to expect the storage water to be used above Milner.

And so, from that perspective, I think we need to all take a step back, review the history of how we got to where we're at and then figure out how all of these various agreements come together. So, from that perspective, I think there is a need for a very serious dialogue on how we go about water marketing in terms of a particular outcome.

I'm not capable today to tell you what that might be, but I do know that that discussion needs to

occur. And I think it needs to occur in the context where there is true transparency. More often than not, when you get into these types of controversies, it's because people are operating on what they believe to be the facts, as opposed to what somebody else may see as the facts. And oftentimes, neither one of them are quite accurate in terms what that outcome is.

And so, I know that's a long answer, but it's a true answer that we need to have that discussion so that we can get that transparency and that those who rely on those water supplies can have confidence that the water rights are being administered by the Department in a way that provides the opportunity to use the water without creating secondary impacts on other users.

CHAIRMAN SENATOR SCHROEDER: Thank you, Mr. Strong. Thank you, Mr. Chairman.

Representative Wood?

REPRESENTATIVE WOOD: Thank you, Mr. Chairman. Clive, just so that I'm clear in my mind on the issue that I did talk about on the trust water, and you mentioned that Department -- or that Idaho Power might prescribe to use those waters that are not allocated.

My mind went further to the question if the

director were to -- the petition for a water right to use some of that, is Idaho Power able to then, I guess -- I don't know whether they would be in a lawsuit -- that they would be able to protest that in some way or are they bound by any agreement to not interfere with the Department of Transportation -- or Department of Water Resources if they are petitioned for another use for some of that water.

CHAIRMAN SENATOR SCHROEDER: Mr. Strong?

MR. STRONG: Mr. Chairman, Representative Wood. The ground rules for allocation of trust water were spelled out as part of the original Swan Falls Agreement. And it's a two-step process. You've got the normal process for issuance of a water right and then you have what's called 42-203C, Idaho Code 42-203C, that spells out the criteria for how to make the determination whether it's appropriate to issue a trust water right. Nothing in this Agreement changes that standard.

Now, having said that, the company wouldn't be able to come in and make the argument that this is somehow injuring their water right. On the other hand, the company would have a right, as any other citizen, to use the processes that are available to the Department to make their opinion known about the

effect of that water right. But it's not based on a water right. It's based upon the public interest standards of the statute that is enacted.

REPRESENTATIVE WOOD: Thank you, Mr. Chairman.

CHAIRMAN SENATOR SCHROEDER: Any further questions?

Senator Siddoway?

SENATOR SIDDOWAY: Thank you, Mr. Chairman.

Clive, Mr. Tucker talked about the 3,900 -- and, I believe, 5,600 CFS at Milner. And we always talk about 3,900. And when you see the jeopardy that we can have over, say, 4 CFS at one of the fish farms in the state that 56 CFS could be significant.

Could you straighten that out for me?

MR. STRONG: Mr. Senator, Mr. Chairman, Senator Siddoway. The way the agreement is set up is that from April -- the original Swan Falls Agreement is from April 1 to November 1. The flow conditions, 3,900 CFS at Murphy gauge. From November 1 to March 31, the number is 5,600 CFS. That is a nonirrigation season. It's the storage season.

Because of the zero flow at Milner, there is nothing that impairs the ability to store water above Milner. That's what that zero flow accomplishes -- or

the zero flow policy accomplishes. And so, there really aren't competing uses in which we should have conflict with the 5,600 CFS other than the issue that we have been dealing with which is recharge. And by the resolution today, the ability to continue to do recharge that is found in the public interest pursuant to state law would not be affected by this Agreement. In fact, what it does is it allows that to go forward. You are correct, though, in observing -- and it's a concern that I think that we, as a state, need to address is the 3,900 CFS flow.

The original intent of the Swan Falls Agreement was that in the future as we develop that trust water, we were going to rely principally upon the flows of the Thousand Springs reach to satisfy that 3,900 CFS. And at the time of the Agreement, the thinking of the Department, their understanding was that those spring water rights were not ones that had a right to call against the aquifer. That was a fundamental assumption of the Swan Falls Agreement.

What we know today, though, is that that assumption is incorrect. That those spring flow water rights do have a right to call against the aquifer. And so, as a practical matter, to me, the problem we're going to have is not so much 3,900 CFS at Milner

-- I mean, at Murphy, but more the issue: How do we manage or deal with those spring flows? So, it's critical from my perspective that we get the CAMP process in place, start addressing the impacts on the spring flows; that way we'll help ameliorate the problems that we're having right now serving those fish farm rights while at the same time it will enhance those spring flows and have the benefit to the power company. I think that is fundamental to why this Agreement makes sense to us today and work forward to try to solve that problem in a way that uses tools that don't require a sledgehammer to get to 2 CFS.

CHAIRMAN SENATOR SCHROEDER: Questions? All right. Let's go through the bills.

MR. STRONG: Mr. Chairman, the first bill that I would bring your attention to is Senate Bill 1167. And it's a rather simple bill, but what we're trying to do with 1167 is to acknowledge the fact that incidental -- not incidental, excuse me, managed recharge may have effects on surface flows similar to storage reservoirs.

For instance, as -- ironically, as you look back, one of the first fights that we had on the Upper Snake River was between the storage water holder --

storage space holders and the natural flow water users. We believe that the storage water rights were affecting their diversions of water. And that, ultimately, led to the committee of nine. Well, today we have that same issue coming back, but it's the spring users versus the surface water users and the storage-space holders. So, replaying history again here. But the idea is that since we know they can have those effects that we ought to be looking at these large managed recharge projects in the way that we take account of their effects up-front rather than waiting for the delayed effects.

And so, the idea is that under 42-1737, presently, we require reservoirs -- surface reservoirs of 10,000-acre feet or more to go through a public review process to make sure it's consistent with state law. We're proposing that we add that same requirement here for managed recharge projects that are in excess of 10,000 acre-feet an average annual basis.

And that way -- by doing that, hopefully, we can avoid creating an unintended problem by failure to consider how this private recharge project might affect the state water plan. That's really the only effect of that particular statutory provision.

CHAIRMAN SENATOR SCHROEDER: Do we have questions on Senate Bill 1167? Anyone?

Okay. Proceed.

MR. STRONG: The second bill that you have before you today is Senate Bill 1169. And Senate Bill 1169 is -- we're skipping 68. Sixty-eight is gone, and I'll come back to a new one in a second.

Senate Bill 1169 deals with the PUC jurisdiction. And as part of the original Swan Falls Agreement, this body passed Senate Bill 1005, I think it was -- or 115. And that was codified in Chapter 14 of the 1985 Session Laws. It's an uncodified section that what it was intended to do was to make it clear that the company wouldn't be subject to ratepayer actions for entering into the original Swan Falls Agreement. Why was that necessary? Because the original Swan Falls controversy arose out of a conflict over whether the company had taken adequate actions to protect its water rights at the Swan Falls facility.

By reaffirming the Agreement, what the company is asking for is to make it clear that that same protection that they received back in 1984 continues forward to this 19 -- or 2009 settlement agreement. It's not intended to create any new

benefits or any new burdens, nor is it intended to deprive PUC of its jurisdiction to determine whether a petition by the company for inclusion of its rates of new resources acquired are reasonable and necessary. Those decisions are made. What it simply says is that the PUC will not go behind the framework of the Swan Falls settlement to say that entering into the agreement was a waste of the company's resources. So, that's the purpose for which it's intended.

CHAIRMAN SENATOR SCHROEDER: Questions for Clive on Senate Bill 1169? Anyone? Okay.

Do you want to tell them what we did with 1168?

MR. STRONG: Yes. Senate Bill 1168, we're withdrawing that and substituting in place of it Senate Bill 1185. And the only difference -- well, let me first describe what the bill is intended to accomplish and then I'll describe the difference between the two bills.

The purpose of Senate Bill 1185 is to confirm that the Swan Falls Agreement did not and does not preclude aquifer recharge. That is the first and primary purpose of that bill. And it does so by removing the reference to Idaho Code Section 42-234, which had the language in it that created the

controversy during the House Bill 800 dispute a couple of years ago. It also would repeal Idaho Code Section 42-4201A, which contained similar language in it. But the reason that we're repealing Idaho Code Section 42-4201A is to consolidate all of the state -- or most of the state policies within Idaho -- the new Idaho Code Section 42-234, so there will be an easy reference to see what state policies are with regard to recharge. The legislation would reaffirm that recharge water rights will be issued in accordance with Idaho law and the State water plan, and it will reconfirm that the director has authority to regulate how recharge is implemented in order to avoid or prevent the creation of adverse effects on other beneficial uses.

A prime example of that is we certainly wouldn't want to be doing a recharge project that is causing a water quality problem that would thereby impact a water use that relies on water quality. So, it gives the director the authority to look at a broader basis and to make sure that as we do, as we implement the recharge project, we can avoid those kind of adverse effects.

The only real difference between the original bill that was before you and Senate Bill 1185 occurs

in paragraphs 3 and 4.

In the original bill, we, as attorneys, were trying to consolidate and make things more concise, but there was a concern that in the process of doing that that somehow we may have lost some the intent, and that was expressed to us by the Idaho Water Users, some of the intent of the original bill. So, rather than create that kind of unintended consequence, what we agreed to do was to go back and include the express language from the current Idaho Code Section 422 -- 4201A, subsections (3) and (4). So, those two sections that you see in the new bill substitute for the original section (3), and by doing so, this gives comfort that we are not changing the current recharge policy.

In addition, you'll see in this bill a couple of additional sections that are being referenced. That's only for the purpose of making it clear that since we're repealing -- we would be repealing 42-4201A and making the cross reference back now to 42-234 it's a way to do some housekeeping to make sure that we don't have inconsistent reference in those statutory provisions, but there are substantive changes by the inclusion of that particular provision.

So, Mr. Chairman, that is a quick summary.

CHAIRMAN SENATOR SCHROEDER: Just a note.

Committee, we suspended rules to reprint 1185, so you've probably noticed that the format of this is not like the other bills. 1185 you have in front of you. It's just a copy of the official bill that most of the time just the chairman sees.

So, anyway, question from Representative Wood?

REPRESENTATIVE WOOD: Thank you, Mr. Chairman. Just to be clear, Clive. I heard you say that you were now trying to consolidate all of the state policies for recharging into one place. And then if I got that correctly, would that be in the 42-25 or -- I didn't get the code section exactly right, I don't believe.

CHAIRMAN SENATOR SCHROEDER: Mr. Strong?

MR. STRONG: Mr. Chairman, Representative Wood, it would be consolidated in 42-234.

CHAIRMAN SENATOR SCHROEDER: Further questions?

Senator Hagedorn?

SENATOR HAGEDORN: This particular bill, 1185, page 2, paragraphs 3 and 4, was the director of the department (inaudible.) Is there built in somewhere a process where someone may protest that

decision?

CHAIRMAN SENATOR SCHROEDER: Mr. (inaudible)?

UNIDENTIFIED SPEAKER: Mr. Chairman,  
Representative Hagedorn, yes, there is.

CHAIRMAN SENATOR SCHROEDER: Further  
questions?

Representative King?

REPRESENTATIVE KING: Thank you.

Mr. Strong, I'm concerned about recharge and how you measure it. And so, if a person that drills down to 100 feet this year and that goes dry into the aquifer, are we going to try to maintain 100 feet or 50 feet that they have to drill? I'm sure --

CHAIRMAN SENATOR SCHROEDER: Mr. Strong?

MR. STRONG: Mr. Chairman, Representative King, the question you ask is not so much about recharge. Recharge is a way to try to replenish that water supply; rather, it's a question about how do we maintain an aquifer level.

And there are statutory provisions that give the director the authority to establish what's called "a reasonable pumping level." Without getting too far afield today, let me just suggest to you that establishing a reasonable pumping level is extremely complicated, particularly by the fact that we have an

aquifer that extends over an 11,000 square mile area and doesn't have homogeneity in the types of rock formations in which the water is flowing through.

So, that's one of the issues that is front and center right now in the A and B delivery call that Justice Schroeder just issued a decision recommending to the Department that they consider establishing reasonable pumping levels. I'm confident that the department hasn't had a chance to take a position on that yet, but that is an issue that we'll have to deal with because as a practical matter, if we draw the water down too far, it becomes an economic impact, and at some point an economic impact should not be visited on the existing user.

CHAIRMAN SENATOR SCHROEDER: Further questions?

Now, I understand that Norm (inaudible) from the Idaho Water Users Association has called and said 1185 is acceptable to them. I think it was Senator Coiner that related that to us.

Okay. So, further questions? All right. Thank you.

Anyone else here that wants to --

UNIDENTIFIED SPEAKER: I have one question for you, Clive, and that's not on this legislation,

but on your Agreement. It's based on the legislature passing House Bill 264. If for some reason that didn't pass, is that null and void there? Because that's the one that puts the CAMP process into the river -- or into the water.

MR. STRONG: Mr. Chairman, Representative Stevenson, that would be a potential outcome, not necessarily the outcome, but, certainly -- although we don't incorporate the CAMP legislation into this bill, if that were to change, then it affects some of the fundamental aspects of the Agreement, and we would have to sit down around the table and see if we can resolve that issue.

CHAIRMAN SENATOR SCHROEDER: It's scheduled for hearing on Monday.

Further questions? Representative Wood?

REPRESENTATIVE WOOD: Mr. Chairman, if I might, just be sure that I'm writing this down correctly, are you saying that House/Senate Bill 1185 replaces Senate Bill 1168?

CHAIRMAN SENATOR SCHROEDER: That's correct.

REPRESENTATIVE WOOD: Okay. Thank you.

CHAIRMAN SENATOR SCHROEDER: Further questions?

UNIDENTIFIED SPEAKER: Mr. Chairman, I guess

the only other question that I would like to ask does not involve Mr. Strong but the director.

CHAIRMAN SENATOR SCHROEDER: Absolutely.

Mr. Director, would you answer questions of the Chairman?

UNIDENTIFIED SPEAKER: Mr. Tuthill, you have reviewed this. Have you found anything here that you wouldn't be able to administer or to live with?

MR. TUTHILL: Mr. Chairman, Representative Stevenson, through the process, there has been good coordination between those that were involved in developing this Agreement and the agency. We've had many opportunities to provide input and weigh in. The Department is very supportive, as is the Governor's Office, of this bill and the various provisions. And these elements are administrable in my view, so I'm very supportive.

Mr. Chairman, if I could add on to that one clarification. There was a question by, I believe, Representative Hagedorn about the entity that conducts the measurements at Swan Falls. And Mr. Strong asked me at the break if it really is USGS. I confirmed "yes." And while on one hand at one time the USGS did for many years conduct a measurement. I might clarify I was told -- we just double checked, and that is one

device that has been assigned to Idaho Power Company for measurement as a cost-saving measure.

And as Mr. Strong indicated up and down the Snake River system there are many measuring devices; some are monitored by USGS, others by Idaho Power. That particular one right now is monitored by Idaho Power Company, and it points out that we do want to beef up our measuring capabilities on the Snake River below Milner, as we move forward, and that is one provision of the Agreement.

CHAIRMAN SENATOR SCHROEDER: All right. Any questions for the director?

Representative Raybould?

REPRESENTATIVE RAYBOULD: Thank you, Mr. Chairman.

Director Tuthill, do you know if the Murphy gauge, if that measurement is by telemetry or if that has to be physically measured?

MR. TUTHILL: Mr. Chairman, Representative Raybould. I believe it's on the hydro method. Let me take a look at Mr. Anderson just for a moment to confirm. And he is nodding, "yes, it is."

UNIDENTIFIED SPEAKER: Mr. Chairman, just a comment. If that is by the hydro telemetry process, there would be a record of that all of the time then,

automatically, wouldn't there?

UNIDENTIFIED SPEAKER: Yes, Mr. Chairman, Representative Raybould. For most of us, as we look at the device, it's transparent as to who was actually monitoring that gauge. It's a multi-year gauge measurement, and it's been continuous through many years as it's passed from USGS to Idaho Power Company.

UNIDENTIFIED SPEAKER: Thank you.

CHAIRMAN SENATOR SCHROEDER: Further questions?

All right. Thank you, Director.

Is there anyone else that wanted to testify on these bills?

Okay. What we're going to do at this time is we're going to allow the house members to leave and the Senate is going to consider the bills, and we can get this moving.

Chairman Stevenson?

CHAIRMAN STEVENSON: Mr. Chairman, for the House members of the committee, these will then go through the process in the Senate? And when they're read back across the desk for hours, then we'll have to have a short meeting to vote on each one of these bills as they come back, and that's the intent.

CHAIRMAN SENATOR SCHROEDER: All right.

Thank you, everyone, for coming.

(End.)