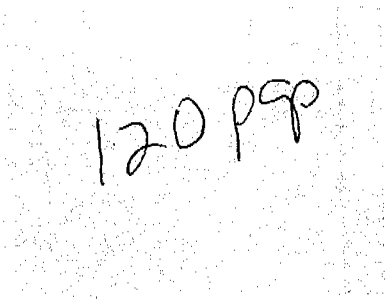
REVISION 1 - 3/4

HOUSE RESOURCES & CONSERVATION COMMITTEE

1:30 p.m. or upon adjournment
Room 412
Wednesday, March 15, 2006

BILL NO.	DESCRIPTION	SPONSOR
H800	Water rights, priority revised	Rep. Bruce Newcomb Speaker of the House
H792	Water use/legislative approval/when	Rep. Bruce Newcomb Speaker of the House



If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS:

Chairman John A. Stevenson
Vice Chairman JoAn Wood
Rep Frances Field
Rep Maxine Bell
Rep Jack Barraclough

Rep Lawerence Denney
Rep Lenore Barrett
Rep Mike Moyle
Rep George Eskridge
Rep Dell Raybould

Rep Ken Roberts
Rep Scott Bedke
Rep Ken Andrus
Rep Paul Shepherd
Rep Bert Brackett

Rep George Sayler
Rep Wendy Jaquet
Rep Mike Mitchell

MINUTES

HOUSE RESOURCES & CONSERVATION COMMITTEE

DATE	March 15, 2006
TIME	1:30 p.m. or upon adjournment
PLACE	Room 412
MEMBERS	Chairman Stevenson, Vice Chairman Wood, Representatives Field(23), Bell, Barraclough, Denney, Barrett, Moyle, Eskridge, Raybould, Roberts, Bedke, Andrus, Shepherd(8), Brackett, Sayler, Jaquet, Mitchell
ABSENT/ EXCUSED	None
GUESTS	Dan Adamson, Candidate for Idaho Governor; Vince Alberdi, Manager, Twin Falls Canal Co; C. Tom Arkoosh, Attorney, Surface Water Coalition; Tim Deeg, President, Idaho Ground Water Appropriators, Inc. (IGWA); Jeffrey C. Fereday, Attorney, IGWA; Don Hale, Committee of Nine, Water District 1; Steven Howser, General Manager, Aberdeen-Springfield Canal Co.; Randy MacMillan, Vice President, Clear Springs Foods; Jim Miller, Vice President, Idaho Power Company; Jeff Raybould, Chairman, Fremont-Madison Irrigation District; Jerry Rigby, Attorney, Water Resource Board, Committee of Nine; Ray W. Rigby, Attorney, Upper Valley Water Users, Committee of Nine; Dale Rockwood, Progressive Irrigation District, Committee of Nine; Dick Rush, Idaho Association of Commerce & Industry (IACI); Norm Semanko, Executive Director, Idaho Water Users Assoc. (IWUA); Dan Shoemaker, Chairman of the Board, Twin Falls Canal Co; Dennis Tanikuni, Farm Bureau; Lynn Tominaga, Executive Director, IGWA; Jim Tucker, Attorney, Idaho Power Company Please see sign-in sheet for other guests.
CALL TO ORDER	Chairman Stevenson called the meeting to order at 2:22 p.m. The secretary took a silent roll call. There were no minutes to approve.
H800 **SPEAKER BRUCE NEWCOMB Opening Remarks**	Rep. Bruce Newcomb, District 27, Speaker of the House of Representatives, presented H800, legislation to facilitate diversion of flood flows expected in the spring of 2006 in the upper Snake River Basin into existing canal structures for the purpose of recharging the Eastern Snake Plain Aquifer. H800 makes recharge a primary use of water. He submitted an excerpt from The Senate Journal, Statement of Legislative Intent S1008, dated February 1, 1985 (Exhibit 1); Attorney General Opinion 06-2, dated 3/9/06 (Exhibit 2) Speaker Newcomb said H800 does not take water rights, as some have stated. He said the argument was a "veiled threat" of a Kelo case. Speaker Newcomb said he has fought for property rights and the people who have them. H800 is a policy change. It repeals a 1994 law that changed recharge

from a primary to a secondary use. The repeal allows for a policy change in the management of trust waters that Idaho owns pursuant to the Swan Falls Agreement ratified in 1984. The Swan Falls Agreement was negotiated by the Idaho Power Company, and the then Governor and Attorney General, and ratified by the legislature. As part of that agreement, Idaho Power Company agreed to subordinate its hydropower water rights "to subsequent beneficial upstream uses upon approval of such uses by the state in accordance with state law" subject to maintenance of a 3,900 c.f.s. average daily flow in summer, and a 5,600 c.f.s. average daily flow in winter as measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls Dam. The Swan Falls Agreement did not impose any limitations on the type of beneficial uses to which the subordination applied.

Ray Rigby is the person who conceptualized holding water in trust. He will speak to the concept and its intent.

Speaker Newcomb quoted from The Senate Journal (Exhibit 1, page 59, column 2):

> "To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. . . . To the extent of the established minimum flows and any rights recognized by contract, such water rights for power purposes remain unsubordinated to all uses. . . . Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. . . . As applied to the agreement between Idaho Power company, The Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust."

Speaker Newcomb said Idaho Power Company agreed to the minimum stream flows. Water is spilled out of the upper Snake River over Milner Dam, "free gratis to Idaho Power Company all the time." It is part of the agreement for the State to balance use in favor of rate-payers. Last year, the State acquired water at Bell Rapids. That water all goes through the Hells Canyon complex for Idaho Power Company's benefit without charge. Idaho Power Company's opposition to H800 is about who is going to control the water.

QUESTIONS: There were no questions.

REP. DELL RAYBOULD Opening Remarks

Rep. Dell Raybould, District 34, Co-Sponsor, gave the history of events leading up to H800. For the past two years, there has been an Interim Committee on Natural Resources working on water problems in the southern part of Idaho. Rep. Raybould and Senator Don Burtenshaw, Co-chairman of the Interim Committee, were directed to address specific issues pertaining to recharge of the Eastern Snake Plain Aquifer. The work has progressed and culminates in the decision that a recharge plan is needed. Two years ago, the model developed by the University of Idaho and Idaho Department of Water Resources was updated. It showed that in order to stabilize the aquifer, at least 200,000 acre-feet of water is needed each year to recharge the aquifer. About 100,000 acre-feet is accomplished by the USDA in the Conservation Reserve Enhancement Program (CREP). Rep. Raybould said not taking water our of the aquifer is the same as putting it in.

Considerably more water than 100,000 acre-feet is needed to stabilize the aquifer. Problems go back two years ago to water delivery calls made in water districts120 and 130. The call included thirteen cities in southern Idaho that would have had water rights in jeopardy because of spring flows coming out of the aquifer. The Interim Committee's decision is that recharge programs are needed. The best and fastest way to proceed is to get water out of the river when there are high flows, and to fill the canal system in the upper valley, especially around Twin Falls.

The 1994 statute made recharge a beneficial use for the state, but had another clause subordinating recharge to water for investor-owned utilities. That clause breaches the Swan Falls Agreement that established Idaho Power Company's water rights, and places a cloud over the state's water in excess of the company's minimum rights at the Murphy gauge just below Swan Falls Dam. It was decided that an Attorney General's opinion was needed before taking action to rescind the 1994 language. That has been done. (Exhibit 2) The opinion states that the state does have authority to allocate water and change allocations for the beneficial use of the people of Idaho. Page 3 provides an overview of the Swan Falls Agreement . Quoting from that citation:

> "The parties resolved this litigation by agreeing that a portion of Idaho Power's hydropower water rights would be held in trust by the State of Idaho and that hydropower use of the trust water would be subordinated to subsequent beneficial upstream uses approved by the State in accordance with State law."

In the subordination provision of the Swan Falls Agreement, the parties recognized the agreement as "a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest." H800 does not jeopardize Idaho Power Company's rights as granted to them by agreement. It protects them, and they are not being contested. Idaho Power Company is not the sole beneficiary of the trust. Future appropriators may seek appropriation of trust waters in conformance with State law. The Senate Testimony at that time includes a dialogue between Senator John Peavey and Tom Nelson, Attorney, Idaho Power Company stating that the State was free to do

as it liked with water above Idaho Power Company's minimum water rights. The only thing they can't do is change the contractual nature of the water right at Murphy gauge. The Attorney General's statement concludes that the terms of the Swan Falls Agreement:

> " . . . conclusively demonstrate the parties' intent that the hydropower water rights held in trust by the State would be subordinated to all beneficial upstream uses approved in accordance with State law, including aquifer recharge."

Rep. Raybould said water is going down the river now, and aquifer recharge should have started a month or so ago.

QUESTIONS/COMMENTS: Rep. Barraclough noted there was an error in the statement of purpose in paragraph 2, line 5: April 1 to March 31 should read April 1 to October 31. Rep. Raybould acknowledged the error.

Rep. Barraclough explained where the minimum stream flows of 3,900 c.f.s. and 5,600 c.f.s. came from.

Rep. Roberts asked how H800 would affect the 200,000 acre-feet estimated to be needed for aquifer recharge.. Rep. Raybould said it would depend on several factors including the weather and the harshness of the winter. He said it isn't known how much recharge is possible just with the canal system.

Rep. Roberts asked if there was a way to tell what is happening this year, given the snowpack and precipitation. Rep. Raybould said he hasn't seen any figures yet. They will be published this summer.

Rep. Andrus asked what the c.f.s. is now at Murphy gauge. Rep. Raybould said yesterday the flow past the Murphy station was 9,950 c.f.s.

RAY W. RIGBY
Upper Valley Water Users

Committee of Nine

PRO

Ray W. Rigby, Attorney, Upper Valley Water Users, Committee of Nine, testified in support of H800. Mr. Rigby submitted supporting documentation for the record: Statement of Ray W. Rigby before the House of Representatives Committee on House Bill 800, re: Swan Falls Agreement (Exhibit 3); Swan Falls Statement by Robert R. Lee, dated August 20, 1983 (Exhibit 4); Official Stenographers' Report before the Federal Power Commission (Exhibit 5); Memorandum to James E. Bruce, from Thomas G . Nelson, dated June 22, 1976 (Exhibit 6); Idaho Supreme Court Report, Vol. 82, No. 95, Supreme Court Opinions No. 13794 (Exhibit 7); News Release from the Office of the Governor, dated January 10, 1984 (Exhibit 8); The (Swan Falls) Agreement, an unsigned copy (Exhibit 9); The Idaho Statesman, article dated 10/26/84 (Exhibit 10); Idaho State Journal, article dated 10/26/84 (Exhibit 11); Swan Falls and Minimum Stream Flows in Idaho, by Ray W. Rigby (Exhibit 12).

Mr. Rigby is a former Senator, and one of the people who worked to put the Swan Falls Agreement together, as well as a water attorney for fifty-six years. He said the testimony he submits "tells the story": At the time preceding the Swan Falls Agreement, Idaho Power Company was short of power. Ratepayers went to court. The power company had let people use water when they shouldn't have done so. Idaho

Power Company sued about 7,500 people seeking to regain water rights. The Governor appointed a task force to find a solution. Mr. Rigby chaired the Governor's Task Force on Swan Falls.

The court case ultimately went to the Supreme Court, where it was found that the water rights in question had not been subordinated to any power plants except for the three in Hells Canyon. Subordination may have been intended, but Idaho Power Company didn't do it. Swan Falls, therefore, is not subordinate to any water rights. The Supreme Court also found that Idaho Power Company may have lost 600 c.f.s. due to non-use. Mr. Rigby emphasized that this finding of loss is important. The decision was returned to the District Court. Instead of returning to court, Idaho Power Company agreed it would subordinate water rights to the State. The central issue was to decide who would have title and use until the water was allocated by the Idaho Department of Water Resources, pursuant to law. An impasse developed that was resolved when Mr. Rigby conceived the idea of a trust for water rights. All parties agreed, resulting in the Swan Falls Agreement. Legal title to the water rights reside with the State. The State has the power to allocate the water. There is now a need to put water into the aquifer. Recharge isn't a new concept. Idaho Code documents recharge projects such as St. Anthony.

Mr. Rigby read from the statement by Robert R. Lee, the first Director of the Idaho State Water Board, (Exhibit 4, page 1, paragraph 2):

> "There was also a clear understanding at the time that there was a 'defacto' subordination of all upstream power rights on the small dams owned by Idaho Power Company. Otherwise, there was no need to insist on the subordination clauses for the Hells Canyon Dams since the lack of subordination of the power rights upstream at Swan Falls and the other Idaho Power Company dams would require the water to be released anyway. The 'defacto' subordination was wholly endorsed by the Idaho Power Company, and they actively promoted irrigation development above Swan Falls Dam."

Mr. Rigby read from the Official Stenographers' Report before the Federal Power Commission (Exhibit 5), beginning on page 2, bottom, quoting Mr. Roach, Idaho Power Company:

> "Well, the waters of the Snake, of course, are used primarily to first provide for the so-called consumptive needs of the area and then to supply the hydroelectric power which furnishes the electric service to the people of the area which I have described here."

Quoting Mr. Roach again from (Exhibit 5), beginning on page 4, paragraph 4:

> "Well, our company for a period of 87 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development.

As far back formally as 1947, in our hearing, our initial hearing, before the Oregon Hydroelectric Commission, that policy was stated and made a formal part of our application to the Oregon Hydroelectric Commission, and currently all of our State permits in the State of Idaho carry in them a specific provision which preserves for irrigation not only now but at all times in the future a prior claim on the water with the claim for hydroelectric energy being secondary to that of the irrigator or the farmer."

Mr. Rigby said the Swan Falls Agreement made provision for both the power company and agriculture to survive. He said he was surprised when the legislature passed legislation in 1994. Passing H800 reinstates it.

QUESTIONS:

Rep. Barraclough read (Exhibit 15), page 1, end of paragraph 2: "Aquifer recharge is an unproven process whereby Snake River water would be diverted into the southern Idaho desert in the hope of partially replacing water removed by ground water irrigation pumping." He then gave instances where recharge had beneficial effects, including Mud Lake and INEL. Rep. Barraclough said the quote above is a wrong opinion. He asked Mr. Rigby to comment. Mr. Rigby said there is no doubt that recharge works; and it isn't new. It is a use of water set by the State a long time ago; and it is a use that Idaho Power Company rights are subordinate to.

JAMES TUCKER
Idaho Power Company

CON

James Tucker, Attorney, Idaho Power Company, testified in opposition to H800. He said Idaho Power Company is forced to protect their water rights. The Swan Falls Agreement is a contract between parties. Contract law looks to the intent of the parties at the time of the contract. Idaho Power Company is not stepping away from the Swan Falls Agreement. They disagree with the Attorney General's opinion that Idaho Power Company subordinated its water rights to "all uses, forever." It is the company's opinion that there was no agreement to subordinate water to aquifer recharge. Aquifer recharge was discussed, but as a future management tool. The 1994 legislation was not a mistake. The legislation came out of committee recommended by the Idaho Water Users Association and approved by the Idaho Department of Water Resources. It recognized and ratified the Swan Falls Agreement with respect to making Idaho Power Company's water rights senior to aquifer recharge because of the effect "unbridled" recharge might have on hydropower rates.

Mr. Tucker said aquifer recharge is a complex issue. Idaho Power Company is forced to put its vested rights "on the books," because the issue may return the State and the company to the same position they were in prior to the Swan Falls Agreement. Idaho Power Company wanted to work through the aquifer recharge issue by engaging in the pilot project this year.

QUESTIONS: Rep. Wood said she was "intrigued by the idea of using recharge as a pilot program." Recharge has been done in the upper valley for years. She asked where the idea came from. Mr. Tucker said he didn't know where the idea came from. He said it is clear from

statutes that recharge has limited applicability to irrigation districts, and then to an aquifer recharge district. Other entities can't get a permit. The "broad brush approach" was first used in 1994. That was the first time people acquired permits for that purpose.

Rep. Bedke said recharge is within the context of the original agreement. He said future use was addressed in the Swan Falls Agreement in the context it is now being used. He asked if it is not a legislative prerogative to act in behalf of the State since the increments over the stated minimums at Murphy gauge are held in trust by the State. Mr. Tucker said the dispute is to what Idaho Power Company subordinated rights. Idaho Power Company still holds water rights, and the right to use them "up to its full right."

Rep. Barraclough said the Swan Falls Agreement apportioned 150 c.f.s. for domestic, commercial, municipal and industrial purposes, leaving 450 c.f.s. to fulfill irrigation development. He asked for a response. Mr. Tucker said aquifer recharge was not contemplated as a beneficial use at that time. Idaho Power Company did not subordinate to aquifer recharge. That is the dispute.

Rep. Jaquet noted that there is water going through Milner Dam and Bell Rapids that creates energy for Idaho Power Company that is in addition to their water rights, and that is not charged to the company. She asked how the pilot program that has been referred to would answer questions regarding the aquifer recharge issue. Mr. Tucker said Rep. Jaquet's comments speak to the issue: The Swan Falls Agreement gives Idaho Power Company rights, it does not take them away. There are rights to use water to the extent it can be used going through the company's facilities. If water is in the river, Idaho Power Company has the right to use it. With regard to the Governor's pilot program: If water is being used for an aquifer recharge project, Idaho Power Company is looking for adverse effects to rate-payers. In that context, Idaho Power Company could "true up" impacts after the fact.

Rep. Roberts asked if Mr. Tucker saw the legislature as having the ability to appropriate water held in trust in order to recharge the aquifer; and if recharge was prohibited in Idaho law by the Swan Falls Agreement. Mr. Tucker said it is Idaho Power Company's position that the legislature or the State does not have the right to reallocate trust water for purposes of aquifer recharge. Rep. Roberts said if a law is passed to prohibit something specifically it is prohibited; if not, it is permitted. Mr. Tucker said contract law looks to the intention of the parties when they entered into the contract. When the parties referred to beneficial uses by Idaho law, the Idaho law they referred to was a series of criteria put into place for allocation of the Swan Falls trust water. Beneficial uses had a precise meaning at that time that did not include aquifer recharge. Rep. Roberts asked if aquifer recharge was prohibited within the Swan Falls Agreement. Mr. Tucker said it was not precisely prohibited; but if the history of the agreement was considered together with the supporting documents, it is clear that aquifer recharge was not contemplated.

Rep. Barraclough said he was co-chair of the Aquifer Recharge Subcommittee in 1993 that focused on aquifer recharge. Aquifer recharge is not the "mystery" Idaho Power Company suggests , based

on recent news articles. 90% of the recharge water comes back to the river for Idaho Power Company's use. The company wants to get paid now, and then use the water when it returns to the river. Mr. Tucker said he was not saying that a portion of the water doesn't return to the river, or that the evidence is unscientific. With respect to the Eastern Snake River Plain Aquifer agreement, the evidence of water returning to the river is based on a series of models that may or may not be accurate, because they are still in the development stages. In context of discussion with the Governor's office, certain models were run that look accurate, and are a reasonable estimate. Idaho Power Company is working to "true up" the estimates after the fact.

Rep. Jaquet said a press release dated March 14th says the aquifer recharge process is unproven; but Mr. Tucker just said it does work. She asked why there was a mixed message. Mr. Tucker said it is his understanding, but not the position of Idaho Power Company, that aquifer recharge is unproven. In the context of the Snake River Plain Aquifer it is unproven as to its benefit.

Rep. Barrett said she wanted to be sure that Idaho Power Company isn't taking this position to argue for fish flush. Mr. Tucker said he was not representing any entity except Idaho Power Company, and they were not trying to move water downstream for fish.

JIM MILLER
Idaho Power Company

CON

Jim Miller, Vice President Power Supply, Idaho Power Company, testified in opposition to H800, saying it is his responsibility to have resources to meet all load demands, all the time, for 470,000 customers. The purpose of his testimony is to talk about the impact H800 will have on Idaho Power Company. His concerns are: 1) Cost: Idaho Power Company is predominantly hydroelectric generation based, resulting in some of the lowest cost energy in the U.S. If that is lost, it will need to be replaced from a higher cost source, resulting in higher electric bills. 2) Reliability: An Integrated Resource Plan is developed every year that looks forward at least ten years. In that plan resources and projected loads are identified as to what types and how much new generation will be needed. For the past 22 years, Idaho Power Company has had assurances in the form of senior water rights regarding the amount of hydro generation that could be counted on. H800 removes those assurances. Mr. Miller submitted written testimony (Exhibit 13).

QUESTIONS: Rep. Bedke said he assumed Idaho Power Company was instrumental in bringing the 1994 legislative changes. He asked what was not working for Idaho Power Company between the 1984 Swan Falls Agreement and 1994, when they asked for changes to Idaho Code. Mr. Miller yielded to Mr. Tucker, who said he didn't know if Idaho Power Company lobbied in 1994, but prior to that time there was a provision making aquifer recharge secondary to all hydroelectric power water rights. He said he doubted that Idaho Power Company took the lead in 1994, because recharge was subordinated to all hydro water rights.

Rep. Wood asked if the statement beginning on line 23 of H800 protected Idaho Power Company's water rights: "The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights." Mr. Miller said Idaho

Power Company's water right at Swan Falls is more than the minimums stated in H800. The legislation takes away all the other water that typically is on top of the minimums. H800 protects a worse case, but not the water used to meet customer loads. To reduce water rights to the minimum has a huge impact on today's production. Rep. Wood asked if H800 said that Idaho Power Company's perfected water right is protected. Mr. Miller said it is protected to 3,900 c.f.s. and 5,600 c.f.s. minimum levels, but there is more that is not now subordinated to aquifer recharge.

Rep. Roberts said this is the time of year that recharge takes place. He asked if Idaho Power Company is selling outside of Idaho now. Mr. Miller said yes. Rep. Roberts asked how much. Mr. Miller said "maybe 400 average megawatts on a daily basis." He explained what resources the company was using now, and what was typical in years without as much water. Rep. Roberts asked if Idaho Power Company was using all the water in the river now for power generation. Mr. Miller said they are spilling in Hells Canyon primarily for flood control. Rep. Roberts asked why it was not appropriate to recharge if water is spilling. Mr. Miller said water spilling in the Canyon was not available up on the desert.

Rep. Bedke asked if "hard numbers" were available to definitively show what water is being used at each station, and if water is available for recharge at each station. Mr. Miller said they weren't available, but could be provided. Any water diverted from the river now would take away from water that could be used for generation. He said Idaho Power Company is not at capacity except at Shoshone Falls. The difference above hydro-capacity was considered for the Governor's pilot program. To the extent that the water is not being used, and there is no cost to customers, it could be used for recharge.

Rep. Jaquet asked about sideboards, and asked if his rate-payers and her constituents weren't the same people. The constituents were being hurt now by calls on water. Mr. Miller said he didn't understand the question. Rep. Jaquet said Idaho Power Company was presenting a case to maintain low costs for rate-payers. She said those people are now "in a world of hurt paying into mitigation plans." Thirteen cities are involved in the water calls. Mr. Miller said people were being hurt by aquifer reduction, but Idaho Power Company shouldn't be responsible for fixing the problem. It's possible that the aquifer is over-appropriated. There should be reduced pumping. Recharge will occur if water isn't pumped out. He said it was a matter of who was responsible to pay for the damage.

Rep. Eskridge asked how Idaho Power Company would replace lost generation capacity. Mr. Miller said energy could be purchased, assuming there was a willing seller and enough transmission capacity to import energy. It would have to be replaced at a high cost. Rep. Eskridge asked for a dollar estimate based on spot prices for the highest cost the company would incur. Mr. Miller said costs are based on one-year prices, not spot prices. It can be assumed that future energy costs will continue to rise, and that costs will rise with the market. The typical average now for a new resources is around $50; for new wind, $60; for new coal, $55-$60. Those figures may be low going forward.

Rep. Roberts asked how many power generation facilities were between American Falls and Thousand Springs. Mr. Miller said Milner, Thousand Springs, Shoshone Falls, and the upper and lower Salmon Falls.

TIM DEEG
Idaho Ground Water Appropriators, Inc.

PRO

Tim Deeg, President, Idaho Ground Water Appropriators, Inc., testified in support of H800. He said there are two issues: 1) storage, and 2) the Swan Falls Agreement and water rights. Regarding storage: There is a 4.1 million acre-feet reservoir system, including American Falls, the Palisades, Henry's Lake, and others. Mr. Deeg said we think about that system, but we don't think about the other system which is the aquifer. The aquifer is estimated to contain about 500 million acre-feet of water. It can be used in times of shortages, and it is a mistake not to take care of it. He said about 1 million acre-feet less water is being used on the plain than ever was before, roughly the size of the Palisades Reservoir. Water users are not getting full water rights. Mr. Deeg said the question to ask is when to put water into the aquifer, and then to ask if that is being done during the normal process of filling reservoirs.

With regard to water rights as related to the Swan Falls Agreement, Mr. Deeg said he believed H800 did not impair Idaho Power Company in any way. What the present statute does is to cast a cloud in terms of ownership and use. It is important for Idaho Power Company to know that controlling recharge water provides a mechanism for a defacto water right that enlarges their water right at the springs, and promotes a healthy eastern Snake Plain storage system. Subordination is in statute.

QUESTIONS: None.

DENNIS TANIKUNI
Farm Bureau

PRO

Dennis Tanikuni, Assistant Director of Public Affairs, Farm Bureau, testified in support of H800. He said the Attorney General's opinion and the legislative record indicate that the State has legal title above minimum flows, and trust management. No water rights are being taken. The State is free to change policy, and can determine how water will be used to the benefit of the State of Idaho. To that end, it can determine that recharge is a beneficial use.

QUESTIONS/COMMENTS: None.

JERRY RIGBY
Water Resource Board, Chair

Committee of Nine

PRO

Jerry Rigby, Attorney, Committee of Nine, and Water Resource Board Chairman, testified in support of H800, saying it is clear that the Swan Falls Agreement created a trust providing for Idaho to make and change policy decision. What occurred in 1994 was a policy decision that the State can change, because it is the owner. It is not right for Idaho Power Company to say that recharge was not contemplated as a beneficial use in 1994, because there were recharge projects in fact, and in statute; and the language is clear. It was the reason for Swan Falls in the first place. Mr. Rigby said there is a crisis in Idaho. One way to address the problem, not the only way, is through recharge. That opportunity is at hand and should be used. Recharge is a beneficial use that has occurred for decades, and does not hurt Idaho Power Company. They should not continue to have the ability to stop this recharge.

QUESTIONS: Rep. Bedke asked if there was agreement that there is 450 c.f.s. of trust water at Murphy gauge now, could the calculation be made at each measuring point back to St. Anthony to determine a finite water right, and that it is trust water. Mr. Rigby said he was a lawyer, not a hydrologist, but he would hope there would be a way. He said he assumed the point was that the trust was established, and the parties should "live and die by the trust."

DON HALE
Water District 1
Committee of Nine

PRO

Don Hale, Committee of Nine, Water District 1, testified in support of H800, saying the State's inability to recharge the water that is presently available is frustrating. Not being a lawyer, he can't speak to rights, but he speaks to the fact that there is a tremendous need for recharge. The ability for development to continue depends on the ability to utilize water supplies. Water has to come from somewhere. Without recharge, it will "come on the backs of agriculture." Agriculture is the largest economic driver. It is frustrating that every recharge plan runs into restraints. This year there is enough water for recharge. During the Committee of Nine meeting, the Bureau of Reclamation said it would spill in February. Mr. Hale said his first response was to ask "why, the reservoirs aren't full"; and his second response was, "why not do recharge." Any water recharged above Blackfoot returns to the river. Something needs to be done for the aquifer when the occasion arises.

QUESTIONS: None.

STEVEN HOWSER
Aberdeen-
Springfield Canal
Co.

PRO

Steven Howser, General Manager, Aberdeen-Springfield Canal Co., testified in support of H800. He gave an overview of the canal company from its conversion to a sprinkler system in the 1950s to present. In a system of this scale, a substantial amount of water returns to the ground annually. In the last five years of drought, conservation measures have become progressively more stringent. Mr. Howser itemized ways that water conservation is contributing to the aquifer problem. He said there is a difference of from 75,000-80,000 acre-feet less water showing up in springs and drains that is directly attributable to conservation. Mr. Howser said the 100,000 acre-feet shortage said to be needed to replenish the aquifer could be recaptured in a few weeks, if Aberdeen together with the smaller canal companies filled their canals. The diverted water would return to the springs and drains within a few weeks.

QUESTIONS/COMMENTS: None.

C. TOM ARKOOSH
Surface Water
Coalition

CON

C. Tom Arkoosh, Attorney, Surface Water Coalition, testified in opposition to H800. He objects because of the priority doctrine, and because the contract is unclear. He said the priority doctrine causes "a rift among water users." Recharge needs to occur immediately, and the magnitude of the problem is greater than that represented by Rep. Raybould. The Straw Man proposal estimated that 600,000-900,000 acre-feet was needed to replenish the aquifer. H800 alters a law passed in 1994, resulting from an Interim Committee study where the priority of power v. recharge was addressed, and is included in the minutes. H800 comes without much study or consideration. There is danger in launching "Swan Falls Two." Mr. Arkoosh said the coalition would like the problem solved, but doesn't think H800 is going to do it.

In fact, it will be counterproductive because the Governor has a program this year to recharge the North Side Canal Company the maximum amount possible for the maximum time–that is, from March 15th until April 1st, when irrigation season begins. Mr. Arkoosh opposes not continuing with the Governor's pilot project.

QUESTIONS: Rep. Raybould read from the Idaho Session Laws, Chapter 366 (Exhibit 16) to establish that ground water recharge has been a recognized beneficial use since at least 1978, when a new section was added to Code that was applicable to the cities of Rexburg and St. Anthony, and declared ground water recharge an appropriate purpose. He said the 1978 date needs to be recognized if an argument was being made for priority dates, because it precedes the Swan Falls Agreement. Rep. Raybould asked Mr. Arkoosh to comment in terms of priority systems. Mr. Arkoosh said the permit resulting from the 1978 legislation was for one site, and recharge was "done with your own water."

LYNN TOMINAGA
Idaho Ground Water Appropriators

PRO

Lynn Tominaga, Executive Director, Idaho Ground Water Appropriators (IGWA), testified in support of H800, saying he agreed with Speaker Newcomb, Mr. Rigby and Mr. Deeg. Mr. Tominaga was in the Senate in 1984 for the Swan Falls Agreement. What would happen if the State lowered stream flow below 3,900 c.f.s. was asked at that time. The answer was that the State could not, because there was a contractual agreement. Mr. Tominaga was also involved in the Interim Committee. The State had been recharging the aquifer for over 100 years, but recharge hadn't been recognized as a beneficial use. It didn't make sense, and that was one of the issues. Idaho Power Company became concerned about hydropower, and threatened to stop recognizing recharge as a beneficial use unless language was inserted in the Swan Falls Agreement . It was felt to be better to recognize recharge. The participants knew there would eventually be a change; for flood control, it was thought. In IGWA's opinion, H800 is about flood control water that can be used for recharge. The legislature needs to have the ability to make this policy change for the future growth and prosperity of the State.

QUESTIONS: None.

JEFF RAYBOULD
Fremont-Madison Irrigation District

PRO

Jeff Raybould, Chairman, Board member, Fremont-Madison Irrigation District, testified in support of H800, saying recharge has been occurring for over 100 years. Although some say it is an unproven concept, experts will say that's how the water got into the aquifer. There has been recharge on the Egin Bench since about 1885. The question is how much recharge can take place. Since the 1994 enactment, the legislature has been interested in recharge, with over $1 million dollars appropriated in 1995. Since 2000, very little water has been available for recharge. When it is available, water needs to be in canals to keep shallow domestic wells from going dry. By late February or early March, shallow well problems begin to occur. It is important to repeal the 1994 language making recharge a secondary water right.

QUESTIONS: None

RANDY MacMILLAN
Clear Springs Foods

NO POSITION

Randy MacMillan, Ph.D., Vice President, Research and Environmental Affairs, Clear Springs Foods (CSF), testified without taking a position on H800. Dr. MacMillan is a fish pathologist and ichthyiotherapist. He said Clear Spring Foods is a vertically-integrated food company, and the world's largest producer of rainbow trout. Dr. MacMillan said CSF does support aquifer recharge as one important tool among others to resolve the current water crisis; but, to the extent H800 takes away a water right, CSF is opposed to H800. Spring flows have declined from decreed and realized water rights. On average CSF loses $15.4 million dollars annually to ground water pumping by junior right holders. CSF believes it is essential to protect water rights according to priority. The position CSF takes is that a program must be developed to stabilize the aquifer to a greater level than it is currently. It is incumbent on junior ground water pumpers to fully mitigate. Efforts to circumvent that responsibility damages water rights and the future economic development of Idaho. There continues to be disagreement about what the Swan Falls Agreement says. CSF wasn't a party to that agreement. As an ichthyiotherapist, Dr. MacMillan looks for a "break line." He doesn't see one.

QUESTIONS: None.

VINCE ALBERDI
Twin Falls Canal Co.

CON

Vince Alberdi, Manager, Twin Falls Canal Co. (TFCC), testified in opposition to H800. He said there seems to be continued erosion and depletion of the aquifer. He asked why the Murphy gauge was being used for measurement, and not something else–such as the reservoirs. The bulk of TFCC's water right is natural flow from runoff and springs feeding the American Falls Reservoir, which is fed by the aquifer. At TFCC's position on the ditch, water levels in the aquifer are very important. It has been found that it takes many years to recharge. Mr. Alberdi said H800 "is not the silver bullet that you think." Depletions continue because there has been a long drought. There needs to be a tool that provides for more than special cyclical opportunities. TFCC agrees that there will not be a flood if there is recharge. Beyond that there are points of disagreement: H800 "tinkers with water rights, which is not a good way to run a government. It's hard to support a bill that affects someone's water right."

Irrigation begins soon. The Governor has a recharge pilot project that will not happen if H800 continues. The real question is who is going to pay for recharge, the stockholders of Idaho Power Company or the people who caused depletion to the aquifer–who are the ground water pumpers. Mr. Alberdi said water rights are the foundation of the economy. Other means, such as the Governor's pilot program, need to be considered to help with the aquifer problem. TFCC submitted written testimony. (Exhibit 17)

QUESTIONS: Rep. Barraclough asked if the TFCC had water available now for recharge. Mr. Alberdi said not now. If Twin Falls diverted a large amount, it would "explode, because you can't put more water in than the delivery system can take."

Rep. Barraclough asked if there was capacity at some times during the season when TFCC could recharge. Mr. Alberdi said no, but maybe didn't understand the question. Rep. Barraclough asked if there are periods when TFCC is at less than capacity of the canal

during irrigation season. Mr. Alberdi said when operations are at the upper level of the canal, there is a vulnerability to canal breaks. It puts a risk on the Board and the project users.

Rep. Roberts said Mr. Alberdi had made a statement coming in to the meeting that H800 would disrupt the first in time/first in right concept. He asked how H800 would take his water right. Mr. Alberdi said "tinkering with water rights" sets a precedent. Rep. Roberts asked to be shown where that was being done. Mr. Alberdi said legislation in 1994 established Idaho Power Company's water right. Now, 12 years later, the legislature is changing the water right. That is a taking. Rep. Roberts said the water right was established at 3,900 c.f.s. and 5,600 c.f.s. based on seasonal use. He asked how that was being changed. Mr. Alberdi said he respected his opinion. He asked what "would preclude the legislature from altering our rights."

JEFFREY FEREDAY
Idaho Ground Water Appropriators

PRO

Jeffrey C. Fereday, Attorney, Idaho Ground Water Appropriators (IGWA), rose in support of H800. He said he had nothing new to add.

DAN SHOEMAKER
Twin Falls Canal Co.

CON

Dan Shoemaker, Chairman of the Board, Twin Falls Canal Co. (TFCC), testified in opposition to H800. In addition to Mr. Alberdi's testimony, he wants to emphasis that TFCC supports the Governor's pilot project as a consensus-based approach to recharge that respects existing water rights. H800 is based on interpretations of the Swan Falls Agreement. TFCC opposes expensive litigation, and anything that will prevent recharge in 2006. The Governor's program can and will accomplish recharge this year, without litigation.

QUESTION: Chairman Stevenson said he has now heard several references to the Governor's pilot project. He asked what precedent was set for recharge in the future. Mr. Shoemaker said that precedent as it exists is to pay for the use of someone else's property. Chairman Stevenson asked if the water belonged to the State or Idaho Power Company, in his opinion. Mr. Shoemaker said he was not convinced the water belonged to the State.

DALE ROCKWOOD
Progressive Irrigation District

PRO

Dale Rockwood, Progressive Irrigation District, Water District 1, Committee of Nine, testified in support of H800, saying the opportunity for recharge doesn't come often. He said "the reservoirs are going to fill and spill, and it's sad to send it to the ocean." There is an opportunity between April 1 and the early part of May where water can run in canals without any expense to the State. Mr. Rockwood said it would be missing an opportunity not to do so.

Questions: None.

DAN ADAMSON
Candidate for Governor

PRO

Dan Adamson, Candidate for Idaho Governor, testified in support of H800. He said the crux of the problem is to determine who is entitled to the water. He said he sees the matter different from the proponents today: Idaho Power Company didn't give up any water right under the Swan Falls Agreement. Their water right is in trust to the State, and could be subordinated if the State chose. He said the issue isn't about subordination, or rate-payers; it is about money. Idaho Power

Company wants to know what the State will pay.

QUESTIONS: None.

GEORGE LEMMON

Informational Testimony

George Lemmon, Hagerman, Idaho, submitted a statement for the record. (Exhibit 14)

QUESTIONS AND COMMENTS

QUESTIONS/COMMENTS: Rep. Roberts asked how Idaho Power Company made their calculations, and is the company concerned with the entire amount of water going to recharge, or just a portion of it. Mr. Miller said their calculations represented the worst case. He realized the assumptions were unrealistic and couldn't happen. Rep. Roberts asked if Idaho Power Company assumed water going to recharge would not reenter the system. Mr. Miller said yes. Rep. Roberts asked if other calculations could be provided, not representing a worst case. Mr. Miller said no, there were too many possibilities. The Governor's pilot program would provide an opportunity to assess losses at each individual point using various models; to assume how and where water would come back into the system, in what amounts and over what time frame; and to assess the penalty or cost to customers. That was the purpose of the pilot program. The calculations provided today assume all recharge was consumptively used.

Rep. Roberts said he was trying to conclude if Idaho Power Company's calculations are based on 3,900 c.f.s. or 5,600 c.f.s. It's obvious that more water goes down the river at some times of the year, and the capacity for recharge is limited to the canal system which can't take the entire Snake River. Mr. Miller said the assumption was that over time there might be new methods for diversion as, for instance, injecting water into the aquifer.

Rep. Bedke asked how much revenue an acre-foot of water generated for Idaho Power Company at the head of the system at St. Anthony, and at the end of the system at Hells Canyon; and what rules-of-thumb are used for calculations. Mr. Miller said 1000 c.f.s. per day is 2,000 acre-feet , based on today's cost. Chairman Stevenson asked for the calculation not to be done in the committee meeting. Mr. Miller said he would provide the committee with a "cheat sheet."

Rep. Barraclough said studies have been done for over 100 years showing flow paths for water. He said Idaho Power Company is misleading when they say they don't know where the water goes. It is well established that approximately 95% comes back to the river. He asked for an explanation. Mr. Miller said until there was an ability to make measurements, it would not be known.

SPEAKER BRUCE NEWCOMB

Closing Remarks

Rep. Bruce Newcomb, District 27, Speaker of the House of Representatives, said H800 was a policy change, not a water right change or taking. Recharge was identified as a beneficial use in 1978. It isn't the case that recharge was not seen as a beneficial use prior to the Swan Falls Agreement. The 1994 legislation removed the language. Years where recharge can be effective only occur every decade or so. Speaker Newcomb said water flows over Milner Dam and Bell Rapids contribute to Idaho Power Company. The State has

never required the company to pay for it.

QUESTIONS: None.

REP. DELL RAYBOULD Closing Remarks

Rep. Dell Raybould, District 34, Co-Sponsor, said three points needed explanation: 1) There is a press release from Idaho Power Company quoting president/CEO LaMont Keen as saying, "Because Idaho Power primarily relies on hydroelectric generation to meet its customers' electric energy needs, reducing Snake River flows will impact both the costs and reliability of the energy we supply." (Exhibit 15) Rep. Raybould said H800 does not ask for reduced flows. It does ask for language to be removed from statute so the State can manage its water resource to the best use. When there is water going to the ocean, it can go to the aquifer. 2) People have stated that recharge was not mentioned as a beneficial use in the Swan Falls Agreement, but it was because there was a recognition, in statute, for "beneficial uses upstream." 3) The Director of Water Resources said at least 200,000 acre-feet was needed to stabilize the aquifer. It will take more than that to make up for years when there isn't recharge. The State needs to be prepared to use water in years when it is available.

Rep. Raybould gave the amount of water that has gone past Milner Dam and the Hells Canyon project since February 1st. Idaho Power Company has had that water available for use without charge. Meanwhile, there has ben water available for aquifer recharge that Idaho Power Company is not using, but is not releasing for the State to use for aquifer recharge. There is a crisis in eastern Idaho that is affecting ground water rights and surface water rights alike. A long-term, proactive solution is needed.

H800 does not change the Swan Falls Agreement. It was proper to seek an interpretation of the Swan Falls contract. That has been done. (Exhibit 2) H800 reverses the 1994 language that proposed to take away State water rights.

MOTION H800

A motion was made by Rep. Roberts to send H800 to the floor with a DO PASS recommendation, and with instructions to make a technical change to the Statement of Purpose.

QUESTIONS/COMMENTS: Rep. Mitchell asked if H800 became law and was challenged, would the State be restricted from doing anything about recharge while waiting for the courts to make a decision; and since the recharge is needed now, is there anything to stop it. There was Committee discussion, including: Rep. Andrus said he understood water for hydropower production to be subordinate, regardless of historical date or priority use. He asked why there was no one in the room from the Idaho Department of Water Resources (IDWR). Chairman Stevenson said IDWR was not represented because there are cases before the courts that could be contaminated by their testimony. Rep. Raybould said the Constitution sets up priorities for water use: 1) domestic, 2) mining 3) agriculture. But the State does recognize the doctrine of prior appropriation. If a subsequent priority after agriculture has a senior priority date, it would come before agriculture. If domestic water is curtailed, there is a right of eminent domain. Agriculture doesn't have the right of eminent domain.

Rep. Roberts debating in favor of the motion, said he didn't live in the affected area of the State. He made several points: 1) The Idaho legislature does have the right to make decisions for water held in its trust without threatening the first in time/first in right doctrine. There are no rights being jeopardized. 2) Nothing in the Swan Falls Agreement prevents recharge with water held in trust by the State. If it is not expressly prevented, then it is allowed. 3) The crux of the issue is that additional storage is needed for recharge and power generation. H800 doesn't do that. He recommended a new project. 4) It doesn't make sense not to use water that is needed, and is going to the ocean.

Rep. Barrett said the legislation approved in 1994 was well-received at the time. To approve H800 after one long hearing is "like playing football on a field laced with land mines." She wants time to think it over.

VOTE H800 The motion to send H800 to the floor with a DO PASS recommendation, and with instructions to make a technical change to the Statement of Purpose passed by voice vote. Reps. Barrett and Mitchell voting NO for the record. Speaker Newcomb will carry the bill on the floor.

H792 Chairman Stevenson, with Speaker Newcomb's consent, said H792 will not be heard at this time.

ADJOURN The meeting was adjourned at 6:04 p.m.

John A. Stevenson
Representative John A. Stevenson
Chairman

Mona Spaulding
Secretary

Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date March 15, 2006

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify **YES or NO**	Pro	Con
[redacted]					✓	
[redacted]					✓	
[redacted]					✓	
STAN CLARK	member Rules Committee	Committee of 9	H 800	no	✓	
Russ NEWCOMB	LOBBIST	IMA	H 800	No		
Gail McGarry		Bureau of Reclamation	H 800	No		
Brent Olmstead	Lobbyist	Milk Producers	H 800	no		
RAY STARK		Boise Metro Chamber		no		
D L[illegible]	VIDEO	IEPBS				
Caitlin Goff	Intern	IDPTV		NO		
Hannah Smith	INTERN	"		NO		
Michael C. Creamer	~~[illegible]~~ Attorney	IGWA		NO	✓	
[redacted]						
Michelle Dunlop	reporter	Times News		NO		
[illegible]	reporter	AP		No		
Fred Riggers						
Valerie Grizzle	photographer	KTRV		No		
Russell Westerberg	~~Pacif. Corp~~ Lobbyist	Pacificorp				

Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date March 15, 2006

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify **YES or NO**	Pro	Con
Norm Semanko	Exec. Dir.	Idaho Water Users	H.800, H.792	No		
Tim Deeg	President	IGWA	HB-H800	Yes	Y	
Jim Tucker	Sr Attorney	IPCo	H.B. 800	Yes		✓
Jim Miller	SVP-Power Supply	IPCo	H.B-800	Yes		✓
Jack VanderHulst	Lobbyist	Western Dairy Business Solutions		No		
Dan Larkin	Lobbyist	AMG	792, 800	No		
Dennis Tanikuni	Lobbyist	Farm Bureau	800	[redacted]	✓	
Dean Stevenson	Board	MU GWD	800	No	✓	
Ray Rigby	Att	Committee of Nine	HB800	Yes	✓	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	✓	
Aynette Mainwaring	City of Blackfoot Treasurer		HB 800	No	✓	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	✓	
Steve [redacted]	General Manager	[redacted] Canal Company	HB800	[redacted]	✓	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]		✓
Ken Miller		NW Energy Coalition	H792+800	I	✓	
[redacted]	[redacted]	Upper Valley [redacted]	[redacted]	[redacted]	✓	
				(10)		

Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date March 15, 2006

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify YES or NO	Pro	Con
[redacted]						
Courtney Washburn	lobbyist	ICL	all	No		
Matt [illegible] &		BoR	HB800	NO		
Roger Seiber	Const	Id. Pwr	800	No		✓
Jerry Deckard	Const	Id. Pwr	800	No		✓
[redacted]						✓
[redacted]						✓
Linda Lemmon	Secretary	Thousand Springs WaterUsers Assn	HB800	No		
Dustin Miller	lobbyist	Farm Bureau	HB 800	NO		
[redacted]	Legislative	IACT [redacted]				✓
Louis Thiel	Board chair	Upper Valley Committee	HB800	NO	✓	
Paul R Berggren	member	Upper Valley Comm org	HB800	NO	✓	

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Sign-In Sheet

RESOURCES & CONSERVATION COMMITTEE

Date March 15, 2006

Name, Address, & Phone PLEASE PRINT	Title	Representing Company/Organization	Legislation Interested In	Wish to Testify **YES or NO**	Pro	Con
Gregory Panter		Idaho Power	HB 800	No		
Beverly Boyle	Senate Aide	Senate		No		
[redacted]						

FOR WHICH THE DIRECTOR MAY REFUSE TO ISSUE OR REFUSE TO RENEW A CERTIFICATE OF REGISTRATION.

S 1095
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO IMPLEMENTS OF HUSBANDRY; AMENDING SECTION 49-101, IDAHO CODE, TO INCLUDE MINT TUBS AND MINT WAGONS UNDER THE DEFINITION OF "IMPLEMENTS OF HUSBANDRY"; AND DECLARING AN EMERGENCY.

S 1096
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE DISTRIBUTION OF FEES FROM SNOWMOBILE FEES; AMENDING SECTION 49-2608, IDAHO CODE, TO PROVIDE FOR THE DISTRIBUTION OF MONEYS, TO CREATE THE SEARCH AND RESCUE ACCOUNT, TO PROVIDE FOR USES OF MONEYS IN THE SEARCH AND RESCUE ACCOUNT; TRANSFERRING MONEYS FROM A CERTAIN ACCOUNT IN THE DEDICATED FUND TO THE SEARCH AND RESCUE ACCOUNT, AND PROVIDING FOR THE USES OF SUCH MONEYS; AND DECLARING AN EMERGENCY.

S 1097
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE TRANSPORTATION OF ALCOHOLIC BEVERAGES, WINE AND BEER; AMENDING SECTION 23-505, IDAHO CODE, TO PROHIBIT THE TRANSPORTATION OF OPEN CONTAINERS OF ALCOHOLIC LIQUOR, WINE AND BEER.

S 1098
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO MOTOR VEHICLE LIENS AND ENCUMBRANCES; AMENDING SECTION 49-412, IDAHO CODE, TO PROVIDE THAT IF A TITLE APPLICATION IS RETURNED FOR CORRECTION AND IS NOT RETURNED WITHIN A SPECIFIED TIME THE ORIGINAL DATE AND HOUR OF RECEIPT SHALL BE VOID.

S 1090, S 1091, S 1092, S 1093, S 1094, S 1095, S 1096, S 1097, and **S 1098** were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 19, by Education Committee, was introduced, read the first time at length, and referred to the Education Committee.

Second Reading of Bills

S 1054, by Local Government and Taxation Committee, was read the second time at length and filed for third reading.

H 28, by Resources and Conservation Committee, was read the second time at length and filed for third reading.

S 1052, by State Affairs Committee, was read the second time at length and filed for third reading.

S 1044, by Judiciary and Rules Committee, was read the second time at length and filed for third reading.

S 1066, by Education Committee, was read the second time at length and filed for third reading.

Third Reading of Bills

On request by Senator Ricks, granted by unanimous consent, **S 1008, S 1007, S 1006,** and **S 1005** were placed at the head of the calendar.

S 1008 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Tominaga, Twiggs, Watkins, Yarbrough. Total - 34.

NAYS—Batt, Carlson, Crystal, Ricks, Ringert, Rydalch. Total - 6.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared **S 1008** passed, title was approved, and the bill ordered transmitted to the House.

On request by Senator Noh, granted by unanimous consent, the President ordered the Statement of Legislative Intent relating to **S 1008** spread upon the pages of the Journal.

STATEMENT OF LEGISLATIVE INTENT
S 1008

Prepared by Senator Michael D. Crapo
of the Senate Resources and Environment Committee
February 1, 1985

I. INTRODUCTORY STATEMENT.

Beginning in approximately 1977, a significant controversy arose between Idaho Power Company and certain other water users in the State of Idaho over the extent of Idaho Power Company's water rights at the Swan Falls Dam. Ultimately litigation was instituted against numerous water users by Idaho Power Company to clarify the status of the disputed water rights. Both the Governor and the Attorney General of the State of Idaho became extensively involved in attempts to resolve this dispute. In 1983 and 1984, in two separate legislative sessions, the Idaho Legislature also grappled with the controversy unsuccessfully. At issue was whether the water rights of Idaho Power Company should be subordinated to future appropriators to encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho.

Ultimately, in October, 1984, an Agreement was reached between the Governor of the State of Idaho, the Attorney General of the State of Idaho and Idaho Power Company which resolved the controversy. The agreement required legislative action and was made contingent upon passage by the Idaho State Legislature of certain legislation which was

referenced in the agreement. This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement.

II. STATEMENT OF PURPOSE.

This legislation is intended to resolve conflicts over whether an existing water right for power is subordinated. The legislation resolves these conflicts by defining the nature of such water rights. It is also intended to assure that water is available for development in Idaho and to provide a basis for reallocation of water for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.

The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights. Finally, the legislation is an assertion by the Legislature of the State of Idaho of its authority to limit and regulate the use of water for power purposes.

III. SECTION BY SECTION ANALYSIS.

A. SECTION 1. (AMENDING SECTION 42-203 OF THE IDAHO CODE.)

Section 1 amends Section 42-203 of the Idaho Code by renumbering the section to be Section 42-203A and adding new notice requirements for applications to divert in excess of ten (10) c.f.s. or one thousand (1,000) acre feet of water. Notice of such applications must be published statewide, once per week for two consecutive weeks. Section 1 also provides a mechanism by which persons interested in being notified of any proposed diversions may request in writing to be notified by the Department of Water Resources. Such requests may specify any class of notices of application. Persons making such requests must pay annual mailing fees to be established by the Department of Water Resources.

B. SECTION 2. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 2 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203B, Idaho Code. This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses. It also represents a legislative protection of the rights of a user of water for power purposes (1) against depletion to the extent of a minimum flow established by State action; and (2) to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to State law. The water right for power purposes shall not be subject to depletion up to the amount of the minimum flow as defined by any applicable contract with the State. As applied to the Swan Falls Agreement, the existing minimum stream flow at the Murphy U.S.G.S. gauging station is recommended for change to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. The Agreement recognizes Idaho Power Company's rights as unsubordinated up to the amount of those flows. While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change. Valid subordination conditions governing any existing hydropower rights are not modified or removed by this legislation.

To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. The term "state action" refers only to action by the Idaho Department of Water Resources in compliance with all applicable law, and/or the establishment of minimum stream flows in the State Water Plan by the Idaho Water Resource Board, both of which actions are subject to ratification, modification or rejection by the Idaho State Legislature. To the extent of the established minimum flows and any right recognized by contract, such water rights for power purposes remain unsubordinated to all uses. The amount of water or water rights held in the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. No person to whom trust waters are reallocated shall be required to pay compensation to any party, other than appropriate administrative fees established by the director for processing of the reallocation.

The governor is given specific authority to enter into agreements with power users to define applicable minimum stream flows in accord with the terms of this section. These contracts must be ratified by the Idaho State Legislature.

Thus, existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the State. Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. In addition, if the holder of

such a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section.

The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

C. SECTION 3. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

1. Section 3 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203C, Idaho Code. This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2:

First, the proposed use must be evaluated under the criteria presently existing in Section 42-203A, including local public interest. (Senate Bill 1008 does not adversely affect the use of existing local public interest criteria. Review of these factors is separate from the new factors added by the bill in Section 42-203C.)

Second, if the proposed use meets these criteria, there must be a determination of whether the proposed use would "significantly reduce" the amount of water available to the power user whose rights are owned by the trust. If a significant reduction is not found, then the application should be granted.

Third, if a significant reduction is found, then the proposed use must be evaluated in terms of the criteria stated in Subsection 42-203C(2). The finding of a significant reduction does not infer that any portion of the trust waters should not be developed. Such a finding simply results in the necessity of evaluating the proposed use according to the terms of the criteria stated in Subsection 42-203C(2). These criteria focus on the benefits of the proposed use to the state and local economy, the impact on electric utility rates, the promotion of the family farming tradition, and the promotion of full economic and multiple use development of Idaho's water resources. The fifth criteria sets a cap on agricultural development above the Murphy Gauge.

Subsection 42-203C(2) (b) clarifies that the burden of proof in establishing that any of these criteria would prevent granting of the application is upon the protestant. This subsection was included to implement the specific legislative intent that the administrative burdens of meeting the new criteria would not block future development.

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

The criteria identified in Subsection 42-203C(2) are intended solely to guide the director of the Idaho Department of Water Resources in determining whether a proposed use has greater net benefits to the State than the existing hydropower use. The criteria identify those factors to be considered in making this determination. Proposed uses for domestic, commercial, municipal or industrial purposes and the like are not intended to receive less weight in the evaluation process simply because they are not mentioned specifically in the criteria. Nor is it intended that these uses be subject to the family farming standard contained in Subsection 42-203C(2) (ii), or the agricultural cap contained in Subsection 42-203C(2) (v). In such circumstances only the criteria relevant to the proposed use and its impact on hydropower would be pertinent.

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change

the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.

D. SECTION 4. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 4 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203D, Idaho Code. This section provides that the Idaho Department of Water Resources shall review all water permits issued by it prior to the effective date of this act; provided, however, that permits having been put to beneficial use prior to July 1, 1985 are exempt. These permits are to be reviewed to assure that they comply with the requirements of this act. The director is authorized to either cancel the permits or subject them to new conditions.

E. SECTION 5.

Section 5 clarifies that this act does not modify, amend or repeal any existing interstate compact.

F. SECTION 6.

Section 6 declares the provisions of this act to be severable in the event that any portion thereof is declared to be invalid or unenforceable.

S 1007 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Batt, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Crystal, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 36.

NAYS—Carlson, Ricks, Rydalch, Tominaga. Total - 4.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared **S 1007** passed, title was approved, and the bill ordered transmitted to the House.

S 1006 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins. Total - 30.

NAYS—Anderson, Batt, Carlson, Crystal, Parry, Ricks, Ringert, Rydalch, Tominaga, Yarbrough. Total - 10.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared **S 1006** passed, title was approved, and the bill ordered transmitted to the House.

S 1005 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 33.

NAYS—Batt, Carlson, Crystal, Gilbert, Ricks, Rydalch, Tominaga. Total - 7.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared **S 1005** passed, title was approved, and the bill ordered transmitted to the House.

S 1015, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

On request by Senator Darrington, granted by unanimous consent, **S 1015** was referred to the Fourteenth Order of Business, General Calendar.

S 1016, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Moved by Senator Anderson, seconded by Senator Beck, that **S 1016** be referred to the Fourteenth Order of Business for amendment.

An amended motion was made by Senator Ricks, seconded by Senator Kiebert, that the Senate recess until 1:30 p.m. of this day.

The question being, "Shall the amended motion pass?"

The amended motion passed by voice vote, and the Senate recessed until 1:30 p.m. of this day.

RECESS
AFTERNOON SESSION

The Senate reconvened at 1:30 p.m., pursuant to recess, President Leroy presiding.

Roll call showed all members present except Senators Bilyeu, Kiebert, Lannen, Peavey, and Tominaga, absent and excused; and Senators Lacy and Little, absent and formally excused by the Chair.

Prior to recess the Senate was at the Thirteenth Order of Business, Third Reading of Bills.

Senator Peavey was recorded present at this order of business.

The President announced that the motion to refer **S 1016** to the Fourteenth Order of Business, General Calendar, was before the Senate for consideration, the question being, "Shall the motion pass?"

March 13, 2006
EXHIBIT 2

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION 06-2

Hand Delivered

Honorable Bruce Newcomb
Speaker of the House
Idaho House of Representatives
STATEHOUSE

Per Request for Attorney General's Opinion
Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)

Dear Speaker Newcomb:

This opinion responds to the questions in your letter dated February 27, 2006, regarding the effect of Idaho Code §§ 42-234(2) and 42-4201A(2) on the use of natural flow to recharge the Eastern Snake Plain Aquifer. In order to respond to your questions, it is first necessary to review the Swan Falls Agreement and to then consider the effect, if any, of Idaho Code §§ 42-234(2) and 42-4201A(2) on the Swan Falls Agreement. The questions presented are set forth below.

QUESTIONS PRESENTED

1. Is aquifer recharge a use to which Idaho Power Company subordinated its hydropower water rights under the Swan Falls Agreement?

2. If Idaho Power Company subordinated its water rights to recharge under the Swan Falls Agreement, do the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) change the Swan Falls Agreement and create any vested rights or priorities in Idaho Power Company?

CONCLUSIONS

1. Under the Swan Falls Agreement, Idaho Power Company subordinated its hydropower water rights in excess of the agreed-upon minimum flows to all

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

"subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law,"[1] regardless of the type or kind of beneficial use. Thus, the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law.

2. Idaho Code §§ 42-234(2) and 42-4201A(2) does not create any vested rights or priorities in Idaho Power Company because the State, as trustee, holds legal title to the water placed in trust and, in accordance with the Swan Falls Agreement, the State has the right to determine how the trust water will be used. Idaho Code §§ 42-234(2) and 42-4201A(2) create only an incidental statutory benefit in favor of Idaho Power that the State is free to modify or rescind at any time.

ANALYSIS

I.

THE SWAN FALLS AGREEMENT DOES NOT LIMIT THE TYPES OF BENEFICIAL USES FOR WHICH THE TRUST WATERS MAY BE ALLOCATED

You have asked whether aquifer recharge is a use to which Idaho Power Company ("Idaho Power") subordinated its water rights under the Swan Falls Agreement. This question raises the issue of whether the Swan Falls Agreement limits the subordination of Idaho Power's water rights to any particular types or kinds of beneficial uses, and therefore categorically excludes other uses for purposes of subordination. These issues present a question of the interpretation of the Swan Falls Agreement.

The objective in interpreting a contract such as the Swan Falls Agreement is to give effect to the parties' intentions, which should be ascertained from the language of the contract, if possible. Tolley v. THI Co., 140 Idaho 253, 260, 92 P.3d 503, 510 (2004). The contract must be viewed as a whole and in its entirety. Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). If its terms are clear and unambiguous, their meaning and legal effect are questions of law controlled by the plain meaning of the words. *Id.* If the contractual language is ambiguous, the parties' intent may be determined from the facts and circumstances surrounding the formation of the contract. *Id.* Contractual language is ambiguous if it is reasonably susceptible to conflicting interpretations. Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 614, 114 P.3d 974, 984 (2005).

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[1] "Agreement" executed by the Governor, the Attorney General and the Chief Executive Officer of Idaho Power Company on October 25, 1984, for purposes of resolving the litigation regarding Idaho Power Company's water rights at Swan Falls dam (the "Swan Falls Agreement") at 4, ¶ 7(B).

As discussed below, the plain terms of the Swan Falls Agreement compel the conclusion that Idaho Power subordinated its hydropower water rights to all future beneficial uses, including but not limited to aquifer recharge. Testimony given by Idaho Power's legal counsel in Idaho legislative hearings confirm the plain terms of the Swan Falls Agreement.

A. The Terms of the Swan Falls Agreement

1. Overview of the Swan Falls Agreement

The Swan Falls Agreement had its origin in litigation over whether Idaho Power's water rights for its hydropower generation facilities on the Snake River had been subordinated to beneficial upstream uses. The Idaho Supreme Court held that Idaho Power had expressly subordinated its water rights at its Hells Canyon dams but not at the Swan Falls dam. Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983). The court also held, however, that the mere lack of an express subordination provision in the Swan Falls water rights licenses did not mean that the water rights were unsubordinated, and remanded the case for consideration of the extent to which Idaho Power may have subordinated or otherwise lost its Swan Falls water rights under a variety of theories advanced by the State and other parties to the case. *Id.* at 583, 590, 661 P.2d at 749, 756.[2]

The parties resolved this litigation by agreeing that a portion of Idaho Power's hydropower water rights would be held in trust by the State of Idaho and that hydropower use of the trust water would be subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. This solution was a compromise between the State's desire to have immediate and complete subordination of Idaho Power's hydropower water rights and Idaho Power's desire to retain full ownership and use of its hydropower water rights until a new beneficial upstream use of the water was approved by the Idaho Department of Water Resources. It is against this backdrop that the subordination provision of the Swan Falls Agreement must be construed.

2. The Subordination Provision

The parties to the Swan Falls Agreement viewed it as providing "a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest." Agreement at 5, ¶ 11. This was to be achieved largely through the subordination provision of the Agreement. Miles v. Idaho Power Co., 116 Idaho 635,

[2] These theories included abandonment, forfeiture, adverse possession, equitable estoppel, and customary preference. *Id.*

637, 778 P.2d 757, 759 (1989) ("[t]he purpose of the [Swan Falls] agreement concerning subordination was to make more water available for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River").

The subordination provision established certain minimum flows[3] and provided that water accruing to Idaho Power's hydropower water rights above these minimum flows would be held in trust by the State of Idaho for "subsequent beneficial upstream uses":

> The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers [recitation of the applicable water right license numbers], but such rights in excess of the [minimum flow] amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. . . . This paragraph shall constitute a subordination condition.

Agreement at 3, ¶ 7(B) (emphasis added).

The subordination language is straightforward. The Agreement expressly provides for subordination to "subsequent" beneficial upstream uses "upon approval of such uses by the State." These terms explicitly require subordination to beneficial uses approved after the execution of the Agreement. In the absence of any textual limitation to the contrary, the most natural reading of this language is that it includes not only new diversions for established types of beneficial uses, but also diversions for new types of beneficial uses recognized and approved in accordance with State law. It is a given that State law is not static and changes over time, and this is particularly true with respect to what uses of water constitute "beneficial uses." *See* Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 447-48, 530 P.2d 924, 931-32 (1974) ("With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is

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[3] The agreed-upon minimums are average daily flows of 3,900 c.f.s. from April 1 to October 31, and 5,900 c.f.s. from November 1 to March 31, as measured at the U.S.G.S. Gauging Station below Swan Falls Dam and above Murphy, Idaho (the "Murphy Gauge"). Swan Falls Agreement at 3, ¶7(A).

The Swan Falls Agreement contains three express subordination provisions. Agreement at 3-4, ¶¶ 7(B)-(D). Two of these subordinated Idaho Power's water rights to certain junior uses that actually existed or were in the process of being perfected as of the date of the Agreement and are not directly relevant to the question presented. *Id.* at 4, ¶¶ 7(C)-(D).

always a possibility that other uses beneficial in one era will not be in another and vice versa") (Bakes, J., concurring specially).

Thus, under the plain terms of the Swan Falls Agreement, if a proposal to appropriate water for aquifer recharge is approved by the State as a beneficial use in accordance with state law, the hydropower water rights held in trust are subordinated to such use.

B. The Legislative History of the Statutes Implementing the Agreement

While the Agreement is unambiguous, it is worth noting that the history of the legislation the parties proposed to implement the Swan Falls Agreement also shows that subordination was not intended to be limited to any particular type or category of beneficial use.[4] The testimony of Idaho Power's legal counsel in committee hearings on Senate Bill 1008, the centerpiece of the proposed Swan Falls legislation, demonstrates particularly well that Idaho Power understood the Agreement included all types of beneficial uses subsequently recognized by state law. He testified before the Senate Resources & Environment Committee that "[t]he Company feels it is critical hydropower be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development." Minutes of the Idaho Senate Resources and Environment Comm., Jan. 18, 1985, 48th Sess. (Idaho 1985) ("Minutes of Jan. 18, 1985") at 2 (testimony of Tom Nelson) (emphasis added).

Similarly, at a subsequent hearing, Idaho Power's counsel stated that "[a]nything above the minimum flow the state is free to do as it likes," and that "[o]f course one of the big questions is what will future uses be of the remaining water." Minutes of the Idaho Senate Resources and Environment Comm., Feb. 1, 1985, 48th Sess. (Idaho 1985) ("Minutes of Feb. 1, 1985") at 7, 9 (Nelson testimony). These statements reveal that the parties intended to provide for subordination of the trust water to all future beneficial uses approved in accordance with state law.

The statements of Idaho Power's counsel take on even more significance in light of the fact that the future use of trust water for aquifer recharge was an obvious possibility at the time of the Agreement. Statutes authorizing aquifer recharge, albeit on a limited basis, were first enacted in 1978, some six years prior to the Swan Falls

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[4] *See* Agreement at 2-3, ¶ 6; *id.* at 8, ¶ 13(A)(vii) (agreeing to propose and support a legislative program implementing the Agreement and conditioning effectiveness of the subordination provision on the enactment of corresponding subordination legislation); *id.* at Exhibits 1-8 (the proposed legislation). The proposed subordination legislation was enacted substantially as proposed and is codified at Idaho Code §§ 42-203B and 42-203C.

Agreement. *See* Idaho Code §§ 42-4201 *et seq.* Indeed, the 1978 aquifer recharge statutes invoked the same "multiple use water policy of this state" that the parties explicitly recognized in 1984. 1978 Idaho Session Laws, ch. 293, § 1; Idaho Code § 42-4201(1) (emphasis added); *see also* Agreement at Exhibit 1, pp. 3-4 ("the promotion of full economic and multiple use development of the water resources of the State of Idaho") (emphasis added).[5] Further, aquifer recharge had been recognized as a "beneficial use" in other states for several years. *See* McTaggart v. Montana Power Co., 602 P.2d 992, 996 (Mont. 1979); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 564 (S.D. 1981). In this context, the absence of any evidence that the parties intended to exclude subordination to aquifer recharge must be understood as meaning that the parties were aware that aquifer recharge would potentially trigger subordination under the Agreement in the future.

II.

IDAHO CODE §§ 42-234(2) AND 42-4201A(2) DO NOT CREATE ANY VESTED RIGHTS OR PRIORITIES IN IDAHO POWER COMPANY

Idaho Code § 42-234 declares that the appropriation and underground storage of unappropriated water for purposes of ground water recharge is a beneficial use, and authorizes the Department of Water Resources to issue permits to appropriate for such uses. The statute also provides that such rights are secondary to prior perfected rights, including those that might otherwise be subordinated by the Swan Falls Agreement:

> The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

Idaho Code § 42-234(2).[6]

Idaho Code § 42-4201A(2) is identical in relevant part. By their terms, these statutes make a licensed right to beneficially use water for underground storage or aquifer recharge secondary to the hydropower water rights held in trust by the State of Idaho under the Swan Falls Agreement. Thus, the question is whether the statutes give rise to

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[5] Presently codified at Idaho Code § 42-203C.

[6] The language of Idaho Code §§ 42-234(2) and 42-4201A(2) is an express acknowledgement that the subordination provision would apply to aquifer recharge in the absence of the 1994 change to the statutes making recharge use secondary to hydropower use under the Swan Falls Agreement.

any vested rights in Idaho Power Company that permanently trump the subordination provision of the Swan Falls Agreement. Under the plain language of the Agreement and the relevant legislative history, the answer to this question is clearly "No," for two reasons: (1) the State holds legal title to the subordinated portion of the hydropower water rights in trust for the people of the State of Idaho and Idaho Power, and (2) as part of the Swan Falls Agreement, Idaho Power bargained away any right to assert a vested right in the trust water.

The Agreement and the implementing legislation resolved the Swan Falls litigation principally by transferring legal title to a portion of Idaho Power's hydropower water rights to the State, which holds the rights in trust for the benefit of the people of the State of Idaho and Idaho Power. Agreement at 8, ¶ 13(A)(vii); *id.* at Exhibit 7B; Idaho Code § 42-203B. Hydropower use of the trust water is subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. *Id.*

A Statement of Legislative Intent for Senate Bill 1008, the centerpiece of the legislation proposed and enacted to implement the Swan Falls Agreement, was prepared and read into the Senate Journal and describes the trust as follows:

> [T]his trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust, and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

Statement of Legislative Intent S 1008 ("Statement of Legislative Intent"), JOURNAL OF THE STATE SENATE, 48th Sess. (Idaho 1985) at 58-61, 60; *see also* Minutes of Jan. 18, 1985 and Minutes of Feb. 1, 1985 (testimony by Idaho Power's legal counsel describing the trust arrangement).

Thus, the State, as trustee, holds legal title to the hydropower water rights referenced in the Swan Falls Agreement to the extent they exceed the agreed-upon

minimum flows, and has the authority to manage the trust water for the benefit of the people of the State of Idaho and Idaho Power. Under the Agreement and the implementing legislation, Idaho Power surrendered its legal title and control of the water rights above the minimum flows. Idaho Power retained only an equitable interest in the use of the trust water until such time as the State approved a subsequent beneficial upstream use in accordance with state law. Thus, as trustee, the State has exclusive authority to determine how the trust water will be allocated.

This understanding is supported by the express language of the Swan Falls Agreement, which provides that other than the legislative program that implemented the Agreement, legislation enacted after the effective date of the Agreement has no effect on it:

> This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, **legislative enactment** or administrative ruling shall not affect the validity of this Agreement.

Agreement at 8, ¶ 17 ("Subsequent Changes in Law") (emphases added). In other words, the parties expressly agreed that legislation passed after the Agreement became effective would not void the Agreement or change the parties' rights and obligations as established by the Agreement. Part of the contractual agreement was Idaho Power's acceptance of beneficial upstream uses upon approval of such uses by the State in accordance with state law.

The language in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement was enacted some ten years after the Agreement was signed. *See* Idaho Session Laws 1994, ch. 274, § 1, p. 851; *id.* ch. 433, § 1, p. 1397. These statutes reflect a policy decision at the time to treat aquifer recharge as a secondary use. But, as noted above, the state as trustee is free to change the policies regarding the use of the water held in trust.[7]

This interpretation accords with the parties' intent as revealed by the legislative history of SB 1008. In testimony before the Senate Resource and Environment Committee, Idaho Power's attorney left no doubt that the Agreement ultimately controls

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[7] Once a subsequent beneficial upstream use becomes a vested right, the water subject to that right is no longer part of the trust water.

subordination, and that statutorily increasing the amount of water actually available to Idaho Power merely creates an incidental benefit that the State is free to modify or rescind at any time:

Senator Crapo: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract. Would you clarify, what subsequent legislative changes would do to the status of [the] Idaho Power water right with regard to changes in minimum flow?

Tom Nelson: As the contract and the statute work together, the state could obviously increase the minimum flow at Murphy anytime they wanted. The Company would have no rights involved in that decision. If the state wanted to reduce that minimum flow below the seasonal 3900 and 5600 it certainly is at liberty to do that. However, the contractual recognition of the Company's water rights at that level would remain at those levels and therefore the Company's rights would not follow the minimum flow down in that instance. The contract would still define it as the seasonal 3900 and 5600.

. . . .

Senator Peavey: What would be the flip side of Senator Tominaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

Tom Nelson: In a situation where the state raised the minimum flow, the Company's subordinated rights would remain at 3900 and 5600. However, that increase would then make the company the beneficiary of that increase [sic] flow and I as read both what we have as those minimum flows operate, the company would be a beneficiary of the higher flow and entitled to protect it or to try and make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

Senator Peavey: When you say "to protect the new higher minimum flow," you aren't saying then that the state couldn't after it had done that, relower that to 3900, that would be at the state's option, would it not?

Tom Nelson: You are right. Anything above the minimum flow the state is free to do as it likes.

Minutes of Feb. 1, 1985, at 3, 7.[8]

In the February 11, 1985, hearing, Senator Little asked Idaho Power's legal counsel that if "two years from now we don't like [all these bills fulfilling the Agreement] and parts are repealed, will that affect the agreement made between the power company and the state." Minutes of the Idaho Senate Resources and Environment Comm., Feb. 11, 1985, 48th Sess. (Idaho 1985) at 1. Idaho Power's counsel replied:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in the law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have power to do, would be to change the contractual recognition of the company's water rights at Murphy gage [*sic*].

Id. (Nelson testimony).

Legal counsel for the Office of the Attorney General testified during the same hearing in regard to the general trust concept that "the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary." *Id.* at 12 (testimony of Pat Kole). Idaho Power's attorney then testified with regard to hydropower water rights placed in trust under Idaho Code § 42-203B that "[i]f you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement the constitutional provision." *Id.* at 13 (Nelson testimony).

These exchanges demonstrate that the parties intended the Agreement to control the parties' rights and obligations with respect to subordination of the trust water, regardless of subsequent changes in State law. *See also* Statement of Legislative Intent at 59 ("While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change"); Minutes of Jan. 18, 1985 at 18-19 (written testimony of Attorney General Jim Jones at 5-6) ("If the public interest criteria is not, after trial and error, precisely what the legislature desires, the standards can be changed

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[8] Likewise, when discussing the reservation of 150 cubic feet per second of the trust water for domestic, commercial and industrial uses before the Senate Resources and Environment Committee, Idaho Power's attorney testified, "it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low." Minutes of Jan. 18, 1985, at 5 (Nelson testimony).

without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established").

It was understood that subsequent changes in state law would not reduce or enhance the State's authority over the trust water or the rights established by the Agreement. Just as the State cannot reduce Idaho Power's rights under the Agreement with regard to the unsubordinated portion of the hydropower water rights, Idaho Power is simply an incidental beneficiary of any State law governing the trust water. This aspect of the Agreement is crucial, because the overarching intent was to put control of the reallocation of the trust water in the State's hands, and to provide the State with the flexibility necessary to promote full economic and multiple use development of the water resources of the Snake River system. *See also* Minutes of Jan. 18, 1985, at 18-19 (Jones testimony at 5-6); Agreement at Exhibit 1.

It is thus evident that any subsequent changes in statutory language such as the relevant portions of Idaho Code §§ 42-234(2) and 42-4201A(2) do not trump the Swan Falls Agreement for purposes of subordination or give rise to a right of compensation regarding use of the trust water. These statutes may have worked to Idaho Power's benefit but the legislature has the authority to change this policy at any time.

Nothing in the legislative history of Idaho Code §§ 42-234(2) and 42-4201A(2) can be viewed as requiring a different conclusion. The only reference to the Swan Falls hydropower rights in the legislative history of the recharge statutes is a single statement by a representative of the Idaho Water Users Association that the language regarding privately owned electrical generating companies was "to protect and verify the agreement on Swan Falls." Minutes of the Senate Resources & Environment Comm., March 9, 1994, at 1 (testimony of Sherl Chapman). This statement is essentially meaningless for purposes of interpreting the Swan Falls Agreement, because, as the statement recognizes, the Agreement speaks for itself, and by its terms is fully integrated and sets forth all of the parties' understandings. Agreement at 9, ¶ 19. Further, the statement was made by a non-party ten years after the Agreement was executed, and cannot be viewed as probative or reliable for purposes of determining the intent of the parties at the time they executed the Agreement. *See* Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) ("the Court must determine the intent of the parties at the time the instrument was drafted").

III.

CONCLUSION

The plain terms of the Swan Falls Agreement, as well as the facts and circumstances surrounding the Agreement, conclusively demonstrate the parties' intent

that the hydropower water rights held in trust by the State would be subordinated to all beneficial upstream uses approved in accordance with State law, including aquifer recharge. The Agreement and implementing legislation also demonstrate that the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement only created an incidental benefit in favor of Idaho Power, and did not give rise to any vested rights or priorities.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 42-203B.
§ 42-203C.
§ 42-234.
§ 42-4201.
§ 42-4201A.

2. Idaho Session Laws:

1994, chapter 274, § 1.
1994, chapter 433, § 1.
1978, chapter 293, § 1.

3. Idaho Cases:

Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 106 P.3d 443 (2005).

Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 661 P.2d 741 (1983).

Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 114 P.3d 974 (2005).

Miles v. Idaho Power Co., 116 Idaho 635, 778 P.2d 757 (1989).

Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003).

Tolley v. THI Co., 140 Idaho 253, 92 P.3d 503 (2004).

4. Other Cases:

McTaggart v. Montana Power Co., 602 P.2d 992 (Mont. 1979).

Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).

5. Other Authorities:

"Agreement" (Oct. 25, 1984) (the "Swan Falls Agreement").

JOURNAL OF THE STATE SENATE, 48th Session (Idaho 1985).

Minutes of the Idaho Senate Resources and Environment Committee, 52nd Session (1994).

Minutes of the Idaho Senate Resources and Environment Committee, 48th Session (1985).

DATED this 9th day of March, 2006.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLIVE J. STRONG
MICHAEL ORR
Deputy Attorneys General

March 13, 2006
EXHIBIT 3

STATEMENT OF RAY W. RIGBY
BEFORE THE IDAHO HOUSE OF REPRESENTATIVES
COMMITTEE ON HOUSE BILL _____

Re: Swan Falls Agreement

My name is RAY W. RIGBY. I reside at 2131 N. 3000 W., Rexburg, ID 83440, and practice law at 25 N. 2nd East, Rexburg, ID 83440. I appreciate the privilege of appearing before this committee on a subject matter, the Swan Falls Agreement, that I spent a lot of time on back in the 60s and periodically ever since.

A brief summary of my background and experience are as follows:

A. I was a member, by election, to the Idaho Senate for four terms, between the years 1964 and 1972, where I served for a time as Assistant Minority Leader and also as a member of several Senate committees, including the Natural Resources Committee.

i. In particular, with Attorney William Holden representing the Governor, Vard Chatburn representing the House of Representatives, and myself representing the Senate, we drafted, from all of the ideas submitted to the legislature, after the passage of the Constitutional Amendment allowing for the same, the extensive water resource legislation, and created the State Water Resource Board.

B. I was admitted to the practice of law in the State of Idaho in October 1950 and am admitted to the practice of law in the Courts of Idaho, Federal Courts, and the U.S. Supreme Court.

C. I am also a rancher and cattleman, with ranches located in Jefferson, Madison, and Fremont Counties, Idaho.

D. I have served as an officer and director of the North Fork Reservoir Company (Henry's Lake) for the past 46 years.

E. I am a Past member (12 years) and National Chairman (2 terms) of the Interstate Conference on Water Problems (1967-1978).

F. I was a U.S. State Department Delegate to the United Nations World Conference on water in Argentina, 1977.

G. I am a past member and chairman of the Legal Committee and the Full Council of the Western States Water Council (1973-1988).

H. I was a member of the Natural Resources Committee and Chairman of the Western States Conference-Council of State Governments (1968-1972).

I. I have served as an attorney for the Committee of Nine, Mitigation, Inc., and numerous claimants in the Snake River Basin Adjudication.

The Swan Falls Controversy

1. As was said by Robert R. Lee on August 20, 1983, in a statement on Swan Falls (Exhibit A), the Idaho Power Company received licenses on the three Hell's Canyon Dams in spite of the Idaho Constitutional Provision that, in substance, the legislature may limit the use of water for power production, by agreeing with the State and the Federal Power Commission to subordinate hydroelectirc development to all upstream development. (See Exhibit B, which is an excerpt from the record of the hearings before the Federal Power Commission on the Idaho Power Company's application for licenses on the Hell's Canyon dams and power plants.) (Also, see Exhibit C, which is a memorandum to James E. Bruce, President of the Idaho Power Company at that time, from his attorney Thomas G. Nelson, which confirmed that concept. Note at the top of page 2, the reference to Article 41 of the license issued for the Hell's Canyon Project 1971, which provides in substance that, "The Hell's Canyon Project shall be operated in a manner not to interfere with future depletion with the flows of the Snake River and its tributaries, or prevent or interfered with the future upstream diversion and use of such water . . . for the irrigation of lands and other beneficial consumptive uses in the Snake River water shed.")

2. After Idaho Power Company received licenses to establish and operate the three dams and power plants in Hell's Canyon, they found they had an excess of power in the summer time, with its loads peaking in the winter time, and so it set about looking for summer loads to increase its earnings by utilizing its tremendous summer time generating capabilities. This continued to produce increased revenues.

The time came, however, when Idaho Power Company developed a shortage of power and some of its customers and stockholders proceeded through the Idaho Public Utilities Commission and the courts to require Idaho Power Company to retrieve its water rights, which were being used by upstream users pursuant to the claimed subordination agreement by Idaho Power Company. The case ultimately went to the Idaho Supreme Court, and on November 19, 1982, the Supreme Court

of Idaho, in substance, concluded that the licenses for the three Hell's Canyon Dams included the provisions concerning subordination, but the Swan Falls Dam did not (which therefore applied to all of Idaho Power's upstream dams and powerplants). In effect, the Court said that regardless of the intentions of the parties, all the licenses for all the other power plants except the Hell's Canyon power plants had not been amended to include the subordination. (Exhibit D, Supreme Court Opinion No. 13794 found in Vol. 82 of the Idaho Reports, pg. 95.)

3. Consequently, the Idaho Power Company filed an action in the district court of Ada County against approximately 7,500 water users to quiet title to their water rights (Reference 1).

4. Governor John Evans and Attorney General Jim Jones determined that this dispute would greatly affect the economy and well-being of the State and decided to look for solutions to the problem. Governor Evans formed a task force to advise him in his deliberations and negotiations with the Power Company (Reference 2 contains the names of those task force members). I was a member and Chairman of Governor Evans' task force on Swan Falls.

5. This committee met on several occasions and received a multitude of statements and documents from various people and agencies. After lengthy negotiations by and between the parties involved in the Swan Falls dispute, subordination was agreed upon as well as the amount of water that the Idaho Power Company would agree to be licensed to upstream uses by the Idaho Department of Water Resources, pursuant to law. The committee made recommendations to the Governor (Exhibit E).

The final issue concerned the question of who would hold the title and use of said released waters until they were granted by license for upstream use through the Idaho Department of Water Resources. The Idaho Power Company wanted to retain title and use of the water until that occurred. The Attorney General and I, speaking for the committee vigorously opposed the Power Company retaining title to the water right they were giving up. The negotiations came to a stand still.

I recalled a recent incident where a child had been taken from its parents and the legal rights were held by the State in a trust relationship until an adoption could be completed. I recited other similar incidents and told the parties that if the State could be the trustee of a child, surely it could be the trustee of those water rights. This broke the "log jam" and I called the State police and told them to go up in the mountains in the Soda Springs area and get the Governor, who was helping to round up the family cattle herd, and bring him to Pocatello, where we met and came to a final conclusion of the dispute (see Exhibit F, *The Idaho Statesman* news article).

The so-called Swan Falls Agreement in 1984 was signed by Governor John V. Evans, Attorney General Jim Jones, and President of the Idaho Power

Company James Bruce (Exhibit G).

6. I have reviewed the Idaho Attorney General's Opinion 06-2 (Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)) a copy of which you have received from the Attorney General (Reference 3); also, I have also read and studied at length the Legislative History Concerning the Swan Falls Agreement (45 pages), which will be referred to several times during your hearings and debates and we would be glad to furnish any of you a copy of the same at your request (Reference 4); and I have reviewed my extensive repository of documents, which I have kept over the years since serving as the Chairman of the Governor's task force on Swan Falls.

7. I concur in the wording and content of the questions asked the Attorney General by Honorable Bruce Newcomb, Speaker of the House, Idaho House of Representatives, and in the conclusions reached by said Attorney General in answering those questions.

8. I believe that under the Swan Falls Agreement, Idaho Power Company did "subordinate its hydropower water rights in excess of the agreed-upon minimum flows to all 'subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State Law,'" and "Thus, the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law," and that "Idaho Code §§ 42-234(2) and 42-4201A(2) does not create any vested right or priorities in Idaho Power Company because the State, as trustee, holds legal title to the water placed in trust and, in accordance with the Swan Falls Agreement, the State has the right to determine how the trust water will be used. Idaho Code §§ 42-234(2) and 42-4201A(2) create only an incidental statutory benefit in favor of Idaho Power that the State is free to modify or rescind at any time."

9. I submit a statement I made on the question "Swan Falls and Minimum Stream Flows in Idaho" as Exhibit H.

10. I concur in the statement made by Senator Laird Noh, formerly Chairman of the Committe on Resources and Environment, dated August 25, 1983, and the conclusions and legal opinion of the Attorney General of the State of Idaho.

11. The Statement of Purpose on RS 10298 of a prior session of the legislature states as follows: "Development is provided for by the subordination of all existing and future hydropower water rights." I concur with that statement.

12. The case of Miles, et al., v. Idaho Power Company, et al., in a 1989 opinion No. 114, states, with regard to the Swan Falls Agreement, "The purpose of the

agreement concerning subordination was to make available more water for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River."

Ray W. Rigby

RAY W. RIGBY

March 13, 2006
EXHIBIT 4

SWAN FALLS STATEMENT

by

ROBERT R. LEE

August 20, 1983

The Idaho Power Company received the very valuable Hells Canyon license permits to produce power at Brownlee, Oxbow and Hells Canyon Dams only because the water users of the Snake River Basin agreed, provided the water rights for power production were subordinate to upstream use for irrigation and other purposes. Thus subordination provisions were written into the Federal Power Commission Licenses and some of the licenses issued by the State of Idaho.

There was also a clear understanding at the time that there was a "defacto" subordination of all upstream power rights on the small dams owned by the Idaho Power Company. Otherwise, there was no need to insist on the subordination clauses for the Hells Canyon Dams since lack of subordination of the power rights upstream at Swan Falls and the other I.P.C. dams would require the water to be released anyway. The "defacto" subordination was wholly endorsed by the Idaho Power Company and they actively promoted irrigation development above Swan Falls Dam. In fact, the Idaho Power Company proposed the joint venture, Swan Falls-Guffey Project with the State of Idaho as a program to accelerate the development of desert lands and further diminish the flows at Swan Falls.

The Idaho Power Company supported the subordination of power rights at the proposed Swan Falls-Guffey Project at Idaho Water Resource Board Hearings and in Idaho State Legislative Hearings. Thus, subordination language at Swan Falls-Guffey became State Law. The 1971 statute reads:

> The joint venturer shall petition the Federal Power Commission for insertion of a license condition subordinating the project power right to future upstream depletionary use." (Idaho Session Laws, Ch. 265 P. 1064)

Unfortunately this project was abandoned by the State because of environmental objections. Had the dam been built the current issue would be moot.

The Idaho Power Company has changed its previous policy which recognized upstream depletion as being paramount. In doing so it has broken a solemn covenant with the water users of the Snake River Basin. There are now pending law suits by Idaho Power Co. against 7200 existing water rights holders above Swan Falls and all future water development in the Snake River Basin is now threatened.

The Swan Falls power license now being considered for relicensing to the Idaho Power Co. by the Federal Energy Regulatory Commissions must include subordination language. If that is done the current Swan Falls problem will be solved without further Idaho Legislative action or court action.

Volume No. 6

OFFICIAL STENOGRAPHERS' REPORT

BEFORE THE

FEDERAL POWER COMMISSION

SUBJECT

In the Matter of:)
)
IDAHO POWER COMPANY) Project Nos. 1971, 2132, 2133

Held at Washington, D. C.
July 8, 1953

PAGES 1295 TO 1455

NATIONAL REPORTING ASSOCIATES, INC.
OFFICIAL REPORTERS
306 NINTH STREET, N. W.
WASHINGTON 4, D. C.

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NATIONAL 8-1145
NATIONAL 8-1120
NATIONAL 8-1121
NATIONAL 8-0927

EXHIBIT T-11

having endowment funds to invest and a good many of the larger universities, privately-supported universities of the country, are likewise numbered among our bondholders -- or, rather, shareowners -- as well as a number of the larger pension trusts, employee pension trusts.

Q Can you state percentagewise what percentage of your stock is owned by what you might call individual, small investors?

A Yes. Approximately 93 per cent of our share owners are individual owners, men and women, with a few joint accounts, and approximately 7 per cent of our total outstanding shares are in the hands of these institutions of the character I have just described to you.

Q Does any one individual own any large per cent of your stock?

A There is no single individual or institution that owns more than, if my memory serves me right, at our last count, about 2 per cent of the shares or voting control of Idaho Power. The majority of our voting control rests in the 11 Pacific Coast States, and about something over 50 per cent of that control is in the hands of individuals.

Q Will you describe generally the territory your company serves, Mr. Roach?

A Well, our company service area is confined entirely to the so-called Snake River Valley, running from Eastern

Oregon pretty largely along the main line of the Union Pacific Railroad to a point east of Pocatello and southward across the Nevada line into Northern Nevada and north from the main line of the Union Pacific a maximum of probably 175 to 200 miles.

Q And about how far does your territory run east or west would you approximate?

A Pretty close to 450 miles east and west.

Q What type of power plants does your company use?

A Our company is a 100 per cent hydroelectric-operating utility.

Q Does the Snake River play any important part in the economy of your territory other than as a producer of power?

A Our area as such I would say is almost completely dependent upon the Snake River and its tributaries, because we're located in a semi-arid region with approximately ten inches of annual precipitation.

Its primary economy is grounded in agriculture, and the waters of the Snake River provide the life blood for both our domestic, our agricultural, our industrial and our hydroelectric sources.

Q What use is made generally of the waters of the Snake River and its tributaries there through your territory?

A Well, the waters of the Snake, of course, are used primarily to first provide for the so-called consumptive needs of the area and then to supply the hydroelectric power which

furnishes the electric service to the people of the area whi
I have described here.

Q Just speaking in a general way, how extensive is the irrigation development through your service area?

A Well, irrigation development in Idaho has been progressing for some 60 or 65 years, when this sagebrush land first began to be reclaimed from the desert, and at the present time we have under irrigation in our service area somewhere in the neighborhood of 2,500,000 to 2,600,000 acres of land.

Q And I believe you have indicated already that your customers generally are quite dependent on this water supply from the Snake River and its tributaries?

A That's true; they are.

Q Does it affect your business directly or indirectly -- this water supply?

A Yes, I think it has both a direct and an indirect effect on our business. In the first place, it's the source of our hydroelectric generation which supplies the power that is being used rather extensively for the pumping of irrigation water from deep wells to water the lands being brought under cultivation, and because agriculture is the backbone of our economy in the Snake River Valley, the prosperity and the success of agriculture affects the lives and the businesses of practically everybody in the Snake River Valley who are dependent upon the prosperity of agriculture for their own

business growth and their own business prosperity.

Q And would that be true as to the future growth the area if it occurs?

A It certainly will be true as to the future grow of the area, because I think the Snake River Valley's futu lies in the continuing development in an orderly fashion of the yet-undeveloped arable land, and that development will be directly dependent upon the use of the Snake River water and its tributaries for the reclamation of those additional acres.

Q Has your company adopted any policy for the integration or joint use of the water for irrigation and hydroelectric development both in the past and as respects the future? Roach 7-8-53 F.P.C. in D.C.

A Well, our company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development.

As far back formally as 1947, in our hearing, our initi hearing, before the Oregon Hydroelectric Commission, that policy was stated and made a formal part of our application to the Oregon Hydroelectric Commission, and currently all of our State permits in the State of Idaho carry in them a

specific provision which preserves for irrigation not only now but at all times in the future a prior claim on the wate with the claim for hydroelectric energy being secondary to that of the irrigator or the farmer.

Q And is that in accordance with your formal request as you apply for these water permits from time to time?

A It is.

Q And is that true of the water permits that have been issued for the three projects here involved -- Oxbow, Brownlee, and Hell's Canyon?

A It is. All three of those permits contain the specific reservation or provision which I have just described.

Q That they will be subordinate to all future irrigation development?

A Yes.

Q We have mentioned some of this future irrigation development. Does that have any effect upon your planning for future hydroelectric development on the Snake River?

A Yes, I think it has a very important effect or bearing on our future use of water for hydroelectric planning, because it is the basic and I think fundamental element that must be taken into consideration in all planning for future hydroelectric developments, whether they be by our company or any other individual or group.

Q In your opinion, can future hydroelectric

developments be evaluated without taking that into account?

A Absolutely not.

Q And have you made any studies -- that is, your company -- in that respect as to what may be expected as to futu irrigation development?

A Yes. Engineers of our company have made some very exhaustive studies of what may be expected in the future and will be presented here for testimony outlining the result of those studies.

Q Have those been continuing studies that have run over quite a period of time?

A They have.

Q Now, it's rather obvious, but I gather that your company recently has been engaged in developing hydroelectric plants on the Snake River?

A That's right. We have a total of nine hydroelectric plants now on the Snake River, and in the last, well, approximately six years, we have constructed six new hydro plants on the Snake River and on its tributary, the Malad River.

Q And of those on the Snake River, have those recently-constructed ones been some of your larger plants?

A They have been. We have recently completed in 1952 our largest project, the C. J. Strike development, with a total installed capacity of about 90,000 kilowatts, and prior to that our Bliss project upstream from the Strike project

MR. MASON: Mr. Examiner, before we adjourn, if that is your intention, might I ask Mr. Parry if he proposes to put into evidence here or have you already distributed as exhibi your permits from the State of Idaho in which the priority for irrigation use is expressed and some evidence from the State of Oregon where the same policy is expressed? Mr. Roac has testified that this is the policy of the company.

MR. PARRY: Yes.

MR. MASON: If possible, I would appreciate some additional evidence in documentary form.

MR. PARRY: We expect to put that in in documentary form showing the precise language in which we have applied for the permits on the Idaho side of the river, and they all have that precise language in them. We will put that in the record.

MR. MASON: What about Oregon?

MR. PARRY: Oregon has not so far required the precise language as I have it in my mind at present, but, as Mr. Roach stated, the company has expressed that policy.

MR. MASON: Thank you.

MR. DAVIDSON: Mr. Examiner, I wonder if I might ask the applicant to supply copies of Exhibits J, K and L for the Brownlee and Hell's Canyon applications?

MR. PARRY: I didn't hear you, Mr. Davidson.

MR. DAVIDSON: I wondered if I could have copies of your Exhibits J, K and L of both the Brownlee and Hell's Canyon

of witnesses that should come later. That was the only point I had in mind.

MRS. COOPER: Are you in a position to say, Mr. Parry, whether as to any of the other witnesses we are going to be up against time limitations such as we are with Mr. Kulp.

MR. PARRY: The only other one, Mrs. Cooper, that I think of now is Mr. Dewey who was included in the group that I mentioned earlier that we would like to have cross-examined immediately. And then General Robins will follow shortly, and he is anxious to get away. I think those are the two that we have in mind at the present time.

MR. MASON: With reference to General Robins, do you have some more direct for him?

MR. PARRY: Yes. When we put him on before, we announced we would recall him.

MR. MASON: That was my recollection. I just wanted to be sure.

Whereupon --

MARK R. KULP

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PARRY:

Q What is your full name, please.

A Mark R. Kulp.

EXHIBIT J - 12

March 13, 2006
EXHIBIT 6

MEMORANDUM

TO: James E. Bruce

FROM: Thomas G. Nelson

SUBJECT: Possibility of using the Swan Falls water right to stop upstream depletion of the Snake River.

DATE: June 22, 1976.

FACTS: The Idaho Power Company has the following water rights at the Swan Falls site:

2150 cfs	priority January 17, 1900
1840 cfs	priority January 17, 1900
1460 cfs	priority April 17, 1900
4000 cfs	priority July 29, 1919

The discussion of the possibility of using the Swan Falls water right to prevent upstream depletion of the river by irrigation projects and consequent diminution in power generation was raised in the Pioneer licensing proceeding. A full understanding of the issue requires review of FPC licenses on other IPC projects on the river and the present status of the re-licensing of the existing Swan Falls plant.

The original FPC license on the existing Swan Falls plant was issued in 1928 to expire on June 30, 1970. IPC timely filed an application for re-licensure, which has been complicated by three options for power production in the area: (1) re-license and maintain existing plant; (2) re-build Swan Falls as a part of a two dam project, with a re-regulating dam at Guffey, to be an IPC project, or (3) build the two dam project as a joint venture with the Idaho Water Resource Board. Since 1970, the existing plant has been operating under a series of annual licenses issued by the FPC.

The joint venture proposal has progressed to the point of passage of state enabling legislation, a contract and an opinion of the Supreme Court of the State of Idaho. (Idaho Water Resource Board v. Kramer, 548 P. 35 (1976)). The project is presently undergoing study to update the original cost estimates and determine its financial feasibility.

The license issued for the Hells Canyon project (Jan. 1971) contained the following language:

"Article 41. The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead." (sic)

A similar provision is found in the state water license issued for the C. J. Strike Project (License No. 21671.) and in some, but not all, of the Hells Canyon water licenses. Those water license provisions were inserted at the request of IPC. An essentially identical provision is included in the license issued for re-licensing of the existing American Falls power plant (in Article 32). The license issued for the proposed new American Falls power plant did not contain such a provision, since the FPC felt it unnecessary in view of the control of USBR over releases of water from the American Falls Dam. (pp 11-12 of opinion of FPC)

The original Swan Falls license contained no language comparable to that found in Article 41 of the Hells Canyon license. Article 13 of that license provided:

"Article 13. The licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by this license, provided such use will not materially reduce the amount of power produced and is not in conflict with the laws of the State of Idaho."

Section 3 of the state Swan Falls enabling legislation provides, in pertinent part:

"provided that the state or the state and the joint venturer shall petition the federal power commission for insertion of a license condition subordinating the project power right to future upstream depletionary use." (1971 S.L. Ch 265, p. 1064)

The joint venture contract executed by IPC and the Idaho Water Resource Board contains the following provision:

"Section 14.2. Balance Between Irrigation and Power. The parties hereto recognize that the Act requires that the Board, or the Board and the Company, shall petition the Federal Power Commission

for insertion of a license condition subordinating the Swan-Falls-Guffey Project water right to future upstream depletionary use. The parties agree to comply with this requirement."

DISCUSSION

An appropriator of water has the right to have the water he has appropriated flow to his point of diversion (Weeks v. McKay, 85 Idaho 617, 382 P 2nc. 288, 1963), but is not injured by the activities of junior appropriators which do not substantially intefere with his use. (5 Water & Water Rights, Clark, Section 4102, p. 130) That is, a senior appropriator cannot complain of the gaining of a water right by junior appropriators until those activities result in a diminution in the quantity or quality of water to which the senior appropriator is entitled. The Idaho Power Company, or any senior appropriator, cannot object to the proposed appropriation of a junior appropriator, since the junior appropriator takes his water right subject to the rights of senior appropriators.

The hydraulic capacity of the turbines at Swan Falls is approximately 8,000 cfs. Even though the water rights at Swan Falls total 9,450 cfs, an appropriator gains the right to only that amount of water which he can beneficially use. In this case, the water right at Swan Falls would be the hydraulic capacity of the turbines, or approximately 8,000 cfs.

Actual monthly flows at Murphy during June, July, August, and September 1940-1974 are as follows, in cfs:

YEAR	JUNE	JULY	AUGUST	SEPTEMBER
1940	7262	7026	7382	8613
1941	7982	7250	7898	8650
1942	9854	7479	7642	8654
1943	22,490	13,710	8182	9017
1944	15,540	7965	7950	8564
1945	15,040	8648	8079	8847
1946	12,160	7818	8072	9070
1947	17,080	7812	8409	9182
1948	17,500	8246	8045	9064

YEAR	JUNE	JULY	AUGUST	SEPTEMBER
1949	10,650	7702	8232	9407
1950	17,190	13,630	8464	9347
1951	12,100	8090	9004	9576
1952	15,110	9993	8627	9306
1953	15,290	8153	8249	9117
1954	9345	7907	8070	8869
1955	7927	7682	7644	8483
1956	21,410	7594	8243	9128
1957	11,520	7716	8151	9325
1958	6662	7595	8246	9110
1959	6951	7212	7881	9236
1960	7540	7043	7541	8209
1961	6572	6219	6838	7778
1962	9558	7062	7821	8435
1963	19,600	7235	7605	8700
1964	17,620	7394	7450	8565
1965	11,170	8672	8705	9441
1966	6731	6701	7387	8421
1967	13,310	8304	7277	8260
1968	9109	6748	8897	8743
1969	9024	7427	7292	8687
1970	14,220	8859	7154	9327
1971	16,990	11,000	7385	9008
1972	17,120	7739	7884	9779
1973	7114	6370	6694	8472
1974	14,780	8830	6855	8037

Looking at the last five years of record set out above, of the 20 months there involved, only 8 months show mean flows below the capacity of the turbines, and two of those months are within 500 cfs of turbine capacity. It is only in those months that IPC could complain of injury to its prior rights, since in the other months, the junior appropriators were using water to which IPC had no claim.

In order to obtain a prescriptive title to a water right used by another, the claimant must have made a use of the water in question that was (1) open and notorious, (2) adverse and hostile to the claim of the rightful owner, (3) exclusive of the use by the owner, (4) continuous and uninterrupted, (5) under a claim of right and (6) for five years. (Hutchins, "The Idaho Law of Water Rights," Vol. 5, Idaho Law Review, Number 1, page 80) In order for a use to be exclusive, it must be made at a time when the rightful owner actually needs the water. An irregular and interrepted possession is not sufficiently continuous to constitute "continuous use." (Carrington v. Crandall, 65 Idaho 575, 147 P2d. 1009, 1944)

Applying the above criteria to junior appropriators who potentially could claim to have adversed a portion of IPC's Swan Falls right, it appears that the elements of exclusive and continuous use are absent, since their use in the other 12 months of the 20 discussed above is consistent with their own junior right, and not inconsistent with IPC's senior right. (There may be 5 year periods in the past which could give rise to a valid claim of prescription but as to junior claimants of the last 10 years, it is doubtful that any prescriptive claims would be valid.) In Martiny v. Wells, 91 Idaho 215, 419 P2d. 470, (1966) the court said that the claimant must show "that he has used the water during each of the irrigation seasons of the five-year period when it was actually needed by the prior owner."

A more difficult question is the one of estoppel. Long and continuous known acquiescence in anothers use and enjoyment of a property or a privilege may preclude one from subsequently asserting his own claim. (Hutchins, supra, p. 84) As a public utility, IPC has to furnish service to persons within its service area requesting it, including pumpers from the Snake and its tributaries. The Company has no discretion in the matter.

Using the Bell Rapids project as an example, the settlers spent large sums of money reclaiming the land and preparing it for cultivation. They contracted with IPC for power for pumping. It is a matter of common knowledge that successful irrigated farming requires the availability of

water throughout the growing season. There are no senior consumptive uses below Bell Rapids which would deprive them of a water supply in dry years. So their water supply is assured, absent an assertion of a flow right by IPC.

In looking downstream, the Bell Rapids settlers could find the depletion provisions in the Hells Canyon and Strike water licenses and in the Hells Canyon FPC license.

If IPC now attempts to enforce the Swan Falls right against Bell Rapids, it is saying, "We saw you spend the money, we will deliver power for pumping and collect money for it, but don't deplete our Swan Falls flow right." The counter argument that IPC had to furnish the service and that Bell Rapids water rights were subject to the same risks of short supply as any other junior appropriator would probably not be convincing. In the case of Newport Water Company v. Kellogg, 31 Idaho 574, 174 P. 602 (1918), Kellogg had sold some land to the water company for a reservoir site to enable it to sell water to its customers both in and out of Idaho. The court held that Kellogg was estopped to question the right of the water company to carry the water outside of the state.

Absent the giving of prior notice of its intentions to enforce its Swan Falls rights, the Company probably could not enforce those rights to the detriment of upstream junior pumpers to whom it furnished power. While the prior discussion has related to existing junior appropriators, the same answer would apply to people who have applied, but not yet diverted.

If IPC was to attempt to use its Swan Falls water right to prevent further irrigation depletion above Strike, any benefit from stopping such depletion would, of course, redound to the benefit of flows at Strike, and potentially in Hells Canyon. Thus IPC would be doing indirectly what it cannot do directly, that is, protect its Strike and Hells Canyon projects from upstream depletion. In our judgment, the FPC license and state water license provisions above referred to would be construed to make the Swan Falls right subject also to depletion, since the IPC plants on the Snake are all co-ordinated for operation, and since the water license depletion provision in the Strike and some of the Hells Canyon licenses were inserted at the request of IPC.

ejected Sup. Ct.

Additionally, a depletion provision similar to that in the license for Hells Canyon and the old American Falls plant will almost certainly be in any new license issued by the FPC for the Swan Falls site, whether a renewal of the existing license or a license for the two dam plan, as a sole project

of IPC or as a joint venture with the State of Idaho. Therefore, as a practical matter, even if the Swan Falls right could now be used as a basis for stopping development which would substantially impair that right, the issuance of a new FPC license for that site will prevent any such protection being derived from the Swan Falls water right.

CONCLUSION: The Idaho Power Company's water rights for its Swan Falls plant cannot be used to prevent consumptive uses from depleting the flow of the Snake River above Swan Falls.

IDAHO SUPREME COURT REPORTS

ISCR | A SERVICE OF JAG CORPORATION • STAR ROUTE • GARDEN VALLEY, IDAHO 83622

Vol. 82, No. 95

SUPREME COURT OPINIONS
No. 13794

IDAHO POWER COMPANY,
Plaintiff-Appellant-Cross-Respondent
v.

THE STATE OF IDAHO, acting by and through the DEPARTMENT OF WATER RESOURCES, the IDAHO WATER RESOURCE BOARD, and its Executive Director, C. Stephen Allred, in his official capacity,
Defendants-Respondents-Cross-Respondents,

and

THE STATE OF IDAHO, acting by and through the IDAHO PUBLIC UTILITIES COMMISSION, and Commissioners, Robert Lenaghen, Conley Ward, and Ralph Wickberg in their official capacities; and Matthew Mullaney, John Peavey, Charles Hisaw, Diane Plastino, Jeff Fereday, Billie Thompson, L.N. "Bud" Purdy, John Falkner, Bill Arkoosh, Eslie Heinz, Harold Ingram, Ralph Ingram, Harold Huyser, Mary Mech, Gerald Tews, John Bryngelson, Clive Schell,
Defendants-Respondents-Cross-Appellants-Cross-Respondents,

and

David Mickelson, A. W. Molyneaux, Morgan & Shillington, a partnership,
Defendants-Respondents-Cross-Respondents,
and

Fred Tiede, Gary Tiede, Otto Tiede, James Tiede, Ferdinand Gehring, Melvin Funk, Sid Allen, Jim Pahl, Lenard Schritter, Alfred Fothergill, Marcia Pursley and J.W. Swan, as Complainants in P.U.C. Complaint, Case No. U-1006-124,
Defendants-Respondents, Cross-Respondents-Cross-Appellants,

Boise, December 1981 Term

Filed: November 19, 1982

Frederick C. Lyon, Clerk

and)
)
Murphy Water Company, Crane Falls)
Mutual Irrigation Co.,)
Defendants-Respondents-Cross-Respondents,)
)
and)
)
Nelda E. McAndrew,)
Defendant-Respondent-Cross-Appellant-)
Cross-Respondent,)
and)
)
Pilgram Irrigation Company and)
Enterprise Acres,)
Defendants-Respondents-Cross-Respondents,)
and)
)
Upper Grand View Canal Company,)
Defendant-Respondent-Cross-Respondent,)
and)
)
Martin K. Slane, and Mountain View Irrigation)
Company, INc., aka Yahoo Company, Inc.,)
Ronald H. Warrick,)
Defendants-Respondents-Cross-Respondents,)
and)
)
Cottonwood Canal Company,)
Defendant-Respondent-Cross-Appellant,)
and)
)
John Doe, and the State of Idaho, acting by and)
through the Department of Fish & Game, acting)
through its Executive Director Joseph Greenley,)
in his official capacity; John Peavey, Picabo)
Livestock, Inc., Faulkner Land & Livestock,)
Bill Arkoosh, Ralph Ingram, Harold Huyser,)
Mickelsen Farms, Inc., A. W. Molyneux, Morgan &)
Shillington Farm Co., a partnership, Fred Tiede,)
Otto Tiede, Melvin Funk, Jim Pahl, and Lenard)
Schritter,)
Defendants-Respondents-Cross-Respondents,)
and)
)
Mud Flat Canal Company,)
Defendant-Respondent-Cross-Appellant-)
Cross-Respondent.)

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County, The Honorable Jesse R. Walters, District Judge.

Cross-appeals from a grant of partial summary judgment on cross-motions constituting a final judgment. Affirmed in part and reversed in part.

Thomas G. Nelson, of Nelson, Rosholt, Robertson, Tolman & Tucker, Twin Falls, for appellant Idaho Power Company.

David H. Leroy, Attorney General, Josephine P. Beeman, Deputy Attorney General, and Howard Carsman, Deputy Attorney General, Boise, for C. Stephen Allred, et al.

Phillip Barber, Boise, for Water Resource Board.

David H. Leroy, Attorney General, and Michael S. Gilmore, Deputy Attorney General, Boise, for Idaho Public Utilities Commission.

Jeffrey R. Christensen, of Anderson, Kaufman, Ringert & Clark, Boise, for Mud Flat Canal Company, Cottonwood Canal Company, Nelda E. McAndrew, and Upper Grand View Canal Company.

Matthew J. Mullaney, Jr., Boise, for Paragraph XX defendants and Pro Se.

Ben Cavaness, American Falls, for Picabo Livestock.

Severt Swenson, Jr., Gooding, for Faulkner Land & Livestock.

Larry R. Duff, of Goodman, Duff & Chisholm, Rupert, for Morgan Shillington Farm Company.

David H. Leroy, Attorney General, and John Vehlow, Deputy Attorney General, Boise, for Idaho Department of Fish & Game.

Lloyd J. Walker, Twin Falls, for Pilgrim Irrigation Co. and Mountain View Irrigation Company, Yahoo Company, Inc.

Jack Murphy, Shoshone.

Fred Stewart, Pro Se.

SHEPARD, J.

This case involves a series of appeals from an order of the district court which granted certain motions for summary judgment, disposed of all the issues raised, and constituted a final judgment. Narrowly stated, the case involves the validity of Idaho Power's water rights at its Swan Falls Power plant on the Snake River, and the case arose when Idaho Power brought the action seeking a determination of the validity of those water rights, and that they were not subject to future upstream depletion. More broadly stated, the case involves conflicting claims to utilization of the waters of the Snake River between competing interests of power generation and agricultural irrigation. The issues involved here are of large significance to the majority of the people of the state. We affirm in part and reverse in part.

The Snake River system rises in the easternmost part of Idaho and the adjoining area and flows westward across the entire breadth of the state. Thereafter it turns northward, forming Idaho's western border, and ultimately falls into the Columbia River, of which it is a principal tributary. Hence, the Snake River and its use has exercised and will continue in the future to exercise an enormous influence over a very substantial portion of Idaho and its people.

The roots of this litigation stretch back to the early days of the state and the background must be set out in some considerable detail. The Trade Dollar Consolidated Mining Company constructed the first hydroelectric dam on the Snake River at the Swan Falls site in 1901. It originally provided power to the mines of the Silver City area, which service was later shifted to the towns which lay to the north. At that time there were a number of small scale companies supplying electric power in that region, and eventually five of those companies came to dominate the electric power supply market for southern Idaho. In 1915 those five companies merged to form Idaho Power Company, and in the merger Idaho Power acquired the Swan Falls dam and powerplant, as well as others which had been built in the interim. See R. Sessions, Idaho Power Co., 43-54 (1939).

Idaho Power had secured a federal court decree which, together with state water licenses, granted Idaho Power water rights at Swan Falls of 9450 cfs with priority dates ranging from 1900 to 1919. However, it is undisputed that the Swan Falls power plant's hydroelectric capacity is 8400 cfs, and therefore the water rights at Swan Falls are limited to 8400 cfs.

Congress, in 1890, had passed legislation prohibiting construction of obstructions to navigation without the approval of the Secretary of War. 26 Stat. 454 (1890). That legislation was superseded by a provision of the 1899 Rivers and Harbors Act which, in part, made it unlawful to build dams on navigable rivers without the consent of Congress and approval of the plans by the Corps of Engineers and Secretary of the Army. 33 U.S.C. § 401. In 1920 Congress enacted the Federal Water Power Act, now known as the Federal Power Act, 16 U.S.C. §§ 791-828, and thereafter created the Federal Power Commission (FPC) to administer the Act. One of the stated purposes of the FPC was, in conjunction with the Corps of Engineers, to issue licenses for construction and operation of dams and other hydroelectric projects. 16 U.S.C. § 797(e). It does not appear from the record before us that such a license was obtained for Swan Falls until an operating license was granted in 1928. That license by its terms expired in 1970, but annual renewals have kept it in force. The record here reflects only that Idaho Power's application for a new license for Swan Falls is presently pending before the FERC.[1]

Thereafter, in the last 1920s and the 1930s, new dams and improvements on existing facilities were constructed on the Snake River. Following the Second World War, Idaho Power undertook a massive dam building campaign, and between

1) The functions of the FPC were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) within the Department of Energy, by the Act creating the Department of Energy in 1977. 42 U.S.C. §§ 7151, 7171, 7172(a)(1)(A) and 7172(a)(2)(A). This appeal involves action taken by the FPC long before the creation of the Department of Energy; therefore, this opinion will refer throughout to the FPC. To the extent that we discuss the power of the FPC under the Federal Power Act, it follows that such discussion applies to its modern counterpart, the FERC.

1948 and 1952 five additional dams (Upper and Lower Malad, Lower Salmon Falls, Bliss, and C.J. Strike) were constructed on the central portion of the Snake River. See G. Young & F. Cochrane, Hydro Era: The Story of Idaho Power Company, 46-53 (1978).

With the completion of the C.J. Strike dam in 1952, it became apparent that the Snake River was no longer inexhaustible and concerns began to be expressed as to the usage of the remaining finite flow of the river. Reflective perhaps of those concerns were provisions that began to be placed in FPC licenses and in state water licenses, known as "subordination" clauses. Therein water rights of power companies did not contain the customary total priority of right but, rather, would be inferior to future upstream depletion. The validity and scope of those subordination clauses have become the principal issues of this appeal.

The license obtained by Idaho Power in 1928 for operation of the Swan Falls dams and generating facility which was granted by the FPC contained a provision forbidding Idaho Power from objecting to use of water by others, "provided such use will not materially reduce the amount of power produced." The Idaho Power license granted by the FPC for the Twin Falls dam (1934) provided that its water rights were subordinate to present and future irrigation uses, except that Idaho Power could use its water stored at the American Falls reservoir some distance upriver and any water entering the river below Milner dam (approximately half way between Twin Falls dam and American Falls dam), but stated that the license affected water rights at no other point. Of the other licenses granted Idaho Power for dam construction prior to 1952 which appear in the record here, neither FPC project licenses nor state water licenses appear to contain any subordination language.

The FPC license granted Idaho Power in 1928 for operation of the Swan Falls project also provided that the licensee "will, during the period covered by this license, retain possession of all project property . . . including . . . water rights; and that none of such properties valuable and serviceable to the project . . . will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission." That provision appears to have become a standard form attached to later FPC licenses and appears in the record relating to the licenses for several other dams.

When Idaho Power sought a license for the C.J. Strike project, a subordination clause was sought to be inserted in that license. Idaho Power resisted such efforts for the insertion of the subordination clause in the C.J. Strike license. At that time the federal government had plans for the building of upstream irrigation-diversion projects and the then secretary of interior, in light of those plans, sought some form of protection guaranteeing the availability of water for future upstream irrigation. A compromise was reached and in the 1951 license for C.J. Strike dam, provisions were inserted giving the federal government a choice of paying damages or acquiring the C.J. Strike project if federal irrigation projects caused a reduction of power output. We pause to note that, as will later be developed, perfection of water rights depends not only on FPC licenses, but also upon granting of state water licenses. Such state water licenses are not granted until the completion of the project. In 1951, the C.J. Strike project had not been completed, and hence its accompanying state water license application was

still pending.

Meanwhile, Len Jordan had been elected governor of Idaho, taking office in 1951, and a major controversy was under way between the federal government and Idaho Power regarding the development of the Hells Canyon stretch of the Snake River (lying northerly along a portion of the western boundary of Idaho). Jordan sought to apply pressure to Idaho Power by insisting upon subordination clauses being inserted in the licenses for the proposed Hells Canyon project.

Faced with Jordan's attitude, which was reflected by his administrative department charged with issuing state water right licenses, Idaho Power agreed to subordinate their state water right license at C.J. Strike to future upstream depletion. That water license was issued in 1953 and contained the first unrestricted subordination language on record.

As to the Hells Canyon stretch of the Snake River, two competing proposals had been put forward. One, a single massive structure to be known as High Hells Canyon project, was to be constructed and operated by the federal government. The second was the proposal of Idaho Power to build three smaller dams on the same portion of the river. Legislation authorizing the federal project was introduced in Congress and contained a subordination clause, but attached certain conditions giving the federal government limited control over the reasonableness of future upstream depletions. Hells Canyon Dam: Hearings on H.R. 5743, Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess. 510 (1952) (statement of Rep. Engle).

To obtain the influence of Jordan and the irrigators, then as now a powerful political force in the state, for its Hells Canyon three-dam project, Idaho Power proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition. That distinction between the two projects appears to be one of the major factors in gaining Jordan's support for Idaho Power's proposal. Id. at 501 (statement of Gov. Jordan). By the time of the senate hearings on the Hells Canyon project in 1955, Robert E. Smylie was governor of Idaho. Smylie also reiterated the state's interest in full unconditional subordination of Idaho Power's water rights in Hells Canyon project to future upstream diversion. Hells Canyon Project: Hearings on S. 1333 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong. 1st Sess., 6 (1955) (statement of Gov. Smylie).

Idaho Power asserts that its economic survival was dependent upon the Hells Canyon project and that it thus agreed to subordinate its water rights at Hells Canyon in return for the support of state government and the agricultural irrigators. While such might be regarded as an overstatement, nevertheless, the Hells Canyon dams remain today one of the more important parts of Idaho Power's rate base. Another factor, although unarticulated, may well be that a single high federal dam would have been administered by the Bonneville Power Administration, and historically, Idaho Power has actively opposed efforts to extend Bonneville Power's authority into this portion of the Northwest. See G. Young & F. Cochrane, Hydro Era: The History of Idaho Power Co., 64 (1978); Idaho Evening Statesman, May 30, 1963, p.8 (full page advertisement by Idaho Power).

At the time of the pendency of congressional action authorizing the federal High Hells Canyon project, Idaho Power had initiated and was engaged in proceedings before the FPC to obtain a license for its three-dam project. In 1955 the FPC issued a single license to Idaho Power for the construction of three dams (Low Hells Canyon, Oxbow and Brownlee), stating that the dams should be treated for the purposes of that license as "one complete project." Consistent with the request of Idaho Power, that license contained a subordination provision with no conditions attached. In another portion of the Hells Canyon license, minimum flows were required at specified points on that reach of the river in accordance with the federal governments' navigational servitude. (Hells Canyon Project FPC license, Article 43). The FPC order granting the license to Idaho Power was appealed by proponents of the federal High Hells Canyon dam to the D.C. Circuit of the United States Court of Appeals. That Court held that the FPC was not required to approve a potential federal project over an available private project and that the FPC was not required to measure a federal project it had just rejected against the remaining private project to determine which of the two was the "best adapted" plan for developing the waterway. National Hells Canyon Ass'n v. Federal Power Comm'n, 237 F.2d 777 (D.C. Cir. 1956), cert. denied, 353 U.S. 924 (1957). The subordination clause, its validity or scope, was neither challenged nor considered on that appeal.

Following construction of Idaho Power's three Hells Canyon dams, state water licenses were issued. Seven of those licenses appear in the record here. One is a storage right measured in acre-feet, and the six others are flow rights measured in cubic feet per second (cfs). Two of those licenses contain subordination clauses identical to that in the FPC license, i.e. one granted for Brownlee in 1964 for a flow of 10,000 cfs with a priority date of 1965, and the second granted at the same time for Oxbow for a flow of 14,000 cfs with a priority date of 1964. The other four licenses for water flow rights, one each for Oxbow and Brownlee and two for Low Hells Canyon, are silent upon the subject of subordination.

Thereafter in the 1960s other projects continued to be proposed for the Snake River in the area of Hells Canyon. A utility consortium obtained an FPC license for a proposed High Mountain Sheep dam one mile below the confluence of the Salmon and Snake Rivers. That license was overturned by the U.S. Supreme Court on the grounds that the FPC had failed to consider a proposed federal project for the site and failed to fully consider the "recreational purposes" served by the river, including the conservation of anadromous fish. Udall v. Federal Power Comm'n, 387 U.S. 428 (1967). That dam was not and has not been built. During the late 1960s, a congressional moratorium was placed on dam building in Hells Canyon. Subsequently Congress placed Hells Canyon downstream from Low Hells Canyon Dam within the Wild and Scenic Rivers system, thereby effectively forclosing any further hydroelectric development on that stretch of the Snake River. 16 U.S.C. §§ 1274(12), 1273(b)(1), 1273(b)(2).

During the same period of time in the 1960s, the state of Idaho negotiated with Idaho Power over a proposed dam known as the Guffey project. It was to be built downstream from Swan Falls and would be substantially higher than the Swan Falls dam. Such a joint venture was authorized by the legislature, 1971 Idaho SEss. Laws, Ch. 265, p. 1064. See generally Idaho Water Resource Board v. Kramer, 97 Idaho 535 (1976). Such a joint venture

contract was entered into in 1972, amended in 1974 and again in 1976. That project was abandoned in 1979 following the withdrawal of the Snake River Birds of Prey area in 1971, its expansion in 1975, and an environmental impact statement released in 1978, indicating major environmental difficulties with the proposed project.

The legislature enacted a comprehensive water resources policy in 1978 establishing minimum stream flows on the Snake River. I.C. § 42-1736A. That statute established minimum flows of 5000 cfs at Johnson's Bar, 4750 cfs at Weiser, and 3300 cfs at Murphy (just downstream from the Swan Falls dam). Those minimum flows were set aside as beneficial uses.

The cessation of construction of hydroelectric facilities on the Snake River, the scrapping of plans for coal-fired power plants, oil embargoes and escalating costs and opposition to nuclear generation plants, all coupled with a continuing demand for energy, have been the cause of large concern and have inevitably focused attention on the existing hydroelectric plants.

The genesis of the instant litigation was a complaint filed with the Idaho Public Utilities Commission by one Matthew Mullaney on behalf of himself and other ratepayers alleging that Idaho Power had failed to protect and preserve its Swan Falls water rights and that, by so doing, Idaho Power had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers. Idaho Power sought to have that complaint dismissed for lack of jurisdiction. Idaho Power's motion to dismiss was denied, and Idaho Power answered the complaint indicating it would file an action in district court to protect those Swan Falls water rights. A large number of applications for water permits were then pending before the Idaho Department of Water Resources and Idaho Power filed protests against a large number of those applications. In the interim, and pending the outcome of this case, the Public Utilities Commission has retained jurisdiction over the Matthew Mullaney complaint.

Idaho Power's action in the district court named as defendants the Public Utilities Commission, the Department of Water Resources, numerous canal and irrigation companies, and individuals involved with irrigation, together with the ratepayers who brought the complaint before the Public Utilities Commission. Therein Idaho Power sought a decree that its Swan Falls rights were not subject to upstream depletion and that the state water plan was a taking of those rights. Idaho Power also sought to have the court identify those areas where its water rights were protected. The Department of Water Resources answered Idaho Power's complaint, claiming that the State Constitution allows the state to limit hydropower rights and that Idaho Power had lost those rights by adverse possession, forfeiture, and abandonment. Grandview Canal Co. in its answer added laches and subordination in the Hells Canyon and Strike licenses as affirmative defenses, and Nelda McAndrew added waiver and quasi-estoppel to the list of affirmative defenses. The Public Utilities Commission in its answer claimed primary jurisdiction and raised the questions of applicability of I.C. Title 61. The Public Utilities Commission also sought to obtain declaratory relief. All parties then filed motions and cross motions for summary

judgment based in part or in whole upon their respective theories of the case.

As a preliminary matter, the district court determined that Idaho Power's Swan Falls water rights held priority dates from 1907 to 1930 rather than 1900 to 1919. That portion of the order is not an issue of this appeal, and we express no view as to whether those priority dates were correctly determined by the district court.

The district court next held that Article 41 of the Hells Canyon Project's FPC license, subordinating Idaho Power's water rights, was a lawful exercise of power by the FPC. In that part of the decision the district court relied upon the FPC's power to implement a comprehensive development of navigable waters, its authority to impose conditions on licensees, the state legislature's recognition of desirability of subordination clauses in the enabling legislation for the now defunct Guffey joint project, and a U.S. Supreme Court case recognizing use of water for irrigation as being a public use. In so upholding the validity of Article 41, the district court held it was not necessary to reach a number of related issues: (1) Whether the licenses can be collaterally attacked; (2) whether the Public Utility Commission and the ratepayers are real parties in interest; (3) whether the Public Utility Commission and the ratepayers have standing to attack the validity of Article 41; and (4) whether the subordination was a transfer in violation of I.C. § 61-327.

The district court next held that the effect of the subordination language in Article 41 of the Hells Canyon license had subordinated all of Idaho Power's water rights used in hydropower production at all of its facilities on the entire Snake River watershed. In reaching that result the district court relied on federal preemption under the Federal Power Act. The court focused on language in Article 41 subordinating water rights at the Hells Canyon project to future upstream depletion "on the Snake River and its tributaries," from which the court reasoned that this meant the entire river upstream could be depleted, including any water rights at any other dam upstream from Hells Canyon. The court reasoned that since the entire river is one hydropower system, with Idaho Power operating its dams in a coordinated manner, such system could not be subordinated in bits and pieces.

As to the Public Utilities Commission's contention that Idaho Power had violated I.C. § 61-327 et seq., by the acceptance of the subordination language of Article 41 in its licenses, the court held that the Commission had no standing, or in the alternative was barred by estoppel, res judicata and laches. The court also held that Idaho Power's upstream rights were not "interests in property" and that the subordination language of Article 41 was not a transfer of property under I.C. § 61-327 et seq. It further held that if any such transfer did occur, it was forced upon Idaho Power by the federal government, and the power increase obtained by the acceptance of that subordination clause was so much in the public interest, it outweighed any violation of those sections.

As to Idaho Power's demand for compensation for loss of its Swan Falls

water rights, the district court held that Idaho Power had vaived whatever right it had to demand such compensation in accepting the licenses with the subordination provisions. The court reasoned that Idaho Power was barred from seeking damages since, although it had the right to compensation for its Swan Falls water rights, they had been bargained away in exchange for the FPC license.

The court held that the minimum flow requirement in the state water plan, I.C. § 42-1736A, was the exercise of a valid police power of the state to protect the public welfare.

Finally, the district court held that its decision subordinating the water rights of the entire system to all future upstream depletion had mooted the contention that Idaho Power had lost its water rights at Swan Falls by forfeiture, abandonment, adverse possession, equitable estoppel and customary preference.

This appeal and these cross-appeals were filed from the decision of the district court and the parties have stipulated to the existence of five broad issues as constituting the assignments of error:

I. THE SUBORDINATION CLAUSE

On appeal the first issue presented is the authority of the FPC to insert a subordination clause into the Hells Canyon project license. We affirm the district court and hold that the subordination clause is a valid condition which, within the circumstances of this case, fell within the power and authority of the FPC.

Section 10 of the Federal Power Act provides that FPC licenses "shall be" issued on the following pertinent conditions:

> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. § 803(a).

The ratepayers and the PUC argue that such statutory language confers onthe FPC the power to approve only conditions involving non-consumptive use to the end that water be retained in the river for commerce and hydropower. We disagree.

The Federal Power Act was passed by Congress in 1920, but it had its roots in the philosophies of Theodore Roosevelt's administration that the country's natural resources should be developed in an orderly manner and water resources should be developed by a single governmental agency responsible for coordinated planning of flood control, navigation, hydropower, irrigation, and waterway improvements. That philosophy was opposed by various forces including the Corps of Army Engineers, which then had existing jurisdiction over flood control and navigation, as well as those interests who wanted free use of the nation's waterways and resources. See S. Hays,

Conservation and the Gospel of Efficiency (1959); G. Pinchot, Breaking New Ground (1947). The sturggle between those opposing forces resulted in the passage of a compromise Federal Power Act, which did not provide for the single agency concept. Hays, supra. We deem it clear, however, that the Act delegated to the FPC the authority, in Section 10 thereof, to consider uses other than mere hydropower production. G. Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash L. Rev. 9 (1945).

It also appears clear from the legislative history of the Act, that the FPC was required to consider irrigation as one of the other uses in its determination of whether a project is "best adapted for a comprehensive plan" for the waterway. In the committee hearings, each appearing witness was questioned by Rep. Baker of California as to his belief on the question of whether the bill encompassed irrigation. Therein the Forest Service and administration spokesman, O.C. Merrill, indicated that the Administration intended that the Commission consider irrigation as part of the comprehensive plan.

> "Mr. MERRILL. [T]he commission . . . should make a thorough examination of the stream and prepare, as the bill provides, for a scheme of development that will utilize to the full the resources of that stream for every purpose.
>
> Mr. RAKER. That is just what I am asking about.
>
> Mr. MERRILL. Irrigation, water power, water supply, navigation, and whatever there may be; and it should have a plan drafted which would comprehend that, and then it should, in considering applications for license, approve the application of that applicant who will carry out to the best degree the plans prepared.
>
> * * *
>
> Mr. ESCH. So you get the utmost use, whether for irrigation or for power?
>
> Mr. MERRILL. And that is the intention, judge, that the plan for development that should be approved should take into consideration all uses that can be made of the water and of the site in that particular locality, as a unit.
>
> * * *
>
> Mr. MERRILL. In my judgment it is covered by the provisions of subparagraph (a) of section 10, as well as by the last part of section 7 in the preferences. Not only should the scheme of development be considered in relation to irrigation and to navigation and to water power, but also to flood control"

Hearings on Water Power Before the House Comm. on Water Power, 65th Cong. 2d Sess. 90-94 (1918).

See also the colloquy between the Secretary of the Interior and Rep. Raker and Rep. Hamilton.

> "[Mr RAKER.] Now I wanted to suggest and to ask you if you do not believe it would be a wise thing in this bill, and in this connection, after having designated navigation and water-

> power development, that we should make irrigation as important as we do those two and should include the word "irrigation" in that connection, so there would be no possible doubt as to what the intention of Congress was in such legislation; and in order that we may get two developments, water power and irrigation, to their utmost. I would like to ask if you do not think it would be a good thing to so draft the bill that we would be sure to get all those uses?
>
> Secretary LANE. I can not see now any objection to it, Judge. It seems to me in the granting of a power proposition you have got to take into consideration what is the best use to make of that water, and there should not be a development simply of power to the exclusion of irrigation.
>
> * * *
>
> Mr. HAMILTON. Is there any danger of irrigation being overlooked in that connection?
>
> Mr. RAKER. It is my purpose and I believe it is the duty of thecommittee to so get it before the committee that it could not be overlooked.
>
> Mr. HAMILTON. It can not be."

Id. at 455-56.

See also Congressman Raker's summation of the testimony before the committee:

> "I have suggested to add in there [Section 10] 'and irrigation, and of other beneficial public uses.' Now, I asked particularly Mr. Merrill and every man that had been on the stand in regard to this provision, and they all say unanimously that those words are intended to cover irrigation and all other matters that may be used in connection with the project. So therefore, if there is water-power development connected with it, navigation or irrigation, it applies."

Id. at 615-16. See W. Walker & W. Cox, Jurisdiction of the Federal Power Commission over Non-Power Water Uses, 5 Land & Water L. Rev. 65, 70-75 (1970).

The Public Utilities Commission and the ratepayers argue that the case law to this date has established that the FPC's authority to consider various factors has not included non-comsumptive uses. While many of the cases cited do direct the FPC to consider nonconsumptive uses such as recreation and fish conservation, e.g. Udall v. Federal Power Comm'n, 387 U.S. 428 (1967), we find that none of those cases state that such non-consumptive uses are the only ones that may be considered by the FPC. We cannot conceive that with agricultural irrigation being such a large factor in both federal and private development of the arid lands of the West, a federal agency developing a "comprehensive" plan would be precluded from considering the effect of irrigation. Indeed the United States Supreme Court, while recognizing that hydroelectric power was the principal use to be regulated by the Federal Power Act stated:

> "The central purpose of the Federal Water Power Act was to

> provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power--uses which, while unregulated, might well be contradictory rather than harmonious." (emphasis added)

Federal Power Comm'n v. Union Electric Co., 381 U.S. 90, 98 (1965). While that language might arguably be dicta, it supports the interpretation we have made of the legislative history and intent behind the Act. See also Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 408 (1975); Harris v. Central Nebraska Public Power & Irrigation Dist., 29 F.Supp. 425 (D. Neb. 1938).

Finally, we note that Section 10 of the Act specifically requires that "other beneficial public uses" be considered in the comprehensive plan. 16 U.S.C. § 803(a). At the time of the passage of the Act, the United States Supreme Court had long recognized that irrigation was a "public use", Clark v. Nash, 198 U.S. 361, 369-70 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160-61 (1896). See also, Id. Const. Art. 15, § 1 (providing in the original constitution, adopted in 1889, and continuing to the present, that irrigation is a public use). Hence we hold that the condition in the Hells Canyon license subordinating Idaho Power's water rights to future upstream depletion was within the authority of the FPC.

As indicated above, the trial court viewed the subordination language in Article 41 of the Hells Canyon licenses as subordinating all of Idaho Power's water rights on the entire Snake River watershed. We disagree and hold that the language of the subordination clause affects the operation of the three dams in the Hells Canyon project only and does not extend to the other dams on the river, and specifically does not subordinate the water rights of Idaho Power at Swan Falls.

The language of Article 41 provides:

> "The project shall be operated in such manner as will not conflict with the future depletion in flow of the waters of Snake River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the backwater created by the project, for the irrigation of lands and other beneficial consumptive uses in the Snake River waterhead. (sic)." (emphasis added).

The license states that the proposed Brownlee, Oxbow, and Low Hells Canyou dams "for the purposes of this license shall be considered as units of one complete project." FPC Order issuing license, August 9, 1955, at 10. We deem therefore that when Article 41 requires "the project" to be operated in such a manner that it will not interfere with future upstream depletion, it refers to Brownlee, Oxbow and Low Hells Canyon dams and demonstrates no intent that all of Idaho Power's dams on the river be considered as "the project" subject to subordination. Further, the opinion and order of the FPC issuing the Hells Canyon dams licenses contain no mention of the Swan Falls dam or the subordination of Idaho Power's water rights in that dam, and we find therefore no intent to subordinate water rights at other projects.

We have considered and reject the argument of the Department of Water Resources and canal companies that permitting Swan Falls to receive its full water right allocation somehow allows Idaho Power to utilize those rights at Hells Canyon in violation of Article 41 of the Hells Canyon FPC license.

Finally on this issue, we deem it questionable whether the FPC would have the authority to subordinate then-existing water rights, even assuming such had been the intent in the Hells Canyon licenses. Section 27 of the Federal Power Act, known as the "Savings Clause," provides that the Act does not intend to interferr with any vested right acquired under state water law. 16 U.S.C § 821. See Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930). Here Swan Falls water rights were vested, having been acquired in the early part of this century. C.f. Hidden Springs Trout Ranch v. Allred, 102 Idaho 623, 636 P.2d 745 (1981); Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45 (1927). We further note in this regard that Section 6 of the Federal Power Act states that licenses can be altered only after thirty days public notice. 16 U.S.C. § 799. Clearly Idaho Power possessed a valid license for the operation of Swan Falls. Nowhere in the record before us is there any indication that the public notices of the Federal Power Commission proclaim any intent to amend Idaho Power's Swan Falls license.

The district court, as noted above, held that Idaho Power had waived its right to compensation for its water rights at Swan Falls by accepting the subordination clause in the Hells Canyon license. Since we have concluded that Hells Canyon license subordination clause does not affect Swan Falls water rights, that portion of the district court decision is reversed.

II. THE SAVINGS CLAUSE

A number of subsidiary yet important issues have been raised which flow from the FPC licenses and in particular, the subordination clauses thereof. Those issues involve the interplay between state water law, the Federal Power act, and the provisions of the FPC licenses. The resolution of those issues focuses upon the "Savings Clause" of Section 27 of the Federal Power Act. Therein it is provided:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municiapl or other uses, or any vested right acquired therein."

16 U.S.C. § 821.

The ratepayers and the Public Utilities Commission assert that Section 27 "saves" all Idaho water law; that Idaho water law forbids subordination; and that therefore the subordination clause in the Hells Canyon license is in conflict with Idaho water law and ineffective. We disagree. No case

holding that subordination is prohibited by Idaho water law or the law of any state has been cited to us. Rather, the ratepayers and the Public Utilities Commission rely on Idaho's constitutional provision of priority in time being priority in right. Id. Const. Art. 15, § 3.

The record here makes it clear that Idaho Power voluntarily agreed to have the subordination clause inserted in the Hells Canyon licenses. We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, e.g. restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. We hold only that a voluntary subordination agreement is not in violation of Idaho's water law, and therefore we find no conflict between our state water law and the language of the subordination clause inserted in the Hells Canyon licenses.

The record indicates that of the six state water licenses for flow rights at the Hells Canyon project, only two of those licenses contain a subordination clause. Ratepayers and the Public Utilities Commission assert therefore that the four state water licenses not containing such clauses somehow control and override the federal subordination clause contained in the FPC licenses. Again we disagree. However, neither do we agree with the assertion of the canal companies that the state water licenses are preempted by the federal license.

Authorization from the FPC is a threshold step for constructing a dam on navigable waters. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); Citizens Utilities Co. v. Prouty, 176 A.2d 751 (Vt. 1961), cert. denied, 369 U.S. 838 (1962). The Federal Power Act does preempt some state laws relating to the building of dams on navigable streams and particularly does it preempt those state laws which require a state license as a predicate for building a dam. First Iowa Hydro-Electric Coop. v. Federal Power Comm'n., 328 U.S. 152 (1946); State v. Idaho Power Co., 312 P.2d 583 (Ore. 1957); City of Tacoma v. Taxpayers of Tacoma, 262 P.2d 215 (Wash. 1953). However, state law regarding proprietary rights in water is expressly saved. Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930); cf. California v. United States, 438 U.S. 645 (1978) (savings clause of Reclamation Act). Under Idaho law, a water license does not issue until after the diversion works are completed and the water is applied to a beneficial use, albeit an application for licensure can be made prior to actual construction. I.C. §§ 42-202 to 42-219; Big Wood Canal Co. v. Chapman, 45 Idaho 380, 405-06, 263 P. 45, 53-54 (1927). When the FPC licensed Idaho Power's Hells Canyon project, it was conditioned upon Idaho Power obtaining only such water rights as would not interfere with future upstream depletion. This insertion of that subordination clause in the FPC licenses had the consent, knowledge and support of Idaho's state officials. Hells Canyon Dam: Hearings On H.R. 5743 Before The Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 82d

Cong., 2d Sess. 501 (1952) (statement of Gov. Jordan); Hells Canyon Project: Hearings on S. 1333 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong., 1st Sess. 6 (1955) (statement of Gov. Smylie). There can be no doubt from this history that the officials of the State of Idaho intended and believed that Idaho Power's water rights at Hells Canyon were subordinated. No party asserts that the subordination language was omitted from some of the state water licenses because the state officials intended to override the federal subordination clause. Whether the subordination language was omitted from the state water licenses through administrative oversight or because the appropriate state officials felt its insertion unnecessary in light of the federal license language, we need not speculate. We hold only that when the FPC has authorized the obtention of only subordinated state water rights, and where, as here, the state and the licensee power company both intended the subordination of those water rights, failure to include a subordination clause in the state water licenses does not render those rights unsubordinated. Since we so hold, we need not reach the more delicate issues of federalism that might arise from an FPC authorization for one form of water rights at a licensed project, and the state, in the exercise of its authority, expressly authorizing a greater or lesser form of water right.

During proceedings below, various parties argued that Idaho Power had abandoned or forfeited all or part of its water rights at Swan Falls. The district court held that those issues were rended moot by its ruling that the subordination clause included the Swan Falls water rights. Since we have reversed that ruling of the district court, the cause must be remended for consideration of, and findings of fact and conclusions of law on, the issues of abandonment and forfeiture of Idaho Power's water rights at Swan Falls. Although we are urged to make such a determination, we deem those issues to involve factual determinations inappropriate to this Court.

The elements of abandonment and forfeiture are set out in several recent decisions of this Court and need not be reiterated here. Jenkins v. State Department of Water Resources, ____ Idaho ____, ____ P.2d ____ (No. 13705) (1982); Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

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It is also argued that the issues of abandonment and forfeiture are preempted by Article 21 of the FPC license issued for the operation of Swan Falls. That provision states:

> "Article 21. It is hereby understood and agreed that the Licensee, its ~~(his)~~ successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission." (emphasis added)

In Idaho, "[i]f a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. [citations omitted]. . Other parties may then perfect a water right in those waters." Jenkins v. State Department of Water Resources, supra (slip. op. at 6) (1982). Under Section 27 of the Federal Power Act, 16 U.S.C. § 821, all state water law is preserved "relating to the control appropriation, use, or distribution of water." Idaho's state water law, allowing subsequent appropriators to perfect a water right in water that has been abandoned or forfeited clearly relates to the control, appropriation, use or distribution of water. Hence, we deem it follows that neither the Federal Power Act nor a license issued pursuant to that authority has overridden Idaho's law of abandonment or forfeiture of water rights. Cf. California v. United States, 438 U.S. 645 (1978). To what extent, if any, the Article 21 "retain possession" language may create a cause of action against the licensee or others, the complex questions of plaintiff's standing and other questions are not substantially presented here, and we doubt the authority of any state forum to adjudicate such an action.

III. EFFECT OF I.C. §§ 61-327 to 61-331

The PUC asserts that if Idaho Power has subordinated water rights used in the generation of electricity, it has violated I.C. §§ 61-327 and 61-328. I.C. § 61-327 provides generally that property in this state used in the generation or transmission of electricity shall not be transferred in any manner to out-of-state organizations, governmental entities, or any entity not subject to regulation by the PUC. I.C. § 61-328 provides that any transfer of such property must be approved by the PUC after public hearings. I.C. § 61-329 states that property transferred in violation of those sections shall escheat to the state and the attorney general must institute court proceedings to adjudicate such an escheat, and I.C. § 61-331 sets forth criminal penalties for violation of the preceding sections. The Public Utilities Commission concedes that if the Hells Canyon water rights were subordinated at the time of acquisition, the above statutes would not apply. Here we have held that Idaho Power acquired only subordinated water rights at the Hells Canyon complex, therefore, there has been no transfer, and those statutes do not apply. We have held that the Swan Falls water rights were not subordinated, but we have also held that the cause must be remanded for consideration of whether Idaho Power has abandoned or forfeited any of its water rights at Swan Falls. Since the argument of the Public Utilities Commission can be applied to the question of abandonment and forfeiture, we turn to the consideration of the applicability of those statutes to abandonment or forfeiture of a water right. See I.C. § 1-205; Tibbs v. City of Sandpoint, 100 Idaho 667, 670; 603 P.2d 1001 (1979); County of Bingham v. Woodin, 6 Idaho 284, 289, 55 P.662 (1898).

While we agree that the language of the statute I.C. § 61-327 to 61-331 is very broad in forbidding any transfer "directly or indirectly, in any manner whatsoever" (I.C. § 61-328), nevertheless, we hold they are inapplicable to abandonment or forfeiture of a water right. If those sections were applied to abandonment or forfeiture of a water right used to generate electricity, the attorney general would be required to file an action to have such an escheat decreed, and thereafter there would be a

court ordered sale of the property. Such a scheme is totally inconsistent with Idaho water law, which provides that if a water right is abandoned or forfeited it reverts to the state, following which third parties may perfect an interest therein. I.C. § 420222(2); Jenkins v. State Department of Water Resources, ____ Idaho ____, ____P.2d ____, (No. 13705) (1982); Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976). Absent a clear legislative mandate, we will not infer such an intent from a provision of a statute relating to Public Utility Regulation.

IV. THE STATE WATER PLAN

It is next argued by Idaho Power that the State Water Plan effectuates a taking of its Swan Falls water rights without payment of just compensation. That assertion was rejected by the trial court, and we agree with that court's conclusion. The State Water Plan was enacted by the legislature in 1978 and codified at *.C. § 42-1736A (1982 Supp.). That plan established as a beneficial use minimum stream flows at various points along the Snake River. A flow of 3300 cfs on the Snake River at the Murphy gaging station was established. I.C. § 42-1736A(2). The Murphy gage is just downstream from the Swan Falls dam and power plant. Idaho Power argues that the river may thereby be depleted to 3300 cfs at the Murphy gage in derogation of its water rights of 8400 cfs at Swan Falls.

We hold that the State Water Plan does not mandate a taking of Swan Falls water rights. There is no requirement contained therein that the Snake River be depleted to 3300 cfs at Swan Falls, but rather the plan only prohibits a reduction below 3300 cfs. To that extent, if anything, it protects the Swan Falls rights to the extent of 3300 cfs. I.C. § 4201736A recognizes House Concurrent Resolution No. 48 (44th Leg., 2d Sess. 1978) as the guide for the interpretation for the state water plan. Policy No. 1 of that Resolution requires the protection of all existing water rights vested under state law. Since we have held that Idaho Power's water rights at Swan Falls are vested, the State Water Plan is not to be construed as affecting those water rights.

V. CONCLUSION

In summary, we hold that the Federal Power Commission lawfully acted within its authority in issuing the license for Hells Canyon project by the insertion of the subordination clause therein and such subordination clause is a valid condition of the license. However, we hold that that subordination clause applies only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver. We hold that by accepting the subordination clause for the Hells Canyon project, Idaho Power has not waived its compensation for any taking of its Swan Falls water rights. Having differed in the latter two conclusions from the decision of the district court, we must remand this cause for further proceedings on the issues of abandonment and forfeiture, since those matters were raised below and not there decided. With respect to the statutes requiring Public Utilities Commission approval of transfers of utility property, we hold

that the statutes do not apply to water rights subordinated when acquired, nor do they apply to water rights which have been abandoned or forfeited. Finally, we hold that the State Water Plan does not take Idaho Power's water rights at Swan Falls without payment of compensation. We have not specifically dealt with a number of arguments raised by the parties which we deem to have been subsumed by our discussion of the issues, and therefore, we intimate no views on the validity of those arguments.

The judgment of the district court is affirmed in part, reversed in part, and remanded. Each party to bear its own costs.

BAKES, C.J., McFADDEN, BISTLINE and DONALDSON, JJ., concur.

(McFADDEN, J., registered his vote prior to his retirement on August 31, 1982.)

March 13, 2006
EXHIBIT 8

JOHN V. EVANS
GOVERNOR

OFFICE OF THE GOVERNOR
STATE CAPITOL
BOISE 83720

JANUARY 10, 1984

NEWS RELEASE

BOISE -- Governor Evans said today he has received eight recommendations from the Task Force he appointed last summer to examine the Swan Falls water rights issue.

The recommendations are as follows:

1. The state should move forward expeditiously with case 13794 and reach the earliest determination. Unanimous.

1.a. The Governor should do everything possible to see that there are additional appropriations of sufficient size to carry forward with legal and technical expertise to litigate case 13794. This should include the A.G. and IDWR. Unanimous.

2. The Governor should do everything possible to support data collection and research; to include collection of data and to determine the relationship between ground and surface water above Swan Falls. (Note: the rationale for this recommendation is that data is needed for both long and short term management decisions relative to this important resource.) Unanimous.

3. The Governor should support an adjudication of Snake River with water user fees to support funding of this

effort (e.g. the resolution passed by the Water Users Association on a water use fee). Unanimous.

4. The Governor should ask the Water Resources Board in cooperation with the Legislature, to undertake a comprehensive review of existing water legislation with the objective of protecting existing uses, encouraging wise use and conservation of water in anticipation of possible future limitations on available water. Unanimous.
5. The Governor should retain subordination as a viable option - (i.e., hydro power to upstream uses). 3-1, Scott Reed voted no.
6. The Governor should consider asking the Legislature to consider a moratorium to protect existing water users and practices and farm loan relationships, pending final determination of Swan Falls cases. Unanimous. (Note: The moratorium refers to legislative action that would ensure that the Swan Falls issue is not used to deny the renewal or issuance of loans.)
7. The Governor should not sign the contract. Unanimous.
8. The Governor should support the repeal of S.B. 1180. Unanimous.

Evans said he was pleased with the work of the Task Force and he accepted their recommendations.

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AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.

C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.

C. Establishment of an effective water marketing system.

D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.

E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.

F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.

G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs),02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains ts rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).

ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.

iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.

D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;

ii. Enactment of the legislative program outlined in paragraph 6;

iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;

iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);

v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;

vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this ____ day of _____, 1984.

STATE OF IDAHO

By: _____
JOHN V. EVANS
Governor of the
State of Idaho

By: _____
JIM JONES
Attorney General of the
State of Idaho

IDAHO POWER COMPANY

By: _____
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

ATTEST:

(Seal of the State of Idaho)

PETE T. CENARRUSA
Secretary of State

ATTEST:

(Corporate Seal of Idaho
Power Company)

Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this _____ day of _____, 1984.

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and

2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and

3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this _____ day of _____, 1984.

_____
PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this _____ day of _____, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
NOTARY PUBLIC FOR IDAHO
Residing at _____

STATE OF IDAHO)
) ss.
County of Ada)

On this _____ day of _____, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
NOTARY PUBLIC FOR IDAHO
Residing at _____

March 13, 2006
EXHIBIT 10

The Idaho Statesman

The Valley

Evans, Jones, Idaho Power sign Swan F

RON ZELLAR
Idaho Statesman

Idaho Power Co. and state officials approved a detailed proposal Thursday to settle the Snake River water rights dispute. The action came less than a week after one of the signers, Attorney General Jim Jones, said he might withdraw his support for the agreement.

Jones, Gov. John Evans and Idaho Power Board Chairman James Bruce signed the proposed settlement Thursday morning.

The 32-page document contains four pieces of legislation that are needed to carry out the settlement. Other provisions also must be approved by the state Water Resources Board, the Idaho Public Utilities Commission and the Federal Energy Regulatory Commission.

Evans said he presented information about the proposed settlement to legislative leaders on both sides of the long-standing water rights dispute. He said he is confident it will be approved.

"Most of the principal water rights leaders are on board," he said. "I've had an advisory committee of some of the finest water attorneys in the state counseling me ... right up until last night."

The key to securing Jones' participation in the agreement was a suggestion by Rexburg attorney Ray Rigby that the water rights Idaho Power will give up in the agreement be held in trust by the state until decisions are made on how to use the water, participants said.

At a news conference Thursday, Jones said he rejected an earlier proposal that would have allowed Idaho Power to maintain control of the water until the state issued permits for its use. That, he said, would have given the utility the upper hand in opposing the applications.

Idaho Power objected to Jones' proposal that the company give up its water rights when the agreement was signed.

Idaho Power spokesman Jim Taney said giving up the utility's water rights immediately might have allowed developers to push through water permit applications before the state cou[...] write laws giving equal con[...] tion to power and irrigation [...]

Jones said the state's e[...] authority could have pre[...] that, but he added that the [...] promise "strikes that nec[...] balance between upstream [...] opment and protection of t[...] dropower base."

Under the plan, the mi[...] stream flow on the Snake [...] downstream from Swan [...] Dam would be raised fron[...] cubic feet per second to 3,[...] in the summer. Summer

Swan Falls

Continued from Page 1C

holdings was to have gone to trial in 4th District Court later this year or next.

Legislative leaders said Thursday that they are optimistic the plan can be carried out.

Sen. John Peavey, D-Carey, said the Legislature should be able to "flesh out" the agreement to the satisfaction of both sides in the water-rights dispute.

Sen. Laird Noh, R-Kimberly, chairman of the Senate Resources and [...]vation Committee, said he supported the agreement. But Noh stopped short of predicting easy passage of the legislation."

He said interest groups undoubtedly would press for changes.

Noting that several legislative races in the Nov. 6 elections involve differences among candidates on the water-rights issue, Noh said, "We can't just assume it's all done. It's just as important for people to look at how they cast their votes in the election."

Evans, Jones and Bruce will include a statement of principle with the proposed legislation, tel[...]ing lawmakers that the agre[...]ment was negotiated as a pac[...]age and urging no changes, sa[...] Pat Costello, an attorney who re[...]resented the governor in the n[...]gotiations.

In a related matter, Eva[...] signed a contract with Ida[...] Power to limit Public Utilitie[...] Commission authority over Ida[...] Power's water rights. In e[...]change, Idaho Power agreed [...] drop 3,000 water-rights perm[...] holders from the water-rights li[...]gation.

170 Ray Rigby

March 13, 2006
EXHIBIT 11

Jones Explains Reversal on

BOISE (AP) — The attorney general says he restored his endorsement of a landmark water-rights agreement after the amount of control it granted Idaho Power Co. was revised.

Attorney General Jim Jones on Thursday added his signature to those of Gov. John Evans and Idaho Power President James Bruce on an agreement intended to settle the controversy over appropriation of Snake River water.

The longstanding dispute surrounded use of water for the competing needs of hydropower producers, irrigators and other users.

Thursday night, at a Twin Falls hearing on the new pact, officials said the agreement won't go into effect unless the Idaho Legislature and the Water Resources Board approve a six-step legal package.

The agreement places unappropriated Snake River water in a state-controlled trust. Jones said the plan likely is the century's "most significant water decision" in the state.

Just days earlier, he had abruptly dropped his support for a water-agreement framework drawn up between the state and Idaho Power Co., the state's largest utility.

But Jones said the new trust provision "turned the agreement around," and caused him to restore his support.

"The whole difference in making the agreement acceptable is who owns the water above the minimum streamflow," Jones said.

The agreement calls for Idaho Power to have the use of unappropriated water until it is parceled out to developers who prove their proposals are in the public interest. An earlier plan would gradually have subordinated Idaho Power's claim to water.

Idaho Power's opponents during the months of controversy have said the company's claim to water would cut off future agricultural development in the southern part of the

IDAHO NEWS BRIEFS

Teachers' Association Condemns T.F. Action

IDAHO FALLS (AP) — Closure of Twin Falls schools is the type of action a fledgling teachers' association was formed to fight, says the group's spokeswoman.

"When teachers become more concerned with (a) union's bargaining power, they forget what they are paid for — to teach," Diana Robertson of Independent Educators of Idaho said in a news release.

In announcing formation of her group during the summer, the Idaho Falls teacher said Independent Educators of Idaho would be an alternative to the "trade-union mentality" of the Idaho Education Association.

The IEA is the negotiating organization for teachers around the state, including Twin Falls, where schools were closed for three days because of deadlocked contract talks.

The unscheduled vacation for 6,500 students ended when classes resumed on Wednesday. Teachers staged a walkout on Friday, and school officials continued the closure on Monday and Tuesday on grounds there were no assurances teachers would stay on the job.

Ms. Robertson said Independent Educators of Idaho operates "to see that children are not used as pawns" at the bargaining table.

Forensic Anthropologist to Get Skeleton

LEWISTON (AP) — A skeleton found last month near Powell will be sent to a forensic anthropologist in an attempt to find clues to the identity of the remains, Idaho County Coroner Kathleen Gibbs has said.

She said she hopes Dr. Marvin Hegler of San Francisco will be able to determine the age and other factors that might help investigators identify the remains, believed to be those of a man.

"It just might give the sheriff's office something more to go on, because we're at a dead end," she said.

Hegler last year helped identify the bodies of U.S. Marine Capt. Robert Bravence and his wife, Cheryl; the two were killed in Idaho County in the summer of 1983 and their bodies found three months later.

Kellogg Goes into Ski Resort Business

KELLOGG, Idaho (AP) — The Kellogg City Council has formally gone into the ski resort business by adopting an addition to its budget to operate the Silverhorn Ski Area.

The city will lease the resort for $1 a year under a tentative agreement between the city and Bunker Limited Partnership, which owns the ski hill.

Bunker Limited has operated the property at a loss for the past two winters and told the city it could not afford to keep the resort open this year.

A committee appointed by Mayor Jim Vergobbi put together the lease agreement in hopes of preventing another business closure in the area.

The city adopted a $310,193 addition to the budget, with $31,022 of that to come from donations and $4,000 from a state grant.

Student Governments Approve Resolution

PULLMAN, Wash. (AP) — The student governments of the University of Idaho and Washington State University have approved a resolution saying the schools could benefit through improved cooperation.

The passage of the resolution came Wednesd[illegible]

Remington to

BOISE (AP) — Corrections Board member Kent Remington says he will announce by Monday whether he'll step down from the board.

And Gov. John Evans said Thursday that if Remington will not resign voluntarily, he will have to remove the St. Anthony businessman from the board.

"I have no choice but to seek his resignation," Evans said, explaining that state code mandates such action when a law has been broken.

An attorney general's report released this week concluded that Remington violated state law by entering into a contractual agreement with Prison Industries, while a member of the board that supervis-

Six Removed

CALDWELL (AP) — Authorities have removed six juveniles from a mountain camp that welfare officials say lacked running water and any communication with the outside world.

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Opponents of the agreement signed on Thursday charge it will send power rates soaring. Gov. John Evans said rates can be expected to rise, regardless of the water-rights settlement.

The agreement allows water users to lower the river to no less than 3,900 cubic feet per second during the summer irrigation season.

The issue over who would have control over water above the minimum flow was hotly contested between the state and Idaho Power for two weeks.

Idaho Power President Jim Bruce and Vice President Logan Lanham have been out of town and unavailable for comment on the negotiations outcome.

Company public information director Jim Taney said the agreement protects Idaho Power's capability to produce hydropower.

"We think we've got a good compromise going," he said.

Taney said he couldn't comment on details of the agreement until studying it further.

The pact arose from a controversy stemming from a 1982 ruling in which the Idaho Supreme Court said Idaho Power had priority Snake River water rights and was entitled to defend them.

The company said that if it did not defend its rights, it was subject to lawsuits by shareholders and ratepayers who could charge their interests weren't being protected.

Idaho Power subsequently filed a lawsuit against thousands of Snake River water users. The majority were dropped from the litigation on Thursday, Taney said.

Jones said he doesn't expect any last-minute efforts to obtain water diversions before the agreement takes effect.

"There are not going to be any (water) applications processed until the agreement is finalized," Jones said. He said that probably won't happen until after the 1985 legislative session.

Certain aspects of the water agreement must be approved by the Idaho Legislature, as well as by state and federal regulators.

Among issues the Legislature must address is funding for adjudication of water rights in the state. It is estimated the multimillion dollar project could take a decade.

At the Twin Falls hearing, state hydrologist Frank Sherman, Idaho Falls, said the agreement calls for the legal package to be adopted no later than May 15, 1985.

"That date will be a magic date in which we can sit down and say yes, the controversy has finally been resolved," Sherman said.

But if the legal package is rejected by the Legislature, then the agreement would not take effect, Sherman cautioned.

Sherman teamed up with state Water Board members and key negotiators in the Swan Falls agreement to explain the complicated legal document to an audience of about 60 people.

"We're anxious to get the word out to the public so they can evaulate what we like to term a road map for the resolution of the (Swan Falls) problem," said Pat Costello, an aide to Gov. John Evans.

Deputy Attorney General Pat Kole said that the agreement not only protects the rights of current water users but also sends a message to the rest of the nation that Idaho has its house fully in order.

"We are telling the world that the (Snake River) water is now fully appropriated and can't be claimed by any other entity," Kole said.

He said that the agreement will also allow future development to "proceed ahead in a responsible fashion" by bringing Idaho's water code into the 21st century.

The agreement calls for new development below Milner Dam to be carefully regulated to maintain a 3,900 cubic feet per second minimum stream flow at the Murphy gauge near Swan Falls.

Sherman said this new regulation will cause the Water Resources Department to change the way it views new water right applications for land development. In the past, the agency has reviewed these applications in terms of how much new farmland they would irrigate.

If the agreement takes effect, a water rights' consumptive impact on the Snake River flow at Murphy would be a key concern, he said.

"As an agency, our main concern will be what is the consumptive use of a water right — because consumption will be what places limitations on future development," Sherman said.

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es the Department of Corrections.

But Remington, after a closed-doors meeting with the governor, wants to think the matter through before deciding whether to resign. He'll decide by Monday, then will telephone the governor with his decision.

Remington said he planned to confer with his attorneys and others before deciding.

"If I refuse to resign, then the governor will have to fire me," Remington said, after the private meeting with the governor.

Remington also criticized the news media for what he said were attempts to portray him as a criminal.

Corrections Chairman Bob Anderson, Post Falls, said that if Remington refuses to resign, Evans will have to send him a letter seeking his resignation. Remington will have up to 10 days to respond to the complaints against him. The third member of the board is Charles Hall of Boise.

If Remington still doesn't resign, a hearing will be held to decide whether he will serve the remainder of his term, which expires at the end of the year.

A voluntary resignation is in the best interest of Remington's family, the Department of Corrections and state government, Evans said.

The governor said the situation has been personally difficult for him.

"I've been to his house. I know his family," Evans said. "As a friend, I advised him the best course of action would be to resign."

Remington, appointed to the Corrections Board by Evans in 1983, succeeding the late Robert Fanning of Idaho Falls, acknowledged the technical violation of the law. But, "I haven't done anything wrong," he said.

"The only thing I've done in this whole deal is help the people of Idaho and the prisoners," said Remington, seemingly shaken.

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"I think a lot of this has been misunderstanding and miscommunication," he said.

He said evidence eventually will show that "we are providing is a very viable, useful service."

Aldridge said he is willing to comply with all safety and health requirements. But he said he disputes some provisions of the licensing law.

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SWAN FALLS AND MINIMUM STREAM FLOWS IN IDAHO

By

Ray W. Rigby

In 1901, a mining company constructed the first hydro-electric dam on the Snake River at Swan Falls, which is south of Boise. In 1915, five of these small electric companies merged to form the Idaho Power Company and in the merger, Idaho Power acquired the Swan Falls Dam and power plant as well as others.

Idaho Power Company obtained a water license and a decree authorizing it to have 9,450 cfs of water with priority dates from 1900 to 1919, but its power plant capacity was 8,400 cfs and so that constitutes the Swan Falls water rights.

In 1920, Congress enacted what is now known as the Federal Power Act and created the Federal Power Commission for the purpose of issuing licenses for the construction and operation of dams and hydro-electric projects. The license for Swan Falls was actually not granted until 1928. In the 1920s and the 1930s, several new dams were built on the Snake River, and following the second World War, Idaho Power built five new dams on the Snake River between 1948 and 1952. Attached to this report is a copy of a map of the Northwest showing Idaho Powers Company's sites along the Snake River in Southern Idaho, showing 17 sites, and with its interest in Jim Bridger here in Wyoming and others, a total of 20 power sites.

Eventually it became apparent that the Snake River was no longer inexhaustible and the water licenses and FPC licenses started to contain "subordination clauses", which in affect said that power production would be inferior to future upstream depletion. There was no such limitation in the Swan Falls license and except for an occasion or two, such as the Twin Falls Dam in 1934, those provisions did not appear in the licenses.

Then in the early 1950s the issue of public versus private development of the Hell's Canyon stretch of the Snake River was hotly debated in the Northwest and in Congress. The Hell's Canyon site was probably the most desirable power site in North America. Idaho Power Company and other private interests feared that if the high single Hell's Canyon Dam was built it would be administered by the Bonneville Power Administration, which Idaho Power Company had been successful in keeping out of Southern Idaho, and so it proposed to build three smaller and lower dams in the Hell's Canyon reach of the Snake River.

~~Lynn~~ Len Jordan, then Governor of Idaho, and Governor Smylie who followed him, together with many groups in Idaho, particularly the irrigators and water users in Southern Idaho, were concerned that the Idaho Power Company would take up an excessive amount of water for non-consumptive uses at the Hell's Canyon site, which means the water would go through their generators there and then into Oregon and Washington along the Columbia. Therefore, they insisted that in exchange

for the public giving up the right to construct the high Hell's Canyon Dam, that the Idaho Power Company licenses for Oxbow, Brownlee and Hell's Canyon dams would contain a provision subordinating the power rights in those dams to upstream development.

It was the consensus of the water users of Southern Idaho that the subordinations in the Hell's Canyon licenses were also affective for all of the other Idaho Power Dams on the Snake River. During the proceedings before the Federal Power Commission on the application of Idaho Power Company for licenses on the three Hell's Canyon dams, R. P. Perry, General Counsel for Idaho Power Company, testified: "Historically, the Applicant has always conceded that water rights for future irrigation development shall have precedence over their hydro-electric water rights. All water licenses being currently issued by the State of Idaho provide specifically that this shall be true. And it is obvious that this Commission would not authorize any project without making the same requirement."

Later, in those hearings, Thomas E. Roach, President of Idaho Power Company, testified: "Well, the waters of the Snake, of course, are used primarily to first provide for the so-called consumptive needs of the area and then to supply the hydro-electric power which furnishes the electric service to the people of the area which I have described here."

Later in the hearings he said, "Our company, for a period of 37 years or more, has had a very firm and fixed

policy of complete coordination of the use of the Snake River Waters for the development of hydro-electric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydro-electric development."

Later, he further stated, "I think the Snake River Valley's future lies in the continuing development in an orderly fashion of the yet-undeveloped arable land, and that development will be directly dependent upon the use of the Snake River water and its tributaries."

In those hearings, A. C. Inman, in behalf of the Idaho Power Company, told the Federal Power Commission, "Idaho Power Company fully recognizes the primary importance in Southern Idaho of the use of water for reclamation and irrigation purposes, and over more than 35 years of its existence has cooperated fully with water users in the Snake River Valley. Our system has been planned and built accordingly, and in the entire history of the company, I know of no instance where the company has ever protested a water appropriation filing, or raised any objection to diversion or use of water, for such purposes."

The subordination provisions were placed in the three Hell's Canyon licenses, and State officials had always understood that those provisions were all encompassing the entire Snake River and its tributaries and that the Company's rights were therefore subordinate to all other upstream

consumptive uses. Unfortunately, the licenses on the other Idaho Power dams were never amended to contain those specific provisions.

At the time the Swan Falls Power Plant was constructed, there were probably no more than two dozen irrigation pumps in all of southern Idaho. Over the years, thousands of pumps were licensed by the State and thousands of surface rights were licensed or decreed. This was all done with not only the acquiescence of the power company, but they aided in the planning of these projects, and this all meant additional revenue to the company to furnish the power for the pumps and for the farmsteads, businesses and other developments that came with irrigation of the plains of Southern Idaho.

However, upstream development, in affect, diverted the water to the various uses instead of letting it flow quickly down the river and out of the State. Then the recharge of the Snake River plain, actually, for years, resulted in increased flows at the Swan Falls Power site. Naturally, there had to come a time when those flows would start to diminish, and the controversy was beginning to develop.

The interesting thing is that the Swan Falls Power Plant produces less than one-half of one percent of the power generated by the Idaho Power Company, and it was being used more for stand-by at the time this controversy erupted by the filing of a law suit by some individuals who protested that the power company was not protecting its water right, and as a result there was developing a power shortage and more expensive

coal fired plants and nuclear plants were going to be needed to produce the power to meet Idaho Power Company's increased demands, unless these hydro rights were preserved. Also, the power company was working diligently to remove any inference or direct provisions on direct subordination in all of its licenses.

This represented a change in policy of the company, and eventually on November 19, 1982, the Idaho Supreme Court ruled that there was no subordination of the Idaho Power Company's water rights at the Swan Falls site. Naturally, since Swan Falls is south of Boise, located after the river has served most of the agriculture of the state, if the Idaho Power Company could get its full water right at Swan Falls, it would, in affect, have that water at its Hell's Canyon sites, and thus avoid, to a great extent, the subordination provisions in the Hell's Canyon licenses. The Hell's Canyon power plants produce over 80 percent of the Idaho Power Company's hydro-generation.

The Supreme Court decision stunned Southern Idaho Water users and suddenly the "enemy" was not California trying to "steal" Idaho's water, but it was now the power company. There was no longer any surplus water in Idaho. The power company was now in the drivers seat. It filed action against thousands of water users in Idaho who's licenses, decrees, and claims to the use of water, were later in time than the priorities of Swan Falls. Article 15 Sec. 3 of the Idaho Constitution states in part as follows: "The right to divert and appropriate the unappropriated waters of any natural stream

to beneficial uses shall never be denied, except that the State may regulate and limit the use thereof for power purposes." An attempt was made at the legislature to pass a bill authorizing the state to subordinate the power company's water rights on the Snake to up stream development. It failed in two different sessions by one vote each time.

Consequently, the State of Idaho by its Governor, the Attorney General of the State of Idaho and the Idaho Power Company entered into an agreement intended to resolve the Swan Falls water right controversy. In order for it to take full affect, the legislature would have to adopt a "new public interest criteria for water right approval, granting to power rights the same importance as irrigation and other rights." It required a general adjudication of the entire Snake River Basin, which, by the way, has now begun. It required an effective water marketing system to be developed, with the theory that water could then be marketed and, within certain guidelines, that market would determine the uses of water. The agreement also provided for the funding of hydrologic and economic studies, making allocations of gains for sale of utility property, limitation on IPUC jurisdiction, and especially provided for new rule making and moratorium authority for the Idaho Department of Water Resources.

Additionally, the Idaho State Water plan would be amended, the Idaho Power Company would dismiss with prejudice its case against approximately 7,500 water users and grant to them, and as a matter of fact, all those who had used water

until the date of the agreement, October of 1984, priority over the power company rights.

It provided that the Idaho Power Company could not make demand upon any waters above Milner Dam which is in the center of Cassia County, in the Burley, Idaho, area, and the return flows from Milner to Swan Falls would be used to obtain the minimum stream flow at the Murphy gage, which is just downstream from Swan Falls, and instead of the Swan Falls water right being 8,400 cfs, it would be limited to 3,900 cfs from April 1 to October 31 and to 5,600 cfs from November 1 to March 31. This meant that the balance of those waters, previously included within the Swan Falls right would be held in trust by the State and once the Federal Power Commission licenses were amended, the legislation was adopted, the rules were in place, and all other parts of the agreement performed, the State could allocate that trust water to those areas and for those purposes deemed for the best interest of the people of the state, including power production, and not necessarily according to the "first in time is first in right" doctrine. It is presumed that the additional water could allow for some additional irrigation development in Southern Idaho, but a limit of 20,000 acres per year is also included within the agreement.

There are several other features of this agreement and the entire controversy that could be discussed, but this is an attempt to give a brief overview.

Historically, surface water rights and ground water rights have been administered independently of each other in

Idaho. Under current legislation, and in the Snake River adjudication, all rights, surface and underground, will be adjudicated together and administered together, recognizing the fact that underground water affects surface water and that is why the State needs the study that it is now conducting to determine the extent of that interrelation.

The discussion of the Swan Falls controversy is important, because this matter affects every person and every industry, as well as the natural resources of the State of Idaho. Legislation has now been adopted in Idaho that enlarges the "beneficial uses" of water, to include such things as "fish and aquatic life, recreation, swimming, boating, aesthetics, fish propagation, etc."

This concern also brought about legislation on "minimum stream flow" adopted by the Idaho Legislature in 1978. Starting first with the minimum stream flow to implement the Swan Falls agreement the Idaho Water Resource Board has, therefore, adopted the following policy, "the ground water and the surface water of the basin be managed to meet or exceed the minimum average daily flow of zero measured at the Milner gaging station, 3,900 cfs from April 1 to October 31, and 5,600 cfs from November 1 to March 31 measured at the Murphy gaging station, and 4,750 cfs measured at Weiser gaging station. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point a minimum of 95 percent of the time. Lower flows may be permitted at Lime Point only during the months of July, August and September."

Pursuant to the minimum stream flow law, which provides that the board is the only entity that can apply for same, there have been approximately 34 applications filed. Some have been granted, others are pending, and some have been dismissed. The board has adopted guidelines on minimum stream flow applications and I am sending around a blue pamphlet entitled "Minimum Stream Flow". From that pamphlet you will note that a minimum stream flow in Idaho is a "beneficial use" and, unlike the historical qualification, it does not have to be diverted from the stream.

It is supposed to be in the interest of preserving public health, safety and welfare, it has a priority date as of the date the application is filed by the board with the director of the Idaho Department of Water Resources, it is measured like other water rights, it is initiated by either the board itself or by other interested agencies, principally the Fish and Game Department filing a request with the board and then the board files the application with the director. It must be in the public, not the private interest, must be unappropriated water, it must only require a minimum stream flow not an ideal or optimum flow and it must be capable of being maintained to preserve fish and wildlife habitat, aquatic life, aesthetic beauty, navigation, transportation or water quality of the stream. If anyone who testified at the hearings is dissatisfied with the departmental ruling, that person may request a rehearing or may appeal the decision to the District Court.

All instream flow rights must be approved by the Idaho Legislature, only a small number of the streams are capable of having a minimum stream flow right, non-consumptive uses may still be granted which do not deplete the minimum stream flow granted by the license, however prior rights that have already vested are capable of drying up a stream beyond that minimum set by the license. In other words, it is like any other right, and takes it place in the list of priorities, according to the date the application was filed. That water right will be treated in all respects like any other water right, and will even be administered by the water masters.

From the lackadaisical and carefree days in Idaho when there was an abundance of water, and efforts made by Federal and State agencies to encourage development, reclamation of the lands, and greater uses of water in every respect, we have now come to the point where there is very little water for further development, and any such development which means diverting waters from the stream for consumptive purposes must meet the new "public interest criteria", and will draw opposition from environmentalists, sportsmen, and those wishing to keep the water in the streams.

What a paradox. The power company now finds itself to be allied with all of these groups who wish to keep the water in the stream, because it provides the water for its non-consumptive use in producing hydroelectricity. The general adjudication, of both groundwater and surface water, under all of these new philosophies and rules is going to be very interesting.

March 13, 2006
EXHIBIT 13

IDAHO POWER
An IDACORP Company

IDAHO POWER COMPANY
P.O. BOX 70
BOISE, IDAHO 83707

Testimony of James C Miller
Senior Vice President – Power Supply
House Resources Committee
March 15, 2006

Mr. Chairman and members of the Committee,

My name is Jim Miller. I am the Senior Vice President of Power Supply for Idaho Power Company. As such, I am responsible for making sure that Idaho Power has adequate generating resources to meet our customers' electrical demands whenever they need it.

I am an electrical engineer and have been with Idaho Power for over 29 years in the areas of Engineering, Power Operations, Delivery and Power Supply.

I am here this afternoon to talk with you about issues relating to aquifer recharge that cause me particular concern – and ultimately would cause every one of our 470,000 customers concern.

First is energy cost. As I'm sure you are aware, Idaho Power has a predominantly hydroelectric generation base. Hydro provides approximately 55% of our generation in a typical year. As a result, we have some of the lowest cost energy in the United States, and every one of our customers and the economy of the state of Idaho benefit from that. If we lose hydro generation as a result of reduced flows in the Snake River, we will need to replace it with a much higher cost resource and our customers will have to pay higher electric bills. Idaho Power did not cause the problems with the Snake River Aquifer and our customers should not be required to pay to repair it.

My second concern is reliability. Every two years we develop an Integrated Resource Plan that looks forward at least 10 years into the future. In that plan we identify our current resources and our projected loads and, with the help of a customer advisory council, specify what types and how much new generation we will need to build or acquire in order to reliably meet our obligations to our customers over the next 10 years.

For the past 22 years, Idaho Power has had assurances concerning the amount of hydro generation we could count on to help us meet our customers' needs. Those assurances came in the form of senior water rights. However, this proposed legislation removes any certainty we will have about whether and how much hydro generation we will be able to plan on from each of our hydro projects. If we have to assume that the only water that will pass Milner Dam will be Idaho Power's American Falls storage and the Flow Augmentation water specified in the Snake River Basin Adjudication, and that we will only see the minimum

flows established by the Swan Falls Agreement at Swan Falls Dam, we will have to immediately replace a large portion of the hydro resources in our current plan with market purchases, and begin the process of identifying and constructing new resources that will be at substantially higher costs. Our estimate of lost production at our hydro facilities in a typical year with these assumptions amounts to over 2.2 million megawatt-hours of generation. That's a reduction of over 25% of our hydro generation and 14% of our total. At today's market prices, that amounts to over $120 million per year of additional expense to our customers. Now I recognize that estimate is based on unrealistic, worst-case conditions, and I don't expect that the immediate impacts to the Company will be that high. But, there are no side-boards on this legislation and if passed, our customers could ultimately see that level of impact.

Thank you! That's all I wanted to share with you today. I would be happy to try to answer any of your questions.

March 13, 2006
EXHIBIT 14

******FOR THE RECORD******

H800: Statement of Mr. George Lemmon- Hagerman, Idaho
House Resources and Conservation Committee March 15, 2006

1. Maximum flow is for peaking power to put through Idaho Power's plants.

2. If the spring flood is recharged, it will go through the aquifer in about 6 months. Rain takes about 12 months to show an affect on the aquifer.

3. Old water rights have been diminished. Rate payers won't have to pay high prices, as Idaho Power will get the recharged water back in the fall of the year.

H800geolmmnstmnt3.15

March 13, 2006
EXHIBIT 15

IDAHO POWER
An IDACORP Company

March 14, 2006

FOR IMMEDIATE RELEASE
Dennis Lopez, Corporate Communications
208-388-2464
dlopez@idahopower.com

Idaho Power Opposes Recharge Legislation;
Bill Would Unfairly Burden Company's Customers

BOISE – Idaho Power today announced its strong opposition to a bill introduced in the Idaho House of Representatives that would repeal certain sections of Idaho law that protect the public benefits of low-cost hydroelectric generation.

"House Bill 800 is an effort to repeal an important and universally adopted piece of public policy. If passed it will unfairly impact Idaho Power and our customers," said company President and Chief Executive Officer LaMont Keen. "While others may try to confuse this issue, one fact is clear and undisputed; Idaho Power did not deplete the Snake River aquifer. Decades of ground water pumping and other uses have taken more water from the aquifer than nature has been able to replace. Idaho Power and our customers should not bear the financial burden of recharging the aquifer." Aquifer recharge is an unproven process whereby Snake River water would be diverted into the southern Idaho desert in the hope of partially replacing water removed by ground water irrigation pumping.

The proposed legislation would amend Idaho law to subordinate water rights for hydroelectric generation, or make them secondary to, aquifer recharge. The original law was passed unanimously by the 1994 Idaho Legislature and signed by then-Governor Cecil Andrus.

"Because Idaho Power primarily relies on hydroelectric generation to meet its customers' electric energy needs, reducing Snake River flows will impact both the cost and reliability of the energy we supply," Keen added. "Simply put – reduced hydroelectric generation will drive up the cost of energy production and ultimately costs to customers."

Keen also noted that Idaho Power plans its resource additions to meet customer loads based on the availability of the hydroelectric generation House Bill 800 now threatens. He said this has serious implications for the growing southern Idaho economy and Idaho Power's ability to reliably meet electrical energy demands.

"Neither Idaho Power nor our customers should be made the political scapegoat for the aquifer's depleted condition," he added.

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"Policy questions of this magnitude should not be hurriedly considered during the final days of a legislative session," Keen said. "They can only be fairly and appropriately addressed following a thorough analysis of all the consequences, intended and otherwise. In addition to power generation impacts, House Bill 800 has potential environmental affects on ground and river water quality, salmon and steelhead, native fish and snails, and recreation that should be fully explored. Realistically, no meaningful amount of aquifer recharge can be accomplished in 2006 so there is no need to rush this legislation through."

Keen also noted that Idaho Power is sympathetic to the needs of ground water irrigators, many of whom are customers. In fact Idaho Power has been working with Idaho Governor Dirk Kempthorne's office and other senior surface water users to implement a pilot aquifer recharge program in 2006 to test the concept while keeping Idaho Power and its customers financially whole.

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March13, 2006
EXHIBIT 16

CHAPTER 366

(H.B. No. 598)

AN ACT

RELATING TO RECHARGE OF GROUND WATER BASINS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AND DESIGNATED AS SECTION 42-234, IDAHO CODE, TO DECLARE THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER FOR PURPOSES OF RECHARGE OF GROUND WATER BASINS IN THE VICINITY OF ST. ANTHONY AND REXBURG, IDAHO, A BENEFICIAL USE AND TO AUTHORIZE THE DEPARTMENT OF WATER RESOURCES TO GRANT A PERMIT FOR THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER TO THE AUTHORITIES RESPONSIBLE FOR THE IMPLEMENTATION OF THE RECHARGE PROJECT; AMENDING SECTION 42-233a IDAHO CODE, TO PROVIDE THAT IN ISSUING A PERMIT FOR THE APPROPRIATION OF GROUND WATER IN EXCESS OF TEN THOUSAND ACRE FEET PER YEAR FROM A SINGLE OR A COMBINATION OF DIVERSION POINTS, THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES MAY REQUIRE THAT THE APPLICANT RECHARGE THE GROUND WATER BASIN IF HE DETERMINES THAT WITHDRAWAL OF THE AMOUNT REQUESTED WILL ADVERSELY AFFECT EXISTING PUMPING LEVELS OR WATER RIGHTS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AND DESIGNATED AS SECTION 42-232, IDAHO CODE, TO DIRECT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO INSTITUTE NEGOTIATIONS WITH THE BUREAU OF RECLAMATION AND THE IDAHO CONGRESSIONAL DELEGATION FOR THE INCORPORATION OF AN ARTIFICIAL GROUND WATER RECHARGE PROGRAM INTO CERTAIN PROJECTS FOR WITHDRAWAL OF GROUND WATER BEING UNDERTAKEN IN CONJUNCTION WITH THE SALMON FALLS CREEK IRRIGATION PROJECT IN TWIN FALLS COUNTY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-234, Idaho Code, and to read as follows:

42-234. GROUND WATER RECHARGE PROJECT IN THE VICINITY OF ST. ANTHONY AND REXBURG, IDAHO -- AUTHORITY OF DEPARTMENT TO GRANT PERMIT. It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed

to advance this policy be given maximum support. The legis lature finds that the pilot project to recharge ground wate basins in the vicinity of St. Anthony and Rexburg, Idaho has enhanced the full realization of our water resourc potential by furthering water conservation and increasin the water available for beneficial use. In view of th demonstrated feasibility of the project and in recognitio of the benefits to be derived from its continuation an expansion, the legislature deems it in the public interes that this project be continued and expansions of thi project be encouraged.

The legislature hereby declares that the appropriatic and underground storage of water for purposes of grour water recharge in the vicinity of St. Anthony and Rexburg Idaho shall constitute a beneficial use and hereby author izes the department of water resources to issue to th authorities responsible for the implementation and expansic of this recharge project a permit for the appropriation ar underground storage of unappropriated waters in the area c recharge. Any right so granted shall be subject to depletic for surface storage or direct uses after a period of yea sufficient to amortize the investment of the appropriator.

SECTION 2. That Section 42-233a, Idaho Code, be, a the same is hereby amended to read as follows:

42-233a. "CRITICAL GROUND WATER AREA" DEFINED -- PUBL HEARINGS -- PUBLICATION OF NOTICE -- GRANTING OR DENIAL APPLICATION -- APPEAL. "Critical ground water area" defined as any ground water basin, or designated pa thereof, not having sufficient ground water to provide reasonably safe supply for irrigation of cultivated land or other uses in the basin at the then current rates withdrawal, or rates of withdrawal projected by conside ation of valid and outstanding applications and permits, may be determined and designated, from time to time, by t director of the department of water resources.

Upon the designation of a "critical ground water are it shall be the duty of the director of the department water resources to conduct a public hearing in the area co cerned to apprise the public of such designation and t reasons therefor. Notice of the hearing shall be publish in two (2) consecutive weekly issues of a newspaper of ge eral circulation in the area immediately prior to the da set for hearing.

In the event an area has been designated as a "critic ground water area" and the director of the department water resources desires to remove such designation or modi the boundaries thereof, he shall likewise conduct a publ

hearing following similar publication of notice prior to taking such action.

In the event the application for permit is made with respect to an area that has not been designated as a critical ground water area the director of the department of water resources shall forthwith issue a permit in accordance with the provisions of section 42-203 and section 42-204, Idaho Code, provided said application otherwise meets the requirements of such sections~~.~~ ; and further provided that if the applicant proposes to appropriate water from a ground water basin or basins in an amount which exceeds ten thousand (10,000) acre feet per year either from a single or a combination of diversion points, and the director determines that the withdrawal of such amount will substantially and adversely affect existing pumping levels of appropriators pumping from such basin or basins, or will substantially and adversely affect the amount of water available for withdrawal from such basin or basins under existing water rights, the director may require that the applicant undertake such recharge of the ground water basin or basins as will offset that withdrawal adversely affecting existing pumping levels or water rights.

In the event the application for permit is made in an area which has been designated as a critical ground water area, if the director of the department of water resources from the investigation made by him on said application as herein provided, or from the investigation made by him in determining the area to be critical, or from other information that has come officially to his attention, has reason to believe that there is insufficient water available subject to appropriation at the location of the proposed well described in the application, the director of the department of water resources may forthwith deny said application; provided, however, that if ground water at such location is available in a lesser amount than that applied for the director of the department of water resources may issue a permit for the use of such water to the extent that such water is available for such appropriation.

Any applicant dissatisfied with the decision of the director of the department of water resources may appeal to the district court in the manner provided for in section 42-237e, Idaho Code.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-232, Idaho Code, and to read as follows:

42-232. GROUND WATER RECHARGE PROGRAM -- NEGOTIATIONS

March13, 2006
EXHIBIT 17

TWIN FALLS CANAL COMPANY

POST OFFICE BOX 326
TWIN FALLS, IDAHO 83303-0326

March 14, 2006

To: House Resources & Conservation Committee

Chair Rep. John A. Stevenson
Vice Chair Rep. JoAn E. Wood
Rep. Frances C. Field
Rep. Maxine T. Bell
Rep. Jack T. Barraclough
Rep. Lawerence Denney
Rep. Lenore Hardy Barrett
Rep. Mike Moyle
Rep. George E. Eskridge
Rep. Dell Raybould
Rep. Ken A. Roberts
Rep. Scott Bedke
Rep. Ken Andrus
Rep. Paul E. Shepherd
Rep. Bert Brackett
Rep. George C. Sayler
Rep. Wendy Jaquet
Rep. Mike P. Mitchell

Re: House Bill 800 (Recharge)

Dear Committee Members:

The "Recharge" of declining water tables in Idaho aquifers sounds as patriotic and American as apple pie. How patriotic does it sound if you have to steal the apples to make the pie? We all recognize the value of recharge, but the structure of property law must be respected.

A taking of a property right is a serious matter. Even under the auspices of eminent domain, "just compensation" must be paid after "necessity" for the taking is shown. This year the Idaho Legislature was concerned enough about some applications of eminent domain in recent court cases to attempt to curtail its use in Idaho in some circumstances.

House Bill 800 smacks of a "taking without compensation." The actions of the Legislature in 1994 reaffirmed property right status for "trust water" and its use by Idaho Power Company until allocated as provided in the Swan Falls Agreement. What has changed?

Governor Kempthorne's proposed Pilot Program provided for the purchase of apples for the pie. It provided a plausible program for 2006 since the time is short and only 40,000 acre-feet could be diverted into the preferred canals because of capacity limitations. It also deferred payment until the program could be totally assessed.

357 6th Ave. West * Twin Falls 83301
Phone (208) 733-6731 * Fax (208) 733-1958 * www.tfcanal.com

We need to know more about the Eastern Snake Plain Aquifer before we start World War III with Idaho Power and their ratepayers. It is possible that studies as to diversions and discharges, recharge and the timing of such a program could result in benefits to spring flows, groundwater levels, the aquaculture industry, and power generators without substantial cost.

Lastly, the scepter of Government taking a water right invokes the possibility that irrigation water rights are next. This State was built on property rights, the most prominent of which may be its water.

Sincerely,

Board of Directors

Twin Falls Canal Company