

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

RE: WATER ALLOCATION RULES AND
REGULATIONS HEARINGS.

TRANSCRIPT OF PROCEEDINGS REQUESTED BY

ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND

MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

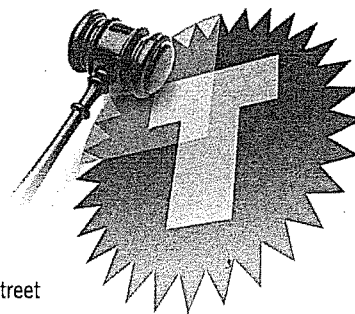
January 15, 1986, 2:15 p.m.

MINI-AUDITORIUM, COLLEGE OF SOUTHERN IDAHO
TWIN FALLS, IDAHO

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A P P E A R A N C E S

ROGER LING
CHARLES BROCKWAY

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<p>1 STATE OF IDAHO 2 DEPARTMENT OF WATER RESOURCES 3 -----x 4 : 5 RE: WATER ALLOCATION RULES AND : 6 REGULATIONS HEARINGS. : 7 : 8 -----x 9 10 11 TRANSCRIPT OF PROCEEDINGS REQUESTED BY 12 ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND 13 MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES 14 15 January 15, 1986, 2:15 p.m. 16 17 18 MINI-AUDITORIUM, COLLEGE OF SOUTHERN IDAHO 19 TWIN FALLS, IDAHO 20 21 22 23 24 Transcribed by 25 Frances J. Morris CSR N6. 696</p>	<p>1 TWIN FALLS, IDAHO 2 January 15, 1986, 2:15 p.m. 3 4 THE HEARING OFFICER: Today is January 15th, 5 1986. The time is 2:15 p.m. This hearing is 6 being conducted in the Mini-Auditorium at The 7 College of Southern Idaho, Twin Falls, Idaho. 8 The roster of attendance indicates that 9 Mr. Roger Ling wishes to make a formal statement 10 for the record. 11 Mr. Ling, if you would come forward and 12 get near the microphone and state your name and 13 address, then you can proceed to make your 14 statement. 15 MR. LING: Thank you, Mr. Young, Officials 16 of the Idaho Department of Water Resources. I 17 apologize for the cold that I have, and as a 18 result of that, try to paraphrase some of my 19 comments which I am at this time also presenting 20 in writing. And I'll submit my comments in 21 writing to you. But I think it may be worthwhile 22 for this hearing to review those comments to some 23 extent. 24 My name is Roger D. Ling. I am an 25 attorney from Rupert, Idaho representing numerous</p>
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<p>1 APPEARANCES 2 3 ROGER LING 4 CHARLES BROCKWAY 5 ***** 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 water entities, not only those presently using 2 water in Southern Idaho pursuant to valid permits 3 and decrees, but also entities seeking to 4 appropriate water in Southern Idaho for irrigation 5 purposes. 6 In reading the proposed rules, my first 7 concern is that perhaps we have avoided and 8 ignored certain legal principles that have applied 9 in the state of Idaho for some time. One reads 10 Section 42-203 as recently enacted by the Idaho 11 legislature and Article 15, Section 3 of the Idaho 12 Constitution. And then the rules, it seems to me, 13 that there are several inconsistencies which in 14 the rules would not pass constitutional safeguards 15 as provided by Article 15, Section 3. I'd only 16 point out specifically that in Article 15, Section 17 3, as you well know, the constitution clearly 18 provides that, when waters of any natural stream 19 are not sufficient for the service of all those 20 desiring it, that in an agricultural area of the 21 state, those using the water for domestic purposes 22 shall have the first right, and, of course, those 23 claiming water for agricultural purposes shall 24 have a preference over those using the same for 25 manufacturing purposes.</p>

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<p>1 I recognize that certain agreements 2 have been entered into in regard to DCM water, 3 but I respectfully urge that perhaps those 4 provisions are unconstitutional in view of the 5 fact that they do, in fact, grant a preference to 6 DCM water over agricultural uses which seems to 7 me would be inconsistent with that section of our 8 constitution.</p> <p>9 And if, in fact, that is the desire of 10 the state of Idaho, then that constitutional 11 provision should be presented to the people of the 12 state of Idaho for amendment rather than amending 13 it through rules and regulations.</p> <p>14 In the Swan Falls controversy one of 15 the ultimate goals of the legislation that was 16 enacted and the agreements that were entered into 17 was and has been agreed by all concerned, 18 including Idaho Power Company and representatives 19 of the state of Idaho. But those agreements would 20 make a significant amount of water available for 21 appropriation to promote family farming tradition, 22 to create jobs and beneficial development. There 23 is nothing in those agreements that I have been 24 able to determine that provides that mitigation 25 would be a requirement to obtain additional</p>	<p>1 enactment, it is my understanding, although I was 2 not legislator, but I was active in presenting 3 testimony and agreeing on the language, the words 4 "significant impact" was meant to mean something. 5 By placing a presumption that is a significant 6 impact, then, of course, the legislative enactment 7 could very well have said "then any impact" 8 because you have presumed that there is a 9 significant impact. And so really the word 10 "significant" doesn't mean anything. A 11 significant impact is a question of fact that 12 should be determined on each individual 13 application, not as a presumption because a 14 presumption will, in most instances, especially as 15 to groundwater, prevail.</p> <p>16 If, in fact, there are groundwaters -- 17 and I believe there are groundwaters in almost all 18 of the Snake River drainage -- then, of course, we 19 know that those groundwaters are there, but we 20 don't know what the effect of those groundwaters 21 are or their connection is with the Snake River. 22 But by making the presumption it will be, in fact, 23 considered trust water whether or not there is any 24 evidence to show that they are, in fact, even 25 tributaries of the Snake, and if there is no</p>
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<p>1 sources of water for these agricultural uses. The 2 rules, however, as I will point out, have placed 3 mitigation a major issue in determining future 4 uses of water in Southern Idaho above Swan Falls. 5 To the extent that the rules do provide those type 6 of criteria, although the legislature has never 7 authorized such criteria to be considered, we feel 8 the rules are inconsistent with the agreements 9 that were negotiated and the legislation that's 10 been passed by our legislature.</p> <p>11 As to the specific rules, Rule 1,4,2,2 12 accurately states the law in the first sentence. 13 But then the second sentence requires a 14 determination of whether or not the proposed use 15 will significantly reduce individual or 16 accumulative with other uses of the amount of 17 water available to the holder of the water right 18 used for power production, and then goes on 19 without giving the people of the state of Idaho, 20 and particularly any applicant, a basis for the 21 director's determination, makes a presumption that 22 any application will, in fact, significantly 23 reduce the flows available for downstream 24 hydropower rights.</p> <p>25 The intent of that legislative</p>	<p>1 evidence that they are or are not, then the 2 presumption prevails.</p> <p>3 It's my understanding of Section 4 42-203C that not only was the words "significant 5 reduction" important, but also the last section of 6 that enactment provides that the burden shall be 7 upon the protestant. Now, if, in fact, that meant 8 anything, then it really is immaterial whether or 9 not the state is the protestant or an individual 10 is a protestant. If the burden is upon the 11 protestant to show that there is a significant 12 reduction, then that was the intent of the 13 legislature. For the rules to say that the 14 presumption is that it is a significant impact, a 15 significant reduction, then, of course, we 16 immediately have a situation that the burden is 17 taken care of by the rule because the presumption, 18 then, is given against the applicant. And so the 19 burden -- obviously to say the burden is on 20 somebody who has the presumption is an anomaly; it 21 just doesn't make sense. You can't give somebody 22 a presumption and turn around and say it's your 23 burden to prove it. Because if you give him the 24 presumption, he has proven it. He's met his 25 burden with the presumption with everything else</p>

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<p>1 being equal. And then it is on the person who the 2 presumption goes against to then present evidence 3 to overcome the presumption. 4 So I think that the rule is 5 inconsistent with that provision of the enactment 6 of the legislature. If, in fact, the legislature 7 meant that the presumption or the burden of proof 8 on a significant reduction fact question is upon 9 the applicant, then I can see the presumption may 10 very well be justified in the rule. But it 11 doesn't say that. It says that the burden of 12 proof shall be on the protestant. 13 (Tape change.) 14 MR. LING: In regard to, again, Rule 15 1,4,2,2, the other objection we have to the rule 16 is the arbitrary determination by the department 17 that the Snake River drainage above Murphy shall 18 be the area in which groundwaters will be 19 determined to be trust waters -- and if I 20 understand that -- and that generally is it. And 21 then you have the map within the rules that really 22 says that all groundwater, wherever located, 23 shall, in fact, be trust waters because they are, 24 in fact, tributaries to the Snake River above 25 Murphy. This rule takes away the opportunity for</p>	<p>1 east of the city of Minidoka which is about one 2 half of the area that the department has 3 determined are trust waters. That arbitrary line 4 was determined, and any applications above that 5 line, the department -- or the Idaho Power Company 6 had, in fact, recognized that they would allow 7 those people to get power if it was within the 8 Idaho Power Company service area and appropriate 9 water in those areas. If permits were pending 10 above that arbitrary line, Idaho Power did not 11 attempt to prevent those people from using water 12 from that groundwater source. It was only in that 13 area that they had determined was an area, again, 14 approximately the city of Minidoka on the west 15 that they felt they had to protect by issuing a 16 moratorium on hookups and refusing to grant power 17 to those people. 18 Now, we have the director and the 19 department coming in with rules that say that 20 those trust waters go much further beyond what 21 Idaho Power had determined back in those days. We 22 now say trust waters apply to all waters, in 23 essence, within the Snake River drainage east of 24 Swan Falls. 25 Rule 1,4,2,3 provides that an</p>
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<p>1 any person as an applicant to come in and say 2 these are not, in fact, trust waters; these are 3 not, in fact, waters tributary to the Snake River, 4 because he has a burden now of not only showing 5 that they are not, but he must overcome the 6 presumption. And, again, as all evidence is equal 7 or there is no evidence, of course, we then have a 8 situation that the presumption prevails, and the 9 presumption is they are trust waters. 10 That is not what ordinarily would be 11 considered as a person who has a right to come in 12 and appropriate water. He would not ordinarily 13 have to overcome a presumption that the water 14 belonged to somebody else -- in this case, the 15 state of Idaho -- under a trust doctrine. I am 16 particularly concerned, also, that, as a result of 17 the Swan Falls negotiations, future water users of 18 the state of Idaho or future applicants have lost 19 considerably. 20 During the time that the Swan Falls 21 suit was pending, Idaho Power had made a 22 determination as to where they felt groundwaters 23 may affect their rights. And they had drawn an 24 arbitrary line through the middle of the area. In 25 fact, as I recall, that line was just a little bit</p>	<p>1 unprotested application proposing DCMU uses are 2 determined to satisfy the public interest 3 criteria. And I recognize this is a result of 4 certain negotiations that took place. The 5 question is, though, is this rule in conflict with 6 Article 15, Section 3, where, in fact, you are 7 granting industrial uses, manufacturing uses, a 8 preference to agricultural uses. And I think that 9 we have a problem even though they were talking 10 about trust waters and not merely just waters of 11 the state. 12 If one looks at your DCMU provisions, 13 it provides that a person can, in fact, get 14 730-acre feet of water per year, actual 15 consumptive -- water consumed each year. Doesn't 16 limit the amount that they might take, but that 17 they can get up to 730-acre feet of consumptive 18 use each year without meeting any criteria. That, 19 of course, as you would know, would, in fact, be 20 sufficient to irrigate over 300 acres because the 21 consumptive use in irrigation, 300 acres would be 22 substantially less than two-acre feet per acre. 23 Rule 5 -- excuse me. Rule 1,5,1,2 24 establishes, again, the presumption the 25 groundwater existing within the geographic area</p>

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<p>1 described in the rules is tributary to the Snake 2 River, and this area shall also include the entire 3 surface water drainage. And yet we don't know 4 what evidence, in fact, the director used to make 5 that arbitrary determination. We do not believe 6 that these presumptions should exist in the rules. 7 And no determination should be made until there is 8 an application with the authority of the court or 9 the hearing officer. And, then, of course, if the 10 state wants to allege that those are trust waters, 11 then, of course, the other party ought to have an 12 opportunity to present evidence to the other, and 13 no presumption should be in the rules which 14 defeats the applicant. And that's exactly what 15 the presumption does, especially when the hearing 16 officer may very well determine that the other 17 evidence, none of which is preponderance and is a 18 prepondering proof, and therefore they will say, 19 all things being equal the presumption must 20 prevail. And yet the presumption really maybe had 21 no more basis than, in fact, the evidence as 22 presented to that hearing officer. It may all be 23 equal. If it's all equal, then, of course, we 24 ought to be able to allow applicants, unless there 25 is some showing that it, in fact, is trust water,</p>	<p>1 determining whether or not 42-203C is applicable. 2 Because that says that this section of the code -- 3 and it doesn't limit it to any part of the section 4 that says that entire section, the burden of proof 5 shall be on the protestant. And, again, as I have 6 mentioned, the rules take away that provision, and 7 the burden of proof now is on the applicant 8 because of the presumptions. 9 Rule 5,1 is the criteria to be used to 10 evaluate all applications to appropriate water. 11 But I believe it contains a misstatement of law 12 when it includes this criteria for the application 13 to appropriate trust water. This rule allows the 14 director to deny an application if the proposed 15 use will be determined to reduce the quantity of 16 water under an existing water right. That's rule 17 5,1,1, but this is not the standard for the 18 appropriation of trust waters as the very 19 definition of trust waters anticipates that these 20 waters are subject to an existing water right that 21 has been subordinated. So we have to change the 22 provision in the ordinary application, otherwise 23 the director immediately has the right. Because 24 it doesn't say that he will only deny it if the 25 proposed use will reduce the quantity of water</p>
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<p>1 to proceed as if it was not trust water. 2 Rule 3,2,1 imposes a presumption based 3 upon a presumption against the applicant who seeks 4 to appropriate water. This rule incorporates the 5 presumption that all waters in the Snake River and 6 its tributaries above Swan Falls not previously 7 appropriated are trust waters. That's a 8 presumption that must first be overcome. Then it 9 says all groundwaters within the Snake River 10 drainage by the Swan Falls that have not been 11 previously appropriated are trust waters. Again, 12 a presumption that must be overcome. And then 13 that all proposes to appropriate water from these 14 sources will significantly reduce the amount of 15 water available to Idaho Power Company. So you 16 have two presumptions that the applicant 17 immediately must overcome to avoid certain 18 provisions of the rule. And I respectfully submit 19 that those presumptions will, in many cases, be 20 the determining factor of whether or not that 21 person is seeking to appropriate trust water or, 22 in fact, they are unappropriated waters. 23 Again, I think that they have done away 24 with the provisions of Section 42-203C which says 25 the burden of proof shall be on the protestant in</p>	<p>1 under an existing water right that is not 2 subordinated and, perhaps, if the words reduce a 3 water right on an existing water right that is not 4 subordinated would, in fact, cure that. But if 5 you say that it is going to reduce the amount to a 6 water right, and the trust water concept, as I 7 understand, is a concept in which that is, in 8 fact, water under a water right but it's been 9 subordinated and placed into the trust, the 10 director, if he decides to deny an application of 11 any trust waters, can use that section to deny it. 12 And I don't believe any court would overturn that 13 unless he determined the rule was arbitrary and 14 capricious. 15 Rule 5,2,1, again, as I said, creates a 16 presumption that all permits being reprocessed and 17 all applications which propose a use that will 18 deplete trust water as those waters are defined by 19 the record will cause a significant reduction in 20 water available to hydropower rights. Again, I 21 object to that presumption being in the rule. I 22 think that it should only be that if, in fact, 23 that proposed application would do that, and then 24 the burden of proof would be upon those persons 25 protesting the application.</p>

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1 Rule 5,3, the criteria for evaluating
2 the public interest proposes that criteria which,
3 I believe, exceeds the authority and intent of the
4 legislature of the state of Idaho.

5 First, the rule provides that this
6 criteria will apply if the director determines
7 that a proposed use of trust water will
8 significantly reduce water available to the holder
9 of the power right. Then we already know that the
10 director's already presumed that it will. So to
11 say that the director determines that, it's
12 already been determined.

13 That, I think, shows the inconsistency
14 of the presumptions. I think it is proper when it
15 says if the director determines that, then he
16 should determine it on each specific application,
17 even though it may be a tremendous burden to him.
18 There are so many different types of groundwater
19 basins within the Snake River Plain. And my own
20 experience tells me that -- I have heard experts
21 tell me, and I'm certainly no hydrologist or
22 geologist -- but many of the critical groundwater
23 areas especially are isolated basins that do not
24 connect to the Snake River. And some indications
25 are that, when those areas were determined, that

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1 because they certainly did not connect to what we
2 commonly refer to as the Snake Plain aquifer
3 because there didn't seem to be any connection
4 between the two, usually a critical groundwater
5 area was created. But the presumptions of the
6 director are that, even those areas, although you
7 may free up the critical groundwater designation
8 as a result of the determination there is more
9 water there, they then be would be trust waters
10 because he's included all that water.

11 Rule 5,3,1,1 sets out direct project
12 benefits, and that is, of course, one of the
13 criteria the legislature mandated would be
14 considered, both direct and indirect. But the
15 director, in his proposed rules, goes beyond that
16 criteria, and, under Rules 5,3,1,3 and 5,3,1,4,
17 will consider direct and indirect project costs
18 including verifiable reductions in net revenue
19 resulting from losses to other existing instream
20 uses and the cost of replacement of hydropower
21 generation. In my opinion, this is an attempt to
22 give the director a second opportunity to consider
23 the economic impact of the proposed use.

24 Economic impacts are one of the
25 criterias to be considered, and we know that. But

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1 to say that in direct project benefits you will
2 consider economic impacts, and, then, in looking
3 at the second factor the legislature set out, it
4 then asks you to look at the economic impacts
5 again. Well, the director said we are going to
6 look at them under both factors. And, to me, that
7 appears to be an effort to say, "I am going to use
8 the same criteria in two factors because that's
9 one criteria that the applicant may not be able to
10 meet."

11 And the interesting thing is that the
12 legislature said under 42-203C that one factor
13 will not be given greater weight than another. No
14 single factor will be given greater weight. But
15 the rules have added factors into factors. So
16 that, when you look at direct project benefits,
17 you're looking at economic impacts. Then you look
18 at economic impacts which is another factor, and
19 you look at it again. So if you say that in
20 direct project benefits you have failed because of
21 the economic factors in direct project benefits,
22 and then you come back and look at economic
23 factors again, and you fail there, well, then,
24 you've lost two out of the four criteria or five
25 criteria. Again, it allows the hearing officer

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1 and the director only to stack complaints to meet
2 the criteria that no one factor will be considered
3 greater weight than another factor. The
4 legislature seemed to say that economic impact is
5 a single, separate factor that should be weighed
6 alone, and it should not be weighed in direct
7 project benefits.

8 As I have pointed out in my written
9 comments, Rule 5,3,2, again, sets out the economic
10 impact factor in the criteria which is really a
11 restatement of Rule 5,3,1,4 on indirect project
12 costs.

13 Rule 5,3,2,2 imposes mitigation as a
14 factor to be considered in determining the
15 economic impact. Again, we believe that that is
16 beyond what the legislature has stated.
17 Mitigation was not, and is not, included in any
18 legislative enactments. And by mentioning it in
19 this Rule 5,3,2,2, we believe was a stepping stone
20 to ultimately get mitigation and other rules in
21 determining the public interest criteria. And
22 I'll discuss those provisions in the other rules
23 as well.

24 It's interesting to note, though, that
25 this is the first place in the rules where you say

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<p>1 that in determining economic impact, mitigation is</p> <p>2 a factor. So now you have not only economic</p> <p>3 impacts, but you have mitigation to determine what</p> <p>4 those economic impacts are.</p> <p>5 Rule 5,3,6 is a rule consistent with</p> <p>6 legislative enactment in Rule 42-203C which</p> <p>7 provides that no single public interest criteria</p> <p>8 as set out by the legislature will be entitled to</p> <p>9 greater weight than any other public interest</p> <p>10 criteria. But that rule is negated by the</p> <p>11 inclusion of the same criteria in several of those</p> <p>12 areas instead of keeping them separate as the</p> <p>13 legislature did.</p> <p>14 Rule 5,3,9 establishes an arbitrary</p> <p>15 presumption that a proposed diversion of water for</p> <p>16 irrigation purposes from the Snake River between</p> <p>17 Milner and Swan Falls Dam, including groundwater</p> <p>18 within four miles of the nearest edge, are not in</p> <p>19 the public interest. Now, this presumption is</p> <p>20 apparently based on a conclusion that says</p> <p>21 proposed versions would not promote full economic</p> <p>22 and multiple-use development of the water</p> <p>23 resources of the state of Idaho, one of the five</p> <p>24 criteria set forth by the legislature. But this</p> <p>25 rule would allow the director to unilaterally</p>	<p>1 mitigation is not a criteria that the legislature</p> <p>2 said will be a sole factor in determining whether</p> <p>3 or not an application will be approved.</p> <p>4 Next is, if you have Rule 5,3,7 and</p> <p>5 Rule 1,5,2, they are inconsistent. Rule 5,3,7</p> <p>6 indicates that you can, in fact, have diversions</p> <p>7 and they do not -- the public interest criteria</p> <p>8 doesn't apply. Then you turn around and say</p> <p>9 mitigation does apply. Well, the only place</p> <p>10 mitigation could possibly apply is if the public</p> <p>11 interest criteria applies. And I don't even think</p> <p>12 it applies even if the public interest criteria</p> <p>13 applies. But you're saying that mitigation, the</p> <p>14 public interest criteria may not apply in some</p> <p>15 instance, but you turn around and say mitigation</p> <p>16 does. Well, to me, mitigation, if you have</p> <p>17 mitigation, then, of course, the public interest</p> <p>18 criteria is usually fully met because, in that</p> <p>19 instance, you haven't lost anything, especially</p> <p>20 determining, of course, the type of mitigation</p> <p>21 that may be proposed. But if it is, in fact,</p> <p>22 exchange of water for water, then it would be</p> <p>23 pretty difficult to show why the public interest</p> <p>24 criteria doesn't apply because that's exactly what</p> <p>25 you're doing is meeting the public interest</p>
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<p>1 reject such applications without considering the</p> <p>2 other factors. And the legislature did not say</p> <p>3 that those other factors should not be considered</p> <p>4 and given equal weight. In fact, the opposite is</p> <p>5 true. The legislature said those other factors,</p> <p>6 all those factors, would be considered. It's</p> <p>7 therefore respectfully submitted that this rule is</p> <p>8 arbitrary and capricious, and, if enacted, will</p> <p>9 deny due process to an applicant to whom the rule</p> <p>10 might apply. There is no basis that I can see</p> <p>11 that the director has made the determination on</p> <p>12 anything except on that one single criteria to</p> <p>13 make that presumption.</p> <p>14 Rule 5,3,10 presumes, again, the</p> <p>15 commercial or industrial use of up to 730-acre</p> <p>16 feet per year is in the public interest. Again,</p> <p>17 that gives me some concern in view of our</p> <p>18 constitutional provisions.</p> <p>19 Rule 6,2 then provides, I believe</p> <p>20 again, an arbitrary provision. This rule says</p> <p>21 that you must, and, in fact, it requires</p> <p>22 mitigation for the approval of any proposal to</p> <p>23 appropriate trust water between Milner and Murphy</p> <p>24 to offstream storage during the period of</p> <p>25 November 1 to March 31. Now, the first concern is</p>	<p>1 criteria.</p> <p>2 My other concern about Rule 6,2 is that</p> <p>3 it seems to indicate that it will require</p> <p>4 mitigation of all hydropower plants downstream in</p> <p>5 Idaho, and that is, in fact, an inclusion of the</p> <p>6 Hells Canyon Complex of Idaho Power Company. Now,</p> <p>7 we know from the licenses that were issued in the</p> <p>8 Hells Canyon Complex and our decision from the</p> <p>9 Idaho Supreme Court, those water rights are fully</p> <p>10 subordinated without any requirement for</p> <p>11 mitigation. And those water rights can, in fact,</p> <p>12 be reduced to zero, and no mitigation would occur.</p> <p>13 That was a condition for the Hells Canyon Complex.</p> <p>14 Now, the department and the director has sought to</p> <p>15 protect the Hells Canyon Complex by saying that</p> <p>16 you shall, if you want to divert water from</p> <p>17 November 1 to March 31 between Milner and Murphy</p> <p>18 for offstream storage, you shall mitigate. And</p> <p>19 one of the areas of mitigation will be Hells</p> <p>20 Canyon Complex, an impossible standard for anyone</p> <p>21 to meet. And we think that is, in fact, arbitrary</p> <p>22 and capricious and not supported by legislative</p> <p>23 enactments.</p> <p>24 Finally, I'd like to mention -- and I</p> <p>25 believe my comments do -- that we object to the</p>

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<p>1 understanding in the proposal that all waters 2 above Milner, and particularly surface waters, 3 are, in fact, and will be considered trust waters 4 if they have not been previously appropriated. 5 Under the Swan Falls agreement, it is our 6 understanding and I believe the understanding of 7 many in that agreement, that all waters -- surface 8 waters, at least -- and instream waters above 9 Milner were, in fact, not trust waters; were, in 10 fact, not subject to any water rights of Idaho 11 Power Company. And development within that 12 stretch of the river, to the extent there was 13 water to be developed, would not come within the 14 Swan Falls agreement. 15 This now has changed that around. The 16 proposed rules say that all that water is, in 17 fact, trust water. If there is any water that can 18 be determined to be unappropriated in that stretch 19 of the river, then they now must meet the public 20 trust criteria. And we believe that's improper 21 because we think that it was the intent of all 22 parties that that water would not, in fact, be 23 trust water. 24 I thank you for the opportunity to give 25 my comments. I hope that I have not been too</p>	<p>1 as they relate, in my opinion, to existing 2 statutes, hydrology, and perhaps administrative 3 capability of the department. 4 What I would like to do initially is to 5 comment specifically on certain sections of the 6 proposed rules and regulations. Let me point 7 out -- 8 THE HEARING OFFICER: Mr. Brockway, may I 9 interrupt for a moment? Will you be submitting 10 that as a written statement? 11 MR. BROCKWAY: I will be submitting it by 12 the time you close the time for submitting. I 13 won't submit it today. 14 THE HEARING OFFICER: Okay. Thank you. 15 MR. BROCKWAY: Okay. Mr. Ling has gone over 16 very well the requirements of the new legislation 17 in Chapter 2 of Title 42 and indicated a concern 18 that I have. And that is primarily the shifting 19 of the burden of proof from the protestant, in 20 many cases, if some of the proposed rules are 21 adopted. And I think that's contrary to what was 22 the intent of the legislature and what was 23 specifically spelled out. 24 There were specific criteria identified 25 in the legislation by which the director could</p>
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<p>1 oppressive and would hope that you would give 2 these considerations. I recognize that much of 3 the complaint that I have and the context of the 4 rules is the interpretation of legislative 5 enactments and the agreements. And perhaps the 6 legislature is going to have to give us the 7 ultimate guidance on that. But I believe that, in 8 essence, we have gone much further than what 9 anyone had even contemplated, including the 10 legislature, in protecting the trust waters. 11 Thank you. 12 THE HEARING OFFICER: Thank you, Mr. Ling. 13 You can be assured your comments will be 14 considered and taken into account. 15 Mr. Brockway, I believe you're next. 16 While Mr. Brockway is coming up, I do believe we 17 have had some come into the hearing since we have 18 started the record. I would encourage you to sign 19 the attendance roster. And if you wish to 20 testify, I'd appreciate your so noting. 21 Mr. Brockway, the meeting is yours. 22 MR. BROCKWAY: Thank you very much. My name 23 is Charles Brockway. I am a hydrologist with the 24 University of Idaho. I appreciate the opportunity 25 to comment on the proposed rules and regulations</p>	<p>1 evaluate public interest. I think many of these 2 rules have gone beyond those specific criteria, 3 especially in the area of the economics and 4 benefit costs ratio requirements for public 5 interest. 6 Section 1,4,2 dealing with the 7 determination of whether or not a significant 8 reduction in flows available for hydropower 9 generation makes, again, the presumption that any 10 diversion or any consumptive use, either 11 individually or in total, is a significant 12 reduction or makes a significant impact. Again 13 hydrologically, nothing is defined or nothing is 14 put forward to define what is meant by 15 "significant." So it really means any consumptive 16 use is determined to make an impact. 17 I don't believe that was the intent. 18 Although it does ease the administrative burden of 19 the department, it was not, in my opinion, the 20 intent of the legislature. Their intent was to 21 ensure equity and equality and not decrease the 22 time or cost of administration. 23 I think it's significant that Rule 24 1,5,2 indicates that diversion to surface storage 25 is in the public interest. That particular rule</p>

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<p>1 conflicts with some subsequent rules which I will 2 point out at a later time.</p> <p>3 Section 4,2,2,2 requires that permit 4 applications which have been held without action 5 pending the resolution of the Swan Falls matter 6 are to be re-advertised at the applicant's expense 7 to allow opportunity for protests to be entered. 8 There are numerous applications for permits which 9 have been held without pending action of certain 10 federal and state government agencies prior to the 11 inception of the Swan Falls matter. It doesn't 12 seem equitable that those applicants be subjected 13 again to the additional administrative expense 14 when the failure to process resulted not from 15 anything that they did but from what some 16 government agency did or failed to act in a timely 17 manner.</p> <p>18 The requirements for permit application 19 under Section 4,5,3 seem excessive for the 20 proposed -- for the small user in particular. It 21 appears to require, in determining the adequacy of 22 the water supply, flow frequency relationships, 23 aquifer properties, and other information which 24 the small applicant or small user is not going to 25 have available without the services of a</p>	<p>1 Section 5,1,1 deals with the 2 determination of availability of water supply. 3 And it indicates that the determination of some 4 unreasonable modification of existing method of 5 application of water or an unreasonable effort or 6 expense to divert water on an existing user will 7 be sufficient to determine that the water supply 8 is not available. I really believe that those 9 terms "unreasonable modification" or "unreasonable 10 effort or expense" will be very difficult to 11 define and might ultimately be defined by the 12 courts. We have had experience with defining and 13 determining reasonable pumping levels which are 14 under the current statutes. I think we are going 15 to have the same ball of wax with this designation 16 as we have had with reasonable pumping level.</p> <p>17 Section 5,3,1,4, again, deals with the 18 economic criteria under the public interest 19 criteria and indicates that an indirect cost will 20 include the cost of replacing reduced hydropower 21 generation from hydropower generation facilities 22 located in Idaho. If you include reduced revenue 23 from Idaho Power generation, in my opinion, it 24 will prevent any further irrigated agricultural 25 development in the Snake River Basin above Swan</p>
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<p>1 professional requiring, then, additional financial 2 burden in the application process. I believe that 3 this requirement may be deemed to -- or construed 4 to be excessive and may be even administrative 5 harassment.</p> <p>6 Section 4,5,3,2,3 requires applications 7 appropriating more than 25 cfs or 10,000-acre feet 8 of storage or to generate more than 500 horsepower 9 be prepared by a registered professional engineer 10 or geologist. I would point out that most 11 geologists receive little or no training on water 12 requirements, hydraulics, surface hydrology, 13 irrigation, crop water requirements, all of which 14 are required in order to prepare the required 15 information. It seems inappropriate to specify 16 that a geologist be required to perform that 17 service. A more appropriate requirement might be 18 for a registered professional engineer or a 19 geological engineer. But an individual with a 20 geology degree, in my opinion, is not capable of 21 performing the required studies and determinations 22 for that application.</p> <p>23 THE HEARING OFFICER: Mr. Brockway, would 24 you give that citation again? 25 MR. BROCKWAY: I believe it's 4,5,3,2,3.</p>	<p>1 Falls. A benefit cost ratio including those 2 costs, certainly at the present economic climate, 3 would never satisfy the criteria. And I believe 4 it's contrary to the legislative intent under the 5 agreements and the statutes.</p> <p>6 I don't really think that the 7 legislature had the intent of stopping all 8 additional irrigated agricultural development. 9 And, again, I would point out, as Mr. Ling did, 10 that these rules seem to give unequal weight to 11 the economic criteria for satisfaction of the 12 public interest criteria. We see the costs for 13 mitigation coming in here for hydropower 14 generation loss over and over. And I don't -- and 15 it really appears to be giving greater weight to 16 the economics than to any other single factor.</p> <p>17 Section 5,3,7 indicates, again, that 18 diversion to offstream storage is in the public 19 interest, at least until some studies that were 20 designated under, I think it's Section 32I of the 21 state water plan, that those diversions or 22 proposed diversions would be deemed to be in the 23 public interest. That conflicts with Section 24 1,5,2 which says they will be in the public 25 interest and doesn't mention anything about</p>

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1 studies.

2 Section 5,3,9 which arbitrarily finds
3 applications or permits to be reprocessed not to
4 be in the public interest under 203C, appears to
5 be proposed in the name of administrative
6 efficiency and not in accordance with legislative
7 intent.

8 Now, the impact of direct diversion
9 between Milner and Swan Falls on the hydropower is
10 easy to determine. Hydrologically I think we can
11 do that, certainly easier than we can with some
12 upstream diversions that interact with the Snake
13 Plain aquifer and make it more difficult to
14 determine the timing of impacts on the river at
15 Swan Falls and the quantitative impacts. That,
16 however, is not sufficient to arbitrarily exclude
17 proposed projects in that reach, and that's what
18 that rule will do.

19 The determination that direct
20 groundwater diversions within four miles of the
21 Snake River or tributary is any less in the public
22 interest than a direct groundwater diversion 4.1
23 miles from the river is hydrologically
24 indefensible. Now, you can set up hydrologic
25 criteria as to a percentage of water returning to

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1 the stream from a diversion or a percentage of
2 water returning in a specific time limit from a
3 previous diversion and make an estimate of how far
4 away from the stream you would have to be in order
5 for that effect to occur. Any of those criteria
6 that you set up, in my opinion, are arbitrary.
7 And so whether it's four miles or one mile or 40
8 miles, I don't think you can defend any of those
9 hydrologically. I think that rule should be
10 eliminated.

11 Section 6,2, again, which requires the
12 mitigation of the impact of flow depletions on
13 downstream generation of hydropower by those
14 appropriators proposing to use offstream storage
15 in the winter months was never intended by the
16 legislature. Again, if this rule is adopted, it
17 will, in effect, guarantee Idaho Power Company
18 replacement revenue for any acre foot of water
19 diverted for wintertime offstream storage, not
20 just down the Swan Falls, but through Hells Canyon
21 Complex because it includes all hydropower
22 facilities on the Snake River reach. That was not
23 intended.

24 There is some question as to what
25 "mitigation" means. I believe Idaho Power Company

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1 indicates that it would mean compensation. And I
2 think ultimately that's what it would come to
3 because there aren't many other ways you can
4 mitigate the loss of water in the river except by
5 compensation for lost power generation.

6 Again, it relates to the economics, not
7 the technical aspects of putting a project
8 together in the Milner/Swan Falls reach. If you
9 hang another \$50-per-acre or per-acre-foot for
10 mitigating or compensating for hydropower losses
11 on that user, he's not going to build the project,
12 so you've eliminated the problem. And I really
13 think that this penalty for offstream storage, if,
14 in fact, this rule is adopted is contrary to what
15 the department's policy has been in the past which
16 encouraged offstream storage to mitigate the
17 impact of low summer flows on the river at Swan
18 Falls, which, in fact, is what it does. This
19 section would penalize the individual who is
20 trying to comply with what the department has
21 encouraged in the past.

22 One comment on Section 5,1,1, if I can
23 find it. This deals with criteria used to
24 evaluate applications to appropriate water and
25 primarily as to what constitutes a reduction in

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1 quantity of water for existing water rights.
2 5,1,1,1 says that the holder of an existing right
3 will be unable to continue to operate at the same
4 level of production from the lands or facilities
5 that rely upon the existing water right without an
6 unreasonable modification to his existing method
7 of application of water or to his use facilities.
8 Again, the "unreasonable modification" is a
9 problem. But this proposed rule seems to fly in
10 the face of the existing statutes and the duties
11 of a water master to assure that a diversion under
12 an existing perfected right is maintained. And it
13 appears to delve into the application systems on
14 an individual user's property which has always
15 been off limits to the Department of Water
16 Resources.

17 The statutes talk about diversion of
18 water, the right to divert and really have not
19 related to the efficiency of water use on a farm
20 or on an irrigation system. Now, under 5,1,1 it
21 seems to me that the water master is charged with
22 preventing or maintaining a diversion if the water
23 is in the river. And even though this rule seems
24 to imply a greater move or a move toward greater
25 efficiency of use, it suggests that an existing

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<p>1 user will be forced to change his method of use 2 and application toward greater efficiency to 3 accommodate a new applicant and push him toward 4 less wasteful practices. I think that's 5 commendable and should be encouraged, but I don't 6 think the existing law allows you to do that. The 7 water master can only ensure that the various 8 users are within their decreed rights. He can't 9 examine their internal uses to determine whether 10 these criteria are being satisfied. So 5,1,1 11 doesn't do anything, in my opinion, to protect 12 existing users as is required in the statutes, but 13 it creates, again, a justification for the 14 department to allow permits for present diversion 15 practices precluding the applicant from receiving 16 water. It also seems to me to be contrary to 17 existing department policy which has determined 18 that several streams in the state are currently 19 fully appropriated based upon existing diversion 20 practices, not on use practices. And until there 21 is some legal basis for IDWR to limit actual 22 deliveries based upon beneficial use, this one is 23 going to be a difficult one to administer. 24 Thank you very much. 25 THE HEARING OFFICER: Thank you,</p>	<p>1 REPORTER'S CERTIFICATE 2 3 4 I, Frances J. Morris, Court Reporter, a 5 Notary Public, do hereby certify: 6 That I am the reporter who transcribed 7 the proceedings in the form of digital recording 8 in the above-entitled action in machine shorthand 9 and thereafter the same was reduced into 10 typewriting under my direct supervision; and 11 That the foregoing transcript contains a 12 full, true, and accurate record of the proceedings 13 to the extent they were audible and intelligible 14 in the above and foregoing cause, which was heard 15 in various cities at Twin Falls, Idaho. 16 IN WITNESS WHEREOF, I have hereunto set 17 my hand this _____ day of _____ 2008. 18 19 20 21 22 Frances J. Morris, Court Reporter 23 CSR No. 696 24 25</p>
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<p>1 Mr. Brockway. Appreciate your comments, and they 2 will be taken into account. 3 Anyone else that wishes to be heard 4 today? Anyone else that wishes to have an 5 opportunity to testify? 6 Okay. Seeing no volunteers, we won't 7 draft anybody to do it. You do have the 8 opportunity to attend this evening's hearing here 9 in this room at 7 o'clock. There are hearings in 10 Boise at 2 o'clock and 7 o'clock in the Len B. 11 Jordan building, third floor conference room 12 tomorrow. 13 The record will remain open, as we have 14 said before, until January 27th for written 15 comment. So we will close the record for this 16 portion of the hearing at this time. Thank you 17 for coming. 18 (End of proceeding.) 19 -o0o- 20 21 22 23 24 25</p>	

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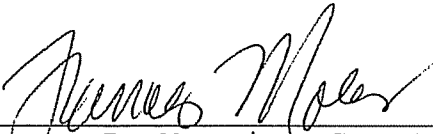
R E P O R T E R ' S C E R T I F I C A T E

I, Frances J. Morris, Court Reporter, a
Notary Public, do hereby certify:

That I am the reporter who transcribed
the proceedings in the form of digital recording
in the above-entitled action in machine shorthand
and thereafter the same was reduced into
typewriting under my direct supervision; and

That the foregoing transcript contains a
full, true, and accurate record of the proceedings
to the extent they were audible and intelligible
in the above and foregoing cause, which was heard
in various cities at Twin Falls, Idaho.

IN WITNESS WHEREOF, I have hereunto set
my hand this 8th day of October 2008.



Frances J. Morris, Court Reporter
CSR No. 696

