

SENATE RESOURCES & ENVIRONMENT COMMITTEE

1:00 p.m.
GOLD ROOM
Monday, March 27, 2006

BILL NO.	DESCRIPTION	SPONSOR
	Committee consideration of Gubernatorial appointment of Marc Brinkmeyer to the Lake Pend Oreille Basin Commission	
	Committee consideration of H 523	
H 736a	Ground water, assessments	Rep. Stevenson
H 737a	Water rights/East Snake River Plain	Rep. Stevenson
H 800	Water rights, priority revised	Reps. Newcomb, Raybould, Stevenson; Sens. Davis, Burtenshaw, Williams

Please present to the committee secretary a written copy of your testimony to ensure accuracy of records.

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COMMITTEE MEMBERS
Sen Gary Schroeder, Chairman
Sen Monty Pearce, Vice Chairman
Sen Dean Cameron
Sen Don Burtenshaw
Sen Stanley Williams
Sen Skip Brandt
Sen Brad Little
Sen Clint Stennett
Sen David Langhorst

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MINUTES

SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: March 27, 2006

TIME: 1:00 p.m.

PLACE: Gold Room

MEMBERS PRESENT: Chairman Schroeder, Vice Chairman Pearce, Senators Cameron, Burtenshaw, Williams, Brandt, Little, Stennett, Langhorst

MEMBERS ABSENT/ EXCUSED: None

CALL TO ORDER: **Chairman Schroeder** called the meeting to order at 1 p.m. He announced to the standing-room only audience that the committee had some items to take care of before H 800 is heard (which is the reason for the large attendance).

CONFIRMATION VOTE: The **Chairman** said a motion was in order for the approval of the Gubernatorial appointment of Marc Brinkmeyer to the Lake Pend Oreille Basin Commission. **Senator Little** made the motion for approval of Marc Brinkmeyer and recommended it be sent to the floor with a do pass recommendation. **Senator Brandt** seconded the motion. The motion passed by unanimous voice vote. **Senator Keough** will be the floor sponsor of Mr. Brinkmeyer.

H 523 **Chairman Schroeder** said this bill allows the Fish and Game Department to come up with some kind of preference points scenario for permit drawings. The Chair ruled that discussion on H 523 has ceased and said that, without objection, he would write the Department a letter explaining that the Senate Resources Committee wants to know more fully the plan for preference points for permit drawings.

MOTION: **Senator Brandt** said he agreed that a letter be written, then made the motion to hold H 523 in committee. **Senator Langhorst** seconded the motion. He then explained his position for holding the bill. He said it wasn't so much to see the program developed, but a more pressing problem is the issue of access. The motion passed by unanimous voice vote.

ANNOUNCEMENT: **Chairman Schroeder** said that with the large attendance, he wanted to lay out the plan for the afternoon. He said H 736a and 737a would be considered first, which he hopes won't take more than 30 minutes. Then H 800 will be heard. Thirty minutes will be allotted to Mr. Speaker and whoever else he designates. Time will be allowed for questions. Then, thirty minutes will be allotted to the leading opponents of the bill, plus time for questions. At this time, there are 56 people signed up to testify.

do pass recommendation. **Senator Pearce** seconded the motion. The motion passed by unanimous voice vote. **Senator Burtenshaw** will be the floor sponsor of this bill.

H 800

Chairman Schroeder announced that there were 60+ people who have signed up to testify on H 800, and he wanted to make people aware that public testimony will probably be limited to three to five minutes. He then welcomed **Mr. Speaker (Representative Bruce Newcomb)**.

MR. SPEAKER:

What House Bill 800 does is to correct a decision that was made by the Legislature in 1994. It's been interesting to research this project because where this all started, we talked about recharge at the very beginning of the session. In fact, Representative Raybould, Representative Stevenson and I proposed such a bill, only to find out that people were negotiating on the water agreement and we wouldn't do anything about it at this point in time. So we pulled the bill back, but we did find out that the director would not be willing to divert any water until - pursuant to the bill that was passed in 1994, which was a bill that grew out of a recharge interim committee and was brought to the Legislature, but subsequently the bill this interim committee recommended had a subtle change and the bill was finally put forth to the Legislature. To put that in context, we also had many other bills that we were putting together that same year in response to adjudication decisions made by Judge Hurlbutt. I think you all have a copy of the AG's opinion. There were two questions I asked. 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? The conclusions were 1.) Under the Swan Falls Agreement, Idaho Power Company subordinated its hydropower water rights in excess of the agreed-upon minimum flows, that's 3,900 cfs at the Murphy gauge summertime and 5,600 in the wintertime at the same gauge, to all "subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law," regardless of the type or kind of beneficial use. Thus, the hydropower rights referenced in the Swan Falls Agreement. So you go back and read the two code sections and it's interesting too. What this bill does then, corrects that and when you look at the session law, one of the arguments you're going to hear against this bill today, that in Swan Falls... recharge is not a beneficial use. To put this in a timeline, in 1978, there was a bill passed by the legislature who started a recharge in St. Anthony and Rexburg. 1984 was when the Swan Falls Agreement was signed and ratified. So, in 1978, the Legislature recognized recharge as a beneficial use. Even so, if you read the Swan Falls Agreement, the Swan Falls Agreement makes a statement that says... "companies water rights are subordinate to subsequent"...subsequent is the key word there... "beneficial upstream uses". So the word subsequent implies, it

seems to me, any other beneficial uses the legislature might otherwise claim. So you have two arguments. First of all, I think it was recognized in 1978 that recharge was a beneficial use because of the statute that was passed then and subsequent to '94 it was struck. But still in 1978 the Legislature recognized that the subsequent beneficial use is a key word there. So, basically what this statute says is that we're going to go back prior to where we were before 1994 and then it says to ensure that other water rights are not injured by the operations of the aquifer recharge. So then I would go back in history and I would look at the Swan Falls Agreement. I would point out I think we're fortunate the fact that we have former Senator Peavey, former Senator Noh, and Former Governor Evans who were all very much involved in this whole Swan Falls discussion and I would hope they would be given ample time to state and to give us a historical background. But I want you to look at the Attorney General's opinion and look at the dialogue that occurs between them, Senator Peavey, Senator Crapo, and Tom Nelson. This is the question asked by Senator Peavey. "When you say 'to protect the new higher minimum stream flow' you aren't saying then that the state couldn't after it had done that, re-lower that to 3,900 cfs, 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 with as it likes." Tom Nelson was chief counsel at the Idaho Power Company at that time. Let's go back. "You are right. Anything above the minimum flow the state is free to do as it likes." OK, so, let's go back and look a little bit further here. It says - here's some checks and balances. In the Swan Falls Agreement, Section 42-203 it is mentioned from all the way A, B, C, D. Here's 42-203C (2)(ii) "The economic impact the proposed use would have upon electric utility rates in the state of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact." In other words, it statedthe impact to the ratepayer in Idaho is not significant. Otherwise, you got to be fair to ameliorate then. Under Swan Falls, there is Exhibit A, so in Exhibit A it says, Exhibit 6, I mean. The minimum daily flow at the Milner gauging station shall remain at zero cfs. That is really significant. They subordinated everything above Milner and any spill that comes over Milner is an incidental benefit to the ratepayers of Idaho Power because they agreed to a zero minimum stream flow at Milner. The water we're talking about recharging here is the water that might otherwise spill over Milner. That's the only place we can really divert water at this point in time anyway. I would submit that what we're talking about here in recharge is only going to occur in about once in every ten or eleven years. That's when you get high water years. What we're talking about here is spill water, which by definition, is water that's in excess of what they can use to generate electricity and/or is more than what they need to supply the demand that is currently on the system. We're not talking about water here that would impact the ratepayers. I think there are a lot of red herrings out there and a lot of the sky is falling. But if you go into 42-203B - I'll provide a list for you, but it basically confirms that at Milner, the minimum stream flow at Milner, is at

zero. So, all we're doing here is saying, first of all, that the state should not pay in this whole process, a trust agreement that was agreed to, in the water that was in excess of the 3900 and 5600 cfs that was to be held in trust by the state to benefit everybody, including cities and including hydropower. No facet outweighed the other, they were all equal. So, I would say with that, what happens here now is that over the years we have let water flow over Milner that was an incidental benefit to the ratepayers of Idaho Power Company and nobody has ever offered to pay for that or give us compensation. The state hasn't even asked. Then we have the 427,000 to go along with the 60,000, which is about to be 487,000 has gone down on occasion. So the agreement we have with the Bureau of Reclamation, again that went through all the power plants, at no cost to Idaho Power and the ratepayers. Last year, we have started the water rights at Bell Rapids and that's about 75,000 acre feet that goes through the Hells Canyon complex and the state has not asked Idaho Power for a payment for the usage of that. When you go back and read the Swan Falls Agreement, you find out that they agreed to spread the Agreement across the pages of the journal. I'll tell you what - the Senate, and I'm really reluctant to say this, but the Senate is pretty thorough on what it does sometimes. Basically, in the Journal, they read the intent language of the Swan Falls Agreement. That's an interesting read. So, and then the Attorney General's opinion, just read the dialogue between Tom Nelson and Senator Crapo and Tom Peavey. It's really an eye-opener. So, I would just hope, and I know that you're going to hear a lot of the sky is falling or we're going to do all this, but all they're talking about, I would just tell you this much, if there is a need for this bill to pass, I have talked to a Burley, Idaho boy that I have a lot of respect for, but has something to do with this issue and whether he prevails or I prevail, we've agreed that we'd set down and figure out how to shape recharge for the future of Idaho. I think because it is a significant tool, it shouldn't go wasted because what we're doing, apparently, is the water that goes over the spillway is of no beneficial use to anybody. It just goes to the ocean and if you believe in global warming, the melting of the ice in Newfoundland is going to raise the level of the ocean, so they don't need our water. (Much laughter!) So, anyway, what we need to do is make sure we use the water that's otherwise going into the ocean that is no beneficial use to benefit Idahoans by storing it in the largest aquifer, one of the largest in the world, the size of Lake Erie, and the fact is - if you do it right, you can probably set it up so that Idaho Power could get water in the summer months when they need it most. I think with that, I'll defer to my co-sponsor. He's really the brains of this outfit.

**Chairman
Schroeder:**

Are there any questions for Mr. Speaker?

**Senator
Stennett:**

This isn't a question. I just want to make sure that we got it on the record that the Speaker's quote about the Senate being thorough.

Mr. Speaker:

Would you please strike that from the record? (Much laughter.)

**Chairman
Schroeder:**

We'll probably read about it in the Statesman in the morning.
Representative Raybould, welcome to the Committee.

Rep. Raybould:

Thank you, Chairman Schroeder. It's a pleasure for me to be here today to visit with the Senate Committee. If I might, Chairman, I would like to give you just a little bit of background about how this came about. As most of you know, and many of you were on the Interim Committee, chaired first by Senator Noh and myself two years ago, and then Senator Burtenshaw and myself this past year. We were assigned to work on these problems that were inherent with the surface and underground water in Southern and Eastern Idaho. Last year, in particular, we were charged by the Legislature to work with a plan and a method for recharge of the aquifer. We met, we discussed this and we appointed a subcommittee just on recharge that included other individuals besides members of the committee. It was the universal opinion of that subcommittee and subsequently the recommendation of our Interim Committee that we embark very quickly on a recharge program on the Eastern Snake Plain Aquifer. Probably the most important thing that we did was to authorize a recharge pilot project. That project was a branch of the North Side Canal Company, called the W Canal. The Department of Water Resources people there, their engineering staff, came to us with a proposal of where a recharge facility could be implemented. The cost of it, I think we were talking about somewhere in the neighborhood of \$800,000 to implement that recharge project. The next item of business and probably the most important was, where are we going to get the water for recharge? Once again, the Interim Committee and the subcommittee said the only real chance we've got for recharge is when we have high flows. And we referred considerably back to 1997 when millions of acre feet of water flowed out of Idaho to the ocean and none of it was recharged and recharged projects and yet all the time, the aquifer was receding. And so, legislation was prepared because of those committee meetings last summer and was ready to go, as the Speaker has said, early in the Session this bill was prepared and been in my desk for quite sometime, but we were asked to refrain from introducing this legislation simply because of an ongoing settlement agreement, or mediation, between the surface water users and the underground water users, to see if they couldn't come up with some kind of a plan that would, in fact, settle this problem so that they could go forward. But still, with the understanding, that if they couldn't find replacement water for mitigation purposes that we would have to go back to recharge. The recharge program was probably most beneficial to the spring water users, those down in Hagerman, those in the Twin Falls Valley, city of Twin Falls in particular who gets much of their drinking water from springs on the north side of the canyon and, of course, other cities in the Snake River Plain that do draw their drinking domestic water and other DCMI (domestic, commercial, municipal, industrial) purposes from the aquifer. Knowing that the aquifer was going down each year, and not just the pumpers that was causing the aquifer to go down, but also the springs. Back in 1902,

the springs at Hagerman were flowing at about 4,200 cfs. Through irrigation, throughout Southern and Eastern Idaho that was flood irrigation at the time, which about 90% of that water went percolated directly into the aquifer. The aquifer rose to where the springs in the 1960's were flowing at 6,800 cfs, a rise of that much, that much more pressure. And it was at this time that many of the aqua culture industry and cities did get their water rights for wells and spring use at that high flow, while since the 1970's and early 80's, that aquifer has diminished. Springs are flowing now at Hagerman at somewhere around 5,200 - 5,300 cfs. So you can see that even curtailing some pumping, those springs are going down because the spring flows themselves are draining the aquifer. And so we need to do something to stabilize the aquifer. While this bill is legislation to facilitate the diversion of these expected high flows in the years when we have them, so that we can get that aquifer stabilized. This bill takes out about four lines of language that includes the water rights for power purposes that may otherwise be subordinated by the Swan Falls Agreement. This was a taking of the trust water that was given to the state of Idaho and agreed upon in the Swan Falls Agreement. The state of Idaho had possession of all the water above the minimum flows that were established by that agreement, 3,900 in the summer and 5,600 in the winter, that was agreed upon by the Power Company and the state of Idaho and the balance of that water was subordinated to the state as trust waters for future upstream beneficial uses, which recharge is an upstream beneficial use. Because we've got to do the recharge up above Milner, in the Upper Valley, so that the aquifer then can percolate down through and replace the springs around American Falls Reservoir that our Lower Valley canals depend on for their natural flow water and also the springs down at Hagerman and in the valley or canyon there at Twin Falls to satisfy those spring users rights. The Speaker had told you that we did have an Attorney General's opinion, many of you have it in front of you. I won't go into reciting all of it, but there are some parts of it that I think should be noted and that's on page 4 where it talks about the subordination provision in the agreement. It says "The subordination provision established certain minimum flows 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'." Then it says "The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use".... That does not entitle the Company to excess flows that go by those facilities over and above the ability of the Company to divert that water through its generators. Then it says " ...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".... Upstream uses from Milner. The last statement is my own, the last few words. It says "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." That would be the Swan Falls Agreement. Another provision and I believe the Speaker talked about this a little bit, it talks about Idaho Power Company's agreement on stream flows. Then it says specifically, "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." The minute the State grants someone else the opportunity to use that trust water, Idaho Power's rights to that trust water above their minimum flows they agreed upon is subordinated water. It's the state's right to allocate that water to whoever they would. "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.

And then I think this paragraph, and this is the last I'll do in the Attorney General's opinion on page 8, right in the middle. It says "This agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board [which was approval of the Swan Falls Agreement]. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the condition as 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." That, I think, clarifies the whole thing.

The conclusion of this is: 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. Well, that's the issue. Are we going to try to stabilize the aquifer or are we going to try to maintain the economic viability for that section of the country? There's a statute, I won't go into it, Title 42-4203B, which is the Swan Falls Agreement, definitely subordinates these water rights from power purposes to upstream uses. There is one other thing I would like to quote, though, and is - if I can find it here quickly - is the 1978, which preceded the Swan Falls Agreement, the 1978 statute that declared water recharge a beneficial use. And this is 42-234. "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 be assigned to advance this policy be given maximum support. The Legislature hereby declares that the appropriation and underground storage of water for the purposes of ground water recharge in the vicinity of St. Anthony and Rexburg, Idaho shall constitute a beneficial use and hereby authorizes the Department of Water Resource to issue to the authorities responsible for the implementation and expansion of this recharge project a permit for the appropriation and underground storage of unappropriated water in the areas of recharge. Any rights so granted shall be subject to depletion for surface storage or direct uses after a period of use sufficient to amortize the investment of the appropriator." We had in the statute ground water recharge prior to the Swan Falls Agreement. Swan Falls Agreement just substantiated the statutes that gave us that declaration. Well, members of the committee, I won't go any further at this time, I believe the Attorney General's opinion, the need for water, the need for us helping the ground water users, the cities that are involved there, and I might just list those cities. Besides Twin Falls that gets their water out of the springs on the northside of the canyon, two years ago, a call was made by the spring users in Hagerman against the underground water users, dairies, processing plants, and these cities - American Falls, Chubbuck, Idaho Falls, Pocatello, Roberts, Burley, Hazelton, Heyburn, Jerome, Paul, Richfield, and Rupert were all listed in that call. Those cities' water supplies were in jeopardy. Now a lot of people think that city water supply is domestic use - they are not. Those city wells are municipal wells. A portion of that water in those wells can be classified as domestic, but the cities would then have to implement a distribution system that would limit the use of those wells only to domestic use. Cooking, drinking, toiletry purposes. And any kind of manufacturing or any kind of business use, city use - washing the streets, car wash and all that would be prohibited from using that water. Domestic water would be that priority. The rest of that water of the city's that I just outlined under that call was in jeopardy. This is serious business. Our Interim Committee realized the seriousness of it and they directed us, as legislators, to see what we could do to provide the water necessary. We went to the Department of Water Resources and then's when this thing came up. They said you have legislation that puts a cloud over whether we can allow those canals to open up and start recharging during the late months after November 1st in the fall, and before April 1st when the irrigation rights come on. We've got to do something about it. With that, Mr. Chairman, I appreciate the time and I would stand for questions.

**Chairman
Schroeder:**

Any questions for Representative Raybould? (No indication of any questions.) All right. Thank you, sir.

Rep. Raybould:

Thank you.

**Chairman
Schroeder:**

At this time, Idaho Power - who do you want to represent you? You have a half-hour for two or more speakers, as you choose. Welcome to the Committee.

Greg Panter:

Thank you, Mr. Chairman. My name is Greg Panter. I am vice president of Public Affairs for the Idaho Power Company. I've been involved or associated with Idaho Power Company in one capacity or another since 1976. In fact, I was employed by the predecessor organization to the Idaho Association of Commerce and Industry from 1974 to 1976 which goes back to the real onset of this dispute which is carried forward to this day.I gave you that history because I think a lot of you are aware of it and I do want to raise one issue with respect from a historical perspective. That is, and I think what gets lost in this debate, is the fact that in 1982 or '83 the members of the Supreme Court issued a decision that said Idaho Power had an unsubordinated water right at Swan Falls of 8,400 second feet. At that time, there were approximately 7,500 ground water pumpers who found themselves junior in priority to the company. And there are a lot of similarities between what went on back in the 80's and what's going on today. Back in the 80's, the company said we recognize this is a huge economic significance to the state of Idaho and in our contracts, we want to help resolve that issue. In the response that we received, from at least part of the Legislature, was - the way we're going to resolve it is - we're just going to take your water. And so we had to fight that battle out and at the end of the day when the state finally concluded that they couldn't take our water from us, they actually came to the table and we, in effect, reached an agreement that accommodated all parties on all sides and we accommodated those 7,500 water users and it came at considerable expense to our customers and to the future hydro production that we have enjoyed on the Snake River. And what we did, and you've heard that referred to, we took that 8,400 right and we subordinated it to those 7,500 people and essentially ended up with a flow of 39 and 56 and there's some obviously contractual dispute as to the nature of that agreement with respect to recharge, but I'll reserve that to our legal counsel. But I think it's important to bring that up, only in the context that we haven't always been, nor have we ever been, in our view, anti- agriculture and we believe that the company has made a significant contribution back in the 80's to the economic viability of agriculture in the state of Idaho. Then you fast forward to today and we have to ask - the same similarity. We were approached by various interests three or four weeks ago, primarily by senior party surface water right holders and said is there some way - is there some avenue that we can go down where we can fix some recharge issues and the company said yes, we can negotiate recharge. The question is - who's going to pay for it? And I would submit to you that that is what House Bill 800 is all about. I agree, it's probably about recharge but when you get right down to the essence of the issue, the issue is - who's going to pay for the recharge program? Is it going to be the parties who are currently pumping out of the aquifer or are you going to shift that financial burden on to the ratepayers of Idaho Power Company who had no role whatsoever in creating that problem, but now are being asked by the adoption of this bill to pay for it. But frankly, we don't think that's fair and we don't think that's right and obviously, that's why we're taking such a strong position against that bill.

There has been a lot of rhetoric in the news media and otherwise about rate impacts associated with House Bill 800, but there are rate impacts associated with it and they are real. I noted that in the Statesman over the weekend, Mr. Reading estimated those impacts to be \$6 million. Our estimate is obviously significantly higher. It's more in the neighborhood of \$80 to \$120 million. But it all involves the assumptions that you make - when you make those forecasts. But the assumption that we're making, and I think we have to make because we're responsible to provide the energy, that this is something more than just we're going to take a little bit of water every eight or ten years. There are no sideboards on this legislation. I think what this legislation really says is - we're going to take that river down to 3,900 cfs in the summer and 5,600 cfs in the winter and if we can stop every drop at Milner, we're going to do it. Well, if that in fact is what is accomplished, then that \$80 to \$120 million number is what comes into play.

The other issue that is associated with this when you start dealing with company or individual property rights, it has other consequences as well. We were notified this morning by Standard and Poor's that our credit rating has been downgraded. We've gone from stable - let me get these words right - we've gone from stable to negative. So that, in effect, is going to cause an immediate increase in the cost of capital when the company has to go out and acquire to help keep up with the growing demand for electricity that we're all experiencing in our service territory. There has been some discussion here earlier about Idaho Power is wasting water, we're spilling water, we're only going to take water that is going down the river to the ocean. Nothing could be further from the truth. Idaho Power isn't wasting water and if you look at the actual generation on our system for the month of March. I chose the month of March because in our estimation, it is not feasible because of icing and freeze-up and other issues. To realistically talk about recharge before that time, to look at our system in toll for the month of March, there wasn't any spill at all in any of our projects, starting in American Falls down the system until you get to Hells Canyon. Zero spill, with the exception of Shoshone Falls and there is an esthetic spill that we make there. It is part of our agreement with the license and part of the understanding we have with the city. Shoshone Falls also has, I think it's the plant that probably has the least amount of hydraulic capacity on our system. Every other plant was producing energy. If you want to know how the hydrology of the system really works, let me give you these numbers. The average flow past Milner since March 1 has been 2,900 cfs. The average flows at Swan Falls is 10,000 cfs. To put that in perspective, hydraulic capacity of Swan Falls is 20,000 cfs. So you can see, we're just barely at half at Swan Falls and the inflow to Brownlee Reservoir is 31,000 cfs. And that 31,000 cfs. number is largely due to the fact that there are six rivers that are downstream from Swan Falls that contribute to that inflow to Brownlee. Those are the Boise, the Payette, the Malheur in Oregon, the Owyhee, the Weiser, and the Powder River. Obviously, to take the

numbers associated with what's coming out of those tributaries and suggest that it's wasted water that we can recharge with is nonsense, unless somebody can figure out a way to build a pipeline from the discharge at Hells Canyon and pipe the water back upstream above Milner because that's the only area where you can divert water for recharge that I know of. Are we spilling at Hells Canyon? Absolutely. And that's an annual phenomenon and it varies every year and we have no control over it and those spills are dictated by the Army Corps of Engineers. It's one of our license articles to operate the Hells Canyon project and it's all part of the Lower Snake and Columbia River flood control. Like I say, that varies year-to-year. They tell us how far down we have to go in elevation and they tell us how quick we can refill the reservoir. I heard a number of 300,000 acre feet thrown out as the amount of water we are wasting. For the life of me, I've had our people try to figure out where that number came from. All we can conclude is that they've had to add the totals of the spill at Brownlee, Oxbow, and Hells Canyon. The only number that has any merit with respect to that is the spill at Hells Canyon because that's the farthest dam downstream. During the month of March, there was a spill at Hells Canyon in the neighborhood of about 104,000 to 105,000 acre feet of water. So, with respect to that argument, I think you can see that Idaho Power, in fact, is utilizing every drop of water that's been allowed to come by Milner, down through the system and once it gets to Hells Canyon, it's not available for recharge.

Mr. Chairman and members of the Committee, those are essentially all the comments I wanted to make today. Mr. Tucker, one of our senior attorney's is here and he would like to address the legal issues.

**Chairman
Schroeder:**

Just one comment for those of you who have written testimony, you can leave a copy with us. Now, questions for Mr. Panter.

**Senator
Cameron:**

Thank you, Mr. Chairman. A couple of questions for Greg - Mr. Panter. You articulated the issue as to who is going to pay. Is it Idaho Power's position - I'm having trouble hearing myself think with that window open (truck noise from the street). Mr. Chairman and Mr. Panter, when you indicated who's going to pay the issue, is it Idaho Power's position that we are sending, there is as much water flowing right now as there was last year?

Mr. Panter:

I've not looked at the numbers, but my assumption would be that there's probably more water coming down this year than last year, just based on the water year that we're having.

**Senator
Cameron:**

Since you're a public utility and you have to go before the PUC for a rate increase, if I and the rest of the members of the legislature showed up at the Public Utility Commission said not to grant a rate increase, then who would pay?

Mr. Panter:

I'm not sure I can answer that. I suspect that would come down by decision by the Commission. If you all went to the Commission and suggested that Idaho Power not be granted a rate increase, and on the record we were entitled to that rate increase, I suspect they may differ with you. In the event they didn't, then I think, obviously, you can carry that out, where company would have an issue of confiscation of property or whatever entitlement you're entitled to under the law and we can take it on to appeal to the courts.

**Senator
Cameron:**

Has the company calculated the benefit that it would receive, that the ratepayers would receive, when we purchased Bell Rapids last year and when we spent - and we're planning on spending an additional \$5 million this year to set aside 100,000 acres. Has the company calculated a financial gain to the company or to the ratepayers because of those events?

Mr. Panter:

No, we have not and let me explain why. Why did you raise that issue? Because it is one that keeps coming up and up. One thing that concerns us, concerns me as management of the company, is the singling out of our ratepayers as if they are separate and apart and they're not taxpayers too. The fact of the matter is, those purchases were, such as they occurred, were assisted at least in part by tax dollars that came from our ratepayers. We're not some evil empire over here, separate and apart from the rest of the state of Idaho. We do have water rights and that water right entitles us to flows, natural flow coming down the river from whatever source. Now with respect to the Bell Rapids issue, I can tell you that we lost money initially by taking that project off-line because we had property invested to serve those loads that were no longer used and useful, so we ate those costs. And I can also tell you that there was a significant amount of that water that was already in the river that hadn't been used. And so to say that we had derived the benefit for the purchase of that entire amount of that water right is just not the way that whole water purchase came down. Part of that water was already in the river and hadn't been diverted.

**Senator
Cameron:**

First of all, we didn't bring up the issue of ratepayers. You guys did. You brought that argument to us. So, it's a little bit, I suppose you need to either accept part of the equation or not and with regards to the CREP program (Conservation Reserve Enhancement Program), should we take 100,000 acres out of production or not, that's water that's not being pumped out of the aquifer. Wouldn't you admit that stronger spring flows benefit Idaho Power?

Mr. Panter:

Absolutely. And I would also, if I may, just add to that. I would also tell you that Idaho Power probably has a greater interest in the health of that aquifer as does anybody sitting in this room. The fact of the matter is, about three or four years ago, the state dropped below the Swan Falls minimum. If that trend line continues, I've heard people say we're not after the Swan Falls minimum, we're going to guarantee the Swan Falls

minimum, so I'm not sure you can. Even if you want to, I'm not sure you can, if collectively we don't solve that Eastern Snake Plain Aquifer issue. I don't think the company is not negative towards resolving the issue, the position of the company is - if it's a matter of statewide importance, and obviously it is, then why the effort to single out only one group of taxpayers and/or customers of Idaho Power Company to shoulder the entire financial burden? They didn't create the problem. Idaho Power Company didn't issue those water permits.

**Senator
Cameron:**

Mr. Panter, to use your own words, if you are asking the state to pick up that, then it's the same taxpayers that are your ratepayers. So again, your argument is a little bit duplicitous. But I want to go to your point. The one thing is I go home and talk to my constituents that aren't really a party to the argument and they're hearing Idaho Power's ads and they're seeing the comments in the news media. The one thing I want to come back to - my constituents ask, "Why doesn't Idaho Power care about the aquifer? Why doesn't Idaho Power want the aquifer restored? Why isn't the company concerned?"

Mr. Panter:

We, in fact, had worked out a program with senior priority users and with the Governor of the state of Idaho to come up with a recharge program and quite frankly, that program has gone by the wayside now, but it was probably the only shot we had for any kind of meaningful recharge in this particular year and it would have answered a lot of unanswered questions. I've heard it said, well, Idaho Power, the water is going to come back to us, so it may be a benefit and maybe it is. But we don't know that and there isn't anybody that I know that can grant those assurances. And so what our intent was, with respect to working with those different interests, is let's put something together and we can go forward and see if we can't come up with some answers to these questions and then we'll know. We'll know whether that water comes back. And the company was not looking for any unjust enrichment as a result of that program. We agreed that within the first six months, any water that came back into the system, we would back out and any amounts of money that might be otherwise payable to the company. In response to the question about wasted water, we also agreed that if in fact we were spilling, which we're not, that any of those projects down through the Thousand Springs system, we would back that generation out. We would have a six month tune-up period where we would look back between March 15 and April 1 and calculate what the actual cost of energy was during those 15 days. We could look over the six month period of time at how much of that water actually came back. There was no dispute as to how we would make those calculations. We wanted to make sure that our ratepayers were protected. And our estimate was, and it was an estimate, the maximum, it was approximately \$1.6 million. That was based on the price of energy at that point in time. I can tell you that the number would have been somewhat less than that, how much less than that, I don't know. But we left it up to the Public Utilities

Commission to actually verify those numbers and certify to the state what were the actual costs to the ratepayers. So, in response to your question, and that's a long-winded answer, Senator Cameron, the company has tried this year, just as we tried back in '84 when we were trying to stay on the Swan Falls Agreement to try to affect something positive.

**Senator
Cameron:**

Just one last question. Would you not agree that if we're going to do recharge, time is of the essence? And we need to do it now, rather than study and go through negotiations? And the second part of that question, I think you said that the ratepayers weren't paying, but wasn't your actual communication with the Second Floor was, in essence, a buyout from the state of Idaho paying Idaho Power money so that we could do recharge? Why should the state be forced to do that when we hold that water in trust?

Mr. Panter:

Mr. Tucker will get into that whole issue, holding that water in trust. It's clearly a difference of opinion.

Help me with the first part of your question.

**Senator
Cameron:**

Wouldn't you agree that if we're going to do recharge, now's the time to do it, rather than in the sixth of the last seven years with the type of water that we've had?

Mr. Panter:

Absolutely. That's why we were attempting to get something done prior to March 15. The fact of the matter is, the opportunity for recharge is gone. I've also been advised that irrigation season starts on April 1, where the canals are going to put water into their systems, charge them up and that doesn't lend itself to recharge. So, as far as we can see, I don't think there's going to be a drop of recharge done this year and I think you only gain with the contract we were trying to put together with the Governor.

**Senator
Stennett:**

Referring back to Exhibit 6 on the Swan Falls Agreement. I have a question here that is intriguing to me. The first item in that says that the minimum daily flow at the Murphy gauging station should be increased to 3,900 cfs. That implies to me that whatever reason before the deal was signed, it wasn't decreasing as your testimony seemed to say, but it was actually increasing to 3,900, rather than decreasing from 8,400. Can you square that up for me? I just don't understand why. The wording is "should be increased to 3,900 cfs."

Mr. Panter:

I'm not familiar, obviously, with the document that you're reading from.

**Senator
Stennett:**

It's the Swan Falls Agreement, Exhibit 6, Item 1.

Mr. Panter:

What I can tell you, if I may, relative that all -- if you go back in time...in fact, there were enough pending applications on file, the whole river - if everything would have been followed through on, the whole river would have gone dry. With respect to the trust water, and I think we're mixing

apples and oranges and trying to construe trust water in two different contexts. Trust water is ground water. In the way trust water was derived at is, and this gets, I think, to part of your question, the lowest flow on record at that time, when we were negotiating that agreement is 4,500 cfs. When we agreed to subordinate our water rights down to 3,900 cfs, 600 cfs was what was set aside and held in trust for future beneficial uses. There was approximately 450 cfs, as I recall, set aside for agriculture, and there was some indications placed on it and another 150 cfs set aside.

**Senator
Stennett:**

I think I'll put that question to Governor Evans and some of the other guys, cause I think that's intriguing that it appeared to me that the folks around the table said that we should increase, rather than decrease to 3,900 cfs. So, we'll talk about that. The next - Number 2 in Exhibit 6, states "the minimum flow at the Murphy gauging station" - it doesn't say should be, but says "shall remain at zero cfs." What's your interpretation of that? If the interpretation was worded as shall remain at zero cfs, it would seem to say that all the water could be diverted at any time all day long. Zero - shall - flow over the Murphy gauging station.

Mr. Panter:

I'm going to bring my attorney, in the back of the room,I practiced law though for years, but I am going to defer in part to Mr. Tucker, if I may, because of the aspect of testimony that he's going to provide. But I can tell you with respect to the uses of the subordinated events, beneficial uses there's no dispute on the part of the company and the state doesn't have the right to take those flows down to that level. We didn't give up any rights that we had at all, we retained all of our water rights. What we did was allow the state take those rights down to those certain minimum levels as against those other things.

**Chairman
Schroeder:**

Further questions from the Committee?

**Senator
Williams:**

Just a followup on Senator Cameron's question. In the CREP program that we have tried to initiate and hope we would get initiated in the next year, hopefully, the rates that Idaho Power charges to underground water pumpers compared to those rates charged to industrial and commercial and some of the residential users, if in fact we shut off 100,000 or thereabouts acres of pumper water, and you're able to use that for residential and commercial, will that be a plus or a minus for Idaho Power if that block of power is available for you to use for your customers?

Mr. Panter:

I don't know that it would be either. I think it would come in the context of our integrated resource plan. How much of that energy, when it's going to back, what investment we have that we have to write off against what we have out there. As a general observation, when you talk about the rates that are in existence on our system, the fact of the matter is that agriculture currently is staying about 76 percent of the actual cost of the service, the cost to the company to provide that service to them and most

other ratepayer classifications are paying in excess of 100 percent to make up that difference. So, it comes back as a benefit to the company, and it may very well come back as a benefit to the company during that period of time, it may be that we won't have to purchase power. There are a lot of different scenarios. That all figures into the mix and under the power cost adjustment clause with the Commission, it could end up having a favorable result or a favorable impact. If that's the case, 90 percent of those benefits could go to the ratepayers.

Senator Williams:

If, in fact they're paying 75 or 76, whatever the figure happens to be, the actual cost, and the others are paying over 100 percent, then it looks like there is a little bit of spread there. Plus, is it not true that Idaho Power has a program in effect that will pay you, if you're an irrigator, to shut down your pumps during peak periods during summer months so that more power is available for your distribution to other areas?

Mr. Panter:

That's correct.

Senator Burtenshaw:

Maybe you can help me understand this a little better. I have a flow chart here from your website from March 2nd on through to the 15th. As I understand, the 5,600 cfs is the winter right. Is that correct?

Mr. Panter:

That's correct.

Senator Burtenshaw:

On your flow chart, it shows from 8,960 to 10,900; 11,200; one day, 14,200 cfs. The water above the 56 to these figures that I have here, would you explain to me, what water is that?

Mr. Panter:

Where are you looking at those numbers? Where are those numbers coming from? Which project? Are you looking at.....

Senator Burtenshaw:

This is at the Murphy Gauge.

Mr. Panter:

Oh, at the Murphy Gauge. So, the nature of your question is - what flows that are relative to the 56?

Senator Burtenshaw:

Above the 56. Everyone of them is way above it. What water right are you using there?

Mr. Panter:

The water right that we are using there is the right that we have to use the natural flow coming down the river to the maximum extent of the hydraulic capacity of each of the facilities. That right, the 5,600 right and the 3,900 right, and that's part of the essence of this debate, it's the company's contention we did not subordinate the recharge, so maybe to put it in clearest terms possible, the largest plant we have on the mid Snake system, actually is above the Murphy Gauge, it's the Lower Salmon and the hydraulic capacity of the Lower Salmon project is 17,200. When the flows for recharge, flows coming downstream exceed that amount, then there's no dispute from the company that you can take every drop. Until the flows exceed that amount, we believe that we have an

unsubordinated water right to utilize that water.

**Senator
Burtenshaw:**

So then, you believe that everything over the minimum stream flow belongs to your company, the rights.

Mr. Panter:

No, Senator Burtenshaw, that isn't what I mean. What I mean, as it relates to recharge, that is what I mean. As it relates to those other beneficial uses - agriculture, municipal, etc., that we subordinated ourselves to at Swan Falls, not asserting those rights against those uses. Those uses take us down to those levels. There's no dispute from the company. This is a fairly new argument of contract interpretation involving, basically, aquifer recharge what was intended in the original contract and what was intended in the '94 legislation. But I would rather defer that to our attorney and I think he's getting nervous over there as it is.

**Chairman
Schroeder:**

Any further questions?

All right. Let's get the attorney up here.

James Tucker:

I'm James Tucker. I'm an attorney with the Idaho Power Company. To put things in context, a little bit if I can, to start off with, a little bit of history of who I am. I have been working with Idaho Power for about five years as what's called senior attorney. Brought in principally to deal with Hells Canyon projects, do licensing and other resource issues. Also represented Idaho Power Company for twenty some years with the firm of Nelson, Rosholt, Robertson and Tucker. Tom Nelson was with that firm before he took the bench.

I came to Idaho in 1977. I was born in Pocatello, but went back East with my family, went to school on the East Coast. Practiced law back there for about five years and came to Idaho in 1977 and took the Bar. It was interesting though when I came to Idaho because when I took the Bar, I had to study up on water law. They didn't teach water law in the East. That's something that East Coast schools didn't pay much attention to. I learned two primary things when I studied for the Bar in Idaho. Number one - water in Idaho is a property interest. Number two - there is an importance when you talk about water in Idaho with a respect to priority base. And I think that's something here that's really being lost in the noise, if you will.

What we're talking about here is Idaho Power's water rights. I have here on the desk before me a booklet of Idaho Power's hydropower records, a license, and decreed rights that Idaho Power has claimed in the SRVA, licensed rights by the state, all fully vested, all claimed in the SRVA. The state of Idaho has not claimed any rights in the SRVA that belonged to Idaho Power. In other words, they haven't claimed any portion of those rights. Idaho Power has water rights like any other people in this room have and they are property rights, they are property interest, they have a value, they can be sold, they can be transferred - subject to state

If you roll forward another 10 years, 1994, there were specific committees that were commissioned to look at recharge and met during the months of 1993, prior to the 1994 Legislature. That committee was participated - there was participation by the Department of Water Resources, by the Bureau of Reclamation, by the Idaho Water Users, pretty broad-based water user participation in that committee. The 1994 legislation came out of that. And if you look back at the record in 1994, back what they did was they took out the general representation, or subordination language, that was in 42-4201A, they took it out. That language read that recharge in irrigation districts and the recharge districts would be subordinate to all hydropower rights. They took that out and they specifically referred to the Swan Falls Agreement and said it would be subordinate to Swan Falls. I submit to you, they knew what they were doing. It wasn't a mistake. And it was actual legislation that was carried by the Idaho Water Users and it was carried by - one piece of legislation was - and the other piece was carried by the Idaho Department of Water Resources.

My point of all this is - we're in the last stage of this legislative session. We're dealing with one of the most complex, as you can see from the number of the people in the room, one of the most volatile issues I think that has faced the state of Idaho is the last twenty some years. And we're trying to solve it too quickly. And we're solving issues that really have ramifications for claimed water rights that Idaho Power has and SRVA, and a contract that Idaho Power Company has with the state of Idaho. If there is a dispute, and I say "if", because I'm not sure if there's a dispute with the state of Idaho as to what that means. We do have the Attorney General's opinion which we disagree with. But we have not heard formally from the state of Idaho that there's a dispute as to what that contract means. If there's a dispute, I think you heard from Mr. Panter that the Power Company is ready to sit down and try to resolve that dispute. If we can't resolve it, the place to resolve a contract dispute, I submit, is for the court to tell us what it means, not the Legislature to interpret the contract and perhaps impact vested water rights that Idaho Power Company has.

Now, I'll get back to the reluctant litigant issue that I brought up earlier. Idaho Power Company does not want to be in a position, like it was in Swan Falls, where it finds itself that it has to move forward with some litigation. That's not where it wants to be. But as you can see, because it has vested water rights, the 1994 Legislature said and interpreted, we think correctly the Swan Falls Agreement, if that is changed abruptly, we may be in a position to where we have no choice but to bring an action. And we have no choice because again we find our self in that situation where we have ratepayers, we have the PUC, we have the FERC (Federal Energy Regulatory Commission), which we're going through licensing now in Hells Canyon, where we have an obligation under our licenses to protect our assets and water rights are an asset. Water rights determine the value of property in Idaho. There isn't a piece of property

the courts of the Swan Falls legislation which set aside 600 cfs for subsequent beneficial uses of trust water. Concept also in Swan Falls - consumptive uses. The reason I say that is because when you look back at the Hells Canyon subordination, and you look at the subordination at the C.J. Strike project, each of those projects when they were originally licensed had subordination clauses. The upstream consumptive uses, the irrigation. As Greg said, Idaho Power is cognizant of the fact that irrigated agriculture is a very important entity in the state and its subordinated irrigated agriculture.

In 1984 when it entered the Swan Falls Agreement, recharge was a very good thing. We've heard today some reference to the statutes that were in place in 1977 and 78. One of those statutes granted a recharge permit to two small canal companies' irrigation districts in the Upper Valley. If you go back and look at that legislation in 1978, it calls that, and that was a pin-point, it was specifically tailored to grant legislatively a permit for recharge to those two districts and referred to in a 1978 legislation as those being pilot projects. There was another statute that was in place, I believe in the 1977-78 era, that talked about recharge being allowable for irrigation districts and recharge districts. To go back and look at that legislation, it's very specific and it says that recharge permits to those two entities or types of entities would be subordinate to hydropower rights - to all hydropower rights. It's very clear. In 1984, when these agreements were entered into, beneficial use was not a recognized beneficial use in the state, where you or I or another person on the street could go into the Department of Water Resources, make application, and receive a permit for recharge. The only way it could be done was through those two statutes, one of which subordinated recharge through hydropower and the other of which was a very specific pilot project in the Upper Snake River. Now, you also can go back and look at the record with respect to Swan Falls, and I made this point in the House. We've got to be cautious here of trying to determine what the intent of the parties was by looking at the four corners of about an eight or nine page agreement. I understand that the law says if you can determine what the intent is, then it's not ambiguous. But that agreement resolved one of the most complex water issues in the state of Idaho. As you can see, it didn't resolve it all, cause we're here some 20 years later and we're still trying to interpret and still trying to argue what that Agreement means. But if you look at some of the things that surround the Swan Falls Agreement, one of which was the framework for the Agreement, it came out about 20 days to 30 days before the Agreement was signed. It talks about recharge. But it talks about recharge in the context of future, major, it might be considered, might be studied, in the context of trying to resolve some of the severe water property issues that the state is facing. So surely, recharge must be looked at in the future. Swan Falls Agreement interpreters really thought that was the case. But that doesn't say that when we subordinated in 1984 that we subordinated recharge.

regulation obviously, but they are certainly property interest like any other water right in the state. What we're talking about here is the interpretation of a contract that was entered into between Idaho Power Company and the state in 1984 which certainly affects Idaho Power's water rights. There is no question with respect to property interests that you can subordinate it, you can condition it by contract and the company did that. There is no question they did in 1984.

A little history about what happened in 1984 and why. As Mr. Panter said, there's a lot of similarities here and why Idaho Power again finds itself somewhat of a reluctant participant here, and hopefully not a reluctant litigant. I say that because in 1984 what really started this whole process and I was with the firm of Parry, Robertson, Daly and Larsen at that time, Nelson and Rosholt in 1977, when this process started. What started the process was an action by ratepayers against Idaho Power Company for failing to protect its water rights. For failing to protect its property interests on the Middle Snake, an allegation that by doing so, that its rates were being artificially raised because of the failure of the company to protect its hydro resource. Idaho Power Company had previously considered that the upstream pumping of water that it was likely subordinated to the Hells Canyon subordination provision. And it went to court and found out, and I say reluctantly because I think it was a bit of surprise when it went to court, but it found out from the Idaho Supreme Court that its water rights on the Middle Snake were not subordinated. It found itself in the situation where it had to bring an action to protect its ratepayers and its stockholders. It had to bring an action not any different than what we find the surface water users today have brought a call against junior groundwater users - to protect its interests. And assets were being dissipated. It had the Supreme Court that said - you have a water right and a company as a corporation, had to protect that asset, so it sued 7500 people, reluctantly. It did not like doing that and I know that because I helped draft the complaint. Well, hopefully, that was worked out.

But what's happening here, I think is very similar in that context. We have a contract dispute now of what the Swan Falls Agreement means. And there are certain places that you can take care of water rights disputes. We have the SRVA Court and we file claims in that court where if we have a dispute of what a water right is, it can be litigated there. And there are certain places that you can resolve contract disputes. I don't think that's before the Legislature. I'm speaking as a lawyer. I think contract disputes should be resolved in a court of law. Now we can argue today about what the Swan Falls Agreement means, whether or not the Swan Falls Agreement talks about the beneficial uses and what that entails. I can tell you from the company's position that we have a very different view than what Speaker Newcomb has indicated. Subsequent beneficial uses in the contracts of the Swan Falls Agreement was considered to be consumptive uses, approved by law, it was approved in

in Idaho that its value isn't determined on the basis of its water right. That's what brings value to Idaho land. Idaho Power finds itself in that position, unfortunately. And again, I bring that out. I think I've hit the points I wanted to hit. I'm down to a minute and four seconds, so it's getting close to my time. I would be happy to answer questions.

**Chairman
Schroeder:**

Questions?

**Senator
Cameron:**

Were you here in 1994 in front of this committee or a witness, if you will, or participant in the Interim Committee in 1993?

Mr. Tucker:

Yes, I was. I don't recall whether I testified in 1993 or 1994, but I recall that I was involved in that process.

**Senator
Cameron:**

As a committee member that was here in 1994 and served on the Interim Committee, I can tell you that Idaho Power did not testify at any point, either during the Interim Committee or in front of the committee. And, Mr. Tucker, I will also affirm for you that I and along with Representative Bell made the motion from the Interim Committee to amend the law, amend Section 42-4201A and did not include the asserted language that is now being used to un subordinate the water right.

Mr. Tucker:

I don't know how to answer your question. Is that a question or statement?

**Senator
Cameron:**

A statement.

Mr. Tucker:

As I say, I don't recall whether I testified or not. I was over at the Legislature and I remember when the Legislature passed that legislation.

**Senator
Cameron:**

Again, probably not a question. I'm just stating for the record, for your information, because I don't believe we understood that that language was put in there to somehow un subordinate our rights, our trust rights. It's my understanding that that language was inserted at the request of Idaho Power with the water users, unbeknownst really to the legislators, and in between when the Interim Committee met and when Representative Bell and I made the motion. I seconded her motion to amend 42-4201 and subsequent when the language came forward before the committee. There was no testimony. I reviewed my minutes, reviewed our motions, and seen nothing that reflects that any testimony was given to the fact as you stated - that we knew what we were doing, that we purposely chose to un subordinate our rights.

**Chairman
Schroeder:**

Further questions? Senator Langhorst.

**Senator
Langhorst:**

I just want to make sure I understood one of the things that you said. My question has to do with the law that was passed in 1994 and I believe you said that prior to that there was an existing statute which also had held

that recharge was subordinated to our production. Did I hear you correctly?

Mr. Tucker:

Yes, that is correct. There were two statutes on the books as I recall, and as I understand it, prior to 1994. It was 42-234, I believe, and 42-4201A. The first statute, 234, dealt with a specific granting of a permit in the St. Anthony's area for recharge. That was referred to in 1978 as a pilot project. 4201A granted to irrigation districts and recharge districts the ability to get water rights for recharge. And there was specific language in that section that said that those water rights for recharge were subordinate to all hydropower purposes.

**Senator
Langhorst:**

If the 1994 law did not exist and we were arguing this issue under the previous existing statute, I think it was 1982, would this discussion be the same? In other words, is the contention that the 1994 legislation was a mistake?

Mr. Tucker:

I believe it is. It's not controlling. To me, the controlling issue is what was intended by the parties in 1984. The 1994 legislation, in my view, was something that was there that I think illustrates that in 1994, contrary to what Senator Cameron may have said, that in 1994 the Legislature validated what the company said was the intent in 1984.

**Senator
Stennett:**

I appreciate you talking about the importance of the contract, as it is central to what this issue is. Politically, this is - there's cross-currents going on here that doesn't make any sense for any of the members of this committee. So I think we all have to go back to the contract and I'm going to ask you, under Exhibit 6, since you were there in the room - you're not a signatory to this but you were representing the Company at that time, what in your mind, is the word "shall remain at zero" pertaining to the flows at Milner. What does that mean?

Mr. Tucker:

First of all, this was 30 years ago and I was sitting in the back of the room, but my recollection of that event, that Exhibit that you're talking about, was specific to how the State Water Plan was intended to be changed. You brought up in an earlier question about raising the minimum flow to 39. The minimum flow at that time under the State Water Plan, for planning purposes was 3,300 cfs, and the raising to 39 was what was intended. The zero flow was the intent to manage Milner for zero flow. Now that said, I think everyone realized that it would not necessarily be zero flow, but the management mind-set was to manage - the State would say - if it gets to be zero at Milner, that's fine with us. That's what they were saying.

**Senator
Stennett:**

Thank you. I appreciate the interpretation on the 3,300. I recall reading that somewhere else. It makes more sense than why the language would say it should be increased under Item 1. Let's go back to Item 2. Both parties, the Power company and the state signed the Agreement that regardless of what the interpretations are, whatever it means shall remain at zero and the word "shall", it doesn't say "should". Should is a qualifier

in every one of these documents, everyone - one through six, except for two, in which it says "shall". So is this the interpretation of the Power Company at that time that the state could shut off Milner and use the water however they chose to above Milner?

Mr. Tucker:

I'm pausing because I'm not sure the Power Company considered that. I don't know for sure. My sense, when you qualify your question or having your question that the state use the water for whatever purpose, I would have to say no. The Power Company, if it had been the intent of that Agreement, the Power Company would subordinate its water rights for all purposes down to 3,956, they just as well had said, all you get is 3,956 and don't come back and darken our door again. That's not what occurred. There was the setting aside of a specific amount where at least trust water, over and above the 3,956, that was to be used for subsequent purposes as envisioned by the contractor and as envisioned by the later legislation that went in place. I might say, that subsequent use, was also have a component that what its impact might have upon hydropower. If you look at the IDWR regulations, the allocation of trust waters has a hydropower component. In other words, the state was not blind to the fact that it had the most forward and looked at potential impacts these types of reductions might have on hydropower. But the Company's presumption was is that they were subordinating irrigated agriculture, those that were in place and those that might come into place later that might want to use this block of water that was set aside. I can tell you the Company was not contemplating a total subordination for all purposes and just walk away and forget about it.

Senator Stennett:

I appreciate your interpretation; however, it is telling in the Exhibits, under the qualifiers that the zero flow at Milner Gauging Station remain at zero and says shall. The Company saw that and shall is a term of art in the legal profession as it is around here, and when we put shall in the statute it means something.

Mr. Tucker:

I appreciate that comment, but I don't know that it changes my mind. But I understand what you're saying. It does say shall.

Senator Little:

I'm reading the minutes of March 11, 1994 of this committee and Mr. Chapman's testimony on Senate Bill 1574 and there's some language by Mr. Chapman and some by Norm Young. They're talking about incidental recharge and artificial recharge. Is it your position that there's a difference between incidental recharge and artificial recharge?

Mr. Tucker:

Yes, Senator Little, there is. As I recall I've read that same portion of the minutes. There was some concern at the time when the 1994 legislation went in that, I think, Mr. Higginson, the administrator of IDWR, was concerned that we shouldn't be creating in the context of talking about recharge generically, that someone could come in and claim a water right in the SRVA for an incidental recharge. In other words, for irrigating and the fact that you do irrigation, if incidentally recharges the aquifer, that is

not a recognized use. So it was specific, the intent was to allow people to go get a permit for recharge, primary purpose for recharge. Incidental recharge was recognized as being beneficial to the state in that legislation. It was recognized by that committee as being important.

Senator Little: The last line of Mr. Chapman's testimony said that Chapman noted that language was added and referring to privately owned electrical generating companies to protect and verify the Agreement of Swan Falls. Does Mr. Chapman's testimony on Senate Bill 1574, obviously it's meant to verify the Swan Falls Agreement, but is your interpretation that it basically says recharge is subordinate to everything what's agreed upon, the DCM language and the trust water of the Swan Falls Agreement. Is that your position?

Mr. Tucker: Yes, it is. If you go back and look at some of the minutes of the meetings just prior to when Mr. Chapman made that statement. The Idaho Water Users proposed a certain piece of legislation or policy on recharge and as I recall, in that piece of legislation, they didn't say anything about subordination. The Department of Water Resources in commenting on that policy said we have to say one thing or the other here about whether it's subordinate that hydropower and subordinate to Idaho Power's rights or not. It was changed, at least in the minutes, it looks like that change was made to validate or to verify or whatever the language.

Chairman Schroeder: Further questions? All right. Thank you.

Chairman Stevenson, would you like to make some comments on this piece of legislation?

Chairman Stevenson: Mr. Chairman, I think you'll hear lots of testimony on this and I decline.

Chairman Schroeder: Governor Evans, would you like to speak? And Committee, Governor Evans has provided us with two handouts that are in your blue folder.

Governor John Evans: Thank you very much, Mr. Chairman, and it's a pleasure for me to be here today and listen to the very complicated debate in relation to the Swan Falls Agreement of which I was a party to. Fortunately during those days, we had some excellent attorneys - Tom Nelson, Jim Jones, Pat Kole, Pat Costello - they would negotiate all the way through to come up with the Agreement.

It is a pleasure to be here to report my recollection of the negotiation of the Swan Falls agreement which the State of Idaho and Idaho Power signed almost twenty two years ago. I hope my testimony will help to clarify the issues before you.

The issues of major concern to Idaho Power in 1984 were the water priorities, the minimum flows of 3,900 second feet in the summer and 5,600 second feet in the winter. Aquifer recharge was not an issue in

1984, as we negotiated the agreement.

As for the allocations of the surplus water above the agreed upon minimum flows, former Senator Ray Rigby, an eminent eastern Idaho water attorney and former Attorney General and now Supreme Court Justice Jim Jones, developed the concept of the Trust Doctrine for the surplus water. They recommended that the surplus water would be held in trust by the State and then be allocated to the future beneficial uses. Although Idaho Power has received the benefit of those trust waters over the years until the Legislature would determine the future beneficial uses, in my opinion they gave up their water rights of those trust waters for power generation in the Swan Falls Agreement.

I have read the Attorney General's Opinion 06-2 of March 9, 2006 and agree with the opinion. It appears to me that Idaho Power recognizes they cannot win the aquifer recharge issue in the courts so they are trying to win in the political arena.

I am quite surprised that Idaho Power is not being the good citizen they were when they signed the Swan Falls agreement and are now objecting to the aquifer recharge plan. If the recharge works as we envision, in time the increased flows back into the river from the Thousand Springs and other springs along the river plus the Bell Rapids water buy out of 75,000 acre feet plus the water from the planned Conservation Reserve Enhancement Program of 200,000 acre feet, Idaho Power will receive an abundance of additional water to run through their generators. They should be very pleased with the results

Let me urge you to support Speaker Newcomb's H800, The Aquifer Recharge Bill.

{Governor Evans handed out a document that was prepared for the Swan Falls negotiations by Assistant Attorney General Pat Kole and the Governor's Attorney, Pat Costello in 1985. }

It's a very interesting story of what their interpretation was of the Swan Falls Agreement. On page 17, I thought it was most interesting, of course they were talking about the recognized beneficial uses that the state could allocate water for and they are listed there in the first paragraph on the left hand side of that document. The second paragraph says "The parties agreed that the State would be free to change these factors in the future as deemed necessary by the State. The final agreement divided the power company's water right into three parts: (a) the subordinated as to all existing uses developed as of the date of the agreement; (b) the company's remaining right in excess of the state's minimum flow is initially unsubordinated but held in trust by the state to be allocated to meet future uses which conform with state law; as each such right is approved, the power company water right is automatically

subordinated to that new right; (c) the company's right to use the amount of water protected by the state's minimum flow (3,900 cfs summer, 5,600 cfs winter) is permanently unsubordinated."

This document is put together by two young, bright attorneys that worked all the way through the Swan Falls Agreement and I think it is a document that you all should study very carefully and I think it very clearly indicates that Idaho Power gave up those rights to those surplus waters and now when they're coming back around after the '94 agreement, that was obviously to me was a huge mistake and I ask the Speaker - what happened? Why would you place that kind of a document in the code to give Idaho Power those higher priorities on that surplus water? He said we were dead on our feet. We just weren't watching it closely enough. That's about what you said, wasn't it?

If there are any questions, I'd be very happy to answer them.

**Chairman
Schroeder:**

Any questions for Governor Evans?

**Senator
Stennett:**

Thank you very much for being here and I appreciate having someone who has actually signed the document. I have a question about trust water. Twenty-five hundred was the recognized minimum flow at one point in time, apparently. That's where everybody came with 4,500 cfs. The Company agreed to go to 3,900 cfs since the minimum standard flow and the 600 cfs to be held in trust. I think that's clear, everybody seems to understand that. I think what is at issue is the water that was in excess of the trust, every day water that comes down. The interpretation that you have is - did Idaho Power subordinate all the water or just 600 cfs? That's the question that remains in my mind about this agreement. It isn't clear.

**Governor
Evans:**

In my interpretation of the Agreement and the negotiations, that's exactly what they were doing. Their emphasis was we need to protect our interest for the minimum flow. You do that and we'll subordinate our rights to the trust water.

**Senator
Stennett:**

The trust water - is it everything above 3,900 cfs or is it just 600 cfs between 39 and 45?

**Governor
Evans:**

I'm not sure. I'm not sure about that, Senator.

Senator Little:

Governor, this document by Kole and Costello. Was that a part of the Agreement or was that - the thing that gives me a little interest about it is on the page that you were quoting, page 17, that said "the State would be free to change these factors in the future as deemed necessary by the State". If the state determined that American Falls Reservoir had to be kept full, all reservoirs kept full, I can't imagine Idaho Power would agree in 1984 to say we're going to leave all the reservoirs full for fishing and

any other use that would come up after the Swan Falls Agreement would have been okay. Was this document part of the Agreement or was this an analysis done by those two for some legal.....

**Governor
Evans:**

You're absolutely right. This was their personal consideration of the historical review as prepared by the Assistant Attorney General and the Governor's attorney. I thought it was good to bring it to your attention and it hasn't been published for many years and it's something you can use as a document because it's what they had concluded the Agreement was all about.

**Chairman
Schroeder:**

Further questions?

Thank you, Governor.

**(Former)
Senator
Laird Noh:**

It's nice to be with you this afternoon, I guess. My recollection of the last hearing on the Swan Falls legislation after the lawsuits was, we sat down, as I recall, about 1 o'clock in the afternoon and didn't even have a formal break until 2 a.m. in the morning. So, you have a long ways to go here. (Much laughter.)

I did feel an obligation as Chair of the Committee at that time to be at least available for questions and to share with you a little bit about the information I may have and raise two or three points that have not been given, perhaps, adequate attention. I hope you will, at least it's easier for me, to analyze this issue in two fairly separate components. One is the issue of whether it is good public policy to use the trust water for recharge or to use it for hydropower generation. That, I think, is a legitimate policy issue for the legislature to decide. The separate issue, of course, is whether Idaho Power, in fact, has priority over you as trustees for the trust water, to make that determination and anything other than the political process. Do they have a right and if so, where and how should that right be determined.

Now to back up a little bit. Speaker Newcomb said this probably was going to be the testimony of the dinosaurs, but a little bit of history. One of the reasons why you do have such a good record of the Swan Falls hearing is because you could see there was a lot of pretty good lawyering going on. At that time there was a very bright, young fellow not too long out of Harvard Law School named Mike Crapo. You will see that in reading the Attorney General's opinion, the record weighs very heavily. We take all of those hearings, all of those hours of hearings, a very dedicated, bearing in mind this is "typewriter years", the committee secretary named Bev Mullins who still lives here in Boise, who transcribed the minutes directly from the tapes because of concerns that we would at some point be back in the same situation that we confront today.

Senator Crapo was particularly actively involved in this process. It is very unusual that statements of legislative intent and the statement of purpose

of legislation be in the official records of the Senate. Senator Crapo insisted upon that. He wrote the statement of purpose which you will see in the Attorney General's opinion and the very extensive, perhaps the all-time record, of statement of legislative intent. He stood on the floor of the Senate and read that verbiage into the record, realizing that an accurate record, for better or worse, would probably be important in future situations, such as this.

A couple of points that may need a little talking about - one is these specific water rights or recharge held by the Water Resource Board, not some general open-ended fall to recharge, but only that we could define in minimum flow water rights held by the Idaho Water Resource Board. Secondly, I also served as an active member of the Facility Deregulation Interim Committee a number of years ago. Senator John Hansen was Senate co-chair of that committee; now Treasurer Ron Crane was the House co-chair of that committee; Senator Lee was also involved. It was at the time Idaho Power was just commencing the re-licensing of the Hells Canyon project and Joe Marshall was president and CEO of Idaho Power. Idaho Power was then concerned about public support and political support for the re-licensing project and how that might affect litigation under the Hells Canyon re-licensing process. No one was sure at that point what Congress would do, and I'm not sure that we're still sure today, whether a complete deregulation of electrical energy removing it totally from the authority of the state Public Utility Commissions. We were invited, and we did, sit down and negotiated for a period of over two years with the executives of Idaho Power over how the ratepayers of Idaho, in fact, might be able to benefit contractually from the Hells Canyon and other hydro projects if deregulation occurs. Envisioning it for us exactly what happened in the state of Montana when, at Montana Power's request, and heavy lobbying, the legislature did fully deregulate the senior water rights along with the generating projects were sold to an international Pennsylvania company and now there are thousands of junior water rights which are situated similar to those water rights junior to Idaho Power's at Swan Falls which are now far beyond the reach of the Montana Legislature or the Montana court.

There are similar water rights similarly situated with Avista at the Post Falls Power Plant which are senior to the minimum lake level of Lake Coeur d'Alene, held by the state of Idaho and many upstream on the Clark Fork River and other commercial, industrial, and other water rights. There were similar water rights on the Bear River. Those were protected by contract at the time through the Idaho Public Utilities Commission, the Attorney General's Office and the Department of Water Resources. When Utah Power and Light was sold to Scottish Power, then it became Pacific Corp, those junior water rights were also protected in the agreements with the PUC. Mr. Buffet and Mr. Hathaway recently, when Scottish Power sold that entity and those water rights to Berkshire Hathaway, which is a private - not a publically registered company. The

point I want to make here is that we don't know on in the future what will happen in terms of the status of public utilities regulated by the Public Utilities Commission. We hope that continues, but there still are very large pressures to fully deregulate electrical energy. I think it's imperative upon the Legislature to be particularly diligent as they deal with hydro water rights and how they might be affected by changes in ownership or changes in federal law at some future date. Those negotiations with Idaho Power didn't resolve with any agreements and negotiations were terminated.

When I read in the newspaper that the Governor was negotiating with Idaho Power to use taxpayers money, \$1.6 million I believe, to compensate Idaho Power for what I believe to be trust water. Now obviously, that may be a position of contention for debate in the adjudication court or other courts. From my understanding of what occurred in Swan Falls, the Legislature are serving as the trustees and assisting the state over that trust water have a trust obligation, and there would be no compensation due and no other non-trust water rights in any kind of risk under this legislation or other legislation. But I do raise the issue, and you know this issue of compensation almost came to pass for water rights which in my opinion Idaho Power probably doesn't own, was almost an accomplished situation.

So, I might summarize by saying that Idaho Power's water rights are currently under determination before the adjudication court. That may result in litigation or the nature of the Swan Falls contract, contracts in non-adjudication courts- must certainly- the two must come together. I did become alarmed from learning the Governor and Idaho Power had tried to negotiate that Idaho's taxpayers would pay \$1.6 million to Idaho Power for these trust waters, which the taxpayers, I believe, already own.

Now, in '94, there's been a lot of discussion about that. It appears to me, at least from what I know, that the Legislature was within its authority to make that determination at that time of the trust water and it is within its authority today to reverse that decision within the bounds of other Idaho law. There may be litigation to determine that, but I don't believe it should constitute the taking of the rights of Idaho Power. If there are any legal issues, they should be settled in the adjudication or other courts and those decisions should not be affected by taxpayer compensation to Idaho Power or by abdication of legislation to the court. Thank you.

**Chairman
Schroeder:**

Questions for Senator Noh.

**Senator
Williams:**

Welcome to the Committee. It's good to see you. In your words, Senator Noh, what was the intent of the legislation that was passed in 1994 by the Legislature at that time?

Senator Noh: I was not a co-chair nor a member of the recharge committee. I have not gone back through the minutes from the interim or resources committees in that regard, so I am giving you my recollection. My recollection is that there was a group of people who were very interested in recharge. My own opinion is that recharge is only one component of what would be necessary to address the aquifer problem. I recognize that Idaho Power is a very formidable political player. When the advocates for [the 1994] legislation drafted the bill, they wanted to be able to be subordinated to Idaho Power's hydro rights but felt they probably could not get the votes. In order to get the bill passed, it was necessary to add that provision.

Senator Williams: Senator Noh, have you read the statement made by Senator Crapo ... [in the Senate] journal?

Senator Noh: Yes, I have.

Senator Williams: What is your opinion of it?

Senator Noh: I think the interplay in the minutes between Senator Crapo, Idaho Power's attorney, and Senator Peavey was very important. Senator Crapo was very careful and deliberative in putting that together.

Senator Little: In S 1575 from 1994, section 1, the language before 1994 said, "the legislature hereby declares that the appropriation of underground storage water for purposes of water recharge," and then it said, "in the vicinity of St. Anthony and Rexburg." That was stricken in 1994, "shall constitute a beneficial use" (I'm returning to the old language). Prior to 1994, the legislature said recharge is a beneficial use in this pilot project. Help me if I'm getting this right: in 1978, recharge, as a beneficial use, was to pilot a project. In 1994, they struck out any reference to the pilot project and said at that point in time that recharge is a beneficial use categorically. The document Governor Evans gave us contains discussion in which two attorneys talked about how the parties to Swan Falls agreed to change these factors in the future, as deemed necessary by the state. Do you think that Idaho Power, when they negotiated Swan Falls, would have given its full trust to the legislature to deem whatever it wants as a beneficial use, and thus causing Idaho Power to subordinate its water rights? Do you think that was their intent?

Senator Noh: A 68-year old shepherd may be able to read the mind of a sheep, somewhat, but not Idaho Power's.

Senator Stennett: If I go back to the Senate Journal, the vote was not unanimous on the floor, and there were six who voted against it, including former Governor Batt. It is telling, though, that the statement of legislative intent was read, and in this case, was read by unanimous consent without objection. So there was obviously some deference given to the interpretation of Senator

Crapo as to what the agreement meant at that time. I'm still grappling with how, politically, this doesn't make any sense for anybody, so I'm trying to figure out what the contract said. You were there.

I'll go back to one paragraph in the Senate Journal on page 59, where Senator Crapo wrote. I'll read this to you and ask the question of whether the trust water that Idaho Power gave up is the 600 cfs or if it exceeds the 600 cfs. Here's what Senator Crapo had written in the Senate Journal: "Thus, the existing hydropower rights, which have not been affected or subordinated, shall not be subject to depletion below any applicable minimum stream flows established by the state." It goes on to say, "Hydropower rights in excess of such flows will be held in trust by the state and are subject to subordination and to depletion by lawful beneficial uses." Going back to the question I asked Governor Evans, again, was the 600 cfs all we held in trust water, or did we hold in trust all water in excess of 3,900 and 5,600 cfs?

Senator Noh:

From my perspective, it is very clear, not only from the statement of legislative intent, but also from the committee minutes and a number of other documents, that all of the water – all future water – above the minimum flows [is included].

**(Former)
Senator John
Peavey:**

I'd like to go back just a little bit before 1984 to the 1970s, when this all got started. Back then, there was a proposal to build a 1,000 megawatt coal-fired plant and the power company was promoting this. They clearly told us that the demand for power would literally pump every drop of water out of the Snake River south of Boise. The power company had the dams – 11 of them, I think – in the rate base, a guaranteed return on that investment, and they were going to get a billion dollar investment on the 1,000 megawatt plant in addition to pumping water away from their dams to develop another half million acres of farm ground. Now, I was an irrigator, a pumper, north of Rupert and at one of the hearings, I asked the president of the Company what that would do to the power rates. I suggested it would result in a 10-15% bump. He said, "No, Senator. Triple the rates."

Well, it was pretty obvious to me that [tripling the rates would cause us to] lose our farm and go out of business. So, I came to the legislature and tried very hard to get a one-year moratorium – that's as long as I could muster support for – on taking water out of the Snake River. Believe me, every water user group, Farm Bureau, Idaho Power, everybody was against stopping that development.

My grandparents on both sides arrived in Idaho about 100 years ago and we all developed that desert – and we did a whale of a job. But at some point about mid-century, we had more farm ground than we had water. I got 12 votes on that moratorium and immediately afterward, in August of

1976, a woman ran against me and Idaho Power gave her \$3,000 to run. I lost that Republican primary and I might point out that I was the last Republican senator from Senator Stennett's district. You don't like to lose an election, and I was struggling with how I could get the development of that river shut down. I ran into a guy named Matt Mullaney who had been defeated for a position on the Public Utilities Commission (PUC). So, Matt was highly-motivated, as was I, and he figured out that if he could file a complaint with the PUC saying that we thought the stockholders ought to pay for the generosity in not defending this water right and not the ratepayers. The complaint went to the Supreme Court and... the Supreme Court said it was the one water right on the river that was not subordinated. That changed Idaho Power's promotional pro-development push to develop the desert, to irrigate, [and to] take every drop of water. "Use it or lose it" was the theme of the day. And so, there are a lot of people caught cross-current. There are irrigators – I'm one of them – who aren't irrigating all of their ground. But the power company was definitely in a pro-development stance. They wanted to literally dry that river up. The Supreme Court decision on the Swan Falls complaint made some real businessmen... and they're doing a whale of a job defending their water rights.

With the 1994 bill, what the legislature giveth, the legislature can take back, unless it's a contract. And I'd ask you to help unscramble this situation and let us do some recharge in these big, big water years. It would be tragic to let all that water go down the river. I'd certainly stand for questions. This thing started before 1984.

Senator Cameron: Good to see you, John. Senator Peavey was a member of the interim committee in 1993, along with myself and other members. And you were a member of the Resources Committee in 1994, were you not?

Senator Peavey: I certainly was, yes.

Senator Cameron: Do you recall the language that was brought forward to the interim committee with regard to amending 42-4201 as amended?

Senator Peavey: You'll have to refresh my memory.

Senator Cameron: Have you had a chance to review the minutes on the language between the interim committee and the Senate committee?

Senator Peavey: In 1994? I have not.

Senator Stennett: Senator Peavey, on February 1, 1985 – 21 years ago in this committee – you asked Tom Nelson, who was lead council for Idaho Power involved in the Swan Falls agreement, "When you say 'to protect the new higher minimum flow,'" which I am assuming that was then up to 3,900 cfs from the 3,300 which had been earlier established by the water resources

board, "you aren't saying then that the state couldn't after it had done that, re-lower that to 3,900, that would be the state's option, would it not?" Then Tom Nelson said, "you are right. Anything above the minimum flow the state is free to do [with] as it likes." So, I'll refer back to you, what does that question mean? Does that mean that anything above 3,900 cfs is free for the state to do with as it wants?

Senator Peavey: I assume that those were trust waters and that the state had control of that water. With everybody on the same page, I didn't think we were going to go out and develop a lot of farm ground. The North Side Canal Company, the Twin Falls Canal Company, they're players now and everybody's up to speed on the fact that we don't have unlimited water, but the state needed to have some leeway – Governor Evans was a big proponent of that – and that was the agreement we came to. In my mind, above that 3,900 was trust water.

Senator Stennett: The final question is about the zero cfs at Milner. "Shall" is in the document, versus "should." What does that mean?

Senator Peavey: I think that is very significant that waters diverted above Milner are recharged, [and] the state should be free to do that. It's really important to get as many people whole in this situation as we can. We forced the power company to actually change position. Greg is a whole lot better friend than enemy, but that trust water is for the water board to decide what to do with.

Chairman Schroeder: Committee, we're going to take a five minute break, as I promised.

[The committee took a break, and when they returned, the Chairman addressed some sound control issues. The meeting then proceeded. With 60 people to testify, the Chairman allotted three minutes to each person.]

Jerry Rigby: Thank you. I appreciate the opportunity to address this body this afternoon. Not only am I speaking on behalf of myself, I also have a written statement. Ray Rigby, who is here with me this afternoon, is one of the authors of this and one of the authors of the trust agreement itself and therefore, I will read this with you. I just have to give you a little bit of history as to the trust itself and how it came up. The agreement was struck, but the biggest problem with the agreement was who would hold the water. Therefore, Dad, who had just gotten into a trust with a child... thought that it would be a good idea to use a trust concept and hold the water in trust. Therefore, you heard the comments today that the water right is still held by Idaho Power – it is. But the actual 600 consumptive cfs was placed in a trust and held by the state. So in other words, Idaho Power still owns its water right, but the excess water was held in trust by the state. It's your water; it's not their water, and because of that... it is up

to the state to determine where [that water] should go.

As an attorney, I have to say, I have read this and to me it is so clear that the document itself speaks for itself. Whenever we deal with contracts and agreements, you go to the terms of the agreement itself. If this water was taken, in essence, from the water holders and put into the trust, then you go to the terms of the trust. I won't go into all the issues because of the time limitation..., but I want to point out a couple of things [about] the trust agreement itself. Number one, you've heard it before, but it was subordinated to subsequent beneficial upstream uses. Now again, Idaho Power has said, "well, but we didn't contemplate this." It existed at the time and it didn't say consumptive uses, as Mr. Tucker said. It [says] "subsequent beneficial uses as determined by the state." Who is the state? That's you, making statutes whereby you can effectuate this.

The other issue that you need to understand, and Representative Raybould pointed this out: in paragraph 13 of the agreement, it clearly says that any subsequent final order by a court of competent jurisdiction, legislative enactment, or administrative ruling shall not affect the validity of the agreement. In other words, you go back to the trust agreement itself. We're not necessarily concerned about the state laws anymore. We're concerned about an agreement that lives and dies by the words in the agreement. And that agreement says even if you made a decision in 1994,... policy-wise, you are going to subordinate a right. That's a policy decision. That does not, by the agreement itself, allow you to change the terms of the agreement. That's what was decided in 1984.

Answering Senator Stennett's question as to the 600 cfs over and above, it is my understanding that the 600 consumptive use – now that doesn't mean the whole flow, but the consumptive portion – is the balance of the water right that was subordinated. So in other words, it's all of what Idaho Power had anyway. If there is something beyond that, Idaho Power didn't have a right to it in the first place because it goes beyond their water right. The 600 cfs was an attempt to quantify the balance of that right.

Answering a couple more questions, Mr. Panter said the Supreme Court granted them an unsubordinated right, and therefore it almost sounds as though Idaho Power came back and said, "we'll work with you on this." Remember, the Supreme Court remanded it back to the State Court to determine if they'd lost their rights anyway by abandonment and forfeiture. That's why they came to the table, because they could have lost it all. They didn't win the case; they won an issue in the case and that was it. And for that reason, a policy decision by this legislative body and the state in 1994 can be changed thereafter. It can be and it should be because these are trust waters for the state of Idaho. Again, remember, this doesn't say "subsequent consumptive use;" it talks about beneficial uses. Idaho Power knew that there were beneficial uses of recharge

going on then, so they knew that the state could make those in the future. For them to fail to put this into the agreement is their problem, not the state's; that's not what was contemplated and we've heard that here. In fact, the whole Swan Falls agreement came as a result of even Idaho Power believing that their water right was subordinated up above because rate payers that brought an action [in court]. Idaho Power was surprised when the Supreme Court said, "no, your water right isn't subordinated." So, we talk about misunderstandings or what people contemplate – that's not the issue here. The fact of the matter is that recharge is a beneficial use. The four corners of the trust agreement very clearly state that [Idaho Power's rights] can be subordinated... to these trust waters. For them to then say it isn't is disingenuous.

Another issue that I'm involved with, because I'm a member of the Water Resources Board, is the zero flow at Milner. That's the state plan promulgated by the Water Board and it passed by this legislative body. Zero flow is what it says; it's absolutely zero. Nothing below that is entitled to anyone. The only issue involved, and it was said very clearly in the Senate record, is the issue that as long as the 3,900 and the 5,600 cfs were met, nothing else need be done.

Finally, the legislative history says, "in such times as a future appropriator is granted a water right in the trust waters, Idaho Power Company's right in such unappropriated water becomes subordinated." The point is that because this trust held [the water], who benefitted from it initially? Obviously Idaho Power [did] because there were no other rights at that particular time. Every right that was there at that time was already subordinated because of the grandfather clause. So anything subsequent [holds its] benefit until it is actually appropriated. [By] who[m]? By the Department of Water Resources. Once that's appropriated through another beneficial use – recharge – then that right lowers. And therefore, it's so disingenuous to listen to the arguments that [H 800 is] taking [Idaho Power's] water right. It's very disingenuous because they subordinated it to begin with. They knew that their water use right was going to be decreased because the trust water was going to be appropriated up to the entire balance of their water right. For that reason,... I think too much is being made of what the legislature did in 1994. Yes, it was a mistake, in my opinion. But it did not grant them a right that they can now bootstrap in and say, "we have more than Swan Falls." If they believe Swan Falls is still in existence, remove this part of the statute and let's test Swan Falls because to me, the language is clear and unambiguous. And I stand for questions.

Robert Murdock: My name is Robert Murdock and I'm from Blackfoot, Idaho. My family has been in Blackfoot, for 117 years. I'm a 5th generation farmer. My whole life depends on the aquifer. This is where we get all our water. I would like to agree with Speaker Newcomb, Representative Raybould,

Governor Evans, Senator Noh, and Mr. Rigby with what has been said.

A lot of people have asked me how we were going to do this recharge. Some people have asked if we were going to drill wells. It seems like there has been a lot of misperception as to how we were going to [recharge] this water. I want it clear to everybody that we're just talking about letting the water seep through the canal bottoms. We're not necessarily dumping it on the desert, like I've read. We're just taking it out and running it through the canal systems that already exist. Water flows downhill. I want it clear that – the first rule in Idaho water law says that all waters belong to the state, and I think that this is something that they tried in the Swan Falls agreement. I support what Governor Evans has said to us today, that he wants Idaho to be the state's water master. I agree. I want Idaho to be the state's water master. This is a complicated issue for everyone, and you, as a legislature, are the only ones who can resolve this issue. This is too complicated and too far-reaching of an issue to leave to the courts. The aquifer is so unique that current laws which are set up to manage surface water can't even begin to fairly manage the ground water. The Governor and the Department of Water Resources can't seem to manage the resource in a sensible way. I think the common sense needed to handle this can only be found here with you, and while you're at it, maybe you should start thinking about ways to protect the air we breathe. Before you know it, someone will be filing rights to it and claiming someone else is breathing their share.

No one seems to want to recognize that we've had a really bad drought these last seven years, and with all the scare tactics that we've seen in the newspaper and advertisements, in my opinion, Idaho Power seems to want to extort Idaho's water and money in a similar way that the oil companies did with gas prices after Hurricane Katrina. Idaho Power is not going broke. They reported a rise in operating income of 39.1% over last year. I would certainly welcome that kind of profit on my farm in a drought year. Thank you.

**Chairman
Schroeder:**

Committee, you have received three papers which Mr. Howser has prepared for us.

Steven Howser:

Thank you, Mr. Chairman. With the papers that I've passed out, if you'd refer to the map and the graph that's on the back of the written statement, that might help as we go along.

Inserted into the minutes is Mr. Howser's testimony.

My name is Steven T. Howser and I am General Manager of Aberdeen-Springfield Canal Company. I have been working in Natural Resources research and management since 1987 and have been General Manager of Aberdeen-Springfield Canal Company since 1998. Aberdeen-Springfield

Canal Company's system has been identified by the Idaho Department of Water Resources as one of two systems where significant recharge can be accomplished.

The Committee will no doubt hear testimony today about the Swan Falls Agreement and the subsequent change to the Agreement accomplished with the 1994 legislation. I suspect that all of you have read the Attorney General's opinion. So rather than take my time to repeat what our finest legal minds will present in their testimonies, I would like to take my time to provide all of you some historical information about Aberdeen-Springfield Canal Company, to provide you with some data that will give you an idea of the scale of the currently proposed recharge effort, and speak to the reasoning behind recharge from a water manager's point of view.

Aberdeen-Springfield Canal Company was the first Carey Act project in Idaho and provides irrigation water to approximately 62,000 acres in Southeastern Idaho. We have natural flow rights of 1,172.1 cfs with a priority date of February 6, 1895 and 230 cfs with a priority date of April 1, 1939. In addition, Aberdeen-Springfield Canal Company has storage contracts in American Falls, Palisades, and Jackson reservoirs for nearly 280,000 acre-feet of space. We divert our water from the Snake River about 12 miles upstream of Blackfoot and deliver it through nearly 200 miles of canals and laterals; stretching from our head works on the western bank of the River nearly 70 miles to the end of our Main Canal about 5 miles downstream of the American Falls Dam.

Deliveries to lands within the system began in 1896 and the entire system was completed in 1910. In the 1950's irrigation on the Aberdeen-Springfield system began to change from flood to sprinkler and by the early 1970's more than 90% of our system was being irrigated by sprinkler. Currently we are approximately 99% sprinkler irrigation. The primary effect of this conversion from flood to sprinkler irrigation was to decrease the amount of water applied to the field, resulting in less run-off water entering drains and less water entering the local, perched aquifer through infiltration. However, because the system was designed for gravity flow, our actual yearly diversion remained substantially unchanged. In fact, the decrease in water delivered through headgates resulted in the Company spilling more water from its control structures and lateral ends. Throughout the history of the system, our consistent loss from the canal has been one of our primary maintenance and management difficulties. We know that our minimum daily loss is on the order of 600 cfs. That is, it takes a diversion of 600 cfs just to keep the canal wet all the way to the end, with no deliveries or spills. For reference I would remind you that one cfs over a 24 hour period equals 1.98 acre-feet so our minimum loss is approximately 1,200 acre-feet per day. As our diversion increases, we see an increase in our loss due to increased head pressure and an increase in wetted surface.

At our typical peak diversion of 1,250 cfs we estimate that as much as 675 cfs is transmission loss.

This 'lost' water, along with our operational spills and water arising in our system drains, returns to the Snake River in the Blackfoot to Neeley reach and becomes part of the 'reach gain' of the River. This reach gain water is 'natural flow' that helps to fill water rights for surface water users downstream. In order to give you an idea of the scale of these contributions, I would like to present to you some broad calculations based on our Company records.

Since the early 1950's Aberdeen-Springfield Canal Company has diverted an average 330,000 acre-feet between April 1st and October 31st. Of that, we deliver approximately 120,000 acre-feet through Company controlled headgates, we spill approximately 34,000 acre-feet, and lose about 2,000 acre-feet to evaporation. We estimate that of the 120,000 acre-feet that are delivered, approximately 24,000 acre-feet is not consumptively used by crops and enters the aquifer through infiltration. We also estimate that approximately 6,000 acre-feet of that delivery enters the Company drain system from field run-off and through-the-headgate spills (water that runs through the headgate but is not applied to the field). Thus our calculated transmission loss to the aquifer is our diversion minus our deliveries, spills, and evaporation loss, or 174,000 acre-feet. Add to that the 24,000 acre-feet of water that is not consumed by crops and the total contribution to the ground water through Company operations is 198,000 acre-feet per year. The total amount of water that we add to the reach gain through our spills and drains is 40,000 acre-feet (which are indistinguishable from spring flows in River accounting). If we assume that all of our loss (excepting evaporation) returns to the reach through springs within one year we can calculate that our yearly operations contribute 238,000 acre-feet of water to the River each year.

However, starting in 2001 and extending through the 2005 irrigation season, Aberdeen-Springfield Canal Company experienced significant shortages in our water supply due to the drought. These shortages necessitated fallowing acres and drastically changing our management procedures. Without boring you with more numbers, our calculations indicate that on average the Company's operations during the drought years contributed approximately 65,000 acre-feet less water to the reach gain than during normal years.

At this point you may be asking how I can assume that all of the water lost from our system into the ground returns to the River within one year. For 50 years, 1942 until 1992, the Management of the Company measured the depth to water in 80 wells within the system's service area on a monthly basis. This data clearly shows that within a few days of turning water into the system there is a response in the ground water levels. Ground water

levels rise six to ten feet and hit their peak in mid-August (Attachment A), about two weeks after we start decreasing diversion after grain harvest. The ground water level then begins to decrease at a more gradual rate until it hits its minimum at the beginning of the next irrigation season.

This data shows very clearly that virtually all of the water that is lost from the Company's canals and laterals returns to the Snake River in the Blackfoot to Neeley reach within a year. We estimate that some 5% of our loss actually enters the Eastern Snake Plain Aquifer and is eventually returned to the River at Thousand Springs. This gradual release of water from the Aberdeen perched aquifer sustains spring flows into the Blackfoot to Neeley reach of the River well past the end of the irrigation season. These spring flows, which I might add are unmeasured on the western side of the River, are the basis for natural flow water rights that surface water users such as Twin Falls Canal Company depend upon. In fact, the only spring that is measured in the Blackfoot to Neeley reach of the River is Spring Creek, and that spring is located on the opposite side of the River from Aberdeen-Springfield Canal Company's system.

Ground-water pumping within the Company's system boundary has not changed since the moratorium of the 1980's. I believe that all of this evidence clearly indicates that the aquifer has not been over-allocated, but rather that most of the shortages of surface water supplies to users downstream is attributable to the operational changes made by Aberdeen-Springfield Canal Company in response to the drought.

In my mind there is no question that recharge 'works', all of the historical data collected by the Company shows that as incontrovertible. Certainly the pilot project that is being currently considered, that is a recharge effort of 10,000 acre-feet through the Aberdeen-Springfield system, is small in comparison to the total incidental loss incurred by the system each year. Nonetheless, data collected by the Department of Water Resources during the pilot project will help to refine the Department's ground water model for aquifer flows in the Blackfoot to Neeley reach of the River. Beginning the recharge of the aquifer by managed means early in the season should result in an earlier peak of spring flows into the reach and should help sustain those flows further into the irrigation season. Sustained spring flows should result in sufficient natural flows to serve the water rights of the surface water users downstream, thus removing the need for priority calls.

As a water manager, I view recharge as essentially no different than storing water behind a dam. Water used to recharge our aquifers is not lost or wasted, but rather is stored for release at a future time. The only difference between storing water in our aquifers and storing water behind a dam is that with a dam, we control the time of release by opening gates. Within an aquifer, the time of release is determined by the location of recharge and

that location's particular hydrology. Since we have a pretty good idea of the amount of time recharged water takes to re-enter the River system by use of the Department of Water Resources' ground water model, the timing of recharge efforts gives us essentially the same control of time of release as we have with dams, though perhaps not quite as precise. In years such as this, with excess flows running down the river to the ocean and leaving state control, without being used for irrigation, or generating power, or being stored behind dams, I believe it is incumbent upon us to make every effort we can to store that excess flow in our aquifers so that it returns to the River at some later date to be used for irrigation, recreation, municipal and industrial uses, and of course power generation, for the benefit of all the citizens of Idaho.

Lon Harrington: I would like to make just one comment. A lot of my thoughts have already been touched on. I think Senator Cameron hit it right on the head: time is of issue here.

Chairman Schroeder: Could you tell us where you're from?

Mr. Harrington: I'm actually from the Blackfoot area. Time is of essence. I've spoken to three canal companies with us today, and if they were given the okay, they could start diverting the water very quickly and start recharging the aquifer. I'll stand for any questions.

Senator Langhorst: Will these three canal companies start running water through their canals on April 1 anyway?

Mr. Harrington: They haven't had clearance to start running the water. They would be prepared to start running the water if given the clearance that it wouldn't subordinate their natural flow waters by going in ahead of time.

Steve Bair: My name is Steve Bair and I stand here today to testify in behalf of approving H 800. I'm from Blackfoot, Idaho, and my brother, father, and I have owned and operated about 3,000 acres, all of which are irrigated from deep wells. Therefore, it hits right to my very heart, this topic of the aquifer and how to fill it back full. I think the important thing here is that we look at the aquifer as a giant reservoir that needs to be refilled every bit as much as Palisades Reservoir, American Falls Reservoir, and other reservoirs in our system. A failure to do so will ultimately cost farmers in the Southeast desert an economic loss. It wouldn't take long to put us out of business without water. I would encourage you to vote for this bill.

Don Hale: My name is Don Hale. I'm from the Blackfoot area. I am a member of the Committee of Nine, which is basically the Board of Directors for Water District #1. I served as one of the helpers on the Recharge Committee. We [have] studied recharge for many years now and we are told that we don't necessarily know where that water is going. Idaho Power was willing

to do a study this spring through both the North Side and Aberdeen Springfield Canal Companies to demonstrate where that water comes from. I have here before you today (and I'll give this to the committee), [a report called] "Feasibility of Large-Scale Managed Recharge of the East Snake Plain Aquifer System." This was put out in 1999 by the Department of Water Resources in connection with the Bureau of Reclamation. It, in detail, tells you where the water's going.

We know recharge works and we know how to do it. As the Committee of Nine, we met last week to discuss a recharge plan for District #1 and I'm here to tell you today that there are canal companies ready and willing to start diverting water on April 1. We feel on our own water rights – we're not going to say "recharge" because we don't want to get the bad graces of Idaho Power, but we're going to "wet our systems down." We believe we should be able to put about 2,000 acre-feet of water in our systems and percolate it through the aquifer. Normally in a year such as this, the canals which I work with wouldn't be turning in until the end of April. If we could get two, three, or four weeks worth of recharge – percolation, wetting ourselves down – I believe that will help. And this is at no cost to the state of Idaho. I repeat: at no cost to the state of Idaho. Every one of you is going to be affected by recharge. If you get your water from a well, this is your issue, I don't care if you're in the Moscow aquifer, the Rathdrum Prairie aquifer, the Boise aquifer, or the East Snake Plain aquifer. Anytime you allow a for-profit corporation to control a resource, it affects you and your future development. And I want you to remember that. Thank you.

Kim Cox:

I appreciate the opportunity to be here. I've submitted a written statement and because time is of the essence, I'll forego my time.

Inserted into the minutes is a copy of Kim Cox's testimony.

Mr. Chairman, Mr. Vice Chairman, members of this Senate of the Great State of Idaho and fellow citizens and water users. Thank you for this opportunity to speak to you this day concerning this critical bill. I am a citizen of this state, having been born and raised in the Blackfoot area. I also am co-founder and president of Swiss Mill Dairy, Inc. an Idaho corporation. I am major stockholder, chief executive officer, technician, chief cook and bottle washer and only full time employee of Swiss Mill Dairy, Inc. We are a really small company. We are groundwater users as well as surface water users and have been for many years. I have many points I would like to make but time restraints require me to focus on only one. I along with all other customers received a letter from Idaho Power Co. stating their opposition to bill #800 and laying claim to all the water in question in this bill. As I understand it, this bill only refers to unappropriated flood waters in the Snake River. Idacorp, the umbrella company of Idaho Power Co. claims a bill passed in 1994 gives them

ownership of this water. If you all recall, 1997 was the first year this flood water appeared since that bill passed. The existing surface water reservoirs were unable to contain all of the runoff resulting in serious flooding in the Blackfoot area. Since Idaho Power has claimed ownership of this water, I took the liberty of calling a few of my friends who were affected, some severely by this water. I asked them two questions: 1) Were you or do you know anyone who suffered damage due to the excess unappropriated flood water occurring in 1997. Of those who answered in the affirmative, I asked the second question. 2) Did you receive or were you offered any compensation by Idaho Power Co. for the damages caused by said flood waters or do you know of anyone who did? I suspect you all can imagine the answers I received. They ranged from "You're joking, right?" to raucous laughter followed by "of course not" to shocked silence. Obviously they were wondering how anyone with such diminished brain function would be allowed to be let out at night. I don't know what you are accustomed to where you live, but in my hometown if a rancher goes out and claims all the unmarked cattle on the range and these cattle subsequently crash through my fence and destroy my haystack, I would expect him to compensate me for the loss, or deny claim to the cattle. If he were an honorable person he would do no less. In point of fact, I own the right to use waters of the state to irrigate my land. If that water leaves my land for any reason, not only am I liable for the damage it causes, I am also in danger of incurring fines or suspension from the Idaho Department of Water Resources. I am a corporation just like Idaho Power. Since they have not been held responsible to pay for damages in the case of the 1997 flooding, it is only logical to conclude that they do not have right to this water as they claim. Idaho Power it seems only wants claim to the water when it is of economic benefit to them. In fact, they have offered this water to the groundwater users for the same recharge this bill proposes but at a fee that would be paid to them. The fact that they are unwilling to accept the responsibility of "ownership" should in and of itself deny them the "right" of ownership. The economic strength of this great state is tied directly to its ability to manage its water and it only makes sense that decisions concerning that water remain with the citizens of that state through you, their elected officials, rather than in a corporate boardroom where the only criteria is profit margin.. I urge you to keep the resources of the state under state control and allow us to store this unappropriated flood water in the largest reservoir we have available to us for all of the citizens of this state to use. Vote to send this bill to the floor with a "do pass" recommendation. We will all be watching closely all senators and their votes on this bill and remind you, as you are all aware, you work for the citizens of the state, and we are they.

**L. Dewey
Stander:**

My name is Dewey Stander, from Blackfoot, Idaho. I'm representing Stander Farms, Inc. As farmers on the Snake River Plain, the aquifer and deep wells are very important to us. [We need] to have water back in the storage system under our ground. In the saving of time, I'd just like to

say I'm for H 800, and I'll leave it at that.

Jim Williams:

My name is Jim Williams. I am from the Pingree, Idaho area, which is close to the Blackfoot area. I'm also a many-generation farmer, and I am here in support of H 800. A lot of things I wanted to say have already been mentioned so I won't waste our time. Any questions?

Brian Murdock:

My name is Brian Murdock. I farm in Blackfoot, Idaho with my brother, Robert Murdock. I'm grateful and honored that my testimony has been given my House Speaker Newcomb, Representative Raybould, Governor Evans, former Senator Noh, and former Senator Peavey. I couldn't ask for better men to give my report, so I will submit it later on anyway. But I guess with somebody else giving [my] speech, it gives me time to look you folks in the eye and have a little heart-to-heart with you.

We are all farmers here – most of us in this room. And we have had a long history with Idaho Power. We were the beautiful wife that Idaho Power married back in the 1950s when irrigation pumping was started. They unfortunately divorced us during the early 1980s in what we call the Swan Falls agreement, and they have yet to get over that divorce, I feel. They're still trying to get back at the ex-wife for various issues, and this is another one of those issues. I guess I'm going to plead to you: do not lose control of Idaho's water because it's our lifeblood. You can manufacture power in many other ways, but you cannot manufacture plants without water. That is our only source of making things grow. I love the fact that I'm in Idaho – not Colorado, not Montana, not other places in which the state law says that the state does not own the water. The first law, as you well know,... is that the state owns the water. The state is in control of it. And I want to see that happen because you're my only protection from big corporations.

Granted, farmers aren't perfect. We make mistakes. We have to learn from the everyday routine about the various things that happen in life. We have droughts. We have all had to suffer because of those droughts. We have to get along as best we can, especially in East Idaho in which we have held the higher line by not calling on our most junior users. We have not forced people out of business because we were in a drought.

Unfortunately, when your brother [speaks] before you, he steals your best lines. My last closing comment was going to be... Governor Evans'... famous line: I want Idaho to be the water master of the water in the Snake River, not Idaho Power. So, from Idaho Power's own book, I will read my next-best line. And it was from Senator Laird Noh: "The most important long-term question in the Swan Falls controversy is who shall control the destiny of our state: a single public utility that gained an unexpected windfall from a Supreme Court decision or the people of the state of Idaho?"

Larry Kerbs:

My name is Larry Kerbs. I live in Fremont County. I am a member of the Committee of Nine and also am a farmer in that area. I [see] these big canals go for miles and miles. Up in our area we have smaller canals, a large artery of them, around 100, but we have the same situation with recharge. If we just had permission to put water in the whole artery of canals, [we could recharge the aquifer]. We lose 20-30% of water that does not go in the ground or in the aquifer. I feel like we need to replace the reservoir that sits beneath us and not forget that it's important. I'd say other things but they've already been said so they'd just be a waste of your time.

Bill Newman:

My name is Bill Newman, I own a ranch in St. Anthony, Idaho which is where most of [Idaho's] water comes from – part of it anyway. I accept and vote for this measure that has been proposed. The last six or seven years, our water, and mine particularly, has been cut to 30% of what was allocated, and needless to say this has had a definite effect on [my] crop land. It's my opinion that this is a matter of control. I'd like to make an analogy to the beef industry. There are three [entities] that control the industry, and this is what will happen with water. Water is what made the west and this desert, in particular. Thank you.

Greg Edgar:

I grew up in the Milner area and Milner Dam was a great place to go play at, fish, boat, etc. But we also have deep wells. I have farmed [throughout] my life. I am currently an accounting manager for Spudnik Equipment. We employ 160 members in Bingham County. Our livelihood at Spudnik [depends on water] – we're not farming, but we produce potato equipment. Last spring, my parents' well went dry, as did [the wells of] many workers at Spudnik. They had to go punch down another 20 or 30 feet to get to water because we were in a substantial drought.

This isn't an issue between farmers and big business, being Idaho Power. This is Idaho. I lived in Illinois where I was on a drainage water district in which the issue wasn't putting water in, but getting water off the fields. I understand the issues going both ways – both parties – but it's not an issue of who's right or who's wrong. [The issue is] what is in the best interest for the great state of Idaho. With that, I support H 800. The time is now. We don't have time for further committees to do further study. We need to react now with the surplus we've been given.

Stan Clark:

My name is Stan Clark and I live in Ashton, Idaho. I served on the Committee of Nine for about ten years, and then I served on water policy for the governor for a few years. [I also worked] out of the Water Resources Department for a while. I'm here to support H 800. [We should re-allot] natural recharge in the aquifer this year because of the wet winter. However, it would take several years of high water to get us back to where we were. With the use of some of the surface water above

Milner, we can speed that process and help to mitigate some of the problems in some areas. According to the model, we can expect a large percentage of the water to find its way back to the river through the Thousand Springs and other spring systems, keeping the whole aquifer higher and with very little impact to Idaho Power. Therefore I'd urge you to pass this legislation out of committee with a do pass recommendation. Thank you.

Roy B. Thomsen:

I am Roy Thomsen. I'm from the Blackfoot area. I represent a small irrigation company and I am in favor of this recharge bill. As has been said many times, if we had the opportunity, we could put water in our canals and it would percolate into the aquifer. From April 15 to November 1, we have to shut our water off [due to] a contract with the Palisades and the Island Park water build-up. We have some runoff water we can use but we can't get it into our system legally until April 15. Thank you.

Ed Clark:

I live in the Ashton area and divert water out of a canal system. This is a year in which we have the opportunity to do a lot of good for the economy in the state of Idaho, in my estimation. In the Island Park area, we have in excess of six feet of snow. Our reservoir there will fill rapidly. The ground is saturated. There's going to be a lot of water come off – not immediately, but it will come off – and we need the opportunity to divert this excess water. We don't want to take anyone's water rights. We don't want to jeopardize anyone's water rights. We know how dear and precious they are. I would encourage you to pass H 800 out of this committee and give it a do pass recommendation for the full Senate.

Senator Little:

What's the normal date that you fill your canals?

Mr. Clark:

In Ashton, [it is] somewhere between the 15th of May and the 25th of June.

Senator Little:

How much earlier could you fill them if this legislation was enabled?

Mr. Clark:

This year, not any earlier. But in the St. Anthony area – which is part of the Fremont-Madison distribution system – they could go immediately.

Senator Stennett:

That's quite a spread between the middle of May to the end of June. Is it just when the call comes? When everybody needs the water?

Mr. Clark:

That's the policy. Right now, our canals are full of snow and will [continue to] be until sometime in the latter part of April.

Ron Murdock:

I think most of the points that I had have already been mentioned. I was glad to hear mentioned that this issue isn't just about irrigators. We're talking about a lot of people who draw domestic water out of wells and about a lot of cities. I just feel that in this year of plenty, it's prudent that we work on filling the aquifer.

Brock Driscoll:

I'm from the American Falls area. [I am a] fourth generation farmer there. I appreciate what Governor Evans, Senator Noh, and others have said. [I would like to point out] one thing: in 1997 when we had the flood, I took my family down to Shoshone Falls and everybody was "ooing" and "awing" about how great it was to see. It was a spectacular thing to see, but I had a pit in the bottom of my stomach. They were flushing the water, some of it, down the creek and we'll never see it again. We don't have the abilities in our society right now, I don't think, to build other dams and make other reservoirs, but we do have a reservoir underneath the ground. I'm for H 800. I hope that you would approve it. The Lord has blessed us with a lot of things this year. We've had a long drought but right now we have the capability to see what we saw in 1997.

**Michael
Bamberger:**

My name is Michael Bamberger. I am the CEO of Spudnik out of Blackfoot, Idaho. On behalf of Spudnik's employees, I want to express our strong support for H 800. We have a pretty simple view on this issue. We believe that, especially in times of drought, the aquifer is really essential for our well-being in Idaho for its people, its farmers, everybody. Therefore we also believe that in times of plenty, it's our natural obligation to replenish this resource. The bottom line is: we think we could live with higher energy prices; we can't live without water. Thank you.

Scott Kirwan:

I'm Scott Kirwan from the Blackfoot, Idaho area. Actually, I just live down the road from Senator Williams, and we've known each other all our lives. I work at Rocky Mountain Machinery Company [which is] a family-owned business out of Blackfoot, Idaho. I'm the local John Deere dealer. Obviously... we have a vested interest in the aquifer and the agriculture industry and ag business. I also have had many neighbors who have had to dig their wells deeper. I am grateful, particularly today, to be a part of this great American government that we have, to have the opportunity to stand here and talk to my elected officials. I would appreciate your vote in response to H800 in the affirmative. I think it will be a benefit to the entire state of Idaho. Also, I am grateful that you have the opportunity to manage the water in the state of Idaho, rather than a corporation. Thank you.

Louis Thiel:

My name is Louis Thiel and I am from just west of Idaho Falls. I'm the director of the New Sweden Irrigation District four. Most of our district uses surface water, but I strongly support H 800 and I urge you to do the same. I think we would be very amiss if we don't take the opportunity this year to recharge the underground aquifer. We've been in this terrible drought for seven, eight years and I think we'd be much amiss if we didn't grab hold of this opportunity. We have a canal system we can recharge the aquifer through, and we would be willing to do that. All we need is the green light.

Paul Berggren:

My name is Paul Berggren. I'm the Senior Director of the New Sweden

Irrigation District. I've been there [for] 28 years. I also sit on the Committee of Nine and I've been there for 23 years. On the Committee of Nine, I represent the water users between Lorenzo and Shelley. I'm here in support of this bill. I think we would really be remiss if we fail to do this. I have a real a problem with the letter I received in the mail from Idaho Power. I am an Idaho Power customer. I've been in the livestock and farming business all my life. [The letter] didn't actually say it was going to raise rates, but it alluded to it. But my question is that in the last five or six years, they've never received the water they're talking about. Because of the drought, there hasn't been any storable water that has gone past Milner. The only water that's gone past Milner is water that's been their own [under their] water right. And they're talking about raising the rates if they don't get the flux water? We haven't had any since 1997. If recharging takes place, it'll only take a little of the water. They'll still get a lot of it. But my problem is - how in the world they can justify scaring the pants off everybody about raising rates when they're talking about something they haven't even had in the last five or six years?

I appreciate the chance to talk to you folks. I was just going to turn my time over to someone else but we've heard so much good testimony already today.

**Neil Morgan and
Jim Marriott:**

[Someone in attendance announced that Neil Morgan and Jim Marriott had to leave due to a traffic accident.]

Vince Alberdi:

My name is Vince Alberdi and I'm the general manager of the Twin Falls Canal Company. The Twin Falls Canal Company, by way of reference, irrigates some 200,000 acres, and we have a senior water right. It is 3,000 cfs below Blackfoot which is diverted from Milner. So when we talk about recharge, recharge is very important to the Twin Falls Canal Company because the natural flow that we're talking about this afternoon is fed by recharge, and that recharge comes to us when water comes into the aquifer. We're very dependent on that water in the latter part of the season - anytime after runoff [ceases] during the months of July and August, in particular.

But after a lot of serious soul-searching, I have to tell you that we cannot support H 800, and the reason we can't support it is because of the water right issue and not the recharge issue. It's the water right issue that's at stake here. In 1994, when the Swan Falls agreement was reaffirmed by the legislature, I have to tell you that in my opinion, I think that was a very intelligent legislature, just like 2006. To be able to take a water right and change it is a pretty slippery slope. I don't think this legislature wants to get into the business of changing water rights. When I look at your agenda, the agenda today on H 800 tells the whole thing: "Water rights, priorities revised." Now, the Twin Falls Canal Company could not stand nor be in operation if our priorities were revised because we depend upon

that natural flow right to provide water for our users.

I urge you to reconsider H 800. Don't get on the slippery slope just because you think you might be doing something right, because 12 years from now, the next legislature might change it again. Water rights are going to have to change, but we have a process in place [to do so]: the adjudication process. Water rights need to be changed; that's the format. That's what adjudication's all about.

**Senator
Burtenshaw:**

Vince, what's your understanding of this trust water we're talking about?

Mr. Alberdi:

I wish I could understand – I understand the Swan Falls agreement fairly well, but I think this whole trust water agreement was put into place for further development. I don't know nor have I heard today from all the testimony we've heard how much of the trust water's ever been used. I know that agreement came into place in 1984 and the moratorium came about in 1992. I don't even know if there is any trust water left. I don't know how much of that was developed or where it went.

**Senator
Burtenshaw:**

That seems to be the crutch of what we're trying to [decide]. If, say, that there was trust water, do you think that using it for recharge would be good?

Mr. Alberdi:

Perhaps the constitution of the state tells us that we have prior appropriation, and the legislature has some responsibility determining where and how these waters are going to be used. But it's in the midst of this adjudication that there is so much controversy. I think we should slow down, we should let the adjudication courts – where every other water right is going to be tested – determine where, in fact, that water right is. I don't think it's for the legislature – and please don't misunderstand this, because I do respect you very much – to mangle in water rights. I don't think that's probably a good topic for you all to take under consideration.

**Senator
Burtenshaw:**

Say we can identify the trust waters. Don't you think that's a valid water right?

Mr. Alberdi:

I think that's a valid water right.

**Senator
Stennett:**

Vince, then, if it is a valid water right, basically all they have to do is define the trust, and Governor Evans, Senator Noh, and Senator Peavey, said that the trust water is anything over 3,900 cfs. Isn't all that trust water for the state of Idaho? Do you disagree that it's trust water for the state of Idaho?

Mr. Alberdi:

I do.

**Senator
Stennett:**

Then help me with the Swan Falls agreement, if you can find anything that will lend credibility to [your] answer.

Mr. Alberdi:

The only thing that I lend credibility to my answer was that the 1994 legislature reaffirmed the water right, and now 12 years later, here we are debating that water right again. I think the water right needs to be protected.

**Senator
Cameron:**

Obviously one of the key elements of the Swan Falls agreement was subordination. I think that was the crux of the issue. Why do you think the 1994 legislature would overturn, in (I think) a unanimous vote, that subordination? Why would they un subordinate? What would be your opinion of that?

Mr. Alberdi:

You know, I wasn't... here in the 1994 session, even though we were water users. But you were, and you might have a better answer than I do.

**Senator
Cameron:**

I guess the trouble that I have with this [is that] I sat through those committee hearings. We wanted recharge. The whole motive behind that piece of legislation... was recharge. We approved language in the interim committee for recharge. When that language was brought forward to the main body, it was adjusted. It was stated in the germane committee that this was done in accordance with the Swan Falls agreement and in collaboration with Idaho Power, and so the legislature ratified what they believed was an effort to try to obtain recharge. And yet, what we really did was shoot ourselves in the foot. If, in fact, my portrayal is accurate, would your testimony and Twin Falls Canal Company's perceptions remain the same?

Mr. Alberdi:

My testimony is that somebody in 1994 did a lot of thinking in regards to what legislation was passed or ratified by the Swan Falls agreement. I don't think we can discount that. I think that has to be tested through the adjudication courts to find out what the meaning of the Swan Falls agreement is.

**Senator
Cameron:**

Do you give more weight to the 1994 legislature and its activity than you do to the original agreement? Do you believe the 1994 legislature knew what they were doing more than the original signers of the Swan Falls agreement did?

Mr. Alberdi:

I haven't pondered that, but obviously they gave it a lot of thought.

**Senator
Cameron:**

I would submit to you that I think a lot more thought went into the Swan Falls agreement than what took place at all in 1994. I am embarrassed that I was a party to it and nobody caught on.

One last question: Would the Twin Falls Canal Company benefit from a restored aquifer?

Mr. Alberdi:

Of course.

Gerald Tews:

My name is Gerald Tews. I'm a rancher/farmer from Filer, Idaho. I serve on the Canal Board, but these thoughts are mine. First, to pull the rug out in the middle of the stream in three days... isn't fair to Idaho Power. Why couldn't we have sat down and come to an agreement? That's what bothers me, and I believe that's one of their main issues. It's ridiculous that we're in this squabble – fighting in the newspapers and what not.

...We've been talking recharge for years and years and years because it's to our benefit to fill our springs. But the main part of the water that we got this year will come out probably in May. By then, the canals will be full with irrigation water and we will receive that incidental water just like we always have. Where we fail as a state, all of us, is that we do not have recharge [locations] where we can [put] this big amount of water... to go into aquifer recharge. Right now, we're just depending on these canals, and we appreciate that and realize that they do a lot of good. But the big block of water that will come this year will go down the river. So we need to look forward. We need to step up as a state and get some recharge sites [where we can] put large blocks of water, when it's available.

Recharge is just one of the tools [to fix] the problem that we have, and to me, one of the ways to correct it is going to take money. The state traded this, in my mind, by over-allocating the resource. It was there forever and we could just drill, drill, drill, water out, water out. We all drink water, we all get up in the morning and do our things, washing, whatever we do – everybody in the state. So these aquifers are more important to us than we realize. Boise valley is on the verge of the same problem we [have], and so is Mountain Home, Bear River, and Sun Valley.... They're going to have problems to address.

My solution to it is to take one-fourth of 1% in sales tax and put it in a fund for these problems. We're all willing to pay \$8.00 per gallon for drinking water and think nothing of it, so why can't we build a fund to the future where our grandkids won't look back and say, "Dad what were you thinking?" like we're doing now. These are some of the things and ideas we should be thinking about. It takes money to do these things.

**Senator
Burtenshaw:**

Do you realize [that] all the way up the Snake River, there are gravel pits, Jensen's Grove, and all of those places? ...You made the statement that we can't take advantage of this water. I'm asking you if we have permission to do it. I'm saying that we could [take advantage of the water] because we could divert water into [those places]. ...In 1997, we had a lot of water come down the creek. I went to my cabin in Henry's Lake Flat and the only thing I could see was the roof. I mean, there's snow up there like I've never seen before. Do you disagree that if we get a big flush of water and we are able to put it in those places I'm talking

about, it'd help the aquifer?

Jeff Raybould:

My name is Jeff Raybould. I'm the Chairman of the Fremont-Madison Irrigation District. I'm also a member of the Board of Directors of Egin Canals. I'd like to talk to you about aquifer recharge on Egin Bench.

Egin Bench Canals has practiced aquifer recharge for about 120 years. When settlers went out on Egin Bench, the first thing they did was to build canals. When they put water in the canals, it sank. A lot of water sank on Egin Bench. Recharging the aquifer on Egin Bench and holding the water table within a few inches of the ground was how they irrigated for almost 100 years. They did a really good job of irrigating that way until the 1980s when Egin Bench was converted to sprinkler irrigation. Even then, it became necessary to continue to run water in the canals as much as possible to maintain the aquifer for domestic wells and other purposes.

Egin Bench Canals participated in the state-sponsored aquifer recharge program from 1995-2000. During that period of time, we recharged 220,369 acre-feet of water, varying from 8,972 acre-feet in 1995 to a little over 69,000 acre-feet in 1998. This program was operated through our ordinary canal system. There are some structures designed specifically for recharge on Egin Bench, specifically the Egin Lakes project. It works really well there because the soil is well-suited to take water in.

The question's been asked how much can you recharge and how soon can you start it. I think we need to keep our eye on the ball and look at the full picture. Recharge can be accomplished with the system we have in place. Realize that the components are there and add to them over time [by taking] advantage of the water when it's available. I think the question is how are we going to deal with the future growth of Idaho, not just [how we will] deal with the immediate needs. Where is the water going to come from and where are we going to store it?... The aquifer is a place where we can put water and utilize it in the future. I appreciate you supporting this legislation.

Dick Rush:

My name is Dick Rush. I'm the Vice President for Natural Resources for the Idaho Association of Commerce and Industry (IACI). We are a statewide business association. We represent members of all types and sizes throughout the state of Idaho.

Our members are extremely aware of the need for a consistent supply of electrical energy to fuel Idaho's economy and provide jobs for its citizens.... There are many of our members who are appreciative to Idaho Power for standing up for their water rights because the generation of power and the opportunity to reduce power rates when we have additional water is valuable to many of our members.

The statement of purpose on H 800 says the legislation is to facilitate diversion of expected flood flows in the spring of 2006 in the upper Snake River Basin. However, there is no sunset provision in the bill, and there's nothing in the bill that limits recharge to flood waters. The bill specifically puts the use of water for recharge ahead of use of water for electrical purposes. I've heard a lot of testimony as to whether the state has the authority to do this. I'm not going to argue that [point], but there was one thing that Senator Noh mentioned that I thought was the heart of the issue: To look at policy. Is the decision before you good policy for the state of Idaho, regardless of all the legal issues surrounding it? Do we know [whether] this is good policy for the state of Idaho? Do we have enough information? Are we sure that recharging the aquifer for the purpose of sustaining or increasing pumping is better for Idaho's citizens and our economy than producing the maximum electricity to fuel our homes, our farms, our businesses, and our factories? Have we thoroughly considered the changes in Idaho's economy including the unprecedented growth in population and the new houses and businesses that need power? Do we know the impact on power costs of decreased power production? Do we know where we will obtain new power because of reduced hydro production?

This legislature has spent a great deal of time discussing Idaho's need for electrical power this year, and there are still unanswered questions. There's going to be an interim committee to look at power generation, where we can [obtain] it, and what is the best path forward. I believe... we should postpone action on H 800 and review the relative benefits of hydropower versus other uses of water.

IACI will always consider the sponsors of H800 our friends. They are the supporters of business in Idaho. Everyone here has good intentions and is making their case, but I think we should take a strong stand against H 800. It will raise electrical rates for businesses, farmers, residents, and government. I don't think it's good for Idaho. Our association supports recharge provided that it recognizes and protects prior ground and surface water rights. Please oppose H 800. Thank you.

**Senator
Stennett:**

I think it is important that we get this on the record. I want to make sure I heard you say this. In your testimony, you said that power production should take priority over other uses of Idaho's water. Is that the position of IACI?

Mr. Rush:

I think the position of IACI is very specifically that we support existing state law [which says] power production takes precedence (if you want to put it in those terms) over recharge. I think that's the point I made.

**Senator
Stennett:**

And is it your position that Idaho Power has a water right in excess of 3,900 cfs in the summertime and 5,600 cfs wintertime?

Mr. Rush: I heard prominent attorneys speak on both sides of the issue, and I certainly don't know the answer to that question. But I can read state law, and it is very clear that groundwater recharge is subordinate to power production. We support that law. We don't think it ought to be changed, and that's why we oppose H 800.

Senator Stennett: The position of IACI is that the statute passed in 1994 has more... weight than a contract between the power company, the governor of the state of Idaho, and the attorney general of the state of Idaho, and that the statute supersedes the contract?

Mr. Rush: Did I say all that? I don't remember making those comments, but I specifically recall saying that there was a discussion in this legislature 11 years ago or so. I've heard a lot of comment that some folks wished they hadn't voted for that, but we think it was good legislation. We think there are a [lot of people] in Idaho that support it, and all I can say is that if it takes a law to change the use of water, there must be some right out there. In this case, it's a water right. If that's not the case, I don't think we'd be here discussing this legislation.

Randy MacMillan: My name is Randy MacMillan. I am the Vice President of Research and Environmental Affairs for Clear Springs Foods in Buhl, Idaho. Clear Springs is a 400-plus employee-owned company. It also happens to be the world's largest producer of Rainbow Trout. For the record, and with all due respect, we dispute some of Representative Raybould's characterizations of spring flows in the Thousand Springs area. The issue of how water got into the aquifer is irrelevant prior to its appropriations. I might add that much of the groundwater pumping that goes on now occurs because of the same water that the springs have benefitted from.

Clear Springs Foods was not a party to the Swan Falls agreement, and if it is the intent of the state to drain down the aquifer..., there will be significant repercussions not only to Clear Springs but to groundwater pumpers in the region, and there will be an issue of takings. I share the responsibility of protecting the assets of Clear Springs Foods, and one of our most important assets is our water rights.... Our use of water is not consumptive, but over the past 30 years, our water flows have declined 20-30%. In the last ten years, we've been injured in excess of \$15 million due to the mining of water in the East Snake River Plain aquifer by junior right holders. It's our belief, and that of a variety of hydrologic experts, that the [water] has been over-appropriated. The Director of the Department of Water Resources calls it over-allocated. Over-appropriation has contributed significantly to a water crisis that threatens the long-term economic fiber of the region, jeopardizing not only our water rights, [and the water rights of] existing businesses, but also those who might otherwise choose to join our communities.

Clear Springs Foods has been working for over the past five years on a short- and long- term management plan which would stabilize and enhance the aquifer for the benefit of everyone. Will H 800 help solve the water crisis in the region? Will there be substantive recharge to the aquifer? Make no mistake: Clear Springs does support aquifer recharge as one of several tools that must be implemented, along with decreased depletions and reduced demand. Unfortunately, the type of recharge contemplated in H 800... comes along only once every ten to eleven years, if history repeats itself.

Here are some of the other problems we see with H 800: Idaho Power Company's rights have not been adjudicated; we do not know if H 800 would take the Company's water rights; there is considerable disagreement regarding the attorney general's opinion; we believe the adjudication court is the best place to sort the Company's water rights out, not in the legislature; if H 800 becomes law, additional court time should be anticipated; and there's no accounting for how much of the so-called trust water is unappropriated. We believe it is all appropriated, and in fact, we believe it is over-appropriated. We believe all of the water resources in the region are over-appropriated. Hence H 800 is largely futile when it comes to making substantive improvements to the aquifer.

From Clear Springs Food's perspective, H 800 [will cause] all parties to suffer, and as a result, the region's economic viability will become even less secure if it passes. For these reasons, Clear Springs opposes H 800, but we support reinvigorated efforts to craft an aquifer recovery program. We need to capture the energy present [in this meeting] and put it to real beneficial use in developing a sound aquifer improvement plan. I was encouraged by Speaker Newcomb's comment that he and a respected associate will help develop recharge as an important component of a solid aquifer program. If there's anything the legislature can do this session it would be to give us the resources we need to make the aquifer stabilization and recovery happen. We need statesmanship to bring this to pass.

Randy Polatis:

My name is Randy Polatis. I'm a third generation farmer from Bingham County. I represent Polatis farms which irrigates 8,000 acres, [using] mostly underground water and some surface water. We have many employees who raise our crops. I am also an avid skier and on Grand Targhee website's snow report, it says they've gotten just under 500 inches of snow since September 1. They're having a phenomenal year. Jackson Hole is ahead of them, which is very rare. So the mountains are full of snow, and as we saw in 1997, ...sometimes the runoff comes down pretty fast. I believe we can put it into our aquifer system.

I also represent the Bingham Groundwater District. I've been a board member for ten years and I've never been able to make an agreement

with the Twin Falls Canal Company. We started talk of recharge ten years ago. I think this is a great opportunity and I would ask that you support H 800. I'm also a neighbor farmer of Senator Williams, and as we drive up and down our county roads in the summer, it's beautiful to see these green crops growing. It provides a lot of money and a lot of work for the community. Agriculture is one of our biggest assets. Thank you.

**Dennis
Tanikuni:**

The Farm Bureau supports H 800.

Renee Puschen:

I'm Renee Puschen. I'm representing Puschen Farms. We came to Idaho from Utah 40 years ago... because of the aquifer. In Utah, we saw that there was not a good water future and we thought that this aquifer was better. The aquifer is very important to us. We farm about 9,000 acres, counting our ranches, and we irrigate over 2,000 acres with deep wells. We've had ranches from Kilgore to Fort Hall Reservation. It's very interesting to observe what happens when you have a drought.... When there's no water, there's no water. It doesn't matter what your water right is. That's why it is so important that we take care of our aquifer, and I think that recharging the aquifer when we have water is the thing to do. That's how we take care of it. There are gravel pits, Jensen's Grove, plenty of places we can put the water. The principle that we need to observe is when there's water, keep it as high as you can to be prudent in your use of the water. I support H 800.

**(Former)
Senator George
Katseanes:**

My name is George Katseanes. I'm just west of Blackfoot. I'm a 79-year old sheep herder, farmer, and geologist. I'm here today to testify in favor of passing this legislation. I believe that if we allow Idaho Power to control our groundwater that sometime in the not-too-distant future, it will create an economic disaster and a demise for Idaho agriculture. I certainly support the passage of this legislation.

**Chairman
Schroeder:**

Senator Williams informs me that you are a former member of this body, so welcome Senator and thank you for your testimony.

Don Hales:

My name is Don Hales and I've been a farmer in Idaho for the past six years. I support my family through this operation. From what I have learned in listening to both sides of this discussion, it reminds of the words which Benjamin Franklin said: "If you trade your freedom for security, you'll have neither one." From what I have gathered here, water belongs to the state of Idaho, and I've heard contrary to that. But my opinion is I favor H 800 and encourage you to vote for it.

Dale Rockwood:

I submitted testimony from nine counties in Eastern Idaho to Senator Davis, and you can go through that testimony when you get a chance

**Chairman
Schroeder:**

Mr. Rockwood has indicated that they're in favor of H 800.

- Blair Furniss:** My name is Blair Furniss. I am a farmer from Bingham County. I'm in support of H 800 for the [purpose] of storing water in the aquifer, and I would appreciate your support.
- Adam Hales:** My name is Adam Hales. I am from Blackfoot, Idaho, and I am in favor of H 800. I feel that at this time, we have a prime opportunity to take advantage of the abundance of water that we were blessed with this year. I am a young man, a farmer just beginning, and I would like to continue farming in that area where we irrigate with wells. I would appreciate your support on H 800 and passing it so that me and many other people throughout the state can continue farming.
- John Thompson:** My name is John Thompson and I'm representing Thompson Farms of Blackfoot, Idaho. I farm with six of my brothers and we support about 12 families. We farm north of Pocatello, to Blackfoot, the Fort Hall area, and out to the Aberdeen area. We have surface water and [wells]. I hope that you will support this bill, and I'm truly in favor of it.... I remember one time when we were hoeing beets, my dad said, "I want you guys to get a good education. Farming's not very good." As it turned out, each of my brothers and I [returned] to the farm. We feel like that's where we need to be.
- Layne Polatis:** My name is Layne Polatis and I'm with Polatis Farms. I just want to give my two cents here. I'm a new farmer. I'm on the People's Canal Board, just appointed recently, and I want to make these points quick. I hope we can be good stewards in this good water year and recharge our aquifer. It's beneficial more than just to agriculture, but [also] to homeowners and everyone else. I think [legislators] can allocate it in times of need better than a court can. Courts are slow, and I think time is of the essence.
- Keith Esplin:** My name is Keith Esplin and I'm from Blackfoot, Idaho. I'm wearing a couple of hats today. First, I'm the executive director of the Potato Growers of Idaho. A few weeks ago, I was over here appearing before some of you in the Transportation Committee asking to keep the Famous Potatoes on the license plates to help us sell potatoes, and now we're asking you to help us keep our water so we can raise them. I do want to affirm that Potato Growers of Idaho supports H 800. I have a letter here from our President I'll leave with you.
- Also today, I'm an 18-year Canal Board member. Recently our canal merged with another, [forming] United Canal. Mr. Morgan, president of the other canal company, had to leave earlier so I'll make a couple points for him. One thing that he pointed out is that with aquifer recharge, the water in the ground is higher and it takes less energy to pump it out. That [translates into] less strain on Idaho Power's system and more benefit to the irrigator. I also want to point out something that I think often gets lost in our water debates, [which] is that all the water that [drains] into the Snake River eventually ends up going [down] the Snake River. The only

things reservoirs and aquifers do is change the timing of it. So nobody's going to get shorted any water. The only way you can actually get more water is to dry up crop land permanently so the water will go down the river and will turn turbines. [This will] just change the timing.

I did want to point out one other thing: In 1997, I was farming full-time and I had over 200 acres of ground that was under water for two weeks, as did others. We would much rather [have used] that water [for] recharge than [have it] on our farms recharging because we didn't get paid for the recharge and our crops didn't do too well either. As Senator Burtenshaw mentioned, I think H 800 could go a long way to set up ways we can get the water out to where it should be so that it doesn't end up flooding us. I'm getting nervous [as I] hear about all the water up above. In closing, it's always been my understanding that the state controls the waters of Idaho, and I hope that we continue to have the state control them.

Klarin Koompin: My name is Klarin Koompin. I farm with my brother in the American Falls area and we're served not only by surface water [but also groundwater]. We have 2,000 acres under surface water and about 6,000 acres under deep wells, so we're affected by both. Falls Irrigation is very interested in recharge and [is] for it. I have an explanation for what happened in 1994.... It may have been a case of "just happens." Idaho Power is very formidable. I was here a few years ago working on a transmission line bill that looked like it would take some [difficulty to] get used to. It got through the House but when it got to the Senate, they sine died the committee before we could testify.

Mr. Rush is a very fine guy that does a great job, but the IACI decision to not support this did not go to the vote of the whole committee. It was done by the executive committee [which] I believe shows that Idaho Power's still the same way. I love Idaho Power. I have an uncle that worked for them for 42 years, and they've treated our family very well.... But this is about a water right, about what's good for the state of Idaho which will ultimately be good for Idaho Power. There are no losers in recharge. Idaho Power will receive all the [recharge] water sooner or later; all the studies we've done shows it will happen. Twin Falls has to know that will happen, and so does Clear Springs, because that's what all this money we spent shows. There are no losers, only all winners in H 800. I urge you to vote for it.

Raymond Matsuura:

My name is Raymond Matsuura. I'm a third generation farmer from Blackfoot. My grandparents migrated from Japan in the early 1900s and started farming in the Rexburg area. In 1953, they moved to Blackfoot and started farming just north of Blackfoot. My father and his brothers farmed together. Idaho Power played an important role... in the growth of Matsuura Brothers Farms, and it was a good partnership. Many acres were brought into production because of the electricity provided by Idaho

Power to run our pump which drew water from the aquifer. I now farm my dad's share of the farm with my brother, and we produce about 300 acres of potatoes. I concur with all that has been said in favor of this bill. We have always been pleased with the service of Idaho Power, and its employees are the greatest in the Blackfoot area. However, the ongoing actions of Idaho Power have despaired and upset me. The threatened rate hikes, announcements of rate decreases this summer, the barrage of misinformation through media outlets have all been calculated moves based on power, money, and political positioning to control Idaho's water this year and in future years. It will set a bad precedence to let them have their way.

I'm a farmer who just wants to have a voice on how Idaho's excess water can be used, and Idaho Power seems to want to take that away from me by claiming that the excess water is theirs to decide. Thank you for your time.

**Michael
Creamer:**

Mr. Creamer provided a six page handout that was prepared by Charles M. Brendecke, PhD, PE on behalf of Idaho Ground Water Appropriators, Inc.

Pages 1, 2, and 3 are inserted into the minutes, prior to Mr. Creamer's oral testimony. Pages 4, 5, and 6 are graphs that show "Recharge Diversions Compared to Flow Passing Milner", "Locations of Return Flows from Recharge via North Side Canal", and "Monthly Pattern of Recharge and Return Flows over First 15 Years", which Mr. Creamer refers to in his testimony.

According to the U.S. Geological Survey, more than 24 million acre-feet of water was added to the Eastern Snake Plain Aquifer (ESPA) between 1880 and 1950 as incidental recharge associated with the development of large surface water irrigation projects. This additional aquifer storage raised ground water levels across the Plain and increased the flows of springs that discharge from the ESPA to the Snake River. These increased spring flows augmented the supplies of surface water users and supported the development of a large aquiculture industry. The increased water levels also facilitated the development of ground water-supplied irrigation projects.

Starting in the late 1950s, changes in surface water irrigation practices began to reduce the amount of this incidental recharge. These changes included the transition from flood irrigation methods to sprinklers and the cessation of winter diversions to enable the filling of the new Palisades Reservoir. These changes probably reduced incidental recharge to the ESPA by roughly a million acre-feet per year. At about the same time, ground water pumping for irrigation was expanding. The result of all these trends has been a reduction in water levels and spring flows in portions of

the ESPA.

Managed recharge could reverse these trends by using the State's largest reservoir—the ESPA—to store surplus river flows in wet years. The Idaho Department of Water Resources (IDWR) has studied extensively the potential for large-scale managed recharge. In 2004 IDWR developed a modest recharge proposal that is based on the following considerations:

Water diverted for recharge would be derived from excess natural flows in the spring and fall of wet years.

The maximum combined rate of diversion for recharge would be 1200 cfs, which is the amount of the Idaho Water Resource Board's water right for recharge.

No water would be diverted for recharge until a minimum of 750 cfs had been left in the river at Milner.

Water would be recharged using existing canal systems, mainly the North Side Canal, the Milner-Gooding Canal and the Aberdeen-Springfield Canal, in the spring and fall when those canals had excess capacity available.

Figure 1 shows how the amount of water available for managed recharge would vary, relative to the total flow passing Mimer Dam, over the period used by the IDWR in its analysis. On average, about 171,000 acre-feet per year would be available for recharge. In dry years there would be little water available, but in wet years the amount would exceed the average value. By putting the high flows in the aquifer, water supplies for all users connected to the aquifer could be enhanced in the dry years.

The benefits of managed recharge would be almost immediately apparent in increased spring flows and aquifer water levels. And over time, because recharge is not itself a consumptive use, all the water diverted to recharge would re-emerge as spring flow back to the river. A 2004 analysis by the Idaho Water Resources Research Institute, using the new ESPA model, examined the effects of managed recharge using the North Side Canal. Figure 2, which is derived from this 2004 study, shows schematically the distribution of spring flows that would ultimately result from this managed recharge. Use of other canals further upstream would cause more of the increased spring flows to occur higher in the system. For example, almost all of the increased spring flows from recharge via the Aberdeen-Springfield Canal return to the river above Mimer.

The Idaho Power Company (IPC) has raised objections to managed recharge on the basis that diversions to recharge would reduce the amount of water available to their hydroelectric plants on the Snake River

downstream of Mimer. The IPC is the licensee or joint licensee of several run-of-the-river hydroelectric plants between Mimer and King Hill, which are also shown on Figure 2. Figure 2 shows that more than 90% of the spring flows resulting from managed recharge via the North Side Canal would accrue to the Snake River above IPC's Upper Salmon Falls plant, and that more than 99% would accrue above its Lower Salmon Falls and Malad River plants. All of the spring flows from managed recharge directed to improve spring flows in the Thousand Springs would accrue to the river above the C.J. Strike plant, the Swan Falls plant and the Hells Canyon complex (which alone accounts for 2/3 of IPC generation). Only the Mimer, Twin Falls and Shoshone Falls plants could be significantly affected by recharge diversions into the North Side Canal, and the 750 cfs bypass assumed in the IDWR recharge proposal would nearly fill the capacity of the Shoshone Falls plant.

Diversions to recharge would occur mainly in the spring of wet years when power prices are low and when the hydraulic capacity of IPC's hydroelectric plants may already be exceeded—which is the case this year (IPC has spilled more than 400,000 acre-feet so far this year at Hells Canyon). The enhanced spring flows resulting from recharge would occur on a more firm, year-around basis, increasing river flows in the summer and winter periods when power prices are high. Consequently, managed recharge has the potential to actually improve revenue production from hydropower.

In its media campaign against HB800, the IPC has implied that more than 1.6 million acre-feet per year could be lost from their system as a result of recharge. This amount is nearly ten times what the IDWR has determined could practically be diverted for recharge, and assumes that none of the water diverted for recharge would ever return to the river. IPC's assumptions and conclusions on this score are entirely false.

Furthermore, other actions by the State of Idaho and upper Snake River basin water users already have put more water into the Snake River during the high-power-value summer months than would be diverted in the spring for recharge, and at no cost to IPC. The State's purchase of the Bell Rapids irrigation water right, as part of the Nez Perce agreement, now leaves an additional 74,000 acre-feet per year in the river above the Lower Salmon Falls plant. And since 1991, upper basin water users have leased an average of 150,000 acre-feet per year to the Bureau of Reclamation as salmon flow augmentation. This addition of approximately a quarter of a million acre-feet of augmentation water now flows in the summer through all of the IPC plants.

To be sure, some portion of the initial diversions to recharge will go to increased storage in the ESPA and not to increased spring flows or river flows below Mimer. This is inevitable, and is analogous to "priming the

pump." Using the new ESPA model, I have prepared an analysis of the temporal effects of a managed recharge scenario consistent with the IDWR proposal. This scenario assumes recharge via the North Side and Aberdeen-Springfield canal systems. The analysis was carried out on a daily basis for a period of 15 years. The results of this model run are displayed in Figure 3, which shows the temporal patterns of recharge diversions and increased spring flows. Figure 3 shows that return flows above Milner, which can pass through all of the IPC plants, approach their steady state value in just a few years. Return flows below Milner take slightly longer to build up to this value. But in both cases the returns from spring and fall recharge diversions are distributed throughout the year, to the benefit of water users and IPC. (End of Mr. Brendecke's document.)

**Mr. Creamer's
testimony:**

You've heard a lot of important testimony by a lot of very sincere people. A lot of discussion has been in favor of recharge, and certainly this bill has to do with recharge, but I would submit to this committee that H 800 is a bill whereby the legislature in the state of Idaho reasserts its trust responsibility for the water that was granted through the trust agreement with the power company for allocating subsequent beneficial uses for the benefit of the people of the state of Idaho. That's what this bill is about. Mr. Tucker would tell you that this is a matter of contract interpretation. I think Mr. Rigby made a very strong case that the contract doesn't need interpretation. One of the first rules of contract [that] I learned in the first year of law school is that the plain language of the agreement describes the terms. You don't need to look outside of the document for an interpretation. You don't need to ask Governor Evans what was intended. But isn't it great that we have a legislative record to tell us in case some party to the agreement would like to dispute what the plain language means? Isn't it great that we had the record that was created by Senator Crapo at the time? And what does that tell us? It tells us that we had a trust water right and this state is responsible for administering it.

Interesting, the 1994 legislation was of such importance that the legislature saw fit to put the full intent and purpose of the legislation in record. There isn't anything in the record about how the language that unsubordinated a portion of those water rights Idaho Power got into it. People would say that there was a lot of deliberation, but I don't see that from the record; I don't hear that from the legislators here who were part of that interim committee or voted on the matter.

H 800 gives the legislature an opportunity to reverse the mistake that was made in 1994 and reassert the state's trust responsibility.... I have provided to the committee a report that was prepared by a consultant for the Idaho Groundwater Appropriators, whom I represent. [The report] looks at a scenario prepared by the Department of Water Resources showing how much water could actually be diverted, given the constraints of the Water Resource Board, limitations in canal capacity, and water

availability. [It was] applied to a scenario over the period from 1983-2000. You can see in the first figure how much of the water which flows past Milner could be diverted for recharge, [and it is] not the massive amounts that Idaho Power has represented to generate significant impact to their rate payers.

Where do the current flows for recharge appear? In Figure 2, Mr. Brendecke has shown that 90% of the recharge... which accrues below Milner [eventually] runs through Idaho Power's plant. Ninety-nine percent of those flows will run through the upper Salmon Falls and lower Salmon Falls power plants, to the benefit of Idaho Power Company. In Figure 3, this report demonstrates that [if the scenario were used,] 170,000 acre-feet on an average annual basis would be diverted. In the bottom graph, we can see how much water would be diverted in any given month in the spring and fall. Then we see when that returns to the river both above and below Milner. This chart shows that [within] 15 years, we approach an almost steady condition where the majority of that water is coming back to the river above and below Milner. The waters that come in below Milner provide a more firm supply for Idaho Power Company and for spring users.

I hope that you will vote in favor of H 800 and I hope it will come out of this committee with a do pass recommendation. [I hope] you will share with other senators the information from this meeting.

**Senator
Langhorst:**

In the second paragraph, ... it says, "These changes probably reduce incidental recharge to the ESPA by roughly a million acre-feet per year. At about the same time, ground water pumping for irrigation was expanding." Do you know how many acre-feet come out of the aquifer every year?

Mr. Creamer:

[By] simply using the irrigation component of groundwater use, not counting municipal and domestic uses, there would be approximately two million acre-feet [per year].

**Senator
Langhorst:**

Do you know what the level of the aquifer is today compared to what it was in 1880?

Mr. Creamer:

Compared to the turn of the century, I'm not aware of any information that would describe what those numbers are. The level rose from the early 1900s to the mid-1950s then began to decline thereafter. We know from a mass measurement made by the Department of Water Resources in 2001 that the water level in 2001 was comparable to the water levels in the aquifer when they were last mass-measured in 1980. In the vast majority of the aquifer, there were no statistically significant changes in the aquifer over that period.

**Senator
Langhorst:**

Since 2001 – I don't know if you know factually or anecdotally – I've heard that people [who own wells north of the river] are having to extend them deeper. Do you know how much the aquifer is dropping in a given year? Is there any amount of recharge that you think we could do that would stop the decrease?

Mr. Creamer:

I do not have information on the rate [of decline] in the Eastern Snake River Plain Aquifer. We do see a noticeable trend of decline since 2001. I don't have any information I can share with you about how that reflects in aquifer levels. It is a fact that there are areas in the aquifer that wells had to be deepened, particularly since 2001.

Senator Little:

In your interpretation of the Swan Falls agreement, if the legislature came up with a new beneficial use tomorrow – to have every reservoir full for swan habitat – would that new beneficial use subordinate Idaho Power's rights?

Mr. Creamer:

I think that may be a debatable question. Certainly the statute clearly says, "subsequent beneficial upstream uses."

Senator Little:

So in your interpretation of Swan Falls, it is not the current beneficial uses that existed then, but [beneficial uses which] we make up [and thereby] subordinate their water right.

Mr. Creamer:

I hadn't said that, Senator. I said that's a debatable question. My position, based on a reading of the statute, is that the legislature has a trust responsibility.... I think it is an appropriate assertion of the trust responsibility to [allow] the state to determine what beneficial uses are.

Senator Little:

So, you're saying that the trust isn't only for beneficial uses [in existence at that time, as well as] for the 600 cfs, but we also have a trust responsibility to come up with any new beneficial use. Could we eliminate a beneficial use?

Mr. Creamer:

I think that's a different question. If you could eliminate an existing beneficial use – let's say irrigation. Is that your question?

Senator Little:

Your interpretation of the trust is that we not only have the 600 cfs to use for designated beneficial uses [in existence] at that time of the Swan Falls agreement, but we also have a trust responsibility to make up or adopt new beneficial uses?

Mr. Creamer:

My position, Senator, would be that Idaho Power Company agreed to subordinate all of its water rights at Swan Falls and its hydro plants below Milner down to the 3,900 and 5,600 cfs, and the state is free to allocate for beneficial uses all flow in excess, pursuant to the trust agreement. I think there's room for the state to say, "we think that fish and wildlife enhancement, we think that recreation, we think that in-spring flows, we

think that aquifer recharge, are certainly appropriate beneficial uses of the state's water right." Idaho Power Company has agreed, and presumably they made the analysis in 1984 [as to] what are the potential impacts on power production by subordinating their water right to 3900 and 5600. Certainly the state would be free to make those decisions without impinging on the deal or on the benefits of Idaho Power.

Senator Little: So, not only the volume, but any new uses over the existing uses is your interpretation?

Mr. Creamer: If it is consistent with the state's trust responsibility.

Senator Pearce: You indicated 2.2 million acre-feet are presently pumped out of the aquifer per year for agricultural use. Do you have any idea what the municipal and domestic approximation is?

Mr. Creamer: The Department traditionally has considered those uses [to be] de minimus: municipal, domestic, commercial, industrial. I think by de minimus, they must be less than 5%.

Timothy Deeg: I am the President of the Idaho Groundwater Appropriators. You've heard from many of the constituents that Idaho Groundwater Appropriators represents. I think one point that needs to be made is that most of the water users in Southeastern Idaho, up to Mud Lake, are all for H 800.... They're concerned about pumping levels; they're concerned about the aquifer. One of the other things [which is] important to look at is that we always look at reservoirs we can touch and feel. But one [reservoir] we don't really know is the aquifer. How is it doing? We've used it over the past years to help accommodate through the drought and now it's time to put something back into it. It's an important step that we can take right now. I thought the Speaker did well in taking on this task. It's a huge effort, and I would hope that this committee would consider moving forward and pass H 800.

**Former Senator
Lynn Tominaga:** My name is Lynn Tominaga. I'm the Executive Director of the Idaho Groundwater Appropriators. I wanted to bring up a couple of issues that haven't been touched on. It was rather surprising to me to find out that IACI had taken a position opposing H 800 when the Groundwater Appropriators are members. We have never discussed H 800 in IACI.

The second point is that I can shed some light on H 1574. I was in the Senate when the Swan Falls agreement went through the legislature. I worked for the Idaho Water Users Association in 1994, and I'm presently here on this issue. What happened in 1994 was that the legislative committee for the Idaho Water Users Association met very late, and the drafting of the bill recommended by the interim committee did not get approval from the Water Users legislative committee until late in the session because the bill was not drafted. [Then,] Idaho Power came to

the Water Users committee and said, "If you don't add this sentence to the legislation, we will fight you and we will try to kill recharge as a beneficial use." In 1994, there was a lot of legislation that was going on that dealt with the SRBA, and there was some question about whether recharge was a beneficial use, even though people had been recharging for over 100 years. So, there were a lot of questions about whether the adjudication court would allow it unless the legislature came in and did something. When it came before the committee, both sides, they explained it and then said, "Anybody object?" Nobody did because the Water Users Association and a lot of attorneys agreed that it was better to have recharge recognized as a beneficial use than to have a fight over it. It slid by because nobody opposed it. Now we realize, ten years later, that was maybe a policy mistake. Now is the time to take a look and decide if we should change the policy.

The last thing I would like to stress is that with this issue, is it better to have a discussion here in the legislature about a policy change we believe is beneficial to the state, or do we believe it should be made in the board room at Idaho Power? Is it better for the state to decide what to do with the trust water, or is it better for Idaho Power to make that decision? The list that I've given you is a list of over 90 entities (cities, counties, groundwater districts, irrigation districts) [that support the bill. From the time H 800 passed in the House, I've been calling folks trying to get endorsements. If you give us more time, we'd give you more names too.

Craig Evans:

I'm Craig Evans from Blackfoot, Idaho. I represent Bingham Groundwater District. I have two points: 1) I think it is really lucky to have people who were the original debaters and signatories of the Swan Falls agreement here to interpret it for us.... 2) I think that we need to restore the integrity of the Swan Falls agreement. The legislation in 1994 clouded that agreement and we need to restore its original integrity. We are very much in support of H 800.

There was discussion on how long recharge has been considered a beneficial use. I have one report here from the Idaho Department of Reclamation, titled "Artificial Recharge of the Snake Plain Aquifer, Evaluation of Potential and Effect," and dated August 1969. Another one is "Idaho Water Resource Board Snake Recharge Project, Fiscal Year 1980 Report." So it's been around quite a while.

Matt Yost:

My name's Matt Yost. I'm from Rupert, Idaho, but I now reside in Boise. I represent the Idaho Steelhead and Salmon Unlimited organization and I'm here to testify on H 800 as well as to comment on Idaho's publicly-owned water resources. I learned something today that canals can be recharge vessels. I thought canals were recreational opportunities.

Inserted into the minutes is his formal testimony.

I am Matt Yost, Director of Idaho Steelhead and Salmon Unlimited. I am before you today to testify on HB 800 and to make comment on the use of Idaho's publicly owned water resource.

ISSU does not often support the hydro-power industry as it is the hydro-power industry that effectively kills 80 to 90% of Idaho's out migrating juvenile salmon and steelhead smolt on the way to the ocean. None of which is caused by Idaho Power dams.

ISSU's membership is made up of many farmers. ISSU supports the idea of recharge and wishes to protect all Idaho agricultural interests when possible.

That said, ISSU has trouble with HR 800.

- HB 800 does nothing to address the problem of how the Snake River Plain Aquifer became depleted. It is our opinion any good legislation designed to be effective should address the question of how the aquifer became depleted.
- As representatives of the people of Idaho, ISSU believes legislators should not be willing to place the state in front of a legal train wreck unless all other options have been explored. And, we do not believe all options have been explored.
- The Senate Resources Committee has had opportunities in the past to re-water the Big Wood and Lost Rivers, with legislation brought by Senator Stennett. Had the state acted on such proposed legislation - some aquifer recharge would have occurred benefitting farmers.
- Yet another example, there still remains High Lift pumpers who are willing to sell or lease their water long term to the state. Like the Bell Rapid buyout, these waters could be contracted and transferred up stream to use as re-charge when needed.
- If the state of Idaho is truly worried about protecting Idaho water the state should take a different position on the four Lower Snake River Dams in Washington State. These out of state dams provide very little for Idaho other than uncertainty, by continuing to protect out of state interests by giving Idaho water away is foolish. Properly dealt with, flow augmentation for salmon and steelhead could become unnecessary; we could insure regional growth, jobs, abundant wild salmon and steelhead populations in harvestable self-sustaining numbers and federally secure our hydropower facilities within Idaho.

Thank You. Your continued support of Idaho's wild fish runs is appreciated.

Mike Telford:

I farm and live east of Shoshone in Senator Stennett's area.... We've heard a lot of wonderful testimony. I have what I hope is some homespun wisdom on this. There's a law that supersedes all these laws,

...and this is the law of unintended consequences. When our pioneer forefathers came and started to bring water out to the ground, they didn't have any idea what they were doing. So for 50 years they ran water through the canals so that the milk cow could have some water. They chopped holes in the ice to do it. Looking back, you can see what happened to the spring flows and the aquifer. It filled it up. [Those were] unintended consequences.

In 1950, when they made the agreement to put water in Palisades, everybody had a domestic well by then and they didn't need water in the canals all winter long. So for the next 50 years, the aquifer declined. They didn't see the law of unintended consequences. Then later, when we all decided we needed to make better use of the water, when you guys should have come up with a program to pay us to keep the surface irrigated, we all put in sprinklers which depleted it even further. Ninety-five percent of us in the state depend on the aquifer for drinking water, and if we don't do something, it's going to return to its natural state. I've had two domestic wells go dry. It's going down, there's no doubt about it.

I hope you would remember the law of unintended consequences and realize if we don't do something, it's just going to go back to nature. This is your opportunity to make the first right step. I have great confidence in you. We can't ignore the greatest reservoir in the state. The farmers are stepping up and doing their part. I'd like to see what Idaho Power would think about putting part of their productive capacity aside. That's what farmers are already doing, and we support it because we realize how important it is. We need to look at the big picture.

Wayne Hurst:

My name is Wayne Hurst. I farm in the Burley area. I use surface and well water. I am also the President of the Idaho Grain Producers Association. We're a statewide organization representing the majority of counties in the state of Idaho. We recently held a conference call with our director, and the decision was unanimous to support H 800. It is important that Idaho chooses the destiny of its own resources. We don't feel this is a taking of any water right.

Senator Chuck Coiner:

I'm Senator Coiner, District 24. Historically, I was the counterpart to Mr. Deeg. He represented the groundwater users [while] I represented the surface water users in conjunctive management. So, we've been talking about these issues for a long time.

One of the comments I heard earlier was about the sources of water for recharge. There are two sources: Natural flow (which we're talking about today) and storage water. If we go back to the Swan Falls agreement, [part of the agreement] was to set up the adjudication, which we've done. The other one was to set up a water bank with which to market the water.

Right now in Water District One, we have water bank procedures – willing buyer, willing seller – so we can get water most years at a cost. What we need is a funding source to pay for the water so we have a willing buyer. The willing sellers would be available. Water would be available both fall and spring, not just spring. The cost would be about \$5 in years like this, and if we had a full reservoir, it would be cheaper. Drought years would be more expense.

As far as starting adjudication goes, there are two scenarios: if this bill fails, in 30 days the directors will have their recommendations on Idaho Power's water right in the adjudication court; [there will be] 120 days for objections then 60 days for responses,... 60 days for a trial date, and then issues about the trust could be heard. If we pass this legislation, the other scenario [will go] in front of the adjudication court and it'll be a little slower, but my comment is that it's exactly the same scenario.

The policy issue is a different issue. I think it's going to adjudication court, and that is where it belongs because 105 legislators should not be interpreting the Swan Falls contract. I think the 1994 legislation is a perfect example of why it belongs in court. The Senate voted 35:0. Of the senators that are here who were there then, 100% of them voted for it in 1994. One attributed it to some excess activities that caused people to make that determination. In the House, [it passed] 68:0:2. To me, that is a perfect example of why the legislature should not be looking at this issue. It belongs in court.

**Gerald
Fleischman:**

My name is Gerald Fleischman. I work for Idaho Energy Division on wind power development. I just want to point out that there are substitutes for power generation whereas there are fewer substitutes for agriculture. We have tremendous wind power resources. I support H 800.

**Richard
Williams:**

This has been a good hearing. There is one thing that I wanted to bring up at the close of the meeting, and that's a song that said, "From a distance, God is watching over all of us." I remember last spring, we were praying for water and our prayers were answered, and they're still being answered. I am grateful for that. I want to remind you of a scripture that says the earth is the Lord's and the fullness thereof and they that dwell therein. It behooves all of us to appreciate that we need each other and that we need to work together to try and solve these problems in a righteous manner. These things do not need to be litigated. We need to sit down at a table to solve these problems.

**Former Senator
Dane Watkins:**

My name is Dane Watkins. I'm here in a couple of a capacities today, one as Chairman of the Jefferson Groundwater District which supports this legislation. I go back to 1984. I happened to be at that session of the legislature that passed that Swan Falls agreement, and anything I could add to that is the fact that we had bipartisan support. I think this

committee should look at a bipartisan effort here. We have a cloud in that agreement.

I can tell you my impression of what we were passing in 1984. Swan Falls wanted minimum stream flows, and they got it, [set at] 3900 and 5600 cfs. But they subordinated their water rights. That's what I hope you see happened. I know in the legislature, things happen. On the 1994 legislation: Nobody voted against it, but I can tell you of an example in the 1970s when we passed the Equal Rights Amendment in the state of Idaho on the last day of the session. They stood up on the floor and said, "Just pass this legislation. Pass it. We're running out of time." We passed it. The next session, we rescinded it. I was chairman of the Agriculture Committee, and what did that committee have to do with it? But it just happens.... We rescinded it, and we can do the same thing here today. I know the intent of the legislature in 1984. I'm here to ask for your support for this legislation. Recharge is important for all of us.

**Chairman
Schroeder:**

A lot of people have traveled a long way for this. I want to make sure there is no one we've missed. No one? Alright. I'm going to allow Idaho Power to wrap up and then Mr. Speaker to wrap up. Then the committee will entertain some motions.

Greg Panter:

I simply would urge you to vote "no" on this legislation. It's the right way to go for small businesses and rate payers throughout the state. I have nothing more to add.

**Speaker
Newcomb:**

I would like to defer to my cosponsor.

**Representative
Raybould:**

I know it's been a long afternoon and there have been a number of questions that have been brought up during the debate that need answered. One dealt with the timing which put H 800 on the table. This bill was heard by the Ways and Means Committee in the House on March 14th and went to the House Resources Committee, which voted on it on the 15th. It came out of the House to the Senate on the 17th. There have been a lot of things going on that have delayed today's hearing, but the biggest delay was caused by negotiations between the surface water users and groundwater users. The mediator explicitly asked us not to do anything until they had a chance to come to an agreement.

One of the things that Mr. Panter said which really troubles me is that Idaho Power's credit rating has diminished. Idaho Power is a great company. They've done great things for Idaho. They have a great workforce here. They are a good company and I hate to see that rating drop down. But I don't believe that rating dropping down was caused by H 800. If there's anything that caused it, it was probably the management decision to put out a lot of negative advertizing and media reports, and

especially letters to over 400,000 of their rate payers. If anyone caused the drop in their credit rating, it was probably the management of Idaho Power shooting their shareholders in the foot with their negative comments. I don't think this bill had anything to do with it.

As has been stated here, the water for recharge is needed above Milner, not below Milner, and water going down for Idaho Power's facilities has been plenty. We need to talk about what's going past Milner Dam. Another misstatement, or at least a statement which I need to review, is the Thousand Springs flow. I can tell you the numbers that I quoted here came directly from Idaho Department of Water Resource records. And they are the numbers that are being used in the present, updated model of the aquifer that determine cause and effect and what's happened over the years. If there is a discrepancy in those numbers, I would appreciate those who have different number letting us know.

Another statement that was made was that the Attorney General's Office said there would be a lawsuit on the takings issue. I can tell you the exact question that was asked, which was, "Would there be a takings lawsuit?" And the answer from the Attorney General's Office at that time was, "Anybody can file a lawsuit." I think the Attorney General's opinion that you've seen here puts that issue to rest. The lawsuit would be lost on the merits of the Swan Falls agreement and the merits of the case.

I think it would be well for the committee to have the exact language of what was said in the state water plan. This was passed by the State Water Board right after the Swan Falls agreement. The same state water plan is still in effect today, and this is its language: "It is the policy of Idaho that the groundwater and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero, measured at the Milner gauging station; 3,900 cfs from April 1 to October 31 and 5,600 cfs from November 1 to March 31, measured at the Murphy gauging station; and 4,750 measured at the Weiser gauging station." That's the state water plan. It was never modified. The same thing held in 1994. Here's the important part: "Waters held in trust by the state in accordance with policy 32(a) shall be allocated according to the criteria established by Idaho Code. Minimum flows established for the Snake River at the Murphy and Weiser gauging stations are measurements, management constraints. They further ensure that minimum flow levels of the Snake River water will be available for hydro power, fish, wildlife, and recreational purposes. The establishment of a zero minimum flow at the Milner station allows for existing uses to be continued and for new uses above Milner. The zero flow established at Milner means that river-flows downstream from that point to Swan Falls dam may consist almost entirely of groundwater discharge during portions of low water years. The Snake River Plain Aquifer which provides this water must therefore be managed as an integral part of the river system." That was written right

after the Swan Falls agreement.

Concerning the state water plan's trust water held by the state, the agreement between Idaho and Idaho Power Company dated October 25, 1984 provides that Idaho Power's claimed water right of 8,400 cfs at the Swan Falls Dam may be reduced to 3,900 cfs if the claimed water right of 8,400 cfs is deemed appropriated and the amount above the minimum flow established in policy 32 (which was at 3,900).... The 8,400 claimed right is reduced to the flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to October 1, 1984, even if such uses would violate the minimum flow established in Policy 32. Had there been rights that would have diminished that flow below 3,900, those rights were still recognized. Any remaining water above these minimum flows may be reallocated to new uses by the state, providing such uses satisfy existing Idaho law plus criteria the legislature establishes. It's the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 32(a), less the amount of water necessary to provide for present and future DCMI uses, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code.

Now let's talk a little bit about those flows. In a 21-day period, the flows past Milner averaged 3,787 cfs above the zero flow that the state calls for. That provided, in those 21 days, excess flows past Milner were 159,080 acre-feet of water. The Murphy gauge: In 23 days, it had averaged 4,936 cfs daily average above the 5,600 cfs minimum flow, from February 20 to March 14. That's 227,000 acre-feet of water. I don't think anyone's contesting this here because we weren't going to recharge between Milner and Murphy, but those excess flows indicate that Idaho Power is not short of water. Of that water, 159,000 acre-feet could have been recharged, had the canals been filled up, depending on the condition of the canals and the weather. It shows you that there's more going past Murphy than would be necessary if we took all the 159,000 out and kept the zero flow at Milner. At Hells Canyon: if Idaho Power's numbers are correct on their website then they have a generating capacity of 27,000 cfs at Hells Canyon. The average flow past Hells Canyon was between 17,000 and 21,000 acre-feet of surplus per day and 307,200 acre-feet of water went past Hells Canyon that could not be used by their generators in the period from February 1 to March 14. So, there isn't any way that we are depleting Idaho Power of any water.

In closing, I would just like to say that we have an opportunity here to remove a cloud from the law. Whether the statute passed in 1994 was inappropriate, inadvertent, or deliberate. The Attorney General's opinion and the testimony you've heard here today indicates that it needs to be fixed.

Our interim committee for the past two years, and especially last summer, indicates that we have a crisis in the state of Idaho. It just happens to be showing up first in the East Snake River Plain. The Mountain Home aquifer is in crisis. The Treasure Valley aquifer is going down; it needs recharge. The Rathdrum Prairie aquifer now is being looked at for water quality and recharge. What are we going to do to keep it up? We've got a good chance here to start today. Some of the testimony we've heard today said we need to create recharge projects. It needs to be a state obligation to make sure the water supplies for the citizens of this state are protected and amplified, improved. We need to start doing that. We're too late already. We should have started on this ten years ago. I urge you to send this bill to the floor with a do pass and then to go on the Senate floor and support this. I appreciate the cosponsors of the bill. We plead with you to take a start. Let's not be too late.

Senator Pearce: Thank you for that information. You know, we're going to have to defend our decision here today with the rate payers. What is the capacity at Milner? How much water could Idaho Power actually run through Milner?

Representative Raybould: I don't know the capacity there. I think if I recall back when the Swan Falls agreement was being debated that those minimum flows did provide the water that could be used there at Swan Falls. I did not find any of the capacity of those other installations. Whatever the capacity is at Milner, the state water plan is zero flow at Milner. I would imagine that some of the water I just enumerated as going past Milner is going through that power plant. It should be. Any water that's going downstream that we're not using upstream should be generating power.

Chairman Schroeder: This concludes public testimony part of this meeting. H 800 is now properly before you.

MOTION:
Senator Burtenshaw: I make a motion to send H 800 to the floor with a do pass recommendation.

SECOND:
Senator Williams: Second.

Senator Langhorst: I want to explain to all the people gathered here why I am going to be voting against this bill. I want to start by saying that we handle hundreds of bills every year. A lot of them don't need the kind of input we've gotten from you today. So many of you have come from so far to enlighten us and your efforts get us half way there. I feel like, however, that this bill is something that would take me a long time to become comfortable with, [especially considering] the amount of time we spent on the Nez Perce agreement last year or on the original Swan Falls agreement. I appreciate Representative Raybould mentioning [the timing] issue and

how it got to us so quickly, but it still doesn't go far enough to make me feel comfortable.

Recharge is something that we all agree with; I don't see that as the debatable part of the bill. I've heard a lot today about [how] recharge is a good thing; I didn't hear anybody say recharge is a bad thing. I think we need to do recharge, but it's a problem that's been 100 years in the making. Another year or two, in my opinion, won't make or break your farms or our aquifer.

One of the things I really want to address is the idea of whether this is the proper forum [in which] to address water rights, like we're doing today. I've heard the statements that water belongs to the people of the state, we don't want it to be controlled in corporate board rooms, and that the political process is the way that you want water rights adjudicated. But I have to respectfully remind you that that's the way the 1994 legislature dealt with it and now you're back here. I want everyone to think about and remember the fact that things are changing in Idaho and you might want to be careful what you wish for. Imagine yourself in this overflow room, maybe looking in from the outside, and seeing all these chairs packed with people from INL, or Idaho Falls, Pocatello, or Boise – these urban areas – making the argument that energy prices are killing our industry and we need to reorder the priority of water rights in the state of Idaho so we can shore up and protect our jobs. That day could come. I just don't know that fighting it out in the legislature every year is the proper way to do that. I appreciate your hearing me out.

**Senator
Burtenshaw:**

We've worked on trying to settle and negotiate a settlement for the last couple years. I see some people here in the audience today who I would have hoped to hear from [because] they've been working on recharge for 10 or 15 years and every time we get to the point where we can do something, we need to "study it" and "take more time." I think one thing that none of us has looked at, really, is if we allow Idaho Power to go through this adjudication court without clarifying what those trust waters are, we won't need to clarify them because they'll be decided. I think we have a responsibility to make that decision now.

I don't have any figures or facts except my own eyes, but if you think the spring flow has come and it's too late to recharge with this water, you've got another think coming. It's coming, and as soon as it warms up, you'll see it. Many of you drive across the Boise River and it's full now for one reason: They're afraid it's going to flood. I don't know how you could get better conditions anytime. I've been here ten years, and we've got a better chance to settle this thing now. It's been going for two or three or four years and nothing's been done. We've almost come to a settlement several times and there was always something that just wasn't quite right. I think now is the time to address this situation and get on with the

recharge.

**Senator
Williams:**

I thank all those from my district who took the time to come over today. It shows great support and I appreciate it very much. Along the lines of what Senator Burtenshaw said, it seems like we have a tendency here as legislators to talk things around quite a bit. Sometimes it's time for talking and sometimes it's time for doing. I'm here to tell you it's time for doing.

**Senator
Cameron:**

[I have] just a couple of comments. With all due respect to Senator Langhorst, I believe recharge is the debatable point. In spite of testimony you heard here today, I believe that there are those that don't want recharge. I think there have been great comments and great discussion about if this aquifer were a reservoir, would we prevent it from filling in order to run water down the river to generate electricity? I don't think this bill would be here today if it weren't for objections by Idaho Power to recharge.

Last year, many of us debated on the Natural Resources Committee, and we spent \$30 million of state revenue to try and fashion some solutions in a low water year, the sixth year of a seven-year drought. We spent that kind of money to find solutions. Idaho Power would not even come into the room if recharge was on the docket. They didn't say then, "it's because of rates." They didn't even want to talk about it. I find it ironic that we have this rate issue discussion and that's the issue that's being brought forward to the public.

They're a regulated public utility. Past legislators have made the decision that we need to control their rate because they are a public utility. So the issue, to me, goes back to what the initial agreement was. Did Idaho Power subordinate their rights in order to get minimum stream flows? In my opinion, they did. So what happened in 1994?

I was a member of the legislature and a member of the interim committee and I can tell you that the last thing we would have ever done was try to undo the Swan Falls agreement. Our intention was to list recharge as a beneficial use. We made the motions in the interim committee intending for that to occur, and I think testimony has proven that my recollection is the same as others' [regarding] agreements [that] were struck outside the legislative process. The bill was brought at the last minute amongst other bills that came from that interim committee, and the legislature signed onto it without really understanding or fully considering that it might be running something afoul to the Swan Falls agreement. If for one minute any of us had thought we were undoing a very contentious agreement, that bill would never have happened. Unfortunately, it did [happen] and we have the situation that's before us.

I want to tell you, we spent \$30 million last year because of the economic

consequences to the Magic Valley region and to Eastern Idaho, but not only to them: to the entire state. It was very clear to us that if we didn't start to do some things, that the effect on the state was going to be \$200 million or greater. There were studies to show how important it was. I believe that having a healthy, stable aquifer not only protects the state and its revenue, but I believe Idaho Power will be the beneficiary of that. I believe they will have stable flows as they flow out of Thousand Springs if that aquifer ever returns to the level it was. I'm not sure it could ever get back to where it was at its height, but it can certainly get to a point where it's at a stable level. I think agriculture has stepped up to the plate and is willing to set land aside and stop pumping from the aquifer – an appropriate step. But I think, likewise, it's an appropriate step for the state to step forward and to recharge that aquifer.

Now the issue is, if you recharge the aquifer, who has to be paid for it? I think Mr. Pander's testimony was that they were okay this year – they weren't last year – with recharging it as long as the state paid them for it. Why should we have to pay for a right that was already granted to us in the Swan Falls agreement? Those excess flows were already granted to us.

I don't see this as being a difficult decision. I don't see this as the legislature tinkering; it's the legislature rectifying and doing what's appropriate for the economic interests of the state. I urge your "aye" vote.

**Senator
Stennett:**

I'm a surface water user on a ranch, and as I said before, I wasn't looking for a fight with Idaho Power. I guess what I come down to is I have to have a really sensible reason to vote one way or the other, but there's no gain politically one way or the other so I fall back on this agreement. I really appreciate the people here who were party to the original agreement. That's who I wanted to hear from.

When I do a business deal, we shake hands on it, but we still have a contract to fall back on. We're in a position today to be the judge on this deal and what the deal was. I go back to the document that Crapo put in the Senate minutes and back to the conversations that Senator Peavey had in the committee. It was asked at that time that if all the bills, passed as written, fulfilled the agreement between the power company, then the legislature decides to do away with it a couple of years later, what's the effect of the agreement? Mr. Nelson from Idaho Power said there's a provision in the agreement that says the agreement remains viable in the face of changes in the law. If the legislature wants to undo the whole thing next year, that's its prerogative. The only thing a legislature does not have the power to do would be to change the contractual recognition of the Company's water rights at the Murphy gauge. I can't find anything that's different at the Murphy gauge from the 3,900 and 5,600 cfs. I've

asked and I'm looking for that document; if I had that document, I wouldn't be in the position that I'm in. But I can't go forward knowing what this agreement says and not support this bill.

Senator Pearce: A lot of times in these bodies, we vote for things we shouldn't have voted for. A couple of years ago, we made a mistake in here that I look forward to the time when we can go back and correct it. So I think it's almost historic how many years it has taken us to go back and correct what we did in 1994. I appreciate the testimony; it really shed light on the issue. I appreciate the former senators coming back and telling us what the intent was because we could have lost that institutional memory.

I think the state was and is acting in good faith. We recognize that maybe water is over-appropriated, water is limited, and for us to purchase Bell Rapids to put that water back in the system – and Idaho Power is the beneficiary of that probably more than anyone in the state – [is prudent]. On the CREP program, we've got to put more water in. So I think we're acting in good faith by limiting and pushing back the use of this water just trying to fill this reservoir back up. I think this move is good and I think it's timely. We're going back and correcting something we should have done a long time ago. With that, I'm voting for it.

Senator Little: ...We know what happened at Swan Falls. In my mind, it's an absolute no-brainer that we do recharge. The question is: Are we changing the rules in the middle of the game? My visit with Mr. Creamer about whether the legislature can change [beneficial uses] makes me a little nervous. We've got the constitutional protection about first-in-time that overarches all these contracts, and there was an agreement in the Swan Falls agreement. In my mind, this move we have today is [taking us] back to 1983 or 1984 and we're putting in a new beneficial use at that time. It talks specifically about DCMI and it doesn't talk about recharge. The only thing about recharge was the pilot project in St. Anthony and Rexburg. Something Senator Peavey told me – about what the legislature giveth, the legislature can taketh away – makes me nervous.... [for] the future. Today we're here with Idaho Power. Are we going to be here next year with the spring users, and the year after that with surface water? With the changes in demographics in the state, what happens to everyone else's water right? So I am going to default back to the constitutional language we've got. I think this is changing the rules in the middle of the game.

Chairman Schroeder: Okay, the secretary will call the role on the motion we have, and the motion we have is to send H 800 to the floor with a do pass recommendation.

Juanita will call the roll.

VOTE:

**Senator
Langhorst:** No.

**Senator
Stennett:** Aye.

Senator Little: No.

Senator Brandt: No.

**Senator
Williams:** Aye.

**Senator
Burtenshaw:** Aye.

**Senator
Cameron:** Aye.

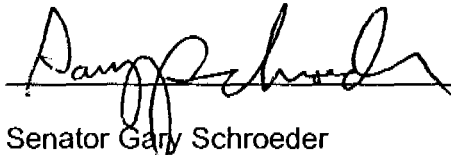
Senator Pearce: Aye.

**Chairman
Schroeder:** No.


And the motion passes. Senator Burtenshaw, will you be the sponsor on the floor?

Thank you committee and everyone who came today. This meeting is adjourned.

ADJOURN: The meeting adjourned at 6:55 p.m.



Senator Gary Schroeder
Chairman



Juanita Budell
Secretary

Kathryn Whittier
Assistant

RESOURCES & ENVIRONMENT COMMITTEE

ROLL CALL VOTE

DATE: 3/27/06

SUBJECT: Water rights

BILL #: 2/800

ORIGINAL MOTION IS:				SUBSTITUTE MOTION IS:				AMENDED SUBSTITUTE MOTION IS:			
	AYE	NAY	A/E		AYE	NAY	A/E		AYE	NAY	A/E
Sen Gary Schroeder, Chair		✓		Sen Gary Schroeder, Chair				Sen Gary Schroeder, Chair			
Sen Monty Pearce, Vice Chair	✓			Sen Monty Pearce, Vice Chair				Sen Monty Pearce, Vice Chair			
Sen Dean Cameron	✓			Sen Dean Cameron				Sen Dean Cameron			
Sen Don Burtenshaw	✓			Sen Don Burtenshaw				Sen Don Burtenshaw			
Sen Stanley Williams	✓			Sen Stanley Williams				Sen Stanley Williams			
Sen Skip Brandt		✓		Sen Skip Brandt				Sen Skip Brandt			
Sen Brad Little		✓		Sen Brad Little				Sen Brad Little			
Sen Clint Stennett	✓			Sen Clint Stennett				Sen Clint Stennett			
Sen David Langhorst		✓		Sen David Langhorst				Sen David Langhorst			
TOTALS	5	4		TOTALS				TOTALS			
MOVED <u>Burtenshaw</u>				MOVED _____				MOVED _____			
SECONDED <u>Williams</u>				SECONDED _____				SECONDED _____			

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
Robert A. ^{MURDOCK} Murdock	farmer	Self	HB 800	yes	yes	
Steven T. Howser	Canal Mgr.	Aberdeen - Springfield Canal Co.	H 800	yes	yes	
LOXI HARRINGTON	Insurance	SELF	HB 800	YES	YES	
ROBERT OLSEN	FARMER	RICH LANE FARMS	HB 800	NO	YES	
Steve Bair	farmer	Bair Farms	HB 800	yes	yes	
Don Hale	farmer	comm of 9	H 800	yes	yes	
Kim C Cox	Farmer	Swiss M. Dairy, Inc	H 800	yes	yes	
MICK PARISIS	Farm owner	aberdeen - SPRINGFIELD Canal Co	H 800	NO	yes	
L. Dewey Stander	Farmer	Stander Farms	HB 800	yes	yes	
Terry Reed	Farmer	Reed Farms	HB 800	NO	yes	
Kurt Gilbert	Farmer	Self	HB 800	NO	yes	
Phillip Murdock	farmer	Southeastern IDMA Potato CO.	HB 800	NO	yes	
Jim Williams	FARMER	Self and MADD Farms	HB 800	YES	yes	
DEAN EVANS	FARMER	SELF	HB 800	NO	yes	
BRIAN MURDOCK	Farmer	MURDOCK FARMS	HB 800	yes	yes	
LARRY KEYS	FARMER	SELF	HB 800	yes	yes	
Bill Newman	farmer/ranch	YH RANCH Self	HB 800	yes	yes	
GREG GOGAR	ALUMINUM	SPUDNIK	HB 800	yes	yes	

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
STAN CLARK	FARMER	Comm of 9	H 800	yes	✓	
George Nedrow	Rancher		# 800	no	✓	
Roy B. Thomson	Farmer	Self	# 800	Yes	✓	
Ed Clark	Farmer	Comm of 9	# 800	yes	✓	
Ron Murdock	Farmer	Stephen County Cotton Producers	# 800	yes	✓	
Brook Driscoll	FARMER	SELF	HB 800	YES	✓	
Michael Zumberger	Engineer	SPUDNIK	# 800	YES	✓	
May Dayton	Farmer	Freemont Irrigation	# 800	no	✓	
DAN LARKIN	Lobbyist	Food Producers	736, 737, 800	NO	✓	
McLeod Langan	Truck	ILWUA	All	NO	✓	
Scott Kirwan	Business	Rocky Mountain Machinery Co	# 800	YES	—	
Brian Murdock	Farmer	MURDOCK FARMS	# 800	yes		
Louis Thiel	Farmer	New Sweden Irrig	# 800	yes no	✓	
Paul Berggren	Ret Manager	New Sweden Irrig	# 800	yes no	✓	
NEIL MORGAN	Land Owner	United Canal Co.	HB 800	Yes	✓	(left)
JIM MARRIOTT	LAND OWNER		HR 800	yes	✓	(left)
VINCE ALBERDI	CANAL MGR.	Twin Falls Canal	HR 800	YES		✓
Ganzel Teus	Rancher	SELF	H 800	yes		✓

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
DAN STEWART	Business Board Chair	Twin Falls Camp	HB 800	Yes		✓
JERRY RIGBY	ATTY	UPPER VALLEY WATER	HB 800	YES	✓	
Jeff Raybould	Farmer	Fremont ^{Irrigation} Madison	HB 800	Yes	✓	
Dale Swensen	Manager	Fremont-Madison Irrig	HB 800	No	✓	
Keith Erikson	Former	FM ID	HB 800	No	✓	
Dick Rush	Legislative Advisor	IAI	H 800	Yes		✓
Dick Rush	"	"	H 736a H 737a	Yes	✓	
Kamala Jonas	Intern	IFAC	H 800	NO		
Nic Christensen	Farmer	HB Christensen's	HB 800	NO	✓	
Garry Evans	Farmer	Self	HB 800	NO	✓	
Bruce Evans	FARMER	Self	HB 800	No	x	
RAUDY MacMillan	FARMER	CLEAR SPRINGS FOODS	HB 800	yes		✓
Andrea Mihun	Lobbyist	Sullivan & Poberger	HB 800	NO		✓
Layne Rolatis	Farmer	Self	HB 800	Yes	✓	
Bridget Shanahan	Reporter	KIFI-TV	H 800	NO	—	—
DENNIS TANIKUNI	Lobbyist	IDAHO FARM BUREAU	H 800	YES	✓	
Therese Perschen	farmer	self	H 800	yes	✓	
Renee Georgia Katsouras	Farmer	Self	HB 800	yes	✓	

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
Tracy Hawker	Independent Agent	Premier Insurance	HB 800	NO		
Steve VanOrden	Independent Agent	Premier Insurance	HB 800	NO		
John M. Stevenson		Rep	HB 736 HB 737 HB 800	Yes	✓	
Dell Raybock		Rep	HB 800	yes	✓	
Dale Rockwood Rockwood		Shogren Assoc.	HB 800	yes	✓	
Doyle Hawker	Farmer		HB 800	NO	✓	
Thane Christensen	Farmer		HB 800	NO	✓	
Darrin J. Wheeler	Farmer		HB 800	NO	✓	
Blair V. Furniss	Farmer	-	HB 800	Yes	✓	
Jonathan Parker	Lobbyist	Idaho Water Users Association	H736 & H737	yes - if necessary	✓	
JOHN PEAVEY	Rancher	MYSELF	H.B. 800	Yes	✓	
Steve Reiche	Farmer	IGWA	HB 800	NO	✓	
John Evans	Banker	—	HB 800	Yes	✓	
Don Hale	Farmer	self	HB 800	yes	✓	
Adam Hales	Farmer	self	HB 800	yes	✓	
John Thompson	Farmer	self	HB 800	yes	✓	
Keith Espin	Exec Director Potato Growers	Potato Growers ID	HB 800	yes	✓	
Robert J. ...	Farmer		HB 800	yes	✓	
	Rancher					

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
Randy Polatis	Farmer	Polatis Farms	HB 800	No	✓	
Karen Koompin	Farmer	Koompin farm - PGI	HB 800	yes	✓	
Robert Martin	FARMER	SAME	HB 800	NO	✓	
Devin Watt	Farmer	Watt Enterprises	HB 800	NO	✓	
Raymond Matsura	Farmer	R & R Farms	HB 800	Yes	✓	
C. Tom ARLOOSH	Farmer	SW C	HB 800	Yes		✓
David Suchan	Farmer	MUGWD	HB 800	NO	✓	
Rex Minchey	Procedon	NSGW / Salavich	HB 800	NO	✓	
Dean Stevenson	Farmer	MUGWD	HB 800	NO	✓	
Roger SEIBER	Consultant	CAPITAL WEST	800	NO		✓
Jim TUCKER	Atty	IDAHO POWER	HB 800	YES		—
KARL BOKENKAMP	Gen Mgr	IDAHO POWER	HB 800	NO		✓
JERRY DECICARD	CONSULTANT	IP CO	HB 800	NO		✓
Greg Pankas		IPCO	HB 800	YES		✓
Leird Noh	Past Gen	None	800	yes		
Neal Powell	FARMER	SELF	HB 800+	NO	✓	
Michael Creamer	Atty	IGWA	HB 800	YES	✓	
Richi Hahn	Lobbyist	Idaho Power	HB 800	NO		✓

Name PLEASE PRINT	Occupation	Representing Company/Organization	Legislation Interested In	Testify Yes/No	Pro	Con
Timothy Deeg	Farmer	F6WA	HB 800	Yes	✓	
A Dwyer	Reporter	T-N		NO		
Chlo Morgan	Farmer	IGWA	HB 800	NO	✓	
Don Williams	Farmer	ILWA	HB 800	Yes	✓	
Lynn Carlquist	Farmer	NS6W District	HB 800	NO	✓	
MIKE BAKER	SALES	1004	HB 800	NO	✓	
Steven Huffaker	Dir.	JD FG	H 523	Y	✓	
Steve Ball	U.P.	Premier Ins.	HB 800	NO	✓	
Stewart Smith	Eng.	Self	HB 800	No YES	✓	
Nate Helm	Ex Dir	SFW-ID	H 523	NO		
Lynn Tompkins	Ex. Dir	ILWA	HB 800	Yes	✓	
CRAIG EVANS	FARMER	BIRKHAM GWD	HB 800	YES	✓	
Mark York	Director	ISSU	HB 800	Yes		✓
Linda Lemmon	Farmer	Blind Canyon Aqueduct	HB 800	NO	✓	
Jo Beerman	attorney	Water Resource Coalition	HB 736a + 737a	Yes	✓	

ignin.march.wpd

[illegible]

[illegible]

~~Written by~~

*Pat Cole and Pat Costello - Attorney for Governor
Evans during the Swan Falls negotiations.*

Sources include precipitation and run-off, certain types of flood irrigation, streams, rivers, and artificial recharge districts. While the sources of recharge have been identified, their accurate measurement has not yet occurred. Further, scientists are just beginning to understand long-range historical precipitation patterns. Most users and observers now recognize that further studies are necessary before accurate computer models for predicting water availability can be developed.

HISTORICAL REVIEW

When the first settlers arrived in southern Idaho, the area was primarily sagebrush and desert. The first semi-permanent settlement occurred during the 1840's. Agricultural development did not begin in earnest until the 1860's when the state's population numbered less than 30,000. Initial agricultural development was through the direct diversion of water from streams and rivers to the land by way of extensive canal systems. Large reservoir planning and development did not begin until the late 1920's.

During the early 1900's, hydropower sites were identified and development began. The early hydroelectric facilities were primarily run-of-the-river developments because of three factors. First, availability of capital for construction was limited. Second, the Snake River plain is highly permeable, making the construction of large facilities costly and complex. Third, until the late 1940's, construction technology, irrigation techniques and electricity demand served as limiting factors.

The Swan Falls controversy actually began in the early 1920's when Idaho citizens in the Upper Snake Valley became concerned that a downstream non-consumptive water right could prevent future upstream

development. Through their efforts, a 1928 amendment to the Idaho Constitution was passed, stating 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. (amendment underlined)

Subsequent to the amendment, several water licenses for power purposes issued by the state contained "subordination language." 2/ However, the practice of inserting subordination language in water licenses was inconsistent, due partly to the confusion over which governmental entity (i.e. state or federal) had authority in this area, and due partly to a lack of clear direction to the agency itself.

The controversy between downstream non-consumptive uses and upstream development flared up again during the late 1940's and early 1950's when Idaho Power Company sought permission to construct its Hells Canyon complex. The Company's proposal directly conflicted with a proposal of the federal government for developing the same area. Proponents of the federal option argued that a federal project would be less costly, produce more energy and provide greater storage. The Company's supporters asserted that the federal project would be subsidized by taxpayers when private enterprise was capable of doing the job, that a significant tax base would be lost if the government owned the project, and that ownership of the project by the federal government could threaten future upstream water rights. ~~The controversy was finally resolved when Idaho Power agreed to subordinate its water rights at the Hells Canyon complex to subsequent upstream depletionary uses.~~

2/ Subordination as used in this context means that the holder of a senior water right could not assert the existence of that right to prevent development of other projects, even if the projects adversely impacted his right.

At the time, it was generally assumed that the other water rights of the company in the Snake River system above Hells Canyon were subordinated through the agreement. While nothing specific was obtained in writing at the time, nor were federal and state licenses appropriately amended, both the State of Idaho and Idaho Power conducted their affairs in a manner consistent with a full subordination of all of the company's facilities on the Snake River. Public pronouncements of state policies and company practices, such as providing electrical service to irrigation pumpers, were consistent with this understanding.

From 1950 through 1973, demand for electrical service in Idaho increased dramatically. ^{3/} The advent of better methods for pumping water directly from the aquifer significantly contributed to this increase. Idaho Power's summer peak load increased nine-fold and its connected irrigation load increased 30 times, from 43,000 to 1.3 million horsepower. These developments had a dual effect on electrical generation. First, they increased the need to find additional generation; secondly, they reduced the return flows to the Snake River upon which existing electrical generation capacity depended. Therefore, in the late 1960's and early 1970's, the company began to search for alternative generating capacity. Like many utilities, the company considered coal-fired generating facilities. ~~But the company's plans ran headlong into the emerging environmental movement, and in 1976, Idaho Power's proposed coal-fired generating plant was turned down.~~

The company was caught in a dilemma. Water supplies were declining and demand was increasing. The problem was made more acute when a ratepayer complaint

was filed with the Idaho Public Utilities Commission charging that the company's failure to protect its water rights (by not preventing upstream consumptive development) had resulted in the company's rate base being overstated as the property was no longer as useful as it should have been. In response to the ratepayer's complaint, ~~Idaho Power filed a lawsuit against the state seeking to determine the status of its water rights at the Swan Falls facility located immediately above the company's Hells Canyon complex.~~ ^{4/} The Swan Falls facility had a pre-1928 water right. ~~Neither the Swan Falls water license nor its federal power license contained express subordination language.~~ In 1982, the Idaho Supreme Court held in part that the Hells Canyon federal license permitting construction of the Hells Canyon facility did not in and of itself subordinate the company's water rights at the Swan Falls facility. With that ruling, the State of Idaho went from a partially appropriated to an over-appropriated water system on the Snake River.

All parties to the controversy attempted to resolve this matter during the 1983 and 1984 Idaho legislative sessions. Upstream developers sponsored legislation to subordinate ~~Idaho Power's water rights at all hydropower facilities on the Snake River where specific subordination language did not already exist.~~ Supporters of Idaho Power's position attempted to link any such subordination with compensation for the effect on lost hydro generation capability. ~~Legislative battles were bitter.~~

The 1984 Idaho legislative session — like the preceding session — ended in a stalemate over the Swan Falls controversy. While almost no one was pleased with the status quo which cast a legal cloud over thousands of Snake River water rights and

^{3/} See *Irrigation Depletions and Competition for Water in the Snake River Basin of Idaho*, by Brockway and Larsen; Paper No. 84-2002 of the American Society of Agricultural Engineers.

^{4/} *Idaho Power Co. v. Idaho*, 104 Idaho 575, 661 P2d. 741 (1983).

prevented any new development, no political consensus was formed. It appeared to the Governor and the Attorney General that a consensus would be impossible to achieve so long as the various interests held out hope of prevailing in court. Those favoring in-stream values — electrical consumers and fish and wildlife conservationists — were convinced that their interests would ultimately prevail. Consumptive water users assumed the opposite. Meanwhile, neither side would give an inch in the political arena.

NEGOTIATIONS

In such an intensely polarized atmosphere, the temptation on the part of state officials to wash their hands of responsibility and leave the parties to slug it out in court was obviously great. However, from the state's vantage point a litigated resolution had a number of drawbacks. First, the complexity of the pending litigation made it likely that it would take many years and hundreds of thousands of dollars to conclude the numerous court cases. It was not clear that the legislature would provide the necessary resources to fully present the state's case or that succeeding administrations would continue to advance a pro-subordination position. Finally, and most telling, it was likely that no matter what the outcome of the lawsuits, total victory by either side would be short-lived. Some political compromise would have been imposed to reach a balance between total dedication of available flows to instream uses and total disregard of instream values. Given the assumption that a compromise was inevitable, it was apparent the state could save transaction costs and time by striking a balance now rather than after another decade of litigation and political strife.

Therefore, in the spring of 1984 after the power company renewed a partial settlement offer which would have protected all currently developed water rights, Governor Evans responded with an offer to enter into negotiations for a complete settlement of the entire Snake River water rights controversy. He suggested a willingness on the part of the state to establish a higher legal minimum flow on the Snake River if the power company would agree to confine the quantity of its unsubordinated water right to the new minimum flow level. 5/ The minimum flows then in effect had been established in the State Water Plan in March of 1976 as follows: Milner Dam (near Burley, Idaho), 0 c.f.s.; Murphy Gage (4 miles below Swan Falls), 3300 c.f.s.; Weiser, 4500 c.f.s. 6/

At the time these minimum flows were originally set, there was considerable opposition from water users to the concept of establishing any legally protectable minimum flow. For much of Idaho history it was assumed that the Snake would always be a "working river," available for development even to the extent of totally drying it up before it left the state, if necessary. With an increasingly urban and environmentally conscious citizenry, this assumption was ripe for review. Even so, the state officials felt strongly that the minimum flow should be a reflection of public policy expressed by the Legislature and the Water Resources Board, rather than a judicial recognition of an unsubordinated instream use right. While power company officials were initially skeptical that new minimum flows could be the vehicle for a settlement, they agreed to enter into discussions of that concept with the State.

5/ A similar proposal had been made by the Attorney General in December of 1983 but was rejected by Idaho Power.

6/ *Id.* at fn. 1.

The first meeting of the three principals — Governor Evans, Attorney General Jim Jones, and Idaho Power's James Bruce — took place in the governor's office in July. The first obstacle the three had to overcome to set the stage for fruitful negotiations was the suspicion on each side that the other would use the negotiations to lull their opponents into complacency in the approaching legislative campaigns. These suspicions were fueled by an anti-subordination advertising campaign launched by the power company just prior to the primary elections, and led to some strongly worded public responses by the Attorney General. In order to dispel some of the rancor and distrust, the three principals agreed to a "cease-fire" in the war of words during the negotiations, with the understanding that if no agreement was in sight by mid-September all agreements were off. If negotiations broke down, both sides understood that each would likely be actively supporting the election of legislative candidates sympathetic to their view. With a cease-fire agreed to, attorneys for the three principals began a series of negotiating sessions. The meetings began as short, weekly sessions, but soon became marathon, daily affairs when it became apparent that an agreement might actually be possible.

The initial hurdle was the power company's view that the state lacked the commitment in legal authority and resources to enforce any minimum flow — even the modest flows then in force on the Snake River. Thus, the initial task was to address the perceived institutional inadequacies in the state's water management system. First and foremost was the need for a general adjudication of the entire Snake River basin to identify and integrate all of the water rights on the river. Upon completion, an adjudication would allow the appointment of a water master to administer the basin's water rights as a unit and permit management and protection of the minimum flows. Second, the state had never collected the hydrologic

data necessary to accurately predict the effects that water development in various areas would have on stream flows. Third, the state had failed to articulate a water resource development policy which would encourage the most efficient uses of the remaining water supply, nor had it given the Department of Water Resources sufficient regulatory authority to implement such a policy through the permitting process. The power company identified these three management improvements as prerequisites to their confidence in the state's ability to deliver on any promised minimum flow.

The Governor and the Attorney General were not opposed to making these resource management reforms. In fact, they recognized many benefits for the state and other water users in the adjudication, data collection and water development policy formation. But the practical problems with attaining any of these reforms were great: the adjudication alone carried an estimated \$28 million price tag. Necessary data collection was estimated to cost \$400,000 annually. Achieving consensus on a water development policy would obviously be a difficult political task. Thus, the state officials were initially reluctant to tie the agreement to these formidable institutional changes because it would appear to doom the whole effort to failure.

But to demonstrate the state's good faith in at least pursuing these concepts, the Governor appointed an informal advisory committee charged with devising an equitable cost sharing formula to raise the \$28 million necessary for the adjudication. He agreed to include the request for funding for various economic and hydrologic studies in his executive budget. And, the Governor and Attorney General agreed to at least explore with the power company what might be a mutually acceptable water development policy, and what regulatory powers would be necessary to implement such a policy.

The negotiators first turned to the problem of establishing the minimum flow level which would also become the quantification of the power company's unsubordinated water right. Because the power company had already indicated a willingness to subordinate its rights as to existing water users, the threshold question presented was what the quantification would be if their right remained unsubordinated as to all future upstream development. The negotiators called on a panel of three hydrologists — one from the Idaho Department of Water Resources, another from the United States Geological Survey, and a third chosen by the power company — to advise them on this question. The three agreed that, in a critical water year, taking current water use and using historic low-flow data, flows would exceed existing legal minimums at the Murphy Gage by approximately 1200 c.f.s. on an average daily flow basis. In other words, the best the power company could hope to do in court was to establish an unsubordinated water right at the 1500 c.f.s. level. At the other extreme, if the state prevailed in court, the minimum flow would have remained at 300 c.f.s. After some haggling, the negotiators agreed to "split the baby in half" and divide the remaining 1200 c.f.s. differential between legal minimums and actual anticipated minimums equally between the power company and the State. This left a reserve of 600 c.f.s. for future development. Under the agreement, the power company would have a protectable water right to 1900 c.f.s. flow during the irrigation season.

This Solomonic solution failed to take into account one important fact of hydropower planning: the value of winter flows. Because most other utilities have winter peaks, electricity is more scarce, and hence more valuable, in the winter. Summer-peaking Idaho Power Company makes up its summer energy deficit by exchanging with winter-peaking utilities in the Northwest. If other water users and the state responded to the new, higher

summer minimum flow by capturing more winter flows in storage, the power company would be a net loser even though it had obtained an "additional" guarantee of 600 c.f.s. in minimum flows. To address this problem, two additional elements were added to the agreement: a "mitigation" requirement that requires a look at the impact on hydro-generation before approval of new storage projects in the middle Snake River (below Milner Dam and above Swan Falls Dam) and a separate, higher non-irrigation season minimum flow. The parties agreed that this new winter minimum flow would be set at 600 c.f.s.

The next key element was to determine a mutually acceptable water development policy to control allocation of the limited amount of water identified by the agreement as available for future consumptive uses. All of the parties agreed that by recognizing the finite nature of the remaining water, the agreement could create a "land-rush" reaction in which rights to all of the remaining water would be claimed quickly with little resultant benefit to society in general. To avoid this, the parties agreed to two points: (1) a substantial block of water would be reserved to meet the needs of future domestic, commercial, municipal, and industrial uses. These uses are obviously critical to the future economic growth of the state. While such uses are "consumptive" to a degree, the vast bulk of the water diverted for such uses is ultimately returned to the system. In short, for each c.f.s. consumed by "D.C.M.I." uses, many primary and secondary benefits would accrue to society. Ultimately, 150 c.f.s. (one fourth of the remaining 600 c.f.s.) was dedicated by the Water Resource Board to meet future D.C.M.I. needs. While this may not seem to be a particularly impressive block of water, it is probably more than the amount of water consumed by all of the D.C.M.I. uses developed to date in the reach of the Snake River above Swan Falls.

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(2) All proposed new uses would be evaluated under a new "public interest" standard in order to receive a state water use permit whenever the proposed use would reduce the availability of water for power production. The factors to be considered were agreed to be as follows: (i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy; (ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and costs of alternative energy sources to ameliorate such impact; (iii) the promotion of the family farming tradition; (iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho; (v) in the Snake River Basin above the Murphy Gage whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.

The parties agreed that the State would be free to change these factors in the future as deemed necessary by the State. The final agreement divided the power company's water right into three parts: (a) the power company's right is immediately subordinated as to all existing uses developed as of the date of the agreement; (b) the company's remaining right in excess of the state's minimum flow is initially unsubordinated but held in trust by the state to be allocated to meet future uses which conform with state law; as each such right is approved, the power company water right is automatically subordinated to that new right; (c) the company's right to use the amount of water protected by the state's minimum flow (3900 c.f.s. summer, 5600 c.f.s. winter) is permanently unsubordinated.

The purpose of placing the water reserved for future development in trust was to assure state ownership and control over this vital resource. Thus, the state will hold ownership of the water until such time as future depletionary uses meeting the requirements of state law are approved. The company has the right to use the water to generate electricity during the interim.

This arrangement has an incidental benefit. The state constitutional provision 7/ establishing the appropriation doctrine guarantees only the right to appropriate the "unappropriated" waters of the state. While the Idaho Supreme Court has upheld regulations governing the exercise of the right to appropriate water, 8/ any deviation from the first in time, first in right principle will likely be challenged as constitutionally infirm. Because the agreement recognizes the validity of the company's water right, the Snake River is fully appropriated as to proposed users not meeting the requirements of state law.

CONCLUSION

With the resolution of the water development policy issues and the definition of the company's water right, all of the major elements of the agreement were in place. However, because the agreement was contingent upon the state adopting the new water management reforms referred to previously, the parties were not terribly confident it would ever be implemented.

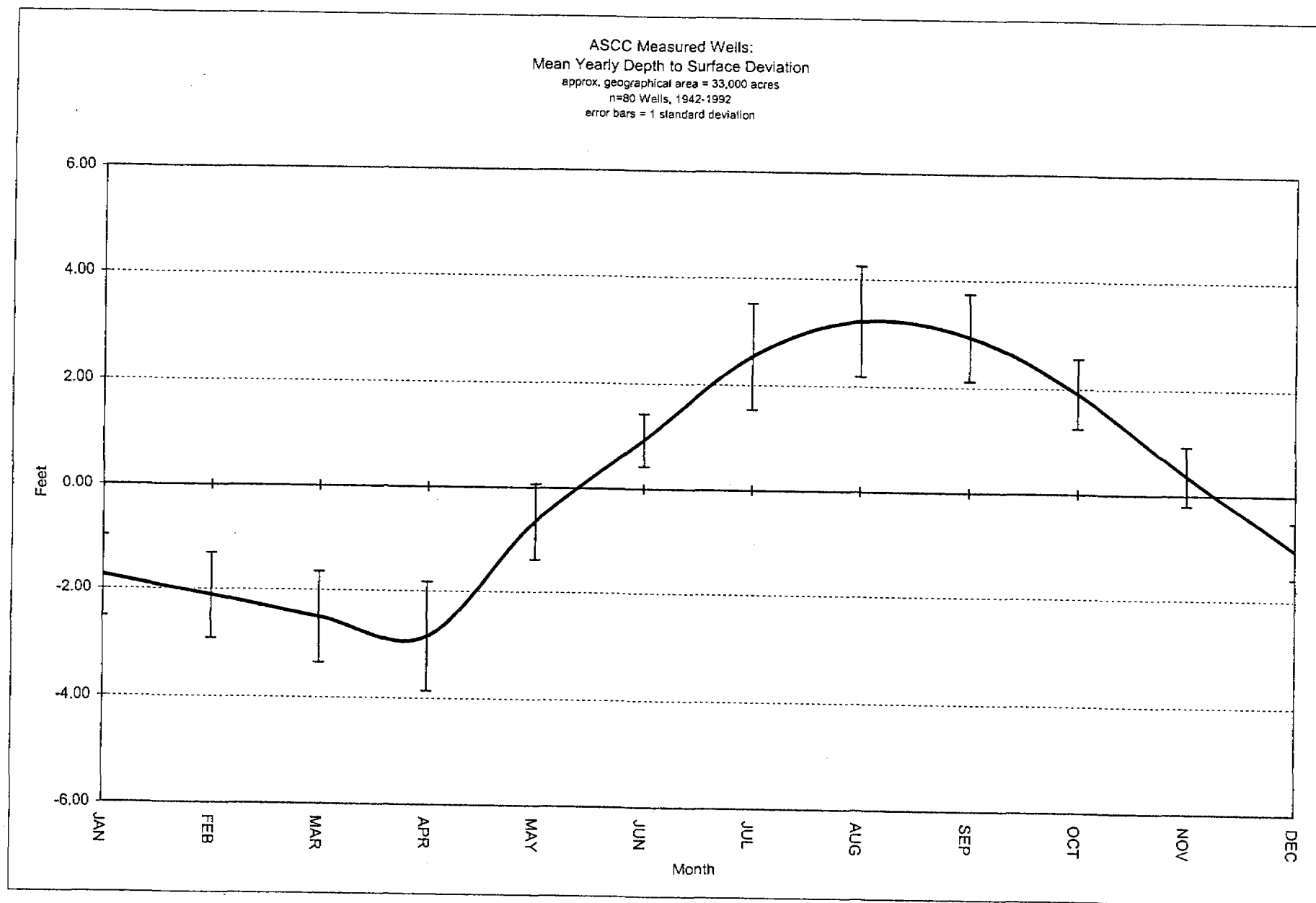
Fortunately, the Legislature, the Water Resource Board, the Public Utilities Commission and the public had all suffered enough from the expense, delay, and political strife caused by the Swan Falls controversy. Within six months after the

7/ Art. 15, § 3, Idaho Constitution.

8/ Hidden Springs Trout Ranch, Inc. v. Alfred, 102 Idaho 623, 636, P.2d 745 (1981).

agreement was signed, its essential elements had received the necessary concurrence from the Legislature and the state agencies. Even the \$28 million basin-wide adjudication was authorized with little dissent, largely because the cost-sharing formula recommended by the Governor's advisory committee was accepted as equitable by the affected users.

Finally, it took twelve pieces of legislation and a complete rewrite of the portion of the State Water Plan dealing with the Snake River to implement the agreement. Even so, the settlement will not be complete until approved by the Federal Energy Regulatory Commission and the state district court.



Aberdeen-Springfield Canal Company System Map

