

1 IDAHO WATER RESOURCES BOARD

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6 Public Information Meeting on  
7 the Swan Falls Agreement  
8 Twin Falls, Idaho

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10 TRANSCRIPT OF PROCEEDINGS

11 Held on October 25, 1984

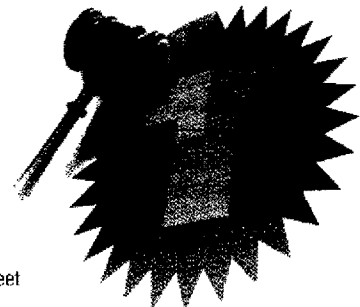
12 before Chairman Kramer

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<p>1 IDAHO WATER RESOURCES BOARD</p> <p>2</p> <p>3</p> <p>4 * * * * *</p> <p>5</p> <p>6</p> <p>7 Public Information Meeting on</p> <p>8 the Swan Falls Agreement</p> <p>9 Twin Falls, Idaho</p> <p>10</p> <p>11 TRANSCRIPT OF PROCEEDINGS</p> <p>12</p> <p>13 Held on October 25, 1984</p> <p>14 before Chairman Kramer</p> <p>15</p> <p>16 * * * * *</p> <p>17</p> <p>18</p> <p>19 Transcribed by</p> <p>20 Patricia J. Terry, CSR, RPR, CRR</p> <p>21 CSR No. 653</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 interest in coming out to listen to what we have</p> <p>2 to say about the agreement that the attorney</p> <p>3 general, the governor, and the power company have</p> <p>4 reached.</p> <p>5 We did negotiate this pretty much just</p> <p>6 between the three individual principals, and so</p> <p>7 now that we have arrived at a consensus at that</p> <p>8 level, we are anxious to get the word out to the</p> <p>9 public so they can evaluate what I've been</p> <p>10 referring to as a road map that we can use to get</p> <p>11 to a resolution of this whole controversy.</p> <p>12 The governor's perspective on this</p> <p>13 problem -- I should begin about two years ago. I</p> <p>14 think most of you are aware that following the</p> <p>15 Supreme Court decision which recognized a claimed</p> <p>16 water right, unsubordinated water right at Swan</p> <p>17 Falls for the Idaho Power Company, the governor</p> <p>18 began leading a charge with the help of Senator</p> <p>19 Negg, who's here with us tonight, to legislatively</p> <p>20 subordinate those rights. And we fought that</p> <p>21 battle over two years in the Idaho legislature and</p> <p>22 fought it to a bloody standstill and weren't able</p> <p>23 to get that accomplished.</p> <p>24 The governor never had the desire when</p> <p>25 he was seeking subordination to pursue a course</p>
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<p>1 CHAIRMAN: The candidates that have come in</p> <p>2 since we started, if you would like to stand and</p> <p>3 introduce yourself, we'd sure like to see who you</p> <p>4 are. Anyone who hasn't?</p> <p>5 MR. COWEN: I had a heck of a time finding</p> <p>6 this building.</p> <p>7 CHAIRMAN: So you weren't alone.</p> <p>8 MR. COWEN: I'm Jerry Cowen from Jerome, and</p> <p>9 I'm running in the legislative district 25. (Tape</p> <p>10 inaudible.)</p> <p>11 MR. SILVER: I'm Jeff Silver and I'm running</p> <p>12 in the same district.</p> <p>13 CHAIRMAN: We're glad to have all of you</p> <p>14 people here. On my left is the negotiating team</p> <p>15 who's been working for a month putting this</p> <p>16 together. Far end Tom Nelson, Idaho Power. In</p> <p>17 the middle Pat Costello. And on the right-hand</p> <p>18 side Pat Kole.</p> <p>19 Pat Costello from the governor's office</p> <p>20 will be the first speaker.</p> <p>21 MR. COSTELLO: Thank you, Chairman Kramer,</p> <p>22 members of the board, legislators, and members of</p> <p>23 the public. As Tom pointed out, the governor did</p> <p>24 request the board to hold these meetings around</p> <p>25 the state. And he very much appreciate s your</p>	<p>1 that would lead to development with reckless</p> <p>2 abandon. In fact, he felt a little bit offended</p> <p>3 that the power company didn't feel like they could</p> <p>4 trust the state to protect their rights and wanted</p> <p>5 to put the state back in the driver's seat but to</p> <p>6 protect hydropower rights.</p> <p>7 But as I say, we weren't able to</p> <p>8 accomplish it through the legislative group, and</p> <p>9 following the last session, the power company</p> <p>10 approached the governor again with an offer to</p> <p>11 enter into an agreement for partial settlement of</p> <p>12 the water rights lawsuits under the legislation</p> <p>13 passed in the 1983 session called Senate Bill</p> <p>14 1180. The governor's response to that offer was a</p> <p>15 counteroffer to enter into negotiations for a</p> <p>16 total settlement of all the lawsuits and of all</p> <p>17 the surrounding issues involved in the Swan Falls</p> <p>18 controversy. The power company took us up on the</p> <p>19 offer, and the governor and the attorney general</p> <p>20 and the Idaho Power Company chief executive</p> <p>21 officer Jim Bruce sat down for the first time in</p> <p>22 July and just had a general discussion to kind of</p> <p>23 explore the things they could agree about and the</p> <p>24 general areas of disagreement.</p> <p>25 And as I say, there wasn't really any</p>

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1 objection on the part of the state to the notion  
2 that hydropower rights ought to be taken into  
3 account in future management decisions on the  
4 Snake River. And if we got away from the loaded  
5 word "subordination" and so forth that we could  
6 possibly arrive at some consensus as to how much  
7 water ought to be in the river, how we can manage  
8 the amount of water we feel can yet be developed.

9 And they designated the three of us to  
10 work together to flesh out the ideas at that  
11 meeting and to come back to them with additional  
12 ideas to explore further. And we went on that way  
13 for oh, probably six, eight, ten meetings of the  
14 three principals and countless meetings of the  
15 three of us in between.

16 And that finally culminated this  
17 morning in the signing by the three principals of  
18 two contracts, the first one being the main  
19 contract that I think most of you got copies of  
20 tonight, which is the one that would resolve all  
21 of the outstanding issues in the litigation, and a  
22 second contract that was the old Senate Bill 1180  
23 contract under which we identified several classes  
24 of use, current users who the power company had  
25 agreed from the start ought to be protected and

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1 who knows, say the year 2020, sometime in the  
2 indefinite future. The status of that right while  
3 it's in this transition period -- and by the way  
4 it gets there through development approved under  
5 public interest criteria that we're going to ask  
6 the Idaho legislature to adopt.

7 The status of that water right in the  
8 meantime while it's in this transition period from  
9 becoming unsubordinated to becoming subordinated  
10 is that legal title to the water right will be  
11 held in trust by the State of Idaho by and through  
12 the governor of the state. But the power company  
13 will retain the right to beneficially use that  
14 right for the generation of power in the meantime.

15 So ultimately when we get to the  
16 future, unless the minimum streamflow is changed  
17 by the time we get to this level, everything above  
18 minimum streamflow is subordinated. Everything  
19 below is unsubordinated. So that is where we are  
20 moving.

21 And the approach that would accomplish  
22 this is a statute that would create this system in  
23 carrying out the legislature's authority to  
24 regulate hydro power under a 1928 constitutional  
25 amendment. The system was designed to solve a

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1 who they were willing to subordinate to. And some  
2 3,040 some of those, Tom has the exact figure,  
3 were dismissed this morning or at least the motion  
4 to dismiss then was filed.

5 I think I can illustrate with a little  
6 diagram what this agreement is, the guts of the  
7 agreement is about as to what we decided as far as  
8 the legal status of the rights in this case.

9 Where we are today, we figure with current  
10 development, we've got an actual minimum flow of  
11 around 4500. The power company through this  
12 contract and actually in effect by what we did in  
13 the 1180 contract subordinated the rights above  
14 that line. Down here at the level of 3900 cfs in  
15 the summer, 5600 cfs in the winter is  
16 unsubordinated rights. That was fairly easy to  
17 get to through the process of (tape inaudible).  
18 What we've been haggling over for the past three  
19 weeks since we signed that framework that was  
20 handed out to you has been this water in the  
21 middle that we both or all sides have agreed  
22 should be available for future development.

23 This water right is currently under  
24 this scheme unsubordinated, but it will become  
25 subordinated in the future, possibly 25-30 years,

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1 lawsuit, but it would apply by its terms generally  
2 across the state. That's because we felt that  
3 this was not only an agreement that was  
4 appropriate for settling the lawsuits but also was  
5 based on sound public policy principles. And that  
6 is your role now as members of the public to  
7 evaluate that on that basis.

8 So the final point I would like to make  
9 is as I pointed out the governor started out  
10 pushing for total subordination. He ultimately  
11 after two long, hard years concluded that even if  
12 we were to get a total victory in the sense of  
13 getting total subordination, it would likely be  
14 short lived. If there were no restrictions and no  
15 more advanced management systems put into place  
16 and there was too rapid development, the pressure  
17 from the rate payers would be so great that the  
18 legislature would probably step back in and  
19 correct the balance. On the other hand, if the  
20 power company had achieved a total victory,  
21 pressure from the other direction probably would  
22 have come in and also given back some of the water  
23 for development.

24 So my view is that ultimately even if  
25 we pursued the litigation to its full course, the

1 result of the litigation would not have been  
2 determinative for all times. There's going to be  
3 a political solution to this problem. There's  
4 going to be a balance found and struck at some  
5 point. It's the governor's firm belief that now  
6 is the time to strike that balance, and he  
7 believes that the approach that we've taken to  
8 striking that balance is a sound reasonable  
9 approach. And we commit it to you on that basis.  
10 And once again, thank you very much for your  
11 interest.

12 CHAIRMAN: Thank you, Pat Costello. Now we  
13 will hear from Pat Kole from the attorney  
14 general's office.

15 MR. KOLE: Thank you, Chairman Kramer,  
16 members of the board, legislators, members of the  
17 public. My comments tonight will be brief. I  
18 think the document that you have in front of you  
19 speaks for itself.

20 What we have tried to do here  
21 throughout the negotiation process -- and I might  
22 say it's not been always a road without a few  
23 rocks and pitfalls in it as we've gone through the  
24 process -- is to do what has not been done in the  
25 past. And that is to put the issue of Idaho's

1 battle over its water behind us. If you look at  
2 the history of Idaho in 1926, 1945, 1952, 1973,  
3 and 1976 and 1982, Idaho's water wars erupted  
4 continuously and more vigorously.

5 We thought it was time to try and come  
6 up with a solution that we could recommend to you  
7 that would put into place a system of responsible  
8 management that would guide us into the 21st  
9 century. In doing so, we wanted to create a  
10 system where there would not be any loopholes and  
11 to the best of our abilities put something that  
12 you can rely upon and that in 50 years you will  
13 still be able to rely upon to guide Idaho's water  
14 management.

15 In order to do that, we focused on the  
16 interests to be protected. The interests to be  
17 protected we saw were primarily these: First, all  
18 current users of water had to be protected. And I  
19 can tell you under this agreement all current  
20 water users will be protected in perpetuity. They  
21 will have a vested water right which is superior  
22 in nature to that of the power company even if,  
23 even if the calculations that we have made in  
24 arriving at the figures we have used are wrong.  
25 So the people that are currently using water as of

1 this irrigation season will be protected.

2 Secondly, we had to make sure that  
3 future development proceeded in the most  
4 responsible fashion that it could so that we could  
5 get the most utilization of a scarce resource. I  
6 say that because in looking at the department's  
7 records, you cannot clearly see that Idaho's water  
8 resource is finite and it cannot last forever. So  
9 in managing that resource, you have to get the  
10 most bang for the buck. And the system that we  
11 have in place in this agreement achieves that  
12 result.

13 Third, in order to handle this  
14 approach, we have to bring Idaho's water law into  
15 the 21st century. Now the code has served us well  
16 in the past, but it needs some updating now.  
17 We're at that point in time when we have to take a  
18 hard look at it, and we think we have done so in  
19 the legislative package that you have before you.

20 Finally, we thought it was time for the  
21 state to take responsible management actions to  
22 assure an adequate supply for multiple use of  
23 developers. And I think the agreement that you  
24 have before you achieves that result also. There  
25 is water to be allocated for various competing

1 uses so that there will be a chance for all  
2 sectors of Idaho's economy to grow in the future.

3 In conclusion, I would like to say that  
4 litigation has benefits and it has its drawbacks.  
5 One of the drawbacks is that primarily lawyers  
6 tend to get a lot of money going into court, and  
7 that might not always be the best way that you  
8 could spend your money, because in the final  
9 analysis when you look at the money that you're  
10 going to eventually have to spend, it may make  
11 more sense to spend that money positively in  
12 trying to get something accomplished and in place  
13 as opposed to spending that money in court.

14 And on that subject, I'd like to point  
15 out that one of the things that we have indicated  
16 to you as being necessary is the Snake River  
17 adjudication. And there's going to be a lot of  
18 controversy about how to finance that  
19 adjudication. That's something that the  
20 legislature is going to have to address. I can  
21 tell you, though, as a lawyer that it is  
22 absolutely essential that that Snake River  
23 adjudication begin in the very near future. We  
24 have received notifications that the federal  
25 government will begin pursuing their reserved

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1 rights. We know that is a fact.

2 Now, there's going to be one of two  
3 forums within which that litigation can occur. It  
4 can occur in federal court or it can occur in  
5 state court. I have not yet talked to a water  
6 user who wants that litigation to proceed in  
7 federal court. So our option is to proceed  
8 immediately as quickly as possible to adequately  
9 finance an adjudication in state court. And I  
10 think it's incumbent upon the legislature to  
11 address that issue in this session.

12 I think those conclude my remarks, and  
13 I'll be happy to answer questions.

14 CHAIRMAN: Thank you, Pat Kole. At this  
15 time I'd like to introduce Tom Nelson, Idaho  
16 Power. About the time I start to introduce Idaho  
17 Power, the lights start turning off. Is that part  
18 of your doing?

19 MR. NELSON: Thank you, Chairman Kramer.  
20 That's a service the company gives me when I try  
21 to tell everybody how important it is that we  
22 preserve the hydro base with the government. They  
23 used to do that in front of the PUC all the time.

24 You know, being last here, I guess I'm  
25 going to spend the entirety of my life living on

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1 the end of the ditch. But I would like to say as  
2 a preliminary before we get to the questions that  
3 when the governor countered our offer to negotiate  
4 1180 with an offer to negotiate the entirety of  
5 the dispute, we were delighted. It had taken a  
6 couple years to get everybody in a posture where  
7 that could happen. And I guess you have to go to  
8 war for a while before you appreciate some peace.  
9 Although I heard a man describe peace as a period  
10 of cheating between two periods of fighting. I  
11 don't know if that's right or not.

12 But in any event we were delighted  
13 because it's the company's business to make  
14 kilowatts, not to make water law for the world,  
15 nor to get in pitched battles with the executive  
16 branch of state government. Nor has it ever been  
17 the company's business to allocate water or be a  
18 water master. It never has been, and it doesn't  
19 want to be.

20 So what the company wanted to get out  
21 of this was a system where it was a water user,  
22 its rights as such were recognized, and the state  
23 was placed in a position to actually act as an  
24 allocator and manager of the state's water  
25 resources. You can't just write those words in a

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1 code and have a water management allocation system  
2 actually work.

3 So when you read this agreement,  
4 hopefully the intent is not too much buried in the  
5 legalese. I would ask that you remember that we  
6 approached the resolution of the litigation in  
7 this agreement, and we approached the resolution  
8 of the entirety of the controversy. So this  
9 agreement is presented as a whole. It's obviously  
10 not presented take it or leave it because the  
11 governor, the attorney general, and the Idaho  
12 Power Company cannot make this agreement work. It  
13 takes the Water Resource Board, the legislature,  
14 the Federal Energy Regulatory Commission to make  
15 it work.

16 But when you look at it, I do ask that  
17 you look at it as a whole and not pick at pieces  
18 of it, because it is a whole. The question is not  
19 how we got to a particular provision, who gave up  
20 what to get there, or who gained what to get  
21 there. The question is as a whole does this do  
22 what it should do? It is I think a responsible  
23 suggestion for a way to resolve the controversy.

24 I think if you look at the potential  
25 results of the litigation, on one hand you have

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1 the power company effectively won about as clean a  
2 victory as you could postulate it would win.  
3 You'd have probably the result that people in  
4 place would remain in place. There would be no  
5 further development. Had the power company lost  
6 entirely and had no water rights at all, you would  
7 have the downside of a 3300 minimum flow year-  
8 round at Murphy.

9 So within those two constraints, this  
10 agreement puts us somewhat in the middle. The  
11 people who have developed will develop. Other  
12 people can still develop but under a different set  
13 of ground rules. But you don't run the risk that  
14 the river goes to 3300.

15 So regardless of your perspective, it's  
16 not so important that you look at what you think  
17 was given up from your side but to look at the  
18 question of what was retained. Because I think  
19 whether you look at it from the standpoint of too  
20 much development is permitted or from the  
21 standpoint that too much development was taken  
22 away, there is still a substantial benefit to the  
23 point of view that you represent.

24 And so if you look at it in that  
25 standpoint, I think that we have a situation where

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1 development can continue, but it's not compelled.  
 2 And it will continue only if it meets the  
 3 standards which we recommend. They're not  
 4 impossible. There has been some criticism that  
 5 they're too loose. And I will leave that to later  
 6 discussion. They're the best we could do  
 7 remembering the interests that we represent and  
 8 remembering also that in the back of our mind we  
 9 had to present a package which we thought would  
 10 sell.

11 And so if you keep those things in  
 12 mind, it might give you a little better idea how  
 13 we got where we did. But I do commend it to you  
 14 as an entirety and ask that you look at it in its  
 15 entirety, and it should pass or fail on that  
 16 basis. Thank you.

17 CHAIRMAN: Thank you, Tom Nelson. Now it's  
 18 up to you as the public to ask questions. Be sure  
 19 to speak loud and clear because we like to get it  
 20 on tape. Also state your name.

21 Before I go to the public, first I'd  
 22 like to ask any members of the Water Resource  
 23 Board, do you have any questions? Greg.

24 Oh, Mr. Jones.

25 MR. JONES: When the question is asked,

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1 sometimes the audience doesn't hear it. Will you  
 2 make sure that the question is understood before  
 3 the answer is given.

4 CHAIRMAN: Thank you, Mr. Jones.

5 Greg.

6 GREG: Mr. Chairman, I have three questions  
 7 that I would ask, some of them probably by the  
 8 state hydrologist that need answers, the others by  
 9 the three principals.

10 Frank, you mentioned that the  
 11 adjudication of the Snake system, which I think  
 12 everyone realizes from the headwaters to its  
 13 juncture with the Columbia River is approximately  
 14 900 miles. If I understood you right, did you say  
 15 that maybe not all of the system would be  
 16 adjudicated?

17 My concern is the federal reserve  
 18 rights because the Clearwater system, the Lochsa,  
 19 Selway, et cetera, has a lot of federal lands  
 20 within it. So if we're going to adjudicate the  
 21 system, wouldn't we adjudicate the entire stream  
 22 system and not just say from the Murphy gauging  
 23 station up over in Lewiston up on the main stem?

24 CHAIRMAN: Mr. Sherman, would you like to  
 25 answer that?

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1 MR. SHERMAN: Certainly. The intent is to  
 2 adjudicate as much as is necessary to bring in the  
 3 federal reserve rights. Without the federal  
 4 reserve rights, the adjudication above Murphy  
 5 gauge, for example, becomes meaningless because of  
 6 the national forest, park, indian reservation. We  
 7 need to bring the federal people in. If they were  
 8 doing the adjudication from Lewiston up, then  
 9 that's what we'll do. If they will agree that  
 10 they may only have to do it above Murphy, then  
 11 perhaps at this time that certainly would be  
 12 cheaper to do it just above Murphy. Whatever it  
 13 takes to bring them in is what the state proposes  
 14 to do.

15 GREG: Okay. My second question will be to  
 16 you, too, Frank. Is the 4500 cfs the historical  
 17 low flow?

18 MR. SHERMAN: Yes, sir.

19 GREG: Okay. Then my next part of this  
 20 question will be to the negotiators. You're at  
 21 3900 cfs in the summer. You're at 5600 cfs in the  
 22 winter. Now, as human beings in areas possible  
 23 and whoever thought the great salt lakes would  
 24 have gone to an elevation of 4208, but we do know  
 25 the elevation of the great salt lakes is 15 feet

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1 higher than that. And I'm assuming that the flows  
 2 here are artificial in nature because of the  
 3 irrigation that has gone on in the Upper Snake.  
 4 In other words, we're getting a larger recharge to  
 5 the aquifer now than we were historically.

6 So why did you arrive at the 39/56  
 7 instead of going to the historic figure?

8 MR. COSTELLO: Well, if we'd gone to the  
 9 historic figure, then by definition there wouldn't  
 10 be any more development. I mean, if current  
 11 development already takes you to X and you set the  
 12 minimum streamflow at X, then you are saying there  
 13 will be no more development. We're going to  
 14 protect the flow. Do I understand the question  
 15 correctly?

16 Our aim was to provide something  
 17 between where we're at now and the existing  
 18 minimum flow so that there would be a block of  
 19 water identified as available for free  
 20 appropriation and at the same time to raise the  
 21 level of protection somewhat that already exists  
 22 for in-stream uses.

23 GREG: All right then, in other words, if on  
 24 a very dry year the minimum summer flow dropped to  
 25 3700 second feet, then that's just the way it is

1 for the utility. No recourse on anyone?  
 2 MR. COSTELLO: To the extent that it's  
 3 caused by users who are currently in place or who  
 4 are grandfathered in here, they have no recourse.  
 5 To the extent that it is because of new users,  
 6 ones that come in after October 1st of this year,  
 7 they would have recourse and in fact can take  
 8 action to shut off upstream uses.  
 9 CHAIRMAN: I assume you mean appropriators.  
 10 GREG: My third question will be to the  
 11 principals. You're going to ask the legislature  
 12 to adopt public interest. In the western states  
 13 public interest is starting to be recognized as  
 14 public trust. Public trust then pushes itself  
 15 into the public trust doctrine.  
 16 Are you asking the legislature to adopt  
 17 a public trust doctrine? And if you are not, then  
 18 please define the two for me.  
 19 MR. COSTELLO: I think I'll defer to Tom on  
 20 that. The answer is no, but I don't know the  
 21 definition.  
 22 MR. KOLE: The answer is no and no and very  
 23 strong emphatic explicative deleted no.  
 24 GREG: That's not part of my question.  
 25 MR. KOLE: Well, first off, you know the

1 buzz word "public trust doctrine" I think is  
 2 something that concerns all water users because by  
 3 its very nature it implies a reallocation of a  
 4 vested appropriated water right. And what we are  
 5 doing here is absolutely the opposite. We are in  
 6 this system using the Constitution of the State of  
 7 Idaho which says that the right to appropriate the  
 8 quote, unappropriated, unquote waters of the state  
 9 shall never be denied by in effect saying that the  
 10 Snake River is an appropriated river and because  
 11 it is an appropriated river we can now begin to  
 12 use the water rights of the power company as a  
 13 shield to pick and choose which developments we  
 14 want to go forward. So the idea is to avoid and  
 15 in fact to head off the infiltration of the public  
 16 trust doctrine into the State of Idaho by going to  
 17 a responsible system that is clearly recognized by  
 18 the Idaho Constitution.  
 19 GREG: Thank you. Do you concur,  
 20 Mr. Nelson?  
 21 MR. NELSON: I concur that this agreement  
 22 does not rest on the public trust doctrine, and I  
 23 think it would be irresponsible in the extreme to  
 24 introduce a public trust concept to the water law  
 25 of the State of Idaho. There was an answer filed

1 on behalf of some of the state defendants in one  
 2 of the lawsuits which raised that doctrine. I  
 3 think that's one of the benefits of this agreement  
 4 is that perhaps we get the state to deter from  
 5 doing that.  
 6 But no, this agreement does not rest on  
 7 the public trust doctrine, and the results it  
 8 seeks can be obtained without reference to that  
 9 doctrine.  
 10 CHAIRMAN: Question from the audience.  
 11 AUDIENCE MEMBER: I was just wondering in  
 12 the legislative process how far could the  
 13 legislature go in tinkering with the different  
 14 items before you guys meet on May 15th and say  
 15 well, it's no go or go? And how do you warn the  
 16 legislature if they're going over the line and  
 17 tinkering with it so then you don't get to make a  
 18 tink and look at the packaging and say well, then  
 19 you're almost negotiating all over again?  
 20 MR. COSTELLO: If they mess with it too  
 21 much, it will destroy the bargain. We'll have to  
 22 renegotiate the whole deal. But we've got three  
 23 tiers to the specificity here. If you'll look on  
 24 pages two and three, items A, B, C, D, E, F, and  
 25 G, item A for example says "as set forth in

1 Exhibit 1." That means we don't -- this was an  
 2 item that was the heart of the bargain and we  
 3 don't want to encourage any adjustments there  
 4 because it really is in the area that a shift one  
 5 direction or the other could destroy the mutuality  
 6 of the bargain.  
 7 The next one item B says "generally as  
 8 set forth." That means it's a little less  
 9 specific, and they can have a little more latitude  
 10 to add to it or clarify it.  
 11 The next item doesn't even refer to an  
 12 exhibit, so there's pretty much a free hand on  
 13 legislation there.  
 14 That's where we were getting at with  
 15 that. There are some things here that are more  
 16 sacred to the principles that hold up in the  
 17 agreement as a whole than others, and that's the  
 18 way we designated them. I think there's a couple  
 19 more, if you look back at the contingencies on  
 20 pages seven and eight. Item 3 is an "as set  
 21 forth." Item 4 is an "as set forth." But that's  
 22 the way we attempted to flag those for the other  
 23 entities that are going to be dealing with this.  
 24 CHAIRMAN: Any questions from the audience?  
 25 Please state your name.

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1 MR. MARCATONI: Oh, okay. I'm with (tape  
2 inaudible) Jerry Marcatoni. As far as arriving at  
3 the 3900 of flow during the summer, was any other  
4 factor considered aside from power generation?  
5 UNKNOWN SPEAKER: Can we have you stand. We  
6 can't hear you.  
7 MR. MARCATONI: Aside from power generation  
8 concerns, were any other factors considered in  
9 arriving at 3900 cfs?  
10 MR. KOLE: Yeah, the framework spelled out  
11 those considerations. At the time the state water  
12 plan was adopted, it was recognized that there was  
13 perhaps inadequate supplies of water for other  
14 uses. So we tried to incorporate those other uses  
15 as identified in policy 32 of the state water  
16 plan.  
17 MR. MARCATONI: Other uses such as?  
18 MR. KOLE: Environmental considerations,  
19 fish propagation, aesthetics, a whole myriad of  
20 other uses that are recognized in the state water  
21 plan as being beneficial.  
22 CHAIRMAN: Next question. Sir? State your  
23 name, please.  
24 MR. FERGUSON: Paul Ferguson, Shoshone.  
25 Will this run counter with the state Constitution

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1 all your plans? Will the state constitutional  
2 water rights bring all this out? (Tape  
3 inaudible.)  
4 MR. COSTELLO: Are you referring to the  
5 appropriation doctrine?  
6 MR. FERGUSON: Yes.  
7 MR. COSTELLO: Okay. The question was  
8 whether this new scheme runs counter to the state  
9 constitutional provision saying the right to  
10 appropriate the unappropriated water so the state  
11 should never be denied. The key there is the  
12 right to appropriate the unappropriated waters.  
13 What we're doing here is saying all the waters in  
14 the Snake have been appropriated. All the water  
15 that's left to be appropriated from this point on  
16 is only available because it was previously  
17 appropriated by the power company, and the state  
18 has gotten control of it through an agreement  
19 which allows us to funnel it through a more  
20 rigorous set of public interest criteria than the  
21 state's ever used before, not only to protect and  
22 take into account hydropower benefits but also so  
23 that we can encourage those types of development  
24 that will get us the most development with the  
25 least amount of impact on the river so we make

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1 that water last as long as we can and go as far as  
2 we can.  
3 MR. FERGUSON: The one stipulation you have  
4 on new (tape inaudible) on this water right zone?  
5 MR. NELSON: The water plan target minimum  
6 flow at Milner Dam is zero, which is a condition  
7 realized in the summer all the time, and this  
8 agreement does not contemplate any change in that  
9 minimum flow. So short of a statement that before  
10 new storage is built we should fully utilize  
11 existing storage, what goes on above Milner is not  
12 affected by this agreement.  
13 And I might explain while we're  
14 touching on the full utilization, what we were  
15 trying to do there was simply get people to ask  
16 some questions about the way we use water in the  
17 Snake River basin. And full utilization is  
18 probably as much a federal question as it is a  
19 state question giving federal policies the use of  
20 its reservoirs. So the way we look at full  
21 utilization is you ask the questions and say is  
22 there any way we can free the water up for other  
23 uses, for different uses, for more intensive uses,  
24 and if the answer comes back no, within existing  
25 law and policy we're doing the best we can, then

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1 that's full utilization. We simply think those  
2 questions ought to be asked before we go too much  
3 further with our water planning. But we were not  
4 intending by that phrase to block any development.  
5 Simply to force some questions to be asked.  
6 CHAIRMAN: Sir.  
7 MR. COWEN: Yes. Jerry Cowen. What bothers  
8 me on this subordinated water during that period  
9 of time and 20 years before it's used up, does the  
10 US Congress have to consider basic transfer and  
11 goes off and recognize that as water being used or  
12 does California have to?  
13 MR. NELSON: Go ahead.  
14 MR. KOLE: I think that's the major benefit  
15 that we have with the system that we've adopted.  
16 What we're telling the world and very firmly  
17 telling the world is that that water has been  
18 appropriated, and it can't be subject to  
19 appropriation by any other entity except those  
20 approved by the state.  
21 And in addition to that, Exhibit 4 on  
22 here talks about if any of that water were to be  
23 sold by the power company at any time, any gain on  
24 that sale would go to the benefit of the rate  
25 payers. So what we're trying to do is send a



1 message there that under any circumstance, any  
2 attempt to take that water out of the Snake River  
3 basin is going to be met by a united front of both  
4 the power company and the State of Idaho and of  
5 course all the water users in the state.

6 MR. COWEN: We only have two senators  
7 against 48 -- or 98. I just wondered if you can  
8 prove beneficial use.

9 MR. KOLE: Well, yeah, the water's being  
10 used beneficially. It's being used to generate  
11 electricity. So that's I think the argument  
12 there.

13 MR. COWEN: Just so if you can prove  
14 beneficial use (tape inaudible).

15 UNKNOWN SPEAKER: If Washington comes up,  
16 can Idaho Power use that water that's sitting  
17 there that's laying there? Are they going to give  
18 us some of that (tape inaudible).

19 MR. COSTELLO: Well, under this arrangement  
20 the governor acts as trustee for the state, and  
21 we're going to try and nick them for a mill per  
22 kilowatt for administering the trust.

23 MR. NELSON: All of which will be passed  
24 through to the rate payers.

25 CHAIRMAN: You had your hand up. Yes, you.

1 MR. STEWART: Yes, Fred Stewart. And it  
2 goes along the same line as Jerry Cowen. I've  
3 always been concerned about the water coming from  
4 California recognized in many hearings.  
5 Legislatively we have a lot of sincere people  
6 wanting fire generation, a lot of sincere people  
7 want to develop. My big concern is do we lose it  
8 to California from Idaho Power 1,058 cubic feet  
9 per second in addition to what they have so a  
10 minimum streamflow. Anything I've seen as yet all  
11 you've addressed is minimum streamflow at Murphy.  
12 The minimum streamflow as adopted by the state  
13 water plan was 3300 at Murphy, and then you have  
14 different figures at Weiser and on down.

15 Now, as you increase this minimum  
16 streamflow at Murphy, are you going to also  
17 increase at Weiser and others on down? Is that  
18 the deal? Are you going to leave a gap between  
19 Murphy and Weiser so that the thousand cubic feet  
20 per second can head on down to California down  
21 through the Death pipe?

22 MR. NELSON: Well, Mr. Chairman, I might  
23 try. Fred, this agreement does not propose any  
24 change in any minimum flow except the one at the  
25 Murphy gauge. Now, it's my understanding that the

1 4750 minimum flow at Weiser has been violated at  
2 least once already. So I don't think that the  
3 changes at Murphy have that much relationship to  
4 what goes on at Weiser. That flow may be either  
5 too high or unprotected right now. So I don't  
6 think you can tie the two together in that  
7 fashion.

8 MR. STEWART: So in other words, we really  
9 do leave a loophole there for California to come  
10 in because there's nothing appropriated between  
11 there and it is an appropriation there?

12 MR. NELSON: There's nobody that could  
13 appropriate the water if they wanted to. There's  
14 no place to use it.

15 MR. STEWART: You can take it on down to  
16 California.

17 MR. NELSON: Well, I don't think you're  
18 going to solve that by addressing a minimum  
19 streamflow at Murphy.

20 MR. STEWART: Okay. Increase the minimum  
21 streamflow at Murphy, then you've taken that size  
22 in cubic feet per second right on down through the  
23 system, and this is what Mr. Bebe's objective was  
24 in the original petition is to get this power  
25 generation on. You've got an unsubordinated right

1 all through the Hells Canyon reach which is your  
2 80 percent among your power generation. And Idaho  
3 Power has made no attempt whatsoever to in any way  
4 protect that. In fact by your own letter, Tom,  
5 you indicated that you wanted to start to allow  
6 the water to go out.

7 MR. NELSON: Well, that's a subordinated  
8 right, Fred.

9 MR. STEWART: Pardon me?

10 MR. NELSON: All the rights in Hells Canyon  
11 are subordinated. They're subordinated to uses  
12 within the Snake River watershed. They're not  
13 subordinated to uses in California.

14 MR. STEWART: They're unsubordinated rights.

15 MR. NELSON: They're subordinated. They're  
16 subordinated by the FERC license and they're  
17 subordinated by the state water permit.

18 MR. KOLE: That's a key factor here, too,  
19 Fred, is that the subordination clauses say they  
20 are subordinated to uses within the Snake River  
21 watershed. So as to uses that would take the  
22 water out of the Snake River watershed, they're  
23 unsubordinated. It's very important to remember  
24 that because if any other state tries to make an  
25 inter basin transfer, it's going to be our

1 argument that that water has already been fully  
2 appropriated.

3 Now, Mr. Cowen's point is very well  
4 taken. If the federal government decides to use  
5 the federal law to preempt state authority,  
6 there's nothing that we as a state can do about  
7 that, but we're going to make every effort we can  
8 as a state to make sure our house is in order.  
9 And that's the reason why this agreement is  
10 drafted the way it is.

11 MR. COSTELLO: Except there is something we  
12 can do because they can't take a vested property  
13 right without compensation.

14 MR. KOLE: Right. That's what we're trying  
15 to do.

16 MR. COSTELLO: So we're in better shape than  
17 we were before.

18 MR. KOLE: Correct.

19 CHAIRMAN: Next question. John?

20 MR. PEAVEYCUP: John Peaveycup. Gene may  
21 have asked this, and I wanted to be real sure, but  
22 if we run into a string of really dry years like  
23 1977, and that 4500 was actually say 3600, those  
24 water rights that were protected in 1180 are still  
25 protected. I mean the power company's junior to

1 say -- are you going to like last night to me last  
2 night you said that wouldn't be (tape inaudible)  
3 the burden would be on the state to provide the  
4 water (tape inaudible). Tonight I think Pat  
5 Costello mentioned it would be just shut off. I  
6 just wanted you to address that.

7 MR. COSTELLO: Well, first of all, the  
8 primary of addressing that problem is that the  
9 water resource department will do its planning  
10 based on not granting any more rights or any kind  
11 of rights that would take it down in the worst  
12 case to below the minimum streamflow. And when  
13 they have finished issuing that amount of rights,  
14 which we say will take a few decades anyway, all  
15 subsequent rights after that presumably will be  
16 coupled with some kind of a condition that in  
17 critical water periods they have storage rights or  
18 something upstream that they could release water  
19 down to protect that minimum flow.

20 Do you follow me?

21 BRUCE: You're saying until you reach that  
22 critical period of time, then you would -- until  
23 you pass a statute that says from now on, our  
24 policy is that from now on when we reach the  
25 critical point (tape inaudible).

1 all existing rights clear down to zero.

2 MR. KOLE: Those legal rights as of November  
3 19th, 1982. I think it's important to note that  
4 in entering the negotiations, the issue of  
5 expanded use and quote, unquote the illegals came  
6 up. And those parties are treated in the  
7 agreement you have before you by paragraph 7E.

8 MR. NELSON: D.

9 MR. KOLE: Yeah, 7D, which will require  
10 those individuals who have an expanded use in  
11 order to get a water right vis-a-vis the power  
12 company are going to have to take action by  
13 June 30th, 1985. And we'll hope to have an  
14 administrative process set up in the very near  
15 future to handle that problem.

16 CHAIRMAN: Questions?

17 BRUCE: In addressing the junior rights,  
18 when you say the minimum streamflow in Caldwell is  
19 3900 cfs in dry years and I have a well 80 miles  
20 in Thousand Springs and the aquifer is theorized  
21 to move one mile every four years and Idaho Power  
22 and the State of Idaho said pretty much just shut  
23 your water off, you really get no initial effect  
24 of the streamflow in the Snake River for 3200  
25 years under that hydraulic pressure. So when you

1 MR. COSTELLO: Right, yeah. That will be  
2 the primary way of addressing the minimum  
3 streamflow. But I suppose you could posit a  
4 situation between now and the time when the  
5 department reaches that where through improper  
6 planning or just extraordinary circumstances that  
7 we can't conceive of somebody that gets an  
8 unconditional water right which is junior to this  
9 hydropower right might be found to owe  
10 compensation in the event that we get into a  
11 critical period that takes us down below the level  
12 we now think we can go to.

13 BRUCE: Is that burden on the permittee or  
14 on the State of Idaho?

15 MR. COSTELLO: On the permittee.

16 MR. NELSON: I think, Bruce, as we discussed  
17 yesterday, you can't in your postulate shut your  
18 well off 80 miles away and do any good in 1995 --  
19 (tape stopped and began again at a slower level.)

20 UNKNOWN SPEAKER: Do we have it already  
21 specified how that would be done?

22 CHAIRMAN: Mr. Gardner, did you have a  
23 comment?

24 MR. GARDNER: I was going to comment on the  
25 gentleman's question back here by saying that the

1 study by Joel Hamilton (tape inaudible) also  
2 delineates what they think are the most likely  
3 195,000 acres that could be developed in the  
4 state. I think they worked in conjunction with  
5 Chuck Broadway.  
6 CHAIRMAN: Fred.  
7 MR. STEWART: (Tape inaudible.) He stated  
8 1.4 million acre feet actually goes over Milner,  
9 and that's all been plowed on, so to speak. The  
10 controversy so far is between Idaho Power (tape  
11 inaudible). But right here in the Twin Falls/  
12 Jerome area there arises a real problem. You can  
13 take that 1.4 million acre feet down to the  
14 Bruneau project (tape inaudible) remnants of these  
15 canal companies. Does this agreement in any way  
16 have an impact upon the decision of that? You've  
17 got the private power company, so to speak, is  
18 wanting a hydropower dropover. Then you've got  
19 many, many small hydropowers in the area. Then  
20 you've got your consumptive use. Now, is that  
21 going to be decided by public interest? And if  
22 so, who makes that decision? Who has the great  
23 omniscient (tape inaudible).  
24 The Constitution says very plainly that  
25 consumptive use has the priority over Idaho

1 generation. Idaho Power of course has a prior  
2 right. But with the canal companies now, I think  
3 it's a real critical question because does the  
4 canal company put on the 35, 60 million, I don't  
5 know where the figures are now for these things,  
6 and then all of a sudden they find that their  
7 rights are going down to the Bruneau project?  
8 Then we're in serious financial trouble here.  
9 What ramification is this going to have?  
10 MR. NELSON: The only place we touched that  
11 Fred, is in Exhibit 7A, which is the authority of  
12 the -- it's proposed to give the director  
13 authority to subordinate hydropower rights. And  
14 if that statute were passed and were applicable to  
15 the Milner permit, then in theory the director  
16 could subordinate that power right. So the  
17 situation you postulate could take place, but the  
18 power plant could be built and the water could be  
19 run out on the Bruneau. But that's the only place  
20 this particular agreement would touch on the  
21 conflict between the hydropower right at Milner  
22 and the Bruneau plateau gravity closest.  
23 CHAIRMAN: Sir.  
24 MR. LEMON: George Lemon. The lowest ever  
25 recorded flow was July 9, 1949 by the USGS of

1 3,900 feet at about Murphy, but the average flow  
2 for the month of July 1949 was 7,702 feet. Now  
3 (tape inaudible) say that somehow control of the  
4 river had caused that low flow. What is to keep  
5 Idaho Power from exercising their dams on the  
6 river to drop the flow below the 3,900 feet and a  
7 (tape inaudible) cutoff of upstream use?  
8 MR. KOLE: Page four, paragraph 7B says that  
9 the operation, any fluctuations resulting from the  
10 operation of the company's facilities shall not be  
11 considered in the calculations. So in other  
12 words, if they hold back water at CJ Strike and  
13 that causes the water level to go down, you don't  
14 calculate that into the minimum streamflow.  
15 MR. LEMON: So the streamflow runs between  
16 six to eight thousand cubic feet per second from  
17 the outflow of the (tape inaudible). Now how can  
18 they get below that point in the Snake River below  
19 there without control or manipulation?  
20 MR. NELSON: Well, pumping out of the main  
21 stem. The pumps on the main stem above Swan Falls  
22 have a capacity in excess of a thousand second  
23 feet.  
24 MR. LEMON: That doesn't get you down  
25 anywhere near the 3,900.

1 MR. NELSON: It gets you down to 45. It  
2 gets you down to 45. In 1981 it occurred in about  
3 three days for being well into the 7-8,000 cfs  
4 range number 4500. So man's doing a lot of that,  
5 George.  
6 MR. LEMON: I realize man controls the river  
7 (tape inaudible). In the '30s we diverted it all  
8 through the aquifer from above Milner (tape  
9 inaudible) maintain more water in the aquifer to  
10 keep the minimum streamflows up above.  
11 MS. MARTIN: Elaine Martin. I notice in  
12 there that you talk about mitigation and leaving  
13 it open for later discussion. Hells Canyon is  
14 subordinated to upstream uses. Mitigation,  
15 though, will allow you to work out a fee, I take  
16 it, for Hells Canyon as well as the other dams for  
17 winter storage?  
18 And also, will that mitigation have to  
19 be worked out even if the -- in other words, right  
20 now, if someone wanted to do a project and it  
21 didn't look like it would affect the 5600 per se,  
22 would they still have to do the miti -- I mean,  
23 you know that it's going to affect it. I mean,  
24 there's no doubt about that. But would they have  
25 to mitigate from right now immediately, or are we

1 talking a mitigation that only occurs when we get  
2 close to the winter 5600 cfs?

3 MR. NELSON: Elaine, the basic reason for  
4 the mitigation provision is when we were trying to  
5 wrestle with how to regulate the river using  
6 streamflows at Murphy, you have to keep the split  
7 personality of the river involved, and the numbers  
8 were based on zero flow at Milner. But you also  
9 have to recognize that winter flows above the  
10 critical period are of extreme importance to the  
11 company in meeting its load.

12 So the mitigation was put in in an  
13 attempt to recognize that value that even if  
14 you're not at 5600, you have to address the value  
15 of those flows for hydropower purposes. So rather  
16 than move to a number, the control mechanism is  
17 mitigation.

18 All we're addressing here in the  
19 terms -- for those of you who are lost on what  
20 we're talking about, it's Exhibit 6. And the  
21 control for the winter season below Milner and  
22 above Murphy states that if you want to divert to  
23 storage in that reach in the winter months, you  
24 have to mitigate for adverse effects on  
25 hydropower. Neutrality is that the parties have

1 not suggested where you consider the mitigation as  
2 being calculated.

3 And you have to keep in mind the  
4 difference between a legal right to compensation  
5 and an analysis of economic damage. And that's  
6 what you address in mitigation. We avoided the  
7 word compensation for that reason. Mitigation in  
8 the sense of "making less harmful" or "lessening  
9 the effect of" can be effectively anything. So we  
10 just left it open to the policy maker in that case  
11 to resolve it if and when you ever get one of  
12 those applications.

13 We can tell in the negotiations we  
14 weren't going to solve it, that we were going to  
15 loggerhead, we were going to deadlock on that  
16 issue. So we said all right, we'll go to the  
17 board, suggest or remain neutral, and at such time  
18 as somebody presents one of those projects, then  
19 it will have to be addressed. Hopefully maybe  
20 there will never be one.

21 MR. COSTELLO: I might just indicate that  
22 the other important aspect of that determination  
23 was that the controlling mechanism was left in the  
24 hands of the state, and the state water board at  
25 any time does have the authority to address that

1 issue and to make policy determination as to what  
2 mitigation means. It's just that on the first  
3 cut, the first time we go through this, we're  
4 agreeing that we're not going to try and get them  
5 to make that determination at this time.

6 MS. MARTIN: But we are going to allow Idaho  
7 Power without any bad feelings to come back and  
8 fight for as much as they could possibly get for  
9 water used during that period in all dams?

10 MR. COSTELLO: Corresponding with the other  
11 side will fight for nothing. And the state will  
12 get caught in the middle.

13 MR. NELSON: We just, actually, I guess when  
14 you come down to it, it was an issue where we had  
15 irreconcilable differences, if you will. It  
16 sounds like we're getting a divorce and we're not.  
17 We couldn't agree and it wasn't important enough  
18 to break the negotiations, so we said let's just  
19 not talk about it anymore.

20 MS. MARTIN: I looked at that, too, and I  
21 thought well, if they didn't pump the five months  
22 in the winter and they couldn't pump the two  
23 months in the summer, they had to put water in  
24 storage five months out of the year.

25 MR. NELSON: And they'll have to mitigate

1 for it if they do it in that reach. But agreeing  
2 not to talk to avoid a fight, that's my wife does.  
3 She says do it my way or I won't talk to you.

4 UNKNOWN SPEAKER: I have a question on (tape  
5 inaudible). Do I understand that the overriding  
6 reason for the general adjudication is to force  
7 the federal government's hand in state court?

8 MR. COSTELLO: I should clear that up.  
9 That's only one of the reasons. There are a large  
10 number of other reasons that we have to begin an  
11 adjudication. Number one, we think just in a  
12 review of what we know now that there is  
13 potentially a large amount or large blocks of  
14 water available upstream that could be put to  
15 beneficial use.

16 Secondly, it's important I think for  
17 everybody to begin a quantification of their own  
18 water rights so that they know what they have with  
19 some degree of assurance. If you look at the  
20 history of the western United States, virtually --  
21 well, in fact every other western state has begun  
22 or is in the process or has concluded adjudication  
23 of the water rights. And they hit this point 10,  
24 20 years ago because of history. We're at that  
25 point now where history is kind of compelling us

1 to begin that process even though it's going to be  
2 a painful process.

3 And finally, I think in order to manage  
4 the system that we're talking about here, you have  
5 to know what you've got. If you don't know what  
6 you've got, you can't manage it. It's like taking  
7 an inventory and having some idea of what's on the  
8 shelf. If you don't have that, you're not going  
9 to be able to manage it.

10 UNKNOWN SPEAKER: (Tape inaudible.) Force  
11 the federal government to pick up part of the tab  
12 on (tape inaudible). And secondly, what's to keep  
13 them from (tape inaudible) if they don't get the  
14 answer they like to see?

15 MR. KOLE: We've already begun to make  
16 approaches at the federal government on this issue  
17 to see if we can get them to participate in the  
18 cost study because of the benefits there will be  
19 to their agencies, as well. And what was the  
20 second part of the question?

21 MR. COSTELLO: Second one was can they go  
22 back?

23 MR. KOLE: No, you can't. The US Supreme  
24 Court I think has been pretty clear on that.  
25 Water law is primarily an area of state court

1 jurisdiction. If the state is moving to handle  
2 that responsibility that the preferable forum is  
3 to go to state court. So that's one of the  
4 reasons for taking some responsible action in the  
5 very near future.

6 MR. NELSON: But the race is partly to the  
7 swift also because if the federal government gets  
8 to the federal court first, that's a major factor  
9 of where the case stays.

10 CHAIRMAN: Any questions?

11 MR. FERGUSON: Paul Ferguson. When you talk  
12 about adjudication, will there be any attempt to  
13 quantify the amount of water that should be on the  
14 ground or will you leave those old finds as they  
15 are? We know there's a lot of them that take our  
16 water (tape inaudible). Will there be any  
17 disturbing of these water rights?

18 MR. NELSON: Well, our resource board could  
19 answer that.

20 CHAIRMAN: Mr. Young, would you like to  
21 handle that?

22 MR. YOUNG: The existing water rights  
23 normally are reconfirmed in the (tape inaudible)  
24 to the extent that they have continued to be used  
25 in the way they were originally used. Now,

1 beneficial use still is a measure of the water  
2 rights. And that will have to be looked at. The  
3 state government at this time fully recognizes the  
4 value of trying to reach out to (tape inaudible)  
5 because of that over application of water. We're  
6 going to be reluctant to take away that recharge,  
7 free recharge and perhaps have to replace it with  
8 a recharge project that everybody pays for. We  
9 understand that. That will be considered.

10 CHAIRMAN: Bill, do you have a question?  
11 Elaine?

12 MS. MARTIN: I've already had several calls  
13 today wanting to know if they were one of those  
14 3,000 people being released. Do you have an  
15 itemized list of those being released and could I  
16 please have one?

17 MR. NELSON: Well, I am going to mail one if  
18 it hasn't gone out already to every lawyer that's  
19 appeared in the case and every defendant who has  
20 appeared pro se. And if somebody has a question  
21 they need to have answered outside of that, we'll  
22 be glad to try to respond. It's alphabetical.

23 Our problem is we didn't always pick up  
24 all the names on the permit when we prepared the  
25 complaint. But we'll certainly cooperate with you

1 if you have a question.

2 But you probably have a pretty good  
3 idea if your water right involves essentially  
4 anything but irrigation or an overstated domestic,  
5 in other words, if you filed a hundred acres and  
6 called it domestic, we'd probably dismiss you.  
7 But if you're anything but irrigation, you're  
8 probably out. If you were licensed prior to  
9 November of 1982, you're out. Or if you filed  
10 anything by way of proof of beneficial use prior  
11 to November 1982, you're out.

12 Now, if you were actually in use by  
13 November of '82 or had a substantial investment  
14 already in your project as of that date, then we  
15 don't know about you, but you're entitled to be  
16 dismissed. So in that case you need to get with  
17 the department. We'll send you some written  
18 questions to answer. And based on those  
19 questions, then you'll be dismissed later. But we  
20 did dismiss all the non-irrigations and all of the  
21 known people in use as of November '82 today. So  
22 if you're in one of those categories, you're  
23 probably out.

24 UNKNOWN SPEAKER: I was just wondering (tape  
25 inaudible.)

1 MR. NELSON: You mean the people who are  
2 dismissed?

3 UNKNOWN SPEAKER: Yes, those that will be  
4 dismissed.

5 MR. NELSON: All right. The people that  
6 come under 1180 that have been or will be  
7 dismissed, the effect of the dismissal is to  
8 remove the lawsuit and to remove Idaho Power  
9 Company's water rights as any impediment to your  
10 development. Now, that obviously doesn't  
11 guarantee you a water right if you've got a  
12 problem with a neighbor or well terms or something  
13 like that, but as far as the power company's  
14 lawsuit or its water right, you will have no  
15 further involvement with either.

16 UNKNOWN SPEAKER: (Tape inaudible.)

17 MR. NELSON: Dismissing.

18 UNKNOWN SPEAKER: (Tape inaudible.)

19 MR. NELSON: That's right. It's a  
20 recognized subordination of the power company's  
21 rights to those permits or licenses.

22 UNKNOWN SPEAKER: (Tape inaudible.)

23 MR. NELSON: Anything that was in use or you  
24 had the substantial investment as of November '82  
25 or any non-irrigation use effectively will be

1 order for the power company to sell a water right,  
2 it would need the consent of the Idaho Public  
3 Utilities Commission, the Federal Energy  
4 Regulatory Commission, and the Idaho state  
5 legislature. When it got all that done, it would  
6 have to go to the Department of Water Resources  
7 and prove that there was no injury to any other  
8 user by reason of the change in place of use or  
9 change in nature of use of that water right.

10 Now when we get all that done, then the  
11 water is going to go someplace. But I suggest you  
12 and I will be a lot older before that happens.

13 UNKNOWN SPEAKER: I guess you don't do that  
14 for grandchildren or great grandchildren (tape  
15 inaudible), but we do know that Idaho Power is in  
16 business of selling power. That certainly  
17 includes in order to sell power to the general  
18 public (tape inaudible). They can sell it to  
19 somewhere else and then on the side they can  
20 generate their power all the way down to the State  
21 of California and generate more power than they'll  
22 ever generate to Swan Falls (tape inaudible.)

23 MR. NELSON: It's a question ahead. But I  
24 think when our grand kids hit the turf, they're  
25 going to be in the legislature, too. I think

1 immune from challenge by the power company's water  
2 rights.

3 UNKNOWN SPEAKER: I have one more question.  
4 (Tape inaudible.) Between the meeting last night  
5 and also again tonight, it occurs to me that (tape  
6 inaudible) is that there is a loophole. I don't  
7 quite understand it. But it was mentioned last  
8 night and again tonight if Idaho Power sold (tape  
9 inaudible) money would be put back to the users.  
10 What would give them the right to sell this water  
11 and to (tape inaudible)?

12 MR. NELSON: I can answer that. If you  
13 remember the nursery story when you were a kid  
14 about chicken little running around saying the sky  
15 was falling. Well, this is kind of a chicken  
16 little situation, and it came out of the politics  
17 of the subordination fight. And somebody said  
18 well, we have to take Idaho Power's water rights  
19 away because maybe they'll sell them to  
20 California, take all the money, and run off into  
21 the sagebrush.

22 So this statute is an attempt to say in  
23 that unlikely event, the benefit of the money goes  
24 to the rate payers and not to the stockholders.  
25 Now, the way the statutes are structured now, in

1 they're about as likely to approve that situation  
2 as the present legislation. I don't see that as a  
3 risk, frankly. I mean, it's not even a possible  
4 risk in my book. But the statute says if they can  
5 work out a deal and get it approved and get money  
6 from California for doing it, the money goes to  
7 the rate payers. Maybe it's worth more that way  
8 than it is raising potatoes. I don't know.

9 UNKNOWN SPEAKER: (Tape inaudible.) It's  
10 kind of just a coincidence really. (Tape  
11 inaudible.) It bothers me. It really does (tape  
12 inaudible.)

13 MR. COSTELLO: Could I suggest just a couple  
14 of things on that because obviously it's a  
15 concern. You know there's more people down in  
16 California. They've got more people in Congress  
17 than we do. And you look at that and they've  
18 talked about it openly. It's been in the press.  
19 And their governor's even appointed some  
20 commissions to look around to try and find some  
21 water. And one of the reasons for that is that  
22 Los Angeles is running out of water and Los  
23 Angeles has to give up a lot of water to Colorado,  
24 Arizona.

25 But the best way to protect Idaho's

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1 water I think is for us to get our law and order  
 2 and to get everybody in Idaho pulling on the same  
 3 train. If we don't do that pretty quickly,  
 4 something like that could happen.  
 5 UNKNOWN SPEAKER: (Tape inaudible.)  
 6 CHAIRMAN: You will be last. Yeah, you.  
 7 MR. PETERS: Ralph Peters. (Tape  
 8 inaudible.) Now that they are dismissing claims  
 9 against nonagriculture users (tape inaudible),  
 10 where do we stand on it? Anybody else know where  
 11 we stand on it?  
 12 UNKNOWN SPEAKER: (Tape inaudible.) Prior  
 13 to whichever date it is, November 19th of '82 or  
 14 October 1st of '84, either way, will have to go  
 15 through a new public (tape inaudible). So before  
 16 we process it, correct me if I'm wrong here,  
 17 you'll have to have legislation worked out.  
 18 MR. COSTELLO: Well, that's not quite right  
 19 because it's covered by the contract, the 1180  
 20 contract which does say immediately subordinate to  
 21 nonconsumptive, domestic, commercial, municipal,  
 22 and industrial right out of the box.  
 23 MR. NELSON: By negative inference, Norm,  
 24 what we did was we simply didn't cover those kinds  
 25 of people in the interim with the suggestion that

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1 don't get the misimpression the condition is  
 2 settled. Clearly it isn't. We're halfway or a  
 3 little over from the final resolution we all hope  
 4 for, and I certainly hope the water board and the  
 5 public and the voters will look at this think  
 6 objectively. It's very complex. There's a lot of  
 7 interests at stake. A lot of people's rights are  
 8 at stake. So look at it with an open mind,  
 9 objectively, and critically. We do have a long  
 10 ways to go. I think it's very important the  
 11 public realizes (tape inaudible).  
 12 CHAIRMAN: Ladies and gentlemen, on behalf  
 13 of the Water Resource Board, we again appreciate  
 14 you taking your time to come out and listen. Give  
 15 us your comments. We will be holding public  
 16 hearings. The legislature will also be holding  
 17 public hearings in the near future.  
 18 If you want to go through another  
 19 session, we will be in Boise November 1st, the  
 20 gold room, fourth floor, 7:30. So if you are in  
 21 town, stop in. Thank you for coming.  
 22 (End of meeting.)  
 23  
 24  
 25

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1 the department proceed to process them. And once  
 2 we get the public interest criteria in place, then  
 3 they will be subject to it. But it was our  
 4 thought because of the minimal impact of those  
 5 uses, the department could process while we're  
 6 getting this thing in place to get the backlog for  
 7 Jerome and Arco and Blackfoot out of the way.  
 8 But we didn't say so because that was  
 9 just kind of left open because we didn't say you  
 10 couldn't. We thought maybe you'd leap on it.  
 11 UNKNOWN SPEAKER: I want to congratulate  
 12 you, gentlemen, (tape inaudible), and you can come  
 13 to a compromise and I think although it may not be  
 14 perfect, I think we are on the road to getting the  
 15 Snake River working for all the people of Idaho.  
 16 And I want to congratulate you.  
 17 UNKNOWN SPEAKER: I'd like to follow up on  
 18 Jerry's comments I certainly agree that on  
 19 May 15th and the next few, if there are any  
 20 heroes, it will probably be these three fellows at  
 21 the table and some of their cohorts. In fact, a  
 22 couple of them will get paid in personal  
 23 satisfaction (tape inaudible). It certainly is a  
 24 fine map or opportunity to follow a route laid out  
 25 for us. On the other hand, I hope the people

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1 REPORTER'S CERTIFICATE  
 2  
 3 I, Patricia J. Terry, a Notary Public  
 4 in and for the State of Idaho, do hereby certify:  
 5 That prior to being examined, the  
 6 witness named in the foregoing deposition was by  
 7 me duly sworn to testify the truth, the whole  
 8 truth, and nothing but the truth;  
 9 That said deposition was transcribed by  
 10 me in shorthand and reduced into typewriting under  
 11 my direction, and that the foregoing transcript  
 12 contains a full, true, and verbatim record of the  
 13 said audio.  
 14 I further certify that I have no  
 15 interest in the event of the action.  
 16 WITNESS my hand and seal  
 17 April 19, 2007.  
 18  
 19  
 20  
 21 Patricia J. Terry, Court Reporter  
 22  
 23  
 24  
 25



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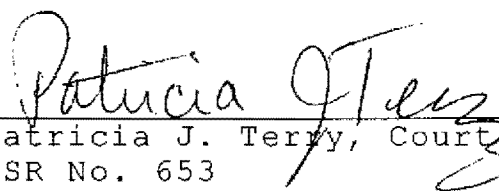
R E P O R T E R ' S C E R T I F I C A T E

I, Patricia J. Terry, Court Reporter Pro Tempore, County of Ada, State of Idaho, hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at \_\_\_\_\_, Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand <sup>19th</sup> of April, 2007.

  
\_\_\_\_\_  
Patricia J. Terry, Court Reporter Pro Tempore  
CSR No. 653



