

RESOURCES AND ENVIRONMENT COMMITTEE

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Public Hearing 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

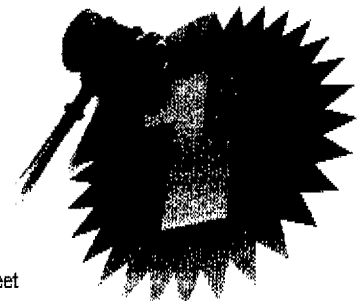
TRANSCRIPT OF PROCEEDINGS

Held on January 21, 1985, 7:00 p.m.

before Chairman Noh

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Transcribed by
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PRESENT:

- Chairman Noh
- Senator Beitelspacher
- Senator Carlson
- Senator Chapman
- Senator Crapo
- Senator Horsch
- Senator Peavey
- Senator Ringert
- Senator Sverdsten
- 14 Members of the House Resources Committee
- Pat Costello, Governor's Office
- Pat Kole, Attorney General's Office
- Tom Nelson, Idaho Power Company
- Marjorie G. Hayes, Idaho Consumer Affairs
- Harold C. Miles, Golden Eagle Audubon Society
- Ben Cavaness
- Fred Stewart
- Forrest Hymas
- John Hatch, Farm Bureau
- John Runft, Attorney for Salmon River Hydro
Company
- Pat Ford
- Al Fothergill
- Art Martins

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1 JANUARY 21, 1985
 2 THE CHAIRMAN: We have a sign-up sheet here.
 3 And we will hear witnesses in the order of those
 4 that have signed up. And when we're finished with
 5 that, why, we'll invite anyone else who would like
 6 to testify to do so.
 7 The purpose of the hearing tonight is to
 8 deal explicitly with two of the multi-bill package
 9 of legislation that accompanied the Swan Falls
 10 agreement for several pieces of legislation. And
 11 for the benefit of our committee, we aren't going
 12 to be at all opposed if testimony gets over into
 13 the areas of the other bills which relate to this
 14 particular package, because it is a package, all
 15 of which fits together, and of course, all of
 16 which need to pass in order for the agreement to
 17 be consummated, or basically, I guess, we're back
 18 in court.
 19 And the two bills that we have tonight are
 20 Senate Bill 1008, which is the bill that has to do
 21 with the new public interest criteria, the trust
 22 agreement in which the waters which are to be
 23 subordinated and available for future
 24 diversions -- future diversions throughout the
 25 state system -- or, will be placed. We also have

1 APPEARANCES
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1 the other bill, S1006, which relates to the
 2 authority of the director of the Department of
 3 Water Resources to establish moratoriums on the
 4 issuance of permits under certain issues, and
 5 grants him authority to establish rules and
 6 regulations for the department.
 7 We've invited Representative Chatburn,
 8 Chairman of the House of Resources Committee and
 9 his committee members to sit in with us tonight.
 10 Many of those -- any of those committee members
 11 are welcome to come up here and sit with us. If
 12 we run out of chairs, just bring some more chairs
 13 along with you.
 14 If you have copies of your statements, we
 15 would appreciate your providing at least one copy
 16 for the benefit of Bev Mullins, our hard-working
 17 committee secretary.
 18 In this particular legislation, there is
 19 more than the usual interests in establishing
 20 background as to what might be legislative intent,
 21 or what, in fact, was involved behind the
 22 legislation that may pass. Hence, written
 23 statements are of particular benefit. We will try
 24 to preserve, as best as we can, the committee
 25 records of the hearing and the testimony that has

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<p>1 been presented to us at whatever hearing we have 2 So at this time, I would like to call upon 3 the spokesman for the three negotiating parties to 4 this agreement, the Governor's Office, the Office 5 of the Attorney General, and Idaho Power to give 6 us a brief summary outline of the agreement, 7 primarily for the benefit of those in the 8 audience.</p>	<p>1 Snake River in Southern Idaho. After many years 2 of struggling over this issue, the Governor 3 concluded that it was essential at this point to 4 end this bitter controversy, if possible, and to 5 try to come up with a fair compromise that balance 6 both of these vitally important interests.</p>
<p>9 Our committee had an extensive discussion 10 with the negotiating parties last Friday in our 11 committee meetings. So by now, we're fairly well 12 filled in on the essentials of this agreement. 13 But it's important that the members of the 14 audience have at least a brief background in that.</p>	<p>7 The piece -- the five pieces of legislation 8 that have been introduced so far in the 9 legislature, as well as one additional one which 10 would be introduced in the next week or so, are 11 the core of the agreement that was entered into. 12 It's essential, in order to implement the 13 agreement, that all of these pieces of legislation 14 pass.</p>
<p>15 So Mr. Costello -- Pat Costello, who is the 16 Governor's chief legal advisor, and who was 17 directly involved in these discussions. I might 18 mention too that, at this point, we don't have a 19 long list of committee witnesses, but we would 20 hope that people would exercise discretion as far 21 as the length of their testimony, and try to keep 22 it germane to the issue at hand.</p>	<p>15 Anyone looking at the agreement can form 16 their own opinion, I think, as to where exactly 17 you ought to strike the balance between in-stream 18 uses, including hydropower, and off-stream 19 consumption, including agriculture. And there's 20 nothing particularly magic about where we drew the 21 line. But I do think it's important for everybody 22 concerned to consider the benefits to reaching 23 some kind of agreed-upon compromise on this issue. 24 Whether or not it's the one we chose is less 25 important, I think, than accepting the concept</p>
<p>23 Mr. Costello? 24 MR. COSTELLO: Thank you, Mr. Chairman. 25 members of the committee and other legislators.</p>	
Page 6	Page 8
<p>1 On behalf of the Governor, I would like to 2 thank you for holding this hearing and providing 3 this forum to discuss the Swan Falls agreement as 4 well as the bills that are before the committee. 5 The bills are part of the larger compromise 6 package that was arrived at between the Governor 7 and Idaho Power and Attorney General Jim Jones 8 this summer and late fall.</p>	<p>1 that there has to be some kind of balance between 2 the two.</p>
<p>9 I'm sure all of you are aware that the 10 agreement arose from a controversy over -- really, 11 it boils down to two very important sectors of the 12 Idaho economy. And those are agricultural 13 industry, which is Idaho's largest industry and 14 has been, and continues to be, and likely will be 15 on into the future, and our hydroelectric asset, 16 which truly is an essential asset to Idaho and our 17 entire region, one of the unique things that we 18 have to offer to the people and the businesses 19 that are already here, as well as to people and 20 businesses that might consider coming to Idaho in 21 the future.</p>	<p>3 And I would like to just point out, very 4 briefly, some of the major features of the 5 agreement, which are incorporated in the bills 6 that are before the committee. The one that's 7 received the most attention, and the one that's 8 easiest, I think, for people to grasp, is the new 9 more realistic minimum stream flows that we've 10 proposed in the agreement.</p>
<p>22 For the past several years, these two 23 interests, both of which are crucially important 24 to our people and our way of life, have been at 25 odds over how we should allocate the waters of the</p>	<p>11 People in the agricultural community, in the 12 development community, have felt that, if Idaho 13 Power, or any power generator, wished to acquire 14 additional rights to a guaranteed amount of 15 in-stream water, that they ought to be required to 16 purchase those rights from people upstream. 17 On the other hand, ratepayers and other 18 consumer and conservation interests have felt 19 that, if there is to be further development which 20 depletes the in-stream flows, that there ought to 21 be some compensation from those developers to the 22 in-stream user, which is primarily the power 23 company. Our recommended solution to this is not 24 to -- is to give each of those interests some of 25 what they were looking for in the litigation.</p>

1 We have raised significantly the base amount
2 of water that's available in the stream, or have
3 proposed to do that through the state water plan.
4 And at the same time, we have identified a
5 significant block of water that should be made
6 available for development. And we've not
7 contemplated, under this arrangement, that either
8 side would receive or have to pay compensation for
9 getting, essentially, half a loaf.

10 Another major feature of this, which is
11 included in Senate Bill 1008 is recognition for
12 the first time of hydropower as a beneficial use
13 of water. This is a major change in state law and
14 policy. In the past, hydropower has not been
15 recognized as a beneficial use to the extent that
16 you could say that the water was being fully
17 utilized if it was passing through the turbine to
18 generate electricity.

19 There's a number of advantages, we feel from
20 a management standpoint, to recognizing hydropower
21 as a beneficial use of water. Among them are the
22 ability to manage the system as the fully
23 appropriated system, and to be, therefore,
24 somewhat selective about what future uses will be
25 approved.

1 The other significant advantage is that, by
2 being able to say that the water is currently
3 being put to a beneficial use, it is, therefore,
4 not available for appropriating for out of basin
5 uses.

6 Next feature is that, before any new
7 development can take place upstream, the proposed
8 uses will be reviewed against criteria which take
9 into account the impact such use would have on
10 downstream hydropower generation. This impact has
11 never before been a factor in the approval of
12 water rights applications.

13 All -- I guess the final major benefit I see
14 to this package, and to this legislation, is that
15 we can achieve these things without enormous
16 litigation costs, both to the state and to the
17 power company, and ultimately to the ratepayers,
18 and also, without inordinate delay.

19 Without this agreement, and without the
20 legislation, we would be looking at a situation
21 where a cloud would hang over Snake River water
22 rights for the foreseeable future, several years,
23 at least. However, if this legislation is
24 adopted, we anticipate that, by the end of this
25 year, the Idaho Department of Water Resources will

1 be able to begin the processing applications for
2 water uses on the Snake River under the new
3 management criteria that we have proposed. And
4 there will be a degree of certainty, both for the
5 power company, which will have a firmer
6 expectation as to the amount of water that will be
7 available, and to those people who currently have
8 water rights for other uses, and who propose to
9 develop water uses in the Snake Basin.

10 So with that, Mr. Chairman, I would conclude
11 my remarks. And I'd be happy to respond to
12 questions. Otherwise, turn it over to Mr. Nelson
13 or Mr. Kole.

14 THE CHAIRMAN: Fine.

15 Perhaps we should hear from those two
16 gentlemen first, and then see if there are
17 questions of the three of you.

18 Mr. Kole -- Pat Kole, who now handles
19 legislative affairs -- that must be a real
20 headache -- from the Attorney General's Office.
21 And was head of the Natural Resources Division,
22 who was one of the key negotiators.

23 Mr. Kole?

24 MR. KOLE: Thank you, Mr. Chairman, members
25 of the committee, and audience.

1 The remarks that I will make tonight will be
2 brief. And I know whenever you hear a lawyer say
3 that, that causes a lot of concern. But in going
4 into the negotiations, what we tried to do was to
5 accomplish three results. The first one was to
6 give effect to the philosophy that Idaho water
7 belongs primarily in the State of Idaho, and
8 should be used here. Secondly, that decisions as
9 to the use and allocation of Idaho water must be
10 made here in Idaho by Idaho public officials. And
11 third, in the future, in order to protect Idaho
12 from potential threats from not only the federal
13 government, but from our downstream sister states,
14 we needed to get this issue resolved, and to
15 present a united front to protect our water uses.

16 I believe that the agreement that we have
17 arrived at achieves all three of those principles.
18 The important thing is, as Mr. Costello has
19 pointed out earlier, is that where we draw the
20 line is not magic, but what we have achieved is
21 the embodiment of a philosophy that if we have
22 drawn the line in the wrong spot, you as
23 legislators will be able to come back and redraw
24 the line in the future at a different spot. And
25 that's the important element of this package. It

1 restores control over Idaho water to you, members
 2 of the legislature.
 3 Thank you very much, Mr. Chairman.
 4 THE CHAIRMAN: Thank you, Mr. Kole.
 5 Mr. Nelson -- Tom Nelson of Nelson, Rosholt,
 6 et al., the chief negotiator for Idaho Power.
 7 MR. NELSON: Mr. Chairman, thank you,
 8 members of the committee, ladies and gentlemen. I
 9 too will be brief.
 10 One thing I think that would be well to keep
 11 in mind as we go through this is the approval of
 12 this package is necessarily somewhat chopped up.
 13 And so you only see pieces of it now and then in
 14 the legislature. But I think it's important to
 15 remember that it was negotiated by us, and
 16 approved by our principals as a package. And
 17 should be accepted or rejected as a package. I
 18 don't think it's fair to the intent or the spirit
 19 of what's been done to pick at pieces of it
 20 without seeing how that particular piece fits in
 21 with the whole.
 22 For the information of the members of the
 23 audience who may be reading the agreement and
 24 wondering where the rest of the conditions for
 25 implementation are, I'll quickly tell you where

1 those are. The petition has been filed with the
 2 Idaho Public Utilities Commission by the Idaho
 3 Power Company. The Public Utilities Commission
 4 has deferred action on that petition until the
 5 legislature has acted.
 6 A petition has been filed with the Federal
 7 Energy Regulatory Commission. The time for
 8 intervention has run. There has been, to my
 9 knowledge, one intervention by the National Marine
 10 and Fishery Service at the Federal Energy
 11 Regulatory Commission.
 12 The bill on adjudication was introduced for
 13 printing today in the House. The bill on the
 14 authority of the Public Utilities Commission is in
 15 the Senate State Affairs Committee on the form.
 16 The company determined that no filing was needed
 17 with the Public Utility Commissioner of the State
 18 of Oregon, so none has been made.
 19 The amendments to the State Water Plan have
 20 been proposed to Water Resources Board. The Board
 21 has come up with proposed amendments to Policy 32
 22 of the State Water Plan. Those are going to
 23 public hearing next week and the week -- first
 24 week in February. The Boise hearing is the 5th of
 25 February here in Boise at 2:00 in the afternoon

1 and 7:00 in the evening, if you're interested.
 2 But basically, as I said, this is presented
 3 for consideration and approval as a package. And
 4 I believe that, while there are parts of it that
 5 varying pieces of the processes we're not
 6 particularly in love with, I think as a package,
 7 that it's a rational, well-balanced resolution of
 8 the litigation that calls for the negotiation.
 9 Thank you, Mr. Chairman.
 10 THE CHAIRMAN: Thank you, Mr. Nelson.
 11 I might mention, too, that we were advised
 12 today that the State Affairs -- Senate State
 13 Affairs Committee plans to consider the two pieces
 14 of legislation dealing with the Public Utilities
 15 Commission this Friday. And also, Mr. Gene Grey
 16 of the Idaho Water Resources Board is here
 17 tonight.
 18 Gene, would you like to stand, please, and
 19 maybe quickly announce the schedule for your
 20 hearings on the change in the water plan?
 21 MR. GREY: Thank you, Mr. Chairman.
 22 We'll start our hearings a week from
 23 tonight -- or a week from today in Idaho Falls.
 24 It will be in Idaho Falls at 2:00 p.m., starting
 25 one meeting, 7:00 p.m. that evening the second

1 meeting. The next day we'll move to Pocatello.
 2 The day following, Wednesday, in Burley. The day
 3 following that, Twin Falls. And then the next
 4 week will be the 5th of February. There will be
 5 two meetings each day, 2:00 and 7:00. Next
 6 week -- the 5th will be in Boise. On the 6th
 7 Lewiston.
 8 THE CHAIRMAN: Thank you very much, Gene.
 9 Now, before we proceed with our witnesses,
 10 are there any additional questions that our
 11 committee members have of the three negotiators?
 12 Okay. If not, our first scheduled witness
 13 this evening is Marjorie Hayes from the Idaho
 14 Consumer Affairs, a group, followed by Sherl
 15 Chapman of the Idaho Water Users Association, then
 16 by Harold Miles of the Idaho Consumer Affairs and
 17 Wild Life Federation and Audubon Society.
 18 Mrs. Hayes?
 19 MRS. HAYES: Mr. Chairman, ladies and
 20 gentlemen, I appeared before you last year on this
 21 issue, and was the next to the last to be heard.
 22 This gave me time to hear Mr. Perry Swisher of the
 23 Idaho Public Utilities Commission as he gave his
 24 impassioned appeal to this body not to get into
 25 this Pandora's box because of the legal

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1 ramifications that would ensue from a taking of a
2 water right from the Idaho Power Company. He
3 warned that a circuit court judge in San Francisco
4 would be making the determination upon the subject
5 about which he had very little knowledge. That
6 judge would be determining the future of our water
7 in Idaho.

8 After he left, the lawyer who had earlier
9 identified himself as the legal counsel for a
10 group of irrigators called out that Mr. Swisher
11 did not know anything about water. And this was
12 picked up and repeated all around the room.

13 THE CHAIRMAN: Mrs. Hayes, if I might ask
14 you to please hold your testimony to the
15 legislation and the issues in question, please.

16 MRS. HAYES: I'm getting to it.

17 I couldn't quite believe my ears, for water
18 is the base of our hydroelectric system in Idaho.
19 And Mr. Swisher is one of our three commissioners
20 on energy. To show his ability to assess a
21 problem, we now only have to look at a case that
22 is on file at the Public Utilities Commission. A
23 declaratory order there is awaiting the outcome of
24 this legislative session. It states, "regarding
25 the agreement dated October 25th, 1984, among the

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1 State of Idaho, by and through the Governor Johnny
2 Evans, in his official capacity as Governor, Jim
3 Jones in his official capacity as Attorney General
4 in the State of Idaho and the Idaho Power Company,
5 it would appear that the Idaho Power Company
6 officials are putting on public notice that any
7 effect upon the Idaho Power Company's
8 hydrogeneration, by this process, will not be
9 grounds for a finding or an order reducing Idaho
10 Power Company's present or future --

11 (Testimony cuts off on recording.)

12 MR. CHAPMAN: Members of the audience, for
13 the record, my name is Sherl Chapman. I'm
14 executive director of the Idaho Water Users
15 Association. Our organization represents some 154
16 irrigation districts and canal companies across
17 the state. We are in place. We have existing
18 vested water rights. And in many cases, those
19 water users have a great deal to gain, and a great
20 deal to lose with the initiation of the negotiated
21 settlement.

22 However, at our annual convention that we
23 just held here in Boise, we held long discussions
24 on these issues on the negotiated settlement and
25 on the legislation that goes with it. And with

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1 the exception of a few of our members, voted to
2 support the negotiated settlement and the
3 legislation that goes with it. The two bills
4 before you tonight are part of that negotiated
5 settlement. And we do support them in total and
6 as they are at the present time.

7 It's our feeling that it's time to settle
8 the controversy. As you well know, I fought long
9 and hard for the last couple of years. The Idaho
10 Power and I went head to head in many committee
11 meetings such as this. But we feel that the
12 agreement as it's established now is the best
13 answer for both Idaho Power and our water users.

14 We've heard a great deal of criticism
15 immediately upon initiation and announcement of
16 the negotiated settlement that it would cost the
17 ratepayers some \$52 million, or that fish and
18 wildlife values were not adequately protected.
19 But we think that this is merely a way of trying
20 to stop the negotiated settlement, and keep us
21 from doing anything for the next 10 or 15 years.

22 For those of you not familiar with the panel
23 report that talked about \$52 million increase, I
24 would suggest that you take a look at that. I
25 would also suggest that you read another analysis

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1 of the Hamilton report, which is entitled Comments
2 on an Investigation Into the Economic Impacts of
3 Subordinating the Swan Falls Hydroelectric Water
4 Right to Upstream Irrigation, which was put
5 together by a Brian McGrath, assistant professor
6 of economics at Boise State University.

7 Therein, Mr. McGrath goes through much the
8 same exercise as was done on the first study, and
9 comes out with a 29 and a half million dollar cost
10 of lost electricity or additional consumption with
11 a \$78 million return to the economy. I don't want
12 to get into the details of that, but I would
13 suggest that you read it if you have the time. We
14 have copies of it available if you would like to
15 see it. I'd be more than happy to furnish it.

16 Senate Bill 1008 in particular is the real
17 heart, I think, of the negotiated settlement.
18 It's also the bill which I personally had the most
19 problem with initially, the establishment of new
20 criteria for the approval of water rights. The
21 idea of going back and reviewing existing permits
22 or existing applications in light of that new
23 criteria gave me some problem. Additionally, I
24 had some concerns over how the new criteria would
25 be interpreted.

5 (Pages 17 to 20)

1 We all are reluctant to give a lot of power
2 or interpretation to a single man when we don't
3 know how that's going to be accomplished. We now
4 feel quite comfortable with the bill and do urge
5 its approval.

6 The bill in itself establishes a trust
7 mechanism to allow water to be appropriated, even
8 though it is subordinated down to a minimum flow
9 of 3,900 cubic feet per second in the summer time
10 and 5600 CFS in the wintertime. The water below
11 3900 in the summer and 56 in the winter is still
12 unsubordinated. Therefore, even if the state
13 decides that it's going to change its policy on
14 minimum stream flow and not call for the water
15 right, for example, in a drought year, or decides
16 that it's going to move it downward, the power
17 company still has the right to demand that water,
18 and maintain at least 3,900 CFS in the river
19 during the summer months.

20 We feel that that is appropriate, that it
21 does give protection to our hydropower base. And
22 it does give protection to fish and wildlife
23 values as well. That water over and above the
24 3900, which is about 600 CFS, will be parceled out
25 in accordance with the additional criteria. And

1 that additional criteria will allow the state to
2 determine which projects are best, which are most
3 viable, and which are in the public interest, and
4 approve those permits while watching to make sure
5 that we don't have some fly-by-night or
6 speculative-type projects that don't have much of
7 a chance of succeeding.

8 The local public interest is still retained
9 in the law. And that allows additional protest
10 authority and protest capabilities if there's
11 concern over aesthetics or fish and wildlife
12 values, or if it's felt that it is not, in fact,
13 in the public interest to initiate some sort of
14 project.

15 The section 6 in the legislation, while not
16 absolutely necessary to solve the Swan Falls water
17 right controversy -- this is section 6, under
18 section 3. That's not absolutely necessary to
19 solve this controversy, but it's a mechanism to
20 keep us out of this kind of war in the future. It
21 allows subordination of future water right permits
22 for hydropower. And also allows the department --
23 excuse me, the Water Resources to issue term
24 permits so that low head and small hydropower
25 projects can be amortized before they are

1 subordinated.

2 As I say, criticism has been leveled at
3 these new so-called public interest criteria,
4 because they don't specifically include fish and
5 wildlife values. We would submit that it's not
6 necessary. First of all, you have of the local
7 public interest criteria. Then secondly, if you
8 look at items 1 and 4 under the new criteria, it
9 says that "the director of the Department of Water
10 Resources must take into account the potential
11 benefits, both direct and indirect." And under 4,
12 "the promotion of full economic and multiple use
13 development." Those in themselves allow the
14 consideration of fish and wildlife values,
15 aesthetics and other areas.

16 If we start looking at this piece of
17 legislation in deciding what all is in the public
18 interest, you'll have a list 20 pages long. We
19 don't want to get into that kind of Pandora's box.

20 Additionally, it's important to realize that
21 the 3300 CFS that was established under the
22 original water plan minimum flow was for
23 hydropower and fish and wildlife values. I was
24 involved in the development of that number. And I
25 remember many of the discussions relating to fish

1 and wildlife.

2 The additional 600 CFS does not sound like a
3 large number. But you have to stop and think that
4 that's 270,000 gallons per minute of additional
5 flow in the Snake River. And that's a lot of
6 water.

7 Lastly, section 4 is the section that
8 provides the ability of the Department of Water
9 Resources to go back and look at existing
10 applications on file to assure that they meet
11 these criteria, and that they are in the best
12 interest of the state.

13 Mr. Chairman, members of the committee, we
14 would urge you to act favorably on these bills.
15 Thank you.

16 THE CHAIRMAN: Thank you, Mr. Chapman.
17 Are there questions of Mr. Chapman?
18 Great job there, Sherl.

19 MR. CHAPMAN: Thank you, Mr. Chairman.

20 THE CHAIRMAN: Thank you very much.
21 Now Mr. Harold Miles. And Harold will be
22 followed by Ben Cavaness.

23 MR. MILES: Mr. Chairman, I gave to the
24 Sergeant of Arms copies of all this for everybody.
25 And hopefully they got it, but here are some

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1 extras just in case.
 2 THE CHAIRMAN: Okay. Fine. The main thing
 3 is our good secretary has a copy.
 4 Bev, would you pass a couple of those back
 5 here, please?
 6 MR. MILES: Mr. Chairman, and members of the
 7 committee, and members of the audience, my name is
 8 Harold T. Miles, residing at 316 15th Avenue,
 9 South Nampa, Idaho, and I am representing the
 10 Golden Eagle Chapter of the National Audubon
 11 Society and Idaho Wildlife Federation --
 12 national -- of the National Wildlife Federation.
 13 I won't be representing Idaho Consumer Affairs
 14 'cause Mrs. Hayes showed up. I thought she was
 15 out of town, so she (unintelligible).
 16 UNIDENTIFIED VOICE: They give you two a lot
 17 of latitude, don't they?
 18 MR. MILES: I guess I lost my place.
 19 Anyway, at this hearing concerning Senate
 20 Bill 1006 and Senate Bill 1008 in particular,
 21 consequently, we wish to submit the following
 22 changes and comments to these proposed pieces of
 23 legislation. But first, thank this committee for
 24 allowing us to present testimony concerning our
 25 views regarding --

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1 (Testimony cuts off on recording.)
 2 THE CHAIRMAN: Thank you very much.
 3 MR. MILES: I've been called worse than
 4 that, Mr. Chairman.
 5 THE CHAIRMAN: I get called a lot of things
 6 too. And your name is easy to spell and
 7 pronounce.
 8 Mr. Ben Cavaness. Ben will be followed by
 9 Fred Stewart, and then Forrest Hymas.
 10 MR. CAVANESS: Try to get so I can look at
 11 the committee.
 12 My name's Ben Cavaness. And I'm an attorney
 13 for American Falls. And I spoke a number of times
 14 before both of these committees last year on a
 15 subordination question. Appearing here this
 16 evening on my own simply to give you my ideas as
 17 to what I think of the two bills that you have
 18 pending before you this evening, Senate Bill 1006
 19 and Senate Bill 1008.
 20 I believe that the first bill, Senate Bill
 21 1006 is relatively noncontroversial if there can
 22 be such a thing when it comes to legislation of
 23 this nature in that it simply legitimizes what the
 24 director has already been doing with regards to
 25 holding out the issuance of pending applications,

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1 pending insurance that there is water available
 2 for appropriation, which it's not difficult to
 3 determine in view of the claims of the Idaho Power
 4 company in the last several years, and especially
 5 since the 1982 decision.
 6 As far as I know, again, as Sherl has
 7 addressed you earlier relative to the members of
 8 his association, the water users in my area have
 9 no objection to this legislation other than I
 10 would hope that Ken would have the audacity to at
 11 least proceed at sometime in the future and not
 12 hold a moratorium on forever.
 13 The only -- the other comment that I would
 14 have with regard to Senate Bill 1008, which is the
 15 most controversial of the two that you're facing
 16 this evening is that -- and to address the two
 17 factors that are primarily new in the legislation,
 18 and that is the public interest criteria addition,
 19 and also the public trust that was -- was
 20 established in the legislation.
 21 The concern that the director had and we had
 22 to resolve in the negotiation process was how do
 23 we circumvent, if you want to say -- use that
 24 word, the constitution, which says that "the right
 25 to divert and appropriate the unappropriated

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1 waters of the state will never be denied." And
 2 that that would allow the first person, regardless
 3 of how beneficial this development was to the
 4 state, to develop, regardless of a later
 5 development that would be more beneficial.
 6 Since the issue of subordination has been
 7 resolved and we are using that as the basis of
 8 adding additional criteria for the presently
 9 undeveloped permits. And what this is is the
 10 director was given a set of criteria which is
 11 listed in the bill on the new 42-203(c) section
 12 that was added to add public interest criteria and
 13 balance the interest that -- the benefits that
 14 would accrue for the state versus the costs that
 15 would accrue for the state in allowing the
 16 development to proceed.
 17 Additionally, the bill would establish a
 18 public trust for the unappropriated water for the
 19 surplus waters of the state at this time, pending
 20 these waters being applied to a beneficial use in
 21 accordance with the newly developed criteria.
 22 As a water user and an attorney who works
 23 extensively in the water area, I feel that the
 24 overall settlement package is a fair one for all
 25 concerned, and as fairly as is possible,

7 (Pages 25 to 28)

1 reconciles the competing and conflicting uses for
 2 our very limited resource of water in this state
 3 in the most equitable fashion as possible. I
 4 commend both bills to you, and ask for your
 5 favorable passage and reporting out of them.
 6 Thank you. I will stand for questions.
 7 THE CHAIRMAN: Thank you, Mr. Cavaness.
 8 Are there questions?
 9 If not, we appreciate you coming here to
 10 testify.
 11 And I might point out too, someone advised
 12 me that Governor Evans is absent from the state
 13 tonight. So we have here with us tonight the
 14 Governor of the State of Idaho, Mr. David LeRoy,
 15 on the job 8:00 o'clock in the evening. It's a
 16 rare event when the Governor shows up to a
 17 legislative hearing.
 18 Do you have any comments that you want to
 19 make here, Dave?
 20 GOVERNOR LeROY: I'm excited to listen
 21 tonight. I understand that this evening's
 22 proceedings are going to be a lot more
 23 entertaining than this afternoon's inaugural
 24 parade.
 25 THE CHAIRMAN: Yes, I suspect that's true.

1 Okay. Mr. Fred Stewart. Fred, you have
 2 established a record at these committee hearings,
 3 too, so we're going to want you to be on your
 4 quick toes tonight.
 5 MR. STEWART: Thank you, Mr. Chairman. I
 6 find myself at these hearings (unintelligible)
 7 been five minutes long from the other hearing,
 8 which is a little more lengthy.
 9 Mr. Chairman, members of the committee,
 10 ladies and gentlemen of the legislature, I come
 11 with an entire opposite viewpoint of the prior
 12 speakers. It is in complete contradiction to what
 13 Mr. Kole said where he said that this will protect
 14 the Idaho waters from being taken over, primarily
 15 California. I submit that this sets up the
 16 vehicle to take our water to California. Is that
 17 Mr. Costello said it was a balance between the
 18 two -- one development and the other's chief Idaho
 19 Power. I submit to you there's a third
 20 alternative. And that is the exporting the water
 21 to California.
 22 Now, in 1963, after the US Supreme Court
 23 ordered half of California to adjudicate its right
 24 to Arizona, there was all kinds of water plans
 25 that was put on the market, so to speak, and to

1 take Idaho water to California, and that the
 2 population of Idaho got so excited, that Governor
 3 Smiley (phonetic) in 1964 called an extraordinary
 4 session. That's all the members of the House and
 5 all the members of the Senate. And it was such an
 6 issue that the whole state was upset about it.
 7 They were going to lose their water to California.
 8 So they called an extraordinary session. Now,
 9 that's quite an event.
 10 Now, today, there doesn't seem to be any
 11 concern about water going to California. And
 12 that's amazing to me, because it's the old wolf
 13 story that all sudden the wolf's at the door and
 14 people are recognizing it. But Senator Church at
 15 the time recognized the danger of the planning,
 16 and so he, along with some of the senators from
 17 Washington and Oregon, got a 20-year moratorium.
 18 It was actually a ten-year starting in '68. And
 19 in '78 came a ten-year extension of the
 20 moratorium. This last year, the representatives
 21 from California put a bill in to the congress
 22 there that they terminate that moratorium now.
 23 Now, that should be soothing to people.
 24 That's a fact.
 25 In 1977, the City of L.A. passed a

1 resolution and sent to congress demanding that
 2 they pass the Snake River water now. It's at this
 3 special legislative session that Governor Smiley
 4 called, they created the State Water Barter -- set
 5 the steps to create the State Water Barter. It
 6 was created by initiative. It was 10 years later
 7 they came out with their State Water Plan, 1976.
 8 And I first became aware of it in that article
 9 (unintelligible) messengered by Senator Reid
 10 Budge.
 11 And I know I can't quote it exactly, but
 12 correct me if I'm wrong, Senator Budge. It's the
 13 effect that ten years prior to then needed to
 14 upgrade the State Water Board, and charged them to
 15 protect Idaho water. Now, when they received the
 16 State Water Plan Part 2 that was adopted by the
 17 Board in December 1976 and (unintelligible) in
 18 January of '77, that they had done diametrically
 19 opposite, that they had provided the tools whereby
 20 we could lose all of Idaho's water. And the whole
 21 legislation felt the same thing.
 22 So they passed HB14, which gave them their
 23 legislative overview of the State Water Plan. And
 24 Senator Budge for the Senate and the
 25 Representative Chatburn for the representative of

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1 the House, when all of the state got input, the
 2 input was just the same as the legislature felt,
 3 that it was the worst thing that hit the State of
 4 Idaho.
 5 And so in the legislative session in 1978,
 6 they spent the whole session correcting that State
 7 Water Plan. Now they studied the policy, and the
 8 committee chairman, Mr. Chatburn, appointed a
 9 committee chairman for each of the policy. And at
 10 the end of the legislative session, they met, the
 11 House and the Senate together. And the chairman
 12 of each of the subcommittee got up and presented
 13 these policies. And they voted, the conjoined
 14 House, and passed it. And they thought that they
 15 had something to protect Idaho water. But low and
 16 behold, all of a sudden you've got a lawsuit by
 17 Idaho Power that's back again. It's the
 18 signatures for the petition to the IPUC, which is
 19 known as Swan Falls 1.
 20 Now, Swan Falls 1 has two parts to it. And
 21 I don't want you to mistaken Swan Falls 1 for Swan
 22 Falls 2 and the second part of Swan Falls 1 for
 23 the Swan Falls 2. The first part of Swan Falls 1
 24 addressed the flow of the water over Swan Falls.
 25 Everybody who played with that attracted the

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1 attention of the world.
 2 The second part of Swan Falls 2 -- that's
 3 why I say the second part, because the two parts
 4 were handled in court at separate times. Said --
 5 and this is part of the complaint, said that the
 6 state lawyers plan proposed to build a high-head
 7 dam, the shoestring band just above King Hill, and
 8 that this dam would undulate for their power
 9 plant. That they recognized the power of the
 10 Water Board to do this, and that they wouldn't
 11 oppose this. But by the law of eminent domain,
 12 that they wanted to be paid for those power
 13 plants. And I don't believe anybody disagreed to
 14 that.
 15 But -- and this is a big important thing.
 16 They said that if the State Water Board has the
 17 power to do that, then they had all inclusive
 18 power, and so therefore, HB14 that gave the
 19 legislative overview which they had utilized to
 20 correct these things that they found as a whole
 21 body wrong was unconstitutional.
 22 Now, those two went into court separately.
 23 Swan Falls 1 was attended by -- I don't know how
 24 many lawyers they consolidated to -- I know
 25 Senator Ringert there was there, and quite a few

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1 lawyers there. Swan Falls 2, when it went to
 2 court -- and it would have not gone to court if I
 3 hadn't called a meeting in Wayne Wellis'
 4 (phonetic) House -- we all know who Wayne Wellis
 5 was. And we had all of this legislature that sits
 6 right here at that meeting. And the upshot of all
 7 of it was is the speaker of the House, Alan
 8 Morrison, came down and insisted the attorney
 9 general to file in his name and the president
 10 (unintelligible) Senate, Phil Batsname (phonetic)
 11 against this. Now, if we hadn't have done that,
 12 no one would have appeared on it.
 13 So the day came in court. And Idaho Power
 14 wasn't even mentioned in the proceeding. And that
 15 was amazing to me. I'm not smart enough, maybe,
 16 to understand why they didn't bring Idaho Power
 17 in. When they came into court, it was Idaho Water
 18 Resource Board against the resource agency and the
 19 legislature. And the resource board, being
 20 represented by Phil Barber out of the law firm of
 21 Eva and Jedson Evans and Boyd (phonetic), and the
 22 legislature by Josephine Demen (phonetic).
 23 Josephine Demen, all she took in was Wayne
 24 Skidwall (phonetic), whose attorney general's
 25 opinion in 1814 interjected between the word

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1 formulate and implement, which created the Safe
 2 Water Board's word adopted by the legislature.
 3 Phil Barber brought in half of the pickup
 4 post. The District Court ruled against the
 5 legislature. They wanted to kill it. I got ahold
 6 of Wayne Wellis. He came up and met with Senator
 7 Budge and said you can't kill it. She didn't have
 8 anything to begin with. So they directed her to
 9 get more information. And she did. She got a
 10 whole bunch of affidavits from the legislature
 11 that said this was her intent. They had
 12 legislature. But primarily in her brief, she
 13 submitted a brief from Professor Peterson who
 14 worked with the legislature at the time. The
 15 preamble history said that the legislature should
 16 have the overview there. But the conclusionary
 17 remarks said in as much as it's created by
 18 constitutional amendment, that the legislature did
 19 not have.
 20 Now, the day in court came where Phil Barber
 21 got up and said for some reason he could call a
 22 mistrial, but he wouldn't. But he used counsel's
 23 brief. And he turned to the conclusionary remark
 24 and read it. And she was very amazed at it. But
 25 anyway, the judge in the District Court ruled

9 (Pages 33 to 36)

1 against them. It went up to the Appellate Court.
2 The Appellate Court ruled against them. So
3 everything that these two bodies did for what
4 whole year 1978 was thrown out the window.

5 Now, the state lawyer claims it stands and
6 just as it was adopted with these things in there.
7 Now, one of the -- is policy 4 in there, which
8 qualified -- and those that have this handout --
9 and Mr. Winchester, there's a bunch of those
10 handouts there you might hand around that don't
11 have -- is that code 542245 say there's a file
12 claim where any person may relinquish his right,
13 "Any person claiming the right to divert or
14 withdraw and use waters of the state can fail to
15 file a claim provided in section 42243 Idaho code
16 should be conclusively deemed to have waived and
17 relinquished any right, title and interest in said
18 right." Now there's some sort of protection in
19 that, the legislature did, but the protection they
20 put in was thrown out.

21 Now, we've got a condition right here now is
22 they gave people until June 30th, 1983 to file.
23 It was extended to June 30, 1984. It's now
24 extended to June 30th, 1985. Now, the director of
25 the water resource Ken Dunn (phonetic) says that

1 he'll start adjudication on July 1st. Now, that's
2 got to be spooky, because they say that there's
3 somewhere between 20,000 and 2,000 people out
4 there who should have filed claims who haven't
5 filed claims. Now, that's got (unintelligible).

6 Now, we think we've seen a lawsuit before on
7 this Swan Falls 2. We haven't seen anything. And
8 my mention about Swan Falls 2, the minute this
9 agreement was signed, they released everybody who
10 had up to December of '82. And they had to
11 release them. They never should have been
12 enjoined in the first place. And the reason why
13 is that their license on Swan Falls expired in
14 1970. It was issued in 1920. 50-year license.
15 That's the maximum that the FPC, which was then,
16 which is now the first FLR seen condition. They
17 did not receive another license until December of
18 1982. So anybody who had license, whatever, up
19 until then, should never have been enjoined. And
20 they enjoined them only for one thing, and that's
21 to creat this great payoff that we've seen the
22 last two years up here. It's been the one
23 consumptive users against the people who
24 considerably desire a cheaper deal, the cheaper
25 hydro (phonetic).

1 And therefore I say we have a third
2 alternative, which I claim completes the very last
3 part of my dissertation is that we're going to
4 lose this water to California. And I'd like to go
5 through a little bit the town. Over there, if
6 everybody can see (unintelligible) those are half.
7 The Supreme -- the District Court in Swan Falls
8 1 -- that's the first part of Swan Falls 1 -- said
9 that the whole system was subordinated, starting
10 at the Lower Hills Canyon and clear on up through
11 their whole (unintelligible) private system.

12 Now, Senator Reid and some of the other
13 lawyers there had said that even if Swan Falls 1
14 was not subordinated, that they had lost their
15 right to (unintelligible) whatsoever. The
16 District Court said that's a moot question,
17 because I'd subordinate the whole thing. When it
18 got to the Supreme Court, the Supreme Court
19 affirmed the District Court on the three lower
20 dams. That's the Brownlee, the Oxfall (phonetic)
21 and Lower Hills Canyon Dam.

22 Now, the three of them generate 19,345,000
23 KW. The rest of this hydrosystem 446 KW. They
24 reversed this decision on Swan Falls. They said
25 that Swan Falls was not subordinated. They

1 remanded back to the Court the issue of loss by
2 forfeiture and so forth. Now that's never gone
3 back into court. In fact, this agreement said
4 that they would put a stay in motion on that,
5 which they did. Billed seven days after the end
6 of this legislative session, and that they would
7 also put a stay in motion on Swan Falls 2, which
8 is the action against the 7,000.

9 I want to point out once again that 90
10 percent, near as I can figure out, of the
11 defendants on Swan Falls 2 have been released.
12 They never should have been enjoined, and they've
13 been released now. Now, there's a lot of the
14 legislature who didn't realize that, but they had
15 been released. A lot of them don't know it
16 because they've joint different organizations and
17 things, retired lawyers. And I got entered into
18 the Swan Falls 1, Swan Falls 2 (unintelligible),
19 so I get all the materials there. And it shows
20 the releases by the names and by the volume
21 numbers. And anybody that needs to know that
22 should get ahold of their lawyers, or else,
23 perhaps, come over, whoever.

24 Is that -- so what you got now, you got a
25 situation that the water is forced down through

1 Swan Falls. But with the exception of the 4700
2 CFS, which is provided at a minimum stream flow at
3 the Weiser Gauging Station, which is above the
4 back waters of the Brownlee, is that if California
5 was to come in -- which I submit they will.

6 And in the handout I've got, I've submitted
7 the plat of what's known as the Dunn plan, or the
8 modified Snake Colorado Plan that came out in
9 1965. And it pumps the water out of the back
10 waters of the Brownlee, and takes on down to Lake
11 Mead, with an aqueduct going over to Oyum's River
12 Valley, which you all know was dried up in 1930 by
13 L.A. (unintelligible). And they devastated that
14 valley. All the towns that was there basically
15 are an exempt (unintelligible) stayed there
16 (unintelligible) is that the subordination
17 thoughts that be subordinated to any future
18 upstream consumptive use.

19 I've approached one of the US attorneys on
20 that. Raised the question there's water coming
21 out the back waters of Brownlee. They go into
22 California, meet that criteria. Certainly, it's
23 just the same as the waters coming out of the back
24 waters of the McInary (phonetic) Diversion
25 Reservoir and going down to Castleford, just maybe

1 another thousand miles further than Castleford,
2 but it's the same thing.

3 In the contract -- and those that have the
4 papers that the Water Resource put out, you might
5 turn to page -- page 4, second column, and right
6 at the bottom of the second column there, is that
7 if the legislature has the contract itself -- it's
8 also page 4, and E there. And I'd like to read
9 it. It says, "(unintelligible) a bill," that's,
10 of course, out of our company's ability, "to
11 purchase, lease, own or otherwise acquire water
12 from sources upstream of its power plants, then
13 convey it to and past its power plants below the
14 river and the dam, shall not be limited by this
15 agreement. Such flow shall be considered
16 fluctuations resulting from operation accompanied
17 facilities."

18 Then drop back down to the paragraph just
19 above C there. It says, "any fluctuations
20 resulting from the operation of a company, per
21 say, shall not be considered in the calculations
22 of the minimum stream flow set forth herein.

23 Now, what this sets up is, if on July 1st
24 these 20 to 200,000 people haven't filed, their
25 water's gone. Just didn't listen. Now, the

1 legislature corrected that. But their HB14 that
2 due to the Idaho Power lawsuit, that's thrown out
3 the window. There is no protection.

4 Now, just like you, I set my cruise control
5 the last few trips between here and Jerome at 55.
6 Man, everybody passes me on the road. Now,
7 everybody recognizes that that was the law passed.
8 That isn't an enforceable kind of law.

9 This is a law that was passed, whether by
10 design or by accident, that on June 30th, we're
11 going to have this thing devastated. Anywhere
12 from 20 to 200,000 people who have an easement
13 receive claimjumper claim for this loss. The
14 director will have to shut it off. Now, when the
15 director said it might have taken 10 years to
16 adjudicate, I say it might take a month, because
17 everybody has had to record their rights, so it's
18 set up on the computer. When Idaho Power got
19 ready to file Swan Falls 2, they just went to the
20 District -- to there and got the computer readout
21 and took everything from 1950 up there. And it
22 was really easy. And they can do just the same
23 thing.

24 Now, California, everybody knows they want
25 the water. They're going to lose their water.

1 And the -- Dr. Bloomsberg (phonetic) testified at
2 the Water Users Association meeting the other day
3 that -- (unintelligible) not Dr. Bloomsberg.
4 Anyways, the head of the Water Reclamation
5 testified that the Central Arizona project would
6 be completed next year.

7 Now, next year, when they take the water out
8 of the Colorado that's been going to California,
9 now, they're a powerful company. They got 18
10 million people in Southern California. Is the
11 power structure down there, lies within 20
12 corporation -- there's a book there that's less
13 than 10 years old put out by Ralph Nader. It
14 shows where about two, three dozen big
15 corporations control most of the water in
16 California. They paid 30 some dollars a year per
17 share. And they're subsidized by taxpayers -- 130
18 (unintelligible). The biggest of these being the
19 Southern Pacific Railroad. Is that the Southern
20 Pacific Railroad, Bectel Engineers, Wells Fargo,
21 Stanford University, they're all one in the same.
22 When the Transcontinental Railroad went across the
23 United States, the Union Pacific came west, the
24 Central went east. The Central was started by an
25 engineer, a good honest man, but four high buyers

1 stepped in and ultimately took it over, leaving
 2 Stanford --
 3 THE CHAIRMAN: Fred -- Mr. Stewart, I'm
 4 going to have to ask you to wrap this up fairly
 5 soon.
 6 MR. STEWART: All right.
 7 THE CHAIRMAN: We're flying 20 minutes into
 8 your testimony now and --
 9 MR. STEWART: That leaves me 10 minutes,
 10 right? You told me 30 minutes.
 11 THE CHAIRMAN: Hurry right along, you'll
 12 make it in 30 minutes.
 13 MR. STEWART: All right.
 14 But anyway, then they put their Central --
 15 or the Southern Pacific down through California,
 16 and they got a tremendous lot of ground given to
 17 them by the government. They were supposed to
 18 divest it in three years and they didn't.
 19 Now, the water that went out of Orange River
 20 Valley did not go to the City of L.A. It went to
 21 the desert. And it made these guys, Central --
 22 the Southern Pacific, Bectel billions of dollars.
 23 Now, Arizona and California can use every drop of
 24 water from Idaho. And in the bill, Idaho Power
 25 can purchase, lease, own or otherwise acquire.

1 When these people lose their water, the 2 -- 20 to
 2 200,000, who's going to get that water? Even if
 3 they don't buy it, it's got to flow down the
 4 stream. But it does not have to flow through
 5 those three lower dams.
 6 Now, just a year ago, the Corp of
 7 Engineers -- and that was testified at the Water
 8 Users by Dean Heller at the US Core of
 9 Engineers -- up until a couple years ago, the
 10 Walla Walla district and the Corp of Engineers had
 11 the form area, the back waters of the Brownlee. A
 12 year or two ago, they transferred the west side of
 13 that to the Corp of Engineers in Sacramento,
 14 California. And you couple that to the -- they're
 15 wanting to get the termination the memorandum, the
 16 resolution they sent to Congress to put the Snake
 17 River down, the tremendous power they have, the
 18 Secretary of State Sherl, Secretary of State
 19 Blinberg (phonetic), right out of Bectel
 20 Engineers, who's one in the same Southern
 21 Pacific -- they were the great power that helped
 22 put President Reagan in. And I voted for him and
 23 am for him.
 24 But ladies and gentlemen, I think we stand
 25 on the threshold of being devastated. To those of

1 you who have gone down to Bishop, California, in
 2 1930 that was a beautiful valley, 120 miles long,
 3 24 miles. The same people that took that water
 4 out of there devastated it. The towns all
 5 disappeared (unintelligible). The turn of the
 6 century, we were a desert. Now it's that same
 7 group. And who they've used to implement it is
 8 immaterial.
 9 But anybody is to mesmerize the whole
 10 state -- this action, Swan Falls 2 is to mesmerize
 11 the state where they were so excited and called a
 12 special session. Then why are we mesmerized
 13 today? Why can't we think that this is what they
 14 gonna. And if anybody can show me a fault in how
 15 they're going to get that, I'd appreciate them
 16 doing it. Anybody, any time, please approach me
 17 and show me.
 18 And I conclude my remarks with that, except
 19 for one thing. My advise on this agreement is to
 20 throw it in the trash can where I think it
 21 belongs. Purchase Swan Falls to eminent domain.
 22 Now, the last two, three years what they've been
 23 saying is subordinate Swan Falls. And there's a
 24 world of difference. I've heard testimony that
 25 that is repelling to a lot of people,

1 subordination, because that takes without paying.
 2 But the power of eminent domain -- and that's only
 3 a 12,000 KW dam. Again, it's almost 2 million KW,
 4 the whole system.
 5 Now, eminent domain is used -- about how
 6 much goes here and how much there, perhaps using
 7 the same formula as Mr. Costello used. But it
 8 will not go to California, because when it goes to
 9 California, the power users aren't going to get
 10 it. And the water users aren't going to get it.
 11 But let me tell you, the multibillionaires in
 12 California and Arizona, they're going to make more
 13 multibillions.
 14 And I thank you, Mr. Chairman.
 15 THE CHAIRMAN: Thank you, Fred, very much.
 16 Are there questions of Mr. Stewart?
 17 Senator Horsch.
 18 SENATOR HORSCH: Mr. Stewart?
 19 THE CHAIRMAN: Mr. Stewart, Senator Horsch
 20 has a question.
 21 MR. STEWART: Mr. Chairman, Senator Horsch.
 22 SENATOR HORSCH: Mr. Stewart, is your
 23 problem, then, with this 30-minute oration that
 24 you've given us -- and I appreciate the work
 25 you've put into it, and the history or lesson that

1 you've given us.

2 Is your problem a philosophical problem, or
3 have you read the agreement, and read the six
4 pieces of legislation, and actually could give us
5 a problem with what we have in front much as
6 tonight, 1006 and a 1008?

7 Can you shoot holes in those two pieces of
8 legislation? Or what you're basically saying is
9 you, philosophically, have a problem with the
10 agreement and think we ought to buy the dam?

11 MR. STEWART: Yes, (unintelligible)
12 Mr. Chairman, Senator, I'd like to expound that as
13 the Chairman will allow us to. I'd like to start
14 out with Senate Bill 1005, if I may. And that's
15 an acceptance of the agreement. And of course, I
16 spoke for one half hour to that.

17 But the bottom half of that speaks to the
18 Public Utility Commission. Part of this enabling
19 action says, that Mr. Nelson referred to, states
20 that "the Public Utility Commission will never,
21 from now on, until time in eternity" -- and I'll
22 read it to you -- section 2 of 1005, "Public
23 Utility Commission jurisdiction. The Idaho Public
24 Utility Commission shall have no jurisdiction to
25 consider in any proceedings, whether instituted

1 before or after the effective date of this act,
2 any issue as to whether any electric utility,
3 including Idaho Power Company, should have or
4 could have preserved, maintained, or protected its
5 water rights and hydroelectric generation in a
6 manner inconsistent with the contract entered into
7 by the governor" --

8 SENATOR HORSCH: Mr. Chairman?

9 THE CHAIRMAN: Yes.

10 SENATOR HORSCH: Mr. Chairman, in the effort
11 of expediency, Fred, if you would give me and the
12 Chairman and the rest of the committee members
13 from both the House and the Senate a section by
14 section of -- I can tell you've read the bills,
15 you've read the agreement. If you would go
16 through that and, in your time sometime in the
17 next couple weeks, and give this -- shoot holes in
18 these pieces of legislation as I can tell you're
19 going to here, rather than take the time tonight.
20 I would appreciate it.

21 MR. STEWART: Mr. Chairman, Senator, yes,
22 I'd be glad, perhaps, to speak you on an
23 individual, person-to-person basis. I'd welcome
24 that, especially if you senators and legislature
25 would say, "Mr. Stewart, I have a moment or two

1 time." It's real hard to catch you people.

2 You're going back and forth, and you're so busy.

3 And after a while, I tell you, I feel like a nut.

4 SENATOR HORSCH: Well, I tell you, you're
5 still the best legislative catcher around.

6 THE CHAIRMAN: Okay. Thank you.

7 Forrest Hymas, followed by John Hatch, and
8 Mr. Runft, and Pat Ford.

9 MR. HYMAS: Mr. Chairman, committee members
10 and guests, my name is Forrest Hymas, and I'm from
11 Jerome.

12 I'm here tonight representing the Idaho
13 Water Rights Defense Group. And this is a group
14 that was formed out of people with a general
15 common bond, because they were sued by Idaho Power
16 Company. And so we tried to form a group to
17 answer and respond to the summons as it prepared
18 for litigation. Our group is made up of business
19 people, people with recreational interests,
20 agricultural interests, industrial interests,
21 professional interests, and domestic interests.

22 Let me clarify one misconception and one
23 misunderstanding. After the negotiations were
24 signed, a lot of people felt that Idaho Power
25 released all of the people from this suit.

1 Unfortunately, they did not. And those who were
2 left in the suit realize that they'll have to live
3 by the new negotiations. However, as a group, we
4 feel it is essential that this issue be resolved
5 in this session. It has been extremely costly to
6 individuals who have been sued. And in some
7 cases, basically, financially devastating.

8 It has also had a tremendous negative
9 impact, an economic impact -- a negative economic
10 impact on our communities and our State of Idaho.
11 It's approximately 51 percent of the privately
12 held land in the state of Idaho that's affected by
13 this issue.

14 I'd like to illustrate a couple of examples.
15 In our community in Jerome, two particular issues
16 were industries that wanted to come into our
17 community during this last two years, but they
18 needed one element, and that was water. Both of
19 them happened to be in manufacturing of a product
20 which we develop and we produce in our area. One
21 of them, to my knowledge at this time, has given
22 up on coming into Idaho and into Jerome. The
23 other one is a dairy manufacturing facility. And
24 they're having a very difficult time sticking to
25 Jerome where they want to be, and acquiring an

1 adequate amount of land and an assured abundance
2 of water for that facility.
3 The gentleman mentioned about the facility
4 that's in Nampa that's delighted to be here
5 because of the power rate. We have some companies
6 that would like to be in our area because of an
7 abundant supply of water. The Idaho Water Rights
8 Defense Group supports the entire package as it's
9 presented to you. And specifically the ones that
10 are before you this evening, 1006, we have no
11 problem with that. In fact, we would feel that,
12 perhaps, it would be essential that the director
13 would have the authority, if he felt necessary, to
14 declare a moratorium or suspend applications.
15 Senate Bill 1008, perhaps we could nitpick
16 that to death, but we don't believe that we can at
17 this time. And we will support it. We believe
18 that the review process is logical. And we also
19 believe that the State should be the one that
20 controls the unappropriated water, and to hold it
21 in trust. And also, we do believe in a multiple
22 use development of the Snake River.
23 There's also one other alternative in there
24 that we believe is logical, and that is that if
25 somebody feels that they've been shortened by this

1 process, that they have a recourse of going to the
2 courts to settle the issue.
3 When we look realistically, as people of the
4 State of Idaho, and when we look at the
5 alternatives, this appears to be the best way to
6 solve this very complicated and emotional issue.
7 Members of the committee, I would ask for
8 your support of the Senate Bill 1006 and 1008, and
9 also for your support of the entire legislative
10 package when you review it. Thank you.
11 Are there any questions?
12 THE CHAIRMAN: Thank you, Mr. Hymas.
13 Are there any questions?
14 Senator Horsch?
15 SENATOR HORSCH: Mr. Chairman, Forrest, I'm
16 sure full well that you and the Water Rights
17 Defense people have analyzed this piece of
18 legislation -- these pieces of legislation.
19 Do you see holes in that piece of
20 legislation that bring about the fear in
21 supposedly the wolf at the door that we do not
22 recognize that water will eventually end up in
23 California?
24 THE CHAIRMAN: Mr. Hymas?
25 MR. HYMAS: Mr. Chairman, Senator Horsch,

1 are you talking specifically 1008, or all of them
2 together, or any specific one?
3 SENATOR HORSCH: Mr. Chairman, Mr. Hymas, I
4 would assume that that would be under public --
5 best public interest, probably speaking of 1008.
6 I would assume that would be where the hole would
7 be.
8 MR. HYMAS: Mr. Chairman, Senator Horsch,
9 1008 certainly carries -- counters along variety
10 of areas. And we do not see that that is a
11 problem. First of all, you have the public
12 interest criteria that we believe would protect
13 that particular area.
14 Does that answer your question?
15 SENATOR HORSCH: Yes. Thank you for your
16 input.
17 MR. HYMAS: Any other questions?
18 THE CHAIRMAN: Thank you very much.
19 MR. HYMAS: Thank you.
20 THE CHAIRMAN: Thank you, Mr. Hymas, for
21 coming here tonight.
22 Mr. Hatch from the Idaho Farm Bureau
23 Federation.
24 MR. HATCH: Mr. Chairman, members of the
25 Senate Resources Committee and guests of the House

1 Resources Committee, my name is John Hatch. I'm
2 Director of Public Affairs for the Idaho Farm
3 Bureau Federation. The Idaho Farm Bureau is a
4 private nonprofit general farm organization
5 composed of 39 county farm bureaus around the
6 state, and representing over 23,000 families in
7 Idaho.
8 The Idaho Farm Bureau has been involved in
9 this issue since its inception. Just about
10 everything that needs to be said about the
11 legislation and about the issue here tonight, by
12 this time in a hearing like this most everything
13 has been said. I don't want to prolong the
14 proceedings anymore than is necessary. This has
15 been an issue that has been very time consuming.
16 It has been very difficult for agriculture to deal
17 with. It was very difficult for them to come to
18 the point of accepting all of the elements of the
19 compromise package. It has been said that it is a
20 compromise, and that it is a package.
21 I would like to stress that again, that the
22 legislation before you is two elements of a
23 package agreement that should be viewed in all of
24 its parts as a whole, and not just taking each
25 individual piece of legislation and feeling that

1 we can look at it as a separate piece of
 2 legislation without looking at the compromise
 3 package as a whole.
 4 I would also like to stress the idea that
 5 has been stated before that it is a compromise.
 6 Compromise, of course, means that not everybody is
 7 satisfied with all elements of the package. I can
 8 vouch for this very candidly, that I would doubt
 9 that any party to the agreement is wholly
 10 satisfied with all elements of the package. That
 11 is the reason it is called a compromise. That is
 12 why it is so delicate.
 13 I would urge the committee to resist the
 14 temptation of tampering too much with the
 15 individual pieces of legislation from the desire
 16 to maybe put a stamp of legislative -- kind of a
 17 legislative stamp on the package.
 18 I would like to read the policy that was
 19 adopted at our convention. We had our
 20 convention -- state convention in December. And
 21 after a great deal of discussion and debate, and
 22 weighing all of the alternatives that were before
 23 the group, we adopted the following resolution.
 24 "We support a State of Idaho negotiated settlement
 25 with Idaho Power as a solution to the Swan Falls

1 issue. This should include a contractual
 2 agreement by Idaho Power to allow state
 3 appropriation of water for upstream development
 4 down to the statutory minimum flow of 39 cubic
 5 feet per second summer, and 5600 cubic feet per
 6 second winter at Murphy. This should also include
 7 a complete adjudication of the Snake River and its
 8 tributaries above Lewiston to be paid for by an
 9 equitable distribution of the costs among all the
 10 beneficiaries."
 11 Again, I would like to reiterate that we do
 12 support the compromise as a whole. And we would
 13 urge the legislature to look at it that way, and
 14 adopt all elements of the compromise as has been
 15 presented to them.
 16 And thank you for this opportunity to
 17 testify.
 18 THE CHAIRMAN: Thank you very much, John.
 19 Are there questions?
 20 If not, we appreciate very much your
 21 testimony.
 22 Mr. John Runft, followed by Pat Ford.
 23 MR. RUNFT: Mr. Chairman, members of the
 24 committee, my name, for the record, is John Runft.
 25 I'm a lawyer here in Boise. I represent the

1 Salmon River Hydro Company.
 2 Now, the Salmon River Hydro Company, members
 3 of the committee, consists of 27 small hydropower
 4 projects. All these projects are located on the
 5 main reaches -- or the reaches of the Main Salmon
 6 and the Little Salmon. I think for significance
 7 here, well below Swan Falls. The status of these
 8 projects, these 27 projects is that all of them
 9 have received from the Federal Energy Regulatory
 10 Commission preliminary permits or exemptions or
 11 had licenses pending. In other words, they are
 12 bonafide projects, small hydro projects which are
 13 underway. The -- all of these projects, all 27 of
 14 them, have accepted application -- have accepted
 15 applications for water permits with the
 16 Department. And many of them have had permits
 17 already granted.
 18 Now, our coming here tonight is not to
 19 attack the concept of the agreement that has been
 20 forged. Our perspective is that there have been
 21 untold hours spent by many lawyers for the
 22 Department, also for the State, and also for Idaho
 23 Power Company. In fact, if this goes on longer,
 24 this bill may become known as the Idaho Lawyer's
 25 Relief Bill, I'm sure.

1 But let me suggest that perhaps a few
 2 comments would be appropriate. And that would, of
 3 course, conform with the purpose of this hearing,
 4 would be to make some comments without destroying
 5 or attempting to destroy the fabric of the
 6 agreement that has been woven here tonight and
 7 heretofore.
 8 The fresh perspective that might come from
 9 the viewpoint of a small hydro developer on the
 10 reaches of the Salmon River could be, of course,
 11 quite different than that which would be presented
 12 by a water user on the reaches of the Snake River
 13 above Swan Falls.
 14 Now, in general, I would like to make one
 15 overall observation upon my reading of the bill,
 16 and then go from there to some specific comments
 17 about the language of the bill. Again, merely,
 18 hopefully, to, perhaps, add to the finalization of
 19 this process, which has been ongoing.
 20 I have a general impression that what we
 21 have here in Bill 1008 a hybrid that might have
 22 been better left, perhaps, in two parts. The one
 23 part, I would suggest, to take care of the --
 24 addressing the settlement that had been reached
 25 regarding the Swan Falls controversy, and perhaps

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<p>1 a second bill addressing the small hydro and other 2 uses and the permits for overall permits in the 3 state. In other words, both consumptive and 4 nonconsumptive uses throughout the state, a bill 5 regulating the granting of the water rights.</p>	<p>1 extremely broad criterion, State action. I would 2 recommend, perhaps, that consideration be given to 3 language that would say State action should be 4 specifically designated to mean Water Resource 5 Board approval with legislative revocation.</p>
<p>6 I think there are two different elements 7 here that are fundamentally attempted to be -- 8 brought together this bill. I'm not sure they 9 entirely mix at all times. On the one hand the 10 bill attempts to establish rules and procedures 11 and criteria for the issuance and handling of 12 water rights throughout the State of Idaho for all 13 sorts of uses everywhere. On the other hand, of 14 course, the (unintelligible) is made by this bill 15 to address the settlement of the Swan Falls 16 controversy which relates to only certain waters 17 in Idaho.</p>	<p>6 Going on, now, down that same page, on page 7 3, to subsection 6. This again is Senate Bill 8 1008. And let me emphasize that it is in 9 subsection 6 that my clients' principal concern 10 (unintelligible) is located. First of all, the 11 last sentence of subsection 6, which is the 12 portion that is underlined, at least in my copy, 13 reads as follows. "The director shall also have 14 the authority to limit a permit or license for 15 power purposes to specific term."</p>
<p>18 Let me now go to the specific comments 19 regarding the bill, and perhaps would ask members 20 of the committee to follow me along on these 21 specific provisions and make specific comments 22 regarding them. I only have -- so you can get a 23 feeling of timing on this. I only have nine 24 points to make. So you can follow me through. 25 Number one is on the first page of Senate</p>	<p>16 Now, the limiting of a right or a license to 17 a specific term would appear to me, at least from 18 the reading of this bill, to place in jeopardy any 19 reasonable financing of a small hydro project. 20 These projects, as many of you know, are based 21 upon a 35-year financing, and also generally have 22 a -- frequently have a 35-year contract with the 23 power company. Not only would havoc be wreaked 24 with the financing, but also, under the present 25 day Idaho Power contracts, you'd be placing in</p>
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<p>1 Bill 1008. It struck me in reading section 2 42-203(a)(2) and (3) that we've got, perhaps, here 3 an excessive notice provision, perhaps leading to 4 excessive costs, in that you already have a 5 subscription right from the Department, that is 6 any person wanting to know where these notices 7 come up, the Department can mail in the ordinary 8 mail any application that is sent in for a water 9 right to any person subscribing to the Department. 10 That's in subsection 3. Subsection 2 provides 11 that the director of the Department shall cause 12 notice to be published in a newspaper in the 13 county. Now, on top of that, then, you have a 14 statewide notice to be published, which seems to 15 me to be somewhat (unintelligible) cost.</p>	<p>1 jeopardy the developer in that he may be faced 2 with recapture -- the recapture provisions of the 3 contract.</p>
<p>16 Moving right along over to page 3 of the 17 Bill 1008, I'd like to draw your attention to 18 42-203(b) right in the middle of the page there, 19 No. 3. That's in subsection 2 there. The 20 statement sentence -- first sentence of number sub 21 3 is "water rights for power purposes not defined 22 by agreement with the State shall not be subject 23 to depletion below any applicable minimum stream 24 flow established by State action."</p>	<p>4 For example, if the term of the license went 5 out only, say, for five years or ten years, just 6 long enough for the developer to get his money 7 back his investment, and then it were terminated, 8 and he were unable to perform the recapture 9 provisions of the standard Idaho power contract, 10 would be costing a lot more money than he ever put 11 in the project in the first place. He'd be unable 12 to perform.</p>
<p>25 I would submit to you that that is an</p>	<p>13 Thirdly, there is also the possibility that 14 the FERC, Federal Energy Regulatory Commission, 15 might not grant licenses to developers if, indeed, 16 the underlying water rights were subject to terms 17 to be determined by -- at some time in the future 18 by whatever administrator were in office. 19 I think those three -- those three -- those 20 three worries that my clients have are very, very 21 serious. One, that you cannot get financing if 22 you do not have an absolute water right for a -- 23 granted to you as a developer. Secondly, that 24 your Idaho Power contract, or even possibly 25 Washington Water Power and the other companies,</p>

1 your contract would be placed in jeopardy on the
 2 recapture clause. And thirdly, that maybe even
 3 FERC would not grant your license.
 4 Now, in this same section 6, in the very
 5 first sentence, the language reads, "the director
 6 shall have the authority to subordinate the rights
 7 granted in a permit or license for power purposes
 8 to subsequent upstream beneficial depletionary
 9 uses." That's an extremely broad authority, I
 10 suggest to you, members of the committee. How is
 11 this authority to be exercised? It is done by
 12 rule making. What are the standards? What are
 13 the criteria of beneficial use?
 14 Then there's also a worry, I believe, about
 15 possibility of taking rights without due process
 16 of law. In other words, the language reads that
 17 the director shall have the authority to
 18 subordinate rights, which I presume are already
 19 existing. And if you can subordinate rights,
 20 property rights, simply by bureaucratic fiat, then
 21 you may run afoul of the due process of law
 22 requirements for anybody having a property right.
 23 Going on now to the next page of the bill,
 24 page 4, I would call your attention to section
 25 42-203(c) near the top of the page, and sub 1.

1 First sentence reads, "if an applicant intends to
 2 appropriate water which is or may be available for
 3 a preparation by a reason of a subordination
 4 condition applicable to a water right for power
 5 purposes, then the director shall consider, prior
 6 to approving the application, the criteria
 7 established in section 42-203(a) Idaho Code," and
 8 so on.
 9 I want to draw your attention to the first
 10 line of that sentence on the bill. If an
 11 application -- "if an applicant intends to
 12 appropriate water," I would suggest there that
 13 this particular type of criteria would be best
 14 applied to the upstream consumptive uses from
 15 the -- from the Swan Falls dam, and would suggest
 16 language that effect in that. That would be
 17 section 1. 402 -- 42-203(c), "if an applicant
 18 intends to appropriate water," and I suggest the
 19 language for upstream consumptive use right there
 20 as a possible constructive addition.
 21 I would like now to go through 42-203(b),
 22 which is on page 4 also. And in the first
 23 sentence of that section which reads, "the
 24 department shall review all permits." I presume
 25 that, under the statute, that, of course, means

1 all water permits. And I presume that it is
 2 limited to permits granted by the Department and
 3 the Department only.
 4 The final comments I could make regarding
 5 some of the criterion, I will go over, because I
 6 think the concern there for some of the criterion
 7 utilized in the bill, there are a number of listed
 8 criterion for a decision. One of the thoughts
 9 that occurred to me was exercising the decision --
 10 or entering decision-making process, how much
 11 value would you give to the various criterion?
 12 Which -- how would you weight them. I think
 13 there's a question there.
 14 But moving on, as I promised to do, I'd like
 15 to go through Senate Bill 1006, which is the last
 16 page. And essentially concerns --
 17 THE CHAIRMAN: Mr. Runft --
 18 MR. RUNFT: Yes.
 19 THE CHAIRMAN: -- if I might interrupt, the
 20 Senator Beitelspacher has a question for you
 21 before you leave this --
 22 MR. RUNFT: Perfect.
 23 SENATOR BEITELSPACHER: Mr. Chairman,
 24 Mr. Runft, some of your questions that you asked
 25 on No. 6 back in page 3 I asked last Friday.

1 You're not alone in your concern here.
 2 On 402-203(c), there is some concern among
 3 some of the committee members that those who have
 4 initiated this piece of legislation have been
 5 dealing with it for so long that they understand
 6 what the intent it is but that perhaps others
 7 might not.
 8 How do you read the lines 12 through 30? We
 9 were concerned as to whether or not all of those
 10 apply, whether one applied, whether one could be
 11 given greater weight than the other.
 12 Do you see anything there that needs to be
 13 clarified?
 14 MR. RUNFT: You're on page --
 15 SENATOR BEITELSPACHER: I'm sorry, page 4.
 16 MR. RUNFT: 42-203(c)?
 17 SENATOR BEITELSPACHER: Yes, sir.
 18 MR. RUNFT: And your question, again,
 19 Senator, was --
 20 SENATOR BEITELSPACHER: Lines 12 through 30,
 21 as you look through those, were they clear to you,
 22 or is it -- do you think any clarification needs
 23 to be done as to whether one of those are given
 24 greater weight than another one, or how they might
 25 be implemented by the director.

1 MR. RUNFT: I believe there is a problem,
2 which of course, with some redrafting, I'm sure it
3 could be handled. But I believe there is a
4 problem as to what weight to give to which
5 criterion. I believe that the -- I meant to
6 address that briefly in an effort, of course, to
7 move forward, when I said I'd leave -- just
8 leaving Bill 108 -- or 1008, that I felt there
9 were some criterion in the bill, and I
10 specifically meant these, which were not
11 designated as to how much impact or weight were to
12 be given to those criterion by the director. I
13 think that's a problem. You don't have direction
14 here.

15 There is authority to use these criterion,
16 but how much weight would you give to the
17 promotion of family farming tradition, for
18 example? How much weight would you give to the
19 promotion of full economic and multiple use
20 development? One could put these criterion,
21 perhaps, in order of preference. There's a number
22 of things to be done. I do believe that is a
23 problem. Again, I don't think it is an
24 insurmountable problem. I believe that the
25 counsel have spent many, many hours on this have

1 certainly picked up some -- have laid out some
2 very important criterion. But I do believe there
3 is a weight problem, Senator.

4 Does that answer your question?

5 SENATOR BEITELSPACHER: Thank you, sir.
6 Thank you, Mr. Chairman. Perhaps you and I could
7 follow up on this another day. Thank you.

8 MR. RUNFT: I do, Mr. Chairman and members
9 of the committee -- before leaving 1008 again --

10 THE CHAIRMAN: We have another question for
11 you, too.

12 MR. RUNFT: Certainly, I'll take the
13 question.

14 THE CHAIRMAN: Senator Winchester
15 (phonetic).

16 SENATOR WINCHESTER: Thank you,
17 Mr. Chairman.

18 And John, my question is on page 3 when
19 you -- and I share your concern with -- about the
20 limiting of the specific term. But you didn't
21 give us a recommendation whether your preference
22 would be just to leave it wide open as no term
23 set, or is 20 or 30 years something feasible, or
24 do you have an idea?

25 THE CHAIRMAN: Mr. Runft?

1 MR. RUNFT: Mr. Chairman and Senator, asking
2 a lawyer if he has an idea could be a dangerous
3 thing to do, but --

4 THE CHAIRMAN: Maybe we better move on,
5 then.

6 MR. RUNFT: We do have a recommendation on
7 this as we do plan to follow up with some written
8 materials. But yes, Senator, I think that the
9 best course of action would be to do as has been
10 done in the past, and that is grant a permit, a
11 permit to be utilized so long as the user complies
12 with the law. And I say permit, and of course, a
13 license eventually, so long as the permittee and
14 licensee eventually complies with the law.

15 Obviously, I'm coming to this committee on
16 behalf of people that bring a different
17 perspective. These are the small hydro producers
18 that aren't even in this particular reach of water
19 that generated the Swan Falls controversy. And
20 these people have a perspective that they're
21 dealing with long-term contracts. They must have
22 long-term, irrevocable contracts in order to
23 finance these projects. And they don't have this.
24 They can't get their financing, let alone the
25 problems I mentioned with the Idaho Power

1 contract. So I think a -- grant the water
2 license -- or permit them a license as to
3 (unintelligible).

4 Mr. Chairman, then I would --

5 THE CHAIRMAN: Yes, sir, proceed.

6 MR. RUNFT: Thank you very much.

7 The -- it is in that same context in my
8 comments to Senator -- in answer to Senator
9 Winchester's question regarding the constitutional
10 problems that I would also urge the Committee to
11 consider how these rights are handled, vis-a-vis
12 our property rights, which I believe them to be,
13 particularly as they grow into status or a
14 license. I'm not sure that these rights -- that
15 the beneficial use of these rights can be depleted
16 or taken away without more specific authority --
17 pardon me, without more specific criterion and
18 standards being set forth in legislation. It
19 takes the due process problems of taking property
20 without the due process of law.

21 Let me move on, then, members of the
22 committee, to Senate Bill 1006. And in that
23 respect, I want to address the last page, page 2,
24 No. 7. No. 7, essentially, presents the
25 possibility of a moratorium. And from the

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1 perspective of my clients up on the Salmon River,
2 we would ask that the moratorium not be applied to
3 them. Again, I suggest to you that this is
4 another aspect of this hybrid bill, that there
5 were two fundamental purposes of this legislation.
6 One was to settle the Swan Falls controversy. And
7 the other was to develop a comprehensive set of
8 rules and regulations for handling water rights,
9 and the granting of them. And they don't always,
10 I suggest, mesh.

11 For example, in No. 7, which says, "after a
12 notice to suspend the issuance or further action
13 on permits or applications as necessary to protect
14 the existing vested water rights or to ensure
15 compliance with the provisions of chapter 2," and
16 so on. I would suggest that after the word "water
17 rights" in the second line there, "existing vested
18 water rights," that the language be added
19 "upstream from Swan Falls Dam on the Snake River."
20 And that would -- that would distinguish and
21 separate out to folks who were not involved in the
22 Swan Falls controversy of any necessity of a
23 moratorium on their applications for water rights,
24 and leave them free of that particular problem.

25 Mr. Chairman, I could go on and on. I think

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1 I've covered the -- perhaps the salient points
2 after a review. And let me conclude by stating
3 that my clients certainly commend the untold man
4 hours of lawyers, experts and people that have
5 gone forward to forge this legislation and the
6 compromise and reliant. And we come not here to
7 destroy, but to perhaps help clarify and to add
8 something to it.

9 THE CHAIRMAN: Thank you, Mr. Runft. We
10 appreciate your testimony.

11 Any other questions? Guess not.

12 Okay. Pat Ford.

13 MR. FORD: Thank you, Mr. Chairman.
14 Chairman Chatburn, members of the committee,
15 members of the legislature, my name's Pat Ford.
16 I've followed this issue and been involved in it
17 in the past as working for the Idaho Conservation
18 League, but I no longer work for them. I want to
19 emphasize tonight that I'm speaking for myself
20 alone in my comments on the proposed legislation.
21 This will be, for the first time, the real,
22 unrestrained Pat Ford.

23 I do support Senate Bill 1006. The rest of
24 my comments are about Senate Bill 1008. I'd like
25 to look at that bill from the point of view of

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1 fish and wildlife and recreation, specifically
2 looking at the proposed public interest criteria
3 on page 4 of the printed bill, new criteria for
4 water rights in the Snake Basin above Murphy. And
5 it may become applicable to other waters in the
6 state under the terms of 43-203(b) in the future.

7 I'd like, before I begin, to address the
8 argument that some of the parties have made. Mr.
9 Chapman made it in his testimony. Mr. Runft
10 responded to it briefly, that this is a fragile
11 package, the result of long negotiations and hard
12 work. And any criticism of it, rather than
13 helping to improve the package, is more likely to
14 scuttle it. And, therefore, there should be no
15 criticism of it. That's a hard argument to
16 address. Speaking for myself, I'd just like to
17 say that I do not intend to scuttle the agreement.
18 My purpose is to try to improve it in the
19 suggestions I'm making. And I hope that that's
20 the spirit they're taken in.

21 I recognize the hard work of the negotiators
22 and the legislators and all the other parties who
23 have dealt with this the past two or three years.
24 And for my own part, I don't wish to see that work
25 scuttled. But neither do I believe that,

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1 necessarily, that work has created a product which
2 the legislature should adopt intact if, in its
3 wisdom, it decides there are things that could be
4 done with it.

5 I'd like to look at the proposed criterion
6 from the point of view of two major existing uses
7 of Snake River water, namely fish and wildlife and
8 recreation. Obviously, this is a partial view.
9 Those are not the only uses of the river. Indeed,
10 they're not the primary uses in terms of economics
11 or quantities. The legislature, obviously, must
12 and will look at the whole picture. But I think
13 the partial view that I'm going to try to speak to
14 is justified, one, by the fact that's my
15 expertise, two, by the fact that the parties, in
16 making, in putting together the agreement, didn't
17 really consider those two uses.

18 Mr. Costello, in his opening comment said
19 something he had said before, that they were
20 looking at two major uses of the river in trying
21 to reach an agreement about those. I understand
22 why that had to be done, but there are more than
23 two uses of the river. And I would like to
24 address two of the ones that were not particularly
25 considered. I think they should be. And I hope

19 (Pages 73 to 76)

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<p>1 the legislature can fill that vacuum. Let me say, 2 I also believe they can be considered and dealt 3 with without scuttling the entire package. 4 Before I look at the proposed criteria, I've 5 been working with a number of other organizations 6 the past two or three weeks. And I would like to 7 just briefly announce to you here tonight that a 8 number of organizations, Fish and Wildlife 9 Organizations and interest groups are sponsoring 10 this Thursday night in this same room at 7:30 a 11 public forum on the Fish and Wildlife implications 12 of this agreement. Not just the legislation 13 you're considering, but the entire agreement. 14 The Idaho Natural Resources Legal 15 Foundation, the Idaho Wildlife Federation, the 16 Idaho Conservation League, Ada County Fish and 17 Game League, American Fishery Society, and others 18 are cosponsoring that public forum. The speakers 19 would be Scott Reid, a former member of the Water 20 Resources Board to talk about the legal 21 implications of the agreement for Fish and 22 Wildlife; Larry Reynolds, an economist at Boise 23 State who will talk about the economic 24 implications of the agreement; Howard Funke 25 (phonetic), representing the Shoban tribes, who</p>	<p>1 benefit cost analysis that would be neutral 2 regarding the uses, would not automatically favor 3 any use, particular use, but would subject each 4 application, whatever was being applied for, to 5 the same economic analysis, the same economic 6 tests. Each proposed use would be judged on the 7 same terms. That, at least, makes sense to me. 8 And it seems to me the proposed criteria are 9 weighted to favor just two uses, the two in 10 dispute in the lawsuit, Idaho Power and 11 agriculture. Both of those uses are specifically 12 mentioned in the new criteria, while all of the 13 uses are not. Instead of a complete economic 14 accounting, then, that covers all uses, the 15 impacts on all uses, the director is told to make 16 a partial accounting, emphasizing those two uses 17 downplaying any others that may be affected. 18 Aside from helping settle the lawsuit, which 19 I agree is good thing to do, I don't see the 20 logical or legal grounds for directing automatic 21 preference to those two uses in the law, 22 regardless of what the actual economic 23 circumstances are, the particular time, particular 24 place of the proposed use. 25 Let me look specifically at the proposed</p>
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<p>1 will talk about the Indian fishery issues raised 2 by the agreement, in particular, the Salmon and 3 Steelhead implication. And I believe a 4 representative of the Governor's Office will also 5 be present. I don't know who that will be. 6 And that will be this Thursday at 7:30. We 7 had originally scheduled that for tonight, and 8 then your hearing made us bump it. So, if it 9 occurs after you considered this legislation on 10 Wednesday, Thursday is the best we could do. And 11 I hope that you could attend. 12 The proposed criteria on page 4 strongly 13 emphasized economic factors. I'm personally not 14 sure that water rights decision should be made 15 almost entirely on economic grounds, but I'd like 16 to assume that they should be, for the purpose of 17 my testimony, made on economic grounds. If they 18 should be, I think that those who believe in free 19 market decision-making could perhaps agree that, 20 as a general principle, there should be a complete 21 accounting of the economic benefits of proposed 22 uses, and a complete accounting of the costs, if 23 any, of those same proposed uses to other existing 24 uses. 25 In other words, some sort of standard</p>	<p>1 criteria. The first one, No. 1, directs 2 consideration of potential benefits of the 3 proposed use. But then the second criteria 4 directs consideration of potential costs of only 5 one use, namely hydropower. I don't see why, as a 6 matter of law and economic fairness and equity and 7 efficiency, all potential costs to other existing 8 uses are less important than the costs of that one 9 used. 10 No. 3 directs consideration of a single 11 tradition, the family farming tradition. There 12 are many traditional economic uses of Idaho water, 13 recreation, fishing, Indian fishing, et cetera. I 14 question, I guess, the whole notion of requiring 15 explicit consideration of traditions in the water 16 rights decisions. But if they were to be 17 considered, I'm not sure I understand why one 18 tradition is to be given consideration and other 19 traditions are to be excluded. 20 Criterion 4 is a very general one. And 21 conceivably as Mr. Chapman said in his testimony, 22 Fish and Wildlife and Recreation and other unnamed 23 uses could be accounted for in that one. But it 24 seems to me so could agriculture, which is 25 specifically named twice.</p>

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1 No. 4 is -- I'm not sure No. 4 is the best
2 language, but it is the kind of general economic
3 criterion that makes no automatic prior judgments
4 that some uses are better than others, and that it
5 seems to me, would make more sense than mentioning
6 some specific uses and not mentioning others.

7 The last criterion, No. 5, it seems to me,
8 is an apple among oranges. And I think it's
9 entirely out of place. I don't see why one
10 particular use should have an annual target
11 enshrined in the law, regardless of the particular
12 economic sense of applications that will help meet
13 that target. I don't see the legal or the
14 economic logic to doing that. There has -- the
15 parties have made an argument that that is not a
16 target, that it is a cap that is intended to
17 prevent development above that level, but it is
18 not intended to mandate development to that level.

19 If that's their intention, fine, but in
20 consulting dictionaries, to look at the words that
21 are stated there, I consulted four, all four of
22 them, I think, favor my interpretation that it is
23 the target more than the interpretation that it is
24 a cap. If you look up the word conform, if you
25 look up the word policy, if the intention is for

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1 it to be a cap, then I think it needs to be
2 redrafted to state that more specifically rather
3 than leaving it the way it is where two fairly
4 different interpretations are possible which will
5 have different practical consequences, depending
6 upon which one the director chooses to go by. It
7 would be very simple, I think, to amend it to make
8 it clear that it is meant to be a cap allowing no
9 development above that rather than to be a target
10 to that level.

11 There have been a few arguments made
12 previous to tonight and tonight about some of the
13 questions I raised. And I want to briefly mention
14 them. The argument's been made that fish and
15 wildlife and recreation interests are already
16 covered by the local public interest language in
17 the existing water right criteria that are in
18 42-203(a).

19 But I make three responses to that. The
20 first is that the specified use of agriculture is
21 also covered by that language, yet it receives two
22 specific mentions in using the criteria. Second,
23 the local public interest language does not cover
24 nonlocal fish and wildlife and recreation impacts.
25 An example would be salmon and steelhead flows

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1 downstream at the local area where the application
2 was made for diversion. And the third point --
3 I'm not an attorney, but it seems to me that, in
4 judging local public interests to include fish and
5 wildlife and recreation, which is the
6 interpretation that is now used by the Department,
7 and in, then, defining public interest in the new
8 criteria in the way that they are defined, you're
9 setting up within the space of about a page in the
10 Idaho Code two different definitions of public
11 interest. I don't know if that has any legal
12 merit, but it doesn't seem to me -- it just didn't
13 seem to quite make sense to have the same words
14 mean two different things a page apart in the
15 code.

16 There's an argument that fish and wildlife
17 uses are covered, essentially, by the hydro
18 protection given in the legislation, that, to the
19 extent that hydro is an instream use, fish and
20 wildlife is an instream use, when you protect
21 hydro, you, at the same time, are protecting fish
22 and wildlife. And certainly that would be true in
23 many cases. But again, it wouldn't be true in all
24 cases. There are cases, actual ones, as well as
25 potential ones, where hydro protection and fish

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1 and wildlife protection would be in conflict.

2 And secondly, it's my feeling that the hydro
3 language in this criterion, that how much weight
4 it has is going to be considerably dependent upon
5 the force with which Idaho Power Company makes its
6 case about them to the Director of the Department
7 of Water Resources on a case-by-case basis. That
8 being the case, I think saying that hydro
9 protection is what the authority covers fish and
10 wildlife, to me is someone interested in fish and
11 wildlife, makes Idaho -- puts Idaho Power in a
12 position of defending my interests in a way that I
13 don't think is either a part of their job as a
14 company, nor do I feel comfortable having them
15 take that lead on it.

16 I think that there are some possible
17 amendments that could be considered that the
18 parties might agree to that would not scuttle the
19 package. It seems to me logical that the best way
20 to do these criterion would be to mention no
21 specific uses at all, and again, have a general
22 economic test. I doubt if that's acceptable to
23 the parties or to the legislature given the
24 history of this.

25 If that's the case, then I would suggest

21 (Pages 81 to 84)

1 and urge your consideration for adding the
2 criterion that does mention fish and wildlife and
3 recreation in the same way that No. 2 mentions
4 hydro power, that same sort of language. And I
5 would urge consideration of deleting entirely the
6 last criterion, criterion 5. Again, it seems to
7 me that it's an apple among oranges and doesn't
8 really belong in this list of other criteria.

9 I think that's all. Thank you for listening
10 to me.

11 THE CHAIRMAN: Thank you, Mr. Ford.
12 Are there any questions?

13 If not, we appreciate your sharing your
14 thoughts with us.

15 That concludes the list of witnesses who had
16 signed up earlier in the day. Are there other
17 individuals here who would like to present
18 testimony? If so, we'll be glad to hear from you
19 at this time.

20 UNIDENTIFIED VOICE: (Unintelligible).

21 THE CHAIRMAN: Fine.

22 Well, are you -- now, are you also
23 representing the Idaho Consumer Affairs tonight?

24 UNIDENTIFIED VOICE: No, I'm not.

25 THE CHAIRMAN: Okay.

1 MR. FOTHERGILL: Mr. Chairman, members of
2 the committee, my name is Al Fothergill. I'm the
3 director of the Idaho Associates Coalition, which
4 is a consumer-oriented organization. I have
5 provided the secretary copies of the testimony
6 I've made. Included in that are two other items.
7 One of those is a letter written by Joel Hamilton
8 of -- a personal letter to Don Reading (phonetic)
9 with the Idaho Public Utilities Commission, as a
10 part of which he advises Mr. Reading to make that
11 available to me and others who might be
12 interested.

13 I also have both letters that I've written
14 to Governor Evans and to Attorney General Jones
15 asking if they'd initiate an amendment of the
16 agreement which would provide compensation for
17 consumers. The -- part of my testimony, and I'm
18 not going to belabor it, is that the key provision
19 of the Swan Falls agreement is a reduction of 600
20 cubic feet per second in the summer flow of the
21 Snake River. And the result of that is to reduce
22 the production -- reduce the flow of the river,
23 obviously, and add production of low cost energy
24 from existing dams in the river and to rate
25 people's power -- power bill. In addition, as you

1 know, the agreement is applicable to all other
2 rivers and streams in the state. But I don't have
3 any knowledge of what the impact might be on them.

4 The study done by Hamilton Lyons was done
5 for the Interim Committee, Legislative Committee
6 on Swan Falls, and presented -- oh, I've forgotten
7 the exact date. I think it was a couple years --
8 couple summers ago. It was paid for by the State.
9 It was authorized by the Committee. And as far as
10 I know, it is the basic document that the
11 legislature has for analyzing the effect of the
12 Swan Falls agreement or subordination at that time
13 on the electricity rates.

14 As Mr. Hamilton's letter to Don Reading of
15 the Public Utilities Commission indicates it is
16 his belief that \$52 million cost -- annual cost to
17 consumers as a result of this agreement is in
18 place. It also indicates that that assumes
19 195,000 acres of development over the course of
20 the agreement. And it could be higher.

21 Our only request in this is that we should
22 make this fair. And consumers are consumers of
23 all kinds, farmers, residential consumers,
24 business consumers are being asked or are going to
25 be asked to pay a large part cost of this

1 implementation of this agreement as in the -- part
2 of the Hamilton Lyons study, up to possibly
3 80 percent unless the cost is charged to the
4 irrigation pumpers -- the plants of irrigation
5 pumpers for a reduction in the energy produced.
6 We think that once implemented, would help.
7 And that amendment would require the other
8 consumers, that is the existing consumers, to be
9 fully compensated for the cost of reducing the
10 Snake River flow, and the cost of serving new
11 irrigation or other major additions to energy man
12 created by reducing the river's flow.

13 As I understand the proposed legislation,
14 quite just the contrary is recommended. And we're
15 curious as to why those persons who are at
16 detriment in this are being asked to provide
17 compensation for the losses for the development.
18 There are really very few developers that will be
19 involved in changes from Snake River through
20 the -- should this agreement be implemented.

21 That's really all I have, Mr. Chairman.

22 THE CHAIRMAN: Fine, sir?

23 Any questions of Mr. Fothergill?

24 If not, we appreciate your testimony.

25 Anyone else who has something for the good

1 of the order?
 2 Yes, sir?
 3 MR. MARTINS: Art Martins.
 4 THE CHAIRMAN: Yes, Art. Would you like to
 5 come forward, please?
 6 MR. MARTINS: Very short and very brief.
 7 THE CHAIRMAN: Boy, that's what we like.
 8 MR. MARTINS: I don't have a legal degree.
 9 THE CHAIRMAN: That's a shame.
 10 MR. MARTINS: Many of you people in that
 11 back row, plus the negotiators that have more --
 12 I'll leave a few copies. I didn't bring that many
 13 of the feasibility study.
 14 I represent a new development, the Little
 15 Pilgrim irrigation company, proposed development
 16 laying south and southwest of the Bell Rapid's
 17 project, they own more in Owyhee and Twin Falls
 18 County. Now, I'm going to chop the rest of this,
 19 and I would just briefly hit on the main points of
 20 the plan.
 21 We have applications back in late '75 for
 22 water, though, we feel we got a little leeway if
 23 any new applications become available or permits
 24 signed. I think the impression I'd like to
 25 leave -- and I said I didn't have a law degree,

1 and I did not go to the legal -- I've been through
 2 the agreement many times, but to represent each
 3 one of the pieces of legislature, I'm not in a
 4 position to do that.
 5 The one thing I'd like to impress is the
 6 fact that our project is blessed with three
 7 things, due to some burning midnight oil by
 8 engineers and whatever, we are able to live with a
 9 year-round pumping schedule of which can be worked
 10 around the Murphy Gauge. And it never hurt
 11 anybody. The main assets, that would be one. In
 12 or out, two. And maybe I should come up with the
 13 next ingredient. It's a 35,000-acre of storage of
 14 which makes the year-round pumping schedule very
 15 flexible.
 16 The other thing, en route to this reservoir,
 17 or on the inlet side -- and by the way, there's
 18 maps, there are -- Laird Noh got one, Lloyd
 19 Chatburn, and the most of the negotiating team --
 20 I will deliver that last one as I walk by, Jim, in
 21 just a moment.
 22 But anyway, with the year-round pumping
 23 making a little water year-round go a long ways,
 24 the proposed power plants on the inlets of the
 25 reservoir will produce over a net of a million

1 dollars a year of which there should be some
 2 credits there that would apply to a power bill for
 3 the entire project. And I'm sure Idaho Power is
 4 probably in a position that they would be more
 5 than willing to use some of that power that
 6 they've got that they claim they're happy to sell
 7 cheap back to the irrigators.
 8 Concluding, we would like to -- and this is
 9 tough to do, because these people have put in
 10 numerous hours. They worked, I feel, for the
 11 State. I cannot see any real compensation coming
 12 from the negotiators to this agreement. I think
 13 it's the best thing that could be had. It may be
 14 minor --
 15 (Recording ends.)



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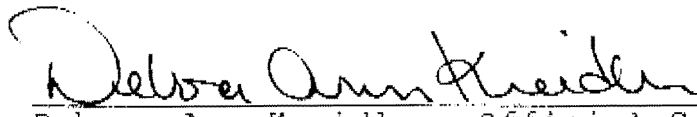
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R E P O R T E R ' S C E R T I F I C A T E

I, Debora Ann Kreidler, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed 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.

IN WITNESS WHEREOF, I have hereunto set my hand February 23, 2007.



Debora Ann Kreidler, Official Court Reporter
CSR No. 754

