

RESOURCES AND ENVIRONMENT COMMITTEE

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Meeting on

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

SB 1008 - Water rights for hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on FEBRUARY 1, 1985, 1:30 p.m.

before Chairman Noh

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A P P E A R A N C E S

PRESENT:

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Little
Senator Peavey
Senator Ringert
Senator Sverdsten
Tom Nelson, Idaho Power Company

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1 APPEARANCES

2 PRESENT:

3 Chairman Noh
4 Senator Beitelspacher
5 Senator Budge
6 Senator Carlson
7 Senator Chapman
8 Senator Crapo
9 Senator Horsch
10 Senator Little
11 Senator Peavey
12 Senator Ringert
13 Senator Sverdsten
14 Tom Nelson, Idaho Power Company

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16 * * * * *

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1 FEBRUARY 1, 1985

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3 CHAIRMAN NOH: Senator Crapo, can you give
4 us a little background and explain how the process
5 works and where we stand on the matter.

6 SENATOR CRAPO: Mr. Chairman, everybody
7 received yesterday a photocopy of the statement of
8 the intent as it existed at that point. Today as
9 you came in, there was another copy at your place
10 at the table. There were some minor changes
11 between the two, so the one on the table today is
12 the final version.

13 The way that came about is a sample
14 draft of that was prepared by myself. We
15 discussed that between the representatives of
16 Idaho Power, the Governor's office, the Attorney
17 General's office, and Senator Peavey's, and went
18 through another redraft and rewrite at that point.

19 Then after everybody saw the redraft,
20 we had a few other minor changes and those are the
21 minor changes before you today. And Senator
22 Peavey has not seen the last changes, but I don't
23 think there is anything in there that he would
24 disagree with.

25 But assuming he does not disagree with

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1 any of the last few changes, we should have
2 something, that if I understand it correctly, all
3 of the negotiators and Senator Peavey and myself
4 have agreed to.

5 Now, let me just quickly go through
6 what changes were made between the two documents
7 that you have. There were a number of
8 typographical or grammatical corrections made,
9 which I won't go over, which didn't change any of
10 the substantive language.

11 The statement of purpose had a sentence
12 added to it which said -- it's at the bottom of
13 the first paragraph beginning with "it recognizes"
14 under statement of purpose. "It recognizes that
15 Idaho's population commercial and industrial
16 expansion, as well as Idaho's agricultural needs,
17 will require an insured supply of water."

18 UNKNOWN SPEAKER: Is that insured supply or
19 amount?

20 CHAIRMAN NOH: Insured amount of water.

21 SENATOR CRAPO: It says amount, okay.

22 UNKNOWN SPEAKER: I'm sorry, Senator Crapo,
23 could you repeat it?

24 SENATOR CRAPO: It should be on the copy
25 right in front of you. It recognizes --

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<p>1 CHAIRMAN NOH: The last sentence of the 2 first page.</p> <p>3 SENATOR CRAPO: It recognizes that Idaho's 4 population and commercial and industrial 5 expansion, as well as Idaho's agricultural needs, 6 will require an insured amount of water.</p> <p>7 Then turning to the next page, again 8 there were some typos, and then we changed 9 Article 15 from Arabic to Roman numerals, little 10 things like that. But the major first change 11 is -- well, let's see, it's ten lines down from 12 section B, section 2, with the sentence beginning 13 with the word "supply." That sentence finished up 14 "supply of water for future beneficial upstream 15 uses."</p> <p>16 The word "all" was deleted and the word 17 "upstream" before "uses" was added. So it didn't 18 say "all future uses." It said "for future 19 beneficial upstream uses."</p> <p>20 Then going down another seven lines to 21 the sentence that begins with the word 22 "depletion."</p> <p>23 CHAIRMAN NOH: Sentence or the line? 24 SENATOR CRAPO: The line beginning with the 25 word "depletion" where it says, "depletion of the</p>	<p>1 clarify.</p> <p>2 And the next change is on page 5 on the 3 bottom paragraph and the last sentence of that 4 paragraph where it says, "it is the intent that we 5 talked about family farming tradition and jobs," 6 we added the words "otherwise qualified water 7 uses" in the first part of that sentence.</p> <p>8 So it says, "It is the intent that 9 otherwise qualified water uses which would promote 10 the family farming tradition or create jobs should 11 be recognized as essential to the economy."</p> <p>12 And then in the next -- excuse me -- 13 and the reason for that clarification was that 14 there was a desire to clarify that family farming 15 tradition and items that create jobs are 16 recognized as essential to the economy of the 17 state of Idaho, but it was not intended to state 18 that they receive a greater weighting than any 19 other uses.</p> <p>20 So we wanted to clarify that they had 21 to be otherwise qualified in the equal weighting 22 system. Thank you.</p> <p>23 And then we had used the phrase 24 "industrial manufacturing and municipal" in the 25 sixth and seventh lines from the first paragraph</p>
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<p>1 amount of the minimum flow," it did say "and shall 2 be," but it should have said "as," so it reads 3 "the minimum flow as defined by any applicable 4 contract."</p> <p>5 And then Murphy gauge was clarified to 6 be the Murphy U.S. gauging station.</p> <p>7 UNKNOWN SPEAKER: Well, would you back up to 8 that line that says "depletion to the extent of 9 the minimum flow established by state action"? Is 10 that the correction on it?</p> <p>11 SENATOR CRAPO: No, the correction that I 12 just told you about was really a grammatical 13 correction, but it clarified that the minimum flow 14 as defined by the applicable contract with the 15 state with regard to this particular discussion of 16 the minimum flow.</p> <p>17 The minimum flow is established by 18 state action, but it's also as pertains to Idaho 19 Power established by a contract as well, and that 20 is being clarified.</p> <p>21 And page 3, the first full paragraph, 22 nine lines down with the sentence -- or with the 23 line beginning with the word "plan," the "plan by 24 the Idaho Water Board," we changed that to the 25 "Idaho Water Resource Board" just again to</p>	<p>1 on the top of page 6. We just corrected that to 2 be consistent with the terminology throughout the 3 statement, which is the domestic, commercial, 4 municipal, and industrial.</p> <p>5 So we just, again, added the phrase so 6 we are using DCMI throughout the entire statement 7 of intent rather than different types of 8 terminology.</p> <p>9 And that is the final change that was 10 made from the drafts that you had yesterday.</p> <p>11 CHAIRMAN NOH: What's the committee's 12 pleasure? I would suggest that -- my suggestion, 13 I guess, would be that we consider the legislation 14 and if it goes out at the appropriate time on the 15 floor, we will just ask unanimous consent, or in 16 the absence of unanimous consent, move that this 17 be spread upon the journal.</p> <p>18 SENATOR RINGERT: Well, Mr. Chairman. 19 CHAIRMAN NOH: Senator Ringert.</p> <p>20 SENATOR RINGERT: I think if this is to have 21 any weight at all in the future, this statement of 22 legislative intent should have general circulation 23 before the bill is considered on the floor.</p> <p>24 CHAIRMAN NOH: Senator Crapo. 25 SENATOR CRAPO: I had also thought too that</p>

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<p>1 the other senators should have the opportunity to 2 review it. And I guess, I had also thought that 3 this committee probably ought to vote on it as 4 well (tape inaudible.) 5 CHAIRMAN NOH: And I might ask 6 Senator Ringert, what do you mean by general 7 circulation? 8 SENATOR RINGERT: Everybody should receive a 9 copy of it, Mr. Chairman. 10 CHAIRMAN NOH: You mean handle it like bills 11 and circulate it around the state, or are you just 12 speaking of within the legislature? 13 SENATOR RINGERT: Just the legislature. 14 CHAIRMAN NOH: Okay. Yes, absolutely. 15 Correct. Sure. I think that has to be the case. 16 I don't think we can pass anything, can we, that 17 isn't on the senators' desks or circulated in 18 advance? 19 SENATOR RINGERT: Well, Mr. Chairman, my 20 point would be that, you know, when somebody has a 21 problem, and we haven't passed legislation yet, I 22 don't think, that didn't have a problem somewhere 23 down the line. 24 And a problem arises and a court looks 25 for legislative intent to explain a particular</p>	<p>1 part of any seconders. The motion is going to die 2 for lack thereof. 3 UNKNOWN PERSON: Mr. Chairman, only because 4 of the point that you bring up that requires that 5 (tape inaudible). 6 CHAIRMAN NOH: Yes. Would someone want to 7 make a motion? 8 SENATOR CRAPO: Mr. Chairman, as a member of 9 the committee that prepared -- or the subcommittee 10 that prepared this statement, legislative intent, 11 I would move that the Senate Resource and 12 Environment Committee adopt or approve -- I'm not 13 sure which word I'm looking for there -- this 14 statement of legislative intent on behalf of the 15 committee. 16 CHAIRMAN NOH: Is there a second? 17 SENATOR BEITELSPACHER: I'd second that. 18 CHAIRMAN NOH: Senator Peavey, you have a 19 frown on your face. 20 MR. PEAHEY: Well, Mr. Chairman, are there 21 any comments from anybody in the audience? 22 CHAIRMAN NOH: Senator Peavey, you were 23 absent, tardy, late, and we did go over several 24 changes that were made apparently since you had 25 last seen the draft, however, there was no</p>
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<p>1 portion of it, we've talked about before, if the 2 legislature doesn't consider this material before 3 they voted on it, then that wouldn't play any role 4 in shaping their intent. 5 CHAIRMAN NOH: Senator Beitelspacher. 6 SENATOR BEITELSPACHER: Mr. Chairman, I'd 7 move that the state -- excuse me. I'd move that 8 the chairman of the committee be instructed to 9 distribute the legislative intent that is now 10 before us, the senate bill 1008, to all the 11 members of the senate so that it might be 12 available for them at such time prior to our vote 13 on senate bill 1008. 14 CHAIRMAN NOH: Is there a second? 15 Maybe we should vote on this first 16 Senator Beitelspacher on whether or not we want to 17 do it, or I guess the Chair could interpret this 18 as a motion in support of the statement of 19 legislative intent. 20 I think maybe we are getting the cart 21 before the horse. Maybe we first ought to have a 22 motion, Senator Beitelspacher, if the committee 23 wants, to accept the statement of intent. 24 MR. BEITELSPACHER: That would be fine with 25 me since there seems to be a reluctance on the</p>	<p>1 disagreement over any of those. 2 SENATOR PEAHEY: Well, I just have -- 3 Mr. Chairman -- 4 CHAIRMAN NOH: Yes, Senator Peavey. 5 SENATOR PEAHEY: I just have a suspicion of 6 what effect the legislative intent is going to 7 have when passed by one body and not the other and 8 if this isn't really just kind of an exercise in 9 futility. The case law pretty well defines what 10 the law means and the statutes. 11 That's my problem really. I guess 12 there's nothing in the language that I have a 13 problem with or that I know of now, but this is 14 just extra baggage that I don't know is needed. 15 CHAIRMAN NOH: Is there any further 16 discussion? If not, I guess, all of those in 17 favor of the motion say aye. 18 (Affirmative response.) 19 CHAIRMAN NOH: Opposed, no? 20 UNKNOWN PERSON: No. 21 CHAIRMAN NOH: (Tape inaudible.) It sounds 22 like the ayes have it. 23 SENATOR RINGERT: Mr. Chairman. 24 CHAIRMAN NOH: Senator Ringert. 25 SENATOR RINGERT: I think the record should</p>

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1 show that passing the motion and acceptance of the
2 statement of intent should not be regarded as
3 addressing anything except for what is
4 specifically set out in this statement of intent.

5 There could very well be other matters
6 within the bill that are not absolutely crystal
7 clear.

8 CHAIRMAN NOH: That should be well
9 understood. Okay. What is your pleasure with the
10 legislation? We have before us, then, senate
11 bills 1008 and 1006.

12 SENATOR CARLSON: Mr. Chairman, I have a
13 question: Now that we have accepted this as being
14 reasonable and understandable, is there something
15 more that needs to be done?

16 CHAIRMAN NOH: Yes. I would ask unanimous
17 consent that the chairman be allowed to circulate
18 this to all of the members of the senate as soon
19 as possible and make sure it's on the desks of the
20 members of the senate at the time that we vote on
21 the bill, should we put the bills out.

22 UNKNOWN SPEAKER: Mr. Chairman, there's
23 nothing to prevent you from doing that, if you'd
24 like to, anyway. I don't know how binding that
25 is, but if it makes you feel better, why it may be

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1 helpful.

2 CHAIRMAN NOH: Okay. How about the
3 legislation?

4 SENATOR PEAVEY: Mr. Chairman, I would vote
5 that we put the 1008 out with a do pass.

6 CHAIRMAN NOH: Second?

7 SENATOR BEITELSPACHER: Yes.

8 CHAIRMAN NOH: Moved to second that we put
9 1008 out with a do pass. Any discussion?
10 Senator Crapo.

11 SENATOR CRAPO: Mr. Chairman, I would
12 support the motion, however, first I would like to
13 ask a few questions, if I could, of some of the
14 negotiators that are here on two additional
15 points.

16 CHAIRMAN NOH: That's fine.

17 SENATOR CRAPO: Maybe, Mr. Nelson, if I
18 could ask you. It's my understanding that with
19 the date of October or November of 1984, which was
20 the cutoff date for those dismissed from the
21 action that are not -- well, whose rights are --
22 to whose rights Idaho Power is subordinated, that
23 that situation applies regardless of the status of
24 the minimum stream flow.

25 Do you understand my question?

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1 MR. NELSON: Yes.

2 SENATOR CRAPO: Could you address for me the
3 interplay between those water rights and the
4 minimum stream flow?

5 MR. NELSON: Mr. Chairman and members of the
6 committee, as I understand your question, Senator,
7 you are right that the contract, the October 25,
8 '84, Agreement, contains a sign-off by the Idaho
9 Power Company that its rights are subordinated to
10 actual use as of October '84.

11 In other words, that regardless of the
12 status of that water right, relative to state law,
13 to neighbors, to whatever other problems they may
14 have, that the company's rights are subordinated
15 to those rights.

16 Now, inherent in the discussion to date
17 has been the assumption that the historic flow of
18 4,500 is the flow. If that assumption is wrong on
19 the down side, that doesn't operate to the
20 detriment of those particular users. In other
21 words, if there isn't 600 cfs there, that does not
22 affect their right.

23 Likewise, if there is more than 600 in
24 the river, then that -- the agreement doesn't
25 limit the use by other people in that either.

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1 Those folks are subordinated regardless of what
2 happens ultimately to the stream flow.

3 SENATOR CRAPO: May I follow?

4 CHAIRMAN NOH: Yes, Senator Crapo.

5 SENATOR CRAPO: Would it be fair to say,
6 then, that Idaho Power assumes the risk of a
7 stream flow -- of an actual stream flow below
8 3,900 as far as priorities on that water?

9 MR. NELSON: Mr. Chairman, Senator Crapo,
10 that is correct as to existing users.

11 SENATOR CRAPO: Then, can you tell me what
12 would happen in Idaho law if something happened,
13 say an earthquake or something happened, and the
14 flow actually was less than 3,900 or less than the
15 amount that these water users could use and still
16 leave 3,900 in the river?

17 What would happen at that point?

18 MR. NELSON: Mr. Chairman and Senator Crapo,
19 as far as any Idaho Power Company rights would be
20 concerned, those users would be immune from any
21 challenge by the company.

22 Now, the state may develop in the
23 future or may claim to have now some right
24 relative to those users, but that is not either
25 defined by or limited by the agreement. So in

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1 that case, the power company would watch the river
2 flow go down, as would everybody else, and there
3 would be -- have no weapons in which to prevent it
4 as to existing users.

5 I want to make that clear.

6 CHAIRMAN NOH: Senator Crapo.

7 SENATOR CRAPO: How would Idaho Power
8 purchase water at the present time if they desired
9 to do so? What would be the procedure it has to
10 go through?

11 MR. NELSON: Mr. Chairman, Senator Crapo, if
12 it's a one-year lease through the water supply
13 bank, then that is handled -- I think that's been
14 a lateral from the Department of Water Resources
15 to the Committee of Nine. The company leases
16 water on a one year basis.

17 If it wants a longer term of use than a
18 year under the water supply bank, then it needs to
19 apply for a change in place of use, point of
20 diversion, and nature of use with the Department
21 of Water Resources.

22 To the extent that that application
23 involves more than 50 cfs or I think it's 5,000
24 acre feet, then it requires legislative approval.
25 That is the existing law, and of course, this

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1 agreement and any of the legislation doesn't
2 attempt to change that.

3 SENATOR CRAPO: With regard to the portion
4 of the contract that says that subsequent
5 legislative changes don't impinge on the contract,
6 would you clarify for me, just a little bit, what
7 subsequent legislative changes would do to the
8 status of Idaho Power's water right with regard to
9 the changes in the minimum flow if the legislature
10 were to do that?

11 CHAIRMAN NOH: Mr. Nelson.

12 MR. NELSON: Mr. Chairman, Senator Crapo, as
13 the contract and the statute work together, the
14 state could obviously increase the minimum flow at
15 Murphy at any time they wanted. The company would
16 have no rights involved in that decision.

17 If the state wanted to reduce that
18 minimum flow below the seasonal 3,900 and 5,600,
19 it certainly is at liberty to do that. However,
20 the contractual recognition of the company's
21 water rights at that level, would remain at those
22 levels. And therefore the company's rights would
23 not follow the minimum flow down in that
24 substance.

25 The contract would still define it as

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1 the seasonal 3,900 and 5,600.

2 SENATOR CRAPO: I just have one more
3 question, Mr. Chairman.

4 CHAIRMAN NOH: Senator Crapo.

5 SENATOR CRAPO: I noted in that state water
6 plan -- and this is not particularly related to
7 Idaho Power, but I wanted to see if you or anybody
8 else had a different understanding.

9 The state water plan used to have a
10 separate block of water set aside for thermal
11 cooling development. And at this point, as I
12 understand it, the state -- the proposed changes
13 to the state water plan, that development would be
14 industrial development under the DCM block that
15 has been set aside.

16 Is that your understanding?

17 MR. NELSON: Mr. Chairman, Senator Crapo, I
18 think clearly a thermal cooling would be an
19 industrial use. That's the -- to me, the common
20 understanding of the word. And that, for example,
21 is the way that the Jim Bridger operators acquired
22 water in Wyoming is under an industrial latitude.

23 So yes, I think that thermal cooling
24 clearly is an industrial use.

25 CHAIRMAN NOH: Thank you, Mr. Nelson. Thank

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1 you, Senator Crapo. Senator Ringert.

2 SENATOR RINGERT: Mr. Chairman, Tom, I'll
3 start off with you, could you just give us a brief
4 overview of which negotiating party wanted which
5 points included in this legislation?

6 I mean, you know, we are confirming
7 somebody else's negotiating, and I would like to
8 know what the negotiating blocks were.

9 MR. NELSON: Mr. Chairman, Senator, that
10 would be, I think, a fairly extensive endeavor if
11 I did it in any detail.

12 I can -- I can give you an overview and
13 then you can ask me questions, if you have any
14 particular concerns. I think you have been at the
15 hearings where we've discussed how the 3,900 was
16 arrived at. It was very scientific. There is
17 2,500 in the river now. The water plan says
18 3,300, halfway is 3,900.

19 The -- somewhat the same function was
20 followed in winter flows to get to the 5,600, that
21 happened overflows. Look at existing conditions
22 in the winter as best you can estimate them, and
23 then just back out the effect of developing the
24 600 cfs summer, you come out to an approximate
25 5,600 winter.

5 (Pages 17 to 20)

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1 So that was an attempt to redivide the
2 existing situation, both between the existing
3 water plan and the existing flow. The other --
4 CHAIRMAN NOH: Senator.
5 SENATOR RINGERT: Well, excuse me. Who
6 wanted -- while we're at this point now. Who
7 wanted the 39 and 56?
8 MR. NELSON: The company wanted both numbers
9 higher, and the state wanted them both lower. I
10 won't --
11 UNKNOWN SPEAKER: If I might interject here,
12 Senator Ringert, it's my understanding that isn't
13 there some element of the agreement that makes
14 even this kind of a discussion somewhat ticklish?
15 MR. NELSON: Well, Mr. Chairman, I don't
16 know that it's part of the agreement. The
17 negotiators had an informal understanding among
18 themselves that we wouldn't voluntarily, you know,
19 pick the agreement apart and say, "Okay, Nelson
20 got this one, but the Attorney General got this
21 one," simply because we have tried to do it as a
22 whole.
23 I don't think in the face of what's
24 otherwise an inordinate question from
25 Senator Ringert, I'm in any position myself to

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1 impose that as our understanding among ourselves.
2 CHAIRMAN NOH: Well, I don't know why our
3 other negotiators aren't here today either, but --
4 UNKNOWN SPEAKER: They are in the house.
5 CHAIRMAN NOH: Okay, fine.
6 MR. NELSON: So, I mean, that has been our
7 gentlemen's agreement, and I think by and large we
8 have stuck to that. But I don't feel I'm in a
9 position to tell Senator Ringert I won't answer
10 his question.
11 I can't -- I don't want to be
12 misunderstood as saying that there are major and
13 minor points of that agreement because the whole
14 thing dovetails together, but one of the obvious
15 factors involved was the public interest criteria.
16 And that was, I think, as I look back
17 on it, both the state and the power company wanted
18 some element of state control over the allocation
19 of that water. That, if the race was to the
20 swift, the swift were already afoot. And in this
21 situation, the price of one man's failure is
22 another man's inability to get started.
23 So, the way of the -- both the existing
24 undeveloped applications and future uses outside
25 those against some form of public interest

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1 criteria was, I think, a mutual desire.
2 The form -- the form each of those
3 criteria went through, I don't know probably 50
4 drafts, literally, I don't think that is an
5 exaggeration, so to say where any one of those
6 five came from, I'm not prepared to even guess.
7 It's obvious from just where the
8 parties were located, that the stricter they were,
9 the more opportunity there was to foreclose
10 development, obviously, that is where the company
11 was coming from. But the state wasn't necessarily
12 speaking only for unrestricted development. So
13 it's really hard to say where some of those things
14 came from.
15 Part of this, obviously, was kind of a
16 put-up or shut-up situation on both sides. The
17 company had said it didn't want to be watermaster,
18 the state says, "Okay, then take yourself totally
19 out of any vestige of control over the rights that
20 you have defined."
21 We said, "All right, but if you are
22 going to be the watermaster, then you get out and
23 you take care of it." So it's in that context
24 that you find the adjudication requirement of the
25 thought being that it doesn't make a lot of sense

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1 to try and define what's in the river when you
2 haven't the foggiest idea, really, of the details
3 of the water uses now going on above Swan Falls.
4 The scope of the adjudication within
5 the McCarren Amendment was simply an effort to
6 make sure that for planning purposes, the federal
7 government had to get involved. Because you can't
8 plan the river with huge potentially large
9 undefined claims that aren't part of the planning
10 process. So that was, I think, a mutual segment.
11 The trust provision in section 2 of the
12 2008 was an idea of -- I think that came from the
13 state. I seized on it with alacrity because it
14 filled what I saw as a major problem the company
15 had in this thing throughout, which was we could
16 get the state to sign up, but how did we get the
17 state to live up to what they said they would do?
18 And that was a major problem from our -- from our
19 side.
20 The trust provision was suggested to
21 get us around the subordinated versus
22 subordinatable nature of the water above the
23 minimum flow. It remains unsubordinated, but it's
24 held in trust by the state, and that neatly side
25 stepped the problem, but it left us, we think,

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<p>1 with another club to use against the state if it 2 tries to ignore the standard set by the 3 legislation. 4 Do you want me to restrict my comments 5 to 2008, Senator, for now? 6 SENATOR RINGERT: I think we should. 7 MR. NELSON: Okay. I believe public 8 interest, I think that as I look back, would be 9 the major elements of the particular bill. 10 SENATOR RINGERT: I have a question 11 Senator -- excuse me, Mr. Chairman, Tom, on page 4 12 of the bill, in section 42-203D, 2, lines 44 13 through 47, it specifically names the 14 administrative proceedings, but most of our -- I'm 15 just going on memory now, but it seems to me some 16 of our other code sections that are similar to 17 this, specifically mention the right to judicial 18 review. 19 Now, would you comment on whether the 20 lack of that statement in this particular sentence 21 would, one, preclude judicial review and, two, if 22 that's the case, is that the intent of it? 23 MR. NELSON: Mr. Chairman, Senator Ringert, 24 first working backwards. It was not the intent of 25 the section to preclude judicial review, but I</p>	<p>1 doesn't pick it up. 2 SENATOR RINGERT: Just a comment I had on 3 this Tom, but it just seems rather strange, and I 4 realize that, at least currently, this section 6 5 is in the code already, but I wonder why we have 6 to mention in some places that judicial review is 7 available under 1701A and not mention it in 8 others. 9 And I just see the opportunity for a 10 court to decline jurisdiction of a neat little 11 question sometime because of that. 12 CHAIRMAN NOH: Mr. Young had some 13 enlightenment to shed on this question. 14 MR. YOUNG: 421701A, Mr. Chairman, includes 15 a specific allowance for judiciary review. (Tape 16 inaudible). 17 CHAIRMAN NOH: Senator Ringert. 18 SENATOR RINGERT: Of any adverse order the 19 director (tape inaudible.) 20 MR. YOUNG: Mr. Chairman, Senator Ringert, 21 that particular section, then, a few years ago 22 clarified any time the director made any decision 23 that was adverse to a water user or citizen on 24 which there hadn't been a previous right for a 25 hearing, that provision would kick in giving the</p>
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<p>1 can't tell you without looking at the rest of 203 2 where that right to review exists, but I believe 3 either in a part of 203 that we haven't put in -- 4 there it is, subsection 6, on page 2, just ahead 5 of section 2 bill, is in the existing code, a 6 right of review, which would I think apply to the 7 entirety of 203. 8 1701 is the section of legislature 9 added or changed, I think in 1980, which creates 10 the right of review under the Administrative 11 Procedures Act. 12 CHAIRMAN NOH: Senator Ringert. 13 SENATOR RINGERT: Mr. Chairman, Tom, I think 14 the one on page 2 refers to proceedings under 15 applications, and 203D on page 4 is review of 16 existing permits, so I just wonder if we do have 17 that coverage. 18 MR. NELSON: Well, Mr. Chairman and 19 Senator Ringert, as I said, it was not intended to 20 exclude it. My thought was section 203 in total 21 already has the right of review in all. And the 22 1701A is the section that creates the 23 administrative review. 24 So I think you can incorporate it by 25 reference there, at least, even if subsection 6</p>	<p>1 right to administrative hearing and judiciary 2 review. 3 CHAIRMAN NOH: Are there other questions? 4 Senator Tominaga, you indicated you might like to 5 ask a question. 6 SENATOR TOMINAGA: I have one question, 7 Mr. Chairman, for Tom Nelson. 8 Now, say in 5 or 10 years the state 9 decides to lower the minimum stream flow from 10 3,900 to say 3,500, would the state have to 11 compensate Idaho Power for -- because it is a 12 contract or agreement between the state and the 13 Idaho Power for that block of water that we, as a 14 state, recognize is used for hydropower, would the 15 state then need to compensate Idaho Power for the 16 reduction in the minimum stream flow? 17 MR. NELSON: Chairman, Senator, as I have 18 said, this whole approach is one of planning and 19 the company's position now is to watch the state 20 to make sure its planning is aimed at compliance 21 with the minimum flow in the contract, which 22 presumably are the same to start with. 23 In your analysis -- in your example, if 24 the state lowers the minimum flow and changed this 25 planning standard to recognize that lower flow</p>

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<p>1 rather than the contract amount, then the company 2 would immediately go to court, as I see it, and 3 attempt to force a change in their planning 4 process to recognize the contractual right. That 5 would be in advance of any -- hopefully, approval 6 of any new uses.</p> <p>7 One option in that situation would be 8 for the court or the state through legislature to 9 say, "Well, all right you have a contract, but 10 your remedy is by compensation not by stopping the 11 state in its planning process."</p> <p>12 But the initial attempt, as we have 13 explained it to the other negotiators, would be to 14 force compliance with the contract. Only then, if 15 we weren't successful in doing that, would we, I 16 think, be entitled to claim compensation. We 17 would rather have the water than the money 18 frankly.</p> <p>19 CHAIRMAN NOH: Yes, Senator Carlson.</p> <p>20 SENATOR CARLSON: Mr. Chairman and 21 Mr. Nelson, early on you indicated that senate 22 bill 1008 addresses the public interest, and I 23 wonder if, can you define the public interest for 24 me?</p> <p>25 MR. NELSON: Mr. Chairman, Senator, as</p>	<p>1 under double ii, the analysis there is that you 2 look in i at the benefit of the new use. And 3 under ii you look at the detrimental effects of 4 the new use on electrical rates.</p> <p>5 That is the other side of the coin. If 6 it is worth X dollars to have the new use in place 7 to the economy of the state, and it costs Y 8 dollars to have that water taken out of the river, 9 then you have to balance X and Y.</p> <p>10 That is where the ratepayer interest is 11 addressed as part of the public interest.</p> <p>12 CHAIRMAN NOH: Thank you. Senator Peavey.</p> <p>13 SENATOR PEAVEY: Mr. Chairman, Mr. Nelson, 14 why don't you give us the flip side of Senator 15 Tominaga's scenario in case the state wanted to 16 raise the minimum flow? How would that work and 17 would there be any problems?</p> <p>18 MR. NELSON: Mr. Chairman, Senator Peavey, 19 in that -- in the situation where the state raised 20 the minimum flow, the company's subordinated 21 rights would remain at 3,900 and 5,600. However, 22 that increase, then, would make the company a 23 beneficiary of that increase flow.</p> <p>24 And as I read both what we have and as 25 those minimum flows operate, the company would be</p>
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<p>1 section 203 of Title 42 now operates, you find 2 public interest defined in two places. The local 3 public interest standard in A, and the portion of 4 public interest defined by C.</p> <p>5 So in that situation, public interest 6 is both -- local public interest as may be applied 7 under 203A and the economic portion of the public 8 interest, if you will, found in 203C.</p> <p>9 SENATOR CARLSON: Well, Mr. Chairman, just 10 off the top of your head, would you illuminate for 11 me, is the ratepayer, Idaho Power and others in 12 the state of Idaho, is their interest involved and 13 considered in this legislation as well?</p> <p>14 MR. NELSON: Senator, yes. The interest of 15 the ratepayer is addressed in 203C, subsection 2 16 ii.</p> <p>17 SENATOR CARLSON: May I interrupt right 18 there, Mr. Chairman --</p> <p>19 CHAIRMAN NOH: Yes you may.</p> <p>20 SENATOR CARLSON: Mr. Nelson, is that the 21 part that says if you ever sell those water 22 rights, the proceeds therefore would go to the 23 customer?</p> <p>24 CHAIRMAN NOH: No, sir.</p> <p>25 MR. NELSON: No. Mr. Chairman, Senator,</p>	<p>1 a beneficiary of the higher flow and would be 2 entitled to protect it, or to try to make the 3 state enforce it if it raised the flow but at the 4 same time didn't put mechanisms in place to really 5 make it work.</p> <p>6 CHAIRMAN NOH: Senator Peavey.</p> <p>7 SENATOR PEAVEY: Mr. Chairman, when you say 8 protect the new higher minimum flow, you are not 9 saying the state, then, couldn't ten years after 10 it had done that come back and relower the 3,900? 11 That would be the state's option, would it not?</p> <p>12 MR. NELSON: Mr. Chairman, you would be 13 right, Senator. In other words, anything above 14 the minimum flow, the state is free to do as it 15 likes.</p> <p>16 CHAIRMAN NOH: Senator Horsch.</p> <p>17 SENATOR HORSCH: Mr. Chairman, Tom, just 18 getting my thinking in the right perspective of 19 maybe I'm not thinking right when you said you 20 would still after the state raised it, had the 21 subordinated right of 3,900, isn't that not the 22 terminology of the unsubordinated right of 3,900?</p> <p>23 MR. NELSON: Unsubordinated, I'm sorry.</p> <p>24 SENATOR HORSCH: Had me turned around 25 180 degrees there for a second.</p>

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<p>1 UNKNOWN SPEAKER: You are going to have to 2 get Tom's paycheck for today. 3 CHAIRMAN NOH: Senator Ringert. 4 SENATOR RINGERT: Mr. Chairman, Tom, on 5 page 3, line 43, it says "permit or license." 6 Now, my question there is, I can understand if 7 that's -- if that's a valid premise to start with 8 to see if the condition would be placed in the 9 permit, therefore, that same condition would carry 10 over into the license. 11 But I am of concern that this language 12 would permit the director to impose subordination 13 on the licensed water right that didn't have that 14 condition when it was a permit. 15 MR. NELSON: Mr. Chairman, Senator Ringert, 16 that is addressed in the last full sentence of 17 sub 6, "Shall not apply the licenses which have 18 already been issued as of the effective date of 19 this act." 20 In other words, what the state wanted 21 here -- 22 SENATOR RINGERT: Well Tom, forgive me, but 23 that is not my concern. My concern is the -- is 24 the small hydro operator who received a permit in 25 1990, and that permit does not have a</p>	<p>1 for me to interject one comment I have. As I 2 said, I am going to support sending the bill to 3 the floor, but with regard to this particular 4 section dealing with, essentially (tape inaudible) 5 the new small hydro or at least impacting new 6 small hydro development, I think there are some 7 inequities in the bill where at least -- that we 8 ought to address the type of discretion the 9 director should have to impose such restrictions. 10 And it's my understanding that there 11 will probably be some subsequent legislation 12 introduced this term to address those issues. And 13 so, although, I'm in agreement to send this bill 14 to the floor, I think that we as a committee ought 15 to be aware that there are some possible 16 clarifications that need to be attached to that 17 type of discretion on the part of the director. 18 CHAIRMAN NOH: Any other questions by the 19 committee members? Are you ready for the 20 questions? Senator Little. 21 SENATOR LITTLE: With this (tape inaudible) 22 about the small hydro, what assurance have we got 23 that there will be legislation coming to protect 24 small hydro? 25 CHAIRMAN NOH: I presume the dedicated</p>
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<p>1 subordination provision in it. 2 And he builds his plant and gets into 3 operation, and here comes the director and looks 4 at that and says, "I probably should have done 5 this while it was a permit, but I'm going to do it 6 now." 7 MR. NELSON: Mr. Chairman, Senator Ringert, 8 that interpretation is obviously possible under 9 that language. What the state was wanting, I can 10 tell you, was that there are existing permits out 11 there for hydropower purposes, some of which may 12 be unsubordinated. 13 I think there is only a handful. They 14 wanted the power to go back and subordinate those 15 permits at the time that they issued the license. 16 So they were thinking of the existing situation, 17 not what happens in 1990. But that interpretation 18 would be possible. 19 All I can tell you is that this was the 20 state's section -- going back to your discussion 21 of who did what, all I added was the last sentence 22 to make sure they wouldn't come back and undo 23 everything we had done with the contract. 24 CHAIRMAN NOH: Senator Crapo. 25 SENATOR CRAPO: This might be a good point</p>	<p>1 interest of the legislative representatives of 2 people in those districts that are concerned. 3 Okay. Senator Peavey. 4 SENATOR PEAVEY: One last question of Tom. 5 Mr. Nelson, what happens to this agreement if 6 nothing gets through and the whole thing blows up? 7 Where are we now? 8 I think there is a misconception on the 9 part of certain sections that state that they are 10 going to be in better shape than they are now, and 11 I might have you address that. 12 MR. NELSON: Mr. Chairman, Senator Peavey, 13 the lawsuits which precipitated the hopeful 14 resolution issue are still pending. And absent a 15 timely, and I can't give you an idea of what that 16 time would be, implementation of the agreement -- 17 the agreement would be scratched and we will go 18 back to war. 19 So the problems that led to the 20 pressures to develop the agreement still exist, 21 absent the agreement (tape inaudible). 22 CHAIRMAN NOH: Senator Peavey. 23 SENATOR PEAVEY: I thought I remembered 24 seeing some dismissal notices. What portions of 25 those lawsuits were dismissed? What do we have</p>

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1 left (tape inaudible)?
2 MR. NELSON: Mr. Chairman, Senator Peavey,
3 we still have the problem with rights versus
4 people. But to date, since October 25th signing
5 of the agreement, we have dismissed in round
6 numbers 4,000 filings, if you will, from the suit.
7 As I say, it is hard to tell in people,
8 because some of them you have ten people on them
9 or you might have one guy with ten filings, but we
10 have dismissed 4,000 filings.
11 In terms of filings still subject to
12 the suit, I'd say there is probably 2,500 to 3,000
13 as a very rough estimate that we would still be in
14 court with.
15 SENATOR PEAVEY: Mr. Chairman.
16 CHAIRMAN NOH: Senator Peavey.
17 SENATOR PEAVEY: What category? How could
18 you classify the 2,500? Who are they?
19 MR. NELSON: Senator Peavey, as far as we
20 know, they would be undeveloped applicants and
21 permits. We are in the process of sending out a
22 questionnaire to try and locate those people in
23 that group that are developed or have made the
24 1180 investment that we don't know about. But by
25 and large, it will be undeveloped applicants and

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1 permits.
2 Mostly, large agricultural because we
3 have dismissed, to the extent that we can, the
4 commercial, industrial, municipal, domestic
5 people.
6 CHAIRMAN NOH: Senator Peavey.
7 SENATOR PEAVEY: Just one last question, to
8 summarize it then, all we really shouldn't have
9 any exiting irrigators left in a status where they
10 are locked in combat with the power company; is
11 that right?
12 MR. NELSON: Mr. Chairman, Senator Peavey,
13 that is right. At least as soon as we can find
14 out all of the 1180 beneficiaries, that won't be
15 the case.
16 UNKNOWN PERSON: (Tape inaudible), the big
17 question, of course, other than that group left is
18 who is going to use the future -- what will future
19 uses be of the remaining water?
20 CHAIRMAN NOH: Senator Ricks.
21 SENATOR RICKS: Mr. Chairman, may I ask
22 Mr. Nelson a question while it's fresh on my mind?
23 The group that you referred to as being
24 dismissed, they were dismissed with prejudice; is
25 that right?

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1 MR. NELSON: Sure.
2 CHAIRMAN NOH: Senator Ricks.
3 SENATOR RICKS: So that means -- does that
4 mean, then, that they could not be -- the courts
5 could not -- or anybody could not sue them and
6 challenge their water right in the future?
7 MR. NELSON: Mr. Chairman, Senator Ricks,
8 the only meaning that has in the context in which
9 that dismissal took place is that the power
10 company is barred from ever challenging their
11 water right.
12 Now, as I said before, if they have
13 trouble with their neighbors, they have trouble
14 with the state, whatever those other problems are,
15 they will continue to have them. But the power
16 company is barred from challenging their water
17 right.
18 CHAIRMAN NOH: Senator Ricks.
19 SENATOR RICKS: Mr. Chairman, one further
20 question, then. Mr. Nelson, do you have any idea
21 about what quantity of the river that involves in
22 terms of the cfs as far as the permit holders are
23 concerned?
24 MR. NELSON: Mr. Chairman, Senator Ricks,
25 the estimates are necessarily very rough, Senator,

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1 because when you are looking at holding paper
2 right, somebody who has not proved up but has a
3 filing, and it's on the basis of some of those
4 filings that we did the dismissal, you find -- and
5 I'm not being critical of the filers. It's just
6 the way you do it at that stage. You over file on
7 acreage and you over file on amount.
8 So if I were to go back through those
9 people who were dismissed and tell you what they
10 showed on paper, other than the licenses that they
11 had in, I would have a vastly overstated amount.
12 Now, I have gone back through to try
13 and determine from the basis of acreage involved
14 on the people we know are existing and then use a
15 depletion based on that acreage, and I come out in
16 the vicinity of 1,000 cfs. But that is a really
17 rough number because what you have is about three
18 assumptions on top of a couple of guesses to even
19 get that close.
20 But that's -- like I say, if you use
21 the diversion numbers, it's huge. I would dare
22 say you would be talking 10 or 15 or 20,000 cfs on
23 the diversion. But in terms consumption, as best
24 I could work out the acreage, it wasn't that big.
25 SENATOR RICKS: Mr. Chairman, one further

10 (Pages 37 to 40)

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1 question along those lines, that is the part, I
2 guess, I haven't got quite clear in my mind. I'm
3 trying to comprehend and understand because I'm
4 wondering whether there is any really free water
5 in that river if not -- we haven't used it all up
6 in terms of permits. I guess that's what I'm
7 trying to resolve within my own mind.

8 And I recognize the fact that when a
9 person seeks a water permit, any one of us or
10 whatever the case might be, and we seek a water
11 permit for X number volume of water. And whether
12 we use it for two months during the year or ten
13 months during the year or what, we still have the
14 permits and the right to that quantity of water.

15 I guess -- and I'm just trying to get
16 that clear in my mind whether or not there is any
17 excess water available in the whole river. That's
18 where I'm kind of confused.

19 MR. NELSON: Mr. Chairman, Senator, if --
20 that is one of the ifs -- if our analysis was
21 right that there's 4,500 in the river. In other
22 words, if you repeated 1961 and 1985, the low flow
23 of the river at the Murphy gauge would be 4,500.

24 All right. If that assumption is
25 correct, implicit in that then is the conclusion,

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1 if you will, that all current development has been
2 reflected in the river.

3 In other words, we have now felt the
4 effects of all of that development. And that --
5 one person can see about as far to the ground as
6 another, but I'm convinced, based on my
7 conversations with experts at the Department and
8 experts that we have and the experts that other
9 people have hired, that that is a supportable
10 conclusion.

11 So -- but if that is right, then there
12 is 600 cfs in the river and that 1,000 cfs that we
13 dismissed, if my number is right, is the 1,000 cfs
14 that took it from 5,500 to 4,500. So they are
15 already in the river. They have already been
16 felt. Their impacts have been measured and their
17 uses have been accounted for.

18 CHAIRMAN NOH: Okay. Are you ready for the
19 question?

20 MS. HAYES: You've allowed everyone to talk
21 but me.

22 CHAIRMAN NOH: The Chair has limited the
23 discussion and the testimony to interrogation
24 between members of the senate, particularly of the
25 committee, and people involved in the negotiations

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1 or the Department of Water Resources.

2 We didn't intend for this to be a
3 public hearing. We have had countless public
4 hearings. The measure has been before us for a
5 long, long time. And I'm certainly not one to
6 want to cut off discussion, but at some point we
7 have to get on with our business.

8 MS. HAYES: Well, I have a valid point to
9 make.

10 CHAIRMAN NOH: All right. Then, Ms. Hayes,
11 you may make your valid point.

12 MS. HAYES: All right. We have done some
13 intensive research into the number of cfs that is
14 in this river. And we have gone to the
15 United States Geological Survey, and we maintain
16 that there's 6,065 cfs in that river, that we
17 should be -- you know, when we have qualified
18 people, such as this, that are telling us that
19 that is the amount, this and that, in that river
20 over a 23-year period, that this is the average,
21 that this is what we should be considering, and --
22 so that we are saying that we are not starting
23 from a valid point. That we need to consider this
24 6,065 cfs's as the average flow in that stream for
25 the past 23 years.

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1 If we start on the wrong (tape
2 inaudible) in planning for this stream, you are
3 going to be coming out with the wrong figures.
4 And I think this is -- you go to people who keep
5 records and you find out what they are.

6 Now this, I think this could throw your
7 whole planning out of kilter, and so I do want to
8 make that point.

9 CHAIRMAN NOH: Thank you. And I should
10 point out those people were involved with the
11 technical committee deliberations which guide
12 negotiators in their (tape inaudible).

13 All right. Are you ready for the
14 questions?

15 UNKNOWN SPEAKER: Mr. Chairman, Mr. Nelson
16 has one last (tape inaudible).

17 CHAIRMAN NOH: Yes, Mr. Nelson.

18 MR. NELSON: Mr. Chairman, Senator Peavey,
19 so that no one gets confused about the 6,065 cfs,
20 if you take June 27th of every year for the last
21 23 years, you may very well come to a number, an
22 average almost flows -- very well come to a number
23 like 6,065.

24 But the USGS, who runs the gauging
25 station at Murphy, recorded a flow on June 27,

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1 1981, of 4,530 cfs. So what we are talking about
2 here is a minimum flow. You know, you don't swim
3 in average depth rivers, and fish don't live in
4 average depth rivers.

5 This is a critical period planning
6 mechanism. You look at the worst case and you
7 say, "What could we accept in that river on the
8 worst day that we can foresee we will have?" That
9 day to date has been 4,530 cfs, not 6,065.

10 If you want to go to an average number,
11 then admittedly it will be much higher. But your
12 exposure to flows below an acceptable limit will
13 be much greater.

14 CHAIRMAN NOH: As many are as in favor of
15 senate bill 1008 signify by saying aye.

16 (Affirmative response.)

17 CHAIRMAN NOH: Opposed, no?

18 UNKNOWN PERSONS: No.

19 CHAIRMAN NOH: Would you like your votes
20 recorded as such?

21 UNKNOWN SPEAKERS: Yes. (Tape inaudible).

22 CHAIRMAN NOH: Senators Ringert, Little, and
23 Carlson voted no. Okay. Now, how about senate
24 bill 1006?

25 Someone care to make a motion on senate

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1 bill 1006?

2 SENATOR BUDGE: Mr. Chairman, I move that it
3 go to a do pass.

4 SENATOR BEITELSPACHER: I second.

5 CHAIRMAN NOH: Moved and seconded that we
6 put out senate bill 1006 with a do pass
7 recommendation.

8 Is there any discussion? If not, all
9 those in favor signify by saying aye.

10 (Affirmative response.)

11 CHAIRMAN NOH: Opposed, no?

12 UNKNOWN PERSONS: No.

13 CHAIRMAN NOH: Do you want your votes
14 recorded?

15 UNKNOWN PERSONS: Yes.

16 CHAIRMAN NOH: Senators Ringert and Little
17 vote no, and Senator Carlson.

18 Okay. I guess the Senate State Affairs
19 Committee are going to consider the PUC bills, the
20 adjudication bill is up across the way in the
21 House. Thank you, troops, you are -- (end of
22 tape)

23 (Meeting concluded.)

24

25

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

2
3
4 I, Roxanne Patchell, Court Reporter, a
5 Notary Public, do hereby certify:

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

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

15 IN WITNESS WHEREOF, I have hereunto set
16 my hand this *14th* day of *March* , 2007.

17
18
19
20 
21 _____
 Roxanne Patchell, Court Reporter
 CSR No. 733
22
23
24
25