

Subject to approval of the Expanded Natural Resources Interim Committee

**EXPANDED NATURAL RESOURCES INTERIM COMMITTEE
MEETING - July 7, 2004
MINUTES**

**9:30 a.m. Boise City Hall, City Council Chambers,
3rd Floor, 150 N. Capitol Blvd., Boise, Idaho**

The meeting was called to order by Cochairman Representative Dell Raybould at 9:40 a.m. Other committee members present were Cochairman Senator Laird Noh, President Pro Tem Senator Robert Geddes, Senator Dean Cameron, Senator Don Burtenshaw, Senator Joe Stegner, Senator Skip Brandt, Senator Clint Stennett, Representative Bert Stevenson, Representative Mike Moyle, Representative Scott Bedke, Representative JoAn Wood, Representative Jack Barraclough, Representative George Eskridge, Representative Charles Cuddy and Representative Wendy Jaquet. Senator Stanley Williams and Senator Bert Marley were absent and excused. Adhoc members present were Senator John Andreason; Senator Brad Little; Senator Gary Schroeder; Senator Tom Gannon, Representative Darrell Bolz; Representative Maxine Bell, Representative Wayne Meyer; Representative Lawrence Denney and Representative Pete Nielsen. Senator Shawn Keough, Senator Brent Hill, Senator Marti Calabretta, Senator Dick Compton, Representative Tim Ridinger, Representative Eulalie Langford, Representative Larry Bradford, Representative Doug Jones and Representative George Saylor were absent and excused. Non-committee legislators in attendance included Speaker Bruce Newcomb, Representative Frances Field, Representative Sharon Block and Representative Anne Pasley-Stuart.

Others present included Ray Houston, Legislative Services-Budget and Policy Analyst; Linda Lemmon, Thousand Springs Water Users Assoc.; Roger D. Ling, Water Users; Garr Wayment, Southwest Irrigation District; Larry Pennington, North Side Canal Co.; Brenda Tominaga, Michael Creamer, Tim Deeg and Lynn Tominaga, Idaho Ground Water Appropriators; Randy MacMillan, C.E. Brockway, Jim Tucker, Jim Lockhead, Rich Hahn, Idaho Power Company; Jack Bell; Tim Corder, Mountain Home Advisory Committee; Barry Burnell, Idaho Department of Environmental Quality; Bill Thompson, Minidoka Irrigation District; Director Karl Dreher, Gary Spackman, L. Glen Saxton, Dave Tuthill, David Blew, Brian Patton, Phil Rassier and Hal Anderson, Idaho Department of Water Resources; Rex Mirchey and Ted Whiteman, Jerome Cheese; Dale Rockwood, Paul Berggren, Committee of 9; Allyn Meuleman, USBR; J. Dee May, Rangen, Inc.; Ron Carlson, Idaho Department of Water Resources/Water District 1; Roger Schmitt, Rich Rigby, Darla Walton and Gail McGarry, Bureau of Reclamation; Tom Stuart and Bill Sedivy, Idaho Rivers United; Mike Faulkner and Lynn Carlquist, North Snake Ground Water District; Brent Olmstead, Roger Ray Parsons, USD; David Suchan and Dean Stevenson, Magic Valley Ground Water District; Christian Petrich, SPF Water Engineering; Joe Jordan, Idaho Water Resource Board; John Roshalt; Chuck Coiner, Twin Falls Canal Company; Dick

Rush, IACI; Gayle Batt and Norm Semanko, Idaho Water Users Assoc.; J. Matt Uranga, J-U-B Engineers; Neil Colwell, Avista Corp.; Leonard Beck, State Water Board; Mary Lupachick, Idaho Department of Parks and Recreation; Craig Evans and Todd Van Orden, BGWD; Del Kohtz, Idaho Water Co.; Bruce Wright, Basic American Foods, Dana Hofstetter, Hofstetter Law Office; Pat Sullivan, Sullivan and Reberger; Mark Daily and Bill Jones, TSWUA; Joann Hunt, NWPC; Lewis Rounds, Idaho Department of Water Resources/Water District 120 and Lomar Bates, City of Twin Falls. Staff members present were Katharine Gerrity, Susan Bennion, Mike Nugent and Toni Hobbs.

After opening remarks by the Cochairmen, a panel consisting of Mr. Ken Dunn (former director of the Idaho Department of Water Resources), Governor John Evans (Governor of the State of Idaho 1-24-77 to 1-5-87), Mr. James Bruce (former CEO, Idaho Power Co.), Mr. Jim Jones (former Attorney General), Mr. Roger Ling (attorney for water users), Mr. Ray Rigby (former state senator and former chairman of Governor Evans' advisory committee), Mr. Pat Kole (former deputy attorney general for Jim Jones), Mr. Kent Foster (attorney for water users) and Mr. Pat Costello (former counsel for Governor Evans) was introduced. These panel members were all instrumental in the development and implementation of the Swan Falls Agreement that was reached in the 1980s.

Mr. Ken Dunn stated that without the Swan Falls Agreement the state would have gone for many years with no development in the Snake River Basin or faced severely reduced flows at the Murphy gauge as a result of the litigation between the Idaho Power Company and the State of Idaho. The alternative to the Swan Falls Agreement was to have FERC subordinate Swan Falls. This would not have been good for the state at that time and, in his opinion, it would not be good for the state today. The Swan Falls Agreement was the result of a lot of work by many people. It did provide a settlement and provided some water for development. It provided water, not only for irrigation, but for industrial, municipal and domestic development in the southern part of the state. From an economic standpoint, this was absolutely critical. The agreement protected some water levels at Swan Falls which then protected water levels in the Lower Snake River for the dams.

Governor John Evans said that on October 25, 1984, he signed the Swan Falls Agreement along with Attorney General Jim Jones and Mr. Jim Bruce, Idaho Power Company. He commented that the leadership and willingness of Attorney General Jim Jones and Mr. Jim Bruce to negotiate allowed this final agreement to be reached. A special advisory committee was formed for the Swan Falls Agreement that included water law specialists that came up with substantial recommendations and advice. The key negotiating team of Pat Costello, Pat Kole and Tom Nelson representing the Governor's Office, Attorney General and Idaho Power Company respectively, were instrumental in putting the agreement together. Not only did they negotiate almost full time during the summer and fall of 1984, they then had to convince the Legislature the agreement was the only option available. **Governor Evans** stated that it was vital that the Legislature adopt the entire agreement. He thanked these men for the work during that time.

Governor Evans continued that over Idaho's water development history, there have been

serious water wars between the Upper Snake River Basin water development program and the nonconsumptive water rights holders, principally Idaho Power. As the power company built power generating facilities or dams on the Snake River, the state and the power company had to assume that the generating facility's water rights were subordinated to upstream consumptive use, mainly for irrigation. In a 1982 lawsuit filed by Idaho Power, as a result of ratepayer complaints that the company had not protected its water rights at Swan Falls from upstream development, everyone, including Idaho Power, assumed that as a result of the Hells Canyon Dam subordination agreement, it also subordinated the water rights at Swan Falls. The Supreme Court held that the subordination did not apply to Swan Falls. Due to this decision, in 1983 and 1984, the Legislature went through some bitter water battles trying to override the Court's decision, but to no avail.

In the spring and summer of 1984, the Governor and Attorney General contacted Idaho Power to see if a negotiated settlement of these serious water rights issues could be reached. Mr. Jim Bruce of Idaho Power Company was most willing to do this because the water battles had been very costly to the company and they did not want to interfere with the development of water resources upstream from Swan Falls. The parties appointed their attorneys, Pat Kole, Pat Costello and Tom Nelson to initiate the negotiations. Ken Dunn, then Director of Idaho Department of Water Resources, and former Senator Ray Rigby added their input and leadership and after many proposals by both sides, an agreement was reached to negotiate a complete settlement of the entire Snake River water rights controversy. A general adjudication of the Snake River water rights was agreed to along with the collection of the necessary hydraulic data to predict the effects of future water development. In addition, the state agreed to develop a comprehensive water resource development policy and negotiated to compromise minimum stream flow at Swan Falls. This minimum stream flow was to be 3,900 cfs during the irrigation season and 5,600 cfs in the winter.

Governor Evans noted that one major issue that still remained was how to pay for the adjudication of all of the water rights in the state. The cost at that time was estimated to be \$28 million. In response to a question about how much has been spent to date, **Director Karl Dreher** responded that it has been close to \$70 million in general funds, not including private money.

Governor Evans said that he believes there are several issues associated with Swan Falls that may influence the water rights issues being faced today. He believes that Idaho Power will protect its minimum flows set by the Swan Falls Agreement and that the state water development policy allows for the development of up to 80,000 acres in any four year period using trust water if the desired water use meets established standards. **Governor Evans** suggested that this is an area the committee should look at to see if it has been done.

Governor Evans added that there were several issues the Swan Falls Agreement did not consider. These include:

- Diminished spring flows
- Drought

- What would happen to the minimum stream flows at Swan Falls if the drought continues

He noted that the Twin Falls Canal Company spring flows that go to the American Falls Reservoir have diminished 50%.

Governor Evans encouraged the committee and interested parties that continued negotiation and compromise will provide the means to reach a solution to the current problems.

Mr. Jim Jones said that if the state had not reached an agreement with Idaho Power, the issue would probably had ended up in a lengthy court battle. After the Supreme Court decision was reached, the Attorney General's Office decided the issue was very important. The intent in responding to the court's decision was to come up with a formula that would protect all of the existing users above Swan Falls and to set aside the maximum amount of water possible to be available for upstream beneficial uses.

Mr. Jones commented that one important result of the negotiations is that the state now has a block of water set aside for upstream uses. The compromise on the 3,900 cfs and 5,600 cfs at the Murphy gauge was the result of the state wanting to be sure it had an unfettered right to allocate the water above that amount of flow. This brought a bit of an impasse to the negotiations. The question was whether the water right above the minimums would be subordinated or subordinatable. In other words should the water right be left in Idaho Power's ownership or should the state assume ownership of that water. **Mr. Jones** stated that it was his position, as Attorney General at the time, that Idaho Power should have no ability to frustrate what the state was attempting to do. He went so far as to say he would not sign the agreement unless it was made clear that the state had complete control of that water right. **Mr. Jones** said that at this point Ray Rigby suggested development of a trust. He suggested having the Governor hold the water in trust for the benefit of subsequent appropriators. This would involve having the Governor hold the water in trust for the benefit of the people and Idaho Power Company until such time someone applied and received a water right. If the water right was above Milner Dam, it was assumed that the special new criteria did not have to be met. This responded to Idaho Power's concern that the closer to the Murphy gauge the water right was, the more impact an appropriation would have. This was eventually incorporated into the agreement.

Mr. Jones noted that at that time, everyone assumed that the flows would be there and that choking off the river at Milner would provide the necessary flows plus about an additional 600 cfs during the summer. The state had the ability, if the flows were not adequate, to tie up additional water to send down the river when necessary.

Additional safeguards that were written into the agreement included:

- The PUC would approve the agreement and, if not, the state could go to FERC.
- The state developed a water plan and asked FERC to approve that plan along with the agreement. (This was done to keep FERC from requiring development of a water plan that the state had not approved.)

Mr. Jones concluded that after the agreement was approved, the group felt a compromise had been reached to meet Idaho Power's concerns while at the same time protecting the rights of the litigators by setting aside a block of water to be available for future growth and development upstream. He added that it was the concept of this group that trust water can be used for anything, including recharge by the Idaho Department of Water Resources if the appropriate steps were taken. This agreement was developed to provide an overall settlement scheme that would eliminate the need for litigation. It did not try to solve each and every issue.

Mr. Jim Bruce, former Chairman and CEO of Idaho Power Company, commented that, in his opinion, Idaho Power's development of the Snake River also helped develop the State of Idaho. The dams all the way up the river supply hydropower (the cheapest power available) to the people of Idaho. This has been a great advantage to every citizen in the State of Idaho, especially southern Idaho. He stated that the principle and intent of the agreement was to negotiate a settlement that would preserve the hydrosystem that existed at that time. In his opinion, Idaho Power had no choice but to initiate legal action to protect their water rights. **Mr. Bruce** said that once the Swan Falls Agreement was established, Idaho Power had no choice other than to enforce it in order to protect its water rights.

Mr. Ray Rigby, former State Senator and former chairman of Governor Evan's advisory committee, explained that when they were developing the Swan Falls Agreement, they knew a major public policy position had to be set. Idaho could not afford to freeze all upstream consumptive uses and other uses of water (the lifeblood of future development) to a downstream nonconsumptive use that would release waters that by and large had their origin in Idaho for out-of-state uses after going through the generators of the power company. **Mr. Rigby** said that something had to happen to protect the state and the water users.

Mr. Rigby went on to note that the following questions might help the committee find a solution to the problems that exist. These questions are:

- 1. Is the State Water Plan adopted by the Idaho Water Resources Board and approved by the Legislature law or is it just policy and guidelines?
- 2. Is the present policy of the Idaho Department of Water Resources on transfers of water rights too restrictive, causing loss of rights to holders?
- 3. Are there enough outside experts in the fields of law and hydrology involved in this process?
- 4. Should an independent analysis of the nature and availability of the millions of acre feet of water in the underground aquifer that exists under the State of Idaho be done?
- 5. Is the statute on reasonable ground water pumping levels available and enforceable enough to satisfy water users for all purposes including fish farming? If not, should it be

amended? Is this not an area to be explored to obtain maximum use of the resources?

Mr. Pat Costello, now with the University of Idaho, joined the discussion by speaker phone. **Mr. Costello** said that being part of the negotiating team for the Swan Falls Agreement was an excellent experience. He noted that even though the Swan Falls Agreement was successful, there were a few miscalculations.

Mr. Costello went on to note that one miscalculation involved cost and the length of time adjudication would take. It was assumed that the cost would be about \$28 million to adjudicate the Snake River based on a ten year time frame for completion; twenty years later we are still working on it.

Another miscalculation, according to **Mr. Costello**, was a conclusion that the adjudication should cover all areas up to Lewiston. This was to ensure the participation of federal agencies and Indian Tribes. At that time, the committee did not envision how much that determination would add to the adjudication as a result of the Nez Perce claims.

Mr. Costello noted also that in order to get federal approval of the Swan Falls Agreement a bill was drafted and introduced in Congress late in the session. The bill was attached to an energy bill that passed very quickly but was eventually vetoed. Because of this, approval actually took another year.

Mr. Pat Kole explained that while the team was negotiating, they tried to stick to a set of principles that made it clear that no matter what issues arose down the road, there would be a process in place by which disputes could be resolved. These principles included balance, stability, predictability and consistency. The team tried to incorporate a new concept into Idaho law, that being that there would be important public policy considerations embodied in public interest criteria that would guide future water resource development in the state. As the process proceeded, and as they worked toward a comprehensive resolution of the issues that existed, it was envisioned that this agreement would be a complete and final resolution in the sense that the principles adopted and put into statute or into the contract would provide a process for the resolution of any unexpected contingencies that might develop in the future.

Mr. Kole noted that the team wanted to preserve the hydropower system in Idaho but they also wanted to make sure that future upstream development under the public interest criteria would be assured. Overriding everything they considered was the concept of state sovereignty over natural resources, water and its future.

Using that principle and looking at the agreement in hindsight, **Mr. Kole** stated that, in his opinion, the new issues that have arisen are clearly solvable. It is a legislative prerogative to step in and review the public interest criteria and to look at the agreement to make sure that any adjustments that can be made are made. The agreement itself has flexibility in the way that it was drafted but it also has consistency and predictability in the outcome that should flow. There should not be an ability of any of the interest groups to insist or opt out of the process that was

put in place by the Swan Falls Agreement. Instead, there needs to be compromise and a review of the balance that was struck to see if circumstances of the drought have changed what the outcome needs to be. Inherent within this concept is that this is a public process resolved through public debate and resolved in an open and democratic forum. In **Mr. Kole's** opinion, the process that was involved in the Swan Falls Agreement is the process that needs to be followed to come to a conclusion of the new challenges that have arisen. These challenges are not really that different from the original issues.

Mr. Roger Ling explained that, although he was not directly involved with the negotiations, he was kept up to date by **Attorney General Jim Jones** and provided input when asked. He also noted that the state was faced with a situation where Idaho Power Company had the unsubordinated water right that would have essentially prevented any future upstream development. Something had to be done to avoid this. It would have taken a great deal of litigation to resolve this and no one was sure how that litigation would turn out. Idaho Power subordinated all water rights that had been acquired up to 1984 after being given the minimum historic flows that had existed at Murphy at that time. This was a significant waiver of water rights.

Mr. Ling noted that in looking at the ability for future development that was arrived at by the agreement, this seemed like a win-win situation. There was water in the system that could be used for purposes other than power production and some power production was preserved by the minimum stream flows of 3,900 cfs in the summer and 5,600 cfs in the winter.

Mr. Ling stated that in the efforts to implement the agreement, as he recalls, there was no discussion of the issue of spring flows and ground water users and the rights they may have. In fact, conjunctive management was barely being discussed at that time.

The Swan Falls Agreement was a method to resolve the issue that arose as a result of the power rights of Idaho Power Company. There were some side issues that came up along the way such as adjudication and the State Water Plan but the primary focus was to resolve the conflict with Idaho Power.

Mr. Kent Foster stated that he became involved in the Swan Falls Agreement after the 1982 opinion. The primary issue was subordination. The Supreme Court stated that under existing acts of licensing, Idaho Power's rights at Swan Falls had not been subordinated. At that time the constitutionality of the Legislature saying those rights had been subordinated was being considered. Eventually this was done but it did not work and lawsuits were filed.

Mr. Foster explained that the evolution of water law since the Swan Falls Agreement has presented the state with the question of how to administer the use of ground water and surface water in a way that is fair to everyone. The goal today, in his opinion, is still to devote the water resources of the state to beneficial use in reasonable amounts through appropriation. This is not a bad policy but how to do it is a difficult question.

In response to a question from **Representative Jaquet** regarding the status of trust water development, **Director Karl Dreher, Idaho Department of Water Resources**, said that we do not have an exact number. There is a need to go back and review the permits issued subject to the trust water limitation and the conditions put on those permits. Having said that, **Director Dreher** noted that he was fairly certain that the state has not fully developed the trust water that was part of the agreement. **Mr. Norm Young** added that there is a 1993 report in his handout material giving the status of the trust water process. Due to the moratorium, this is the most up-to-date information that exists.

Representative Barraclough stated that more information on this would be very helpful to the committee discussion.

Senator Noh asked what the implications were of the "trust water line" that was drawn and how water rights above that line and water rights below that line would be affected differently by the minimum flow water allocation as it relates to the Swan Falls Agreement. **Mr. Jim Jones** explained that it was assumed anything above Milner would not have an impact and was excluded from trust water criteria. The trust water criteria would then apply to the water below Milner and the impact here would need to be calculated. **Mr. Ken Dunn** said that, as he recalls, the reason for the "trust water line" was to differentiate the areas in that anything down gradient from the line had the potential to directly impact the springs. If you go upgradient from the line, it becomes so dispersed that if you had some development you couldn't tell where the impact was. With regard to the springs, **Mr. Dunn** said that the fish farmers, at least when he was director, in his opinion, were regarded as ground water users in relation to their use of the springs and like all ground water users, they had to seek their own water. If the flows went down, the fish farmers had to find water just as pumpers do.

Representative Bedke asked, having it said that the 3,900 cfs at Milner was not the Thousand Springs flow and vice versa, then in the agreement was the lack of a connection recognized between the 3,900 cfs at Murphy and the spring flows out of Thousand Springs. **Mr. Ling** explained that, in his opinion, the trust line was arbitrary (Later he clarified that this word may have been strong, that you just can not say 100 yards on one side is trust water and 100 yards on another is not. That is not to say that there wasn't some data they used as a basis for the line.) and to be used as guidance tool. He said that there was no discussion of management between ground water users above the line and how that affected those below the line.

Representative Raybould commented that at the time of the Swan Falls Agreement, the state was still managing surface and ground water separately. Conjunctive management did not come about until the Snake River Basin Adjudication court mandated it. He asked whether, at the time of the Swan Falls Agreement, there any intent that the spring flows would be managed in conjunction with underground water or with surface water. **Mr. Dunn** stated that the spring flows and ground water were managed separately due to the fact that the state was not equipped to manage them together. There was a feeling that the spring flows themselves would not be protected from other development.

Mr. Ray Rigby commented that the fear was that if Swan Falls was not subordinated, no more development of property would take place. This was quite a shock. When Idaho Power reduced their necessary minimum flow from 4,500 cfs to 3,900 cfs, the state realized that difference was water that could be used to develop land. He added the "trust water line" was not actually discussed as part of the agreement.

Mr. Kole said that this discussion did come at some of the public meetings in the Upper Magic Valley and Hagerman. Some of the aquaculture interests came forward and asked what was in the agreement for them and were concerned that they were not protected. These interests were told they would have to rely on the public interest criteria and the legislative arena and the public process to protect their rights because the agreement contemplated future development. They were told that the public interest criteria was going to be their future protection. There was quite a heated debate on this issue from both sides.

Representative Barraclough explained that in 1959, Morris Lundorf, Chief of the USGS, took the inputs from each of the tributary basins along the Snake River Plain up to Yellowstone and developed flownets. These were used to represent cfs in the aquifer and show quite a division between the flows from the Idaho Falls area south and discharges in the springs from Blackfoot to Neeley. This is where the trust line came from. This was the best hydrology available at the time.

Director Dreher responded to **Mr. Dunn's** remarks regarding the spring rights being considered ground water rights. **Director Dreher** said that the Idaho Department of Water Resources did not issue those permits and licenses as ground water rights. If that was the intent, that is not how it has been done. These spring water rights, just like the Swan Falls water right, were issued without subordination.

Representative Jaquet asked what basis was used in telling the spring users they had to rely on the public interest doctrine to protect themselves. **Mr. Kole** explained that the environmental community was very involved in the process with Governor Evans office. Due to the federal component involved with Representatives LaRocco and Stallings, a conduit existed and the environmental concerns had to be listened to in order to get the state and federal legislation passed. The basic belief was that the legislative arena and the shape of the legislation provided every interest group an opportunity to have a say in the eventual compromise. **Representative Jaquet** asked how the public interest doctrine has helped the spring uses over the last 20 years given their issues relating to the prior appropriation doctrine. **Mr. Kole** said that despite what the paperwork says, these rights were administered by the department as ground water rights.

In response to a question relating to costs from **Senator Andreason**, **Director Dreher** said that the cost of the adjudication has been about \$70 million so far. If private funds are included that cost is closer to \$80 million.

Senator Stennett inquired what the intent was of the relationship between trust water and the local public interest and how that would relate today to artificial recharge in the aquifer. **Mr.**

Jones said, in his opinion, the intent was to list a number of criteria for allocation of trust water that gave everyone an opportunity to give input into the process. It was their understanding that any potential use would be eligible and that the department would develop criteria that would more specifically direct what the public interest was. No particular interest was given more importance than another.

Representative Wood asked whether all of the water rights issued prior to 1984 have been identified. **Mr. Rigby** said that was one reason Idaho Power wanted adjudication and they were right. If water rights were going to be subordinated, all water rights prior to 1984 had to be identified. **Mr. Dunn** said this number is not a moving target and that a claim to a water right has to be filed. The old constitutional rights have been identified.

Senator Noh explained that the trust water was basically to be held by the Governor for the benefit of Idaho Power and the public based on the agreement. He asked whether, due to the Snake River Basin Adjudication, those trust water rights will need to be described. **Mr. Dunn** said that it was his understanding that the trust water rights would be held in trust by the Governor to be appropriated by future water users in the state and, once appropriated, it came out of the trust and was just like any other water right. **Mr. Jones** said that was the intent of the committee. **Mr. Ling** agreed with that. He added that the key is that those rights would be subject to a call to meet the 3,900 cfs minimum flow. **Speaker Newcomb** asked if a call was made by Idaho Power, would it only be on the trust water. **Mr. Dunn** explained that if the trust water is appropriated, it has to be above 3,900 cfs at Milner because it is just water that exists in the river.

Senator Noh asked what affects the minimum stream flow and what does not. He noted that it is his understanding that the agreement stipulates that Idaho Power can lease water from the water bank or acquire additional water that is not part of the minimum flow. He asked if this is true of water that other people might acquire to use and send down the river. **Mr. Dunn** said that the power company can lease water from the upper reservoirs and release it down. It is then the watermaster's job to get that water to them at the Murphy gauge. If the power company leases water, it is water above the 3,900 cfs. If the state or another entity wants to lease water to maintain the 3,900 cfs that is okay also.

Representative Nielsen suggested that, if there is an excess of the 5,600 cfs in the winter during these times of drought, could that water be used as a diversion into the North Side Canal Company for recharge while maintaining the minimum of 5,600 cfs. This would allow recharge to start now and then work up the plain as water becomes more abundant to get the recharge further up. He also suggested that, in the future, additional sites upstream could be substituted through dams or pipelines for Idaho Power to use instead of Swan Falls power production. This would allow more water to be kept further upstream to build up the Snake River Aquifer and have that as the state's reservoir to maintain flow.

Mr. Norm Young, former administrator for the Permitting and Regulatory Programs for the Idaho Department of Water Resources from 1977 to 2003, discussed the development of

the legislation required to implement the Swan Falls Agreement. He stated that this involved requirements for processing new applications for trust water and reprocessing permits that had not been developed before proceeding with development. This involved developing the public interest criteria for reallocating trust water and for rulemaking and moratorium authority.

Mr. Young noted that everyone involved, except FERC, timely implemented the items necessary to make the Swan Falls Agreement effective. Due to the fact FERC delayed until 1988, there was a period of time in which the Idaho Department of Water Resources was not able to proceed with processing permits.

Mr. Young distributed a packet of information containing the policy and implementation plan for processing water right filings in the Swan Falls area, an announcement of intent to write and promulgate rules and regulations for water appropriation and request for preliminary comment, and a copy of the order signed by Keith Higginson regarding significant reduction. These documents are on file at the Legislative Services Office. **Mr. Young** stated that it is important to notice how the Idaho Department of Water Resources went from the agreement and legislation to the point of processing new permits for trust water. He recalled as the notice of intent to adopt rules and regulations was issued, there were five public meetings held and when the rules were actually proposed, four public meetings were held. It is his recollection that these meetings were not well attended by the public.

The Idaho Department of Water Resources asked for public comment in the announcement of intent to write rules and regulations that included:

- How to break the backlog?
- How to determine the order of processing?
- What should be in the requirements for timing and scope of information submitted?
- What factors are appropriate for consideration of the local public interest?
- What constitutes a significant reduction in water available to hydroelectric facilities?

Mr. Young stated that the rules needed to define trust water. The statutes and the agreement were not specific on what it was. It was his understanding at that time that trust water was any water in the Snake River upstream from Swan Falls over and above the minimum flow but less than the water right.

Mr. Young added that the source of that water also had to be identified. When the initial request for rulemaking went out, the department said anything above Swan Falls Dam that gets into the Snake River is trust water. At the public hearings, the people in the Upper Snake River area said they were not a source of trust water, that anyplace where the water is tributary above Milner Dam is not trust water. This question was address by the Legislature in 1986 that split the administration of the Snake River at Milner Dam. In the fall of 1986 the rules were adopted.

Mr. Young continued that the two documents, the S1180 contract and the Swan Falls

Agreement, were signed on October 25, 1984 and in his opinion the two are very much tied together. The S1180 contract subordinated Idaho Power's water rights to 1982 or earlier. This contract settled Idaho Power's claims versus the existing water rights upstream from them earlier than 1982 and provided for limited DCMI (domestic, commercial, municipal, industrial) development. What was left was the future development. This is what the Swan Falls Agreement dealt with. If the Swan Falls Agreement was to fail, there is language in it giving the ability to terminate the S1180 contract. The Supreme Court decision in 1982 affected not only future development but also water rights junior to 1901.

Mr. Young commented regarding earlier remarks that 600 cfs was the amount to be used, with an 80,000 acre foot limitation. He does not believe that is what the agreement talked about. Rather the agreement maintained, or managed the river based on minimum streamflows. If you look at hydrographs he provided in his handouts, at Murphy, if you were to take the unappropriated water and store it, then release it you could keep the minimum streamflow propped up. The ability to develop is not related to 80,000 acre feet or to 600 cfs, he believes those were viewed as being minimums. There is criteria for 20,000 af/year, or 80,000 af every four years, but these go off into perpetuity.

Mr. Young said that he is unsure whether the department started processing the applications that would meet the 1982 date in the contract. In order to meet the terms of the contract, it had to be developed and the application in place by 1982. He is unsure whether the department went back and began breaking the backlog or not. By 1988, when FERC finally became effective on May 28, the department realized there was a backlog that needed to be dealt with. There were 3,800 applications that were pending at that time as well as permits to be reprocessed. He reminded the committee that any permit that had been issued prior to Swan Falls had to be reprocessed if proof was not filed on it in 1985. Each application had to be sorted out according to the requirements of the agreement, the contract, the law and the rules. For example, applications that were filed in the non-trust water area and those filed in the trust water area after 1984 were handled differently.

Mr. Young explained that processing began and the rules and regulations had defined 2 acre feet per day, and then redefined that to be anything smaller than 200 acres, as not creating a significant reduction. As a result of this, the processing commenced with applications for those that had been in place prior to 1984 and applications for new development smaller than 200 acres. These smaller applications were handled first. Before larger applications could be dealt with, the issue of significant reduction had to be agreed upon. A memorandum of decision and order in the matter of evaluating whether developing new irrigated acres would cause a significant reduction was included in Mr. Young's handout and is on file at the Legislative Services Office. This decision was based on two hydrologic studies; one postulating 20,000 acres of development (and these were the 20,000 acres of permits that were being processed) and the other using 196,000 acres (the total number of acres for new development in all of the applications before the department at that time). The depletion was run through a power model that the PUC had and concluded that the impact on Idaho Power after 60 years at full development was one quarter of one percent. As a result of this, the director of Idaho

Department of Water Resources at the time determined that there would be no significant reduction in hydropower from processing all of the permits. Thus the department began processing all of the applications, regardless of the size.

Mr. Young's handouts included a trust water status report dated July, 1993, that shows the number of permits and acres that were processed from 1989-1993. On May 15, 1992, the general moratorium was put on most of southern Idaho and especially the Eastern Snake Plain. **Mr. Young** said that there has not been a lot of processing of new consumptive development since that time.

As the applications were processed, questionnaires were sent out to the persons seeking the permits and depending on certain answers some of them were exempt from the processing. The total trust approved acres at that time was 45,588.

Mr. Young noted that in terms of reallocating the trust water the question was whether new water rights were being created or whether the rights were just being transferred. In his opinion there was a problem with transferring the rights because they were going from a nonconsumptive use to a consumptive use in most cases. In his opinion these rights were appropriately assigned new priority dates to those permits for trust water.

Senator Noh asked for an explanation of the discussion that took place regarding fees and use of the revenue from those fees to obtain a block of storage water that would be owned by the state to allow the state to be better equipped to meet minimum stream flows in times of drought. **Mr. Young** explained that the section addresses conjunctive management. The drawing of the trust water line had the effect of identifying for the canal companies where the ground water users were located that were potentially affecting the canal companies water rights. In his opinion, it was more than coincidence that petitions were filed by the canal companies seeking to either expand water rights to include the nontrust water area or to have a moratorium in the nontrust water area. The ground water/surface water problem certainly seemed to be in existence at this point in 1988 according to **Mr. Young**. Those petitions were withdrawn when the director at that time issued a policy that described how ground water would be treated in the non-trust water area and how surface water rights would be protected, at least in a temporary way, by not forfeiting or by any other theory of law, losing their water rights to new ground water users if they did not continue their protests. So that was put on hold until the drought that started in 1992. To further answer **Senator Noh's** question, **Mr. Young** said that it was fairly obvious to the negotiators that the board was to obtain this block of water to protect minimum stream flows. As trust water permits were issued, the department reserved jurisdiction to apply an annual fee for the use of that water if rules and laws were passed to allow that to happen.

Representative Stevenson asked whether the trust water is listed as a condition of the water right in the adjudication or, whether the fact that the water is trust water shows up anywhere in a person's water right or license. **Mr. Tuthill, Idaho Department of Water Resources**, said it depends on the conditions of the permit or license and is reviewed in the adjudication. **Representative Stevenson** asked about the priority date for trust water. **Mr. Young** said that

was an issue they struggled with. The question was whether the 1901 priority should be attached or should that date be the date of the filing for the unappropriated water because most people did not file for trust water. They filed for unappropriated water. Because they elected to treat them as if they were for unappropriated water, other than they added the significant reduction and public interest test, they are treated as unappropriated water and have a priority date based on the date they file.

In response to a question from **Senator Gannon** relating to “significant amounts,” **Mr. Young** explained that irrigation, no matter how many acres, was included. He stated that as far as he knows, DCMI was not kept track of.

Representative Jaquet asked how city use and semiconductor industrial use fit into the trust water scenario. **Mr. Young** said that if DCMI proposed use was greater than two acre feet per day depletion, that would be processed as trust water.

The next agenda item was working group reports.

Senator Geddes reported that the Bear River Working Group had not had a meeting since the last meeting of the regular committee. He stated that the water situation is improving somewhat in that area due to some significant rainfall in the last few weeks.

Senator Noh reported that at the last Eastern Snake Plain Aquifer Working Group meeting a presentation was given by the Spring Users in that area. He noted that the group was focusing on areas it felt needed to be explored in order to reach some agreements. The next meeting will have a presentation from the Ground Water Pumpers in the area.

Senator Noh added that he, Representative Raybould, Speaker Newcomb and Clive Strong have been meeting with individual stakeholders in the Eastern Snake Plain Aquifer area attempting to identify what it will take to be able to make proposals to the entire group.

Representative Stevenson reported that the Mountain Home Working Group met on June 15, 2004. This meeting included a presentation from Helen Harrington and John Westbrook outlining how they treated supplemental water rights and defined domestic water rights. The meeting included discussion on long-term solutions that hopefully will result in recommendations that can be made to the larger committee. **Representative Stevenson** said that due to the nature of the Mountain Home aquifer, it appears that some type of curtailment or reduction in the use of water will be necessary.

Representative Meyer reported that the North Idaho Working Group meeting was held on May 28, 2004. A staff member of a legislator in the State of Washington was in attendance at that meeting. Legal issues between the two states were discussed and it was determined that Washington can put a water call on Idaho in three ways. These include equitable apportionment, congressional apportionment and interstate compact. Mr. Clive Strong presented this information to the group. Water quality issues were also discussed as were minimum stream

flows. The group learned that the last time the minimum stream flow that has been set by Washington for the Spokane River was met was in 1917.

The Treasure Valley Working Group did not have a meeting to report on.

Senator Noh reported that a meeting was held with staff members of Idaho's congressional delegation discussing potential drought relief, expanded conservation reserve programs and other potential land retirement programs that might fit into resolutions of these issues. This was also a preplanning session for an August 17 and 18 meeting with USDA leaders. The meeting will be hosted by Senator Crapo and Congressman Simpson in Idaho.

Senator Noh said that at that meeting they learned that federal payments for conservation reserves are based solely on average soil types within a county. The maximum expected payment from the federal level is relatively small in relation to what it would appear to be necessary to retire irrigated land.

Senator Noh explained that discussion is ongoing with high lift pumpers in terms of negotiating ways to find high lift pumping water.

Senator Noh also notified the committee that the River Governance Group, that includes the States of Oregon, Washington, Montana and Idaho, will be meeting in Idaho on August 16 and 17. Part of the agenda will include a review of the Nez Perce Settlement and discussion regarding the Rathdrum Prairie Aquifer issues. Another agenda item will include discussion of water quality/quantity implications of the Big Rock Creek mining operation in Montana that eventually affects Lake Pend Oreille.

Senator Noh moved that the minutes from the May 6 and June 3 meetings be approved. **Representative Stevenson** seconded and the minutes were approved unanimously.

The meeting was adjourned at 2:30.