

EXHIBIT B

IDAHO WATER RESOURCE BOARD HEARING RECORD FOR IMPLEMENTATION OF THE SWAN FALLS AGREEMENT

State Water Plan Hearings, Policy 32
Audited July 3, 2002

January 28, 1985

Idaho Falls, 2:00 p.m.

Tape 1 Side A

One person to testify this afternoon.

Purpose of meeting is to take public testimony on policy 32 of the state water plan. My name is Gene Gray, Chair; Don Kramer.... others identified.

Asked about "Currents" magazine.

Front page you'll notice listing of mtg areas. p. 2 & 3 proposed revision of policy 32, which is what they'll be taking test. on. p. 4 to end of paper, legislative package; we won't be dealing with leg. pkg, we'll be dealing with policy 32.

Instructions on how to testify; called Dale Rockwood. Rte 1 Box 218 I.F., Progressive Irrigation Dist. and member of Committee of Nine; but not speaking on CO9 behalf. Supports changes...

Others? Asked if Board could explain to "us" just what's going on; we have a lot of questions

Called Mr. Sherman to answer. Then closed official hearing.

Evening meeting...

In December the water board accepted a draft to bring to the public, (p. 1 Currents). Explains again which part of Currents is what.

GENE GRAY: Mr. Frank Sherman will give a brief run over of policy 32. They'll take questions for clarification purposes. AFTER they close the public hearing, they'll stand for additional questions if they have time.

The original plan was adopted in 76

Under policy 32, Snake River Basin, basically says that the available unappropriated waters of the Snake River Basin are allocated to satisfy the existing uses, meet needs for future growth and development, and protect the environment. The allocations recognize and protect existing water uses and rights. Water allocations are made by large [.....] to allow the widest possible direction in application. Then it discusses all the uses in the basin. In some cases allocates water for new uses or new development for different entities and tries to cover all water use in the Snake basin as it exists and to the year 2020. In looking at that and being faced with the problem of redesigning or amending that policy because of the Swan Falls Agreement, we chose, the Board chose, to

pick out those parts of existing policy 32 that are really policy rather than just simple allocation... and then have underneath those texts to explain the policy.

Directs attention to p. 2... [voices in background discussing what he's talking about; sounds like water board—it's really close to the mic]. reads policy...

Waters not held in trust by the State in accordance with policy 32 a shall be appropriated according to the criteria established by Idaho Code 42-203A. One of the problems with bringing out the proposed revisions at this time is that we're doing this because it's part of a package that the Governor and Idaho Power Company put together; part of that package calls for action on the part of the legislature. What the legislature is being asked to do, is contained in the Currents issue, pgs 4 & 5, and we, the Board, is assuming that they'll get their job done if we get our job done... mutual let's see if we can all get it done.

This policy does several things. One, it represents the compromise the State and IdPower made in the flows at Murphy gage. The flow at Murphy in the old water plan, the existing water plan, calls for a flow of 3300 cfs. Historic low flows in the summer time have been down as low as 4500. Idaho Power claims a water right of 8400. That claimed right was the basis for the legal business going on the negotiators decided to take the 4500 historic low flow and what the water plan called for and kind of split the difference and say that's the water that's really available for use and discussion.

This agreement, these minimum flows will satisfy IPower to the point that as long as these flows exist, Idaho Power would not protest at any of their hydro facilities upstream of the Murphy gage, and that includes Swan Falls, any amount of water that comes through, as long as these flows go by the Murphy gage. It talks about "water is not held in trust by the State." Idaho Power has a claim of 8400 at Swan Falls, it has larger claims at some of the dams upstream. Those waters within that claim of Idaho Power's are to be held in trust by the State for reallocation to other uses.

The second policy directly addresses this issue. It says the policy of Idaho 42-203B be reallocated 42-203A & 203C. 203A ... It has to be a beneficial use, it can't be speculative.

42-203C is a whole new set of criteria which the State intends to apply because this is not unappropriated water. These are waters that were claimed by Idaho Power, they're being held in trust by the State, they're not the unappropriated waters of the state which anybody can have a shot at. Anybody can have a shot at these waters also, but because they were originally appropriated by Idaho Power, the State is gonna give special restrictions, have special restrictions, special criteria that have to be met, before they can be given away. This is the section that discusses its effect on hydropower, on farm interests, a whole series of criteria that have been suggested to the Legislature for them to adopt.

32B DCMI is the policy of Idaho that 150 cfs of water for consumptive purposes held in trust by the state pursuant to policy 32A be reallocated to the future DCMI uses in accordance with state law. The existing swp allocates in terms of acre feet 144 cfs for new commercial—new municipal and industrial, we called it at that time—there are several problems with that.

One, we were allocating water that belonged to Idaho Power because we thought they were subordinated down to 3300. So all those allocations in the existing plan were based on the idea that we could take the river down to 3300. The Supreme Court decision suggests we may not be able to, therefore the compromise gives us something to work with. But in actual fact, the use of water for industry and human consumption is so important, we have actually set aside as much water—in fact slightly more in this policy—than in the existing water plan. We have included domestic uses here. The old water plan was silent on domestic; it was assumed that everybody was entitled to domestic water. We want to keep track of it.

In terms of actual consumptive use, this is probably close to doubling—increasing by the same amount again—the amount of water used for this, in this part of the state now.

Policy 32C, agriculture, [quotes from Currents]... All this is really stating is that the State has some water in its grasp that used to be claimed by Idaho Power and there are really only two ways to consume it. One is to use it for industry and the other is to consume it for agriculture. Any water after you meet the requirements of the dcmi allocation is left over for agricultural use. Why it's not a nice firm number here is because of the difference in claimed water at each facility by Idaho Power. The example we use everywhere in this text is the 8400 vs 4500 vs 3900 at the Murphy gage, but at different places along the river the amount of water held in trust by the State is different.

Policy 32D, Hydropower [quotes from Currents]. Idaho Power has already recognized its beneficial use of water. It's part of the agreement, this 3900 flow in the irrigation season and 5600 in the wintertime at Murphy are to be regarded as unsubordinated waters. That's part of the trade off. The Supreme Court ruled their right there was not subordinated for some of the water we'll continue along the same lines that they're not sub. Idaho Power has said in the agmt they will not object to those people making beneficial uses of the water at the time the agmt was signed. But they will take action against new users, those users particularly who are using their water, if the flow were to go below 3900 or 5600. And the State agrees by signing the agreement and putting it in the SWP that they have a legitimate complaint if we ever get before those numbers.

32E....[quotes] basically the language in the existing plan.

32F Aquaculture [quotes] is DCMI. However, it is recognized that it may be necessary to construct different diversions than those that presently exist." If you

want to process fish and become a commercial user, it says that as long as they're gonna have flows in the river and most of that water at some time comes out of the 1000 Springs, you trout farmers are probably gonna be ok. **But a water right doesn't necessarily guarantee you flowing water. It guarantees you access to water.** [Emphasis added]. These guys may have to reconstruct the stream courses leading away from springs and the extreme case you might even have to drill. But as I say no changes from the existing water plan.

32H Water Quality and pollution control [reads]. Says "really no change" and that the water board thinks there are enough laws to take care of water quality

32G Fish Wildlife & Recreation.[quotes]

Basically, we are guaranteeing by these changes to the water plan that there will be more water than there *might have been* [his emphasis] because the minimum flow at Murphy is raised from 3300 to 3900. The Board is the only authority in the state that can allocate or appropriate water for instream flow purposes. They can do it by specific designation in the water plan or they can go out and appropriate water from the unappropriated waters of the state on any reach of any stream in the state. Between the two, they feel that minimum water is available for these purposes; they're not gonna suggest that optimum value for fisheries, for example, but *minimum water* [his emphasis]. Water available to keep things on an even keel.

New Storage. This is a very awkward one. [reads from Currents]. The text explains it in two parts. First of all, "maximum use of existing storage facilities." We all know that there are people that have a full natural flow right and they also have a full reservoir or stored right. How often many times they use their reservoir water may be once in ten years, it may be once in twenty years. **The City of Pocatello has never used theirs, for example** [emphasis added]. There are lots of cases where water sits in the reservoir all through the irrigation season and on October first the watermaster has to turn it down the river because he needs that space for next year's runoff. That—if we're crying we're water short, and we're gonna have special criteria for people who want to use the water; we're gonna say that Idaho Power has a water right, and Sumner Dam is no longer valid. It seems wrong to me to store that water that is never going to be used and is gonna be turned on October first. The negotiators of the agmt felt that it was appropriate to put this in the water plan to ask the Board to ask questions. Why does this happen? Are there legal or social barriers that we can overcome?

[I'll?] go through a couple of quick legal barriers. If you store water behind a federal dam, you can only lease it for one year at a time. The State has a water bank plan—you can sell water, but you can only lease it for one year at a time and nobody can come in and do anything in the way of new development relying on your water. **If you store water in a federal reservoir you cannot make a profit selling the water** [emphasis added]. Therefore there's little incentive for

someone who has water he needs for one year five or one year in nine to try and wheel it around and sell it off, because he can't make a profit on that water.

There are a couple of State barriers. If you don't use your water for five years in a row, you've lost your water. There's another State barrier. If you can become efficient and use less water than you have been, you have some excess water, you can't sell it for another consumptive use because that's an expansion of the water right, and water is going to new lands. These are the kind of things the Water Board has been asked to address—to ask the questions, at least. If someone were to propose a project today, is maximum use of the existing storage being made, we'd probably interpret the director as the authority. The Director of the Department of Water Resources has the authority to make that decision. He would probably decide no because there's some unallocated water in _____ Reservoir. Once that water is unallocated and there is no longer no unallocated waters in the system, hopefully by that time the Board will at least have been able to ask BOR, ask about changing the state laws that seem to be a barrier. They're working on simplifying the rules and regulations for the water bank as it exists today so the transfers of water are easier. Hopefully, if all these questions have been asked and we can't get anything changed, then we're doing the best we can under the present system. Ideally we would be able to change some of these laws so a person could lease water for more than one year at a time; so a person could make some minimal profit at least by selling his water. That's the intent of this. It's to bring the people of the State's attention to the fact that we have some water that sits here every year and then goes down the river in the fall so we can make space for next year's runoff. If we find we're water short, let's try and use that water.

Now the other one is a stiffer condition in the sense that luckily it only applies to winter time diversions below Milner Dam. In this case, because of its impact on Idaho Power's operational scheme in two ways. Idaho Power has a ready market on the west coast for electricity during the winter time because it's for heating out there. The other way of course is that Brownlee Reservoir at the head of the three dam Hells Canyon complex is their only major storage for that complex, except for they [dump?] water from upstream. So they'd like to fill that reservoir and they'd like to generate power so they can sell it while they're filling the reservoir. As part of the compromise, it was agreed that if somebody wanted to divert water below Milner, where its effect is fairly quickly felt at Swan Falls, they should be subject to supplying some sort of mitigation to Idaho Power for their losses. Now the text here very clearly says that mitigation is lessening of the impact, not compensation which generally means equal. Something should be worked out so that Idaho Power doesn't take a direct loss. Now it could well be, that mitigation would be if you're gonna store water in the wintertime, store a little more and let us call for it when we want it. It may be that mitigation is you're gonna release it when we need it. It could be mitigation if money, but that's one of the hardest things of all to work out. But people below Milner, above Murphy, winter time diversions for storage, if you come up with a legitimate use in the

winter time where you're gonna consume that water or use it right then, that's fine. For storage purposes, we have to work out a deal with Idaho Power through the Department of Water Resources to try and mitigate the impact of Idaho Power's operation. The details are not spelled out, the three negotiators couldn't agree what would be appropriate. The Water Board suggested some language that didn't seem to go over very well with the three negotiators or the legal advisors of the three negotiators. It is left silent until such a project comes up and stares us in the face.

Next policy—stored water for management purposes [reads]. As a technician, I can tell you that with that big Snake Plain Aquifer out there, which contributes the water to 1000 Springs which contributes most of the flow in the reach of the river in summer time, I can't begin to hit that right on 3900. It would sure be nice if the State had some water I could call for if I make a mistake. That's the intent of this particular thing, last policy for the Snake River Basin. If there's unallocated water, why shouldn't the State get it? They could lease it through the water bank, they could sell it to Idaho Power on a yearly basis, but the State ought to have someplace to call for water if the State messes up and can't meet the minimum flows at Murphy. **I can't shut off the junior user on the Snake Plain because the impact of shutting him off might not show up for six months** [emphasis added]. I can't call from water from Ririe to get it there in four days. And that's the intent of that last _____.

New voice: Thank you, Mr. Sherman. Calls Phil Warner followed by Eldred Lee.

Phil Warner... Comments on 32B, DCMI. Comments on industrial uses is restricted; says "to process agricultural, forest, mineral and other" products. Also about amount.

[stopped listening here...]

January 29, 1985

Pocatello, 2:00 p.m.

Tape 1 Side A

2:00 p.m., Little Tree Inn

Gene Gray, chair, Idaho Water Resource Board. Explains difference between Board and Department.

Frank Sherman to explain. Only two will testify, so instead of taking testimony and then closing meeting they're going to have Mr. Sherman give an overview of proposed policy 32, then take testimony, then close meeting and take testimony.

Explains *Currents*—what’s there and how it’s organized. Says Water Board has accepted the proposal, but not the whole plan, and they want input. They’ll take written testimony until February 22 [he encouraged them to submit testimony, I thought—“if you’d like to listen today and maybe do some homework and send things in” (paraphrased)]

Starting on page 2, and Frank will start with policy 32; short questions are OK.

Sherman:

I’ll start with existing water plan. Policy 32 is the policy which allocates the unappropriated waters of the Snake River Basin. When the Idaho State Supreme Court decided that Swan Falls, that the water right that Idaho Power claimed at Swan Falls, was a legitimate right and had not been subordinated with their agreement concerning the Hells Canyon complex, it made the existing policy 32 wrong, basically, because the water that’s allocated to various uses in this policy relied on being able to take Idaho Power’s water away from them. When the State and Idaho Power entered into the agreement in October of last year, they specified certain trade-offs and balances and compromises between the State and Idaho Power.

We start right off with Policy 32 as it’s shown right in front of you. [Reads]. Existing water plan says that the year round minimum flow at Murphy shall be 3300 cfs. This is an unrealistic estimate if, indeed, Idaho Power has ownership and right at Swan Falls greater than that number. The compromise basically is we will set 3900 cfs during the irrigation season and 5600 cfs during the winter time. In return for the state water plan saying the river should never go below those flows, Idaho Power will give up some of the water they claim. The Board has also added some minimum flows at Johnsons Bar and Limes Point which are gaging stations below the Hells Canyon complex. The existing state water plan recognizes that these are part of Idaho Power’s license; they’re called for by the license, and this plan acknowledges that they are important flows and they’re necessary for the well-being of the people on the river. The proposed revision would incorporate them and make them State flows also. Gives it the added recognition that if, for some reason, there would be a change in Idaho Power’s license, that those flows should still be guaranteed by the State Water Plan.

The next policy, 32A. You’re gonna find some references here and in other places to 42-203C or whatever. These parts of the Idaho Code don’t even exist yet; they’re part of the so-called legislative package that exists in the back so you can check the back.

[reads policy]. The agreement basically says that water that Idaho Power has claimed it will give to the State and the State can reallocate that to other uses. Because it’s water that has already been appropriated, new criteria for the use of that water can be established. And that’s basically what policy 32A says. Any of the water that Idaho Power claimed that has been given to the State, special criteria other than the normal beneficial use, non-speculative, no impact on your

neighbor, those kind of criteria will still be in place but those additional criteria for this water that Idaho Power had claimed.

32B DCMI. The existing water plan, which talks in terms of acre feet rather than cfs, set aside a certain amount of water for new municipal and industrial uses. The proposed revision would change that volume to a flow rate and basically keep it the same. We're talking in this case, though, rather than amounts diverted, because the intent now is for the State to try and manage the river until we get to these magic flow numbers, the intent here is to allow up to 150 cfs of consumptive use, the existing diversion from the basin for these kind of uses, DCMI, at best we can estimate, is 404 cfs. Much of that, and this is where it gets a little complicated, much of that is for non-consumptive uses. If you do a water budget, the water that's taken for the municipality for people to drink, the waste products come back to the river and the water basically balances out. Or it comes back to the system through whatever sewage disposal mechanism you use. The real consumptive uses in these kinds of diversions are the lawn watering, community golf courses, swimming pool, those kinds of things. So 150 cfs of water for consumptive purposes will be significantly more in terms of diversion from the river. The Board and the State are setting this aside from whatever block of water is available from Idaho Power. Now I say "from whatever block of water" because the examples in the discussions always revolve around the flow at Murphy, because that's where the court case held, or about those facilities. Idaho Power has a claimed right at all of their hydropower facilities on the river. In many cases it's larger than the claim at Swan Falls. But as part of the agreement, Idaho Power has said they will not protest lack of water at their upstream facilities as long as the 3900 and 5600 go past Murphy gage. They might protest if something illegal is going on, but as long as everybody's meeting the state law and they're not getting their water at some other dam, as long as the 39 and 56 are going by Murphy they're satisfied.

Policy 32C, Agriculture. The existing plan was first adopted in 76 and at that time the Board set targets or at least hoped there would be new agricultural development. It's been sort of a controversy over that magic number of acres when we haven't come close to reaching that number when the agricultural economy is depressed there isn't a big cry for irrigation. What the board proposes in this new policy is basically to say those waters they hold in trust, some portion has to go for DCMI, the rest is available for agricultural uses. Only that magic acreage number now is a restriction saying that no more than 80,000 should go in in a four year period. Over the last 8 or 10 years the average number of new acres coming into development from irrigated agriculture development in the state has run about 17,000 per year. So, the average of 80,000 over four years is up to 20,000 acres per year but no more.

Policy 32D, Hydropower. Basically says that hydropower shall be recognized as a beneficial use and that the depletion of river flows below the levels established in the beginning, the Murphy gage criteria, is not in the public interest. Idaho

Power has already recognized the beneficial use. The minimum flow at Murphy serves several purposes, certainly one of which is hydropower. It guarantees so much water will come through the lowest dam, the Swan Falls dam, the lowest of the upstream system. It provides flows for fish, wildlife, everything else. So it is not in the public interest to go lower than that.

Policy 32E, Navigation. Basically a repeat from what's in the existing state water plan.

[didn't transcribe all—wasn't much.]

Aquaculture. Once again a repeat basically of what is in the existing state water plan. Basically, it says if you want to process aquaculture products and you need more water it can come out of the DCMI because it's a commercial endeavor. It says that the minimum flows established should provide enough for aquaculture uses. They should probably realize many of the trout farmers rely on discharges from 1000 Springs. The policy points out that this agreement will ensure that some discharges continue to occur at 1000 Springs because that's basically where the river gets its water below Milner Dam to ensure a flow at Murphy. But the State is not gonna promise someone who uses those springflows that it's gonna always be there, the amount they may need. They may need to reconstruct a diversion dam, in extreme cases they might have to go to wells, because a water right in Idaho does not guarantee a means of diversion [ind.] a right to get water.

Policy 32G, Fish, Wildlife and Recreation. This is an awkward policy. The Board has done the best they can, I feel. "It is the policy of Idaho" [reads]. The Board has recognized that these are not optimum, these aren't the best flows for fish and wildlife or for aquatic life. They are minimum flows; they will support a sustaining fishery, for example, they will provide for recreational uses. The Board has two different mechanisms to establish minimum flows. The one we're talking about today is by stating in the water plan "the flow at such and such a point shall never go below whatever." They also have the authority to appropriate the unappropriated waters of the state for those instream values. Now they have done that in many cases on streams that are tributary to the Snake River and they will probably continue to do that. Their hope is that between the two processes we'll be able to support the kind of fisheries and wildlife and sport fishing you've become accustomed to.

Policy 32E, Water Quality and Pollution Control. A repeat of what's in the existing water plan. Basically says you can't use good water to dilute bad quality water to try and satisfy the citizens or the state or the federal government. The Board feels there are enough existing rules and regulations and laws in place to ensure reasonable water quality within the state. It's not in their mind an appropriate use of water to use water just to dilute [ind] water.

Policy 32I, New Storage. This is a very complicated, sensitive issue. The negotiators of the agreement specifically asked the Board to address this problem, specifically suggested language that they thought was appropriate. There are two basic criteria here or two parts to this policy. The first part is that before new storage is constructed any place in the basin above Swan Falls Dam, the Director of the Dept. of Water Resources should make a determination that maximum use of the existing facilities is being made. It seems almost an impossible task, but there are several reasons for this. There at the moment are unappropriated waters in the reservoirs within the system. There are also a lot of appropriated waters that are not used for the purpose they were appropriated. Those waters are generally released by the watermaster on October first so that he can make space for next year's run off. If we're in a situation where people are fighting over the water in the system it seems inappropriate to have water stored that's not used, that's basically dumped every October. So the negotiators wanted the Board to address this question. And the Board has agreed to do this and incorporated the suggested language in this policy and they have agreed to look at some of the social and legal barriers to more efficient use of the water in the system.

I'll just skip over a couple of areas very quickly. There is an established water bank within the state. There is a mechanism and rules and regulations for a person who has more water than he needs to sell or lease that water to someone else. Some use of these rules and regulations was made in District 01 by the Committee of Nine to transfer water around up there, but it's not used to any great extent. The reasons are if a person has water stored behind a federal reservoir he can only lease or sell that water on a one year contract. So if someone who's coming in and wants to do something new is only assured of water on a one year basis, he's not going to put very much money in it or in certain instances be able to finance it. The other problem with water stored behind a federal reservoir is you are not allowed to make a profit on that water. It seems a reasonable rule in that if my father had got an old water right when they were building these dams 20 years ago, and I'm not using the water, the federal government paid most of the construction costs, why should I be able to take that water and sell it at a profit to me? It seems reasonable from that point of view, but it seems very illogical in that if I can't make a profit on that water, why should I bother to go through the hassle of trying to sell it to somebody else? Therefore it sits there year after year and is not used.

There are State barriers to more efficient use of the water in the system. Even though we have the water bank business, a user has to be very careful to lease his water for five years in a row, because if he doesn't apply it to his own land for his own beneficial use he may lose his water right. If a person has that water stored that he doesn't need and he tries to sell it to someone who's gonna consumptively use that water, that becomes an expansion of the water right. The only way I could sell water held in storage would be to reduce the amount of acreage I were irrigating, otherwise that water which was proven up as a

beneficial use for my property, if that goes to another consumptive use that's a violation of state law. So this policy basically says the Board is gonna push for everybody involved, BOR, the State, to take a look at these kind of problems and see if we can more efficiently use the water that's in the system. Everybody wants to know "is this a real barrier to new storage?" I think that to some degree maybe, but certainly it's not as much a barrier as the environmental interests, the lack of good dam sites, the lack of water to fill major reservoirs on a yearly basis. It's a barrier only if the Director has to make a finding. If the Director were asked today to make a finding, he would probably say no because there's unappropriated water in the system. Once there's no longer unappropriated water, his finding would have to be "these legal barriers prevent us from doing anything different, therefore we're doing the best we can." If the water were through their efforts in conjunction with the BOR for example and get some of these policies changed then there would be water available for other uses and new construction may not be necessary in the near term.

There's a second part to this new storage policy and it applies only below Milner Dam. Idaho Power's wintertime operation is an important part of their whole system. And as I understand there are two key ingredients here. One is that they have a guaranteed buyer on the west coast during the winter time because of all the electric heating. It's getting so they have a guaranteed buyer in Idaho because of the cold we've had here also. So they can sell power very easily at that time. The other reason of course is that the Hells Canyon complex Brownlee Reservoir has to get filled and that's when it gets filled, during the non-irrigation season.

So as part of the tradeoffs, the State agreed that anyone who wanted to divert water in the wintertime below Milner Dam would have to enter into some kind of agreement with Idaho Power and mitigate for the company's operational losses. What the mitigation will be no one knows; it's gonna be on a case by case basis. It certainly is a barrier to new diversions below Milner Dam. It may be that you build in a few extra thousand acre feet which you let Idaho Power call when they want and that may be enough in terms of mitigation. If you can show the timing of your releases will benefit Idaho Power rather than hurt them, that may be mitigation. But at the moment no one is really clear. But the agreement asks for and the proposed state water plan will say that wintertime diversions for storage below Milner Dam, some kind of mitigation for Idaho Power has to be considered.

There's only one more policy, Policy 32J, Stored Water for Management Purposes. The whole idea of the agreement is that the whole Snake Basin is gonna be managed by a summertime and wintertime flow at Murphy gage below Swan Falls Dam. As a person who works for the IDWR I know that at some point down the road that's gonna be a real difficult task to accomplish. This policy suggests that while reservoir storage, while unappropriated water, is available, the State should try and get some so that if the regulators make a mistake down the road they've got a place to call for water, and meet these flows. The real

problem is not within the river itself, because we can shut off the junior river user. The problem is that with a zero flow allowable at Milner Dam during most of the irrigation low flow periods of the year, the water in the Snake River is discharged from 1000 Springs. That's where the Snake Plain Aquifer lets its excess go. Trying to manage the whole Snake Plain Aquifer in conjunction with the river to meet these minimum flows at Murphy gage is a real task. Certainly we all, most of us, know enough about ground water to know that if we made a call on a ground water pumper that was 50 miles from 1000 Springs, the effect of shutting him off might not show up for six months, at which point who cares. It's not appropriate if you're gonna manage ground water and surface water together, and you have to because of the impact of the aquifer on the river in the summertime, to shut off the junior river user, when there are junior ground water pumpers out there. So, from the point of view of the regulator or the manager, while there's unappropriated water available it sure would be nice if we could get a hold of some of that. Now, from the day we could get a hold of it until we make a mistake that caused us to use it for this purpose, that water could go to a water bank where anybody who wanted to lease it for a year could do so, it could be sold to Idaho Power, for example. But it would be sort of an insurance policy much like an irrigator has stored water for insurance if he doesn't get his natural flow right, this would be an insurance policy for the Dept. of Water Resources if they foul up and can't meet the terms of this agreement.

One thing I would say about calling for that water in a low flow year, the agreement, and this is not part of policy 32, the agreement specifies that all current users, all people who have beneficially put the water to use by the signing of the agreement, are protected. That if nature didn't cooperate, and if the flows were going below 3900, those people who were in place before the agreement were signed, would still be allowed to use their water right. With only the people who proved up on water after the signing of the agreement that would be subject to being shut off to meet these flows.

[Public testimony begins with Sally Ann Gibson (League of Women Voters of Idaho) followed by Mike Caldwell.]

Tape 1 Side A

Fifth meeting...

Once more, explanation of the order of information in *Currents*; same framework as prior meetings, i.e. explanation, then testimony, then questions.

[Note: Kenneth Dunn, Director, IDWR, is present at this meeting.]

[Transcription note: The microphone seems to have been set a distance from the speaker. There are a number of indecipherable passages due to someone very near the mic who coughs frequently and completely shuts out the speaker. Also, the speaker's voice is different during this meeting, and he tends to drop his voice at the ends of sentences, making it difficult to understand him.]

Frank Sherman:

It gets a little bit complicated. There's an existing State Water Plan. There's the proposed revisions to one of the policies of the Plan. Then there's the agreement itself. I'd like to go through the proposed revisions very quickly with you.

The existing water plan deals with water allocations in the Snake River Basin. It has to be changed for two reasons. Quite clearly the agreement specifies this--changes to the State Water Plan the negotiators felt were necessary. There's another reason, and that is that the Idaho Supreme Court ruled that Idaho Power Company had an unsubordinated right to water at Swan Falls dam. It made these allocations wrong because they were based on the idea that the State could take Idaho Power's water right as long as they wanted to. The whole plan was based on 3300 cfs at the Murphy gage below Swan Falls dam. The compromise, negotiations, whatever, specify that as part of the trade-offs between the State and IPCo, the flow at the Murphy gage would be changed from 3300 cfs to 3900 cfs in the summertime and 5600 cfs in the wintertime. That's basically what policy 32, Snake River Basin, addresses. It addresses that change. It also includes minimum flows for places called Johnson's Bar and Lime's Point. They're below the Hells Canyon complex. They're mentioned in the existing water plan as desirable flows. They are actually the flows required by Idaho Power for their federal license. By proposing to add them to the water plan as state policy, the water board feels that if there were ever to be a change in the license requirements, this much water would be guaranteed by those two places. And that's really what the main policy 32 is all about—establishing those minimum flows within the river.

Policy 32A, Water Held in Trust by the State. That's a new concept in Idaho, in that the water that we're talking about is the water that was claimed by Idaho Power. This water is being held in trust by the State for the State to reallocate to other uses. It is the policy of the state and the board that upon reallocation it can

only be done if it meets certain Idaho Code and criteria. This is another place where it gets complicated, because the Idaho Code sections referred to in the proposed revisions do not exist. They do exist along with the legislative package the negotiators put together [ind]. Because these waters that are being held in trust once belonged to Idaho Power, they are not the unappropriated waters of the state. Therefore, the State can put special criteria on anyone who wishes to use those waters, and that's what at one time was called the public interest criteria, it's hopefully gonna be referred to as Idaho Code section 42-203C, it's what's in the agreement. This is where the discussion about family farm [ind.] and hydropower and that kind of thing. Those are criteria for the State to let someone else take this water that Idaho Power had claimed for their own use. The Board acknowledges that this perhaps is best established [ind.] should be part of Idaho Code, just as the requirements for a person who [ind] are in the Idaho Code.

It's a little complex. We always talk about the Swan Falls problem and the flows past Murphy gage [he's the man with the info, and the expert, putting it all in simple terms for everyone else] you have to realize that Idaho Power has a claimed water right at all their hydro facilities upstream of that point. When someone says there's only 600 cfs in the river [ind] divided it up between the 3900 and 3300 and 4500 actually needed downstream, that's true only in the reach around the Swan Falls facility. Idaho Power's claim at other upstream structures can be much larger. As part of the agreement, Idaho Power Co. has said they will not protest lack of water at any of their other facilities providing the 3900 and the 5600 [ind] at the Murphy gage. So when the negotiators made the decision to split between what had historically gone past the Murphy gage and what the State Water Plan called for, they really were setting the rules for that particular gage. There's more water theoretically held across at an upstream facility. How much of that water you can actually use and still get your 3900 cfs gage flow is a question. But that's the water that's held in trust by the State. That water that had been claimed by Idaho Power--they can certainly use it as long as it's available to them, but they agree not to protest if the State lets other people use that other water providing they meet the laws of the State of Idaho, including [ind.].

Policy 32B, DDMI

The existing water plan, when it made its allocations for specific uses in the basin, set aside--at that time we were talking in terms of acre feet but in converts to about 144 cfs [isn't this a different figure than an earlier meeting?] of water average flow—for municipal and industrial uses. The proposed revision keeping the cfs designation the negotiators reached, were used in reaching their compromise, we plan, or we suggest, that 150 cfs of water be set aside for DDMI uses. You note we're including domestic as part of this. It's not too painful a conclusion because a person who drinks water, his waste products generally don't leave the basin. The sewage treatment plants put it back in the river or out on the land, the water budget for a human basically what he sweats is lost to the

Snake River Basin ground water system, river system, but the rest of it is back. So the inclusion of domestic doesn't really amount to much. If you want to get a feel for how much water is going to be set aside out of this block, right now in the basin we divert approximately 400 cfs [isn't this a different figure than an earlier meeting?] as an average. We're gonna set aside 150 cfs. You'll note that this policy very specifically says 150 cfs of consumptive use. Out of that 400 cfs that gets diverted, that part that's used to water people's lawns, keep the golf course green, some of that, most of that water probably is consumed, but the water that's used for cooling purposes, wash water, that water gets back in the system, and in a real consumptive use, very close management approach, you need to know how much of the water anybody is diverting, is actually consumptively used and lost to the system. So if you take 150 cfs consumptive use, that's pretty close to what's probably being consumptively used today by the DCMI uses.

Policy 32C, Agriculture. It is the policy of Idaho that appropriated water held in trust by the state pursuant to policy 32, less the amount of water set aside for the DCMI, shall be available for agriculture purposes. The problem there, of course, is that a new agriculture user has to meet these new criteria the legislature established if they're gonna get that water the State is holding in lieu of Idaho Power claiming it.

Policy 32D, Hydropower. it acknowledges that the use of water for generation of electricity is a beneficial use. It's already law in the State of Idaho. What they do here though is say "and that depletion of flows below the minimum average daily flows set forth in policy 32 is not in the public interest. So what they're doing as part of the trade-offs here is saying that we'll recognize that the 3900 and 5600 are necessary and it's the public interest that that water is available to Idaho Power for power generation. We're taking some of the water away from them, but we're guaranteeing them water hopefully for perpetuity by saying it's not in the public interest to let the flows go below these levels. Now in the existing water plan we're taking the role that rate, if the legislature passes the subordination [several words ind.]. They get something here and the State gets some of the water.

Policy 32E, Navigation. This is basically the same existing in the current water plan. [Didn't transcribe this brief description.]

Aquaculture, Policy 32F. This again is a repeat of the language that's already in the State Water Plan. It does specify, however, that if a trout farmer or aquaculturist wishes to process his product, that's a commercial or manufacturing type of [ind.] and waters for that purposes should be accounted for in the DCMI withdrawal allocation. And then it says that minimum flows established by the plan should supply water for the trout farming industry. That's because the water in the river below Milner Dam, at least in the low flow periods of the year, is frequently, mostly discharge from 1000 Springs. Many of the fish

culturists in the state are relying on the 1000 Springs discharge water. If we're gonna have 3900 going past the Murphy gage, we're gonna have to have the water coming up 1000 Springs. Therefore those guys are probably protected to some degree. It does specify, as does the existing water plan, however, that a water right is not a guarantee of your means of diversion. It says you're entitled to the water as long as there's a legitimate way to get it. If the spring flows were to decline, some people, the trout farmers for example, may have to change their diversion works. In an extreme case some of them might even have to pump water. These water rights will still have its priority date [means that?] water available to him but his means of diversion are not necessarily protected.

Policy 32G, Fish, Wildlife and Recreation. This one I think I'll read [ind., then reads]. ****

The Board has always acknowledged that 3300 cfs at Murphy was not optimum for fish and wildlife and aquatic life. But it is a minimum value to protect and retain some of the resources we [know?]. By raising that flow, they're saying, admitting perhaps even that 3900 isn't optimum, but it will protect the minimum value that we need to set as a sort of lifestyle in Idaho. It is also in particular that the negotiators have asked the Board to adopt. The Board has another mechanism for protecting fish and wildlife, and that's their instream flow program. The Board is the only entity in the state who can appropriate the unappropriated waters of the state for instream values, and they have done that on many of the tributaries and streams on the system. It's a different mechanism, but between the two the Board feels they can protect the fish and wildlife and recreational values of the State.

Policy 32H. Water Quality and Pollution Control. The Board feels that there are enough federal and state regulations to protect water the quality in the state of Idaho. They do not feel that using good water to dilute bad water so that somebody can come into the river and [ind.] is a beneficial use of water. If a person has wastewater that's so bad you can't meet the federal and state requirements, you shouldn't be dumping it in the river; you should change what you're doing. There are laws to make this happen and it shouldn't take our good water to mix with bad water [long indecipherable stretch]. This policy is basically [ind.] in the water plan.

Policy 32I, New Storage. This policy is a direct outcome of the agreement. The negotiators spelled it out in the agreement and asked the Board to address the problem and include this language or similar language in the State Water Plan. This one policy really has two policies in it. Let's deal with the first one, which may be easier to explain but it may not be easier to effectuate. The first policy is that before new storage is developed in the basin above Murphy gage, a determination should be made that we're making maximum use of the existing facilities in the system. It's hard to accept that in an area of the state where we can't meet water claims for water in the river [ind.] for many summers, that on October first the watermaster throws 12,000 cfs or something

along those lines over Milner Dam and it goes on down the river. It would be more beneficial to the state if that water were used rather than just dumped in the irrigation system. So the negotiators asked the Board [ind.] to examine this problem, in fact put the burden on the Director to make the determination as to whether maximum use is being made of the system. There are today unappropriated waters [ind]. I think it would be very hard for the Director to say "we need a new dam" when there are unappropriated waters in the system. If we were asked today to approve the appropriation of that water [and then somebody asked for new construction?] you might have a bit of a problem reaching a decision.

The things that the negotiators want the Board to look at are really legal/institutional barriers to the use of this water which sits in the reservoir for the irrigation season then is dumped. There are a lot of barriers, legal barriers, some state barriers, federal barriers. Federal barriers, one: a person can only lease or sell his water from a federal reservoir for one year at a time. There's a provision in the Idaho law, there are rules and regulations for a water bank. The Committee of Nine uses that to move water around to some degree in the upper part of the basin, but if you're taking water from a federal reservoir you can only be used one [year?] at a time. Not very much incentive for someone who wants to come in and do something new because one, why would he risk his own money if he's only guaranteed water for one year and certainly why would he ask the bank and why would the bank want to risk their money for water one year at a time. So that's a barrier to [introduce? induce?] the more efficient use of the water.

A second barrier is that if your water is stored behind a federal reservoir you cannot make a profit on the sale or lease of that water, so what's the incentive for someone who's got water that he uses one year in ten or one year in twenty to go and try and sell it if he can't make a profit? So those are two real barriers to try to make more efficient use of water [ind.] in the system.

There are several barriers at the state level. A person could have a full natural flow right and a full [historic?] water right on the same piece of ground. But a person can't sell off his water if it would be an expansion of use. Your water right entitles you to put so much water on so much ground for agricultural purposes, for example. if you have more water than that, you can't sell it to another person who's gonna consume it. Many potential sales get caught in this trap. This would require change in state law. The same thing sort of applies all over the rules and regulations for the water bank [to cover this?]. If a person doesn't put his water to use where it's supposed to go, once in five years, he loses his water right. So there are plenty of reasons why this water sits in there year after year and it gets dumped. The city of Pocatello, for example, has a water right to be used in emergency situations, which the only way they could use would be to throw pumps in the river and tell the watermaster to let it pump and try and catch it when it went by. They'll never use it. We're talking about a part of the state

where we're really facing up to the fact that water is short. And yet there is water that doesn't get put to economic uses [ind.]. That's the first part of this policy.

The second part relates specifically to the reach of river below Milner Dam and above the Murphy gage. [Ind.] everybody makes trades here and there, and one of the trades that Idaho Power wanted was protection for their wintertime operations. Two things that need to be protected, at least two I know of. Certainly they have a ready market on the coast where so many people rely upon electric heat. The other is that wintertime is when they fill Brownlee Reservoir, the only storage facility in the Hells Canyon complex. So they wanted as much water assured to them during that period of their operation as they could get. That's the reason for 5600 cfs in wintertime. What the negotiators agreed to, what the Board is supposed to include in their state policy is that approval of new storage projects that would divert water from the main stem of the Snake River between Milner and Murphy during the period of November 1 to March 31 should be coupled with provisions that would mitigate the impact that such depletions would have on the generation of hydropower. Mitigate: very specifically identified as "lessening the impact." It doesn't mean that you're gonna take somebody, someone wants to take somebody, [ind.] water out for storage, he has to give Idaho Power a dollar value for that; it means he has to lessen the impact. The rules and regulations for how it's gonna be calculated will only be in place if the agreement ever gets through because it's gonna be a complicated procedure. Quite honestly, each diversion will probably be evaluated on a case by case basis. If you're gonna calculate the mitigation, you have to know the details and specifics of when the water's coming out, when it's coming back in, that kind of thing.

The last policy, 32J, Storage Water for Management Purposes. This is a policy that's not specifically called for in the agreement, but some of the things the agreement calls for makes this [an effort to solve the problem?]. As I said earlier, there are unappropriated waters in the system. Conceivably the State could part with some of that water. If the Dept. is gonna issue permits for the river, from the aquifer, and realize that the aquifer discharge is basically at American Falls and 1000 Springs, the key discharge point in terms of the whole Snake River is at 1000 Springs, if we start issuing permits on the aquifer and get below the 3900 through an error on our part, we, the State, has no place to get water for the call. [Idaho Power? ind.] shutting off the pump [ind.] is not going to get the water to Murphy gage in time, if at all. It would eventually [long ind. sentence] . . . of course if you shut one or two river people off you can see the water right away. If the State can access to some water to be used when the State [ind.] it would allow the managers and regulators to be less conservative in issuing water rights. Without anything to fall back on, I would assume the Director's going to be very careful as he starts to approach this 3900 [ind.]. If he knows, if he thinks he can get the water very quickly, then he may go ahead and issue right up to what he thinks is [ind.]. Now this water would not necessarily—if the State could acquire it—would not necessarily sit idle. It could go to the water bank, conceivably it

could be sold to Idaho Power; it would not have to sit idle, but it would mean that if the State felt through their own fault they could not meet the terms of the agreement.

One thing that's not in the State Water Plan I'd like to just discuss and then I'll shut up about it, the agreement is designed to protect the existing user. It states that if a person can prove he was making beneficial use of water prior to the date of the signing of the agreement, he shall be protected. If in terms of dry years and the flow would not appear naturally, the existing user would not be called upon by Idaho Power to shut off [ind.]. It would be only the person whose proof of effort to use came after the signing of the agreement that Idaho Power would take action against if their right were not met, the 3900 [ind.]

[Returns floor to Mr. Chairman.]

CHAIRMAN: We'll start the formal public hearing process, and the Chair would first call Dr. Chuck Brockway.

BROCKWAY: [States name, address, with U of I, Kimberly research station]. Asks if he's the only one to speak—banter with Chair.

I would like to address some of the things that concern me regarding the implementation of the proposed policy 32. One of them deals with the 32B for DCMI allocations. It seems like, and maybe it's inevitable that whenever a policy is changed or new statutes are adopted it places additional burdens on the state agencies for regulation or/and administration. This one seems to do that in that if we are allocating or proposing to allocate 150 cfs of consumptively used water, which could translate into anywhere from 150 to 1000 cfs of diverted water, depending on the percentage of the diversion which is deemed to be consumptively used, the determination for all of the various DCMI uses of what is actually consumptively used is difficult, technically. I'm not sure that we have the kind of data to allow the Director to make those kind of determinations, at least currently. That there could be some problems with that kind of an evaluation of what is consumptively used for the DCMI uses. Maybe the Director feels differently about that, but I can see some problems that might arise there.

Another concern that I had was with 32I, and that was addressed by Frank, and that is the determination by the Director of whether the upstream storage is currently online, we are making the maximum possible use of the existing storage. There has to be some criteria defined for what is meant by "maximum possible use." To me that's a term like "reasonable pumping level" that has yet to be defined. And technically it's gonna be difficult, again, to evaluate whether you're talking about optimal use to meet certain objectives or some other criteria for "maximum possible use." It might be well to put some of those criteria in the policy rather than leave it entirely up to the Board and to the Director.

Another thing on Policy 32I that seems a difficult one to get over, and that's the mitigation aspect of wintertime storage between Milner and Murphy, and determination by the Board of what is reasonable mitigation to decrease the impact on power rights within the Snake River. If I'm reading the write-up under 32I, provision 2, it states that "there are no current proposals for new storage projects that would divert Snake River water between the Milner and Murphy gaging stations. I don't think that's true. I think there are proposals that have been on the books for ten years that contemplate wintertime storage on the Bruneau desert by pumping from the Snake River between Milner and Murphy, so it may be that whoever wrote that should review that again.

I agree wholeheartedly with the intent here to really evaluate how the water bank and those provisions could be made more flexible to get better use of the storage facilities that we have online and to help evaluate the needs for new storage in the system. That should have been done a long time ago, and perhaps now this could be the impetus to do it.

In relation to Policy 32J, Stored Water for Management Purposes, I'm not sure that's a good deal, from this standpoint. One of the rationale is to allow the State then to mitigate a mistake in management, perhaps. if we make a mistake and that flow goes below 3900, we just reach in the sugar bowl and make it up. That would give the Director some flexibility. It could also induce the Director to be a little lax in management, in that he wouldn't have a strict line to adhere to if he had some place or some way to bail him out. The other problem is, where are you gonna get the money to buy the storage? Are you gonna take that out of the adjudication fund? Storage is not inexpensive, and whether the State needs to get into that and to assume, perhaps, some liability under all cases for maintaining that minimum flow of 3900 because they have this pot, I'm not sure we need to, wanna do that within the agency. That involves some legal implications, I think, that ought to be evaluated by the staff to see if the State would be incurring some kind of responsibilities or obligations that we don't want to have.

I think that's all, Mr. Chairman, that I have specifically on Policy 32. I understand that there will be an opportunity to at least ask questions on other aspects of the agreement.

CHAIR: Thanks Mr. Brockway. [Then asks Brockway how he'd change 32B to make it acceptable.]

BROCKWAY: I think maybe it's acceptable to a more knowledgeable person. In other words, if you ask me to—well let's go back to the aquaculture portion here, where it's gonna be the policy, perhaps, to charge the processing part of water use for aquaculture to DCMI allocations. Well, if you asked me what is the consumptive portion of water for cleaning and washing fish as a percentage of that total diversion requirement, I don't know. And I don't know *who* knows. The

other aspect is, well, for cooling purposes, if you're talking about power plants or whatever. We can certainly measure the consumptive use under prototype situations, but a lot of times it's difficult to estimate consumptive use as a percentage of diversion for those kind of uses. At the least, implementation of this portion of the policy would take considerable research to determine what these values are. And maybe the staff has done that—I don't know. But I see some problems with making those determinations. Let me give you an example. I was involved with assisting a water permit holder in evaluating his needs consumptively in an industrial recreational complex, where he had truck washing facility, and a car washing facility and a swimming pool, and a couple of Laundromats. Those kind of things which would fit in the DCMI allocation. How much diversion for a Laundromat is consumptively used? How about a swimming pool? You can make estimates, but whether we have good data on all of those, I'm not sure.

CHAIR?: Maybe we can get the money for the research to get these answers the same place we can get the money to buy it over in [ind.] . . .

BROCKWAY: That could be. I'd vote for that.

CHAIR: if you have some thoughts or something on 32B that you might write down for us between now and the 22nd day of February, we will be accepting written testimony to that date, would you please get them to us? We're certainly [ind.].

BROCKWAY: I'll do it.

CHAIR: Thank you very much . The chair would call Elmer McDaniels, please.

MCDANIELS: [Identifies himself as chairman of A&B Irrigation District and gives address and phone]. We have some concerns about well, most of the areas, really. "Maximum use of storage" we feel should be more defined. And are you going to make those assumptions and those regulations on water years that we've had in the last year or two, or are you going to go back to '77 and the early 30s when we had dry years? I guess what I'm trying to say is people have short memories. Let's don't sell the rest of the farm.

The other thing that I wanna just touch on, and I'm not known for long statements. In your deliberations of the minimum stream flows, I would like to be sure that you tie this in to the rest of the package that's in the legislative process. Don't get yourselves in the box of increasing minimum stream flows and the rest of it goes down the tubes, and then you've gotta go through the loops of more hearings to get them back to where they were. Let's not sell the rest of the farm. I think as far as I'm concerned, Idaho Power got the big end of the stick; let's not give 'em the rest of it.

CHAIR: [Thanks Mr. McDaniels. Asks if anyone else would like to testify. No response from audience.] We'll close the official testimony and we'll open it up to questions and answers. Who's first? Dr. Brockway.

BROCKWAY: I have a question regarding Exhibit 3 that deals with the part of the agreement that required the allocation of monies for hydrologic and economic studies. The number in there is \$200,000 I think. Is that firm, or are we talking about a few more dollars than that?

CHAIR: In my perspective, we're talking about a lot more dollars though in yours it might be a few more dollars. The total number is a half million instead of \$200,000. In the budget that was submitted to JFAC the number was a half million dollars for those studies. What that number comes out to be we don't know. That was put together subsequent to the exhibits [tape stops].

[Tape 2 continues question/answer session.]

January 30, 1985

Burley, 7:00 p.m.

Tape 3 Side A

[Gene Gray, Chair, welcomes, introduces others present. Gives introduction to purpose of meeting and revisions to policy 32 of the State Water Plan, and reviews *Currents* contents. Reviews timetable for State Water Plan, legislative package, PUC and FERC actions, etc.]

FRANK SHERMAN: [He's a geologist, not hydrologist. Directs audience to proposed revisions to policy 32 on p. 2-3 of *Currents*. Makes some introductory remarks.] Why are we changing policy 32 at this time? Clearly, because the agreement that the governor and Idaho Power Company entered into called for certain changes, specified certain changes that they wanted the Board to make. If the Board can't make those changes in good faith, it is conceivable that the agreement would fall through. One other reason that I like to cite for changing the water plan now even though it will be up for re-adoption in two years is that the policy as it exists today allocates water to specific uses in the basin. Those allocations were based on the assumption that the river flow could go down to 3300 cfs. The existing State Water Plan for the Snake River Basin says that a minimum flow at the Murphy gage below Swan Falls shall be 3300 cfs year round. That went in because at that time we thought we could take Idaho Power's water right down to [that?] if we wanted to, that it was subordinated. The Idaho Supreme Court said it's not subordinated, there's a question about how far we can take it down under this current plan. The very first thing that's really a management criteria for the whole basin is that "the policy of the State shall be that the flow at the Murphy gage during irrigation season shall be 3900 cfs, and during the non-irrigation season, it should be 5600 cfs." This is a change both in the fact that we're raising the flow, raising the minimum flow established at that point, and we're splitting it between irrigation and non-irrigation season.

Certainly not precedent setting, in that most water rights have a time of use associated with them. Because there's so much water going past the Murphy gage in wintertime [into?] the spring, it was felt that the difference between historic minimum flow of 4500 cfs and whatever the water quantity the State was trying to negotiate [about?], the difference between that and say 33 or 39, the difference between the wintertime flows that are sometimes tens of thousands of cfs, 12,000, 15,000, 17,000, we could afford to raise it a little more in the wintertime. So we split the season on the minimum flow as well as raising it. You'll note that in this particular policy it talks about zero flow at Milner Dam. That's in the current water plan, a continuation of that, plus a flow at Weiser of 4750 cfs, that's in the current water plan. We're also proposed to adding flows for Johnson's Bar and Lime Point. These are two places in the river below the Hells Canyon complex. These flows are actually specified in the federal license that Idaho Power has to operate the Hells Canyon complex. In the water plan today, it says these flows are recognized as a valuable resource, and actually lists that part of the license had to be repeated again [ind.] the Board thinks that's a good idea. The intent here is to make it actually state policy that those flows should be maintained. What it does is guarantees those flows in case the license, the operational license at Hells Canyon complex were ever to be changed. That's basically policy 32 as it states here. That's the criteria that says how you've got to manage the rest of the river.

Now Policy 32A, Water Held in Trust by the State. It's a new concept, and the language is very brief here, for several reasons. Particularly, we're citing things that the Legislature is supposed to do. We've got an existing plan, we've got proposed revisions, and we've got things that the Legislature is supposed to accomplish by May 15. "It is the policy of Idaho that water held in trust by the State pursuant to Idaho Code 42-203B—and that's the piece of code that requests compromise agreement between Idaho Power giving up part of their water right—be reallocated to the uses in accordance with the criteria established in Idaho Code 42-203A." Those are the existing criteria that the Department uses in granting a water right. Beneficial use, [ind.]. And 42-203C. The water that's being held in trust by the State is that water that Idaho Power had claimed and they are now through the agreement relinquishing use of. They're giving that water to the State. So that water is being held in trust. And we always use the Swan Falls example because that's where the lawsuit started and that's where the minimum flows are critical, and at Swan Falls Idaho Power [ind.] 8400 cfs. They actually claimed more than that, but they can only prove beneficial use of 8400 cfs. The water plan called for 3300 cfs, historic daily low was at 4500 cfs, and the compromise agreement the State agreed to set the flow at 3900 cfs in the summertime; Idaho Power would not protest any existing user as long as 3900 cfs were going through that gage, in the summer. The difference between whatever Idaho Power claimed and this minimum flow is being held by the State to be used for other purposes. Now because that water had been appropriated, the Supreme Court recognized the value of the claims, at least some portion of the claim. The State does not have to give it out as they would the

unappropriated waters of the state. We all know that the right of citizens to appropriate the unappropriated waters shall never be denied. This water is water that has already been appropriated and it's being given back to the State so the State can reallocate it. Idaho Power can continue to use it until somebody else starts to use it. Idaho Power won't protest anybody else using that water as long as it meets existing state law. Part of the deal was they're gonna put some extra hoops to go through before you can get that water to use. And those are shown in the back of the agreement, I forget what the specific number is. It was called public interest at one time. It's basically a check off list the Department or someone has to go through and say "this is good for the economy of the state, this impacts hydropower [ind.] are bad, [ind.]. Once they meet the existing criteria, the new proposed criteria, then the Director can allocate that person a water right.

Policy 32B, DCMI. The water plan talks about allocating a volume of water for municipal and industrial uses. The negotiators have put the agreement together for [ind.] cfs. If you convert the allocation that's in the water plan for municipal industrial, it comes out to 144 cfs. By including domestic users, it was felt appropriate perhaps to raise that to a nice even number like 150 cfs. Now adding on domestic users to the DCMI is [ind.] is not particularly important in that domestic users, in terms of consumption, really consume a very small part of the water. If you take today there are about 400 cfs diverted on an average day for DCMI uses in the basin. You stop and think about where the water is actually used up, it comes down most [ind.—watering lawns in communities?] Most of the industries in the basin [ind] some even wash potatoes [ind.] soaks into the ground and recharges the groundwater. They're not consuming most of that water. So 150 seems like a reasonable number to set aside out of this block of new water the State has to allocate to different uses. The other thing that's important to remember about this one is the State Water Plan does get reviewed and updated in five years. If this number is a bad guess, and it certainly [ind.] it can be changed in the future.

Policy 32C, Agriculture. The policy of the State, according to this, would be that to set aside this water we have to manage, we set aside some for DCMI and we want the rest to go to agriculture. But because this is water that's already been claimed by Idaho Power and is being relinquished to the State, it will have to go through the same set of criteria that are traditionally [ind.—several words]. In the existing water plan, the plan specifies that they would like to see so much minimum new agricultural development, and that of course was based on drying [dragging?] the river down to 3300 cfs. What these proposed language will that while water is available, and encourage its use for that purpose, we would not like to see more than 80,000 acres in any four year period of new [ind.] development. It acts as a constraint, of course it's not a major constraint right now if you look at the records for the last 8 or 10 years or so, you find the average new grounds coming in are about 70 to 80,000. So, 80,000 acres in a four year period is roughly what's gonna happen in the last few years. Probably

something we can work with, unless the agricultural [ind.] turns around dramatically [ind.].

Policy 32D, Hydropower. It says that the policy of Idaho shall be that hydropower use be recognized as a beneficial use of water. That's already the case, actually. It goes on to say the depletion of flows below the minimum average daily flows set forth in policy 32 is not in the public interest. We all realize and recognize that the agreement per se is a compromise. When Idaho Power agreed to relinquish certain of their claims, the State agreed then minimum flows set by the water plan would be a firm flow and any depletion below that flow would not be in the public interest. Idaho Power is therefore assured of at least 3900 cfs in the river. One asked why everything is [ind.] to Swan Falls, and I said earlier that was the thrust of the court case. In reality of course Idaho Power has a different claimed water right at every one of their dams on the [ind.]. As part of the agreement, they have said that as long as the 3900 goes past Murphy, we will not take action or ask for our claimed rights at any of our other structures. So 3900 is really important in terms of diversion from any particular reach of the river, the State may in actuality have more water held in trust than [ind.] 8400 [ind.]. The key [ind.] is at Murphy. As long as the State [ind.] 3900 cfs going past Murphy, Idaho Power will not object to not receiving their right at any other dams on the system.

Policy 32E, Navigation. This is basically saying language that's in the water plan. [Reads language]. Commercial navigation they're referring to here is basically what's below the Hells Canyon complex, people running through Hells Canyon itself. If 3300 was the target value by raising it to 39 the Board feels that there's gonna be enough water [ind.].

Agriculture. This really contains two policies. One, first part of the policy, [ind.] water necessary to process agricultural products be taken from the DCMI [ind.]. A person wants to wash and prepare fish for market or whatever, that's a commercial venture. If someone wants to apply for a water right for that purpose he should [ind.] commercial.

The second part is a little more complicated but it's actually in the existing water plan. It states that "the minimum flows provided at the Murphy gaging station should provide an adequate water supply for agriculture. However, it is recognized that it may be necessary to construct different diversion facilities than currently exist. A good portion of trout farmers in the state rely on spring flows in the Hagerman reach—the 1000 Springs area. With a zero flow set for Milner dam during summertime, conceivably most of the water in the river by the time it gets to the Murphy gage is gonna be water that came out of 1000 Springs. We have to keep 3900 going down there for the Murphy gage, there's gonna be a fair amount of water coming out of 1000 Springs. However, a water right does not necessarily guarantee a citizen a means of diversion. It allows you to use the water of the state at that location. Conceivably, if the spring flows continue to

decrease as they have for the last 30 years, the trout farmers, for example, may have to change the diversion structure [at the mouth of] the spring. In the worst case situation they may have to dig a well. The priority date of the water right would be unchanged, but his means of diversion might have to change. As I say, this appears at this time fairly unlikely because of the requirement for the 3900 cfs.

Policy 32G, Fish, Wildlife and Recreation. It is the policy of the State that the minimum flows are sufficient and necessary to meet the minimum requirements for aquatic life, [fish and?] wildlife, and to provide water for recreation in the Snake River below Milner Dam. What the—when the State Water Plan was originally adopted in 1976, that [ind.] was a real sticking point about the minimum flows at Murphy gage, to balance future developmental uses versus a fishery/wildlife situation. At the time, in '76, the Board finally I guess compromised on 3300 and acknowledged that that is not the optimum flow for fish and wildlife [ind.]. I think the negotiators for both feel that by raising the minimum flow of water [ind.] helping those values out, and they would—the Board would still not claim that these are optimum values but they're better than what the water plan is now and they will protect those kind of resources to some degree.

Policy 32H, Water Quality and Pollution Control. In a state where we have real concerns about the quantity available of water available to the citizens, it doesn't seem like a good idea to take good water and mix it with bad water so somebody can get [ind.] waste water. The Board feels that there are enough state and federal environmental laws on the books or appear to be coming on the books that water quality should not be a major problem within the state. [Whole indecipherable sentence.] They do not feel it's a beneficial use of water when you take the good water and mix it with bad so somebody [can meet a law?]. There ought to be a better way [ind.].

Policy 32I, New Storage. There are two policies incorporated in what basically is one policy. They're fairly complicated, they're required by the agreement, the Water Board has already received conflicting testimony about this particular policy. Let's go to the very first part of it. "It is the policy of Idaho that maximum use must be made of the existing storage facilities in the basin. New storage upstream from the Murphy gage should only be approved after it is determined that insofar as possible, maximum use of existing storage is being made." The intent is that that determination would be made by the Director of the Department of Water Resources. Why have this policy in here? I think the real reason is we're claim to be, and are in fact [ind.] position in the Snake River basin where we can't meet Idaho Power's water right. It's a legitimate claim, it's not [ind.]. If we're so water short, we should be making the best use we can of the water that's in the system. Now we all know that, most years, October first the flow over Milner Dam increases to about [ind.]. This happened to be a good wet year, so it went up to 12,000 cfs on Milner Dam on October first. That's because the

watermaster has to make space for next year's runoff. Water's up there, and it's sittin' in the reservoirs and could be used, in theory, but are not. Why aren't they? There are really some legal and social barriers to using that water. The negotiators asked the Board to put this in the water plan and asked the Board to accept the responsibility to ask the questions. Is there a way we can make better use of our water? I think under the laws and rules and regulations that are in place today, the Director would find that we can't do much else. There are not some unallocated waters that are available, but once that water is taken up, that water's gone. There's really isn't much more water in the system that's not allocated. Then why is it the excess most years? It's because a man who has water behind a federal reservoir cannot sell that water at a profit. The State has a water bank, there are rules and regulations to move water around between seller and buyer. The Committee of Nine uses it to some degree in the eastern part of the basin, but if a person can't sell this water for a profit [ind.]. That's another reason—a person cannot sell or lease water from behind a federal reservoir for more than one year at a time. If you wanted to go in and start some new kind of development, be it agriculture, industry, whatever, and you could only be assured of a water supply on a year to year basis, you wouldn't put much money in it, and I don't think any banks would back it, either. So even though there's a lot of water up there, and sits there sometimes for year after year after year, remember that you can have a full flow right and a full stored right for the same piece of ground. You may or may not need that water one year in ten or one year in twenty. The City of Pocatello has water in storage for an emergency situation, or a dramatic increase in population in Pocatello. Right now if they called for that water they'd have to have pumps in the river and try and catch it as it went by. There's no physical way for them to get that water. But they own water that they never call.

There are barriers that the State puts up for more efficient use of this water. If you don't use your water once in five years you could lose it. If you have water for beneficial use as irrigation on a piece of property, you can't sell that water to another consumptive user because that's an expansion of the water right. The only way you could sell that water off would be to reduce the amount of water you put to a beneficial use.

[Ind.] a big social barrier. These one year restrictions tend to protect the agricultural industry, because no commercial buyer can come in and buy that water out in one year [ind.]. If you want to protect the agricultural economy basis in this portion of the state, maybe that's a good idea. So there are social barriers to a more efficient use of the water. **[First time he's said that in a meeting.]** What the Board has agreed to do, is try to ask the Bureau of Reclamation, the congressional delegation, some of the key state people, can these laws be changed so that on October first a big rush of water doesn't go down the river when we've been shutting [ind.] sometime people that wanted more and couldn't get it. As I said earlier, if the Director had to make a determination [ind.] right away, he'd probably have to say, "We're doing the best we can under the existing

rules and regulations and laws.” if we can’t change those laws, then it’s [ind.] gonna [ind.] his determination for sure.

The second part of this proposal, policy, proposed policy, this applies only to the reach of river below Milner Dam and above the Murphy gage. This part of the tradeoff back and forth between the State and Idaho Power, Idaho Power wanted to protect their winter operations systems schedule. It’s key to Idaho Power, there’s plenty of demand for power on the west coast in the wintertime [ind. long passage]. Nights like tonight [ind.] Idaho. And the intent during the wintertime [ind.] the only storage facility in the Hells Canyon complex. So they wanted to assure themselves continued flow during the non-irrigation season. The policy reads: “Approval of new storage projects that will divert water from the main stem of the Snake River between Milner and Murphy from the period of November 1 to March 31 should be coupled with provisions that mitigate the impact which depletions would have on the generation of hydropower.” The text tries to explain it, but it can’t go very far for several reasons. Principally, the negotiators that put the agreement together couldn’t agree on the mitigation question. They did agree that the word mitigation should be used, mitigation meaning “lessening the adverse impact,” not necessarily compensating Idaho Power dollar for dollar, volume of water for volume of water. They left this open to the Board to resolve at some future date. I guess if the agreement comes into place, the first project the Director has that he’s ready to take to the Board for guidance on mitigation, they’ll have to do something. Clearly, if you’re gonna talk about the adverse affect on Idaho Power’s operation, they’re gonna have to look at each project as an individual project. it depends on the volume of the water, the timing of the diversion, the timing of the return flows if there are return flows. It’s gonna be a fairly complicated procedure and it’s gonna go project by project, and we’ll never probably get anything more than a broad set of guidelines. But, anybody who wants to divert water from that reach of the river in the wintertime for storage purposes shall have to come to an agreement in terms of mitigation for Idaho Power. Someone asked the question today and asked for a simple description on [ind.] the Director of the Department of Water Resources had to bring with the applicant, Idaho Power and the Water Board had to [ind.]. Hopefully it won’t be that bad but it could be.

The very last policy, Stored Water for Management Purposes. If there are at this date unallocated waters in the system, I guess the Department of Water Resources is supposed to manage this whole system down to average daily flow at one point of a certain magic number that varies from summer to winter. I **don’t think we can do it** [emphasis added]. OK, we can do it, if we’re very, very conservative and we hold onto all the water that’s in the basin and we don’t issue very many new permits. We can always be on the safe side. If we tend to be even part way liberal, and start issuing rights, particularly on the Snake Plain Aquifer, now remember zero flow at Milner, high flow that sometimes occurs during the summertime, all the water in the river is made up of 1000 Springs discharge from here [ind.] So the Director has to look at the river flow and the

river rights, he has to look at the aquifer and how many new applications and how much ground water is being involved and try and balance those so he never goes below 3900. If he were to go below 3900, no one who's in place and can prove beneficial use by the signing of the agreement [ind.]. Idaho Power cannot issue a call for water against them. Idaho Power can issue a call for anybody who gets a water right after that date, who proves beneficial use after that date. But we all know that if the guy's pumping a well thirty or fifty miles from 1000 Springs and the Director goes and shuts him off, he isn't getting very much at 1000 Springs [ind.] the actual impact might not come till wintertime. Yet you can't shut off the junior river man and not shut off the ground water pumper, or it's not [ind.] fair [ind.]. So what the Board is suggesting here is that the State acquire some water so when the Department gets down close to 3900, if they make a mistake they can call for some water that they already own in the river. And that water wouldn't have to sit there idly year after year. It could be put through the water bank, it could possibly be sold to Idaho Power, or some other [ind.]. But, it would be nice to have it there when we get down to the 3900 number and the Department says, "We screwed up, quite honestly we've issued too many permits on the aquifer and we can't get that water in the river." State law's gonna say "you have to get it." In Colorado, they operate under a system that I think we're gonna see more and more, something [along the line?] will happen in Idaho and that's called conjunctive use. When a junior ground water person [ind.] the right to pump ground water in that area, he has to guarantee that he has the surface water available that can be called on if the river flows go below a certain number. Now if we wait until we get to that kind of situation here in Idaho, and this unallocated water is already gone, it's gonna be very hard for the individual ground water owner [ind.] to acquire some kind of insurance to cover up for his negative impact on spring water. If the State had a big block of water, the State could lease it out in small chunks. So the Board is recommending that through some mechanism the State acquire some water so that we don't have to be ultra conservative in issuing water rights. Mr. Chairman.

CHAIR: [Takes over; calls Ray Gough for testimony.]

RAY GOUGH: [Passes on testifying.]

BILL MCMANUS: [Gives identifying info.] [Discusses the upcoming adjudication and gives opinions]. As far as Swan Falls, as far as the 4500 or 4600 cfs of water that's ever been recorded, and that's 50, 60, 70 years, basically. At 3900 you've got 600 feet or better of leeway for anybody who doesn't look to conserving their water from here on out water's getting squeezed pretty tight. That's just gonna be another thing to give everybody the initiative to work towards conserving that water. So even though we have 600 feet of barrier between 3900 and 4500, some people don't like that idea. I heard quite a bit of that in Boise, and everybody's opposed to letting come up from 3300 to 3900. That just to me seems like there's nothing the matter with the way it's been proposed. I know that I could probably get into a pretty good battle with some

local water users over that, but if it's gone on for this long and it's never gone below 4500, then what's to worry about at 3900? And like you say there might after the adjudication be a few permits issued a little here and a little there, and with all the things that you're looking at as far as extra water in storage, and if we can keep all our storage at 100%, you brought that up earlier, some of our water we've lost at Jackson is down a little bit, that's for surface water use, but eventually that's water that's in the whole upper Snake River area, so as long as all those waters are up, 3900 feet seems to me like a good figure. And that's really all I wanted to state.

UNIDENTIFIED: Bill, let's take questions from the board.

CHAIR: [Asks if there's anyone else who would like to testify. Notes that Board will receive testimony until February 22. Then opens up to questions.]

January 31, 1985

Twin Falls, 2:00 p.m.

Tape 1 Side A

CHAIR: [Calls to order, explains procedures and *Currents*; invites testimony, written comments, criticism.]

FRANK SHERMAN: It gets a little complicated to know what's really happening. There are three things people really have to be aware of. There's the water plan that's in place, there's proposed revisions to the water plan, copies of which you have in your hands, and there's the agreement itself. Most of the changes in the water plan, proposed changes, are really reflections of the agreement, the agreement that the State and Idaho Power entered into specified certain changes that the negotiators felt had to be made to the state water plan.

If you take a look at the very first one, it talks about policy 32 in the Snake River Basin. In the existing water plan, the whole idea of the policy that governs the Snake River Basin was that the Water Board was allocating the unappropriated waters within the basin. That got to be awkward when the Supreme Court ruled in 1982 that the Idaho Power Company had an unsubordinated right at Swan Falls, they had some legitimate claim to certain amounts of water there. That was sent back to district court and that's when the State and Idaho Power decided enough with the courts said let's try and make a deal. The numbers in the existing plan were based on the concept that all of Idaho Power's water right at that facility was subordinated and the State had the authority to allocate all that water to other uses. So the numbers in here have to be high. So, it's a concern of the Board already that they needed to change. With the agreement specifically saying they wanted changes, the Board then looked at the revised language and is out to hear your comments on it. The one thing that's slightly different about this version than that's which already in the water plan, is that we've tried to highlight all the different things that seem to be policy, and we just

have some accompanying text to try and explain the whys and wherefores of the policy. The very key one, the key to the whole agreement, key to the policy on how the Snake River basin should be managed, is the concept that the minimum stream flow at the Murphy gage will be raised. The existing water plan says 3300 cfs year round. We're gonna raise it to 3900 cfs in the summertime and 5600 in the wintertime. It's not at least unusual to have different flows or different periods for a water right. That's not a new idea. In trying to negotiate a compromise between two competing interests, there's just flat more water going past that gage in the wintertime therefore the negotiators set it higher in the winter than in the summer. The proposed revision repeats minimum flows that are already in the water plan for discharge at Milner Dam—that can be zero at periods of low flow. It also repeats the flow at Weiser of 4750 cfs. Those are unchanged, they've gone through the whole hearing process already. The Board is adding or proposes to add, under this particular policy, minimum average daily flows at Johnson's Bar and Lime Point. These two flows that are part of a federal license that Idaho Power has for the Hells Canyon complex. They are points downstream of those dams, they're there to assure, to protect fisheries and wildlife and navigation on the river. Now the existing plan recognizes the importance of those flows by citing them and actually quoting the language. The thought is by adding them to the water plan and making it state policy that they shall be minimum flows at those points. No matter what the federal government and Idaho Power might do in regards to the license in those places, these flows mentioned would be protected by the State as part of the State Water Plan.

Policy 32A, Water Held in Trust by the State. The policy doesn't say very much, and it's cryptic as to what it does say, because part of the agreement was the so-called legislative package. And these sections of Idaho Code that are referred to in policy 32A, Idaho Code 42-203B, C & A, don't actually exist. They're before the Legislature right now. The key one is 42-203C and that's the one that's been referred to as the [ind.]. So let's back up a point before we really talk about the public interest criteria. The whole deal, as it's called, or the compromise or the agreement, revolves around the Swan Falls dam or the gates right below it, because that's where the suit's been brought in court, specific to the water rights at that point. The negotiators, looking at it rather realistically, said we want out of court we want to reach our own settlement. The first point that was really important was "what's the historic low flow? How low has it gotten? How far below Idaho Power's claimed right of [ind.] cfs?" The historic low flow at that gage is 4500 cfs. Quite a bit below what Idaho Power claims, yet still well above the 3300 that the existing water plan specifies. So in trying to compromise they sort of just split that in half. The existing plan calls for 3300, 4500 is as low as it's gotten, you cut it in half and you come up with 600 on each side of the dividing point. So they chose 3900 for the summertime flow. Now everybody thinks about that meaning there are 600 more cfs that's gotta go past that gage. 600 more cfs that's available for allocation. The thing one has to remember is that Idaho Power has a different claimed right at every one of its upstream facilities above Swan Falls. They use the Swan Falls case because it's the critical one in

the river, it's the one where the flows have gotten down close to what the water plan called for, it's the one the court cases revolved around. But in actual fact now, at any gage in the river, Idaho Power's water right is being held in trust by the State. Idaho Power has agreed that as long as 3900 flows past the Murphy gage in the summertime, 5600 in the wintertime, that they will not take action at any of their upstream facilities if they're not getting the water right that their water right claim entitles them to. That's the importance of the Murphy gage. It doesn't matter how much water goes by Bliss or whatever, as long as 3900's goin past the Murphy gage anymore.

What happens to this water that's held in trust by the State? It represents water that Idaho Power claimed, the Idaho Supreme Court recognizes there's some validity to that claim, they have said "you can take part of it and reallocate its water to other uses." Because that water is not the unappropriated waters of the state, they've already been claimed by somebody else, the State can put additional criteria for use on that water. Policy 32A says "the water to be reallocated can only be done in accordance with the criteria established in Idaho Code 42-203A." Well that's the existing requirements that the Department of Water Resources has to check off before they can give you a water right. [Ind.] beneficial uses, the speculative venture, can you prove your beneficial use—those kinds of things; they're already in place. But 42-203C is the idea that because it is appropriated water we're gonna give it to somebody else for a different use, we're gonna put some additional criteria on it. These are the ones that talk about what's its impact on the overall economics of the state, what's its impact on Idaho Power's generation capacity, is it in the family farm tradition, designed to be a simple check off list when someone applies for some of this water the Department tallies up the pluses and minuses there and has to make a decision what that water [ind.] allocated or not. Remember, we're talking about water that's already been appropriated. It's not the unappropriated water of the state to be taken by any citizen.

Policy 32B, DCMI. The existing water plan sets aside, and in the old days we used acre feet, and the negotiators chose to go to cfs, so it gets a little confusing, but the old plan allocated water for municipal and industrial uses. Convert the acre feet in here to average cfs, and it comes out to 144 cfs per day, average [ind.] shall be diverted—or allocated—for expansion of municipal and industrial uses. The policy is written out for 150 cfs. One of the reasons for making it a little larger is that we're including domestic users. It turns out that's not a very important reason, but in terms of trying to manage the river we're not particularly concerned about consumptive use. The amount of diversion, while it has to be recorded, is not the key any longer. It's how much of that water you divert is actually consumed, how much gets out of the basin [ind.]. **The real reason for raising it a little bit is because the old plan discusses the possibility of thermal power plants within the state, and they allocated a lot of water for that purpose.** [*Emphasis added—this is the first time in all the meetings that he's mentioned anything about geothermal plants.*] We don't see the likelihood of

new thermal power plants in the state in the near future, but if they were to come in, we would try in accounting for this appropriated water that we're reallocating, we would consider thermal plants to be an industrial use and charge them against that 150 cfs set aside.

One of the concerns about the 150 cfs—it's really just a guess. Why we feel comfortable with it is, one, it's close to what the existing plan called for and two, the water plan gets revised every five years, or at least re-adopted. So if staff people have made a bad guess on how much water should be set aside for expanded uses in DCMI areas can be changed.

Policy 32C, Agriculture. Pretty straightforward. "It is the policy of Idaho that appropriated water held in trust by the State, less the amount of water necessary for DCMI, shall be available for reallocation to agricultural uses." Once again, because it's water that's already been appropriated, it has to meet whatever criteria the legislature comes up with establishing before the Director can turn it loose. The thing that's slightly different here, is the existing water plan, when the Board thought they had a lot of water to allocate, they put down the desirable acres of new development by the year 2020, for example. We've taken a long hard look at the number of acres of new development that have come in recently, and we find that over the past 8 or 10 years, the average number of new acres per year is something like 17,000. We have therefore chosen to say well, if that's the number that's been happening, let's use that as sort of a target number, or a cap number. Certainly under current conditions we don't expect large acreages to come in this new ground. But rather than just trying to limit it to 20,000 or 17,000 per year, we said let's put a cap of 80,000 acres in a four year period. And that way a big project can go in, and not be stopped because of some artificial barrier or the State doesn't like to see more than 20,000 new acres every year or [ind.] reallocate the water.

Policy 32D, Hydropower. It says, "The policy of Idaho that hydropower generation be recognized as a beneficial use." That's already in the law, certainly electrical generation is recognized as a beneficial use of water. It further goes on to say, "The depletion of flows below the minimum average daily flows set forth in policy 32 is not in the public interest." So a lot of people who argue that the rate payer is being hurt because we're taking away the water that belonged to Idaho Power, or Idaho Power in fact is giving up water that belongs to them—that's probably a legitimate point of view [ind.] the negotiators and the Board have to look at. The thing that Idaho Power gets by this agreement in this particular statement, is that the 3900 and the 5600 is now State policy. The water level should never go below that. When the subordination bills were introduced in the legislature, the intent certainly wasn't to take away all of Idaho Power's water and try and get it down to 3300 [ind.] basis. We couldn't—that did not pass the legislature. The compromise says ok, we won't go quite that low, and we'll guarantee you that, as state policy, these shall be the minimum flows.

Policy 32E, Navigation. It just basically says that minimum flows that are set by the Water Plan provide enough water for commercial and recreational uses of the river. The only commercial boating on the river of any significance takes place below the Hells Canyon complex in the Hells Canyon area itself. 3900 in the summertime probably will provide adequate water [ind.] for recreational uses. So it's more than the existing plan provides for, so the Board [ind.] they're on safe ground.

Policy 32G, Fish, Wildlife and Recreation. The policy is sort of the same language that's in the existing plan except it of course is referring to higher established minimum flows. "It is the policy of Idaho that the minimum flows established in policy 32 are sufficient and necessary to meet the minimum requirements for aquatic life, fish and wildlife and to provide water for recreation in the Snake River below Milner Dam. Stream flow depletion below the minimum flow is not in the public interest." Below Milner Dam things [ind.] critical [ind.] zero cfs. It's been a water short year, and in order to satisfy the rights on the upper Snake, the flow could be set at zero at Milner, in the existing plan [ind.]. The flow below that is [ind.] the Board [ind.]. That's where the 3900 cfs impacts. If you stop and think a minute, if for some reason Milner Dam were shut off and there were no water going by, where's the water in the river coming from? Obviously from 1000 Springs area. That's the water that makes up the flow from the Murphy gage in the low flow parts of the year. If we're gonna guarantee 3900 at Murphy gage, most of that 1000 Springs discharge has to go down the river, at least enough to make [ind.] with whatever return flows [ind.]. The Board feels comfortable here because they're raising the amount of water that has to be in the river at any given time. The Board also feels comfortable, they feel. And speaking for myself, the Board has another authority to guarantee water for these kinds of uses. And that is their instream flow program. The Board is the only entity in the state that can appropriate the unappropriated waters of the state and leave that water in the river. They've done that on many of the tributaries streams, in terms of protecting fish and wildlife in the whole basin, tributary streams in some cases are as important as the main stem Snake.

Policy 32E, Water Quality and Pollution Control. This is a very terse version of what's already in the water plan, and that simply is to provide that to take good water and mix it with bad water so someone can meet a wastewater discharge requirement is not a beneficial use of water. There are existing laws on the books, both state and federal, which should serve to protect our water quality. If we're in such a terrible water short condition that we can't meet Idaho Power's water right, by entering into some sort of compromise with them, we shouldn't be taking good water and using it to make bad water more palatable.

Policy 32. New Storage. This is a fairly complex. Hopefully it won't work out that way, but it seems complex at the moment. And this particular policy includes two different policies. The first one is probably easiest to explain in that it states that, "It is the policy of Idaho is that maximum use must be made of existing

storage facilities in the basin. New storage upstream from the Murphy gage should only be approved after it is determined that insofar as possible, maximum use of existing storage is being made. What most of us in here know is that a person can have a full natural flow right and a full stored water right for the same piece of ground, with the stored water being held as insurance water. Now a person who's got a really old natural flow right never has to call for his stored water right, or very rarely. Once in ten, or once in twenty. There are extreme examples. The City of Pocatello, for example, has a block of storage they've never called for. It's there for an extreme emergency; if Pocatello would double in size, [ind.] in size they might have to call for it. Physically they can only get it if they put pumps in the river and try to nail it when it went on downstream past them. There's water up there that doesn't get used. So the negotiators asked the Board to include this as a policy in the water plan. They've asked the Board to proceed and make the necessary contacts to try and, one, change state law, federal law, federal rules and regulations and state rules and regulations, in terms of "can we better use the water that's held in storage in the basin?" Well we all know that on October first in any good year, the flow at Milner Dam goes kickin' way up as the watermaster tries to get some space for next year's runoff. I think this year it was about 12,000 cfs on October first. That's water that sat in storage up there all summer long, used by the recreational interests but put to no other use, then is sent on down the river so he can make space. Why don't we move that water around, for people who need water if we're in such a water short area? Why don't we move that water around? Well the state has what's called the water bank program. Rules and regulations are established so that water can be moved around. The Committee of Nine does market water in the upper parts of the river. Why isn't it particularly effective? Well federal law says that if you store water behind a federal reservoir you cannot sell that water at a profit. So there's no incentive for someone who has a block of unused storage water to go out and try to sell it. Federal law also provides that if you have water stored behind a federal dam you can only sell or lease that water one year at a time. If someone wants to go in and do something new, break out new ground, put in a new business, he's only assured water for a one year contract at a time, he probably is not gonna put much of his own money into it, and certainly not many banks are gonna want to finance him when his water supply is limited to a contract that's duration is one year.

State law. Though we the state set up the water bank program, state law provides that you cannot expand the water use. You have a right to that water in the space for the beneficial use that you claimed it under, and if it's irrigation it's for irrigation [ind.] for the purpose of [ind.]. If you have excess water and want to sell it, if that's tied to your ground, you'd have to cut down the acreage you're irrigating, otherwise it would be an expansion of use if that were used for a consumptive use. You could sell that water to Idaho Power, because they're a non-consumptive user, but you couldn't sell it to another farmer because that same block of water that's tied to this one piece of ground is gonna be irrigating two pieces of ground. That's state law. There's also the worry constant in the

back of anyone's mind who gets involved in the water bank is you use your water for where it's supposed to be once in five years or you lose it. So the Water Board has asked for the State to try and make the rules and regulations applying to the water bank simpler. They've asked the Water Board, the Water Board has been asked and in some informal discussions with the Bureau of Reclamation, for example, can we change these state laws? We need not disincentives, but incentives for people who have excess water to make it available for other potential users. That's the first part of the policy.

Let me say, as the Director of the Department of Water Resources has said in similar meetings, if he were asked to make a determination today, "are we making, under existing conditions, maximum use of the facilities of the system?" Today he has to say no. There's unallocated water in Ririe. Once that water is gone, allocated out, then his decision would have to be "are we doing the best we can under the existing laws that we operate under?" The answer there would be probably yes. He may not agree that all the laws are the best laws in the world. Hopefully before the question arises, one, we get rid of the water that's unallocated in Ririe, and somebody comes with a reasonable new construction facility, these questions will have been asked of the state and federal government and we'll know whether we're gonna be able to change it. Most people aren't too hopeful about changing many of the rules and regulations, but, it was felt that if it were so critical we can't meet existing water rights on the system, why don't we use up some of the water we hold back every year [ind.].

Second part of this very sensitive topic, and much more appropriate to this area. Second part states that, "Approval of new storage projects that would divert water from the main stem of the Snake River between Milner to Murphy during the period November 1 to March 31 should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower." We've got two competing interests sitting down trying to work out and [ind.] tradeoffs. This is one of the tradeoffs. Idaho Power is concerned particularly about their wintertime operation. It used to be a big part of their scheme of things to sell water to the West Coast during the winter season to balance the irrigation low in Idaho in the summertime. What's getting to be with more and more urban development in Idaho and it seems like colder winters lately, that they have a pretty good market in Idaho for winter power for heating purposes also. That's part of their operation scheme. The other key factor of course is that Brownlee Dam fills during this period. It's the only storage reservoir in the Hells Canyon complex [ind.] the river dams. So they, as the tradeoff, wanted to make sure there was water coming down in the wintertime they could generate power with where they needed it and store it if they didn't. Now it says "mitigation." What does that mean? It's very carefully explained in the text that mitigation means "lessening the impact of." It doesn't mean compensation, you don't give 'em a dollar or a volume of water equal to what you've taken away, necessarily, it means you lessen the negative impact of. I said it's a sensitive topic because the three negotiators couldn't agree as to how

this should be handled. And they sort of bucked it to the Water Board, saying “we want the Board, in conjunction with the Department, to deal with this mitigation question.” Well if you start thinking about making up general rules covering it, it’s pretty clear that each individual processor is gonna have a different kind of impact, a different kind of impact, and the kinds of mitigation that may be necessary will be different for each one. It’s been pointed out in public testimony, and it will probably be pointed out again, that the very concluding language about no current proposals for storage in this reach is incorrect. That’s one of the advantages of going out for public hearing is that pretty clearly that will be changed.

The very last one. 32J, Stored Water for Management Purposes. This is a whole new concept, and it’s not even in the agreement. It’s a reflection of what the agreement forces the Department of Water Resources to do. It says the Department can issue new permits, but they can never let the river go below 3900 or 5600 cfs at Murphy in the two different seasons. Now the Department feels there’s plenty of water available to do that. We have a historic low flow of 4500 cfs, our target is 39. Depending on how much consumptive use is made of the water that’s diverted, depending where the diversions take place and the time, conceivably there’s a lot of water that can be moved around still while maintaining the flow. The thing that Ken Dunn was quoted in the paper as saying is that the possibility of him hitting exactly 3900 cfs is nil. He has two choices. One, he can be very conservative in how he allocates this new water, or this water the State has to be allocated, always keeping himself a good cushion. That’s fair, and he never makes a mistake that way, perhaps. But it means there’s water that could be used that won’t be used because he doesn’t want to get too close to that 3900. If the State could acquire some water to be held in the State’s name, that was to be released or available for call if the Department made a mistake, if we really screwed up, it was clearly our fault, we could call for that water and meet the requirement of 3900 cfs at the Murphy gage.

Two things happen here. One, the Water Plan, or the agreement, the agreement specifies that any user in place by October 1st 1984, anyone who can prove beneficial use, will not be subject to call by the State or Idaho Power to meet the 3900 cfs requirement. That person is exempt. He’s safe, protected, whatever word you wanna use for it. So anybody who’s a new user after the date of this agreement is the one who would be shut off to try and meet that flow. If we start issuing ground water permits out on the aquifer, and it’s, well there are lots of advantages trying to do that, because a person who pumps ground water 50 miles from 1000 Springs, the impact of his pumping may not be felt for months and months after the fact. If we issue permits right out of the river, two days later the impact of that diversion is shown at work. So we feel that technically we feel that we can probably allow more development on the Snake Plain Aquifer and see less impact in the river. The problem there, of course, is if there is a call, shutting off a junior man on the Snake Plain Aquifer who’s fifty miles from 1000 Springs isn’t gonna do the flow at Murphy gage a bit of good, not for months. So,

for management flexibility, it would really be nice, if the Department makes a mistake, to be able to call the watermaster on the phone and say “dump some of that water that belongs to the State so we can meet this flow.” There’s no intention that if the State were ever to acquire the water for these purposes it would sit there. The whole point of much of the agreement is to better use the water in the system. It would go to the water bank, it could be sold to Idaho Power, it wouldn’t sit there idle. But when we see we’re getting down towards 3900 we would keep some of it so we could meet this requirement. The other reason that I think it would be nice to have this flow available is that if it’s only the junior guy who’s gonna get called on, is gonna get shut off if the flow would go below 3900, and a lot of them are gonna be ground water users, most states where they get into that situation, Colorado is a good example, require the ground water user to have surface water available to meet a call in the river. If there’s any likelihood that he’s gonna be, has to be shut off. Now the unallocated water [ind.] may not last too long, and even if it were, an individual ground water user, it’s pretty cumbersome for him to go to the Bureau of Reclamation to try and get a small volume of water, whereas if the State held that water, they could lease it, sell it to the ground water user as the insurance water he might need if there were a call in the river.

I want to re-emphasize that distinct from the policy, the agreement of course discusses a lot of other things that have to be done to get the whole thing in place. The agreement very clearly specifies, however, October 1st, 1984, if you’re in place, you’re protected. You’re protected in extreme drought condition even. If the flow were to go below 3900 because of drought or mismanagement on the Department’s part, the user who was in place before October 1st would still be entitled to his water, no matter how low the flow got at Murphy. I think, Mr. Chairman, that I’ll stop.

CHAIR: We will now start the public testimony part of the meeting. [First calls Robert Reichert, Chairman of the Committee of Nine, and member of the board of directors, Twin Falls Canal Company.

REICHERT: [Gives identifying information]. Mr. Chairman, members of the Board, ladies and gentlemen. I reside on a farm near [ind.] Idaho, I’m the Chairman of the Committee of Nine, and I’m also a board member of the Twin Falls Canal Company. At the present time I am the secretary/treasurer of that board. I appear here at the request of the Twin Falls Canal Company Board of Directors. As you know, the Twin Falls Canal Company delivers water to an excess of 200,000 acres. We have followed the Swan Falls controversy and the suggested solutions closely. In our opinion, the only major impact on the existing rights of the Company and its landowners is that we must now participate in adjudication. Today, the president of our company is appearing at a legislative hearing in Boise in support of the Snake River Basin Adjudication.

As to the proposed changes to the State Water Plan that this Board has asked to endorse, we have reviewed the same and encourage you to implement those provisions. While a compromise at some times that hurts everybody a little, it is a reasonable compromise that's being considered. We encourage your support of it and further encourage the changes in the State Water Plan to facilitate that accord. I thank you for the opportunity to appear here and I request that a copy of this statement be made part of the official hearing record. Thank you.

CHAIR: Thank you, Mr. Reichert. Might you stand for any questions the Board members might have? [Polls the Board to see if there are questions; one thanked him for coming.] The Board will now call Dell Hyatt

January 31, 1985

Twin Falls, 7:00 p.m.

Tape 3 Side A

CHAIR: [Gene Gray calls to order, introduces, explains that they have no one signed up for testimony. He does not refer to *Currents* nor explain the contents of it. Chair asks if there is anyone for testimony, no one responds, and the Chair officially closes the meeting and asks Frank Sherman to give an explanation of policy 32, to be followed by questions and answers.]

SHERMAN: It's really hard to understand perhaps what's happening. We have the existing Water Plan, the proposed revisions, and in the copy of *Currents* you have in your hand, the proposed revisions are on p. 2 and 3. We also have the agreement that the State signed with Idaho Power Company, that's in the back of the *Currents*. As part of that agreement, specific exhibits, as they were called at that time, a package of proposed legislation, and that's also included in the back of *Currents*.

So when people start talking about the Snake Plain water rights compromise, and the Snake River compromise, and the Swan Falls Agreement, you have to remember that all these things were specified and all were part of the action. Now, on the very back page of your *Currents* newsletter lists about seven things that have to take place. I'm sorry, it's one page in. These things theoretically take place by May 15, 1985. At that time, the principles, the three negotiators, will sit down and say "have we made enough progress to continue with the agreement, is it clear we're never gonna get our agreement?" and that decision point is May 15. And also on that list you see the very first thing is to change the State Water Plan. That's what the proposed revisions have to do. They change the State Water Plan to satisfy the conditions of the agreement.

The existing State Water Plan has a policy 32, which talks about allocating the available and unappropriated waters of the Snake River. When that was first adopted '76 and re-adopted in '82, the Board and their staff at the Department of

Water Resources and perhaps even Idaho Power felt that the right at Swan Falls was subordinated, that the State had the authority to take the river down as low as they wanted. The current water plan says 3300 cfs at Swan Falls. As you all know, the Idaho State Supreme Court said that is not the case, that Idaho Power had an unsubordinated right at that particular dam. What the amount of that right was was still subject to litigation in that Idaho Power had a [ind.] generator capacity of 8400 cfs, for a number of years during the low flow period of the year they were not receiving their 8400 cfs, so it was going back to district court to try and resolve just how much water Idaho Power really had a legitimate claim to. The State and the Company both felt that another five years of litigation, it was clear that whatever the district court would resolve it would likely be challenged, if not by one of the principles, by someone else, and would go back to the state Supreme Court. So to prevent this continued litigation, both the State and Idaho Power agreed to sit down and see if they could work out a compromise agreement. In October when the Water Board came around and discussed the agreement, per se, they talked about the framework agreement. On October 1st, the Governor accompanying the Attorney General, signed an agreement which basically laid out the stipulation for things they thought had to be taken care of in order to reach a final agreement. Now the lawyers for the parties put most of that in legalese and that's what you get in the back of this newsletter, and that was signed on [ind.] 25th.

The Board is charged with changing the Water Plan. There are certain specific things they have to address in their changes. There are some other things that [ind., several words] modify the plan sort of crept in. If you'll turn back to page two, let's very quickly go through the proposed revisions and I'll either contrast with the existing water plan, point out there's no contrast, or try and explain why it's there.

The main policy 32, what we've done is take out everything that relates to the basin and where it's strictly policy we've bold-faced it, and then the material underneath was [ind.] to explain, was designed to be explanatory text for that policy. The key change here, of course, is that we've raised the minimum flow at the Murphy gage from 3300 year round, propose to raise it to 3900 for the irrigation season and 5600 cfs for the non-irrigation season. It's a compromise value that's basically reached at by saying "what's the historic low flow at that gage?" and that happens to be 4500 cfs. The Water Plan in the State's position was 3300, that's 1200 cfs difference; if you add six and take six away and split it in half and come up with 3900 cfs. There's more water goes out obviously in the wintertime particularly [ind.] in the spring therefore it's part of the tradeoffs it was agreed to that a higher flow would be appropriate in the wintertime. Now it mentions, in the revised version, a zero flow at Milner gage. That's already in the water plan, the State realizes that in a water short year particularly, all the water in the upper Snake is appropriated. The Board does not intend to try and force somebody to give up their water right to have water go past that particular dam. The flow at Weiser is already in the water plan at 4750 cfs. The two flows at

Johnson's Bar and Lime Point are addition. Lime Point and Johnson's Bar are below the Hells Canyon complex. They're mentioned in the existing water plan as being desirable flows. They are part of the power company's federal license for the Hells Canyon complex. What the Board is doing is adopting the language from the license, proposing to add it as a minimum flow in the State Water Plan, so that if the license were ever to be changed, they would still be recognized as minimum flows by the State. The State's [ind] to assure those flows will continue.

If you turn to Policy 32A, it talks about water held in trust by the state. And here we get into the problem of talking about things that aren't really in place yet, because the Water Board and the legislature are all working at the same time. "It is the policy of Idaho that water held in trust by the State pursuant to Idaho Code 42-203B" and that's not yet law, "be reallocated to the uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C." Well 42-203A are basically the existing portions of the code that specify the conditions that have to be met for the Department to issue a water right. Has to be a beneficial use, can't be speculative, has to be in the local public interest, those criteria are already in place in 203A. 203B relates to compromise that the Idaho Power Company with the State reached. 203C is what's commonly referred to as the new public interest criteria. What happens in the compromise, what happens in the agreement, is that Idaho Power agrees to relinquish their claim to water, their 8400 cfs for example at Swan Falls. They will let the State hold that water in trust and the State can reallocate it for uses provided they meet these three set portions of the Idaho Code.

Why can we add specific criteria onto the issuance of a water right when the Idaho constitution says "the right of the citizen to appropriate the unappropriated waters of the state shall never be denied"? Well, quite clearly these waters were claimed by Idaho Power, they've gone through the appropriation process as such. They're not unappropriated waters of the state. Therefore, when the State wants to reallocate these waters to new uses other than hydropower, they're gonna add additional criteria to the normal ones to get a water right. The idea here is to have a checklist of criteria and we're gonna be broader in scope than the ones that are normally applied for ordinary water rights. They're gonna talk about impact on the state's

February 5, 1985
Tape 1 Side A

Boise, 2:00 p.m.

CHAIR: [Opens. Introduces J.D. Williams (when mayor of _____), Don Kramer, Wayne Haas, among others. Discusses *Currents* and contents. Gov. Evans gets copy. Chair explains the charge of the Board and order of business for the current meeting. They take testimony first. Gene Gray first calls Governor John Evans.]

GOVERNOR EVANS: Thank you very much, Chairman Gray and members of the Board. Ladies and Gentlemen. I want to thank the Board for its cooperation in implementing the Swan Falls compromise agreement. The Water Plan revisions you are considering are consistent with both the letter and the spirit of that agreement. I come before you today to urge your approval of these proposed revisions in order to resolve the complex and urgent problems associated with the Swan Falls water rights controversy. I will now offer some brief comments on some of the specific revisions that are before you.

Minimum stream flows. I am convinced that the new minimum stream flows at Murphy gage will provide needed additional protection to fish and wildlife interest as well as an adequate hydropower base. The Board acknowledged in the original plan that 3300 cfs was not a sufficient level to provide for fish and wildlife needs. By raising the summer minimum flow to 3900 cfs, the Department will be able to manage the river in a manner that should enhance our Snake River fisheries. By raising the winter flow to 5600 cfs, the Board will be recognizing the greater value placed on hydropower generation at that time. It is appropriate to dedicate a greater quantity of water to hydropower generation during the non-irrigation season. This new winter flow reflects a reasonable level for our state to try to protect. The new flows at the Murphy gage, coupled with the retention of a zero flow at Milner Dam will allow for significant new agricultural development without threatening minimum flows. It is important to the future of Idaho that we allow for some additional development. With wise and careful stewardship, we will make what water remains available sufficient for all of our society's needs well into the next century.

Agricultural uses. It is important to emphasize as your proposed Policy 32C does, that we scrutinize carefully any proposed new uses for the limited water which remains for allocation to agricultural uses. By choosing with care those new projects that should go forward in the public interest, we should be able to meet new agricultural needs for many decades to come. But if we were to continue to approve new uses on a first come, first served basis, we would soon exhaust the available water supply and reduce the opportunity for modest expansions for our many small family farms in Idaho.

I also support the proposed reservation of 150 cfs for new domestic, commercial, municipal and industrial uses. While these uses are largely non-consumptive, it would be very shortsighted if we did not make provision for a reasonable amount of future depletion which these new uses can be anticipated to demand. DDMI uses are vital to the potential growth of our economy and our communities. By reserving this block of water, we can assure new businesses they will have an adequate supply of water to meet their needs if they decide to locate here in Idaho. This will greatly assist us in our effort to create new jobs for Idahoans.

Finally, I would like to comment on the one proposed revision which was not specifically mentioned in the Swan Falls agreement. That is the new policy on stored water for management purposes contained in policy 32J. This represents an innovative solution to the problem of protecting minimum flows established by the State. By acquiring stored water, the State will be in a position to raise the public's confidence that we can effectively protect instream flows. Coupled with the proposed general adjudication of the Snake River basin, this policy will give the Department an opportunity and important tool to manage this vital resource.

In closing, I want to stress how important it is to the state of Idaho, and to its water users, our farmers and electrical rate payers alike, to establish a balance between instream values and outstream depletions. I strongly believe the revisions before you strike a balance that will serve our citizens well for many years to come. Thank you for the opportunity to comment on this important issue, and of course I'll be very happy to respond to any of your questions.

CHAIR: Thank you, Governor Evans. [Chair polls committee members present. Thanks staff for the "many many hours and effort that has been put in to this. It's exemplary of the leadership we have in this state. Thank you very much."

GOVERNOR EVANS: Thank you very much, Mr. Gray. I would like to add that I've been most pleased to see how the Water Resource Board and the Department of Water Resources staff have done, particularly Ken Dunn, your director. He has worked very hard to work with us during the entire summer to make sure that you had input constantly. We had the Advisory Committee working very closely with you, and of course your chairman served on that Advisory Committee, as well as Mr. Williams and we're appreciative of the efforts that all of you have put forth. It has meant that we've been able to go to the legislature, and what it looks like right now, we're really seeing a very strong and close to unanimous support for the adoption of the necessary legislation to implement the Swan Falls agreement, and of course all of us are very happy about that. Thank you.

CHAIR: Thank you very much. The Board would call Sherl Chapman, Idaho Water Users Association.

MR. CHAPMAN: Mr. Chairman, members of the board. My name is Sherl Chapman. I represent the Idaho Water Users Association, with offices at 410 South Orchard in Boise Idaho. Telephone 344-6690. I too am pleased to stand here today and bring you the testimony that I have been authorized to give to you today. But before I do that, I would like to commend the Board. As you well know, I testify before many agencies and many boards in a year's time, and it is very few boards that I see that will take the time to attend a hearing such as this so that the board members themselves get the input from the public, rather than having just a hearing officer and then reading a transcript at some later date.

And so I want you to know that our water users appreciate your interest and your involvement at these hearings throughout the state of Idaho.

Our association, which represents some 150 irrigation districts and canal companies throughout the state of Idaho, both in and outside of the Snake River Basin, have almost unanimously supported the changes to Policy 32. We have a few who are concerned about some provisions in the legislation, but very few people are reluctant to adopt that.

The Policy 32 that relates to the minimum stream flow, the 3900 cfs in the summer and the 5600 cfs in the wintertime, we feel are adequate to protect the hydropower base, fish and wildlife, and other values in the stream. I'm sure that you have received criticism in the past, and past hearings, and I know that it has occurred in the legislation that the 3900 cfs level and the 5600 are too low to protect fish and wildlife, and in fact they will cost millions of dollars insofar as Idaho's rate payers go. There was a study published sometime back that indicated that lost power generation would cost the Idaho rate payers some \$52 million per year. That study was flawed in several areas, particularly when discussing the elasticity of electrical energy demand. And another analysis of that investigation showed that in fact the cost might be something like \$29 million per year with an increase to the state in added value of some \$78 million a year, which was in direct contradiction to the earlier study. I think that points out the breadth and error of assumptions that can be made in economic analyses, and I would stand before you today just saying that certainly we have food surpluses at this point in time. We know from past history that that will not continue, that we must protect our options for the future.

With regard to the DCMI flows and aquaculture, our association had some reservations initially when we understood that the Water Board was going to, or wanted to, reserve some 150 cfs out of the potential 600 cfs that might be allocated for consumptive uses in the future. However, with the inclusion of aquaculture in there, and the realization that continued economic development outside the agricultural sector was in as much of Idaho's interest as agricultural development, we agreed to support that provision also.

Again, the fish and wildlife considerations. We feel the minimum flows do protect fish and wildlife. We're talking about the addition of 600 cfs, or about 270,000 gallons per minute, added to the existing minimum stream flow. Now that's a big slug of water, and it's gonna help those fish, it's gonna help the wildlife. I was raised in the southwestern Idaho area; I've seen the Snake River since I first traveled there when I was a youth to fish and hunt, and I know that we have additional needs there. But at the same time, I feel personally, and our association feels, that the 600 cfs will be more than adequate to take care of those concerns.

We had concerns over the Policy 32I that related to full utilization of existing storage prior to new storage developments. We are still concerned about that. We do not understand what “full utilization of storage” might be, but we have received assurances from board members and from the Department of Water Resources that whatever application of that terminology occurs, that it will be reasonable and take into account existing uses, as well as the other policies within the proposed revisions, and that is satisfactory to us. We trust the Board, we trust the Department of Water Resources, and we believe that they’ll be fair in carrying these out. Mr. Chairman, members of the Board, as I say, I’m pleased to be here before you today to support the revisions to Policy 32. Thank you.

CHAIR: Thank you. Mr. Williams, any questions?

WILLIAMS: Just briefly. Sherl, going back to what you mentioned about this cost to rate payers study.

CHAPMAN: Yes.

WILLIAMS: You’re saying it’s your understanding that the original estimates of a \$52 million loss was flawed. Could you explain and you talk about elasticity of demand?

CHAPMAN: Yes. The original study done by Hamilton and Lyman [sp?] indicated that with development of new lands within the Snake River Basin that water would be taken from the Snake River, from the source of hydropower generation, and because of that development that a cost to the rate payers of about \$52 million per year could be anticipated, with an added value of the development of only about \$49 or \$50 million, or a net loss. One of the assumptions that I’m most familiar with was that the demand for energy would not change if the price of energy increased, which we know to be false. And the McGrath study, which was a critique and an analysis of the Hamilton study, went through that analysis, reviewed those assumptions in light of what are more realistic assumptions, and what has happened historically, and their estimate, or his estimate of what might be the annual cost due to decrease in consumption of energy and the modification of the uses of water and the methods of irrigation, that the impact might approach a maximum of \$29 million per year, but in that fact that the added value, because of growing population and growing demands in the future, would be more like \$78 million. And so, based on that and other considerations, we felt that the 3900 and the 5600 was adequate, because of course our water users are rate payers just as well as anybody else, and they’re not anxious to double or triple their power bills, just in the name of saying that we need more development. And they took a close look at that. They feel more comfortable with the McGrath study than they do with the Hamilton/Lyman study.

WILLIAMS: Thank you.

CHAIR: [Polls other members; no other questions.] Sherl, I have a couple, if I might. The way Policy 32I is set right now, it would be up to the Director of the Department of Water Resources to determine when maximum utilization is set. Could you or your group possibly define it as you see it? How would you define maximum utilization of upstream storage? Have you thought about that?

CHAPMAN: Mr. Gray, yes we have. Our considerations of full utilization of storage at this point in time would be that the storage be utilized as it was originally allocated and contracted for in the congressional authorization, because most of those upstream reservoirs are federal reservoirs. That would also require some coordination and discussion with the Bureau of Reclamation of Corps of Engineers.

CHAIR: Mitigation—the term “mitigation”—is defined under 32I, about eight sentences up, just above policy 32J. Do you have any druthers the way mitigate is defined? Would you expand it, or might you otherwise define it than the way it appears?

CHAPMAN: I think that the definition of mitigation is going to take an awful lot of thought, and I wouldn't have any words of wisdom for you at this point in time.

CHAIR: Thank you very much. The Board would call John Keys, please.

KEYS: Mr. Chairman, I'm John Keys, with the Bureau of Reclamation, address is 550 W. Fort St., telephone number is 334-1930. As I started out with Mr. Chairman, I was reminded that one time I stood up before a group where the chairman was a chairperson, and I fumbled around with “chairperson” for awhile and then I came up with “chaircreature.” And that went fine until I got kind of flustered later on and it came out “madame creature.” So I'll promise not to do that today [laughter].

CHAIR: We've been called worse than that in all cases.

KEYS: Mr. Chairman, the Bureau of Reclamation supports the settlement of the Swan Falls water right issue, and it will work with the Idaho Department of Water Resources and the Water Resources Board to implement its articles and proposed implementation. We believe that the settlement is fair and equitable and it would allow necessary growth in the Snake River Basin of Idaho. Additionally, we are glad to see this settlement handled within the framework of Idaho's water law and water rights.

The subject at hand today is proposed revisions to Policy 32. In general, we think the language in Policy 32 that's been proposed is good. We like the spirit and intent of that. It's good to see the policy spelled out for the different uses, the domestic, the M&I, the agriculture, all of them. We also think the minimum flows that have been set are reasonable and probably achievable. We do have

some questions and concerns about Policy 32J, and Policy 32I. We support the concepts behind those two, but we do have some questions and concerns. In addition, we would encourage that the explanatory language that's included in *Currents*—the latest issue of *Currents*—be included in the State Water Plan, and be expanded with some further definition and explanatory comments, and I hope that my comments now will tell you what I mean.

Now, I'll start out with 32I. The basic intent of Policy 32 is to better use existing reservoir storage, and to make more efficient and effective use of the water in storage in the basin. We believe that these objectives could better be achieved without getting into an argument of what maximum use is. We think that if you went through an inventory of water uses in the basin, after you get through with the adjudication process, and then look at an expansion of the water bank concept, that those objectives could be met better than getting into a maximum use argument. The expansion of the water bank program could be tailored such that you could make it worth a person's while to put his water or storage in such a bank.

Now if the current concept of maximum use is included in 32I, we feel that it should be defined. In reading through the explanatory material, it causes us some real problems, and let me give you some examples. We have currently in the Snake River Basin about five million acre feet of storage. A lot of that storage space has been built and depended on for supplemental supply. Is the supplemental supply storage max use of reservoir space? Storage space that's being held for expected drought periods? We have carryover periods of up to seven or ten years in some of our reservoirs. In other words, we're holding that water there for a drought that would only occur once in every seven to ten years. Does max use cover that storage there? Storage space that's been build in reserve for future uses—an example there, City of Pocatello holds space in Palisades reservoir for an expected future use beyond what their supply is now. Is that max use of reservoir space? And minimum pools that have been set aside for recreation, fish and wildlife purposes. I know that the use of water in the Snake basin has been justified for recreation, fish and wildlife, but who says how much? A good example there is the current case that we have in Cascade reservoir, where we're trying to designate about 300,000 acre feet a minimum pool for recreation, fish and wildlife. Is that max use of reservoir space? We have some other concerns. Federal storage space involves a congressional authorization. If it is determined that that space is not being used to its maximum, how do we get the change there? Do we have to back to Congress for such a change in the allocation of storage in the reservoir?

Now, somehow the Water Resources Board would have to deal with the space holders to get their take long periods of time to get those authorities and contract changes necessary to get that done. It might also take quite a while to get it through your current water rights set up to get the change of nature of use, change of place of use and that sort of thing taken care of.

We're wondering also, do the proposed changes apply to private storage? There are only a few private reservoirs on the system, but if a private reservoir owner refused to give up his storage, do you hold up the development of other storage in the Basin because of that? In other words, the proposed policy says that unless you have max use, you can't build new storage. If a private reservoir owner refused to give that up, do you hold up the development of new storage in the basin? What right would the Water Resource Department have in taking that storage? In other words, would you use them in a domain or what?

Basically, these are some of the problems we have with the maximum use concept. We think that those problems could be overcome with the proper definitions, implementation procedures and so forth. What we would like to suggest is, if possible, the policy in 32I be stated in terms of the intent of Policy 32 overall, rather than in terms of maximum use. If not, the term maximum use should be defined and expanded to show its accomplishment of the intent of Policy 32. Policy 32I should contain a water or storage marketing plan for the entire Snake River Basin simpler to the current water bank or rental pool in Eastern Idaho.

The Bureau of Reclamation and the Idaho Department of Water Resources should jointly prepare a report addressing how better water utilization in the Snake River Basin could be achieved. This study should include an inventory of water needs of the existing space holders, the steps necessary to get needed flexibility for new water supply from existing storage, possibilities for a water or storage marketing plan similar to the rental pool, and other steps necessary to meet Policy 32. Language should probably be included to require the Department of Water Resources to show the intent of the use of the surplus storage before release is actually required by the Department of Water Resources. Space holders would then not be arbitrarily called upon to give up their space without knowing what its intended use is. Basically, I think we are talking intended use as to meet a minimum stream flow, but what is it replacing upstream? Is it replacing a groundwater withdrawal? Is it replacing a withdrawal for irrigation? Here again, you get back to better definition of what water is being used for.

Policy 32J; in its current form, Policy 32J is confusing. For example, if the minimum flow at Milner is zero, then storage acquired would have to be found between Milner and Swan Falls, if you use the language that is there now. We should also remember that the review of 32R would have to be done before 32J would be implemented, just a progression there. It's not spelled out that you would have to do that inventory of available space, but it would probably have to go that way. It should also be clarified if new storage were to be built or existing storage would be obtained. Also, how would you get the existing storage? Would the Water Resources Board buy it and hold title to it? If so, what funds would you use for that? Could the storage be condemned for purchase, in other

words would you have to use imminent domain? Or would it be expected that the storage would be donated? These are just some questions on how you get it.

The question of water use priority and authorized uses may become involved. Should the water be purchased for augmentation or should it be used for domestic purposes above? In other words, if you have to buy storage above Milner, to release to make the minimum flows at Swan Falls, why not buy it and supply the use in the first place? If you have someone who is going to take the water out above for a municipal supply, why not have them buy that supply from the rental pool or from that storage, rather than buying the storage and releasing it to minimum flow at Swan Falls. Which use would have the higher priority?

The last question is probably the biggest one of all. Will ground water be part of the adjudication process? The language in 32J indicates that it would. Is the connection here indicative that all ground water permits will be adjudicated as well as surface rights?

With that we are happy to be able to give you our ideas on the proposed changes in Policy 32. The Bureau of Reclamations stands ready to cooperate in any way that we can to help you implement that Policy and those Swan Falls agreements.

And with that, I'll answer any questions that you might have.

Williams: John, on the expansion of the water right, I believe if I recall correctly we've been going across the state with similar hearings, some of them individuals who testified that there are some impediments, federal law impediments, to that.

Keys: Yes

Williams: Would you briefly discuss that and what, if anything, could be done?

Keys: I can think of two. One is the authorized use of water. That means that if we had water in Palisades Reservoir, basically that authorizing legislation limits the use of that water to the Minidoka Project area. That is a pretty big area and we've been able to shift the waters around without any problems there. I think the one that you are referring to, that you've heard from the most, is the one brought about by the Reclamation Reform Act of 1982. That says that under the acreage limitation law, you couldn't use federal water on lands that don't meet the acreage limitation. There are a couple of ways that we have explored to get around that and a couple of those are in our Washington office being reviewed for approval now. I don't know the answer to that yet, but that is one of the impediments that we are dealing with. I think if we got into a change in the rules in the water bank, that might be a bargain chip, maybe, from the state's to say 'hey, fix that up and we can do something else.'

Williams: Thank you.

Chair: Mr. Shaburg.

Shaburg: I think that John covered most of my question in the last one, but are you in favor of expanding the water bank to mold our years...

Keys: Yes, sir...

Shaburg: ...if we were able to regulate obstacles?

Keys: Yes sir, we are.

Shaburg: Thank you

Chair: Mr. Randall

Randall: In relation to this water bank expansion, will there be any difficulties with the bureau in letting the price increase to a market value in that water bank or are you still going to hold the line that you can't make a profit from water stored in federal reservoirs?

Keys: Mr. Chairman, that's one we've dealt with in very difficult straights with. I think, in a certain degree, the price could rise. I don't know how much. Basically, the reason I say that, most of our projects are tied to repayment of the federal obligation and, of course, that is kind of what governs the price of the water from the rental pool now plus an administrative fee and so forth. The current mood of the administration is that those prices could be expanded.

Randall: Another question, there has been some interest in my area of Fish and Wildlife groups renting water out of the rental pool and keep it in the reservoir. Do you have any problems with that in your office?

Keys: The problems that we have are mostly authorization problems or allocation of the original water. Basically, right now we're limited to using that water on its federal authorized allocation. Now what I mean by that is, if the reservoir was built 100% for irrigation we wouldn't have any problem renting the water for use for irrigation. We would have to seek a change in our allocation and authorization to allow that, but we have talked with our people and don't see a great problem. Part of that hurdle was crossed when water was rented to Idaho Power out of the rental pool a couple of years ago.

Mr. Kramer: Thank you, John, for your comments. I don't have any questions.

Chair: We'll have a board meeting on March 1. Might we ask you or possibly one of your officers to briefly address the board on some of the federal constraints that the bureau has in moving some of these waters around. Just a

15 minute thing. Because I think it would enlighten us a lot if we knew some of those problems.

Keys: Sure.

Chair: I thank you very much for your excellent testimony and if you come up with any of the answers to some of the questions you've raised please let us know.

Tape 3, Side A

February 5, 1985

Boise

7:00 P.M.

**Tom Nelson (oral)
Attorney, Idaho Power Co.**

Chair does introductions of board.

Chair: We will be taking testimony on Policy 32...we will open testimony. We will call on Tom Nelson.

Nelson: Mr. Chairman and members of the board, my name is Thomas G. Nelson from Twin Falls. I'm here on behalf of Idaho Power Company, one of the signatories to the agreement of October 25, 1984. I think there are a couple of things that should be said for the record in view of some of the comments that have been made before the board in previous hearings. As the governor said, this agreement was arrived at between the State and the Idaho Power Company -- it's an attempt to resolve certain pending litigation. That pending litigation can be resolved only by certain adjustments in state policy, but also that the parties were negotiating that settlement. Therefore, this view of State policy is a little narrower perhaps than it might otherwise be. As far as the minimum flow itself is concerned, I believe in earlier meetings we discussed how that was arrived at, but I would like to say for the record what that flow is and what it isn't. You heard some discussion today about averages. The state water plan is now couched in terms of an average daily flow. The proposed amendments that are before you are also couched in terms of an average daily flow. What we have done is put the state in a position to have a different planning number to shoot for in allowing new permits and allowing new development. This is now the new target. So, I suggest to you, given what you have said in your previous plan and the way that it physically worked, this is really two things - it's both the flow and it's an enforcement mechanism. Cause if you will recall, when that number was chosen as 3,300 cfs for Murphy in 1976, the board acknowledged that that number was chosen because you had existing permits outstanding that time which would reduce the flow to that level if they all developed. We've had a great deal of development since 1976 and at no time has the water plan minimum at the Murphy gage been a factor in what happened in any of those applications.

This agreement, if implemented, now puts the State in the position where it has to recognize that minimum flow as a part of its planning process, not only has to plan for it, but has to take steps to implement it. So, I think what we've really done is put some teeth in the State water plan. I'm not being critical of the board for not having done that before because that really wasn't your function and I'm not critical of the department because it didn't really have the tools to do it. Now, I think that we have the tools to make the State water plan really work to the level selected and I commend 3,900 to you. If you look at it in a vacuum, I think it can be argued it's inadequate from one side, or you can argue it's too high from the other side. I think it's a relatively realistic number, both physically and politically. I don't think a number that's based on an absolute freezing of further development in this State is ever going to fly. I think people who want that, who think that they can sell an absolute freeze on further development, should go try and sell it. But, I don't think the way to do that is to kick this agreement in the head by rejecting it and going back to war in the courts. I'm not sure you are going to end up with an absolute freeze on further development as a result of any court action that you can file.

The other comment I would make would be relative to good faith. There was a comment made this afternoon that 'you need to put your paranoid hat on cause the Idaho Power Company is going to be over at the legislature chipping away at everything you do here relative to the State water plan.' I'd like to refer you to paragraph 4 of the October agreement. The bullet or caption is entitled "Good Faith." The second paragraph says, "the State shall enforce the State water plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State water plan. State and Company shall not take any position before the legislature or any court board or agency which is inconsistent with the term of this agreement." So far as I know, and I think that I'm in a position to know, the State of Idaho through the Governor and the Attorney General have been consistently in support of the agreement as written and so has the Idaho Power Company. I suggest that that paranoia is badly misplaced. Without the "good faith" support of the parties, I don't think we would be as far as we are in the legislature and probably wouldn't have a chance at getting it passed. The parties have arrived the agreement. To my knowledge, they are in total good faith in trying to get it implemented. With that, Mr. Chairman, if you have any questions, I'd be delighted to try to answer.

Chair: Thank you Mr. Nelson. Mr. Williams.

Williams: Thank you. Mr. Nelson, I'm intrigued by this term 'average daily flow' from April 1 to October 31. Now 'average,' does that mean the average number of days the water flows that you come to are 39- are 3,900 a minimum flow on any one day, cause if you average this, then some days you can be considerably lower than that if it's compensated for by days that have a higher flow.

Nelson: Mr. Chairman, my understanding, and we have some technical people here, but as explained to me by the GS, the way they use average daily flow is take, for example, you had a gage where you read it every hour, so you would go down and you would have a reading every hour and you would average those 24 flows and that would be the average daily flow. It is within that day. The lowest instantaneous flow at Murphy Gage, by way of example, I think is in the area of 3,600 whereas the lowest average daily flow is 4,500.

Williams: So you're averaging all the measurements for that particular day.

Nelson: Yes, that is my understanding of the way the GS uses average daily flow as the board has used it the water plan.

Williams: Could some of those fluctuations may be because of the discharges from dams, to hydro?

Nelson: Whether or not certain irrigation pumps are on or off and that sort of thing, whether you've had rain on a particular tributary that day, that sort of thing.

Williams: That answers my question, thank you.

Nelson: I assume we'll here from the technical people if that is not an accurate explanation.

Chair asks for any other questions, there are none.

February 6, 1985
Tape 1, Side A

Lewiston, 2:00 p.m.

Chair: Good afternoon ladies and gentlemen. My name is Gene Gray, I'm chairman of the Idaho Water Resource Board...
[proceeds to identify other members of board]

What we are here to speak to you about today is Policy 32, the existing State Water Plan. In December of 1983, the board accepted some draft language for proposed change to Policy 32. We are here today to take your testimony. Since we don't have too many people, we are going to break training and do things a little different. We are going to have Mr. Sherman will give a brief overview of Policy 32. After that, we'll take oral testimony from those of you who wish to testify. We'll close the testimony then we will open it up for questions and answers. If you will follow through the *Currents*, the first page gives you an overview of the State Water Resource Board, what our function is. Page 2 and page 3 will give you Policy 32 as we've accepted the draft language and that is what we would like you to critique for us or at least give us written testimony on.

Going on over you'll see page 4-page 5 is the Swan Falls agreement that was put together and agreed upon by the Governor's office, the office of the Attorney General for the State of Idaho, and Idaho Power Company. Going over to page 6, basically the right hand side of page 5 and page 6 and 7 is the legislative package, which the legislators are now working on at the State Capitol. If you take a look at page 7, at the far right hand column, you'll notice actions that must be taken by May 15 for the implementation of this whole thing. Number 1 is 'the State Water Plan is to be amended' and that is why we're before you today – to get your suggestions, your fears, whatever you might have as far as the water board revising this and then passing it on to our state legislature. Number 2 'the legislative package must be passed' and its going to have to be passed pretty much intact as you will find it in the *Currents*. Number 3 'appropriate action by the Public Utility Commissions or the legislature as required an agreement must be taken.' Number 4, 'there must be an appropriate order by the Federal Energy Regulatory Commission' pretty much ok-ing the way the package is and the way the legislature may go ahead and pass it. Number 5, 'the Idaho Public Utilities Commission must dismiss the law suit from 1977 which was filed by the Idaho rate payers.' Number 6, 'Since we have three dams in the State of Idaho which border our neighboring State of Oregon the Hell's canyon complex, if required, may also have to be ok-ed by the Oregon Public Utilities Commission.' And Number 7, 'enactment by the legislature of subordination languages set forth in 7a and 7b.' You'll find 7a and 7b on page 7, just to the left of the box we're looking at. So what we'll do now, is we'll have Mr. Frank Sherman from the Department of Water Resources give you an overview and, if you like, you can kind of follow what he is discussing on page 2 and page 3. Mr. Sherman?

Sherman: Unless you live the whole situation on an almost day to day basis, it gets a little bit complicated in that there is in place the Idaho State Water Plan. There were two different documents signed in October of last year. One, an agreement to agree and one legal document with legal language specifying what the State and Idaho Power agreed to. There are the exhibits as in the *Currents* for proposed legislative changes. Some of those have been amended already or modified as the procedure of the legislature. And then there are the proposed changes to the water plan that are listed in the *Currents* at this time. So it does get a little bit complicated since I assume most people here aren't particularly interested in what happens above Swan Falls and Murphy Gage. Wherever possible, I'll try and emphasize those things that might be important to your local area.

The existing water plan has policies for the Snake Basin, Bear River, _____ region, and the intent back in 1976, when this plan was first adopted was to allocate the remaining unappropriated waters in the system or in that particular basin, more specifically new uses. The agreement that the State and Idaho Power entered into called for specific changes to that. It needed to be updated anyhow. It is updated every five years, but in 1982, when the Idaho Supreme Court ruled that the power company had a legitimate and valid unsubordinated

claim at Swan Falls dam for water, all the allocations in the existing water plan were based on the premise that the State could take Idaho Power's water and use it for other purposes in the 3,300 minimum spring flow established for Murphy Gage is below Swan Falls. This plan, as it stands today, specifies probably was an unrealistic number given Idaho Power's claim at Swan Falls dam. We've gone into litigation and it finally came down to the point where both the Power company and the State felt that trying to resolve this complex issue before the courts was not the way to go. It was back in district court, certainly any decision reached in district court, one of the two parties would have taken it to the Supreme court. It would have been five or ten years before something was put in place by the courts, which would have then directed the Department of Water Resources particularly on how water was to be used in the system.

Part of the problem was that as soon as the Supreme Court recognized the valid right of Idaho Power, the Department of Water Resources stopped issuing new water rights below Swan Falls dam. If we couldn't satisfy Idaho Power's water right and it was legitimate, we certainly couldn't be issuing new permits use water. We have several thousand permits on file that have not been ruled on. If we would have waited for five or ten years, certainly it would be several more thousand permits on file. People in the basin were being done a disservice in that they wanted to do something and had to wait and see what would happen. Everything was at a stand still. So, the State and Idaho Power agreed to compromise.

The compromise itself speaks to several different things. It speaks to new stream flows at the Murphy gage. You're going to have a compromise cause you've got two different positions someplace in between this compromise. Now, the State Water Plan calls for a minimum year round flow at the Murphy gage just below Swan Falls dam for 1,300 cfs. Idaho Power had a claimed a water right of 8,400 cfs; quite a discrepancy if indeed we had satisfied their right. In the negotiation process, Idaho Power recognized that the minimum flow had already been down to 4,500 cfs. Typically, for management purposes, we use the average daily flow for readings. 24 readings average together each day cause of the influence of minor thunderstorms, pumps on and off, Idaho Power's own operations on upstream dams influence the flow, so we talk in terms of the daily average. It had already been down to 4,500 cfs. The only way we could guarantee more water than that was to shut off the current users in the basin. The legislature had clearly shown the several efforts want to subordinate Idaho Power's water right too, to allow the governor to enter into a contract with the power company that they did not want to see existing users shut off. So, the compromise was effective because we started at low flow that the state water plan called for and that's where the 3,900 comes from. If you take 4,500 and 3,300, the difference is 1,200 cfs. The compromise is just cut that number in half and get 600. So the Power company is basically saying, we're going to split what's available and you take this part and you take the other part to satisfy upstream development and loss by additional depletions. So, the 3,900 which is

specified in the agreement in Policy 32 of the Snake River Basin speaks to what's arrived at by the negotiators and in discussing the idea of a compromise there is certainly a lot more water going past that gage in the winter time than in the summer time, so they just chose a higher number. There are several legitimate reasons for this number. Principally, if you take and project the kind of development that might take the Snake River down to 3,900 at Murphy, pluck that back into winter time uses, turns out that [.....] chosen as a [...] number for the winter time season.

A change from the existing water plan is that we would specify the year-round flow. Not change in terms of the water law or thinking because most water uses in this state have a specified period of use for that use, typically irrigation. The existing water plan recognizes the importance, and this is particularly important to people in this area, of a Firk (???) license in the Hells Canyon complex. Talks about the minimum flows up Limes Point and Johnsons' Bar. In order to assure those flows, the intent of the board is to add those flows to State Water policy. While merely recognizing those flows as being desirable, if the Federal government and Idaho Power were to reach us on a different compromise on those Firk licenses, those flows could go by weight. The intent of the board is to add them to the State Water Plan, specifically as State Policy, so that if for some reason the federal government and Idaho Power change the license so that wouldn't have to be those numbers, it would still be guaranteed by state water plan. So that really is all Policy 32 as identified in here does. It proposes to use the 3,900 – 5,600 at Murphy as specified by the agreement and to add as part of the State Water Plan, minimum flows up at Limes Point and Johnsons Bar.

It goes on to talk about waters not held by the State are considered unappropriated waters, and those held by the State shall be issued under certain criteria. What this proposed revision does is break out of the old water plan in every one of those allocations and try to identify specific policies. In doing that, the whole question of what happens to the water that Idaho Power claimed becomes policy in it of itself, really.

So, policy 32A, water held in trust by the state. What Idaho Power and the State agreed to was that as long as 3,900 cfs in the summertime and 5,600 cfs in the winter time goes past the Murphy Gage, Idaho Power will not take action against any other water user in the Basin and call for water based on [...] at Swan Falls, nor will it call for water at any of their upstream facilities. All the examples talking about the Swan Falls compromise, all the assumptions made really seem to revolve around the Swan Falls dam because that's where the lawsuits originated, that's where the numbers developed in court and where the compromise came from, but in fact, Idaho Power claims a lot more than 8,400 at some of those three dams. As part of the trade-off with the State, as long as the 3,900 cfs in the summertime goes past Murphy gage, Idaho Power will not call for exercise of water rights in upstream obstructions. But, what it basically comes down to, using the Swan Falls example, is that Idaho Power says 'we had valid claim

according to your Supreme Court' now what the size of that claim might be depended upon what district court ruled. We weren't getting the water we claimed there for maybe five years or more. The idea of forfeiture, you don't use your water in five years has gone by lose your right, it's state law, the Idaho Constitution provides that the state may regulate the spring flow for hydropower purposes. Based with the grounds to continue the action that Idaho Power doesn't apply at all to the subordinated claim. Idaho Power said 'we'll give up our water right providing you assure us it will never go below 3,900.'

Those waters that Idaho Power is saying 'we're giving up' were actually appropriated waters of the State. They had filed the proper claims, the paper work is on file at the Department of Water Resources. Because those waters were claimed at one time, they are not considered the unappropriated waters of the state. Most of you realize that a citizen of Idaho is guaranteed the right to appropriate or use the unappropriated waters of the State. That right shall never be denied according to constitution. But, because Idaho Power had already appropriated those waters, putting them to beneficial use by running it through the generators, they are not available for the ordinary citizen to apply for or use. Idaho Power turned over, basically, all their water right above 3,900 cfs to the state. The state says we will reallocate that water to other uses provided you meet certain criteria, and that's Idaho Code 42-203A, B, C.

There are existing criteria that have to be satisfied when getting appropriated water by the state. Those are, basically, listed in the Idaho Code as 42-203A. 42-203B specifies that, yes, Idaho Power or any hydropower with a water right can be held in trust by the state and 42-203C states that if the State wants to reallocate water that has been claimed by a hydropower company, they may impose special criteria on anyone who applies for that water. The special criteria is proposed by the negotiators, it's part of the legislative package, talks about the effect upon the State, effected upon hydropower rate base, effected upon family farm tradition. There's five or six new criteria that before you can get some of this water that used to belong to Idaho Power you have to satisfy the new criteria.

Policy 32B Domestic, Commercial, Municipal, Industrial. The existing water plan sets aside a volume of water, this policy is in terms of acre-feet, for new municipal and industrial uses. If you convert that figure to cubic feet per second, it turns out to be roughly 150 cfs, but adding the domestic tends to add a little bit more water to that number just to cover it. When you stop to think about it we're talking about consumptive uses now. It really doesn't matter how much water you divert, it's how much water you consume out of the basin. An irrigator diverts six or seven acre-feet per acre and his crops only use three, the other water goes to recharge the aquifer or it comes back to the river. So we're talking about consumptive use in terms of any kind of water budget analysis. The person who drinks water, the individual human, doesn't consume much water. Your waste waters actually balance out what you're drinking, if you could ignore the amount of water actually lost by perspiration, by digesting food you are

actually creating more water than you are consuming. The domestic, the amount of water that is used by the human population in the area is not a significant factor. If you take a look at the numbers that the department has, it turns out that those municipal diversions, which are used to water lawns, golf courses and city parks, are probably the biggest consumer in the whole basin. This amount, 150 cfs, of this water that the state not holds in trust, is set aside for consumptive purposes, it will probably allow a doubling of the population industry in the whole Basin. IF you take, and it's a fairly inclusive title if you take Domestic Commercial Municipal Industrial, the only other consumptive use left is agriculture.

Policy 32C specifically says that those waters not held by Idaho less the amount reserved for DCMI shall be available for new agricultural development or agricultural uses in general. It specifies that if you're applying for that water that Idaho Power formerly claimed you have to meet the new additional criteria. Conceivable and certainly the intent of the negotiators, the idea of the first applier who thinks he can put it to beneficial use automatically gets the right to the water, hence no longer being in the case. These waters are special waters, they belonged to somebody else and were returned to the state for new allocation, new criteria.

Policy 32D talks about hydropower. Specifies that the use of water for hydropower is a beneficial use, that it's already in the State Water Plan, the Idaho Code. It points out that the depletion of flows below the minimum average daily flows set forth in policy 32 is not in public interest. It's part of the trade off between the Power Company and the State. The power company had to be guaranteed something and what they've been guaranteed is 3,900 cfs in the summertime and 5,600 cfs in the winter time. If the flows were ever to go below that point, Idaho Power should, would, and will take action through the State against any new appropriator of water. The intent of the agreement is to protect the existing user, but anybody who can only show the beneficial use of water after the signing of the agreement, if the flows ever get below those specified by Idaho Power as legal grounds, then they need to be shut off or resupply the water some how.

32E Navigation. This is basically no change from the existing State Water Plan, except that in '76 and '82, when it was readopted, the board was thinking in terms of 3,300 cfs at the Murphy gage, coupled with the federal licenses for the Idaho Power Complex, supplied enough water for recreational purposes and commercial navigation of the lower Hells Canyon complex. They now have raised the flow to 3,900. They feel therefore, even better about the fact that there is enough water for recreation and navigation.

Aquaculture. Certainly a major factor, particularly in the Twin Falls/Hagerman region of the river, trout farming, catfish farming. This specifies very clearly that

an aquaculturalist who wants to process fish, any water for that purpose has to come from DCMI uses. It's not a very water consumptive commercial operation, but it should be counted against the 150 cfs set aside for these purposes. It points out that many of these fish farmers, relying on the discharges from Thousand Springs. It's part of their water flow – they were born from the spring discharge through the race [...]. They have a water right at 4, and the department feels that by having 3,900 at Murphy, they're going to probably always have water coming down from Thousand Springs. The plan, as it exists and as proposed to the advisors to not change, calls for a zero minimum flow at Milner dam near Twin Falls. All the water in the Upper Snake above that point is basically allocated to existing uses. It is legal and has happened on a rare occasion, is that there is no water coming past Milner dam. The only major recharge to the river between Milner dam and Murphy gage at Swan Falls is the Thousand Springs discharge. So if you're going to specify 3,900 at Murphy gage, most of that water in the summertime is coming down from the Springs, so those trout farmers relying on the Thousand Springs should have water right to it. But state law does not provide that a water right guarantees that means of diversion. It provides only that you have access to water associated with that water right. Conceivably if the flows at the Thousand Springs decline, trout farming may have to change its diversion structures. In a worst case situation, he may have to go to wells. Law does not provide that a water right guarantees you a means of diversion, it just specifies that you are allowed access to that water. And that basic language is in the existing water plan, not necessarily all the trout farmers were aware of the existing plan when there was discussion about a provision.

Policy 32G, Fish, Wildlife and Recreation. Back when the original Water Plan was adopted in 1976, there were a number of studies conducted about the needs of fish and wildlife and water for recreational purposes in the basin, particularly at the Swan Falls site since that was the one chosen to determine the minimum flow. The numbers are significantly higher than 3,300 and they're higher than 3,900. The water plan represents a compromise just the way the Swan Falls agreement does. In '76, by trying to balance the fish wildlife interests against the interest of new consumptive upstream development, the board reached 3,300 cfs. They felt this was a reasonable compromise. They recognized in the existing water plan that is not the best number, the best flow, for fish, wildlife and recreation, but it is one they felt would afford some protection to those resources and form a basis for continued use of it. By raising the minimum flow, the board at least feels we're moving in the right direction. While still not [...] by any means, it does support some protection for fish, wildlife and recreation.

Polcy 32H Water Quality and Polution Control. In an area of the state where we're so water short, we can't satisfy the existing water rights, it seems to be a misuse of water to allow it to be used for a simple dilution of polluted waters. The board proposes to adopt as a policy and it's spelled out in slightly different terms than the existing water plan, that to use good water to dilute bad water is not

beneficial use of water. The board feels that there are enough state and federal laws on the books, if properly enforced, that water quality should be maintained at a fairly high level. Soon, no one will be able to get a water right to use water just to dilute their waste.

Policy 32I New Storage. One that may not be particularly significant in this part of the state, but it's a key factor in the upper basin and the whole Snake system above Murphy. This particular policy is two specific parts. Both parts are mandated by the agreement. The first part basically says that until some kind of determination is made that we're making maximum use of the water storage facilities in the basin, no new storage should be created. It's there, I guess, for several different competing interests. Certainly, the large segment of population that says we get enough dams. Idaho Power likes to see as much water come down the river in the winter time as possible because it settles in the surrounding reservoirs which is the only storage facility really in the Hell's Canyon complex. If you stop and look at what the negotiators were really asking, in this case they were asking the water board, want it concluded in the water board, to fix the maximum. Most of the reservoirs in the system were built for irrigation storage. Some minor benefits reflecting recreational purposes, in some cases, but some of the dams were constructed totally for irrigation storage. And yet, they seem to be partially full in the summer time, in some cases quite full. And that's probably because of a number of reasons. In Idaho, water law provides that you can have full natural flow line for consumptive purpose, for example you have as much water from a stream as is necessary to irrigate so many acres and you may have 1870 priority right. That water is almost always going to be guaranteed to you. The law provides that you may have an additional full water right in storage as insurance for. Now some of the farms in Eastern Idaho with early priority rights on natural flows use their water once in five years, once in ten years, or less. City of Pocatello, for example, has water right in a reservoir which they had acquired years ago, they thought Pocatello's need for water would increase. They have never called for that water, they have no means to divert it. If they called for that water, the only way they could get it would be to put pumps in the river and try to catch as much as they can. So there are lots of examples about water held in storage that is never used, that on October 1, the watermaster in that area gets to create new space for next year's run off, he just dumps the water down the river. Now, it's not necessarily going to waste, it's available to Idaho Power for its power generation facilities, but in late fall, even Idaho Power is not trying to fill another reservoir. This water is basically water that has set around, not been used. If there were some way that this water could be exchanged for new uses, maybe we wouldn't be as water short as we think we are.

These are some of the kinds of barriers. First of all, the dam was built for a specific purpose, authorized by congress. The water that is stored behind that dam can be only used for those purposes. They will be only for irrigation, they might only be used for a certain project, so you can't move it around even if you

wanted to. The State has a water bank mechanism so that the person who has excess water can lease it or sell it to someone who needs the water. The federal law provides that if your water is stored behind that federal reservoir, behind the federal dam, you cannot sell it for a profit. It's a fair deal from the point of view that watching somebody be able to make an enormous profit on water that his grandfather or father paid some minimal amount to help support construction of the dam, and he's got all this excess water he doesn't need, why should he be able to make a big profit off of water stored behind that dam that at least a part of it, the biggest part of it, was paid for by federal dollars. So that's realistic from that point of view, but very unrealistic if you expect someone who has excess water to make it available to someone else. It isn't worth his while if he can't make a profit by letting go of his water.

Another federal restriction is that you can only lease or sell your water for one year at a time. The intent of that, I suppose, is to protect the irrigator, or the person who holds the water. There is no way that big business or even new farmers can come in if all they are guaranteed is water on a one year at a time basis. No one is going to finance that kind of an operation. All you do there is you only make the people in the area, and there'd be no water available and you'd be out of business. So, you can't lease or sell your water for more than one year at a time. Certainly a barrier to trying to move this water around so that new uses can be satisfied.

The state has number of laws which apply in this situation and they are equally restrictive. You can't expand your water right. You have water and its beneficial use is to be used to irrigate these certain number of acres described in a water right in a certain location. The law provides that you cannot use that water for a consumptive use at any given point. Makes sense in trying to keep track of the water in the system in that, you would never have any idea how much water was going to actually be consumed if these people could actually sell their water to someone else, or consume a portion of it. But, it certainly provides a barrier because the only use a person with excess water, even if he goes through the water bank in theory, the only use that can be made of it is for non-consumptive use. It's the argument that if you don't use your water once in five years, you use your water right. So there are both state and federal barriers so there are efficient use of water rights.

The board has been asked and has agreed to try and find out are there ways to get around state and federal restrictions on optimum, maximum, whatever you want to define it, better use of water stored already in the system. If you had to ask the director of the department of water resources today to make a decision on 'are we doing the best we can with our water?' he would probably have to say no because there is some unallocated water in the reservoirs. Once that water is allocated, as the director had made his decisions, he would probably have to rule under existing law that we are probably doing the best we can. The intent is for the board to see that some of these restrictions upon how we can better use the water, some of those restrictions need to be changed. Of course, there are a lot

of problems with trying to change state or federal law certainly as it pertains to reservoir storage, but the intent of the board, as part of its response, is to look into 'can these laws be changed?'

The second part of policy 32I applies strictly to the stretch of river from Milner Dam down to the Murphy gage. Idaho Power is quite concerned about filling Brownlee Reservoir. No question about the amount of revenues they generate from a full Brownlee Reservoir. If Idaho Power is going to participate in the Northwest Power claim council or Fisheries Augmentation scheme, they are going to have water there.

In trying to work out compromises, the negotiators agreed finally that filling that reservoir was so important that anybody who wanted to divert water directly out of the river during the wintertime for storage purposes, the impact of that diversion should be measured and some sort of mitigation should be supplied, given to Idaho Power for that impact on their system's operation. The plan does not specify, the proposed revisions to the plan do not specify what that mitigation would be. Certainly it has to be calculated on an individual base. The amount of water diverted at the time of the year, each project each proposes in the wintertime is different. The intent is to lessen the negative impact on Idaho Power's operation. It may be that the timing of the return flows is beneficial to Idaho Power and that may be mitigation in it of itself. It may be that someone who wants to divert more in the wintertime can divert a few additional acre-feet, make them available to Idaho Power in the fall. It doesn't mean the calculation of the economic dollars lost is [...] Idaho Power's. That's not really the idea behind it, the idea is somehow, before we can let anybody take water out of the river in the wintertime in that region, we have to evaluate and try and lessen the impact on Idaho Power's operations.

There's one last policy and it's called Stored Water for Management Purposes. This is one of the few changes that's not directly a reflection of either the agreement or the Supreme Court decision, but it is certainly an indirect reflection of that. The agreement and proposed changes to the Water Plan require that the Department of Water Resources always maintain a 3,900/5,600 depending on the time of the year at the Murphy gage. If the department is going to issue any new water rights for upstream development, they have to then be weighed against the impact of those flows. So I said earlier, continually there are periods of the year when there are no flows coming down the river past the Milner dam, we are relying totally on discharges from Thousand Springs into the Snake River Plain Aquifer. Talking about managed water, as soon as you start talking about trying to manage groundwater and surface water, and that is the intent of these changes in the water plan, that's the intent of the agreement – try to manage all the water, ground and surface, in the basin, as a unit or at least manage them so that we are always concerned about the flow at Murphy – it gets very complicated when you're talking about an aquifer that's several hundred miles long and fifty to seventy miles wide. Someone whose pumping water fifty miles

from Thousand Springs, if the flow gets low at Murphy gage, and I shut him off, I do no good to the flow at Murphy gage as the effects of his pumping the groundwater up there might not show up for weeks, months. So, if the department is going to be allowed to issue new water rights, particularly for ground water purposes, they're going to have to either 1) be very conservative because there is no match in cut off when you get close to 3,900 because shutting off an [...] or 2) they have to have some water someplace they can call from to cover up a mistake they might make. And that's the intent of this. There are unallocated water, there is water available in the Upper system, it could be specified for our use, if it could be obtained by the state, it would be there if the department gets down too close to 3,900 or makes a mistake. The director of the department in a public hearing said 'the possibility of me managing a river, coupled with the aquifer, to 3,900 exactly is nil.' We don't know enough about the aquifer to do it. Even if we do a whole lot more, the possibility of managing some magic number like that are nil. So the idea is to have this water available in case the department goes overboard. Particularly with the idea that if we issue too many permits to groundwater, we can't make up the water for it. The idea here, of course, is that if we can acquire some more water from the system it would not sit idle; it would be put in the water bank, it would be sold by Idaho Power, whatever, but it would be available as insurance if the department needed it.

Those are the policies as proposed. I'd just like to touch on a couple of things about the agreement that relate to the policies, I guess. The agreement specifies that if the flow at Murphy goes below 3,900, and suppose of natural consequences not because of a mistake by the department of water resources, Idaho Power will not protest. They will take no action against the existing users. Any new appropriators, anyone who's got some of this water, or is using water that formerly was a part of that flow, they would be subject to shut off. They would be shut off so that Idaho Power could get their water. The agreement speaks to establishing the criteria for the reallocation of this water and the board is merely saying that in this case they will recognize whatever the legislature does.

The agreement speaks to the so-called general adjudication of the system. An important requirement for two purposes. One, if the State is going to try and manage the river and the aquifer together so that they always maintain this flow in the river, they need to know what use is being made of the water, they need to have a priority system so that if we are water short, then certain users will not be shut off. That's part of it. The other part, of course, is that the federal government and Indian Tribes claim reserve water rights. Now, if you take all the National Forests, Craters of the Moon, the INEL, reservations at Idaho Falls, plus the Fort Hall Indian Reservations, there are a lot of federally reserved water rights in the Upper Snake system. The only way in the Water Plan that was adopted in '76 asks the federal government and Indian tribes to quantify the amount of water that they really need. The existing provides that the Department of Water Resources will provide technical assistance to the Indian tribes, for

example, to quantify that water right. To date, these have not been quantified. The only way to force the federal government to quantify their water right, or to participate in the State adjudication, is to do what's called a systems adjudication. Negotiators felt that if they started at Lewiston where the Snake River starts out of the state, and include all the tributaries upstream, that's a system wide adjudication. That's why the existing legislative package specifies that adjudication beginning at Lewiston, the sole intent of starting the adjudication at Lewiston is to force the Indians and the federal government to participate in the adjudication. In state court, specify how much water they feel they need for their purposes on their reservation, and once and for all we'll have a list of all the water that is managed in the Snake system. That piece of legislation introduced this section, in which we provide that the Indians not participate in the adjudication at Fort Hall, not participate in the adjudication, but that they negotiate their water rights with the state. What that means, in terms of will it get passed, what that means in terms of how the whole adjudication is handled, I don't think is important because an adjudication is basically a negotiation between the individual water right holder and the state. If an adjudication is done and this area gets included, what happens is the department comes out with their records, sits down with every water right holder in the area, and says this is what we show, what do you claim? Let's discuss it, we can reach an agreement, otherwise the individual will have to go to the court. Once everybody compromises or goes to court, the court issues a decree and puts all the water rights in the river basin, in this case Lewiston and above, in order of priority, establishes the mechanisms so that the water master will not find the water short. Mr. Gray, I think that's enough