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2 **RESOURCES AND ENVIRONMENT COMMITTEE**

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5
6 **Meeting on**

7 **SB 1006 - To provide that the director of the**
8 **Department of Water Resources shall have the power**
9 **to promulgate rules and regulations**

10 **SB 1008 - Water rights for hydropower purposes**

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13 **TRANSCRIPT OF PROCEEDINGS**

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15 **Held on January 18, 1985, 1:30 p.m.**

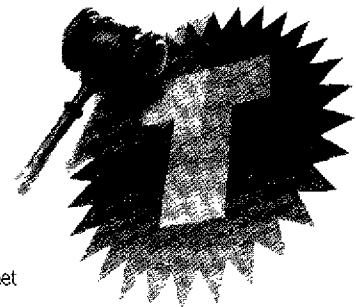
16 **before Chairman Noh**

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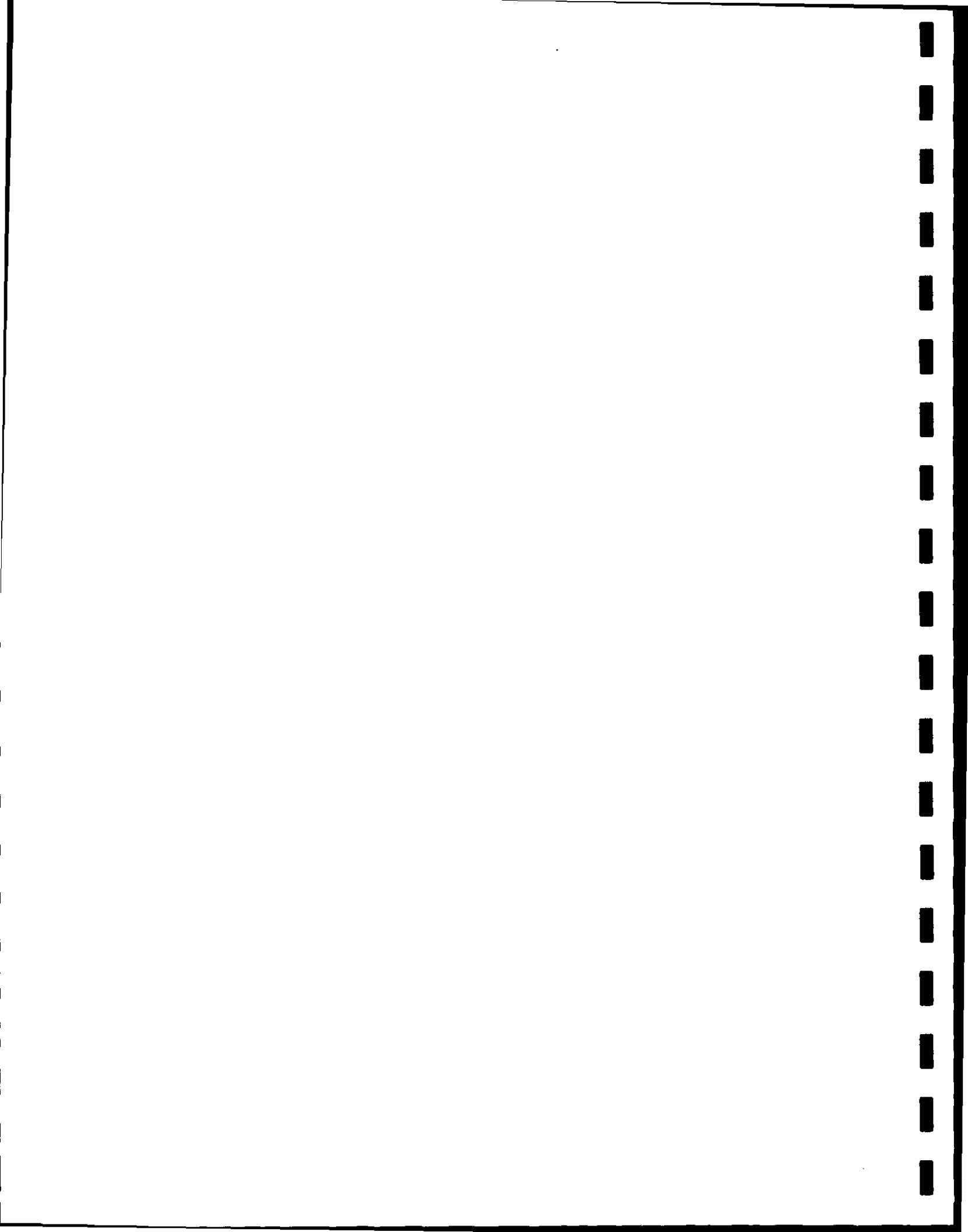
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Meeting on

SB 1006 - To provide that the director of the
Department of Water Resources shall have the power
to promulgate rules and regulations

SB 1008 - Water rights for hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on January 18, 1985, 1:30 p.m.
before Chairman Noh

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A P P E A R A N C E S

PRESENT:

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Peavey
Senator Ringert
Senator Sverdsten
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ward Conley, PUC
Mr. High, PUC
Mr. Swisher, PUC
Ken Dunn

* * * * *

JANUARY 18, 1985

SENATOR BUDGE: Mr. Chairman, before you start, would you care to accept the minutes as written?

CHAIRMAN NOH: I'd be glad to do that.

SENATOR BUDGE: I so move.

CHAIRMAN NOH: It's been seconded by Senator Budge, seconded by Senator Ringert. Accept the minutes of the last meeting, all in favor say aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no? The minutes carry.

So we'll start first then with S bill 1008, the main bill, but don't worry about it if questions come up moving from one bill to the other or any other aspect of this agreement. It might fit together because it all fits together as part of the puzzle.

MR. COSTELLO: Thank you, Mr. Chairman. First of all, I'm standing on a broken foot, so if I pass out, that's the reason. I want to keep this --

UNKNOWN SPEAKER: Mr. Chairman, why doesn't

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1 Mr. Costello just sit down if he'd rather.

2 MR. COSTELLO: Maybe I will. I'll do that.

3 CHAIRMAN NOH: That would be fine. Good
4 suggestion.

5 MR. COSTELLO: The attorney general's office
6 has provided detailed testimony outlining what
7 each of these provisions does, so I'm not going to
8 go into great detail other than to note how all of
9 this fits into the overall picture. The main
10 bill, to take it just section by section, for
11 those of you who followed the agreement, Section 1
12 here originated in Exhibit 1 to the agreement,
13 which is part of the legislative package.

14 Section 2 was all the -- subparagraph 6
15 of Section 2 was Exhibit 7B to the agreement,
16 which is not part of the legislative package, but
17 it's one of the contingencies, the distinction
18 there being the agreement does not take effect
19 without this taking place, although the parties
20 were not bound necessarily to actively support it.
21 The reason for that being 7B is the one that
22 imposes this new trust concept on the portion of
23 the hydropower right that is in excess of the
24 minimum flow, and we wanted to keep this as far
25 away from being a transfer as we could. So it's

1 being imposed by operation of law through this
2 rather than the power company agreeing to it by
3 contract.

4 Subsection 6 of that Section 2 is what
5 was called Exhibit 7A to the contract, which is
6 the authority to impose subordination conditions
7 on new permits. That's so that we won't hopefully
8 get into this position in the future where there's
9 a question whether or not a hydropower right has
10 been subordinated. It does not mandate
11 subordination conditions on all future hydropower
12 rights. It is permissive and would give the
13 director the authority to impose such conditions.

14 UNKNOWN SPEAKER: Chairman?

15 CHAIRMAN NOH: Yes.

16 UNKNOWN SPEAKER: Could you, Mr. Chairman,
17 have Mr. Costello please repeat the exhibits of
18 Subsection 6?

19 MR. COSTELLO: Subsection 6 was Exhibit 7A
20 to the original Swan Falls contract.

21 UNKNOWN SPEAKER: And Mr. Chairman?

22 CHAIRMAN NOH: Yes.

23 UNKNOWN SPEAKER: Section 1, that was
24 exhibit what?

25 MR. COSTELLO: Section 1 was the first part

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1 of Exhibit 1 to the contract.

2 UNKNOWN SPEAKER: Thank you, Mr. Chairman.

3 MR. COSTELLO: Section 3 is the public
4 interest criteria which was the second half of
5 Exhibit 1 to the contract. This is part of the
6 legislative package. These are the new criteria
7 the director must consider in granting new water
8 right applications for water that may be available
9 due to the imposition of a subordination
10 condition.

11 And the Section 4 is -- I'm not sure
12 which exhibit that came from or if it was in an
13 exhibit, but it gives the department the
14 authority -- Exhibit 7A -- in any event, okay, it
15 was a separate exhibit, Exhibit 4, I believe, to
16 the contract. This is the one that will give the
17 department to go through the pending application,
18 permit applications, and also the end develop
19 permits to apply the new public interest criteria
20 to those.

21 And the reasoning for that is that on
22 paper the existing permits are sufficient to
23 exhaust the 600 cfs that has been identified as
24 available to meet the needs of future development,
25 and so it is necessary to be selective in deciding

1 which one of those -- ones of those are going to
2 go forward and which ones should not go forward
3 because they don't meet the public interest test.

4 And if I could move on now to the
5 second bill, which is much simpler. You can turn
6 straight to page two of the bill. All we've added
7 is two new sentences to the authority granted to
8 the director under Section 42-1805 Idaho Code.
9 The first sentence which was added is No. 7, line
10 four of page two, which is the so-called
11 moratorium authority.

12 The historical background is that we've
13 been operating under an informal moratorium that
14 the director imposed after the Supreme Court
15 decision in the Swan Falls case because he could
16 not determine at that point whether water was in
17 fact available to be appropriated on the Snake
18 River above Swan Falls.

19 What the intention of this new section
20 to this new No. 7 is to confirm that power and to
21 expressly authorize him to do that should the
22 circumstance arise in the future.

23 The final bullet there, No. 8, is the
24 authority to promulgate rules. And the director
25 currently has specific authority to promulgate

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1 rules for a number of different areas of
2 department operations, but he does not have
3 authority to promulgate rules to do such things as
4 detail what's in the public interest under the new
5 public interest criteria to deal with water
6 markets and some of the other aspects of the
7 processing of applications to appropriate water as
8 is envisioned by the new management regime this
9 agreement will put in place.

10 That is just a brief summary of the
11 bill, and I think at this point I would turn it
12 over to my two fellow negotiators for anything
13 they would like to add.

14 CHAIRMAN NOH: Which fellow negotiator is
15 next?

16 MR. KOLE: Thank you, Mr. Chairman, members
17 of the committee.

18 CHAIRMAN NOH: Mr. Kole from the attorney
19 general's staff.

20 MR. KOLE: I would like to just add a few
21 comments. If you look at Senate Bill 1008, the
22 negotiators were faced with two questions. One
23 would be to try and rewrite 42-203 or the other
24 would be to try and clean it up and then graft
25 onto it some new criteria for the protection of

1 hydropower interests.

2 In taking a look at this issue,
3 initially we did think that it might be advisable
4 to try and redraft the entire section, but once
5 getting into the process we discovered that it was
6 not and would be better to try and work within the
7 experience of what we had on the books. So that's
8 what we did. As we went through, we did make some
9 minor changes just to make the thing read a little
10 bit clearer. And if you look at page one, that's
11 all we're doing.

12 If you looked at page two of the bill,
13 you can see that there is a new requirement there
14 of statewide notice if there is going to be a
15 large diversion. And as part of this
16 administrative process, there are groups that do
17 like to become aware of various applications that
18 are being considered by the department, so we've
19 provided a procedure whereby they could get on a
20 mailing list and receive notice in all cases. The
21 rest of the section was about the same, other than
22 to renumber and redesignate some of the
23 provisions.

24 You get down to the bottom of page two,
25 the authority to subordinate water rights and

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1 limit the term of permittable licensing. And what
2 we tried to do here was to not only address the
3 Idaho Power/Swan Falls controversy but also
4 provided a method by which other controversies
5 could be addressed.

6 I'm sure members of this legislature
7 are aware of the fact that there is potentially a
8 similar problem on the Spokane River out of Lake
9 Coeur d'Alene. We wanted to provide a mechanism
10 by which the governor would have the authority to
11 enter into a negotiation to resolve that problem
12 before we get the same type of crisis coming up
13 down the road.

14 Also, you might notice on line 49 and
15 50 of page three that Subsection 6 of this section
16 does not apply the licenses which have already
17 been issued as to the effective date of the SAP
18 (phonetic). What that does is that just makes it
19 clear that we won't have any problems. There will
20 only be prospective application of this particular
21 law.

22 Turning to Section 3 of the act and the
23 public interest criteria, I think it is important
24 as we note in our written testimony that it was
25 never the intent of the negotiators nor do we

1 believe that we have altered any protection that
2 currently is in existence for fish and wildlife
3 and other instream guidance. The purpose here was
4 not to change the local public interest standard.
5 It's not to alter that in any way, shape, or form.
6 But rather just to graft on a balancing test in
7 the case of hydropower water rights.

8 The criteria that we have here is
9 capable of being implemented without rules and
10 regulations. Or if the legislature deems fit to
11 pass SB 1006, there would be the authority to
12 adopt rules and regulations. But we thought that
13 was a policy choice that the members of the
14 legislature should be able to make.

15 Then looking at Section 4 on the bottom
16 of page four, as Mr. Costello has indicated, there
17 are a large number of permits out there. The
18 question that concerns the attorney general's
19 office and of course you as legislators is what
20 would the effect be if the state was held
21 responsible for denying one of those permits?
22 Would there be some liability that could be
23 imposed against the state?

24 After researching this area and taking
25 a look specifically at the Hidden Valley Springs

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1 case, we believe that our research, at least as
2 disclosed to us, what we have in 42-203D meets the
3 criteria, and we believe that we can review those
4 permits without creating liability for the state.

5 Section 5 is just existing law, and
6 Section 6 is your standard severability clause.

7 I believe Mr. Costello has gone into SB
8 1006 quite adequately, so I think that would
9 conclude my comments. And I turn the floor over
10 to Mr. Nelson.

11 CHAIRMAN NOH: Mr. Nelson.

12 MR. NELSON: Mr. Chairman, members of the
13 committee, I might just give you a little bit of
14 an overview of where the entire process is. It's
15 obvious that given the things that have to be
16 done, no one entity can do it. But if you have
17 read the contract, you've seen that certain things
18 were required as a condition to the effectiveness
19 of the agreement. I might just tell you briefly
20 where those are.

21 The filing with the Idaho Public
22 Utilities Commission has been done, and the
23 commission has entered an order deferring its
24 decision to the legislature since that degree it
25 was a parallel decision, at least in part. The

1 FERC filing has been made. The time for
2 intervention has either run or is close to
3 running. So far as I know the date, there's one
4 intervention by the National Marine Fisheries
5 Service, which is an agency of the Department of
6 Commerce. That intervention on its face seems to
7 relate to the water budget under the Northwest
8 Power Planning Act.

9 The bill on adjudication and
10 adjudication funding is up for introduction in the
11 house.

12 The bill on PUC jurisdiction is here I
13 believe in the State Affairs Committee.

14 The company made the determination that
15 no filing was needed with the public utilities
16 commissioner of Oregon, so that was not done. I
17 understand that the agreement was filed in the
18 sense it was given to the commissioner and his
19 staff, but there was no formal request for any
20 action.

21 The state water plan amendments have
22 been prepared in draft form. The water resource
23 board had information meetings prior to Halloween,
24 which I thought was big, since I had to go to all
25 of them. The proposed amendments are now drafted

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1 and set for public hearing before the Water
2 Resource Board commencing the 28th of January in
3 Idaho Falls and continuing to the 6th in Lewiston.
4 The Boise hearing for your information is set for
5 the 5th in the Supreme Court meeting room at
6 2 p.m. and 7 p.m.

7 So the other matters that are running
8 concurrently to the extent we can. I don't -- so
9 far we have not seen any insuperable hurdles to
10 (tape inaudible) things that divide the
11 unappropriated water at Murphy. 600 or half remain
12 instream, 600 to be available for appropriation.
13 That part of the settlement is in the state water
14 plan amendments, which according to the
15 constitutional amendment if adopted by the water
16 board will come back to the legislature.

17 Given the authorship of that
18 constitutional amendment, I hesitate to say that
19 it's not clear, but it isn't at all sure right at
20 the moment how that process will work, other than
21 the legislature has the final say. So that part
22 will come back assuming further action by the
23 water board.

24 To me there are a lot of elements to
25 this plan, and I don't want you to get the

1 impression that the only important part of what
2 was done of the part of the settlement was the
3 minimum stream flow. That is an important part,
4 but an equally important part in view of the
5 company are the public interest criteria which you
6 have in Senate Bill 1008.

7 The company thought and still thinks
8 that it's critical that hydropower be recognized
9 as an element in consideration of new water uses
10 that affect the river above Murphy. And that is
11 important. The statute and the contract don't
12 prohibit development. They're not intended to and
13 they don't. They simply say, look, you may have
14 an adverse impact on hydropower generation. That
15 element of the public interest has to be addressed
16 before you have further development. And if it's
17 addressed and it's found to be in the public
18 interest that you have that impact on hydropower,
19 that it's in your state's overall best interest to
20 proceed with development, you proceed with
21 development. But that is a very important element
22 of this plan, not just the river flows but also
23 the public interest.

24 So with that overview, Mr. Chairman, I
25 would yield to questions as they come up.

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1 CHAIRMAN NOH: I might first impose upon one
2 of the three of you or anyone else who wants to do
3 that to explain just where we are in settling the
4 question of the Idaho Falls cost in the
5 adjudication that cropped up yesterday in the
6 House Resources Committee.

7 MR. COSTELLO: Yes, Mr. Chairman. I would
8 be happy to do that.

9 CHAIRMAN NOH: Explain what happened there,
10 what has transpired since then so we don't have a
11 lot of rumors circulating.

12 MR. COSTELLO: Okay. And I also thought the
13 committee members would like to have this, if they
14 don't already have copies of the proposed changes
15 to the state water plan. They are included in
16 this issue of the currents as well as the text of
17 the full Swan Falls agreement. So I guess I'll
18 pass those around if anyone would like to have
19 one.

20 And that details in the amendments how
21 they are going to implement the new minimum stream flows
22 and some of the other provisions affecting the
23 state water plan in this agreement.

24 The question was raised in House
25 Resources yesterday regarding the fee to be

1 charged on hydropower generation to fund the
2 adjudication of the Snake River. It was pointed
3 out by several legislators from Idaho Falls as
4 well as the mayor of Idaho Falls that the \$25 per
5 cfs charge worked a -- had the result of placing a
6 disproportionate amount of the fee on the city of
7 Idaho Falls because they have roughly 20,000 cfs
8 of hydropower right there, which had the result of
9 them paying 10 percent of the overall hydropower
10 share of the adjudication when they only generate
11 about 1 percent of the power.

12 CHAIRMAN NOH: (Tape inaudible.)

13 MR. COSTELLO: Right. It's low head, about
14 20 feet of head going through ball turbines.

15 Right now we are looking at changing
16 that formula to provide for rated capacity as
17 being the measure of the fee to be charged for
18 hydropower. The overall amount to be generated
19 for the adjudication from hydropower would remain
20 constant at about 7.4 million overall for
21 hydropower, which is roughly equivalent to the
22 amount that agricultural users will pay, but it
23 will be based on the number of cents per kilowatt
24 of rated capacity.

25 CHAIRMAN NOH: As I understand the original

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1 formula had been reviewed by the city of Idaho
2 Falls. They declared okay, and they went back and
3 recalculated, and they made some mistakes. So
4 this really shouldn't be blamed on a lack on the
5 part of the people who put this together. It's
6 just one of those human errors.

7 MR. COSTELLO: Yes, that's correct,
8 Mr. Chairman.

9 SENATOR CRAPO: Mr. Chairman?

10 CHAIRMAN NOH: Yes, Senator Crapo.

11 SENATOR CRAPO: Is there available anywhere
12 a breakdown of this schedule?

13 CHAIRMAN NOH: The new schedule?

14 SENATOR CRAPO: Well, the old one.

15 CHAIRMAN NOH: The old schedule is in the
16 bill. You I think probably have copies of that
17 bill which we introduced as an RS and is now at
18 the House Resources Committee.

19 MR. COSTELLO: It's also in this tabloid.

20 SENATOR CRAPO: What I'm referring to is not
21 really the schedule then but how the schedule is
22 broken down.

23 CHAIRMAN NOH: We'll get that for you.

24 MR. COSTELLO: I have that here.

25 CHAIRMAN NOH: You have that here. Fine.

1 Great. This is not the new formula. This is
2 the --

3 MR. COSTELLO: Yes. There would be no
4 difference. The \$25 per claim for hydropower here
5 is listed as yielding 7.2 million if you add the
6 two hydropowers together. And the rated capacity,
7 it will yield the same amount.

8 CHAIRMAN NOH: Okay. Do you have other
9 questions for these gentlemen? I heard there are
10 lots of them. Senator Ringert.

11 SENATOR RINGERT: Gentlemen, I'd like one of
12 the negotiators to tell us just what is the public
13 interest that you're referring to that's in --
14 that will be important to 203C. How is it
15 defined?

16 CHAIRMAN NOH: Who wants to take a shot at
17 that? Mr. Kole?

18 MR. KOLE: Thank you, Mr. Chairman, Senator
19 Ringert. The public interest determination
20 required pursuant to 203C is defined in 42-203C,
21 2A, one through five. Those are the only factors
22 that the director will be considering in this
23 particular determination.

24 It's actually a two-tier process. What
25 happens is the director initially considers all of

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1 the factors listed on page two, in paragraph five,
2 beginning at line 21. Those are the factors with
3 which we're all familiar: reduction in quantity
4 of water, whether or not the water supply is
5 sufficient, whether or not the application's made
6 in good faith or for delay or speculative
7 purposes, and of course the local public interest
8 standard.

9 After that determination has been made,
10 the director then goes over to 203C. And if the
11 water is water that is available because of this
12 subordination condition, he then is required to
13 make an additional public interest determination
14 as specifically defined in paragraph 2A.

15 CHAIRMAN NOH: Senator Ringert.

16 SENATOR RINGERT: Mr. Kole, are you saying
17 then that the director does not have authority if
18 the other bill passes, the regulation authority,
19 that the director will not have authority to
20 expand the test of public interest and the
21 standards of public interest beyond what you have
22 stated here in 2A?

23 MR. KOLE: Mr. Chairman, Senator Ringert, as
24 I understand it he would have the ability to more
25 closely define what those factors are if that bill

1 would have passed giving him rule and regulation
2 authority. He would not be able to adopt a rule
3 and regulation that was in conflict with the
4 specific criteria established here. If that bill
5 did not pass, it would just have to develop those
6 criteria on a case-by-case basis as each
7 individual application came before him.

8 SENATOR RINGERT: Mr. Chairman, another
9 question. Would the negotiators explain why it is
10 necessary to establish a trust for the 600 cfs of
11 water above the minimum stream flow that's
12 available for appropriate operation.

13 MR. NELSON: Mr. Chairman, Senator Ringert,
14 in the course of the negotiation, at least in the
15 final stages, we got lager-headed on the question
16 of whether the company's water rights say at
17 Murphy or at Swan Falls, just to pick an easy
18 example, would be immediately subordinated by
19 operation of the implementation agreement or would
20 remain in place unsubordinated until such time as
21 the state allocated that water to somebody else's
22 use. It was the company's position then and still
23 is that you have an additional argument under the
24 Constitution that the river is fully appropriated
25 if you leave that hydro right in place until such

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1 time as it's reallocated pursuant to the statute.

2 But it became somewhat of a political
3 problem, so in order to get around it, the trust
4 concept was adopted whereby that water is placed
5 in trust. The agreement clearly says it's
6 unsubordinated, so as far as the agreement goes,
7 it's an unsubordinated block of water. The state
8 then takes that water, places it in the trust,
9 subject to reallocation, which had the effect of
10 doing two things. It made clear the state's
11 control over the allocation of the water, clearer
12 if you will, and it left the water unsubordinated.

13 So the company retains its right to
14 urge the state or force the state in the proper
15 case to use that argument. And that's all it is
16 is an argument under Article 15, Section 3 of the
17 Constitution. The river's fully appropriated;
18 ergo, the state does not have to allow the water
19 to go to the first guy who comes down the pike.

20 So the trust concept got around that
21 problem and I think tied it together to a point
22 where it's a little more effective as a mechanism
23 to accomplish the purpose of the agreement.

24 SENATOR RINGERT: Well, Mr. Chairman and
25 Tom, do you feel that this provision will be an

1 effective end run on Article 15, Section 3?

2 MR. NELSON: Mr. Chairman, Senator, I don't
3 know. I can't obviously predict that it will
4 carry the day, but our position was the argument
5 is worth preserving because I'm morally certain as
6 I stand here that some person with an undeveloped
7 permit who would be adversely affected by this way
8 of doing business is going to challenge it, and we
9 think it's an argument worth having.

10 CHAIRMAN NOH: In other words, Mr. Nelson,
11 this is also considered to be an effective way to
12 protect the minimum flow from appropriation?

13 MR. NELSON: Mr. Chairman, that's correct.
14 The minimum flow is itself subject to challenge by
15 those people as being effectively a new recognized
16 instream use with that priority date. And
17 somebody with a prior permit could also say, "Hey,
18 I'm prior. I could take the water in spite of
19 your new minimum flow."

20 CHAIRMAN NOH: Do you want to continue the
21 same line of questioning, Bill, or do you want to
22 yield to --

23 SENATOR RINGERT: Well, along the same.

24 CHAIRMAN NOH: All right.

25 SENATOR RINGERT: I think I should direct

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1 this to Mr. Costello because he is leading the
2 discussion, and that is, if you feel that the
3 trust theory is necessary because the existing
4 permits appropriate all the water that apparently
5 the department feels is left for appropriations,
6 does not the state have any obligation to the
7 people who took those permits out years and years
8 ago and have been waiting patiently for matters to
9 resolve (tape inaudible) and all that?

10 MR. COSTELLO: Mr. Chairman, Senator
11 Ringert, certainly to the extent that they have
12 detrimentally relied and developed, then they can
13 argue that it's a taking if you extinguish their
14 rights. But we are talking primarily about
15 remassaging those undeveloped permits that they
16 have not made -- have not developed to this point.

17 SENATOR RINGERT: So I take it then that the
18 state feels no obligation unless somebody spent
19 money directly on the construction and diversion
20 (tape inaudible)?

21 MR. COSTELLO: Mr. Chairman and Senator
22 Ringert, we certainly owe them the obligation to
23 treat them fairly, and they will be treated
24 fairly. But they'll be treated fairly under the
25 new regime of the public interest criteria rather

1 than under the old straight appropriation.

2 CHAIRMAN NOH: Mr. Kole.

3 MR. KOLE: Mr. Chairman, Senator Ringert, a
4 couple of additional points here. I think it is
5 clear in the Hidden Valley Springs case that the
6 state does have the authority to recall those
7 permits and take a look at that without creating
8 liability, particularly where in this situation we
9 have provided a grandfathering in of anybody who
10 has actually applied water to the land as of the
11 last irrigation season.

12 Secondly, and I think concurrently with
13 that, if you look at 203D on page four, each one
14 of those persons prior to having any property
15 right taken from them will have an opportunity for
16 a hearing and an opportunity to explain why their
17 particular project or permit should be permitted
18 to go forward. So there is procedural due process
19 being applied for those people.

20 CHAIRMAN NOH: Senator Crapo.

21 SENATOR CRAPO: Just a comment (tape
22 inaudible) that I realize -- (tape inaudible)
23 State of Idaho one, that relates specifically to
24 water and hydropower and two, that refers to
25 farming, the family farming tradition and then the

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1 state bill policy which refers to acres. It seems
2 to me that it's not clear, but it could be argued
3 that from this there is a bias against
4 nonagricultural uses in the future, such as
5 development, the National Engineering site here in
6 Idaho Falls, or a major manufacturing outfit that
7 came in and wanted to use water.

8 I guess I just wanted to know how a
9 significant request for water by a nonagricultural
10 user would be dealt with, particularly under roman
11 numeral well 2A, roman numeral 5, which says that
12 the development must conform to its staged
13 development policy in developing number of acres.

14 CHAIRMAN NOH: Who would like to take a shot
15 at that? Mr. Nelson.

16 MR. NELSON: Senator, the criteria as
17 written and as we have understood them, and of
18 course we're probably too close to the (tape
19 inaudible) (tape silent) -- consumption of most
20 industrial use is pretty difficult. Let's say
21 they had to cool the power plant for a major use.
22 Then you would merely look at I on the potential
23 benefits and II depict the utility rates. In an
24 industrial setting, that analysis, at least the
25 ones I've seen, would compel you to grant it.

1 Obviously it would have no impact on the family
2 farming tradition. You might argue that it comes
3 under 4, promotion of full economic and multiple
4 use development of the water resources and would
5 have no effect on the 20,000 acres.

6 So in that case, as we see it you would
7 ignore the agricultural-related factors and (tape
8 inaudible) remain. At least that was our intent,
9 that the director would only apply ones that
10 obviously made sense.

11 CHAIRMAN NOH: Mr. Crapo.

12 SENATOR CRAPO: If I understand you then
13 correctly, Mr. Nelson, roman numeral 5 could not
14 be used to say that as to industrial uses the
15 amount of water utilized could not exceed the
16 state's plan for agricultural?

17 MR. NELSON: Mr. Chairman, that would be
18 correct. You also have the policy statement
19 that's coming out of the proposed water plan
20 amendment which allocates 150 cfs to industrial
21 uses. So with that public policy statement in the
22 water plan, you've probably gone a long ways
23 toward approval under this standard in any event.

24 CHAIRMAN NOH: Mr. Crapo.

25 SENATOR CRAPO: With regard to the 150 which

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1 is being allocated for industrial uses, that's out
2 of the 600, 450 cfs of the 600 available?

3 MR. NELSON: Mr. Chairman, that's correct.

4 SENATOR CRAPO: Would that then be
5 determined as a limit or is that a specified
6 minimum? Or what exactly is intended by this
7 specification of 150 cfs?

8 MR. NELSON: Mr. Chairman, Senator, as I
9 understand it, it's essentially a reservation of
10 that much water for those purposes and subject
11 always to change by the water board as it finds
12 out if it's too high or too low or whatever. But
13 the race is not to the swift for industry as to
14 that 150 cfs. It's there and when they need it,
15 it will be available.

16 CHAIRMAN NOH: Senator Beitelspacher.

17 SENATOR BEITELSPACHER: Mr. Chairman, to one
18 of the three negotiators, much along the lines
19 that Senator Crapo just enumerated on, on line 27
20 and 28 of the same section, we're referring to "No
21 single factor enumerated above shall be entitled
22 to greater weight by the director in arriving at
23 this determination."

24 Does that not in itself preclude some
25 further development of industrial development

1 because of lines 23 through 25 of roman numeral 5?

2 MR. NELSON: Mr. Chairman, senator, as I
3 say, that isn't the intent certainly, and to me if
4 you have a solely agricultural factor, such as
5 roman -- as little B, you simply couldn't apply it
6 to an industrial use. So in making that analysis,
7 the director when he got to that one would have to
8 ignore it as I see it. Otherwise the system
9 doesn't make sense. You would only be entitled to
10 develop agricultural uses, which wasn't the
11 intent.

12 SENATOR BEITELSPACHER: Okay. Thank you,
13 Mr. Nelson. Thank you, Mr. Chairman.

14 CHAIRMAN NOH: Mr. Costello.

15 MR. COSTELLO: If I could just follow up on
16 5. The policy referred to, the staged development
17 policy, is more fully spelled out in the water
18 plan amendment as drafted, and it's clear from
19 that, the text accompanying that we're not saying
20 here that there is a mandate to go out and develop
21 any number of acres. All we're saying, there's a
22 cap at 20,000 so you cannot -- I think what I'm
23 hearing here is that you're afraid that if this
24 would prevent us from developing up to 20,000 or
25 80,000 in a four-year period that it would somehow

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1 conflict with No. 5, and that's not the case. The
2 policy referred to is more fully addressed there.
3 This is simply a cap and not a direction to go
4 forward in and develop at least that much.

5 CHAIRMAN NOH: Mr. Crapo.

6 SENATOR CRAPO: May I ask one further
7 question for clarification?

8 CHAIRMAN NOH: Certainly.

9 SENATOR CRAPO: Let's suppose that
10 industrial uses came along in a given year and
11 used up 50 cfs and that enough agricultural
12 applications were made to develop 20,000 acres.
13 Would both of those be able to be done in a single
14 year?

15 MR. COSTELLO: Mr. Chairman.

16 CHAIRMAN NOH: Mr. Costello.

17 MR. COSTELLO: Senator Crapo, yes, there
18 would be no conflict.

19 CHAIRMAN NOH: Senator Peavey.

20 SENATOR PEAVEY: Mr. Chairman and any one of
21 the three negotiators, maybe Pat Costello, was
22 there any room for consideration of fish and
23 wildlife values in arriving at these criteria?
24 Why were they left out?

25 MR. COSTELLO: Mr. Chairman, Senator Peavey,

1 the original reason they were left out is because
2 we were going to -- we had two versions, one which
3 supplanted the old local public interest and had a
4 comprehensive public interest determination
5 similar to what was in a bill promoted last year
6 by the governor and the attorney general, which
7 would have subordinated everything and put it
8 through a new public interest review.

9 We found that there was resistance even
10 from among some conservationists who felt that
11 they did not want the old local public interest
12 wiped out because they felt that did give them a
13 tool with which to challenge this. So we had
14 option two, which was to leave the local public
15 interest as is and simply add the new criteria
16 that relate to the balance with hydropower and
17 felt that we certainly did not intend to make the
18 ability to take fish and wildlife into account any
19 less available than it was before but that that
20 was a separate issue since we're dealing here with
21 protecting hydropower, water for hydropower
22 because after all that's what was at issue in the
23 lawsuit.

24 Having said that, I would go further to
25 say it certainly is not the governor's intention

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1 to imply that by leaving fish and wildlife off
2 this list that it is somehow not in the public
3 interest. And if it needs to be stated more
4 clearly in 42-203A that fish and wildlife can be
5 considered under the local public interest, we
6 would support doing that. However, we are bound
7 to and do support existing 42-203C as written.

8 CHAIRMAN NOH: Any of the other two
9 gentlemen have any comments on that?

10 MR. NELSON: Senator, Mr. Chairman, Senator
11 Peavey, I would agree with Mr. Costello. I think
12 that the parties are not committed to preservation
13 of 203A in its present form as a part of these
14 proceedings. However, if there is going to be an
15 attempt to change that, I think it should be in a
16 separate bill because we're tied to this program
17 and we're committed to it, and as soon as we start
18 amending it we get in a real mess.

19 CHAIRMAN NOH: Senator Peavey.

20 SENATOR PEAVEY: Another concern that I had,
21 and I don't know where to fit it into the overall
22 settlement without --

23 CHAIRMAN NOH: Senator Peavey, if you're
24 going on to a different consideration, I think
25 Mr. Kole had a comment on your first question.

1 SENATOR PEAVEY: Okay.

2 MR. KOLE: Thank you, Mr. Chairman, Senator
3 Peavey. I would agree with the comments of the
4 other two negotiators. It was our thought that
5 that really was not an issue that was directly
6 involved in the lawsuit. While there may be
7 concerns on that score, that should be addressed
8 separately by the legislature so as to not reopen
9 a lot of demands that came up last year in
10 relationship to this particular bill.

11 CHAIRMAN NOH: Senator Peavey.

12 SENATOR PEAVEY: In other words, what we're
13 saying is that any of us can propose additional
14 criteria outside of this package and it will go on
15 its own merits and that won't change things one
16 way or another, I guess. One of the things I
17 thought we should look at is critical livestock
18 range. It's real easy to go out, for the BLM to
19 give that range away, but the state doesn't have
20 to give the water away if it's a valuable piece of
21 winter range or turnout range. I guess a separate
22 bill would be the place to address that.

23 CHAIRMAN NOH: Further questions? Senator
24 Ringert.

25 SENATOR RINGERT: Mr. Chairman, can we turn

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1 to the other bill, the 1006, the second page, line
2 five refers to "existing vested water rights."
3 Now, in making this determination , is the
4 director going to be able to consider the entire
5 gamut or is he just going to look at adjudicated
6 rights?

7 The rights at Swan Falls, whatever they
8 might be that precipitated the present situation,
9 as I recall had been adjudicated between the two
10 parties back in 1907 or 1909 or something like
11 that. As far as I can tell that was the only
12 final judgment of adjudication that we had with
13 respect to any of those water rights. The whole
14 process was shut down because there was a
15 determination of some sort made in a pending
16 lawsuit that has not reached -- that has not
17 reached final judgment.

18 So what's the standard we're looking at
19 when we use the term "existing vested water
20 rights" in this bill?

21 CHAIRMAN NOH: Mr. Nelson.

22 MR. NELSON: Mr. Chairman, Senator Ringert,
23 the language was chosen in order to include a
24 constitutional right not represented by an
25 adjudication, a statutory right represented by

1 license, or in my judgment you can get into a
2 vesting question at a proper stage in a permit
3 process. So my understanding of why we selected
4 "vested" was to pick up water rights that fell
5 into those categories.

6 Now, as far as Swan Falls is concerned,
7 as an example, there are I think three water
8 licenses at Swan Falls. In my parlance that's
9 clearly a vested water right. There may be the
10 adjudication as you point out. Probably at least
11 as we understand adjudication now it is probably
12 too narrow to be much more than a statement of a
13 constitutional right that's contemporaneous with
14 the use. But I think all of those water rights
15 would be considered vested as I understand how
16 that term is used here.

17 You may also have -- since this is
18 broader than Swan Falls, the director would be
19 entitled to protect a well, a permit on a well if
20 the well were drilled, the water was in use. I
21 think that's vested to the point the director
22 could try to protect it by putting a moratorium in
23 an area while they looked at say a critical
24 groundwater designation.

25 UNKNOWN SPEAKER: (Tape inaudible.)

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1 SENATOR RINGERT: It seems to me that this
2 procedure in effect will force the applicant then
3 to go through the administrative appeal procedure,
4 perhaps take it on up to court if dissatisfied
5 (tape inaudible). And it further seems to me
6 that -- well, it sort of puts the state in the
7 position of saying we are no longer going to have
8 free-wheeling appropriation. We are going to put
9 the front end burden at least more so than in the
10 past on the intending appropriator.

11 MR. NELSON: Mr. Chairman, Senator Ringert,
12 I think that has that potential in the given
13 factual setting. Certainly I think among my
14 clients one of the things they like the least
15 about the present system is the fact that if
16 they're a senior appropriator, they have the
17 burden of shutting off the junior. And they say
18 why do I have to do that? I was here before he
19 was. Why is it my problem?

20 UNKNOWN SPEAKER: (Tape inaudible.) (Tape
21 silent.)

22 MR. NELSON: -- directing how development
23 took place, which I think is probably a better
24 way. The people can fight with the director on
25 his moratorium the scope and timing of it a little

1 easier than they can go back into court and
2 convince a judge they should be relieved.

3 CHAIRMAN NOH: I have a question for any of
4 you that would like to shoot at it. Under this
5 agreement, what is to preclude a utility from if
6 they can generate sufficient resources to buy up
7 or lease whatever water they can get their hands
8 on and in effect take up all of the remaining
9 waters? As I read this, they're pretty well home
10 free on all purchases -- purchased water and
11 leased water.

12 MR. COSTELLO: Mr. Chairman, that's correct.
13 They can acquire through purchase upstream stored
14 water which they can run down the river. They are
15 entitled to that and they can't of course be
16 appropriated between the storage site and their
17 hydro site. So they would be free to do that.

18 CHAIRMAN NOH: But this would not cause a
19 problem on unappropriated water. How about waters
20 that are, for instance, lost because someone
21 failed to file a claim as of a cut-off date? Now,
22 is that water in a situation where another party
23 would have to file on the water? You can't go buy
24 or lease water that's lost for failure to file a
25 claim; can you?

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1 MR. COSTELLO: Mr. Chairman, no, there would
2 be no right, no property right to acquire in that
3 case. They would have difficulty establishing a
4 right anywhere upstream from their facility
5 because they would not be able to apply it to a
6 beneficial use until down below. It's difficult
7 really for me to conceive of them acquiring a
8 right other than a right to a certain amount of
9 storage water in storage in the stream itself.

10 SENATOR BUDGE: Mr. Chairman.

11 CHAIRMAN NOH: Senator Budge.

12 SENATOR BUDGE: Pat, is that true presently,
13 though (tape inaudible)?

14 MR. COSTELLO: Mr. Chairman, Senator Budge,
15 that is what --

16 SENATOR BUDGE: (Tape inaudible.)

17 CHAIRMAN NOH: One more question. Where are
18 we say up in the Spokane River system, if the
19 governor goes to Washington Water Power and says
20 we want to negotiate a minimum flow so we can have
21 further development and Washington Water Power
22 says no, no, I won't negotiate, then where are we?

23 MR. KOLE: Mr. Chairman, first off, I think
24 it's probably not well known, but we have already
25 opened up discussions with Washington Water Power

1 and they have indicated that they do want to
2 negotiate. So I would think that the possibility
3 of them absolutely refusing to negotiate is small.

4 But if they did, we would of course be
5 in the same type of situation as we were with
6 Idaho Power Company. We'd be in a lawsuit. But
7 they have indicated that if this program passes,
8 if they have the authority to negotiate with the
9 governor, they intend to so do.

10 CHAIRMAN NOH: Now, is it possible, looking
11 at future hydro development, say whatever it is, a
12 hydro development on the Bruneau River or on the
13 Salmon River or wherever it might be, is it
14 possible for the director of the State of Idaho to
15 subordinate those future hydro rights without
16 officially establishing a minimum flow on the
17 stream? How would that work? In other words,
18 does the future subordination authority buy
19 anything other than these waters placed in trust
20 through minimum flow?

21 MR. COSTELLO: Yes, Mr. Chairman.
22 Subparagraph 6 found under Section 2 of the main
23 bill authorizes the director to impose this
24 subordination condition on new permits and
25 licenses for power purposes. And that is not in

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1 any way tied to the preceding five paragraphs, so
2 it would just be a straight subordination
3 condition.

4 I think the real question that you
5 raise, though, is if he does that in the absence
6 of a minimum flow, where is that right in terms of
7 this regime established in the preceding
8 paragraphs where it talks about the rights below
9 the minimum flow being unsubordinated and the ones
10 above it being held in trust, which is clearly
11 that regime contemplates that there would be a
12 minimum flow there, and we did not really intend
13 that it would apply across the board if there were
14 no minimum flows in place at that time?

15 CHAIRMAN NOH: Senator Ringert.

16 SENATOR RINGERT: Why is the provision,
17 Mr. Costello, that's on that same subsection that
18 authorizes the director to limit a permit or
19 license for power purposes, why is that any part
20 of this Swan Falls settlement?

21 MR. COSTELLO: Mr. Chairman, with the
22 senator's permission I defer to Pat Kole.

23 CHAIRMAN NOH: Yes.

24 MR. KOLE: Mr. Chairman, Senator Ringert,
25 with the qualification of that, I'm not sure I can

1 answer the question in terms satisfactory to you.
2 But basically there's always been a question as to
3 what the state's authority is pursuant to the 1928
4 constitutional amendment. And in taking a look at
5 that issue, while there is good authority for the
6 proposition that amendment was self-executed, as
7 part of the settlement negotiations the attorney
8 general believed that there should be specific
9 authority given to the director to subordinate
10 hydropower water rights, and that's what paragraph
11 6 does.

12 CHAIRMAN NOH: Senator Ringert.

13 SENATOR RINGERT: This agreement is being
14 promoted very heavily, I feel. The local
15 newspaper is telling us through its editorial that
16 the legislature should not mess around with the
17 settlement in any way, shape, or form. And I
18 don't see any reason at all for that particular
19 provision which will affect a great deal of small
20 hydro permits and applications to be in this
21 tagging along on the emphasis that's been raised
22 by the rush to settle the Swan Falls controversy.

23 The last one I saw like this was a
24 rider on an 1888 appropriation bill in the United
25 States Congress that tied up all the water in the

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1 western United States and all the land for the
2 western United States for the next three years
3 until they got the 1891 amendment of the present
4 land law.

5 Now, would somebody tell me why this
6 has to be in this Swan Falls settlement?

7 CHAIRMAN NOH: Any other comments?

8 MR. KOLE: Mr. Chairman, Senator Ringert,
9 basically all paragraph 6 does is grant authority.
10 It does not require the director to subordinate
11 hydropower water rights, nor does it make it
12 mandatory. In certain situations where there is
13 productive upstream land that could be developed,
14 the director will have to sit down and take a look
15 at whether or not he should subordinate the
16 hydropower license. Obviously if the director's
17 determination is arbitrary or capricious or
18 contrary to the policy set down by the
19 legislature, then this decision could be appealed
20 in court.

21 But I think the reasoning why it is
22 here is because it was felt that the Swan Falls
23 situation would not have arisen had the
24 legislature enacted similar laws back in 1928.
25 And the effort here was to make sure that as best

1 we can foresee, we do not get ourselves into
2 another Swan Falls situation in the future.
3 That's the reason why it's in the agreement and
4 why we think it's necessary.

5 CHAIRMAN NOH: In other words, we might head
6 off a lot of court case and legal costs at some
7 time in the future by acting now?

8 MR. KOLE: Mr. Chairman, that's correct.

9 CHAIRMAN NOH: Senator Ringert.

10 SENATOR RINGERT: I can't let that go
11 without one more comment. I think I know why it
12 is here in this bill, but nobody has yet said that
13 it's essential to settlement of the Swan Falls
14 controversy.

15 CHAIRMAN NOH: Mr. Dunn.

16 MR. DUNN: Mr. Chairman, the primary reason
17 I see it there is to avoid Swan Falls from
18 recurring again. Without that, if Idaho Power
19 Company decides to build one of the dams they have
20 proposed on the Snake River, we're back in Swan
21 Falls if there isn't clear subordination authority
22 for any other group. It isn't just the small
23 hydros. It's virtually all the small hydros that
24 are high enough up in the basin that there is no
25 development occurring above them.

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1 CHAIRMAN NOH: Questions? I might then with
2 your permission, even though the legislation
3 having to do with the Public Utilities Commission
4 isn't before this committee, just for our
5 edification, if I could call upon one of the
6 commissioners, whoever would like to be the
7 spokesman, or perhaps we might ask several of them
8 to speak because often there's a difference in
9 agreement among them on various issues as to how
10 they're viewing this agreement, and particularly
11 I've heard the question raised that if they
12 adjudicate the legislation as drafted protecting
13 Idaho Power from claims for failure to defend
14 their water rights, would it apply to all waters
15 rather than just those placed in trust through
16 these kinds of agreements?

17 Do you gentlemen feel that you're going
18 to have sufficient authority under the legislation
19 to assure that the company doesn't dispose of or
20 sell its water rights other than those which have
21 been properly dealt with through this settlement
22 legislation? Gordon (phonetic)?

23 UNKNOWN SPEAKER: Mr. Chairman, I haven't
24 taken a look at that lately. I brought over the
25 two bills that were on the agenda, so I really

1 haven't given any thought to that. Commissioner
2 High may have.

3 CHAIRMAN NOH: Mr. High, would you want to
4 speak to that?

5 MR. HIGH: Yes. I think the crucial issue
6 with respect to your question is not the bill
7 before you but Senate Bill 1007.

8 CHAIRMAN NOH: Correct.

9 MR. HIGH: And that I might -- if you don't
10 have it before you, it's a bill.

11 CHAIRMAN NOH: It was introduced through our
12 committee.

13 MR. HIGH: Fine. That I think is extremely
14 essential because in effect it clarifies the legal
15 status of gains from sale and dedicates the level
16 of the benefits from the sale to the customers of
17 the company rather than to the shareholders of the
18 company. It in fact sets the title of the water
19 in the hands of the rate payers rather than the
20 shareholders. And I might add that I think
21 whatever happens to all these other bills, that
22 bill should pass.

23 CHAIRMAN NOH: How about the other bill that
24 affects -- that protects Idaho Power from claims
25 by rate payers?

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1 MR. HIGH: I see no problem --

2 CHAIRMAN NOH: I heard it argued that that
3 bill is too broad, that in effect it would free
4 Idaho Power from failure to protect even their
5 unsubordinated water rights inclusion within the
6 minimum flow and wouldn't just protect them from
7 claims by rate payers for that water which is in
8 effect subordinated through the agreement process.
9 Have you had a chance to examine that?

10 MR. HIGH: Well, perhaps in the bills you
11 have before you and speaking to that water below
12 the 3900 minimum flow, I would think the power
13 company would have no incentive to deal with that
14 water if all the benefits went to the rate payers.
15 In other words, I can see where in response to
16 Senator Crapo's question you could really deplete
17 the water down to 3900 second feet. Remember this
18 3900 second feet was established by negotiation
19 process taking into account historic flows,
20 updated current projected conditions, and that
21 there's nothing more uncertain than stream flows.
22 And that uncertainty, and perhaps the committee
23 would like to take into effect and set aside
24 something more than 150 second feet for industrial
25 future municipal uses. There's a protection

1 against that uncertainty factor. And the
2 uncertainty isn't just the demand kind of things
3 (tape inaudible). Maybe I'm not responsive.

4 CHAIRMAN NOH: Senator Crapo, excuse me,
5 then Senator Beitelspacher.

6 SENATOR CRAPO: Mr. Chairman, if I could
7 address one more question in that regard.

8 CHAIRMAN NOH: Certainly.

9 SENATOR CRAPO: Were you suggesting, sir,
10 then we as a committee specify or can the
11 legislation specify certain amounts to be set
12 aside as dedicated to industrial uses and
13 specifically subordinate other uses in that
14 amount?

15 CHAIRMAN NOH: Mr. High.

16 MR. HIGH: Yes, Mr. Chairman, Senator Crapo.
17 In designing this package, I think as Mr. Nelson
18 indicated, the minimum flow has to be tied to the
19 public interest criteria. And if you take the
20 minimum flow as something in the public interest,
21 the minimum flow is rather meaningless if the
22 process gets you down to 3900 second feet and
23 suddenly the long-term climatic conditions change
24 and you have a need to supply new municipal or
25 other needs. And we all know that will deplete

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1 the minimum flow of those prior to the first
2 priority.

3 And as a factor in your deliberations
4 on public interest, I would suggest a paragraph be
5 put in recognizing uncertainties and perhaps
6 reserving something more than the 3900 second feet
7 to recognize that uncertainty.

8 MR. SWISHER: Mr. Chairman.

9 CHAIRMAN NOH: Yes. Mr. Swisher is here,
10 too.

11 MR. SWISHER: Chairman.

12 CHAIRMAN NOH: Yes, sir.

13 MR. SWISHER: With respect to the
14 uncertainty with respect to the reality (tape
15 silent) --

16 UNKNOWN SPEAKER: To the extent the director
17 needs a moratorium while he's (tape inaudible).

18 MR. SWISHER: As for Senator Crapo's
19 concern, historical water development has been
20 based on the ability to assess the charges awarded
21 to those who gain from a project, a fast way of
22 oversimplifying the history of water development.
23 But having watched three successive years of
24 surplus run down the river and in watching the
25 Boise River, for instance, be full bank to bank

1 eight to nine months of the year for three
2 successive years, it certainly occurs over and
3 over again that some state law, I mean statewide,
4 not just the Snake River Basin, needs to be put in
5 place for water retention other than pure
6 diversion for downstream use. That is to say when
7 the Boise River is running that full, the Owyhee
8 on the southwestern end and the aquifer of the
9 Mountain Home desert is going down, that doesn't
10 make sense when water is rushing down the Henry's
11 Fork and nothing's being added to the creek. When
12 the water is flooding Pocatello on the Portneuf
13 and may put the temple under water in Salt Lake,
14 it doesn't make sense (tape inaudible).

15 So following on this parcel, there is
16 concern (tape inaudible) legislative policy with
17 respect to statewide actions under a bonding
18 program or under something in concert with
19 additional reclamation sort of projects, treat the
20 water in the future in the same manner that we
21 have in the past.

22 CHAIRMAN NOH: Thank you, Mr. Swisher.
23 Okay. Are there any other questions that we want
24 to delve into? Senator Beitelspacher?

25 SENATOR BEITELSPACHER: (Tape inaudible.)

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1 MR. WARD: Mr. Chairman, I thought I would
2 try to answer your original question now that I
3 had a little time to look at it.

4 CHAIRMAN NOH: Done your homework.

5 MR. WARD: SB 1005 again. It seems to me
6 there's probably not any question of the defense
7 provided in 1005 being used for anything other
8 than the matters specifically touched on in the
9 contract. You have more lawyers here than you
10 need. But it's what lawyers call an affirmative
11 defense. It would deprive the PUC of
12 jurisdiction, but it first must pertain to
13 something relating to the contract. But it looks
14 fine to me.

15 CHAIRMAN NOH: Thank you. Senator
16 Beitelspacher.

17 SENATOR BEITELSPACHER: Mr. Chairman, since
18 we have so many attorneys here, if we could go to
19 page three of 1008, you'll surely recognize my
20 limitations being from Northern Idaho. I'm just
21 trying to get the water off the roads.

22 Page three between No. 5 and No. 6 we
23 have the governor is empowered to enter into
24 agreements defining that portion of a water right
25 as being unsubordinated. And then on 6 you have

1 the director having the authority to subordinate
2 rights.

3 As I recall, the director works for the
4 water board, which the Constitution and the
5 Supreme Court case we touched upon over the last
6 few years is set up as another entity, so to
7 speak. Do we have a conflict there? Do we have
8 another constitutional body in a sense that is
9 outside of the reach of the governor that has the
10 authority to subordinate water and another
11 constitutional entity that has the authority to --

12 MR. COSTELLO: Mr. Chairman, Senator
13 Beitelspacher, the authority granted under
14 paragraph five is to enter into contracts which
15 are not self-executing. Any contracts -- all this
16 does is really authorize the governor to go out
17 and negotiate contracts to bring to the
18 legislature for ratification. None of them take
19 effect unless they are ratified by law.

20 And because of that, in my view at
21 least, I don't think this would raise any
22 constitutional issues of separation of powers,
23 either vis-a-vis the legislature or the water
24 board, particularly given the passage of the
25 constitutional amendment this November.

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1 CHAIRMAN NOH: Along those same lines, would
2 you care to outline briefly just exactly what are
3 the limits and the extent of a governor's power to
4 grant water rights through the trust agreement.
5 Sometimes -- this trust agreement has sometimes
6 been interpreted as granting of the governor an
7 inordinate amount of authority saying who gets
8 water and who doesn't get water.

9 MR. COSTELLO: Yes, Mr. Chairman. As a
10 matter of fact, when I was glancing through the
11 attorney general's testimony I was a little
12 troubled by a statement here that the governor
13 would be empowered under this to approve of water
14 to be allocated under the trust. That's not
15 really what was contemplated here at all. This is
16 strictly a passive trust over which the governor
17 will not exert any active discretion. It's
18 modeled after trusts that are set up to reserve
19 water in certain lakes around the state. There
20 are half a dozen of these trusts set up by Idaho
21 law. The governor is named as trustee just
22 because you need an individual to be sued in the
23 event of some squabble over the trust assets.

24 And beyond that, it's automatic that
25 water rights flow out of the trust into private

1 hands if they are granted in accordance with state
2 law. So it simply was a mechanism to sever, in
3 lawyer's terms, to sever the legal and equitable
4 title to the water immediately so there's some
5 immediate change in position of the parties, that
6 as soon as this agreement becomes binding and this
7 statute takes effect, legal title to the water
8 will go to the state, and the company retains the
9 beneficial use of the water as long as the trusts
10 last. But it's a passive trust. No active role
11 is taken by the trustee.

12 CHAIRMAN NOH: Mr. Kole and Mr. Nelson, do
13 you concur with that interpretation?

14 MR. KOLE: Mr. Chairman, I do. In looking
15 at page three, I think that is slightly
16 inaccurate. The governor of course is a passive
17 trustee. The intent here was that the director
18 would be the individual who would make the
19 reallocation determination. So I think that
20 basically the last paragraph, it should not read
21 the "governor will be empowered" but probably the
22 "director will be empowered" to release water.
23 And I'm referring to our prepared testimony.

24 CHAIRMAN NOH: You're referring to the
25 testimony rather than the release?

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1 MR. KOLE: Yeah, that's correct,
2 Mr. Chairman. That's really just an oversight
3 that should have been corrected.

4 CHAIRMAN NOH: Fine. Mr. Nelson, is that
5 the way you understand it?

6 MR. NELSON: Mr. Chairman, members of the
7 committee, that's correct. And I think it's clear
8 on page three the senator referred to lines looks
9 like it's to 20, but it's about 16 through 19, the
10 rights have to be acquired pursuant to state law.
11 Under state law unless you change it, the governor
12 plays no part in that process.

13 CHAIRMAN NOH: Okay. Other questions?
14 Mr. Crapo. Excuse me. Did you want to comment
15 further on that, Mr. Kole?

16 MR. KOLE: Mr. Chairman, thank you. Excuse
17 me, Senator Crapo. Just on that trust provision
18 it should be noted that the ultimate control over
19 those trusts does rest with the legislature. They
20 created those trusts, and of course they can alter
21 them or take whatever steps are necessary.

22 CHAIRMAN NOH: Yes, Mr. Crapo.

23 SENATOR CRAPO: Mr. Chairman, my question
24 relates primarily to one of procedure here in
25 committee. Perhaps everybody knows the answer but

1 me because I'm a freshman senator. But it seems
2 to me that we need to leave a very good track of
3 legislative history on this set of legislation
4 because at least as I study it it needed some
5 clarification in my mind. And I am sure there
6 will be a lot more testimony and evidence
7 presented with regard to the hearing.

8 Is it already set up by some mechanism
9 that the testimony which is recorded here today
10 and the prepared testimony and so forth becomes
11 part of the written or prepared record that we
12 direct it be maintained so that in the future
13 there can be reference made and we can ensure that
14 the intent of the legislature is followed?

15 CHAIRMAN NOH: Well, Senator Crapo, we might
16 defer to Senator Budge. My understanding is that
17 we have no financial provisions or procedures in
18 precedent to do that. All I personally had in
19 mind was to ensure that these tapes are -- that
20 there's more than one copy of the tape and that
21 they're placed in the records in the Department of
22 Water Resources to create as good a record as we
23 can.

24 I presume it would be possible to get
25 an appropriation or some way or other have tapes

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1 transcribed if we could. But certainly written
2 testimony, those sorts of things, I intend to
3 attempt to preserve as best we can.

4 But is that correct, Senator Budge, we
5 have no formal means of doing that?

6 SENATOR BUDGE: No, we don't have that. I
7 think you're accurate in the tapes, keeping a
8 record of the tapes, and also accurate notes.

9 CHAIRMAN NOH: Senator Ringert.

10 SENATOR RINGERT: Mr. Chairman, members of the
11 committee, there is a problem even with the tapes
12 because that is merely a record of the committee
13 proceedings and does not necessarily reflect the
14 intent of the other 30 senators who will vote on
15 the floor. So it's a very nebulous job in Idaho
16 to determine what is the intent.

17 CHAIRMAN NOH: Senator Crapo.

18 SENATOR CRAPO: Mr. Chairman, I'm aware of
19 that. I guess as an attorney I do a lot of
20 searching through legislative history where it's
21 available to figure out what laws mean. But it
22 definitely in my opinion would be beneficial to
23 have as much preserved as possible.

24 For example, the written statement by
25 Attorney General Jones, Jim Jones, was helpful and

1 perhaps maybe we can just encourage those who
2 appear before the committee in the future that if
3 they would like to ensure that their understanding
4 of the bill at least as represented in the
5 legislative history as being something that would
6 at least be considered that we make an avenue
7 available for that to be done.

8 CHAIRMAN NOH: That's a good point. We
9 certainly want to in the future cut down all the
10 time we have to invest in attorney services
11 searching through records. Senator Budge.

12 SENATOR BUDGE: Mr. Chairman, members of the
13 committee, I think the nature of the legislation
14 itself justifies very accurate records to be
15 referred to in the future to be available.

16 CHAIRMAN NOH: Senator Horsch.

17 SENATOR HORSCH: Mr. Chairman, similar to
18 Senator Crapo, I must defer my years because of my
19 freshman status over here on the Senate side, but
20 in the House by majority vote we have spread upon
21 the pages of the journal a letter of intent.

22 CHAIRMAN NOH: Yes.

23 SENATOR HORSCH: And you can make that as
24 long as you want. If you can get a majority vote,
25 you can put every bit of the notes in the journal.

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1 CHAIRMAN NOH: That is correct. Senator
2 Beitelspacher.

3 SENATOR BEITELSPACHER: Yes. Thank you,
4 Mr. Chairman. Back to No. 6, if I might, 42-203B,
5 "The director shall have the authority to
6 subordinate the rights granted in a permit,"
7 et cetera. Where are we at with compensation then
8 for the holder of a hydropower right at a later
9 date? In the event that -- let's assume that I
10 invest 5 or 6 million dollars or 10 million
11 dollars, whatever it might be, in a small hydro
12 right, have it producing. PUC and FERC in their
13 wisdom determine I should receive some
14 compensation from a power company for that. And
15 Senator Peavey buys a sheep allotment above me and
16 decides to water the grass up there for those
17 little lambies. Where am I going to be with my
18 investment once he starts pulling the water out of
19 the creek for his sheep?

20 MR. NELSON: Mr. Chairman, senator.

21 UNKNOWN SPEAKER: Do I have a paddle?

22 MR. NELSON: You don't have a paddle and
23 it's all downhill. If as is the practice now your
24 permit was subordinated when issued, you would be
25 subject to Senator Peavey's lambs. Now I

1 understand that lambs don't actually keep much of
2 the water you run through them, so you may not be
3 hurt too badly. But you would be -- if your
4 permit had been subordinated, you would be subject
5 to his depletion. If it were not subordinated, if
6 the director decided in his wisdom that you should
7 have a chance to get your project paid out before
8 the subordination took effect, then you might have
9 a right to compensation in that situation.

10 CHAIRMAN NOH: Senator Beitelspacher.

11 SENATOR BEITELSPACHER: Mr. Chairman,
12 Mr. Nelson, is it all entirely up to the director
13 as to whether or not I receive compensation or
14 not? And is there anything in here that sets up
15 criteria by which he shall determine how much I
16 shall be compensated, or is that to be promulgated
17 by rules and regulations at a later date?

18 MR. NELSON: Mr. Chairman, senator, the
19 compensation issue would follow the subordination
20 issue initially. If you were subordinated, you
21 would have no right to compensation. And it is
22 solely the director's discretion as this is
23 written to implement the constitutional provision.
24 So he has no guidance. My guess is that hen's
25 teeth and unsubordinated power rights from now on

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1 are going to be about on a parity.

2 CHAIRMAN NOH: Mr. Dunn, do you care to
3 comment on hen's teeth?

4 MR. DUNN: Mr. Chairman, I found a hen's
5 tooth. One of the things that we're trying to do
6 on small hydro and it would be one of the things
7 we would define in the rules and regulations is
8 that if those small hydros where just a small
9 amount of water makes a drastic change in economic
10 effect of it is to issue the permit for a period
11 of time. We would look at the payout period of
12 the project and at that time then look at
13 subordination. Where it's necessary, we can
14 protect that plan for a time so there isn't a
15 major economic disaster. But they don't have
16 protection in perpetuity.

17 CHAIRMAN NOH: Thank you, Mr. Dunn. Okay.
18 Anything else? Are you ready to call it quits for
19 the day? And I look forward to our 7 o'clock
20 Monday evening public hearing where we'll take
21 testimony. Anything else for the good of the
22 order?

23 I want to thank you all for being here
24 today. Depending on the wishes of the committee,
25 we may have another session. I guess we're

1 adjourned.

2 (Meeting concluded.)

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REPORTER'S CERTIFICATE

I, Patricia J. Terry, Certified Shorthand Reporter, Registered Professional Reporter by testing, a Notary Public, do 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 reporter's transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

I further certify that I have no interest in the event of the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th of February, 2007.


Patricia J. Terry Court Reporter
CSR No. 653

PATRICIA J. TERRY
NOTARY PUBLIC
STATE OF IDAHO

