

1 STATE OF IDAHO

2 DEPARTMENT OF WATER RESOURCES

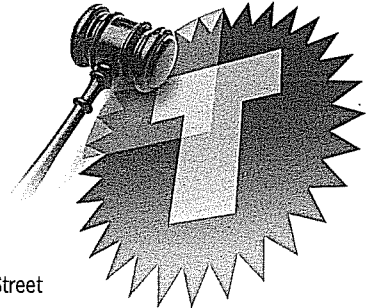
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4 - - - - - x  
5 RE: WATER ALLOCATION RULES AND :  
6 REGULATIONS HEARINGS. :  
7 - - - - - x

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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 16, 1986, 2:17 p.m.  
16 before NORMAN YOUNG, HEARING OFFICER

17  
18 LEN B. JORDAN BUILDING  
19 BOISE, IDAHO

20  
21  
22  
23 Transcribed by  
24 Frances J. Morris  
25 CSR No. 696



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SENATOR TOM LOWRY (phonetic)  
SENATOR MIKE CRAPO

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1 BOISE, IDAHO  
 2 January 16, 1986, 2:17 p.m.  
 3  
 4 THE HEARING OFFICER: My name is Norman  
 5 Young from the state office of the Department of  
 6 Water Resources in Boise. I will serve as the  
 7 hearing officer in this matter.  
 8 The purpose of this hearing is to  
 9 provide an opportunity for formal testimony for  
 10 statements, either orally or in written form,  
 11 concerning the department's proposed rules and  
 12 regulations for water allocation in the state of  
 13 Idaho.  
 14 This hearing is required by the  
 15 provisions of Administrative Procedures Act, Title  
 16 67, Chapter 52, Idaho Code and will be conducted  
 17 pursuant to the department's rules of practice and  
 18 procedure.  
 19 Cross examination or questioning of the  
 20 witness, other than clarifying questions by the  
 21 hearing officer, will not be allowed. All who  
 22 wish to testify will be allowed to do so before  
 23 anyone will be heard a second time.  
 24 The rules implement the provisions of  
 25 Section 42-203, Idaho Code, which were amended

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 3 SENATOR TOM LOWRY(phonetic)  
 4 SENATOR MIKE CRAPO  
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1 during the last legislative session. Authority  
 2 for adoption of these rules and regulations is  
 3 provided by Section 42-1805(8), Idaho Code.  
 4 I have given a brief background prior  
 5 to going on record as to the department's actions  
 6 and holding public meetings concerning draft  
 7 rules. The proposed rules were prepared and  
 8 distributed in December with notice of this  
 9 hearing given on December 5th, 12th, and 19th in  
 10 the Post Register, the Idaho Statesman, the Times  
 11 News, and the Coeur d'Alene Press. Notice was  
 12 provided to all those asking to be provided with  
 13 notice of rule-making, and over 6,000 copies of  
 14 the rules and regulations were mailed in The  
 15 Currents tabloid. I have indicated that this  
 16 record will remain open for written comment  
 17 through January 27, 1986. A copy of the rules as  
 18 proposed in The Current's tabloid will be made a  
 19 part of the hearing record.  
 20 After the last date for written  
 21 comment, the rules will be revised as appropriate.  
 22 Rules adopted will be -- adoption target date  
 23 being February 10, 1986. When those rules are  
 24 filed in the central office of the department and  
 25 with the law library and transmitted to the

1 legislature, there will be an opportunity for  
 2 legislative review.  
 3 Today is January 16, 1986. The time is  
 4 2:17 p.m. This hearing is being conducted in the  
 5 Len B. Jordan building in Boise, Idaho.  
 6 The roster of attendance has been  
 7 circulated, and no one has indicated a desire to  
 8 testify or present any testimony.  
 9 Is there anyone who has entered the  
 10 room that would like to make a statement for the  
 11 record to give to the director about this  
 12 adoption?  
 13 Senator Tom Lowry(phonetic)?  
 14 SENATOR LOWRY: I would like to ask a  
 15 question for my information.  
 16 THE HEARING OFFICER: That would be fine.  
 17 Won't you come to the table and -- Senator, while  
 18 I'm willing to answer questions, this is really  
 19 for expository statement. So I may be a little  
 20 brief with my answer. Once we are off the record,  
 21 we will just discuss it fully.  
 22 SENATOR LOWRY: Just for question, my  
 23 question to my answer is, how many people have  
 24 participated in the hearing process so far?  
 25 THE HEARING OFFICER: I'd have to add that

1 that I have.  
 2 I apologize that I don't have  
 3 specifics -- I can't identify specific sections on  
 4 some of my comments, but I am going to talk to  
 5 topics that I think they should concern themselves  
 6 with.  
 7 There are three things that I'd like to  
 8 discuss. The first is, as I understand the  
 9 proposed rules -- and please correct me if I have  
 10 a misunderstanding here -- they establish a  
 11 presumption that all consumptive uses are going to  
 12 have a significant impact on trust waters. And I  
 13 may not have stated that accurately, but I believe  
 14 there is a presumption in the regulations.  
 15 As a senator who was very involved last  
 16 year in the negotiations of this settlement and of  
 17 the legislation which these rules are  
 18 implementing, I do not believe that it was at all  
 19 the intention of the legislators who supported the  
 20 legislation that there be any kind of a  
 21 presumption of a significant impact. In fact, I  
 22 think if it had been assumed there would be a  
 23 significant impact, we wouldn't have put that into  
 24 the legislation.  
 25 I believe and I know very strongly,

1 up for you, but it's been like six citizens at  
 2 Moscow; I believe we had probably 30 to 35 total  
 3 in Idaho Falls; maybe 25 to 30 total in Twin Falls  
 4 last night; and then I haven't counted today.  
 5 That's total attendance. I believe we have had a  
 6 total of nine people make statements at this  
 7 point. Ten counting you. Some of these  
 8 statements have been extremely detailed and very  
 9 helpful.  
 10 Senator Crapo?  
 11 SENATOR CRAPO: Yes, I'd like to make a  
 12 brief statement, if I could.  
 13 THE HEARING OFFICER: We'd appreciate that.  
 14 SENATOR CRAPO: Should I sit here and speak  
 15 into this microphone?  
 16 THE HEARING OFFICER: Yes, all of these are  
 17 live. So...  
 18 SENATOR CRAPO: My name is Mike Crapo. I am  
 19 senator from District 32A from Idaho Falls, Idaho.  
 20 And I realize that the senate will have an  
 21 opportunity to go into more detail on this as the  
 22 rules are submitted to the legislature, but I  
 23 wanted to give some input at this point just in  
 24 generalities for the department to consider in  
 25 establishing the proposed rules with some concerns

1 from the perspective of the people who were coming  
 2 at it from my point of view last year, that we  
 3 perceived the requirement of proof of a  
 4 significant impact to be a very significant  
 5 safeguard from the point of view of water users  
 6 who wanted to develop the water such as cities,  
 7 farmers, and people from industry. And it appears  
 8 to us that these rules essentially take away that  
 9 first safeguard which we felt was very  
 10 significant. I don't believe that it can be  
 11 presumed that every use, when coupled with all  
 12 other uses, therefore constitutes a significant  
 13 impact. I think that particularly is true above  
 14 Milner given the fact that zero flow at Milner was  
 15 very heavily discussed and was the basis upon  
 16 which the legislation was passed. And certainly  
 17 with regard to surface flow, there are no trust  
 18 waters above Milner, as my understanding of it  
 19 goes.  
 20 And with regard to groundwater, the  
 21 proof of a significant impact, it would seem to  
 22 me, would be a very significant factor.  
 23 So the first comment that I would like  
 24 to make is that I am very concerned about the  
 25 presumption relating to significant impacts.

1 The second comment relates to --  
 2 THE HEARING OFFICER: Senator, could I ask a  
 3 clarifying question on that?  
 4 SENATOR CRAPO: Yes, you may.  
 5 THE HEARING OFFICER: Do you recall from any  
 6 of the discussions, was there any kind of  
 7 definition of "significant impact" that was  
 8 presented in any of the discussions?  
 9 SENATOR CRAPO: I was going to go back  
 10 through and check the minutes from the senate  
 11 hearings, because right now you're asking for my  
 12 recollection from a year ago, and I do have a  
 13 recollection, but I'm not sure if it's accurate.  
 14 We did tape those hearings, and I have not had an  
 15 opportunity to go back and see, first, whether the  
 16 quality of tapes is good, and, secondly, whether  
 17 the tapes reflect my understanding. But my  
 18 understanding is that on the senate side we  
 19 specifically asked about "significant impact," and  
 20 we didn't get a very clear definition.  
 21 So to answer your question, I guess I  
 22 would say, first, no, I do not think that the  
 23 senate hearings established some specific criteria  
 24 as to how to define what a significant impact was.  
 25 But I do specifically recall questions being asked

1 about it, and I recall it being made very clear,  
 2 with regard to representatives from the department  
 3 and from Idaho Power and from the other  
 4 negotiators, that a process must be gone through  
 5 whereby geologically or hydrologically it was  
 6 established somehow that there was a significant  
 7 impact before the necessity for going to the  
 8 remainder of the four criteria was required. And  
 9 I guess perhaps what we may need to do as a  
 10 legislature is to define "significant impact" even  
 11 further. But I don't think that it was at all the  
 12 intent of the legislature that it just be defined  
 13 away by a presumption.  
 14 THE HEARING OFFICER: Thank you.  
 15 SENATOR CRAPO: The second aspect of my  
 16 concern relates to figure 1 which shows in the  
 17 darked-out areas the trust water flows, as I  
 18 understand the regulations. And it talks about  
 19 trust water flows in the Snake River upstream from  
 20 Swan Falls.  
 21 I guess what I am saying is, I  
 22 understand figure 1 to be stating that all of the  
 23 groundwater and surface water in the darked-out  
 24 area would be trust water flows. My first concern  
 25 about that is that, as far as surface flows, I

1 think that is directly contrary to the  
 2 legislation. Because it was the understanding of  
 3 everyone last year that the flow at Milner was  
 4 zero, and there was no trust water in the flow  
 5 above Milner. And I don't even think that Idaho  
 6 Power would take the position that above Milner  
 7 they are entitled to any trust water in the flow  
 8 of the river.  
 9 My second concern is that, as to  
 10 groundwater, although an argument could be made  
 11 that that water above Milner in the groundwater is  
 12 theoretically connected to trust water, or if some  
 13 hydrologic connection could be established to the  
 14 river below Milner from a groundwater use above  
 15 Milner, then perhaps you could get into the area  
 16 of getting into the remaining criteria. But I am  
 17 concerned that we just have a map here that seems  
 18 to blanketly include all of these trust waters or  
 19 all of these waters above Milner. And I think  
 20 that needs to be addressed very carefully. And at  
 21 least it needs to be made explicitly clear that  
 22 surface flow above Milner is not trust water.  
 23 My third concern is that last year  
 24 another of the safeguards that we put into the  
 25 legislation was that the burden of proof was to be

1 placed on the protestant. And I realize that  
 2 these regulations do not specifically change that  
 3 in that they do recognize that the burden of proof  
 4 is on the protestant. However -- and this is  
 5 where I'm not at this point prepared to go through  
 6 all these specific sections, but I think at a  
 7 later date I could or at a subsequent time I could  
 8 note this -- but it seems to me that there are a  
 9 number of places in the regulations where  
 10 additional burdens are placed upon the applicant  
 11 to provide information which is not now  
 12 necessarily required to obtain a permit and which  
 13 was not contemplated by the statute, which, in  
 14 effect, places an additional burden on the  
 15 applicant which was not there before, and, which,  
 16 again, in effect, has the result of making the  
 17 applicant carry a burden of proof that pertains to  
 18 these trust waters which was not intended by the  
 19 legislature.  
 20 And, again, I apologize for not having  
 21 the specific sections here. I got busy today. I  
 22 was going to get those together because I do have  
 23 some notes of my own. But I just -- I had to rush  
 24 over here, and I was late. But, again, I would  
 25 just encourage the department, as they go through

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1 the regulations, to be sure that the applicant  
2 does not have to prove anything more to obtain a  
3 water permit now than the applicant had to prove  
4 before, other than the significant impact as a  
5 first step. And, then, if the significant impact  
6 problem is reached, then the four remaining  
7 criteria, but that the burden of proof on a  
8 challenge based on those criteria still remains  
9 with the protestant.  
10 THE HEARING OFFICER: Okay. Thank you. I  
11 will try and formulate a question relative to the  
12 burden of proof.  
13 SENATOR CRAPO: Yes.  
14 THE HEARING OFFICER: Do you recall, as the  
15 legislation was debated, how an application was to  
16 be treated if it was not protested? There is  
17 where the department is having a bit of trouble  
18 interpreting the statute. Was it simply to be  
19 assumed it was in the public interest, or was the  
20 director to consider those factors?  
21 SENATOR CRAPO: It was my understanding  
22 that, if there was no protest, then the department  
23 was still to make the determination as to whether  
24 there was a significant impact. But it was  
25 understood pretty much in all of the discussions

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1 we had, at least from my perspective, that, unless  
2 there was some pretty solid evidence, the  
3 department was probably not going to find a  
4 significant impact. In other words, unless there  
5 was something pretty solid indicating to the  
6 department that they had a concern there that they  
7 needed to face and no one protested it, that the  
8 application would proceed. If the department,  
9 however, determined from its own understanding of  
10 the aquifer that there would be a significant  
11 impact, then the department on its own was to  
12 evaluate the criteria and to make a determination.  
13 So I guess the answer is, my  
14 understanding is that a protest is not necessary  
15 to trigger the evaluation of significant impact  
16 and the criteria. But by the same token that,  
17 absent a protest, the department was to be quite  
18 flexible in not placing all kinds of burdens and  
19 roadblocks in the way of an applicant. It was the  
20 specific intent of this legislation that trust  
21 water would be liberally available, in my opinion,  
22 and that that the department and legislation was  
23 not intended to place roadblocks in the way of  
24 development of that water. Rather it was intended  
25 to protect Idaho Power's rights to utilize this

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1 trust water for power purposes subject to the  
2 understanding that, any application that did not  
3 cause a significant impact, or, that, if it did  
4 cause a significant impact, was still in the  
5 public interest would be permitted to proceed.  
6 THE HEARING OFFICER: Okay. Thank you.  
7 SENATOR CRAPO: Thank you.  
8 THE HEARING OFFICER: Appreciate the  
9 testimony.  
10 Senator?  
11 SENATOR LOWRY: Shall I call you Mr. Hearing  
12 Officer or Mr. Young?  
13 THE HEARING OFFICER: Either one. Both of  
14 them sound real good.  
15 SENATOR LOWRY: Mr. Young and Hearing  
16 Officer Person, I'd like to thank for the ability  
17 to be able to come today. I am also like Senator  
18 Crapo. I have a lot of notes scribbled down and  
19 nothing in final form. And I also, too, have the  
20 ability to have legislative overview in the Senate  
21 Resource and Environment Committee, and so I will  
22 hold my comments to a basic couple of points that  
23 I saw. And hopefully, if I still see those kinds  
24 of problems later in the rules and regulations, I  
25 will bring up more specific points on the

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1 different parts of the rules and regulation.  
2 I agree with Senator Crapo on most of  
3 these points. Another thing that I think he  
4 failed to stress was that, in the rules that are  
5 being promulgated right now, I think he  
6 believes -- and I do, too -- that the assumption  
7 is that any consumptive beneficial use of water is  
8 not of a benefit to the state. And I would tend  
9 to disagree with that, that any beneficial use of  
10 water does bring business and jobs and everything  
11 of that nature to the state of Idaho. And there  
12 should be more of an emphasis placed upon that  
13 beneficial use.  
14 The other that I saw that I had some  
15 problems with or a great difficulty with is,  
16 usually there was no recourse or chance for appeal  
17 of a director's decision once it's been made other  
18 than going to the courts. If the director asked  
19 for a lot of expensive hydrologic information or  
20 other information that's very expensive to get and  
21 then the applicant is turned down, then the only  
22 recourse that person has is to go to the courts  
23 and start that process all over which makes it  
24 twice as expensive for the applicant to do again.  
25 And so I was wondering if there was a possibility

1 of being able to put an appeal process, either to  
2 the water resource board or to some other person  
3 also, to make that claim without having to go  
4 through that expensive process of going through  
5 the court system to make an appeal for that  
6 process.

7 It might not be possible. It might  
8 take a judge to be able to do that. But I feel  
9 that, if a person spends enough money in trying to  
10 get his permit through and spends a lot of money  
11 on studies and information he should have some  
12 outlet of appeal if there is decision -- if the  
13 person thinks it's just an arbitrary decision and  
14 not a decision made on hard facts and information.

15 With that, again, I will say I will  
16 have more information when the senate will have a  
17 chance to overview the rules and regulations at  
18 another time.

19 THE HEARING OFFICER: Thank you, Senator

20 SENATOR LOWRY: Thank you.

21 THE HEARING OFFICER: Appreciate your  
22 comments.

23 Anyone else like to make a statement  
24 for the record?

25 Okay. Apparently no one else desires

1 to do so. So we would simply note that the  
2 hearing will be held again this evening at  
3 7 o'clock in this room. The hearing record will  
4 stay open for written input, and I would encourage  
5 the senators, if possible, to give that  
6 information to us so we could incorporate that  
7 into the rules as they are promulgated so we don't  
8 have to make another round if you find it  
9 necessary to reverse the director on the rules.

10 So the record will stay open until the  
11 27th, and then these comments will be used to  
12 revise and adopt the rules.

13 So thank you for coming, and we will be  
14 happy to stay here and answer any questions that  
15 you do have.

16 (End of proceeding.)

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1 REPORTER'S CERTIFICATE

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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 Boise, Idaho.

16 IN WITNESS WHEREOF, I have hereunto set  
17 my hand this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

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22 Frances J. Morris, Court Reporter  
23 CSR No. 696

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## Water Allocation Rules and Regulations Hearings 1/16/1986

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<p>ability 15:16,20 able 15:17 17:1,8 above-entitled 19:8 absent 14:17 accurate 9:13 19:12 accurately 7:13 Act 3:15 action 19:8 actions 4:5 add 5:25 additional 12:10,14 addressed 11:20 Administrative 3:15 adopt 18:12 adopted 4:22 adoption 4:2,22 5:12 ago 9:12 agree 16:2 allocation 1:5 3:12 allowed 3:21,22 amended 3:25 answer 5:18,20,23 9:21 14:13 18:14 apologize 7:2 12:20 Apparently 17:25 appeal 16:16 17:1,5,12 appears 8:7 applicant 12:10,15,17 13:1,3 14:19 16:21,24 application 13:15 14:8 15:2 appreciate 6:13 15:8 17:21 appropriate 4:21 aquifer 14:10 arbitrary 17:13 area 10:24 11:15 areas 10:17 argument 11:10 asked 9:19,25 16:18 asking 4:12 9:11 aspect 10:15 assumed 7:22 13:19 assumption 16:6 attendance 5:6 6:5 ATTORNEY 1:12 AUDIOTAPES 1:12 Authority 4:1 available 14:21</p>	<p>believes 16:6 beneficial 16:7,9,13 benefit 16:8 bit 13:17 blanketly 11:18 board 17:2 Boise 1:18 3:1,6 5:5 19:15 brief 4:4 5:20 6:12 bring 15:25 16:10 building 1:17 5:5 burden 11:25 12:3,14,17 13:7,12 burdens 12:10 14:18 business 16:10 busy 12:21</p>	<p>counted 6:4 counting 6:7 couple 15:22 coupled 8:11 court 17:5 19:4,21 courts 16:18,22 Crapo 2:3 6:10,11,14,18 6:18 9:4,9 10:15 13:13 13:21 15:7,18 16:2 criteria 9:23 10:8 11:16 13:7,8 14:12,16 Cross 3:19 CSR 1:24 19:22 Currents 4:15 Current's 4:18</p>	<p>either 3:10 15:13 17:1 emphasis 16:12 encourage 12:25 18:4 entered 5:9 entitled 11:7 Environment 15:21 essentially 8:8 establish 7:10 established 9:23 10:6 11:13 establishing 6:25 evaluate 14:12 evaluation 14:15 evening 18:2 evidence 14:2 examination 3:19 expensive 16:19,20,24 17:4 explicitly 11:21 expository 5:19 extent 19:13 extremely 6:8</p>	<p>getting 11:16 give 5:11 6:23 18:5 given 4:4,9 8:14 go 6:21 9:9,15 12:5,25 16:22 17:3 goes 8:19 going 4:5 7:4,11 9:9 10:7 12:22 14:3 16:18 17:4 good 9:16 15:14 great 16:15 groundwater 8:20 10:23 11:10,11,14 guess 9:21 10:9,21 14:13</p>
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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 Boise, Idaho.

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

Frances Morris  
Frances J. Morris, Court Reporter  
CSR No. 696

