MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 25, 1985 — RM 433, 1:30 p.m.

PRESENT — Chairman Noh, Senators Budge, Little, Sverdsten, Carlson, Chapman, Ringert, Crapo, Kiebert, Beitelspacher, Peavey and Horsch.

Chairman Noh called the meeting to order. He explained the Secretary was working on the previous minutes, so there were none to be approved.

SB 1018 — ACQUIFER RECHARGE DISTRICTS

Senator Noh explained this legislation would allow parties to serve as directors or officers of the district even though their place of residence was outside the district.

MOTION — Senator Horsch moved and Senator Ringert seconded the bill go out with a "do pass" recommendation. Motion carried.

Chairman Noh called upon the negotiators to discuss some of the concerns that were raised in the public hearing on January 21.

Tom Nelson I.P. — Mr. Nelson said he would start off the discussion and pointed out he had handed out a written statement in response to certain comments raised at the hearing. (Attached)

Pat Kole — Mr. Kole also handed out a written statement addressing conerns raised by John Runft, who testified at the public hearing on behalf of the small hydropower interests. (Statement attached)

Senator Ringert — Why do you need review authority on existing permits?

Pat Kole — It is our understanding there are enough permits out there, if they were all to be developed, to, in effect, take all of the water available for appropriation in the Snake River system. By reevaluating and looking at those permits in accordance with the new public interest criteria, we believe we will more effectively manage the resource and get additional development over that which could occur if we were to follow a strict priority approach.

Senator Ringert — What makes you believe that?

Pat Kole — I would like to defer that question to Mr. Dunn as he has completed the analysis of those permits.

Ken Dunn Water Res. — The number of outstanding permits, if all developed would lower the minimum flow of the Snake River to the present minimum flow

Ken Dunn — of 3,300 cfs and that is based on those permits on file in 1976. Since that time there have been a number of others that have been approved. Once you have put the lid on others may rush to develop because it is the last opportunity one may have. What we propose here starts making people develop economically that might not otherwise. So there are outstanding applications and permits to do that, if they were all developed.

Senator Ringert — Won't the priority system take care of the existing water rights and protect them or doesn't the priority system work any more?

Ken Dunn — The priority system works if it weren't for the moritoriums and other things involved. The moritorium I'm talking about is the Bureau of Land Management; their management of lands. As you know, the Desert Entry and Carey Act filings have not been approved for a number of years. That builds up a big backlog of things. The water right filings that have been made were a situation where people who were not going with the Carey Act or BLM and some were able to go around that, have developed and they have a later priority than some of these outstanding permits. It is just a fact of life, once you start managing a resource and you start approaching the end of the development, the priority system creates alot of additional problems. Later rights developed, earlier rights undeveloped and no water. If you develop the earlier one you have to go in and shut off the later one.

Senator Ringert — Isn't that the appropriators risk, Ken? He has his land available first, that is one thing, but shouldn't he recognize that if his permit is of a later priority date he runs the risk that he might wind up short of water if someone else comes on line in accordance with the priority of their permit?

Ken Dunn — That is right if you have a normal system operating, which we do not have. We have government in the process of having messed it up to begin with. The decision, right or wrong, was not to create a land rush; therefore, the development didn't occur.

Senator Ringert — Are we then adopting a policy in this state where land and not water sets priority?

Ken Dunn — With this bill we can do it different than that. You start setting the priorities in terms of economic development. For example, of the outstanding permits left, many are for extremely high lift pumping, directly out of the Snake River. Once that occurs you will have an immediate depletion and the amount of land you can develop shrinks dramatically because you don't have recurring flows. Economic expansion in the state is going to be very small. That is one of the reasons why in all of our discussions we have said the best development would be further upstream in the Snake system. The high level pumping is a direct diversion from the River, has an

immediate effect on hydropower and also requires substantial energy to lift the water. If somebody knows, whoever they are, that this is the last opportunity they will have to get water, they will do it now. You start driving the decision not based on good economics, but on fact if I put it in, I might make it, it's worth the change.

Senator Ringert — I personally doubt if there will be any more high lift projects of great consequence, particularly if they are direct diversion during irrigation season so they have to have enough capacity to pump their needs 24 hours a day throughout the irrigation season. Then are we coming to the point where your Department's assessment of economic feasibility, suitability and efficiency is going to determine the priority of use of water?

Ken Dunn — I think we are coming to the point in time in the Snake Basin where there isn't going to be enough water to meet the needs. In this situation we are not coming to the point where my Department is going to make the decision of priority, we are coming to the point where the legislation you pass, the rules and regulations I adopt and you approve, will set some general priorities of what has to be done in order for somebody to be able to use water in the state. It will not be a strict first in time, first in right. No matter what you get, the water is an extremely scarce resource. I think those changes are needed.

Pat Costello — I would just associate myself with the remarks of Mr. Kole and Mr. Nelson. The one additional point I would cover concerns comments at the public hearing, regarding the absence of mention in the public interest criteria in SB 1008 of uses other than agricultural. I would like to point out that you don't even reach those public interest criteria unless you first find that the proposed use would result in significant reduction of water available for hydropower. Most of the other uses, the non-agricultural uses, particularly domestic, commercial, municipal and industrial, are almost entirely non-consumptive and virtually all of those uses would never reach the public interest criteria. The only exception would be some particular industrial applications. Another hydro project would be strictly non-consumptive and the public interest criteria would not even come into play.

Senator Crapo — Did the negotiators get into what is meant by the term "significantly" reduced?

Pat Costello — No we did not. That would be left to be fleshed out by Department regulations as the criteria themselves would have to be further detailed.

Senator Crapo — I wonder if any of the negotiators even have any ideas or guesstimates of what that phrase means. For example, would it be a significant reduction if the well was going to have an impact 10 years down the line of some small amount? Is it defined in the terms of time, terms of amount or what is contemplated by the term?

Pat Costello: The phrase is "individually or cumulatively" with other uses. So, if you had a well pumping from the acquifer which would not impact the river for 10 years but you could project that if there were a number of wells in the same vicinity and that would have a result at Thousand Springs of "x" cfs in year 2000 or whatever, yes, it would be possible in my view to find it a significant impact.

Tom Nelson: I don't think that phrase is much different than the burden the Company faces in the existing lawsuit. I think in order to get relief from the courts it is incumbent on us to show a potential for a significant impact from either an area or group of people or however the court wanted to analysis it. To me when you look at the sophistication of the gauging systems on the Snake, you may be looking at something you could theorically measure in the river. We are now to the point where we are talking about 600 cfs. If you look at 1 cfs out of 600, that could be significant even if cumulative effects would have to be 2, 3 or 4. The problem we have is the hydrology of the basin is such that you can argue an isolated effect in a certain part of the acquifer. So significant reduction was intended to allow people to argue with the hydropower right holder that they are contributing in a significant sense, but then to get more specific than that because of the unknown. I think that is the burden we have right now. If we couldn't show the potential for significant effect in the pending lawsuit I don't think we would get any relief.

Senator Crapo: I am interested in seeing that the 600 cfs that is made available through the trust is made liberally available and I am wondering is that the intent of the negotiators or is it the intent that each time an appropriations is applied for there is going to be alot of hurdles that any prospective developer must go through. Maybe the only way to answer my question is to say yes or no. Do we intend for the legislature to make this something that is liberally available or are we going to make it restrictive? I really don't know what this is saying, but I want to know what we intend it to mean.

Tom Nelson: I can tell you where I came down when we were looking at how this would work. Concerns were expressed that you are going to have the Ma and Pa farm walk in and all of a sudden you have a hearing room full of people in there to oppose a 10 acre addition to their existing farm. That is addressed a couple of ways; (1) The burden on the protestor. The real protection against that kind of an administrative ambush if you will, is just the way the administrative process works. For example, any time you go to the PUC on an electric rate case, in theory, you can start at A and go to Z and litigate in front of the commission every issue that's possible to raise a utility rate case. The fact is, when you get there usually you are down to a couple of things like how are you going to measure the rate base and what is going to be your return on the power rate base. By and large the commission's previous decisions tell you what kind of a rate you are going to get if you want to litigate the other parts of that

rate case, so you don't litigate. In this situation I have the belief, based on conversation with my counterparts and Ken Dunn, that this is how it will develop. We will either have an area wide proceeding or a group entry proceeding. We won't be faced with a situation where every 10 acres comes up for a hearing on economic grounds. So the administrative part is not going to be a problem once we get use to it. On the issue of whether water is liberally or niggardly available, from our standpoint the fox is probably in the henhouse. The decision here is going to be made by a department that for 100 years has had no constraints except the availability of water on proving new developments. So this is a whole new ballgame for them. It is our belief that those decisions will be made on a relatively liberal basis if you can show the economics are there. It is not going to be a closed issue. For example one of the offers I made last year in the subordination fight was that we will subordinate and put these decisions in the Fish and Game Committee. The attitude of the Agency you are before determines alot of how things are done. In my view, if the economics are there for a particular use, it will probably be approved. This is not saying anything against Mr. Dunn and what he has been doing.

Pat Kole — Just to add one comment. As we went through the negotiations we tried to protect the small farmer. That is why we specifically mentioned the family farming tradition. The idea was that if somebody had started a development, they had 120 acres under cultivation but wanted to add 20 or 30 acres, that type of operation would have a little bit of advantage in the statutory process.

Senator Ringert — On the 42-203D review of permits, I am looking at that and also the fiscal note. Now I am sure you have some idea of how many permits are outstanding and what kind of review process will be necessary. Do you have anything for review; if so how long will it take and how much will it cost the state?

Ken Dunn — I do not look at the review as being a detailed review of every permit. We will have some area of claims that are going to be appliciable to alot of permits. The first few will be extensive by area and type and after that, as Mr. Nelson said if you have the answers on most of the things you start getting into the one or two items we will have to look at. My proposal is to raise the fees for water rights so that this will cover the major portion of that cost.

Senator Ringert — Will your present staff be adequate to handle the review and if you already have enough permits issued to use up all the water in the river, when can we expect to have money flowing in from new applications that will help offset some of the cost?

Ken Dunn — We do have sufficient applications to use up the 600 cfs. Timewise I would anticipate by the first of the fiscal year we would have rules and regulations developed with emergency rules so that we can get started and will proceed as rapidly as we can. We are

not going to clear all those up in the first six months. We have on file I would guess 3,000 water rights applicactions. I would not plan on adding any staff because it will be one of those heavy workloads and then back to the normal routine so we will just stretch it out a little longer. As far as fees, we presently have fees to get us through FY 1986 at the rate we have been spending and still are receiving applications.

Senator Sverdsten — Concerning the hydroelectric units on the Little Salmon, how will you proceed with those in relation to the bill. Are you holding them up to an extent; will they be handled soon or just what will you do in that area?

Ken Dunn — For non-consumptive uses such as that, fish farms, and others, we would process them and have been processing them in a normal time limit. This would not hold them up because they don't create problems of consumptive use.

Senator Crapo — At the hearing there was a concern raised if Idaho could protect its water for use in Idaho over other states. I am not sure if this is a legitimate concern or not and if it is possible for other states to get a hold of Idaho water. Would someone tell us how another state or entity outside Idaho would go about getting control of the water. Is this a real threat?

Tom Nelson — We didn't specifically deal with that. There is a court case dealing with ground water and the court made it pretty clear that the state's ability to discriminate in favor of its citizens opposed to citizens of other states is pretty limited. Let's take the specter that is raised about major diversions out of the Snake above the Hell's Canyon project for example. If we had a statute or even constitutional provison that says we flat can't divert water out of the Snake for use in other states, then you are wasting your time to even pass it. Bacically, the state's system of allocation and appropriation will be honored in that situation, as opposed to interstate equitably apportionment suit in the Supreme Court. I think that probably the most effective thing is the minimum flow and other existing rights on the Snake River which would be impacted by that kind of major diversion from the Snake, say by Arizona or California. We didn't address it and I don't think it can be addressed directly. I would point out that both the FCC and state license subordinate for all of the licenses at Hells Canyon, except maybe the Brownlee Reservoir, all say they are fully subordinated for uses only in the Snake River watershed. So anyone proposing a massive diversion for use outside the watershed would run headon into the 35,000 cfs water right at Brownlee and I think that would just about take up the Snake. I don't think it is a real concern given the policies we have in place in terms of minimum flows and existing water rights on the Snake.

Senator Crapo — My understanding then is that basically the state is protected by Idaho Power Company's water rights because they are not subordinated for uses outside the basin.

Tom Nelson — That is right.

Senator Crapo — I have heard figures, that even over a period of years even though there has been alot of water appropriated from the river, flows have not dropped significantly. I don't know if those figures are correct and that is probably a good reason to have a hydrologic study. If this study shows that some of the diversions we are using now, for say agricultural or other uses, appear to somehow recharge the acquifer and if that study shows we had more water available than we contemplate, would that have any impact on the ability of Idaho Power Company's water right to protect us from claims there was extra water available for out of state diversion?

Tom Nelson — My example of the Hell's Canyon water and the protection there is that the water would have to remain in the river in Idaho at least to those points. If it was determined the acquifer could safely yield more than our supposed 600 cfs, I don't see that as having any impact on the Hell's canyon issue. It may have an impact on how much you can develop. The agreement isn't written around the 600 cfs being available for development, it is written around the minimum flow. So if there is more than 600 cfs available for development, its available.

Senator Crapo — So, if I understand correctly, what we pass here today doesn't say that there is 600 cfs available, it says there may be 600, 500, or 1,000 or whatever, but the minimum flow can't drop below the established points at certain times of the year.

Tom Nelson — That is exactly right.

Senator Noh — Would anyone else care to comment on this?

Ken Dunn — I would like to talk about the other out of state diversion and that is water staying in the stream and appropriated by downstream state. The protection you have there is, one, the power company rights remain in place until the water is used by users in the state so there is an existing right. Secondly, if there is a call on it, again the best protection is what the downstream water rights are. There have been some equitable apportionate cases in the U.S. and they vary back and forth as to what the court says. In some cases they say each state or each entity has a right to a good portion of that water. In a recent case in Colorado, Colorado wanted to require more efficient diversions downstream to make water available in Colorado and the court said no.

Senator Tominaga — The negotiators talk about protection for the small farmer. This irrigation company is thinking of picking up 5-10 acres here and there but the total would probably add up to 4 to 5,000 acres in a fairly concentrated area. Would that significantly reduce those flows and would that development not take place as by adding the cumulative up it would be significant but taken on an individual basis, it would not.

Pat Costello — It would clearly, to me, meet the significant reduction test and therefore you would have to pass the public interest criteria.

However, I think it would probably fare well under that criteria because the water would be used for a number of small farm operations within the irrigation company and probably fits the small farming preference.

Senator Tominaga — Then that could happen in a cumulative basis all across the state. If there is enough cumulative sooner or later the water will run out. How will that be handled?

Pat Costello — Eventually it will run out, but by giving preference to location primarily upstream and ground water rather than direct pumping, we hope to make it last as long as possible. There is an end point. At that point there won't be an end to development but will be under a market system rather than appropriation system.

Senator Noh — Senator Crapo has raised the question with me of developing some formal legislative intent to be inserted in the record.

Senator Crapo — It is my concern that when I first read the legislation I didn't really understand what the intent was and we have had 3 very good hearings now and think I pretty well understand the intent. I think in the future if this ever gets to court or the Department of Water Resources needs guidance on how to interpret different aspects of this, it would be very beneficial if we, as a committee, develop a statement of intent or legislative purpose to accompany this. I'm not sure this can be accomplished as there may be too much divergence among the committee. It seems if there is a divergence among the committee, it should be resolved now before the bill goes to the floor.

Senator Noh — Asked what the committee's pleasure was regarding this and said he wasn't opposed to appointing a committee of two to work on the intent. He didn't think it would be a good idea to hold the bills in committee since the statement of intent can be placed in the Journal at any time.

There was a fairly lengthy discussion by the Committee on the need and lack of need to develop this statement of intent. Senator Ringert explained that in most cases at the state level we do not establish a good statement of intent. If there are ambiguities in the bill, it becomes a statute and if there is a contest over it and goes to court, one effort in court is to try and figure out what the legislature intended when it used this work or phrase. A statement of intent is very helpful in that respect. In the federal congress, they print a formal committee report that becomes part of the permanent record and those reports go to the floor with the bill. So down the line when someone is looking at the bill, they can at least tell some of the expression when they voted on the measure.

MOTION — Senator Ringert moved and Senator Crapo seconded the legislation be held in committee for one week for the specific purpose of working on a statement of intent. Motion carried 8-4 after a submotion failed.

More discussion followed this motion on the pros and cons, and then Senator Peavey made the following motion:

SUB MOTION — Senator Peavey moved to send SB 1006 and SB 1008 to the floor, seconded by Senator Budge, with a do pass recommendation. The motion failed 6-6.

Once again there was discussion on the motion. Senator Budge said he had never heard of what was being attempted here today. He felt the letter of intent could be done from the floor and the rules allowed for that. Senator Beitelspacher also felt this letter of intent could be accomplished on the floor and felt like it was time to move the bills on. Senator Crapo felt another week for the bills in the committee was not too much when they are so important and if there was a difference of opinion, that was the place it should be discovered and could be worked on.

A short break was taken until Senator Little could be called back to the committee to vote.

The Chairman went over the motions for the benefit of the Committee before voting.

ROLL CALL VOTE ON SUBMOTION — Senators Beitelspacher, Budge, Kiebert, Noh, Peavey and Sverdsten voted YES. Senators Carlson, Chapman, Crapo, Horsch, Little and Ringert voted NO. Motion failed on tie vote of 6 to 6.

ORIGINAL MOTION — Senators Carlson, Chapman, Crapo, Horsch, Little, Noh, Ringert and Sverdsten voted YES. Senators Beitelspacher, Budge, Kiebert and Peavey voted NO. Moton carried 8-4.

Senator Noh appointed Senators Crapo and Peavey to work on the statement of intent and they are to report on a week from today.

RS 11082C1 — AUTHORIZING THE CONTINUATION OF IDAHO'S PARTICIPATION IN THE WESTERN STATES FORESTRY TASK FORCE.

Senator Kiebert briefly explained the legislation which would allow the state to continue to participate in the Western States Forestry Task Force which pursues several subjects important to forest management.

MOTION — Senator Beitelspacher moved and Senator Sverdsten seconded the RS be sent to print. Motion carried.

There being no further business before the committee, the meeting adjourned.

(Tapes are on file of this meeting)

Laird Noh, Chairman

Bev Mulling, Secretary

Supplemental Testimony of Attorney General Jim Jones
Before the Idaho Senate Committee on
Resources and Environment

Subject: Comments of Attorney John L. Runft.

On January 21, 1985, John L. Runft, Attorney at Law, appeared before the Committee and provided an analysis of Senate Bills 1006 and 1008. It is important that the Committee carefully analyze Mr. Runft's testimony because it raises several concerns about the agreement. The concerns raised by Mr. Runft were considered by the negotiators and were either rejected as incompatible with resolution of the Swan Falls controversy or provided for by the mechanisms in the agreement. It is my belief that upon careful reflection and thorough analysis that the Committee will find the points advanced by Mr. Runft have been addressed.

The first general observation made by Mr. Runft is that Senate Bill 1008 represents a hybrid that would be better left in two parts 1) resolution of the Swan Falls controversy and 2) standards and procedures for treating hydropower water rights. Mr. Runft's analysis is correct that the bill addresses both of these problems. Yet, the two problems are one in the same. Further, the reason for the structure of the agreement is to prevent future Swan Falls types of situations from arising and

to provide a mechanism under which current Swan Falls type problems can be resolved without expensive litigation. As pointed out earlier, the Spokane River is a prime example of another potential Swan Falls type controversy. The negotiators believed and still believe that a mechanism must be created in state law to provide a resolution process for addressing these problems.

Mr. Runft's second suggestion is to create an exemption process whereby certain hydropower water rights could be specifically exempted from a subordination provision. Senate Bill 1008 in conjunction with S.B. 1006 does in fact provide this type of mechanism. Under S.B. 1008 the director is granted the authority to specifically implement the 1928 constitutional amendment and limit and regulate hydropower water rights. The director has in fact been subordinating hydropower water rights since 1977 and has issued in excess of 252 such rights. What S.B. 1008 and S.B. 1006 do, is to require the director to set forth in rule and regulation form, standards under which hydropower water rights will or will not be subordinated. Those rules and regulations will, of course, come back to the legislature for their review. In effect, these two bills accomplish precisely what Mr. Runft desires; that is, 1) certainty for the holder of a hydropower water right, and 2) a procedure for evaluating whether or not the director's determination is consistent with the intent of the legislature or rather is arbitrary and capricious.

Mr. Runft's third point is that the words "state action" in section 42-203B(3) is to broad. Unfortunately, the analysis over looks the fact that minimum stream flows can only be set in accordance with state law. The negotiators specifically chose the words "state action" in contemplation of the passing of SJR 17 as this and future legislatures may wish to become more actively involved in the setting or review of minimum stream flows. We believe this latitude should be maintained.

Mr. Runft next submits that the authority to subordinate the hydropower water rights granted to the director is to broad. As noted above, when read in conjunction with S.B. 1006, it is clear that the director will be required to set standards that will be reviewed and analyzed by the Idaho Legislature. We suggest that the provision as currently phrased is adequate.

Mr. Runft next contends that the small hydro developer will be unable to obtain financing if the director has the authority to subordinate hydropower water rights. This argument is factually erroneous. To date, as mentioned above, the Department has issued over 216 subordinated water rights for power purposes. Not one of these projects had difficulty in obtaining financing and in fact many are now completing construction and are obtaining long-term financing.

Mr. Runft's objection to term permits is also without merit. The director has established a policy of issuing water right licenses for power purposes to a term consistent with the

Federal Energy Regulatory Commission license. To date both lenders and investors have found this practice to be satisfactory. We would strongly suggest that the original language remain in place as the factors cited by Mr. Runft are simply not accurate. Additionally, the director should maintain a certain amount of discretion in this area as the future predictability of the need for electrical energy or the need for additional water for agricultural purposes becomes apparent over a period of time in the future.

Mr. Runft next argues that 42-203B(6) should be amended to not affect permits which have been issued as of this date. His analysis overlooks the Hidden Springs Trout Ranch case, see 102 Idaho 623, which allows the State to restrict permits that have not yet been fully developed into property rights. There is simply no taking issue presented by 42-203B(6). The same argument would apply to Mr. Runft's suggested clarification of 42-203C(1).

Mr. Runft next recommends the deletion of the statutory language in section 42-203C(2) relating to the weight to be given to the various public interest criteria. As indicated in the earlier testimony provided by Mr. Nelson to the Committee, it is clear that if a factor does not apply, then the director would not consider it in making a determination. It is critical to a full and fair decision making process that some standard guiding the director in terms of weighing the various criteria be maintained.

Section 42-203D relates to permits not put to beneficial use prior to January 1, 1985. For consistency sake we believe that if agricultural permits are to be re-evaluated in relationship to the new law, water rights for power purposes should also be so re-evaluated.

Finally, Mr. Runft suggests that the authority of the director to suspend issuance of the permits or applications should be limited to the geographical area above Swan Falls dam. Once again this argument overlooks the fact that Swan Falls types of problems are developing throughout the State. Further, before the director may suspend issuance of permits he must make a finding of need, which is subject to judicial review. Thus, it is imperative that this legislature act to alleviate those type of problems now so that further problems are not brought forward and, of course, the resulting legal expenses to the State and private parties will thereby be avoided.

STATEMENT OF IDAHO POWER COMPANY
IN SUPPORT OF SENATE BILL 1008

Presented to the Senate Resources and Environment Committee

January 25, 1985

This statement is not intended to be a detailed analysis of the bill, but to respond to certain comments concerning it. As a preliminary explanation, the combining of certain exhibits to the Swan Falls Agreement into SB 1008 has made it somewhat awkward to define the Company's position on parts of the bill. Idaho Power Company is not required by the Swan Falls Agreement to support Section 2 of SB 1008, found on pages 2 and 3 of the printed bill, because its support of that Section could raise implications of a voluntary transfer of its water rights. In fact, the basis for Section 2 is the State's power to "regulate and limit" the use of water for hydropower purposes.

The application of Section 2 to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimum flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right.

One further comment on this subject is in order. Testimony has been submitted on behalf of the Attorney General. Those comments were not reviewed by the other parties to the agreement and do not necessarily reflect the views of anyone but the Attorney General.

One acknowledged typographical error is on page 3, of the Attorney General's testimony, to the effect that the Governor, as trustee, would be empowered by Section 2 of SB 1008 to release trust water to new uses that comply with state law. Those decisions would be made by the Idaho Department of Water Resources under the criteria set out in §42-203C Idaho Code, not by the Governor as trustee.

Specific comments on SB 1008 are:

Section 1, Page 1, lines 37-40. A comment was made that this publication requirement was excessive. However, if 10 cfs were applied at the rate of one-half inch per acre, the 10 cfs would irrigate 1,000 acres. This is a substantial development, and is deserving of statewide notice.

Section 2, page 2, lines 42-48. Certain comments which have been made relating to this section are potentially misleading, in the context of due process concerns. A subordination condition inserted prior to development of a hydropower project is much different in effect than one sought to be inserted after license procedures and construction are complete. This distinction needs to be kept in mind when discussing this section, particularly if claims of violation of due process of law are advanced.

Section 3, lines 14-28. Some question was raised concerning the application of the criteria to non-irrigation uses. As written, and as intended by the parties to the agreement, the family farming tradition (iii) and the development cap (V) would have no application to non-irrigation uses and would be ignored in the review process. Irrigation uses not involving the area above Swan Falls also would not be subject to the 20,000 acre cap.

Concern was also expressed that (V) was a directive to allow development of 20,000 acres per year, regardless of the impact of the other criteria. This concern focuses only on he word "conforms" and ignores the words "up to" and also ignores the next sentence which prohibits giving more weight to one factor than another. The interpretation advanced as a matter of concern would give conclusive weight to (V) in derogation of the other factors listed. §42-203C(2)(a)(V) was intended as a cap, and does not compel the approval of any amount of development which does not meet the other criteria listed.

Another concern expressed was over the perceived need to weight the criteria. The criteria are weighted in the bill: "No single factor . . . shall be entitled to greater weight . . .". The weighting established by the bill is obviously that all factors are equal in weight.

The relationship of existing criteria under §42-203A to the criteria set forth in §42-203C has been questioned. §42-203C specifically requires a three-step process:

1. Review of the proposed use under existing criteria, including local public interest; (§42-203A)

2. Determination of the question of significant reduction of water available for hydropower purposes; (§42-203C)

3. Determination of public interest under §42-203C. It is clear that SB 1008 does not, and cannot, adversely affect use of existing local public interest criteria, since that review is required by SB 1008 to be separate from the §42-203C review.

If the existing local public interest standard of §42-203A is inadequate to permit review of all relevant factors, the parties to the Swan Falls Agreement did not address those issues in writing §42-203C. Any claimed inadequacies of existing standards should be addressed by separate legislation.