

RECEIVED

FEB 19 2008

DEPARTMENT OF
WATER RESOURCES

James S. Lochhead
Michael A. Gheleta
BROWNSTEIN HYATT FARBER SCHRECK, P.C.
410 Seventeenth Street, Suite 2200
Denver, CO 80202
(303) 223-1100 – Telephone
(303) 223-1111 – Facsimile

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
(208) 336-0700 – Telephone
(208) 344-6034 – Facsimile

James C. Tucker, ISB No. 2038
Senior Attorney
IDAHO POWER COMPANY
1221 West Idaho Street
Boise, ID 83702-5627
(208) 388-2112 – Telephone
(208) 388-6935 – Facsimile

Attorneys for Plaintiff Idaho Power Company

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
Case No. 39576	)	
_____	)	Consolidated Subcase No. 92-00023
IDAHO POWER COMPANY,	)	
Plaintiff,	)	SUPPLEMENTAL AFFIDAVIT OF
v.	)	SHELLEY M. DAVIS IN SUPPORT OF
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	IDAHO POWER COMPANY'S
Governor of the State of Idaho; LAWRENCE G.	)	MEMORANDUM IN SUPPORT OF
WASDEN, Attorney General of the State of	)	CROSS MOTION FOR SUMMARY
Idaho; IDAHO DEPARTMENT OF WATER	)	JUDGMENT
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
Defendants.	)	
_____	)	

STATE OF IDAHO)
) ss.
County of Ada)

SHELLEY M. DAVIS, being first duly sworn upon oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff Idaho Power Company in the above-entitled action, and make the following affidavit upon my personal knowledge of the facts and circumstances set forth herein below.

2. In Defendant the State of Idaho's Memorandum in Response to Idaho Power Company's Cross-Motion for Summary Judgment the State alleges that Idaho Power Company used testimony from the October 31, 1990 deposition transcript of Thomas Nelson in its opening Memorandum in Support of Cross Motion for Summary Judgment out of context.

3. In an effort to avoid such arguments and provide the Court with as complete a record as possible for it to make its necessary determinations on Summary Judgment, attached hereto as Exhibit O is a true and correct copy of the complete transcript of the deposition of Thomas Nelson, taken October 31, 1990.

4. Attached hereto as Exhibit P is a true and correct copy of the uncodified Idaho Code § 42-1406A as adopted by the 1985 Idaho Legislature, in its original incarnation, the uncodified amended Idaho Code § 42-1406A also adopted by the 1985 Idaho Legislature, and a copy of the Statement of Purpose of the 9185 bill.

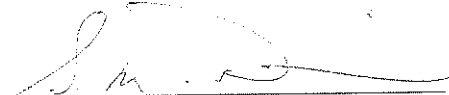
Dated this 14th day of February, 2008.

IDAHO POWER COMPANY

James C. Tucker, Esq.
Senior Attorney, Idaho Power Company
1221 West Idaho Street

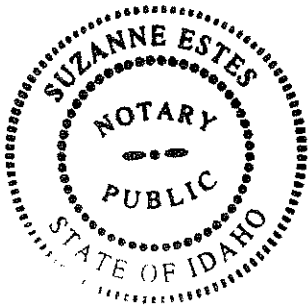
Boise, ID 83702-5627

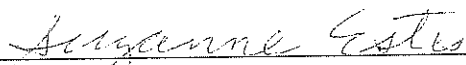
James S. Lochhead, Esq.
Michael A. Gheleta, Esq.
Brownstein Hyatt Farber Schreck, P.C.
410 17th Street, Twenty-Second Floor
Denver, CO 80202

By: 

John K. Simpson, ISB No. 4242
Shelley M. Davis, ISB No. 6788
BARKER ROSHOLT & SIMPSON LLP
205 North Tenth St., Suite 520
P.O. Box 2139
Boise, ID 83701-2139
Attorneys for Idaho Power Company

SUBSCRIBED AND SWORN to before me this 14th day of January, 2008.




Notary Public for Idaho

Residing at: Boise, Idaho
Commission Expires: June 1, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February 2008, I caused to be served a true and correct copy of the foregoing **SUPPLEMENTAL AFFIDAVIT OF SHELLEY M. DAVIS IN SUPPORT OF IDAHO POWER COMPANY'S MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

Filed with the Court via Hand Delivery.

Lawrence Wasden	☐ U.S. Mail, Postage Prepaid
Steven Olsen	☒ Hand Delivered
Karl T. Klein	☐ Overnight Mail
Michael C. Orr	☐ Facsimile
700 W. Jefferson, Room 210	
P.O. Box 44449	
Boise, ID 83711-4449	
Attorneys for Defendant, State of Idaho	

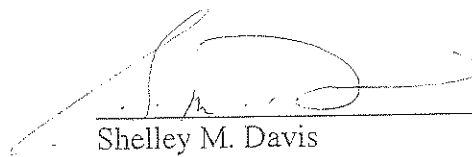
IDWR Document Depository	☒ U.S. Mail, Postage Prepaid
PO Box 83720	☐ Hand Delivered
Boise, ID 83720-0098	☐ Overnight Mail
	☐ Facsimile

United States Department of Justice	☒ U.S. Mail, Postage Prepaid
Environment & Nat'l Resources Div	☐ Hand Delivered
550 W Fort Street, MSC 033	☐ Overnight Mail
Boise, ID 83724	☐ Facsimile

Chief, Natural Resources Division	☒ U.S. Mail, Postage Prepaid
Office of Attorney General	☐ Hand Delivered
PO Box 44449	☐ Overnight Mail
Boise, ID 83711-4449	☐ Facsimile

Randall C. Budge	☒ U.S. Mail
Candice M. McHugh	☐ Hand Delivered
Racine Olson Nye Budge & Bailey, Chtd.	☐ Overnight Mail
P.O. Box 1391	☐ Facsimile
Pocatello, ID 83204-1391	

Josephine Beeman	☒ U.S. Mail
Beeman & Associates, P.C.	☐ Hand Delivered
409 W. Jefferson Street	☐ Overnight Mail
Boise, ID 83702	☐ Facsimile

A handwritten signature in black ink, appearing to read 'Shelley M. Davis', is written over a horizontal line.

Shelley M. Davis
Attorneys for Plaintiff, Idaho Power Company

EXHIBIT O

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General)
Adjudication of Rights to the)
use of Water from the Snake)
River Drainage Basin Water)
System) Case No. 39576

The State of Idaho, ex rel.)
R. Keith Higginson in his)
official capacity as director)
of the Idaho Department of)
Water Resources,)

Petitioner,)

vs.)

United States; State of)
Idaho; and all unknown)
claimants to the use of water)
from the Snake River Drainage)
Basin Water Systems,)

Respondents.)
_____)

EXHIBITS ONLY

DEPOSITION OF THOMAS G. NELSON

October 31, 1990

Boise, Idaho

BURNHAM, HABEL & ASSOCIATES, INC.
Certified Shorthand Reporters

459 Main Street
Post Office Box 855
Boise, Idaho 85701
(208) 545-5700

Reported By

COPY
Prepared for

Mr. James Tucker

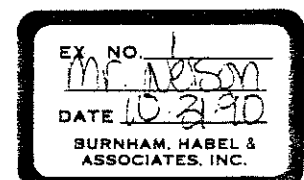
Colleen P. Doherty, CSR

FRAMEWORK FOR FINAL RESOLUTION
OF SNAKE RIVER WATER RIGHTS CONTROVERSY

INTRODUCTION

The litigation concerning water rights on the Snake River and its tributaries has focused public attention on the relationship between hydro-power generation at facilities such as Swan Falls dam, and upstream water use and development which impacts the availability of water for power generation. While the litigation has been costly to the Idaho Power Company, other water users, and the State of Idaho and has resulted in uncertainty over future availability of water, it has served to stimulate much-needed dialogue and study concerning prudent management of this vital natural resource.

However, Governor John Evans, Attorney General Jim Jones and Idaho Power Chief Executive Officer James Bruce believe we have reached the point of diminishing returns in pursuing further judicial resolution of this water rights controversy. Achieving a proper balance among competing demands for a limited resource such as water in the Snake River system is a fundamental public policy question. Litigation is not the most efficient method to resolve complex public policy questions. Moreover, adversary proceedings may not necessarily yield solutions which reflect the broad public interest as well as the interests of the proceeding's participants.



In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction.

1. THE MINIMUM STREAMFLOW IN THE STATE WATER PLAN SHOULD BE ADJUSTED TO 3,900 CUBIC FEET PER SECOND AT MURPHY GAGE DURING THE IRRIGATION SEASON AND TO 5,600 CUBIC FEET PER SECOND DURING THE NON-IRRIGATION SEASON.

The State Water Plan currently provides for a minimum streamflow of 3,300 c.f.s. on an average daily basis at Murphy Gage (below Swan Falls Dam). The Plan itself acknowledges that 3,300 c.f.s. is "less than the amount identified as needed for fish, wildlife and recreational purposes at Swan Falls or downstream." The best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 c.f.s. at Murphy Gage on an average daily basis. By raising the irrigation season minimum streamflow, the state will be able to assure an adequate hydropower resource base and better protect other values recognized by the State Water Plan such as fish propagation, recreational and aesthetic interests, all of which would be adversely impacted by an inadequate streamflow. Conversely, by setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum, the state can allow a significant amount of further development of water uses without violating the minimum streamflow.

Non-irrigation season flows are of critical importance to the preservation of a low-cost hydro base, and to the ability of the Idaho Power Company to meet the needs of its customers. Therefore, the State Water Plan should be amended to recognize a seasonal differential in flows.

Implementation of an irrigation season (April through October) minimum flow of 3,900 cfs at the Murphy gage would result, under similar assumptions, in a low flow of 5,600 cfs in the non-irrigation season (November through March). The non-irrigation season minimum flow should be set at that level. While new storage projects which use non-irrigation season flows may serve to make more water available during the summer irrigation season, they may adversely impact generation capacity during winter months. Therefore, the state water plan should be amended to require that before new storage projects are approved by the state, we should require that existing storage facilities be fully utilized. After such time, new non-irrigation season storage in the reach below Milner dam and above Murphy Gage should only be authorized if it can be coupled with provisions which mitigate depletions such storage would cause in hydro-power generation.

The actual amount of development that can take place without violation of these minimum streamflows will depend on the nature and location of each new development, as well as the implementation of new practices to augment the streamflow.

Development of new domestic, commercial, municipal and industrial (DCMI) uses should proceed without further impediment because of their minimal effect on total water supply. Availability of an assured water supply for those purposes is essential for the orderly development of all the State's resources. Therefore, the State Water Plan should be amended to reserve a block of water for future consumptive DCMI development. This will both assure its availability and avoid the necessity of numerous eminent domain cases to acquire water for such uses.

2. BECAUSE ADDITIONAL WATER USE DEVELOPMENT POTENTIAL IS LIMITED, EACH NEW DEVELOPMENT SHOULD BE CAREFULLY SCRUTINIZED AGAINST EXPRESS PUBLIC INTEREST CRITERIA.

The right to develop the remaining water resources on the Snake River system should be allocated in a manner which will maximize long-term economic benefit to all sectors of society. Priority should be given to projects which promote Idaho's family farming tradition and which will create jobs. Because maintenance of inexpensive hydropower resources contributes to a positive economic climate for the creation of new jobs for Idahoans, future water rights allocation decisions should weigh the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources.

To this end, the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water right to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest. This authority should extend to pending undeveloped permits as well as new applications.

In addition, legislation should be adopted which will enunciate state policy regarding the types of water resource development which are deemed to be beneficial, and which expressly recognizes hydropower generation benefits as an element of such public interest determination. The public interest criteria should also address the timing of new development.

The legislation should also clarify the authority of the Department of Water Resources to impose and lift moratoriums on the granting of new water rights permits. The parties envision that the Department can resume processing of pending water rights filings upon adoption of regulations implementing such legislation.

3. THE STATE SHOULD COMMENCE A GENERAL ADJUDICATION OF THE ENTIRE SNAKE RIVER BASIN IN IDAHO.

The key to effective management of the Snake River lies in a comprehensive determination of the nature, extent and priority of all of the outstanding claims to water rights.

Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights, and determine how much water is available for further appropriation. A general adjudication will also result in quantification of federal and Indian water rights which until now have been unresolved. A further benefit of adjudication is that it will enable the establishment of an efficient water market system, which will encourage the highest and best use of our water resources.

Because a general adjudication will take many years to complete, it is essential to initiate the process as soon as possible so that it will be completed before an even more severe water rights crisis is upon us. The costs of the adjudication will be substantial, and legislation should be passed which equitably distributes those costs among water users, ratepayers and other taxpayers. The parties consulted with representatives of affected interests, and will recommend an equitable cost-sharing formula as part of a joint legislative package.

4. THE STATE SHOULD ENCOURAGE THE ESTABLISHMENT OF AN EFFECTIVE WATER MARKETING SYSTEM.

If the actions outlined in this document are taken there should be a significant amount of water available for appropriation in the Snake River Basin. However, such appropriations should be on the terms and conditions referred to in #2 above. The day is also approaching when there will be no further water

available for traditional appropriation. Therefore some provision must be made to enable people to acquire water rights outside of the appropriation process, over and above the amount reserved for DCMI. Private condemnation proceedings generally involve transaction costs which make it an unattractive alternative. The State should make it easier to get willing sellers together with willing buyers, and to facilitate approval of changes in the place of use. Conjunctive use and management of ground and surface water should also be explored.

5. THE STATE SHOULD FUND HYDROLOGIC AND ECONOMIC STUDIES TO DETERMINE THE MOST COST-EFFECTIVE AND ENVIRONMENTALLY SOUND MEANS TO IMPLEMENT THE STATE WATER PLAN AND TO AUGMENT FLOWS IN THE SNAKE RIVER.

The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement. Much additional information is needed to permit informed management and planning decisions.

A number of methods have been suggested to enhance streamflows in the Snake River, which would benefit both agricultural development and hydro-power generation. Among them are new in-stream storage and aquifer recharge projects. These and other methods deserve study to determine their economic potential, their impact on the environment, and their impact on hydro-power generation.

6. LEGISLATION SHOULD BE ENACTED TO CLARIFY THAT PROCEEDS FROM UTILITY SALES OF HYDROPOWER WATER RIGHTS WILL BENEFIT RATE-PAYERS.

Concern has been expressed that current law could permit a utility to sell its water rights to others. An additional concern is that the proceeds of such a sale would go to stockholders. The parties will propose legislation to address these concerns. Legislation in a draft form has already been discussed at a staff level and should be ready for inclusion in the joint legislative package.

CONCLUSION

The focus of discussion of settlement of the "Swan Falls Controversy" has necessarily been on the claims of right and authority at that site. However, the settlement of those issues necessarily involve putting in place legislation and policies which will govern the rest of the Snake River and other watersheds also.

The ultimate benefit will be to allow informed state policy decisions on future growth and protection of hydropower generation. The definition and implementation of a known and enforceable state policy will make the Swan Falls controversy an asset in the history of the state.

IMPLEMENTATION TIMETABLE

The nature of the controversy surrounding this issue is of such dimensions and affects the actions of so many citizens that the parties have agreed to an implementation timetable to assist the public in understanding when actions may be expected. However, it must be emphasized that the nature of the issues raised in this matter are complex and changes should be expected. Every effort will be made to keep the public informed concerning actions of the parties that could affect their interests.

October 1...Release Framework and Public Interest Criterion.

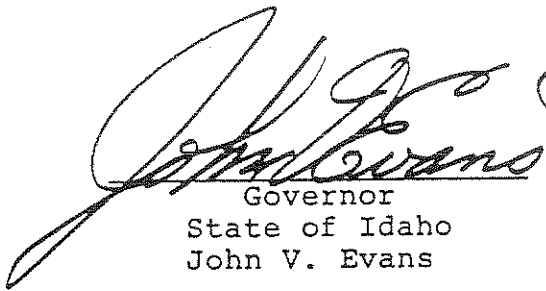
October 15...Execute Settlement Agreement, S.B. 1180 Contract and Stipulation.

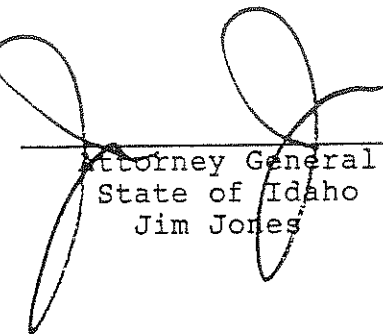
November 1...Proposed amendments to the State Water Plan, and proposed legislation providing public interest criteria, authority of the Department of Water Resources to impose moratoriums on new permits, funding for adjudication of the Snake River, establishment of an effective water market system, funding for hydrologic and economic studies to augment Snake River flows and clarifying allocation of proceeds on sales for hydropower water rights released for comment.

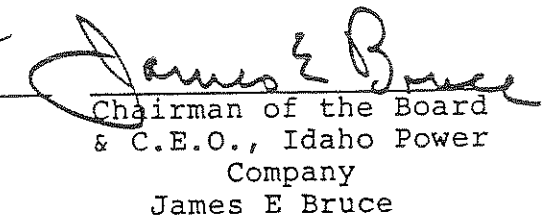
November-December...Meetings with legislative committees for briefing and comments on proposed legislation.

January 15, 1985...Presentation of legislative package to State Legislature.

DATED this _____ day of October, 1984.


Governor
State of Idaho
John V. Evans


Attorney General
State of Idaho
Jim Jones


Chairman of the Board
& C.E.O., Idaho Power
Company
James E Bruce

AGREEMENT

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

1. Effective Date

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

2. Executive Commitment

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

3. Attorney General

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

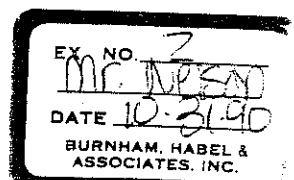
4. Good Faith

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

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

5. Stay Of Current Court And Regulatory Action

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



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

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

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

6. Legislative Program

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

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

- B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.
- C. Establishment of an effective water marketing system.
- D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.
- E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.
- F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.
- G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

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

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

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

- C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.
- D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.
- E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.
- F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

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

9. Proposed 1180 Contract

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

10. Agreement Not An Admission

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

11. Status of State Water Plan

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

12. Regulatory Approvals

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

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

- B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).
- ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.
- iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

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

- C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.
- D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

- A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:
 - i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;
 - ii. Enactment of the legislative program outlined in paragraph 6;
 - iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;
 - iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);
 - v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;
 - vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

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

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

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

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

15. Waiver, Modification or Amendment

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

16. Termination of Contract

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

17. Subsequent Changes In Law

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

18. Successors

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

19. Entire Agreement

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

20. Effect of Section Headings

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

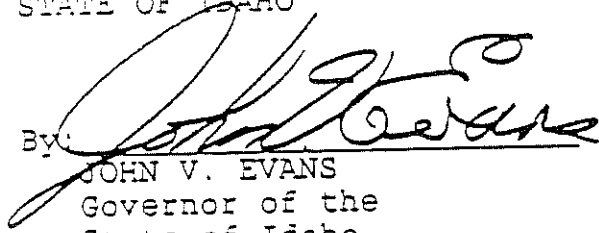
21. Multiple Originals

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

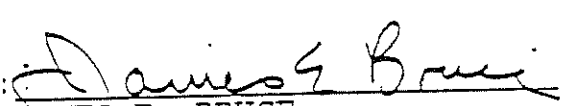
IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

IDAHO POWER COMPANY

By: 

JOHN V. EVANS
Governor of the
State of Idaho

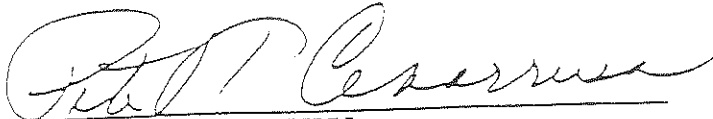
By: 

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

By: 

JIM JONES
Attorney General of the
State of Idaho

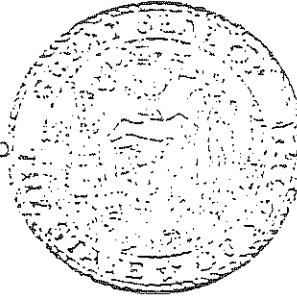
ATTEST:



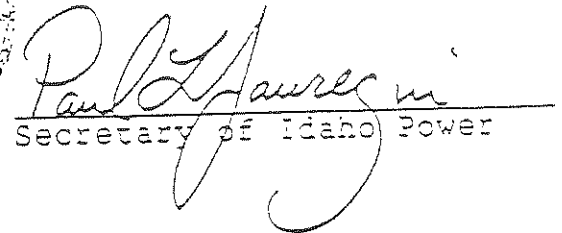
PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho
Power Company)



ATTEST:



Secretary of Idaho Power

CERTIFICATE OF SECRETARY

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

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

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

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

In witness whereof, I, PAUL L. JAUREGUI, as the
secretary of Idaho Power Company, a Maine corporation, have
executed this certificate and affixed the seal of Idaho Power
Company, a Maine Corporation, on this 25th day of October,
1984.



Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE
OF THE STATE OF IDAHO

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

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and
2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and
3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.



A handwritten signature in cursive script, reading "Pete T. Cenarrusa", written over a horizontal line.

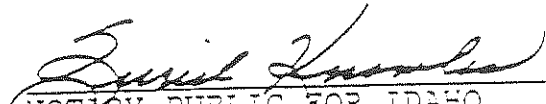
PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

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

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


NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

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


NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

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

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. On and after the passage/ approval and effective date of this section/ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; and (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a1) that it will reduce the quantity of water under existing water rights, or (b2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use; The director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller less quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, ~~feeling~~ aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION -- CRITERIA -- WEIGHT -- BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

- (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 cost of alternative energy sources to ameliorate such impact, to the state and local economy;
- (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) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 3209 through 3215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT.
(1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) the boundaries of the entire system within the state to be adjudicated;

(b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and

(c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;

(b) defines the system boundaries;

(c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and

(d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEEs FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights The department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221, Idaho Code/ except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court/ the claimant shall pay a filing fee of only

ten dollars (\$10.00) fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. Provided, however, that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1971/ was enacted/ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-
watering rights \$25.00

2. Claims for all other rights. \$50.00

B. Additional variable water use fee for each claim filed:

1. Irrigation use: \$ 1.00 per acre.
2. Power: \$ 25.00 per c.f.s.
3. Aquaculture: \$ 10.00 per c.f.s.
4. Municipal, Industrial, Commercial,
Mining, Heating, Cooling: \$100.00 per c.f.s.
5. Public: \$100.00 per c.f.s.
6. Miscellaneous: flat fee only.

C. Payment of a variable water use fee of more than \$1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE
DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

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

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of \$200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____
BILL NO. _____
BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A
NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A
PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF
THE RATEPAYERS.

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

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the
same is hereby amended by the addition thereto of a NEW
SECTION, to be known and designated as Section 61-502B, Idaho
Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used
for the generation of electricity shall accrue to the benefit
of the ratepayers.

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the []
shall not constitute a sale, assignment, conveyance or
transfer within the meaning of §§61-327, 61-328, 61-329,
61-330, and 61-331, I.C., to the extent any of those sections
may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.
2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.
3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.
4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.
5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

[The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

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

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

LEGISLATURE OF THE STATE OF IDAHO
Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE
DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE
THE POWER TO ESTABLISH RULES AND REGULATIONS.

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

SECTION 1. That Section 42-1805, be, and the same is hereby
amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties
prescribed by law, the director of the department of water
resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to
interstate and international water rights affecting Idaho water
resources; and to cooperate with all agencies, now existing or
hereafter to be formed, within the state or within other
jurisdictions, in matters affecting the development of the
water resources of this state.

(2) To prepare a present and continuing inventory of the
water resources of this state, ascertain means and methods of
conserving and augmenting these and determine as accurately as
possible the most effective means by which these water
resources may be applied for the benefit of the people of this
state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

CONTRACT TO IMPLEMENT
Chapter 259, Sess. Laws, 1983

THIS CONTRACT, Made and entered by and between the STATE OF IDAHO, hereinafter referred to as "Idaho", acting by and through the Governor of the State of Idaho, pursuant to the provisions of Senate Bill No. 1180, 1983 Idaho Session Laws, Chapter 259, and the IDAHO POWER COMPANY, a Maine corporation, qualified to do business in Idaho, with its principal offices in Boise, Idaho, hereinafter referred to as the "Company";

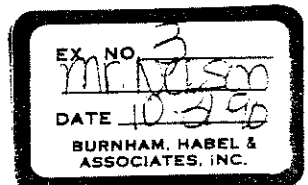
W I T N E S S E T H:

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereby agree as follows:

CONTRACT PROVISIONS

1. Definitions

- (a) The phrase "consumptive water uses for domestic uses" means water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of said households where total use, other than water for irrigation of the residential lot, does not exceed thirteen thousand (13,000) gallons per day. The above definition applies whether such uses are direct or from a municipal water supply. The term "residential lot" means either a lot in an approved subdivision or a lot created by metes and bounds description, which lot had been platted or described prior to November 19, 1982, or meets the minimum residential lot size requirement in effect on November 19, 1982, of the local government agency having jurisdiction. The minimum lot size may be changed by the government agency, but shall not exceed two and one-half acres. The term "consumptive water for domestic uses" shall include, in addition to the uses listed above, use of water for livestock.



- (b) "Nonconsumptive Commercial, Nonconsumptive Municipal, Nonconsumptive Industrial Use" means any CMI use which does not deplete the water of the Snake River system above Swan Falls more than two acre-feet per day.
- (c) The phrase "substantial investment in irrigation wells and irrigation equipment" means an actual expenditure or written commitment, pursuant to a water right application filed prior to November 19, 1982, or pursuant to a water right permit issued prior to November 19, 1982, for a portion of the costs of construction or purchase of a well, or of equipment to be used primarily for irrigation purposes which meets the following requirements:
1. The actual expenditure or written commitment for irrigation wells or for irrigation equipment equals or exceeds the amount of fifteen thousand dollars (\$15,000) or the actual expenditure or written commitment equals or exceeds twenty-five (25) percent, whichever is less, of the total projected cost of the irrigation project; and
 2. The actual expenditure or written commitment must have been made prior to November 19, 1982.
 3. The parties have determined that the disjunctive "wells or equipment" more clearly effectuates the legislature's intent in this regard, notwithstanding the appearance of the conjunctive "wells and equipment" in § 61-540, Idaho Code.
- (d) The acronym "IPUC" refers to the Idaho Public Utilities Commission and to any agency successor in function.
- (e) The phrase "Ada County Civil No. 81375" refers to the following legal action: Idaho Power Company vs. Idaho Department of Water Resources, et al., Ada County Civil No. 81375.

2. Mutual Covenants

- (a) Notwithstanding the pending district court action in Ada County Civil No. 81375 all water users as

defined in paragraphs 1(a), and 1(b), and all consumptive water users who have beneficially used water prior to November 19, 1982, pursuant to a valid permit, license or decreed right existing prior to November 19, 1982, or valid beneficial use claim, and any persons who have previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, even though such irrigation wells or irrigation equipment were not in operation prior to November 19, 1982, may continue the perfection of such water right in compliance with Idaho law without protest or interference by the Company.

- (b) As soon as practicable after the effective date of this contract, the Company and Idaho shall dismiss with prejudice its pending case, Ada County Civil. No. 81375, as to those persons who in the opinion of the Company and Idaho, come within the class of users identified in paragraph 2(a) above.
- (c) As to those persons whom the Company and Idaho cannot initially determine, based upon the information available to them, whether or not they come within the class of users identified in paragraph 2(a) above, the Company and Idaho acting through the Idaho Department of Water Resources, shall endeavor to obtain the information necessary to make a decision as to such persons. To the extent it is requested by the Company to provide information, the Idaho Department of Water Resources shall recover its legally authorized costs for researching and producing data including copies. The Company shall subsequently dismiss with prejudice the pending case as to any other persons who are determined by the Company and Idaho based upon the information received to come within the class of users indentified in paragraph 2(a) above.
- (d) The Company and Idaho shall not assert any claim for injunctive relief or compensation for depleted flows at the Swan Falls Dam or other Company dam from those persons dismissed from Ada County Civil No. 81375, and will not protest the issuance of a permit or license to such persons on account of the depletion of flows at the

Company's hydro dams for water uses coming within the provisions of Idaho Code § 61-539.

- (e) The Company and Idaho shall not name as defendants in any action, or assert any claim against, holders of consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial, or nonconsumptive municipal uses from the Snake River watershed above Swan Falls Dam occurring from and after November 19, 1982, unless such action or claim is unrelated to such uses, or unless such uses would result in a violation of the Company's water right as defined in paragraph 7(A) of the contract attached hereto as Exhibit A, or in a violation of the minimum stream flow established by the State Water Plan.

3. Intent of the Act and of the Contract

- (a) It is the intent of the Act (Chapter 259, S.L. 1983) and of this Contract, and the interpretation of both parties hereto, that dismissal of defendants by the Company pursuant hereto and failure of the Company to pursue any remedies against persons coming within the terms of paragraphs 2(d) and 2(e) hereof during the existence of this contract shall not expose the Company to claims before the IPUC in the event of later termination of this contract under the provisions of paragraph 7(a), and that the IPUC will lack jurisdiction of such claims in the event of termination of this Contract under the provisions of paragraph 7(a).
- (b) In order to implement the Act and this contract in accordance with the intent, the Company and Idaho shall move the District Court in Ada County Civil No. 81375 under the provisions of I.R.C.P. 41(a)(2) to dismiss said case with prejudice as to the defendants entitled to dismissal under this Contract. The provisions of I.C. 61-539 relating to IPUC jurisdiction shall only apply as to the qualifying uses of each defendant so dismissed.
- (c) The dismissal shall be binding upon the plaintiff irrespective of any declaration by a court of competent jurisdiction that S.B. 1180 is null,

void or of no effect. The dismissal shall be construed as an abandonment by the Company of that portion of its claims for damage against the state and its agencies arising from the issuance of permits or licenses to those holders or their predecessors.

4. Third Party Beneficiaries

Persons coming within the class of users identified in paragraphs 2(a), 2(d) or 2(e) above are third party beneficiaries of this contract who may seek enforcement of applicable provisions, except as to paragraph 3, in accordance with the laws of the State of Idaho. By executing this contract, the Company agrees that its claimed water rights are subordinate to the rights coming within the provisions of paragraphs 2(a), 2(d) and 2(e).

5. Exceptions

No provision of this Contract is intended, nor shall it have the effect of limiting in any manner the nature or scope of the claims or defense which may be utilized by any party to the action remanded to district court by the Idaho Supreme Court in Case No. 13794. The parties agree that by executing this Contract, the State is not conceding nor agreeing that the users or uses identified in paragraphs 2(a), 2(d) or 2(e) in fact interfere with the Company's claimed water rights or that the surface water or ground water used or to be used by such users or uses does in fact contribute to the flow of the Snake River. The parties agree that by executing this Contract the Company is not conceding nor admitting that it cannot state or prove a claim against those water users identified in 2(a), 2(d) or 2(e), nor any other users or potential users of water from the same sources. Neither the plaintiff nor the defendant by this contract makes any admission regarding the nature or quality of the water rights at issue in this or any other litigation. Nor does the state make any admission that the ground waters or various reaches of the Snake River are an interconnected water system.

6. Term

This Contract shall take effect when executed and shall continue in effect until terminated in accordance with the provisions of paragraph 7 hereof.

7. Termination

- (a) In the event the Act is amended or repealed, this Contract shall terminate on the effective date of said law amending or repealing the Act, unless the parties keep this contract in force by way of written addendum. In the event of termination under paragraph 7(a), this contract shall be null and void on and after the date of termination except as to paragraphs 1, 3, 7, and 8, which shall continue in force and effect.
- (b) In addition to any termination that may occur under the provisions of paragraph 7(a) hereof, this contract shall terminate (1) on the date the contract has been performed according to its terms or (2) on the date any decree entered in Ada County Civil No. 81375 is final following on appeal or expiration of the period for appeal, whichever of the foregoing (1) or (2) occurs later. In the event of termination under paragraph 7(b), this contract shall be null and void on and after the date of termination, except as to paragraphs 1, 2(d), 2(e) and 3 which shall continue in force and effect.
- (c) In the event that the agreement between the Governor, the Attorney General and the Company dated October 24, 1984 and attached hereto as Exhibit A is not implemented or is terminated by breach, then this contract shall also terminate, except to the extent this contract has been performed as of the date of termination.

8. Waiver of Defenses

In the event the Contract is terminated under the provisions of paragraph 7(a), the defenses of statute of limitations, abandonment, adverse possession, statutory forfeiture, laches, waiver and other applicable common law defenses due to action or inaction of the Company during the period the Contract was in existence shall not be available against the Company on behalf of persons against whom the Company did not attempt to state a claim based on the existence of this contract for a period of two (2) years after the date of such termination, unless the parties keep this Contract in force by way of written addendum.

9. Authority of Department of Water Resources not affected

This Contract shall not be construed to limit nor interfere with the authority and duty of the Idaho Department of Water Resources to enforce and administer any of the laws of the State which it is authorized to enforce and administer.

10. Modification

This Contract may not be modified except in writing, executed by both of the parties hereto.

11. Successors

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

12. Entire Agreement

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

13. Nonlimitations

This Contract is not intended, nor shall it be construed, to limit the rights of either party to prevent the institution or continuance of water uses not in compliance with the laws of the State of Idaho.

14. Effect of Section Headings

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

15. Multiple Originals

This Contract is executed in triplicate. Each of the three contracts with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this agreement at Boise, Idaho.

STATE OF IDAHO

IDAHO POWER COMPANY

By: *John V. Evans*

JOHN V. EVANS
Governor of the
State of Idaho

By: *James E. Bruce*

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



ATTEST:

Pat C. Enns

Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho
Power Company)

ATTEST:

Paul L. Jauregui
Secretary of Idaho Power

APPROVED AS TO FORM:

Jim Jones

JIM JONES
Attorney General of the
State of Idaho

CERTIFICATE OF SECRETARY

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

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the

corporation, or a true facsimile thereof, as the case may be; and

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

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

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui

Paul L. Jauregui
Secretary of Idaho Power Company

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or identified to me to be the President and Secretary, respectively of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

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

Larrel Knowlton
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

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


Terrell Knowles
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

AFFIRMATION OF CONTINUATION OF AGREEMENT

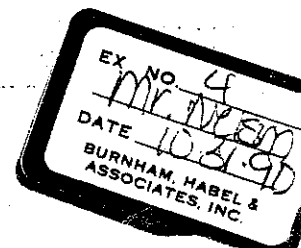
ADD 12 1984

On October 25, 1984, an Agreement was made and entered into by the State of Idaho, by and through the Governor; John V. Evans in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation. Paragraph 16 of the Agreement provided:

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

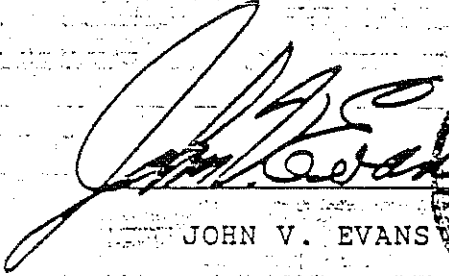
The undersigned parties to that Agreement hereby agree as follows:

1. The Agreement has not been terminated by its own terms. None of the conditions stated in Paragraph 13 has yet failed to be satisfied. All of the conditions except Condition iv. have been satisfied.
2. Condition iv. has not yet been satisfied. The Federal Energy Regulatory Commission has taken no action on the parties' request described in paragraphs 12-B-i and 12-B-ii.
3. No party has yet breached the Agreement. Each party acknowledges the good faith performance of the other parties in discharging their respective obligations under the Agreement.
4. None of the parties desire or intend the Agreement be terminated at this time.



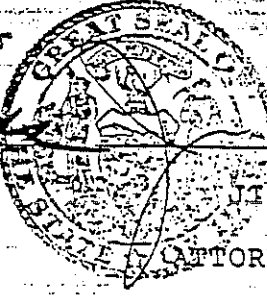
THEREFORE, the Agreement will continue in effect. The parties will continue to seek favorable action by the F.E.R.C. to satisfy the remaining Condition iv. Upon the receipt of notice of favorable action by F.E.R.C. on the pending matters related to the Agreement, the parties will affirm in writing that the Agreement has been implemented. If it appears to any party that Condition iv has failed to be satisfied notice of that fact shall be given by that party to the other parties. In that event, the parties will meet again as soon thereafter as possible to determine the status of the agreement. This affirmation shall be governed by the terms of the Original Agreement of October 25, 1984.

IN WITNESS WHEREOF, the parties have executed this instrument at Boise, Idaho this 15th day of May, 1985.


JOHN V. EVANS

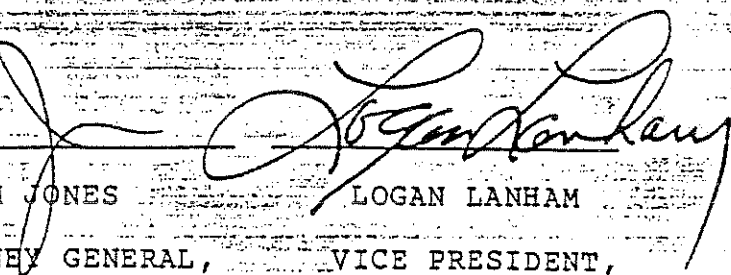
GOVERNOR,

STATE OF IDAHO


JIM JONES

ATTORNEY GENERAL,

STATE OF IDAHO


LOGAN LANHAM

VICE PRESIDENT,

IDAHO POWER CO.

1 calculation, right. But what I'm saying is you may have
2 a declining rate base also.

3 Q. Declining --

4 A. So if the company's rate base is declining,
5 you could not isolate the impact of this particular
6 increase or addition to rate base as a factor in rates in
7 a particular resulting rate.

8 Q. Let's take the economist assumption that
9 all things are equal, and that there is no changes in any
10 other factor. By including the filing fees in the rate
11 base, would that lead to an increase in the rates that
12 Idaho Power could charge to its customers?

13 THE WITNESS: All other --

14 MR. STRONG: Objection. My objection would be
15 that Mr. Nelson has indicated that he's not an expert in
16 that area, and would not be capable of testifying.

17 MR. TUCKER: I would object on the same basis of
18 competency, lack of foundation, and also this line of
19 questioning, while we're allowing to it go a little ways,
20 is far beyond the scope of direct.

21 MR. MONSON: In answer to your question, Mr.
22 Tucker, this deposition is taken not only to preserve
23 testimony, but also as a discovery deposition, it's my
24 understanding. And in response to Mr. Strong's argument
25 about his lack of expertise in this area,

1 Mr. Nelson has testified that he's participated in
2 numerous rate cases before the PUC, and that he has
3 considerable experience in that matter, and I think he
4 can offer his opinion as to the effect on the rate base.

5 MR. STRONG: Mr. Nelson stated he wasn't an
6 expert, and did not consider himself an expert.

7 MR. TUCKER: Just for the record, I don't know
8 that this deposition has been noticed for discovery
9 purposes. Our objection is lodged, and you can continue
10 with that understanding.

11 Q. (BY MR. MONSON) Mr. Nelson, can you answer
12 the question, please?

13 A. If you make the assumption, which in my mind
14 is not valid in the real world, that all other factors
15 remain the same, then an increase in rate base would
16 result in an increase in rates, everything else remaining
17 exactly the same.

18 Q. If the Idaho Power Company chose to expense
19 the filing fees, again, all other things being considered
20 equal, would that also result in an increase in rates?

21 A. No, not necessarily.

22 Q. Why not?

23 A. The rates are set on the basis of a test
24 year. So assuming the usual case, the utility goes in
25 for a rate case, they'll make their case based on that

1 test year. And they'll take actual results, and then
2 they'll pro forma that year to try to take into account
3 unusual things that happened that year. And if you don't
4 have a test year which includes a certain expense, then
5 that expense is not recoverable. Or you may have the
6 test year include the expense, but the pro forma
7 adjustment may take it out on the basis, well, that's not
8 an ongoing business cost, or that was an unusual water
9 year, or some other things. So you cannot categorically
10 say that an increase in expense also results in an
11 increase in rates.

12 Q. Do you know if Idaho Power has taken
13 advantage of the option to extend its payments over a
14 number of years?

15 A. They did initially, and I don't know if they
16 have continued that or not. There was some thought they
17 would simply pay it off, but I don't really know whether
18 they did pay it off, or simply paying it over the number
19 of years. The initial payment took advantage of the
20 five-year spread.

21 Q. And that five-year spread could include one
22 of those test years then?

23 A. It could.

24 Q. Do you know if it did?

25 A. The company hasn't had a rate case since it

1 started paying fees.

2 Q. Who determines the test year?

3 A. Initially the utility, and then the PUC can
4 choose a different test year if it wants to and order the
5 utility to reprepare.

6 Q. How often do rate cases occur?

7 A. It's hard to generalize. If the company's
8 operations are changing, if they've got major additions
9 or deletions to the rate base, or experience a period of
10 growth or something like that, they could come, in fact,
11 you can over file. You can file a new one before you get
12 a decision on an old one. I believe at one time PG&E was
13 reported to have 30 cases pending before the California
14 Public Utility Commission. But the company's situation
15 has been rather stable in the last several years. They
16 haven't filed one in the last, at least, two years, and
17 may not for another couple.

18 Q. When was the last one filed? When was the
19 order in the last one entered, I should say?

20 A. I think it was probably three years ago or
21 more.

22 Q. Let me call your attention to the 7,500
23 lawsuit that you mentioned in your direct testimony.

24 A. Okay.

25 Q. That was filed against approximately 7,500

1 water users; is that correct?

2 A. It was filed against the holders of 7,500
3 water rights. There could have been some overlap. So
4 7,500 more accurately describes the number of water
5 rights then perhaps the number of parties.

6 Q. And in your direct testimony, you discussed
7 in response to a question by Mr. Strong, that you
8 established certain parameters for choosing who to join
9 in that lawsuit. What were those parameters?

10 A. Pending applications, other than I think we
11 excluded domestics. If it was only a domestic use, I
12 believe we excluded it.

13 Q. And domestic use as defined by Idaho Code
14 sections?

15 A. Yes, you know, the one household, half acre
16 or less, 13,000 gallons a day, that definition. At that
17 time there were a couple definitions of domestic use, as
18 I recall the code. But if it was a half acre or less, as
19 I recall we didn't include them. Pending permits on the
20 same basis. And licenses issued within five years of the
21 date of the district court decision, as I recall. And
22 again, if we had a license for small domestic use, we
23 would not include that license, if I remember right.

24 Q. Which district court decision are you
25 speaking of?

1 A. In the first case, which was '79 or 80.

2 MR. BARKER: Can I interject. You mean Judge
3 Bail's decision?

4 THE WITNESS: No, Judge Walters' decision.

5 Q. (BY MR. MONSON) And what was the holding in
6 that case again?

7 A. That was the one that said that the
8 coordinated operations of the company resulted in
9 subordination of its entire system following the FPC
10 subordination of the Hells Canyon project.

11 Q. That decision you appealed?

12 A. Yes.

13 Q. And that's the one that was ruled on in 1982
14 by the Idaho Supreme Court?

15 A. Yes.

16 Q. Which reverse Judge Walters' decision in
17 subordination?

18 A. Yes, there were other issues in the case,
19 but that was the critical one.

20 Q. Were there any others that you joined in
21 that case?

22 A. We joined the Department of Water Resources.
23 We had joined the complainants in the first case. The
24 PUC complainants were joined in the first case. And I
25 can't remember if we specifically joined those people in

1 the second case or not. I don't think we did. I believe
2 some of them got joined simply because they had water
3 rights that fell within our parameters, but I don't
4 believe we named those people again. They came to be
5 called the Paragraph 20 Defendants, because that was the
6 paragraph in the first complaint in which we said that
7 these are the guys that filed the complaint in the PUC,
8 and we want them bound by a decision here.

9 Q. So it was not necessarily because they held
10 water rights, just to bind them in this proceeding?

11 A. Yes. I think we joined them in the first
12 case for that reason, but not in the second.

13 Q. Why did you join the Department of Water
14 Resources?

15 A. To bind the department to administer the
16 water rights of the other defendants consistent with what
17 the court found.

18 Q. What were the geographical boundaries of
19 that lawsuit?

20 A. Swan Falls, the portion of the Snake River
21 Basin tributary to the Snake above Swan Falls Dam.

22 Q. All the way to the Idaho border?

23 A. Yes, we went clear to the Wyoming border,
24 and Nevada on the south.

25 Q. Was it strictly the main stem, or did you

1 attempt to join all the users of the tributaries?

2 A. Tributaries also.

3 Q. What about ground water?

4 A. Ground water also.

5 Q. Does this lawsuit relate to what's commonly
6 referred to as the 02 Adjudication?

7 A. No.

8 Q. What was the 02 Adjudication?

9 A. That was a main stem Snake surface water
10 adjudication from Milner Dam, I believe, to the Oregon
11 border, as I recall, with that geographical extent.

12 Q. So your case was considerably larger in
13 scope?

14 A. Oh, yes.

15 Q. It excluded the part below the Swan Falls
16 Dam, but included everything that was upstream from Swan
17 Falls?

18 A. That's correct.

19 Q. Including Milner?

20 A. Yes.

21 Q. Do you intend to join the United States in
22 that action?

23 A. No.

24 Q. Why not?

25 A. I don't think we'd get jurisdiction.

1 Q. What relief did you seek in that lawsuit,
2 did Idaho Power seek in that lawsuit?

3 A. Essentially to have the court declare Idaho
4 Power Company's rights prior and senior, and superior to
5 those of the Defendants, the water right holders, not the
6 Department of Water Resources. And to the extent that
7 they depleted physical company's rights to enjoin them
8 from the depletion, and I think we threw in a damage
9 claim against the state, if I remember right, just to get
10 their attention.

11 Q. Did you get their attention?

12 A. I think so. At least we spent a lot of time
13 screaming at each other in court after that.

14 Q. Did you seek any adjunct relief from the
15 state?

16 A. I don't remember. It would have been along
17 the lines I discussed requiring the department to honor
18 the decision as far as the relationship between the
19 company's water rights and the other defendants' water
20 rights.

21 Q. If you had not reached the agreement in the
22 Swan Falls dispute, would Idaho Power continued to have
23 prosecuted this case?

24 A. Yes.

25 Q. And if they had so prosecuted this case,

1 would they have been able to protect their rights by
2 entry of decree?

3 A. I'd say to some degree. There were some
4 problems with the case as a vehicle for doing that which
5 the state raised, contending that the only way to do that
6 was in an adjudication, which the state began. You had
7 problems of parties, for example, if the United States
8 had been found to hold a water right that was critical to
9 the whole basin, that fell within those parameters,
10 perhaps we'd have had a defect in matters and couldn't
11 proceed. But at the time we started the negotiations in
12 '84, we had beaten back all the state's attempts at the
13 trial court level to get the case thrown out. Like I
14 say, we were over there a lot.

15 Q. What court was it pending before?

16 A. The district court here in Ada County.

17 Q. So Idaho Power would have had a forum in
18 that action to protect its rights?

19 A. Yes. The adequacy of the forum was being
20 contested by the state. But so far, we still had one.

21 Q. You indicated that the individuals that were
22 joined in the 7,500 lawsuit collectively informed the
23 defense association. Do you remember the name of that
24 association?

25 A. It was something defense fund, but I

1 don't --

2 Q. Would it have been water users defense
3 funds?

4 A. No, I think it was more specific than that.
5 I can't remember the name of it. I remember the name of
6 the woman who did the administrative end of it. Her name
7 was Elaine Martin, and she lived in Jerome at the time.
8 But I don't remember the name they gave the group.

9 Q. Who was the lawyer for that group; do you
10 recall?

11 A. Kent Foster from Idaho Falls. And I might
12 say they didn't represent everybody who appeared in the
13 action. We had appearances by, it seemed to me when we
14 finally dismissed the case, our mailing list was over a
15 hundred.

16 Q. And in the period that the case was on file,
17 you had perfected service on at least approximately
18 2,000, maybe under a little 2,000?

19 A. Yes, that I can trace now. It may have been
20 more than that, but it was a laborous process, so that
21 may be about right.

22 Q. Could you have joined the others had you
23 continued to try to serve process on the other users?

24 A. Could I have joined others?

25 Q. Did you know who -- let me strike that. Let

1 me go back. The others who were not served, was that
2 because the Swan Falls negotiations were pending and it
3 didn't seem prudent to try and spend the money and time
4 to try to join these other people, or was it simply that
5 you could not find them?

6 A. A little of both, I think. We were having
7 trouble serving a fairly substantial number of the
8 defendants simply because they had not kept the
9 department informed of their whereabouts. But also once
10 meaningful negotiations got started, it seemed better to
11 concentrate on that than serving process.

12 Q. Could you have joined others, other water
13 users that you were not able to personally serve, through
14 a process of publication?

15 A. That would have been possible at some point,
16 but that was our last resort.

17 Q. And that would have been effective service
18 of process?

19 A. I think if we did it right, it probably
20 would have. I think the Supreme Court decision required
21 reasonable efforts, and that's kind of a custom made shoe
22 that you have to put on your foot. But I say we should
23 have been able to devise a method that would have done
24 that.

25 Q. You discussed in your direct testimony the

1 so-called 1180 legislation.

2 A. Yes.

3 Q. What was that again?

4 A. That Senate Bill 1180 was passed in the
5 legislature. What it attempted to do was authorize the
6 company to dismiss the defendants in the 7,500 case who
7 actually were using water or had made substantial
8 investments preparatory to using water. In other words,
9 divide out the people who were actually on the ground
10 using water from those people who only had an application
11 or undeveloped permit. And the purpose was to keep the
12 PUC from coming back and saying, Idaho Power, you're
13 giving away your rate base, and take some punitive
14 action.

15 Q. And the bill stripped the PUC of
16 jurisdiction to consider those actions?

17 A. That's my recollection. Somewhat similar of
18 what happened at the final sale.

19 Q. What role does the PUC have in reviewing
20 company water rights?

21 A. Nothing specific under the statutes. They
22 have a great deal to say about what the company's rate
23 base consists of, what expenses it can recover, what rate
24 of return it's authorized, you know, they have within
25 general constitutional restraints relating to taking,

1 they have broad authority over the company's finances, so
2 the PUC is a major player with any regulated utility.

3 Q. And what standards do they use in general
4 terms in reviewing financial activities or other
5 activities of the company?

6 A. Well, I don't know that I can really say
7 specifically. The general standard is that any company
8 is supposed to use reasonable business prudence, I think,
9 or words to that effect. And if it has done so, it ought
10 to be immune to regulatory abuse, if you will. But
11 that's so general that the PUC is said to be an expert in
12 its field, and review by the Supreme Court is sometimes
13 pretty summary, the court saying the legislature
14 established this group, they are the expert, and we're
15 not going to interfere with their discretion. So it's a
16 pretty tough place for a utility to be if it's at war
17 with its regulator.

18 Q. Does the PUC consider the public interest in
19 its regulation of utilities?

20 A. Yes.

21 Q. How does the PUC define public interest?

22 A. Well, I'm not sure that I can answer that.
23 I think it probably varies with the issue before it.

24 Q. Did the effect of the 1180 legislation,
25 Senate Bill 1180, which stripped the PUC of jurisdiction,

1 consider those actions or Idaho Power's actions in
2 dismissing the losses of the 7,500 suit, did that have
3 any effect on the PUC's review of utility actions for
4 public interests considerations?

5 A. Not outwardly, as far as I know.

6 Q. But as to those, as to the actions that were
7 outside the PUC's jurisdiction, it had no power to review
8 that for public interest standard?

9 A. Correct.

10 Q. You said that there was a challenge to the
11 1180 statute, Senate Bill 1180, and that was filed by
12 family trust, the Martin Family Trust?

13 A. Martin Family Trust I believe is the name of
14 it.

15 Q. And they challenged it on constitutional
16 grounds; is that correct?

17 A. That's my recollection. I only dimly
18 remember the case. Most of our effort was trying to
19 intervene so we knew what was going on. And once we
20 intervened, then other things happened, and I don't think
21 anything else ever happened in the case.

22 Q. That was filed in 1983 or '84?

23 A. Along in there. It would have been after
24 the 1180 contract if my memory of the subject matter of
25 the case is right.

1 Q. Do you remember what the constitutional
2 grounds were?

3 A. No.

4 Q. During the course of the Swan Falls
5 negotiations, you referred in your testimony this morning
6 to a group you called the kitchen cabinet or the Swan
7 Falls task force?

8 A. Yes.

9 Q. Do you remember what the name of that group
10 was specifically, or if it had a name?

11 A. Well, as I recall, I heard it called both.
12 But we played no part in setting it up or in dismissing
13 anything with them. I mean, we heard back what was going
14 on and what the reactions were, but we did not play any
15 part in dealing with that group.

16 Q. Who did set it up?

17 A. The Governor's office and Attorney General's
18 office, one or both.

19 Q. Who was on this task force?

20 A. Basically, it was representatives of groups
21 that were concerned with the Swan Falls controversy who
22 were not at the table. So you had agriculture was
23 represented. Some legislators were directly involved in
24 the group, as I remember. There may have been some
25 environmental contacts there to, but I don't now

1 remember. I think the cities were involved through the
2 the Association of Idaho Cities or Municipal League,
3 whichever it was called at the time. Those come to mind.

4 Q. Do you remember the names of any of the
5 representatives or the names of specific groups that were
6 represented then?

7 A. Cheryl Chapman, who is executive director of
8 the Idaho Water Users, was consulted. Roger Lange, a
9 lawyer in Rupert who represents a number of irrigation
10 entities in that area and upriver too. Senator Leonard
11 Noh from Twin Falls.

12 Q. For the record, how is Noh spelled?

13 A. N-o-h. And I think there was a legislator
14 or two from upriver. I don't remember who they were.

15 Q. By upriver, you mean?

16 A. Upstream from Twin Falls.

17 Q. Idaho Falls area, that far upriver?

18 A. Somewhere in there, yes. Oh, and I think
19 Elaine Martin or Kent Foster, both.

20 Q. What about the cities?

21 A. I don't know who would have represented the
22 cities in that discussion.

23 Q. What about environmental groups?

24 A. I don't know that either. This was coming
25 to me probably about thirdhand by the time they reported

1 back. What happened was Pat and Pat would report to Tom
2 with the reaction of this group. And whatever the
3 discussion was was carried to them, and so I just picked
4 up names, you know, indirectly through that conversation.

5 Q. So no one from Idaho Power was involved in
6 this kitchen cabinet task force?

7 A. No. As I said, we thought it was
8 inappropriate for the company to do that. I mean, just
9 as a PR and political matter.

10 Q. Is that because you were already represented
11 at the table?

12 A. No, simply because that was the state's
13 function to broaden the group that was consulted, not
14 Idaho Power's. And it would look a little hypocritical,
15 I think, if Idaho Power was out beating a PR drum,
16 particularly in the light of the vast PR campaign that
17 had been waged and irritated everybody considerably on
18 the other side.

19 Q. You mentioned legislators involved in the
20 kitchen cabinet, and you mentioned Leonard Noh. Were
21 there any other legislators?

22 A. The other name that comes to mind that could
23 have been involved, and I don't remember specifically,
24 was Vard Chatburn, who was a state representative from
25 Albion, down in the Albion area, who was the counterpart

1 to Leonard Noh in the House of Representatives on the
2 House Water Resources Committee. And since he was
3 involved in all the legislation, he could well have been
4 involved in that group too. I would be surprised if he
5 wasn't consulted even if he didn't go to the meeting.

6 Q. How long there was this group in existence?

7 A. I think throughout the negotiations, summer
8 and fall of '84, at least that long.

9 Q. You said summer and fall of '84. Was that
10 the time during which the negotiations were ongoing? Did
11 the negotiations take place in spring of '84, or earlier
12 than that?

13 A. No. As I recall, as I said, the company
14 sent the 1180 contract to the Governor to sign it. He
15 wrote back and said let's broaden it, and the first
16 meeting I believe was in late June, early July when the
17 principals met and said, yes, there is room here to talk,
18 and sent Pat, Pat and Tom off. And that process lasted,
19 if my memory is correct, early July until we finished on
20 the 25th of October.

21 Q. It was a pretty big process?

22 A. It was a lot different as it came out than
23 we had envisioned. We thought, we'll get together for a
24 couple weeks and work on this. And finally turned out we
25 just stayed in session. We met several times a day every

1 day. In fact, I think I got an award from the Governor's
2 staff for being the most consistent volunteer staff
3 member, because I was there more than them, I think.

4 Q. So it happened a lot quicker than the
5 Sho-Ban negotiations?

6 A. Yes. We already had this shape of the table
7 I think. And I might also say that we didn't have any
8 federal involvement at the table too.

9 Q. So noted. Now, these negotiations you said
10 took place, first began in June and July?

11 A. Yes.

12 Q. June, would you say?

13 A. I think it was early July, if I had to pick
14 the time. Because I remember the 4th of July was
15 involved in there someplace as to why we couldn't stay in
16 session, or why we did it on the day we did. So sometime
17 in early July, I believe.

18 Q. And there was first a meeting of the
19 principals --

20 A. Yes.

21 Q. -- for each party? Who were the principals,
22 again?

23 A. Jim Bruce and I for Idaho Power. Maybe
24 Logan Lamb, but I don't know that he was there. Governor
25 Evans and Pat Costello from the Governor's office. And

1 perhaps Ken Dunn from IDWR. Jim Jones and Pat Kole, at
2 least those two from the Attorney General's office.

3 Q. Was the Attorney General himself involved?

4 A. Yes.

5 Q. Was he involved throughout the negotiation
6 process?

7 A. He was the person to whom Pat Kole reported
8 for instructions, so, yes, he was involved.

9 Q. Did he attend any sessions?

10 A. Other than the meetings that the principals
11 went to, I don't think so. Other members of his staff
12 came to some of the meetings when they were asked to do
13 something. Like Clive Strong took over the drafting, so
14 he would sometimes come to the meetings to get
15 instructions for drafting or explain why something was
16 drafted the way it was. I don't know if Jim Jones came
17 other than when all the principals were assembled.

18 Q. But he was the policy maker for that branch
19 of state government that would make the final decision?

20 A. Well, he had to agree. I mean, he was one
21 of the designated principals. So, yes, he had to agree.

22 Q. What about Governor Evans, was he involved
23 in the negotiations at all?

24 A. I don't think we talked to him directly at
25 any time. We did not talk also to the rest of the

1 principals. I mean, we'd see them in the office and see
2 how things are going. And I think I did go in once with
3 Pat Costello to explain something to the Governor. I
4 went in at Pat's request. But by and large the three of
5 us represented our principals. When we needed to, we
6 went back and got instructions.

7 Q. But aside from that first meeting, you
8 didn't bring all the principals together at any time in
9 the negotiations, until the end?

10 A. Until the end. As soon as we got to the
11 point where we thought we could put the framework
12 together, as I remember, we had a meeting of the
13 principals to endorse the idea, and say, yes, let's do
14 that. And of course, they had to meet to sign it. I
15 think there was a big fanfare in there and all this sort
16 of thing. And in fact, I have the pen that the parties
17 used to sign the agreements. So they were together for
18 those three times at least.

19 Q. Now, you said there was a meeting when you
20 thought you could reach a framework?

21 A. Yes.

22 Q. When was that?

23 A. It would have been shortly before October 1
24 or on October 1.

25 Q. You testified earlier I believe that the

1 framework was signed on October 1?

2 A. That's right. And I can't remember if they
3 met to sign the framework, or yes, we're here, let's sign
4 it. But there was at least one meeting associated with
5 the framework.

6 Q. Was there a pre-meeting besides the signing
7 meeting?

8 A. Well, I don't recall. Certainly the
9 negotiators would have had to have instructions from the
10 principals that the framework was the way to go. But
11 whether they did that simply by passing messages or they
12 actually met, I don't remember.

13 Q. You indicated in your testimony this morning
14 that the Department of Water Resources was asked to
15 participate in the negotiations at various points in
16 time?

17 A. Yes.

18 Q. And that they were asked primarily to supply
19 technical information; is that correct?

20 A. Yes.

21 Q. What sorts of technical information did they
22 provide?

23 A. The first question I think we asked was
24 whether or not the 4,530 c.f.s., which was the low flow
25 record to that date, represented all of the depletion

1 that the river would experience from uses that were in
2 existence in 1984. In other words, if everything else
3 remained the same, was that number likely to go down?
4 And so they ran a model and decided that most of the
5 depletion had been realized, we were safe to use that as
6 a worst case condition under current development levels.
7 Then the next question we asked them was if we go to
8 3,900 in the irrigation season, what's the corresponding
9 non-irrigation season number, and that's where we got to
10 5,600. I remember those two specific requests were made
11 of them, and there may have been others, but I don't
12 remember them right off.

13 Q. You said for the second study that they
14 determined what the corresponding winter flow would be in
15 conjunction with the 3,900 irrigation season flow?

16 A. That's correct.

17 Q. What was their decision or determination on
18 the first question, which you stated was whether the
19 4,530 c.f.s. low flow, historic low flow represented all
20 depletions of the river from present uses?

21 A. They said that they believed that the
22 depletion had been substantially felt in the river. That
23 we could use that as a worst case condition. As it turns
24 out, one of the early studies that was done after this
25 that was funded as part of the Swan Falls agreement

1 indicates that there will be some further slight
2 depletion of spring flows below Milner.

3 Q. By using the term spring flows, are you
4 speaking of seasons or sources?

5 A. No, sources, spring end flow. But we used
6 the 4,500 as a worst case number.

7 Q. What did the Department of Water Resources
8 investigate to determine that?

9 A. I think they talked to their hydrologist and
10 may have done some model runs up in the existing aquifer
11 model, may have consulted with the USGS, which was doing
12 their RASA, R-A-S-A, study at that time. Anyway, they
13 got the best information they had.

14 Q. Do you know if they reviewed water right
15 records?

16 A. I'd be surprised if they did specifically.

17 Q. Why would you be surprised?

18 A. Well, that would be a major undertaking, and
19 a lot of that is built into the model. I mean, you have
20 depletion and development scenarios built into the model
21 that takes that into account. So I would think they
22 would not have done that separate look.

23 Q. Can you think of any other detective studies
24 except those two that DWR would have performed for the
25 negotiators?

1 A. Not that comes to mind right off.

2 Q. Was anyone from the Department of Water
3 Resources there during the negotiations on a policy
4 level?

5 A. No.

6 Q. Did the Director of Water Resources attend
7 sessions?

8 A. Only when he was requested because of a
9 specific question we had.

10 Q. And who was that at the time?

11 A. Ken Dunn. I might explain also that a
12 contract hydrologist for the Idaho Power Company attended
13 a couple of sessions at our request for technical
14 information.

15 Q. Did you ever ask the Department of Water
16 Resources for their position on water administration?

17 A. Not as part of those discussions.

18 Q. At what other time would you have asked for
19 that position?

20 A. Well, I've known Ken Dunn for a long time,
21 and he and I used to spar verbally now and then, and we
22 also used to meet on a more sociable basis. And we
23 talked about all kinds of things, and I knew where he
24 stood on water rights administration apart from the Swan
25 Falls negotiation.

1 Q. Where did he stand?

2 A. He thought the Snake River ought to be
3 adjudicated.

4 Q. Exhibit 1 to your deposition, if you could
5 turn to that?

6 A. Okay.

7 Q. And that is the framework for final
8 resolution of the Snake River water rights controversy?

9 A. Yes.

10 Q. Would you say that there is essentially six
11 components of the framework?

12 A. I believe that's right. Yes, there is six
13 numbered parts.

14 Q. Now, is it your testimony this morning that
15 the minimum flow number, which is one of the components,
16 or was that one of the components?

17 A. Yes.

18 Q. Was the second component the establishment
19 of public interest criteria for new water development?

20 A. Yes.

21 Q. Who was the proponent during negotiations
22 for the establishment of those criteria?

23 A. The concept, I assume, was probably
24 initially from Idaho Power, but the criteria were
25 separately negotiated. I don't know that the concept was

1 the subject of much discussion.

2 Q. What about the adjudication? Who was the
3 proponent of the concept of the general adjudication?

4 A. Again, initially it may have been the
5 company, but I can't be categorical about that knowing
6 what I do about Ken Dunn's position, but could well have
7 been the company. Again, there was really no argument
8 about it.

9 Q. What about the water marketing provisions of
10 the framework?

11 A. I don't recall where that came from.

12 Q. Did the state water plan have any provisions
13 at the time?

14 A. On marketing?

15 Q. On marketing.

16 A. It could well have, because that had been
17 discussed at the water board on occasions unrelated to
18 Swan Falls. So it may well have. I don't remember what
19 the plan said at the time. There was water bank
20 discussion in the water plan, I believe.

21 Q. Was it your understanding at the time that
22 water marketing would be beneficial to Idaho Power
23 Company?

24 A. It could be, I believe, or was my thought at
25 the time, had the potential to be. I don't know that we

1 knew it would be.

2 Q. How about the hydrologic studies that it was
3 agreed should be funded by the state. Who proposed the
4 undertaking of those studies?

5 A. If I remember how that came up, I'm not sure
6 it had a proponent. In the discussions with our
7 hydrologist, that is, the Idaho Power Company hydrologist
8 and IDWR -- oh, I'll take that back, I know where it came
9 from. After the 7,500 lawsuit was filed, the state and
10 Idaho Power Company were involved in adversarial
11 positions on a whole bunch of technical things related to
12 water flows in the Snake. We got together and agreed
13 that rather than have everybody out duplicating studies
14 and spending the same money over and over again, we
15 should try to agree on some base technical studies that
16 everybody could use in the ensuing litigation. I was
17 going to say the state, but it was the -- I don't
18 remember now, who really actually formed the committee,
19 other than it was by agreement. It was called the
20 Technical Advisory Committee.

21 And the purpose of the committee was to
22 determine what data needs there were, and define the data
23 necessary to meet those needs. And this came out of the
24 Technical Advisory Committee report, which said, yes,
25 indeed, there were studies that were needed, and this

1 simply recognized that fact, and said those should be
2 done.

3 Q. These were hydrologic studies?

4 A. Hydrologic and economic, as I recall.

5 Q. What were the hydrologic studies?

6 A. Well, I haven't looked at that report for a
7 long time, but basically one was to get the state's
8 aquifer model updated so that it had the best information
9 in it that was available at the time. There were certain
10 other data gathering efforts that were outlined. One was
11 a reservoir gauging program. There is some relatively
12 small reservoirs, which were ungauged, nobody really knew
13 how they acted. There was a suggestion we needed a few
14 specifically sited observation wells throughout the
15 aquifer, because there were places we didn't know how the
16 water levels were responding. There was suggestion we
17 needed some return flow gauging at certain reaches of the
18 river. There were major diversions below Milner that
19 were ungauged, and big diversions. So there was a
20 thought that we needed to get flows gauged so we had some
21 idea what those diversions amounted to. So basically
22 there were management things, you know, what's going on
23 out there. These are the things we need to know to
24 answer that question.

25 Q. What sorts of economic studies did the

1 committee --

2 A. Those are not as clear to me. You might
3 have to look at the report. But I know there was a
4 school of thought that it wasn't enough just to look at
5 the hydrology, but you had to look at economics, the
6 impacts of new uses, whether or not new ground was really
7 economically beneficial if you don't bury the costs in an
8 existing operation and so forth. But what those were, I
9 can't now recall.

10 Q. Was one of the studies to determine the
11 economic value of agriculture as compared to hydropower,
12 hydroelectric power?

13 A. I don't remember that as a specific study
14 call. I'm not saying it wasn't. I just don't remember
15 it was.

16 Q. Who was the proponent of the sixth element
17 that the proceeds of the sale of the hydropower rates
18 should go to the ratepayers?

19 A. I think that came out of the kitchen
20 cabinet, if I remember right, reflective of this
21 paranoia, if you will, that I described earlier.

22 Q. We talked briefly about the committee,
23 subcommittee that was created to determine a way to
24 finance adjudications. Do you recall that testimony?

25 A. Yes.

1 Q. Do you remember when that committee was
2 first created?

3 A. The summer sometime, and not real early, I
4 don't think. Like I said, I don't think we formed that
5 committee until we were on the point where we were, as I
6 said, in the settlement mode. So it would have been
7 later in the summer, but I don't know when.

8 Q. And you said "we formed the committee." Who
9 are you referring to?

10 A. Pat, Pat and Tom, either we formed it, or
11 went to our principals and suggested that it be formed.
12 Basically it helped us because we simply weren't going to
13 be able to do that and run with the ball we'd been given.
14 So if somebody could develop that legislation in working
15 parallel with us, we could save a lot of time.

16 Q. Were you involved in the meetings of that
17 committee at all? Did you attend any?

18 A. Like I said, I can remember at least once,
19 and I think I went to the initial meeting where we
20 explained what we wanted. But the development of the fee
21 schedule itself, I think the committee did. I mean, we
22 didn't oversee them. We just wanted the result back that
23 we could build into the agreement.

24 Q. You said you attended a meeting where you
25 said you told them what you wanted --

1 A. Mm-hm.

2 Q. What was that? What did you want from the
3 committee?

4 A. We wanted a fee schedule that we could build
5 into this legislative package to attach to the agreement,
6 which would equitably fund the administration costs of the
7 adjudication. And obviously there is a lot of component
8 parts to that, you have to know what the costs are, and
9 what the sources of the money might be, and that sort of
10 thing, none of which we as negotiators knew. So that was
11 going to be a lot of work all by itself, and we simply
12 didn't have time to do it.

13 Q. Did you give them any other charge, either
14 in your role as one of the negotiators or in your role as
15 a representative of Idaho Power Company?

16 A. No, I believe that was about it. I don't
17 think we gave them any preconceived notions. The purpose
18 of the committee was to come out with a fee schedule that
19 would be supportable in the legislature by the players.
20 So we certainly didn't know what that was. We just
21 wanted one.

22 Q. Did Idaho Power have any proposals to
23 present as to what it thought should be an equitable fee
24 schedule?

25 A. Not through me. It would have had to come

1 through Greg Panter if there was one, and I'm not aware
2 of one.

3 Q. Besides Greg, who would be aware of such a
4 proposal by Idaho Power?

5 A. If the company ever had a final proposal, it
6 would have come as a result of conversation among Jim
7 Bruce and Greg Panter and myself. There may have been
8 other people in the company that were involved in
9 discussing it, but that's where the proposal would have
10 had to have been discussed and approved.

11 Q. But do you recall any specific proposals
12 that Idaho Power put forward regarding the appropriate
13 fee to be charged to hydropower uses?

14 A. No, I don't.

15 Q. Or agricultural uses?

16 A. No.

17 Q. In giving this charge to the fee committee,
18 you said that you asked them to come up with a way to
19 equitably fund the administrative cost of the
20 adjudication?

21 A. Mm-hm.

22 Q. What administrative costs were you referring
23 to?

24 A. Basically, in order to do the adjudication,
25 somebody had to be in a position to evaluate the claims

1 and make sure that all the ground had been claimed that
2 you could reasonably do, and that sort of thing. It
3 seemed the proper place for that was in the Department of
4 Water Resources. So it was in the -- I was going to say
5 the non-partisan, or non-partisan or non-adversarial role
6 of the state through the department, that I considered,
7 and as it was explained to us, you would incur these
8 administrative costs. I mean, somebody has got to do the
9 satellite mapping the ground the checking of the claims
10 against the satellite perhaps to make sure you've got the
11 claims you want on file, and that sort of thing.

12 Q. But isn't the department at some point in
13 the proceedings put in an adversarial role if somebody
14 objects to the report?

15 A. Shouldn't be. Not adversarial in the sense
16 that it's defending a property or ownership interest. It
17 may want to explain how it arrived at what it did, but it
18 should not be an adversary in the process. In fact, I
19 think we amended the adjudication statutes after '85 to
20 make that clearer than it had been.

21 Q. Doesn't the adjudication statute treat the
22 director's report as a pleading now after those
23 amendments?

24 A. Mm-hm, basically I believe that's right.

25 Q. And isn't the pleading a type of document

1 that's filed in an adversarial matter?

2 A. Well, that's true. It's filed in an
3 adversarial matter, but not necessarily in an adversarial
4 capacity. In other words, you've got to formulate the
5 issue. And the department files the report, and that
6 precipitates then the opportunity for the true
7 adversaries to come in and ask the water right holders
8 who are affected by the description of the rights. The
9 department is not affected. It has no personal or
10 property interest in the state. So once it files the
11 pleading, other than explaining how it got to where it
12 got to, it really doesn't have much interest in the
13 outcome. It may want to go tell the court at some point
14 what kind of a degree it can administer, and that's as a
15 manager, but not adversary.

16 Q. So if a water user objects to the
17 department's characterization of its own claim and nobody
18 else objects, the department will just fold its hands and
19 agree with the objection?

20 A. I'm not sure. I'd have to look at the
21 statute again. That could be the result.

22 Q. Could it not also be the result that the
23 department would defend its report, and put on evidence
24 in the court proceeding?

25 A. It might. A lot of that depends on how the

1 court is doing that whole process. And if the court
2 says, well, the real parties in interest are the water
3 right holders, if nobody else objects, that's the way
4 it's going to be, that's the end of it. But the statute
5 does not establish the department as an adversary in the
6 same way that one water right user is an adversary of
7 another whose rights are so located that it can't affect
8 the right.

9 Q. Does the department have the power,
10 authority to adjudicate water rights?

11 A. Itself?

12 Q. Yes.

13 A. No.

14 Q. That can only be done by a court?

15 A. Right.

16 Q. What do you mean by equitable, when you said
17 that fee schedule was to come up with an equitable fee
18 schedule. What factors did you anticipate the committee
19 to take into account?

20 A. Well, basically mine was pretty shorthand.
21 I had a lot of familiarity with the legislative process.
22 I knew who the players were. And to me, equitable was
23 something you get through the legislature.

24 Q. So politically acceptable, then?

25 A. Yes. Because all the players were there,

1 and if you tried to put the shoe on one of them to his
2 detriment, you were going to hear about it, and it
3 wouldn't go through the legislature. I mean, this thing
4 was so fragile that major opposition from any corner
5 could have killed it. So we had to take care of those
6 things going in.

7 Q. You indicated that Idaho Power was probably
8 the initial proponent of the adjudication as an element
9 of the settlement of the Swan Falls dispute; is that
10 correct?

11 A. I said that. I'm not sure it's the case,
12 but looking back on it --

13 Q. Do you know who first raised the matter of
14 financing adjudication?

15 A. No, other than it was obvious that it had to
16 be funded.

17 Q. Did you consider in part of the negotiations
18 funding the adjudication through general revenues of the
19 state?

20 A. If we did, it was only briefly.

21 Q. Why was it considered only briefly?

22 A. That would be something you wouldn't get
23 through the legislature.

24 Q. And why not?

25 A. They didn't have the funds. You'd kill the

1 whole program right there.

2 Q. What was the state representatives' position
3 on financing the adjudication?

4 A. I don't recall. You have to remember how
5 this thing worked. We met, the three of us usually by
6 ourselves, but we talked to our principals constantly.
7 The Governor could draw on all the executive departments
8 of government for advice. And one of his visitors
9 obviously in this process was Ken Dunn. So as Pat
10 Costello reported to the Governor, Ken Dunn at least was
11 kept abreast of what was going on. So if somebody said,
12 well, now, you've got the adjudication, how are you going
13 to pay for it? That would come back to us as a question
14 that needed to be addressed.

15 Q. And Ken Dunn was on that committee, the
16 adjudication charge committee?

17 A. Well, somebody from water resources was, I
18 believe, or at least was technical support, but I don't
19 think Ken was on the committee. Remember, we had to get
20 the costs and the number of claims and that kind of data.
21 So as I remember IDWR was there with people providing
22 that information. But I don't remember that they had
23 what I considered a member of the committee, because they
24 would not be a player in the legislature. In other
25 words, you wouldn't find IDWR in imposing this program.

1 or there would be a wholesale change in personnel at
2 IWDR.

3 Q. Why is that, because its Governor supported,
4 and he expected all of his people to support his vote?

5 A. That's correct. He's the head of the
6 executive branch of government, with six other exceptions
7 that are elected by the people. And I'm sure he told
8 them the way it was going to go, and that's the way it
9 would go.

10 Q. What would the Board of Water Resources have
11 been? What involvement did they have during the
12 negotiations for the settlement of the Swan Falls
13 dispute?

14 A. They were informed to some degree of the
15 status of the the negotiations. I said that because I
16 remember meeting a couple of them casually myself. But I
17 think they were kept abreast of what was going on so that
18 the negotiators didn't ask them to go do something in the
19 agreement that the board would not do. So when we said
20 we were going to ask the department, the Water Resource
21 Board to do certain things, we had an idea that they
22 wouldn't do that.

23 Q. Does the board report to or are the members
24 of the board appointed by the Governor?

25 A. They are appointed by the Governor.

1 confirmed by the senate.

2 Q. What's the relationship between the board
3 and the Department of Water Resources?

4 A. Well, it's a little fuzzy. The board is a
5 constitutional entity with certain constitutional
6 functions. But the statute says that the department
7 furnishes the staff of the board, but there are occasions
8 when the board makes filing with the department. So it's
9 a little fuzzy. It's not the classic board/department
10 split like you might find with the Board of Health and
11 Welfare as it relates to the Department of Health and
12 Welfare, and that sort of thing.

13 Q. What sorts of filings would the board make
14 with the department?

15 A. As I recall, they make a minimum flow stream
16 filings with the department.

17 Q. Did they rely on the department to provide
18 that information in support of those claims?

19 A. Yes.

20 Q. What about legal assistance. Do you know if
21 they rely on the department for legal advice?

22 A. Well, I think the last time I ran into
23 anybody that said they were the board's lawyers was the
24 Attorney General's office, but that's a matter of the,
25 you know, department has staff lawyers. So I presume

1 they could get staff legal assistance if they needed it.

2 Q. You indicated in your testimony this morning
3 that the resolution of the Swan Falls dispute established
4 certain minimum flows at the Murphy gauge, is it?

5 A. Yes.

6 Q. The 3,900 c.f.s. during the irrigation
7 season and 5,600 c.f.s. in the non-irrigation season?

8 A. Yes, correct.

9 Q. And that minimum flow right is held by whom?

10 A. Idaho Power and by the state. In other
11 words, if the state minimum flow corresponds to those
12 flows, and the state is committed recognizing those
13 quantities as valid water rights of the Idaho Power
14 Company. So the power company has a water right at that
15 site with priorities going back to 1903, the state has
16 minimum flow rights at that site with priorities going
17 back in part to 1975 or '76, I guess, and as recent as
18 1985. So there is a dual water right at that site.

19 Q. Would you expect that the state would file
20 an adjudication for that right, for that minimum flow
21 right?

22 A. I don't know that I ever heard it was
23 discussed.

24 Q. Has Idaho Power filed an adjudication for
25 that right?

1 A. Yes, it filed for I think the entirety of
2 Swan Falls rights, not just those. In other words, it
3 holds rights in addition to the minimums.

4 Q. So what's the amount of the entirety of
5 that?

6 A. 4,500 c.f.s., that's the hydraulic capacity
7 of the existing turbins down there.

8 Q. Now, by adopting that 3,900, 5,600 c.f.s.
9 settlement, you indicated that freed up some water.
10 Could you explain again how that worked?

11 A. On a classic water rights analysis, if Idaho
12 Power Company's summertime water rights were good at the
13 4,500 c.f.s. level, then you could not have any further
14 development that could deplete the 4,500. So by going to
15 3,900, you have on paper that 600 c.f.s. difference
16 that's available for depletion under the trust water
17 criteria. Of course, that's clouded a little by the fact
18 that the board reserved 150 c.f.s. for DCMI use. So
19 really there is 450 available for future agriculture
20 depletion of the 4,500.

21 Q. Of the 600, you mean?

22 A. Yes, that's right, of the 600.

23 Q. Was it your testimony earlier today that
24 that would allow future economic growth in the State of
25 Idaho, at least in the eastern part of the state,

1 southeastern part?

2 A. To the extent that new agricultural land is
3 economically viable, yes.

4 Q. The 150 c.f.s. is reserved for industrial
5 use, though, that would be available for future DC&I,
6 domestic, commercial and industrial uses?

7 A. Yes.

8 Q. Over existing uses?

9 A. Yes.

10 Q. Do you see that as a benefit to the State of
11 Idaho as a whole?

12 A. I believe so. I think if people want to
13 come in and develop some DC&I uses above Swan Falls to
14 say the water supply this year is up to a new population
15 of however many people you can support with 160 c.f.s.
16 year round, which is a huge number, that's a benefit.

17 Q. Do you expect to see any objections to your
18 water right claims in the court during the course of this
19 adjudication?

20 A. No, I can't -- not of the power projects on
21 the main stem Snake. The company owns water rights all
22 over the place for different uses. But those rights, I
23 don't anticipate seeing any objection.

24 Q. So the participation of Idaho Power in the
25 adjudication, at least in defense of its rights, would be

1 fairly minimal; is that your understanding?

2 A. In -- yes, specifically proving up and
3 defending those rights over minimal in staying abreast of
4 the adjudication and perhaps getting in contest of other
5 rights could be substantial.

6 Q. Do you see any other benefits accruing, or
7 accruing as a result of the trust water, the 600 c.f.s.
8 you were talking speak about a minute ago?

9 A. There are instream values that don't have
10 water rights per se that are benefited as long as the
11 water stays in the river. In other words, it doesn't
12 matter where the water is in the river. If it's there
13 for power purposes, the fish can use it, and so on. So I
14 think, yes, stabilizing river at 3,900 plus, depending on
15 the level of development is a real interest to all
16 instream values.

17 Q. And who would be the recipient of that
18 benefit? Would that be the state as a whole?

19 A. Yes, I think the state as a whole would.
20 You could pick out some favored classes within that
21 state, the fishermen and hunters and so on. But by far I
22 think those kind of values are to the state as an entity.

23 Q. I believe you stated earlier that one of the
24 other benefits of freeing up the trust water and
25 establishing a public interest criteria was to permit

1 others to have an ability to object to new uses: is that
2 correct?

3 A. Yes.

4 Q. Let's take different kinds of individuals.
5 Let's say present water uses, do they have an ability to
6 object to new applications for water rights?

7 A. You mean the trust water criteria?

8 Q. Yes.

9 A. They have an opportunity. It's pretty
10 limited. They would have to come in and say the new use
11 would injure their rights or bring themselves within the
12 local public interest, whatever that is. So local, which
13 is defined as the affairs of all those people, proposed
14 use for something like that. They didn't approve it much
15 when they defined it, and that is a fairly tough standing
16 argument to raise sometimes. And I can give you an
17 example if you want one.

18 Q. Sure.

19 A. You look at how Idaho potatoes are marketed.
20 There is a defined market for Idaho potatoes, and they
21 are developed on a displacement basis. In other words,
22 if you have too many potatoes, you will displace certain
23 producers. And, for example, a three percent oversupply
24 might result in a 15 percent reduction in price. So
25 existing potato farmers have a real interest in talking

1 about newly developed farm ground, because the cost of
2 that development are so high, that basically the only
3 crop you can grow to recover your initial cost would be
4 potatoes. And in doing that, you have real potential for
5 distorting the market. As a local public interest
6 market, that would be very difficult to make if you have
7 the Idaho potato farmer in Jefferson County coming and
8 saying they are the local area, the local public
9 interest. Now, I think they have a chance to come in
10 without meeting that standing threshold.

11 Q. Prior to the institution of these public
12 interest criteria, who had the burden of showing injury
13 to an existing water right? Was it the appropriator or
14 the protestants?

15 A. Protestant, the way it worked.

16 Q. Is that different from the way it's done in
17 other states; do you know?

18 A. I don't think so. It's, I guess, it's the
19 old law school argument we used to make, burden of
20 persuasion versus burden of proof, et cetera. But the
21 statute now allocates the burden specifically to the
22 protestant in the trust water area, and that's really
23 about where it ought to be, because they know what are
24 the uses that will be impacted. The burden of persuasion
25 on the value of the new use, probably will rest with the

1 new users. So I think in practice you probably have the
2 burden pretty well allocated where it ought to be. In
3 other states I think it's the same practice.

4 Q. The mere filing of the protest, then,
5 doesn't shift the burden to the applicant?

6 A. No. In fact, I think the rules the
7 department put out pretty well allocate the burden of
8 going forward and the burden of persuasion. And so even
9 though the statute says that the protestant has the
10 burden, the regulations say that if you're protesting
11 you've got to come forward with this kind of information
12 so that we can weigh your economic consequences.

13 Q. And that's under the new rules?

14 A. Yes.

15 Q. Under the old rules was it as clearly --

16 A. No.

17 Q. -- delineated who has the burden?

18 A. No.

19 Q. Once the Swan Falls agreement was reached
20 and signed on October 25th, was it, 1984?

21 A. Yes.

22 Q. Did you submit any more, or did Idaho Power
23 submit anything to the Idaho Public Utilities Commission?

24 A. Yes, we submitted a -- yes, I can't remember
25 the procedural format, but we submitted a petition to the

1 commission to essentially bless the agreement, say it's
2 in the public interest and does not involve the wasting
3 of the property, and et cetera. And the commission
4 deferred to the legislature. So the commission
5 effectively did nothing until after the legislature
6 acted, and then it dismissed that old complaint that was
7 filed ten years before.

8 Q. When you say the commission deferred to the
9 legislature, did the Swan Falls summer package include a
10 provision which renewed the PUC's jurisdiction over the
11 matter?

12 A. As I remember, it did, and that was kind of
13 a fallback if I remember right. And so we went first to
14 the PUC, and they deferred to the legislature, and the
15 legislature passed the statute.

16 Q. The PUC never ruled?

17 A. No.

18 Q. Effectively on whether it was a public
19 interest or any of the other items?

20 A. No.

21 Q. That were before it?

22 A. No.

23 Q. Going back to the fee committee and the
24 proposed fee schedule that was contained as an attachment
25 to the decree, the Swan Falls agreement, which was marked

1 as Deposition Exhibit No. 2?

2 A. Right.

3 Q. Would you turn to that, please, sir, and I
4 believe within that it's Exhibit No. 2, would you turn to
5 page 2 of that. Excuse me. Page 3.

6 A. All right.

7 Q. The variable use fee for hydropower as
8 listed there is \$25 per c.f.s.; is that correct?

9 A. Yes.

10 Q. When the legislation was passed, the
11 legislature made a change in the way the fee was
12 calculated for hydropower. Would you say, again, why
13 that change was made?

14 A. I can give you my recollection. What
15 precipitated the discussion of the change, I don't
16 remember. But my recollection of the discussion is that
17 that a c.f.s. charge is not a good way to assess a cost
18 to hydropower because it doesn't assess the effectiveness
19 of the use of the water. So for that reason, the
20 discussion was we should find some other measure of the
21 hydropower fee for capacity. That's the discussions as I
22 remember. Much along the same line that the irrigation
23 use is per acre not per water right. One acre may have
24 30 acre feet of water right on paper associated with it,
25 out of which maybe you get one usable water right. So

1 acres are a better analysis there, and I think capacity
2 was a better analysis for hydropower. But why that came
3 up after this thing was agreed to, I have no idea.

4 Q. Do you know if there were any interest
5 groups that were particularly concerned with the c.f.s.
6 charge versus the appropriated rating?

7 A. Could have been the small hydro people were
8 concerned. I don't really remember. Like I say, I know
9 the change was made, but I simply don't know why the
10 discussion came up, nor do I know if it made any
11 difference to the Idaho Power fee.

12 Q. That was going to be my next question.
13 Do you know why the agriculture fee is set at \$10 per
14 c.f.s.?

15 A. No.

16 Q. Do you know if any of these fees are based
17 in any way upon the expense or cost to the state of
18 investigating a particular category of water use?

19 A. No, I really don't.

20 Q. Would you expect the expense of
21 investigating an irrigation use to be greater or less
22 than the expense of investigating hydropower use?

23 A. You mean one specific use?

24 Q. Right.

25 A. Ordinarily you would expect just the pure

1 investigation to be easier for hydro than irrigation, I
2 would think. Simply because you can go down and look at
3 the name plate on the generator, and that would tell you
4 if the fee's correct. It doesn't tell you if the water
5 right portion of the filing is correct. It would tell
6 you if the fee was right.

7 Q. What would be involved in investigating the
8 water right portion of the hydropower rate?

9 A. If it's gauged, you could work from gauge
10 records. Some of the Idaho Power Company facilities,
11 you'd have to calculate it.

12 Q. Could that be done in the office?

13 A. If you had all the information. You'd have
14 to gather it up.

15 Q. Would the information be provided as part of
16 the claim that's filed in the adjudication?

17 A. No, I don't think it's required with the
18 claims as they're now structured. But the information to
19 make the calculation would be available, or the company
20 could give the calculations to the department.

21 Q. Do you know why public uses were assessed at
22 \$100 per c.f.s.?

23 A. No, I don't know that either.

24 Q. What about miscellaneous uses? What types
25 of uses would be included in miscellaneous categories?

1 A. Well, anything we didn't think of, I guess,
2 and I don't know whether they've had a miscellaneous
3 claim. I think that there was some discussion about what
4 a mining claim was originally, and it came in under some
5 category. In the 1180 agreement, we regarded it as
6 industrial for lack of a better place to put them. But I
7 don't know what miscellaneous fees you would get.

8 Q. Would the mining claim be included in No. 4?

9 A. Yes, that's where it was, but I think that's
10 the result of the experience of 1180 discussions that we
11 didn't know where to put money under DCMI, and none of
12 them were mining. So we call them industrial.

13 Q. Okay. Why was it necessary to submit the
14 Swan Falls agreement to the Federal Regulatory
15 Commission?

16 A. The concern there was similar to the concern
17 at the PUC. One of the functions of FERC is regulation
18 of rates on the portion of a utility's business subject
19 to federal regulation. And we didn't want FERC coming
20 back with a punitive action down the road saying you
21 should have defended your water rights basically. So it
22 was much the same provision as with the PUC. As a
23 further explanation, we were basically in the posture as
24 I saw it, that if we fought and lost, we probably were
25 not subject to criticism in the regulatory commissions.

1 If we had the appearance of having given it away, then we
2 were. And so if we felt we were going to have to defend
3 this settlement, we wanted to do it early while it was
4 fresh in everybody's mind, rather than at some rate
5 proceeding five years down the road where you would have
6 a similar contention to it made in '76.

7 Q. You indicated just before the last break we
8 took that the United States receives a benefit from
9 being joined with the state base adjudication, and that
10 that benefit is that it has the form in which to present
11 and protect its water rights; is that correct?

12 A. Yes.

13 Q. Is that the the only form that the United
14 States would have to protect its water rights?

15 A. The United States could file an action of
16 its own.

17 MR. MONSON: Thank you. That's all the questions
18 I have for this witness. Take a break.

19 (Whereupon a recess was taken.)
20

21 EXAMINATION

22 BY MR. BARKER:

23 Q. Tom, I'm disappointed. In your list of
24 water rights adjudications you forgot to name one, the
25 Payette River?

1 A. I did, didn't I?

2 Q. I would like to go through a little bit of
3 some foundational information here. Just for the
4 purposes of the record, Mr. Nelson. You are today an
5 attorney for Idaho Power Company in the Snake River
6 adjudication?

7 A. Yes.

8 Q. And as of midnight tonight, you are
9 resigning your position with your firm; is that correct?

10 A. That's correct.

11 Q. And as of the 13th of November, you will be
12 sworn in as a federal judge, at least as planned?

13 A. That's the plan. The formal ceremony will
14 be the 13th. I may do an informal swearing in before
15 that.

16 Q. You reside in Boise?

17 A. That's correct.

18 Q. And do you intend on moving your residence
19 from Boise?

20 A. No.

21 Q. Your chambers will also be in Boise?

22 A. That's correct.

23 Q. Do you have any yet?

24 A. Well, no, actually. I've got to be nice to
25 my former partner to see if he'll let me hang around for

1 a day or two.

2 Q. When was it that you were first approached
3 by the state to be a witness on their behalf?

4 A. Two weeks ago, two and a half weeks ago,
5 somewhere in there. I don't recall specifically.

6 Q. And has the state ever attempted to serve
7 you with a trial subpoena?

8 A. No.

9 Q. At least not that you're aware of?

10 A. Unless it's in the hands of the sheriff
11 right now.

12 Q. Now, on December 3rd you plan to be in
13 Moscow, Idaho?

14 A. Yes.

15 Q. And how long is the trial you're scheduled
16 up there for?

17 A. It's scheduled for a week.

18 Q. During the course of the Swan Falls
19 controversy, and what I'd like to do is start after the
20 Supreme Court's decision in the fall of 1982. There was
21 an attempt to pass some legislation before the Idaho
22 Legislature dealing with subordination of either Idaho
23 Power water rights or all hydropower rights?

24 A. I believe of hydropower rights in general.

25 Q. So that was the principal issue that you

1 were dealing with in the 1983 legislature?

2 A. That and the SB 1180.

3 Q. And when was it that the negotiation team,
4 you, Pat Kole, and Pat Costello, got together to start
5 hammering out a broader agreement?

6 A. The summer of '84.

7 Q. So the issue in the '84 legislature was
8 what?

9 A. Subordination.

10 Q. Again?

11 A. Again.

12 Q. And you indicated that a subordination bill
13 had passed and been vetoed; is that wrong?

14 A. No, no subordination bill ever passed.

15 Q. It passed the house and failed in the
16 senate?

17 A. Right.

18 Q. And so during the summer of 1984 when you
19 first got together with the negotiating team, who was
20 involved in the Swan Falls controversy on behalf of the
21 Idaho Power Company?

22 A. You mean behind the team, so to speak?

23 Q. Why don't you identify the visible people
24 first, and then tell me what they did?

25 A. Okay.

1 Q. It would have been Mr. Bruce?

2 A. Yes. After the legislative session, Logan
3 Lamb, who was then vice-president or senior
4 vice-president of public affairs, may have had some
5 limited visibility. Jim Bruce, of course, and myself. I
6 think that's about it.

7 Q. And Mr. Greg Panter had been involved in the
8 legislative sessions on subordination?

9 A. Yes.

10 Q. But he was not involved in the negotiation
11 process that took place in the summer of '84?

12 A. That's correct.

13 Q. Did Mr. Bruce to your knowledge have anyone
14 else visiting him on the pros and cons of this agreement
15 other than you?

16 A. He met with some other officials of the
17 company from time to time. They had -- the board had an
18 executive committee that he and I talked to by speaker
19 phone on at least one occasion. I went to a couple of
20 meetings where Mr. Bruce and I discussed the status and
21 some operational questions with various staff members,
22 and he may have and probably did discuss it with other
23 people in the country from time to time. Basically,
24 other than the company personnel asking the company
25 personnel technical questions, he and I, and I guess the

1 executive board on that one occasion, pretty much did the
2 policy discussions.

3 Q. The executive committee you're talking about
4 is the committee of the board of directors?

5 A. Yes.

6 Q. Was it a special committee formed just to
7 deal with the Swan Falls controversy?

8 A. No, it's a standing committee.

9 Q. Their standing executive committee?

10 A. That's correct.

11 Q. Do you know who was on that committee in
12 1984?

13 A. It seems to me Bob Hansberger was on it, and
14 Mr. Solen, Phil Solen. I can't remember who else.

15 Q. But you talked to them by speaker phone?

16 A. Yes.

17 Q. And not necessarily have seen them?

18 A. That's correct. And I did report directly
19 to the board several times when I had meetings to just to
20 bring them up to date.

21 Q. A status report to know what was happening
22 with negotiations?

23 A. Yes.

24 Q. Do you know whether there was a principal
25 person from whom Mr. Bruce got his information about the

1 economic effect that this Swan Falls agreement or
2 potential agreement would have on the company?

3 A. If he had asked those questions in the
4 summer of '84, I'm not saying that he did, but if he had,
5 one of the people he would have asked would have been a
6 fellow by the name of Don Barclay, who I believe was
7 vice-president of planning and resources, I believe was
8 his title.

9 Q But you're not aware of whether Mr. Bruce
10 had any conversations with him about the economic effect
11 of this agreement?

12 A. No. If I had to guess, I would say he did
13 not.

14 Q. As you know, a witness doesn't have to
15 guess.

16 A. You haven't forced me yet.

17 Q. Are you aware of any written reports that
18 were made to the board of directors by Mr. Bruce about
19 the Swan Falls status of negotiations or the agreement?

20 A. No.

21 Q. Are you aware of any written reports that
22 Mr. Panter may have submitted to Mr. Bruce?

23 A. No.

24 Q. Are you aware of any reports that any other
25 staff member of Idaho Power Company may have submitted

1 to Mr. Bruce regarding the pros and cons or the
2 implementation of the Swan Falls agreement?

3 A. No.

4 Q. Would you agree with Mr. Panter's
5 characterization of Mr. Bruce's not guilty style as being
6 fairly informal?

7 A. Informal but thorough. Mr. Bruce was a very
8 hands-on sort of guy, and was not big on staff. He knew
9 more about Idaho Power Company than anybody I was ever
10 around. And you could find him anywhere in the company
11 at any time, and he tended to manage by knowing what was
12 going on. But it was informal. I mean, he didn't have a
13 big staff meeting where all kinds of issues were
14 discussed every third Tuesday, and all that sort of
15 thing.

16 Q. And he was not the kind of manager to
17 require a lot of written reports on what's going on?

18 A. No, he did not.

19 Q. In your position as counsel for the Idaho
20 Power Company and during negotiations over the agreement,
21 are you aware of a study that was done by a couple of
22 University of Idaho professors named Hamilton and Lyman?

23 A. Yes.

24 Q. Do you know at whose instance that study was
25 performed?

1 A. It seemed to me it came from the state, I
2 think, but I don't remember what element of the state.

3 Q. Do you know how it came to be that this
4 study was prepared or why?

5 A. It came up, as I remember, in the early
6 adversarial stages over in the political realm of
7 somewhat perhaps a reply to the worst case scenarios of
8 predictions of what would happen if you took the river to
9 3,300 c.f.s. If I recall, it came up in that content.
10 But I haven't read that report I bet for five years.

11 Q. Are you familiar with when it was first
12 prepared?

13 A. Mm-hm.

14 Q. What was the Idaho Power Company's position
15 with respect to the findings of that report?

16 A. I don't remember that either, now. The
17 company did commission or start to commission a report,
18 and I don't know that it was ever completed, by a
19 professor at Boise State.

20 Q. Was that Mr. McGrath?

21 A. I think it was.

22 Q. He did prepare a critique?

23 A. Yes.

24 Q. In essence of the Hamilton and Lyman study?

25 A. Yes.

1 Q. And that was done at the request of Idaho
2 Power?

3 A. As I recall, yes.

4 Q. Are you aware of any other studies that
5 Idaho Power Company prepared internally analyzing the
6 Hamilton and Lyman study, and possible impacts upon the
7 power company of subordination or non-subordination?

8 A. No.

9 Q. During the course of negotiations with Mr.
10 Kole and Costello, to what use, if any, was the Hamilton
11 and Lyman study and McGrath study put?

12 A. I don't remember that they were even
13 discussed.

14 Q. Was there any general discussions about what
15 would happen, to what the effect to the State of Idaho
16 would be if the Swan Falls at that point -- the
17 subordination question was passed, but abandoned,
18 forfeited, principles of estoppel applied so that that
19 flow could not be guaranteed?

20 A. Other than, as I said early in the process,
21 there were some statements made about the impacts of
22 going to 3,300. I think I said Hamilton and Lyman
23 responded to those statements or attempted to, but
24 nothing very sophisticated, as I recall. The PUC put out
25 an estimate. Water Resources put out one. Hamilton and

1 Lyman did their study. McGrath did his critique. But no
2 sophisticated study, what I would consider a
3 sophisticated study. One of the problems as Hamilton and
4 Lyman demonstrated, you have to make so many gross
5 assumptions to do a study like that, that your
6 assumptions are the focus of discussion rather than the
7 results.

8 Q. And essentially that's what McGrath's
9 critique was pointing out?

10 A. Yes. And if he had done a similar study, he
11 would have been just as vulnerable as Hamilton and Lyman.

12 Q. Is it your belief that the Department of
13 Water Resources prepared its own separate study?

14 A. That's why I say I'm not sure it was a
15 study. I think they did some rough estimates of impacts
16 of various development scenarios that they carried around
17 the state with them. And then the PUC put out one that
18 was kind of a worst case. All of this again in the
19 political arena when we were screaming at each other, but
20 nothing I'd call a very sophisticated study.

21 Q. When the negotiating team met, by that, I
22 mean you and Mr. Costello and Kole, was there any
23 disagreement over the need for an adjudication?

24 A. No.

25 Q. Do you recall any statements, and let's

1 start with Mr. Costello, by Mr. Costello on his or the
2 Governor's position on whether the adjudication was
3 necessary and why?

4 A. As I recall, whether or not there should be
5 an adjudication was never negotiated, as you would
6 consider a negotiation. It was agreed I think without
7 simply much discussion.

8 Q. Right. And what I'm getting to was, I think
9 you said you thought Idaho Power may have put the
10 proposal on the table?

11 A. Mm-hm.

12 Q. And so I'm wondering, do you recall any
13 response from Mr. Costello saying, yes, that's a good
14 idea, and here's why we think it's a good idea?

15 A. No, I don't.

16 Q. And the same question with respect to Mr.
17 Kole.

18 A. No. I just recall it was not a contested
19 issue.

20 Q. You described a little bit about how in your
21 view it came to be that the Attorney General and the
22 Governor were both represented in the negotiations. I'm
23 not quite sure I understood that. Could you try again
24 for me?

25 A. Sure. The issue cut across party lines.

1 Q. And the issue is?

2 A. What subordination, or what --

3 Q. The whole Swan Falls controversy?

4 A. The whole Swan Falls controversy,
5 politically you needed both parties involved. The
6 Governor obviously was the ranking Democrat in the state.
7 Jim Jones on this issue was the Republican, plus he was
8 the state's lawyer in the Swan Falls lawsuits that would
9 have been pending. So I guess he really came in kind of
10 both hats, the ranking Republican and as the state's
11 lawyer, and the Governor as the head of the state
12 government and ranking Democrat.

13 Q. So from your perspective, Mr. Jones was
14 representing the Republican party in the State of Idaho?

15 A. No, no, not that at all. It's if
16 politically you're going to succeed in this kind of
17 endeavor and you're going to end up in the legislature,
18 you've got to have the party satisfied that the party was
19 heard. So the parties were not represented per se, but
20 he was going to be the spearhead with the Republican
21 side, as the Governor was going to be with the Democrat
22 side.

23 Q. It was the means by which the Republican
24 party could insure itself that its views to the extent it
25 had separate views were heard?

1 A. No, it wasn't the party doing anything. It
2 was access to the party by the Swan Falls parties. In
3 other words, you need somebody to go talk to the R's.
4 Okay. That could be Jones. You need somebody to go talk
5 to the Ds, that could be Evans.

6 Q. Was there any general disagreement between
7 the position of the Attorney General and the Governor
8 vis-a-vis Idaho Power in these negotiations?

9 A. You mean, did the Governor and the Attorney
10 General have a different position?

11 Q. Well, did they line up on one side of the
12 table, and you on the other, and negotiate together
13 against you; is that how it worked?

14 A. Not uniformly, no. I mean, it was kind of a
15 shifting stance, and they both had different approaches
16 to the problem. So the Governor and the Attorney General
17 weren't necessarily united, I guess in answer to your
18 question.

19 Q. And so with respect to the need for the
20 adjudication, was there any difference between the
21 positions of the Governor and the Attorney General as far
22 as you were aware of?

23 A. My recollection is it came in for very
24 little discussion. I think my recollection is that we
25 basically agreed it needed to be done, and went on to the

1 other issues. So no difference that I now recall.

2 Q. And same questions on the benefits of the
3 adjudication, to whom those benefits -- was there any
4 difference between the Attorney General's position and
5 the Governor's?

6 A. If there was any discussion at all. I don't
7 recall that there was.

8 Q. You don't recall that there was any
9 discussion of the negotiation, or who the beneficiaries
10 of the negotiation would be?

11 A. Of the negotiation?

12 Q. Right. No. The beneficiary of the
13 agreement.

14 A. Not per se.

15 Q. Okay. When was it during the course of your
16 negotiations that this subcommittee was formed to look
17 into the filing fee question?

18 A. Can't be more precise than I was for
19 Mr. Monson, sometime that summer, not early in the
20 negotiations, but far enough along that we were, you
21 know, considering we were going to get settled, and we
22 needed some of these details attended to that we couldn't
23 reach.

24 Q. Do you know when Idaho Power first became
25 aware of the magnitude of the cost of the adjudication?

1 A. The first time I was aware of it, I think
2 was the cost estimates that IDWR did.

3 Q. Would that have also been in the summer of
4 '84?

5 A. Then, or that fall.

6 Q. Do you know whether it was before or after
7 you started this negotiation process?

8 A. It would have been after. I don't think the
9 cost of the adjudication were discussed other than in
10 context of the fee schedule, how much money did the fee
11 schedule have to raise, and how many claims were there to
12 be, and that sort of thing.

13 Q. Well, the fee schedule was developed in
14 response to the cost estimate, was it not?

15 A. Yes.

16 Q. So there will be some cost estimate raised
17 some time before this framework agreement was signed?

18 A. Yes, and it was part of the discussions of
19 the fee subcommittee. That was the first time I think I
20 had ever heard of the costs.

21 Q. Were you aware of any directions to
22 Mr. Panter on amounts that Idaho Power would be willing
23 to contribute to cost of an adjudication?

24 A. No.

25 Q. You don't know how it came to, or do you

1 know how it came to be that Idaho Power agreed to
2 whatever the final number agreed upon was, five million
3 plus?

4 A. The number was carried back to Jim Bruce,
5 and he said we can deliver that, or words to that effect.

6 Q. But you don't know if he went out and
7 commissioned a study to see what impact that would have
8 on his rates?

9 A. Oh, no, no. Because again, as I said, you
10 simply can't postulate a rate effect from one item like
11 that. In fact, if he had asked his rate people that
12 question, they'd have thought he was crazy. I mean,
13 they'd probably try to answer it, but they'd still have
14 thought he was crazy.

15 Q. Do you know if Idaho Power ever prepared the
16 study or an estimate to determine how much additional
17 revenue they'd get by selling power to people that were
18 going to pump upstream from Swan Falls to get them down
19 to the 3,900 c.f.s. minimum stream flow?

20 A. It seems to me that that was part of the
21 overall economic analysis of the Pioneer project that
22 there would be an increased load of flow as well as the
23 depletion. So I think there had to be some estimate of
24 revenue from present assumed rate structures.

25 Q. Was that part of the Hamilton and Lyman

1 study as well?

2 A. I think they did talk about rates. But, of
3 course, in rates more so than any other part of the rate
4 making process, you've got a question of rate shape I
5 think technically, how do you allocate the revenue
6 requirements among the ratepayers, and that gets to be an
7 infinite sum game. As I remember, Hamilton and Lyman
8 talked about the marginal rate, where the new pumpers
9 paid all of it or half of it, and the rest of it spread
10 across existing customers. So rate comments get pretty
11 treacherous.

12 Q. When the subcommittee on filing fees had
13 reached a consensus, did they then come back to the
14 negotiators with their proposal for filing fees?

15 A. Yes. Either that, or they just sent us a
16 version of this one particular statute with the fee in
17 it, and said this is the fee schedule we've come to. I
18 don't know if they met with us. Dick Gardner may have
19 come in. I don't believe we met with the whole
20 committee.

21 Q. Are you aware of the negotiators making any
22 changes to the fee structure put together by the
23 subcommittee?

24 A. No.

25 Q. That wasn't a very good question. No, they

1 didn't, or no, you didn't make any changes?

2 A. I don't recall that we did. In remembering
3 what we were doing there, I'd be relatively certain that
4 we did not.

5 Q. Okay. The Exhibit No. 2 to your deposition
6 is the Swan Falls agreement, is that what we've been
7 calling it; is that right?

8 A. Yes.

9 Q. And the attachments that I asked you about
10 earlier this morning, these attachments are proposed
11 legislation?

12 A. That's correct.

13 Q. Do you know who actually sat down and wrote
14 these proposals out?

15 A. I believe basically our scrivener was Clive
16 Strong. In other words, we would tell him what we
17 wanted, and he would go write something and say is this
18 what you wanted.

19 Q. Well, then, that's true for all of these
20 exhibits? I mean, all the attachments to Exhibit 2?

21 A. No. I think Exhibit 5, I believe was
22 generated by me initially, and since I had done the
23 draft, I think I did the final, but you'll notice it's a
24 different format than the others. And I believe that
25 Exhibit 5 was not done by Mr. Strong, but I believe that

1 perhaps 7(b) -- 7(b) is the statute which creates the
2 trust water concept -- that came up a little bit
3 differently, so Mr. Strong may not have been the
4 scrivener for that one. I believe -- I think Pat Kole
5 and I sat down and wrote up the basic parts of it. Pat
6 Costello came along, and then we had it typed someplace.
7 It's a different type face again, but I don't think it
8 was done quite the same way as the rest of them.

9 Q. Now, is the process of this negotiating team
10 that you would attempt to reach a consensus among the
11 three of you before you went back to the principals and
12 said, this is kind of what we agree upon, or --

13 A. Depends on the issue. I mean, we both had
14 -- all three of us had a pretty good idea generally where
15 our principals were. So we could say in the course of
16 negotiating, I could say, yes, I think the company will
17 buy that, let's move on to something else. Then we'd
18 take a whole bunch of things back. If we got hung up,
19 then we'd have to go back for instructions, and we might
20 do both. I mean, I may go back to Jim Bruce with a whole
21 laundry list of things for discussion.

22 Q. Do you know whether the adjudication costs
23 or the filing fee, either one, were items that you had to
24 take back to your principals to discuss in greater
25 detail?

1 A. I did not, because I believe as you heard
2 from Mr. Panter, he was involved in that and he had
3 access to Mr. Bruce. So he would have carried that back
4 to Mr. Bruce and me. So that was something I needed to
5 go back separately to Jim on.

6 Q. So by the time it got to you, Mr. Bruce had
7 already pretty much agreed on it?

8 A. Or we talked to him together. You know,
9 Mr. Bruce didn't talk about Swan Falls much when I wasn't
10 there. So I could have well been there when Greg talked
11 to him.

12 Q. Was it the view of the negotiating team that
13 this package of legislation that was put together and
14 attached to Exhibit 2, that that group of stuff was all
15 in the public interest that it be passed?

16 A. Of the negotiating team?

17 Q. Yes.

18 A. I believe so.

19 Q. Now, I think you said that -- let's look at
20 Exhibit 2 of the attachment on the filing fees. Is that
21 the right one? Yes. Exhibit 2 to Exhibit 2, page 3.

22 A. Yes.

23 Q. Now, it's your recollection that this
24 document as it came to you from the subcommittee called
25 for a \$25 vesting charge for hydropower?

1 A. Yes.

2 Q. And then I think you said at some point it
3 got changed before the legislature finally passed a name
4 plate rating charge?

5 A. Right.

6 Q. Do you know when in the process that got
7 changed? Let me ask you a more specific question. Was
8 it changed before this package of material was submitted
9 to the legislature?

10 A. I really couldn't say. I'd have to look at
11 the first bill to see how it read to know, but I have no
12 idea.

13 Q. Do you know who it was that brought up the
14 question of the unfairness to the low head power
15 producers?

16 A. No.

17 Q. Are you familiar with a concept called plant
18 factor?

19 A. Yes.

20 Q. What does that mean to you?

21 A. Plant factor is the proportion of time, is
22 the proportion of actual generation compared to the
23 theoretical maximum. In other words, if a plant
24 operating at full capacity 365 days a year could put out
25 a hundred units of power, and it actually puts out 80,

1 then it's a plant factor of 80.

2 Q. With respect to hydropower, does plant
3 factor have any relationship to the water right?

4 A. No.

5 Q. Does it have any relationship to the actual
6 use of water in the plant?

7 A. Yes.

8 Q. And isn't it true that in two hydroplants
9 the same name plate rating can have different plant
10 factors?

11 A. Oh, almost assuredly would.

12 Q. And so that the economic benefit of one
13 hydroplant would be one, whichever had this highest plant
14 factor?

15 A. Mm-hm, everything else being equal, right.

16 Q. Was there ever any attempt to factor in the
17 plant factor into the filing fee structure that
18 hydroplants would pay?

19 A. No. Plant factor is critical in whether or
20 not the project is viable. And so you'll usually find
21 that you're going to have plant factors within a somewhat
22 narrow range. So I don't know that it ever came up, but
23 I don't know if it had come up, that it would have been a
24 factor worth discussing.

25 Q. That's true on the Idaho Power system that

1 the plant factors work within a narrow range?

2 A. If the project is properly designed, that's
3 true. Now, I say properly designed. If the power
4 company has a plant which is much too small for the site,
5 in that situation you get a really high plant factor,
6 which is uneconomical. So if you had done your homework
7 and you can actually make the plant fit the site, then
8 your plant factor shouldn't vary too much. In other
9 words, you should know what it is, at least
10 theoretically, going in.

11 Q. Do you know what the general range of the
12 plant factor for Idaho Power hydro-facilities is at the
13 Snake River?

14 A. No, I know the one plant that's high. But I
15 don't know that I've seen the rest of them. It's narrow
16 in the sense you won't find a zero. You rarely find the
17 100. And it's too low if it's in the range of 40
18 percent, 35 percent; it's not an economical project. If
19 it's higher than that, you redesign the project to make
20 it lower in that sense. In other words, you're not
21 getting your running at 100 percent of plant capacity too
22 much. If your plant factors too high, you're wasting
23 water.

24 Q. But you wanted to be above a certain --

25 A. That's correct.

1 Q. -- level?

2 A. Yes, but economics is going to put you
3 there.

4 Q. Was there ever any consideration in using
5 kilowatt-hour generation of individual power plants as a
6 viable means?

7 A. Not while I was around.

8 Q. Is there a reason why it is not a viable
9 means?

10 A. One that comes to mind that would occur to
11 me if the discussion had come out was we already have a
12 kilowatt-hour tax. And if you start assessing the user
13 fee on the same basis, you might start blurring the
14 distinction. And so if they had raised it to me, I would
15 have said, you better take a hard look at that. Maybe
16 you're effectively converting a user fee into a tax by
17 putting it on the same basis.

18 Q. And I think you said in response to Mr.
19 Monson's questions that there was -- excuse me just
20 minute. Off the record.

21 (Whereupon a discussion was had off the
22 record.)

23 MR. BARKER: Will you read back my last question?

24 (Whereupon the Court Reporter read back
25 the last question.)

1 Q. (BY MR. BARKER) So the variable filing fee
2 on a hydropower plant does not measure the amount of
3 water that a plant uses?

4 A. Not directly.

5 Q. And the same is also true of the dollar per
6 acre irrigation variable fee?

7 A. Right, that is not a measure of the water
8 applied to the land or the water diverted directly.

9 Q. Would you explain directly why it was that
10 you chose to use a per acre fee for irrigation as opposed
11 to a water usage rate for calculating the fees?

12 A. Well, as I say, I didn't do it. I was there
13 when it was discussed. I know the explanation.

14 Q. Okay. I meant you collectively, in a group
15 of you's.

16 A. Collectively. Okay. If you look at water
17 rights in, say, a different context than we think of with
18 the reclamation projects and the Caryl Act, we get on a
19 farm that's got, say, two or three streams that provide
20 water to the farms. You may have one stream that comes
21 on early, and so you get a right out of that stream, and
22 then it's good until May. This other stream comes on in
23 May and runs until July. And maybe have a well then that
24 you turn on in July and it runs until October. If you do
25 a c.f.s. analysis, you're going to find that every acre

1 on that farm maybe has three c.f.s. or its portion of
2 c.f.s. attributable to it, where basically you only have
3 one water right for each acre.

4 So the measure of the water used, the burden
5 on the system, the effectiveness of the water use is per
6 acre. Not how many diversion rights and paper rights it
7 takes to finally have a water right for that acre. To
8 some degree the same thing is true of that capacity
9 charge for hydro, that the capacity charge is a measure
10 of how well you use the water. It's also a function of
11 head, obviously, and that sort of thing. The c.f.s.
12 charge is not a measure of the effectiveness of which use
13 the water capacity really is, how big is the plant, and
14 how well are you using the water. And if it takes you
15 10,000 second feet to produce 100 kilowatts, but if you
16 can get by with one second foot it's still the same power
17 plant.

18 So I know that was the discussion and the
19 rationale for the acre, and that was the reason for my
20 own reluctance to think that c.f.s. was a good measure.
21 But again, I didn't put the schedule together, and I
22 can't tell you why it was changed, but I would not have
23 been opposed philosophically to the change.

24 Q. And as far as you know, there was never any
25 attempt at the time this filing fee structure was put

1 together, to break out the cost of investigation of
2 particular classes of water right uses?

3 A. Not that I recall, at least not when I was
4 there. As I said, the committee had meetings when I
5 wasn't there.

6 Q. And if there was those costs they were never
7 conveyed to negotiation?

8 A. Correct.

9 Q. Was there ever any discussion among
10 negotiators about charging fees on a previously
11 adjudicated basis?

12 A. As I recall, not during the discussions of
13 the Pat, Pat and Tom group. Those discussions, as I
14 recall, it came up in the context of the discussions with
15 the legislature concerning initiation of the
16 adjudication.

17 Q. The boundaries of the adjudication?

18 A. That's correct. And my recollection is that
19 if that was addressed in the initial legislation, it
20 wasn't very sophisticated.

21 Q. Are you aware of any significant changes
22 that the legislature made to this package of material
23 attached to Exhibit 2 to your deposition?

24 A. You mean in '85, or otherwise?

25 Q. In '85, when the agreement was, or when the

1 package of legislation was passed initially.

2 A. There were some changes. Of course, we've
3 talked about the hydropower variable filing fee.

4 Q. But on that one, you don't know whether that
5 was done before or after it went to the legislature?

6 A. No, I don't now remember. There were some
7 changes. I don't now remember that there were any that
8 I'd call significant. And we did go back in the later
9 years and amend some of these packages for various
10 reasons, but I don't remember anything very major in the
11 legislature.

12 Q. Let's see, I think Mr. Panter's description
13 was that Idaho Power, the Governor, and the Attorney
14 General stood shoulder to shoulder, I think that was his
15 term, in front of the legislature, and said that this is
16 our package compromise deal. This is the best we can do,
17 and we'd like you to approve it. Is that your sense of
18 how it was presented to the legislature?

19 A. That's exactly right.

20 Q. Okay. Do you remember being asked by
21 Senator Peavey when you appeared in front of one of his
22 committees, one of the committees he was on, what would
23 happen if they started making major changes, the
24 legislature started making major changes?

25 A. I remember the question. I'm not sure I

1 remember my answer.

2 Q. Do you remember saying we'll go back to war,
3 or something along those lines?

4 A. That would be have been my guess as to what
5 I said.

6 Q. Which means that we go back to the 7,500
7 lawsuit?

8 A. Mm-hm.

9 Q. And we go back to, I guess we couldn't have
10 gone back to Judge Walters, but whatever the remand from
11 the Swan Falls case would have been?

12 A. That's correct. And I think you have to
13 understand that the last thing you want to tell any
14 legislative body blatantly is take it or leave it. The
15 legislature thinks that it makes all of the policies for
16 all of the state, and if you go in and say take it or
17 leave it, they are likely to leave it. So you have to be
18 pretty careful on how you say that. Basically, we did
19 tell the legislature, look, you can take it as is or not
20 take it as is, but if you start tinkering with it, the
21 whole thing is going to blow. So that's why I say,
22 certainly if there were changes, the three parties agreed
23 to them. But the legislature didn't want to go back to
24 war again.

25 Q. But there were no changes that were so

1 significant that you had to come back and amend the
2 agreement?

3 A. No.

4 Q. Mr. Nelson, are you familiar with the water
5 rights held by the Boise River District for the Owyhee
6 project?

7 A. If I am, it's pretty general, but I've heard
8 about it. I have no specific knowledge of it.

9 Q. In your view, was there a substantial amount
10 of uncertainty in water right uses on the Snake River
11 Basin prior to initiation of this adjudication?

12 A. Yes.

13 (Mr. Hockberger joined deposition.)

14 Q. (BY MR. BARKER) Were there geographic areas
15 where that uncertainty was greater or less than others?

16 A. I think that's probably true. It would be
17 greater above Milner simply because there was much more
18 use above Milner.

19 Q. Milner is the Milner Dam?

20 A. Yes.

21 Q. On the Snake River?

22 A. Yes.

23 MR. BARKER: If I could take a minute or two, I'm
24 probably done, but I'd like to take a short break.

25 (Whereupon a break was taken.)

1 Q. (BY MR. BARKER) Mr. Nelson, there is a
2 couple of other areas I'd like to inquire into and we
3 will be done with this. In response to one of
4 Mr. Monson's questions earlier this afternoon you
5 indicated what kind of investigation the department would
6 do to determine water right at a hydroplant?

7 A. Yes.

8 Q. And that would be go out and look at the
9 name plate rate, and maybe look at some records of the
10 gauging stations. In your view, what kind of
11 investigation would the department be required to do for
12 a subordinating hydropower right?

13 A. Same thing.

14 Q. Why is it you have to go out and look at the
15 historic records for a subordinated right?

16 A. Whether it's subordinated or not, you need a
17 description of the right, which requires a statement of
18 capacity and historic use as part of that, how much has
19 it been used, and so on. Even a subordinated right can
20 be lost by abandonment or forfeiture, number one. Number
21 two, the right might not be totally subordinated. I
22 mean, there is qualities of subordination. So I don't
23 see that subordination makes any difference in terms of
24 the effort required to analyze the water right at that
25 site.

1 Q. What do you mean, there is qualities of
2 subordination?

3 A. Well, for example, the Idaho Power's Hells
4 Canyon rights are subordinated only to depletions within
5 the Snake River watershed. That's a vastly different
6 subordination then one that says subordinated all later
7 depletion.

8 Q. And so that kind of water right would be
9 more valuable then one subordinated to all other
10 conditions?

11 A. Depends on how you're looking at value. In
12 my example of the Hells Canyon right, if our friends in
13 Los Angeles tried to take the water, they'd have to pay
14 for it. To that extent it's got an element of value that
15 a totally subordinated right would not. But I'm not sure
16 day to day that it's any different in value than, say,
17 the Idaho Power Company regardless of quality of the
18 subordination.

19 Q. What are your views of the definition of a
20 subordinated water right?

21 A. I think it means about the same here as it
22 does in most land questions. It's functionally junior to
23 a right to which under the priority system it should be
24 senior.

25 Q. So that a subsequent appropriator could come

1 along and get ahead in line of a subordinated water right
2 user?

3 A. Right.

4 Q. And so what it does is it takes away part of
5 the value of that water right to the owner?

6 A. It takes away one element of the water
7 right, certainly, which is a protectable priority date
8 versus other users.

9 Q. What would be the other valuable elements of
10 the water right other than the right to assist upon a
11 priority date? Would it be quantity?

12 A. Definition of it so you can transfer. The
13 right to use it. In other words, the fact that
14 subordinated doesn't mean it isn't there, nor does it
15 mean that you can't require that it be there. In other
16 words, you could defend a subordinated water right as a
17 wasteful use, for example. So it's far better than no
18 water right at all.

19 Q. I'd like to show you a document. I have a
20 bunch of copies of this, and I think you might recognize
21 this.

22 A. Mm-hm.

23 Q. This document is a brief that you authored
24 in the Miles versus Idaho Power case?

25 A. Did I sign it? Yes, Bruce Smith signed it

1 for me. Yes, that's what it appears to be, yes.

2 Q. I'd just like to call your attention to the
3 sentence on the bottom of page 9 starting with the net
4 effect.

5 Q. Would you read that into the record, please?

6 A. This is on page 9 of a document entitled
7 "Brief of Respondent Idaho Power Company on Rehearing,"
8 filed with the Idaho State Supreme Court on February
9 21st, 1989. And the bottom of the page, the second
10 sentence says, quote, "The net effect of the agreement is
11 to grant certainty to the water rights of Idaho Power
12 Company and to provide waters for domestic, commercial,
13 municipal, and irrigation..." that should be industrial
14 "...uses and the potential development of the lands above
15 Swan Falls." Do you want me to go further?

16 Q. No, that's the sentence I want you to read.

17 A. End quote.

18 Q. And by the agreement in that document,
19 you're referring to the Swan Falls agreement?

20 A. Yes.

21 Q. And is that quote consistent with your
22 testimony today about what you believe the benefits of
23 the adjudication are?

24 A. That would be -- that same benefit would
25 also accrue in the adjudication through the adjudication.

1 MR. BARKER: Okay. Thank you. That's all.

2 Nothing further, Your Honor.

3 MR. MONSON: Can I just follow up with a couple of
4 questions that came to mind during the discussion with
5 Mr. Barker?

6

7 FURTHER EXAMINATION

8 BY MR. MONSON:

9 Q. Mr. Barker referred to a Payette
10 adjudication as one that you had been involved in but
11 failed to mention earlier?

12 A. That's correct.

13 Q. Were you involved in that adjudication?

14 A. Only on the fringes, and very late, but yes,
15 I was involved to some degree.

16 Q. Do you know when it was filed?

17 A. No.

18 Q. Do you know how the state's costs were
19 financed in that adjudication?

20 A. No.

21 Q. Let me just show you a document, and ask you
22 if you recognize it?

23 A. I have some general recollection of this
24 document, but I can't tell you who prepared it or when.

25 Q. Did you prepare it?

1 A. No.

2 Q. You did not?

3 A. No. I may have participated, but I did not,
4 you know, I may have looked at it or made suggestions
5 about it, but --

6 MR. STRONG: Do you have a copy, Peter?

7 MR. MONSON: Yes.

8 THE WITNESS: I don't recall any more than I think
9 I've seen it.

10 Q. (BY MR. MONSON) Do you know what the
11 purpose -- why this document was prepared?

12 A. From what it says, it's a response to some
13 of the political arguments that were advanced after the
14 Supreme Court decision.

15 Q. Response by whom?

16 A. By Idaho Power it reads like.

17 Q. As you read it, do you recognize it with any
18 more certainty?

19 A. No. No, there were lots of words, lots of
20 paper and lots of vituperation that came around in those
21 days. And where this fits in that scenario, I don't know

22 MR. MONSON: That's all about that document.

23 Could I break for just one moment?

24 (Whereupon a recess was had.)

25 MR. MONSON: I have no more questions.

1 MR. STRONG: I just have a couple of questions,
2 unless -- Jim, do have some questions?

3 MR. TUCKER: No questions.

4
5 FURTHER EXAMINATION

6 BY MR. STRONG:

7 Q. Mr. Nelson, when did you learn you were
8 being nominated to the 9th Circuit Court of Appeals?

9 A. Formal nomination I think was about July
10 18th, 1990. I knew that there were elements of the
11 selection process had gone on before that, but that was
12 the formal nomination was in July of 1990.

13 Q. When did you first become aware that you
14 were going to be recommended for that position?

15 A. December of 1989.

16 Q. So it's taken almost a year for you to learn
17 whether you're going to go into the 9th Circuit Court of
18 Appeals?

19 A. Actually quite a little bit longer than
20 that, going clear back to between the Reagan
21 administration and Bush administration, the selection
22 process started, and then drug on from then until
23 December of '89 when they made the tentative selection,
24 as it's called, which initiates the investigation
25 process.

1 Q. Did you know with any degree of certainty
2 when you are going to be nominated to the court?

3 A. Confirmed, you mean?

4 Q. Confirmed. Excuse me.

5 A. No, that's a function of Congress, and I
6 couldn't get any -- nobody was willing to make an
7 estimate that they'd stand behind.

8 Q. When did you first learn that you had been
9 confirmed?

10 A. I learned on Sunday, October 14th, and it
11 wasn't publicly known until I think late Monday the 15th
12 of October.

13 Q. Prior to learning of your confirmation, did
14 you intend to participate in this proceeding?

15 A. Yes.

16 Q. Would you have participated in the trial of
17 this matter?

18 A. Absent the confirmation coming in this
19 session of Congress, yes.

20 Q. Mr. Monson asked you a question, and I'll
21 see if I can restate it correctly, is there an
22 alternative forum for the determination of the United
23 States water rights. Do you recall that question?

24 A. Yes.

25 Q. And your response to that was?

1 A. They could file their own case.

2 Q. And where would they file their case?

3 A. Presumably they'd file in federal court.

4 They have a distaste for state court, if they can stay
5 out of it.

6 Q. What would be the nature of that action?

7 A. It would be state law filings, it would be a
8 private adjudication, and I'm not familiar with any
9 federal statute that really deals with adjudication.
10 Sometimes they come across kind of as an in personam
11 trespass action, or they can take a lot of different
12 forms. But if they use the state law analogy, it would
13 be private adjudication.

14 Q. So you'd characterize it as an action?

15 A. Yes.

16 Q. And in an in personam action, who would be
17 bound to the decree?

18 A. The parties to the decree, and their
19 successors if you could get notice to them as, for
20 example, if you could get a statement on the land title
21 or something like that, that would give a successor
22 notice that there will be a decree of the water rights.

23 Q. I believe Mr. Monson also asked the question
24 whether publications could be substituted for personal
25 notice; is that correct?

1 A. Well, if he asked that question, I didn't
2 understand it that way. If he had asked that question,
3 I'd have said no.

4 Q. What would you have to do in an in personam
5 action to bind all parties?

6 A. As I said, the cases require that you use
7 reasonable efforts. And after you have made reasonable
8 efforts, then you can go to publications. But in an in
9 personam setting, those reasonable efforts would be quite
10 extensive, and we were prepared to go to considerable
11 lengths in the 7,500 case before we published.

12 Q. Would that have been a costly process?

13 A. Oh, it would have been hugely costly.

14 Q. One further question. Mr. Monson, I
15 believe, asked the question whether minimum flows would
16 benefit the state as a whole. Do you recall that
17 question?

18 A. Yes.

19 Q. Do you know whether minimum flows would
20 benefit the United States?

21 A. I think so. I mean, you know, the United
22 States is here too, and they have an interest in the
23 river. So any instream use benefits from having water in
24 the river no matter why the water is there. So to the
25 extent that the United States has an instream interest,

1 it's benefited by instream flow.

2 MR. STRONG: Mr. Nelson, I guess this is the last
3 time I'll refer to you as Mr. Nelson. Next time it will
4 be Your Honor.

5 MR. BARKER: I do have one question.

6
7 FURTHER EXAMINATION

8 BY MR. BARKER:

9 Q. The trial you're presiding at in Moscow is
10 not going to be the trial in this case; is that correct?

11 A. No, absolutely not.

12 MR. MONSON: I have one follow up from Mr.
13 Strong's questions.

14
15 FURTHER EXAMINATION

16 BY MR. MONSON:

17 Q. Mr. Strong asked you if followed up my
18 question about the alternative forum for determining
19 federal water rights, and he asked you what kind of an
20 action that would be; is that correct?

21 A. Yes.

22 Q. And your response was that it would be a
23 private adjudication; is that correct?

24 A. Yes.

25 Q. Are you familiar with any general stream

1 adjudication that the United States has filed in the
2 western states?

3 A. Only by reading about them, but they have
4 filed some.

5 Q. And Mr. Strong has characterized private
6 adjudication as an in personam proceeding. Do you know
7 of any bar to a federal court concerning a general stream
8 adjudication to be an interim proceeding?

9 A. Not if it's filed as such, depending on how
10 the United States filed the case. In the context of your
11 question, I have assumed you'd file it in a limited
12 fashion. If you didn't, it could be considered as an
13 general adjudication.

14 Q. And that general adjudication in that case
15 would be an interim proceeding?

16 A. Yes.

17 Q. And the parties bound by that interim
18 proceeding could be all owners of the property involved?

19 A. Yes, with proper flow.

20 MR. MONSON: Thank you.

21 MR. STRONG: No further questions.

22 MR. BARKER: No.

23 (Whereupon the deposition concluded at 4:10

24 p.m.)

25

1 VERIFICATION

2
3 STATE OF _____)
: ss
4 COUNTY OF _____)

5
6 I, THOMAS G. NELSON, being first duly sworn to my
7 oath, depose and say:

8 That I am the witness named in the foregoing
9 deposition taken the 31st day of October, 1990,
10 consisting of pages numbered 1 to 194 inclusive; that I
11 have read the said deposition and know the contents
12 thereof; that the questions contained therein were
13 propounded to me; that the answers to said questions were
14 given by me; and that the answers as contained therein
15 (or as corrected by me therein) are true and correct.
16

17 _____
THOMAS G. NELSON
18
19

20 Subscribed and sworn to before me this _____
21 day of _____, 1990, at _____, Idaho.
22

23 _____
Notary Public for Idaho
24 Residing at _____.

25 My Commission Expires: _____

REPORTER'S CERTIFICATE

STATE OF IDAHO)

) ss.

County of Ada)

I, COLLEEN P. DOHERTY, CSR, a Notary Public

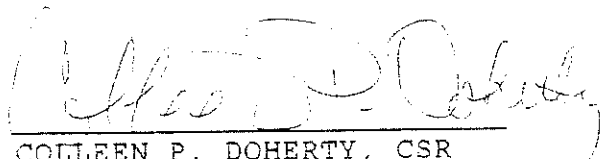
in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness
named in the foregoing deposition was by me duly sworn to
testify the truth, the whole truth and nothing but the
truth;

That said deposition was taken down by me in
shorthand at the time and place therein names and
thereafter reduced to typewriting, and that the foregoing
transcript contains a full, true and verbatim record of
the said deposition.

I further certify that I have no interest
in the event of the action.

WITNESS my hand and seal this 2nd day of
November, 1990.



COLLEEN P. DOHERTY, CSR
Notary Public in and for
the State of Idaho.

My Commission Expires 3/19/93.

EXHIBIT P

THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND TO PROVIDE A PROCEDURE FOR COLLECTION OF THE FEES; AND AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777, IDAHO CODE, TO PROVIDE FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

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

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION -- COMMENCEMENT.

(1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded from the adjudication proceedings;

the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

SECTION 2. That Section 42-1409, Idaho Code, be, and the same is hereby amended to read as follows:

IDAHO AND THE STATES OF OREGON AND WASHINGTON, AND TO INCLUDE WITHIN HIS PETITION FOR ADJUDICATION ANY ADJUDICATED TRIBUTARIES; AND TO PROHIBIT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FROM READJUDICATING ANY TRIBUTARY OF THE SNAKE RIVER DOWNSTREAM WHICH PREVIOUSLY HAS BEEN ADJUDICATED UNLESS IT IS NECESSARY TO OBTAIN THE CONSENT OF THE UNITED STATES OR OTHER NECESSARY PARTIES.

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

SECTION 1. That Section 42-1406A, Idaho Code, as enacted by House Bill No. 70, First Regular Session, Forty-eighth Idaho Legislature, be, and the same is hereby amended to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION -- COMMENCEMENT. (1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded from the adjudication proceedings;

the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the

Snake River Basin;
House Bill
Senate, to
Department of
Water Resources
from the
Department of
Water Resources
State of

motor number, manufacturer's number, or identification number has been defaced, altered, removed, covered, destroyed or obliterated. Any peace officer so seizing such vehicle, vessel, equipment or parts thereof immediately shall notify the ~~motor-vehicle-division~~ transportation department of law-enforcement, and shall make every reasonable effort to determine ownership of the vehicle, vessel or equipment and to notify the rightful owner that the vehicle has been seized.

(2) It shall be a misdemeanor, punishable as provided in section 18-113, Idaho Code, for any person owning, conducting, managing or operating a service station, public garage, paint shop, or other repair shop for motor vehicles, vessels, or equipment described in subsection (1) of this section, to fail to notify local law enforcement agencies or the ~~motor-vehicle-division~~ transportation department of law-enforcement, of any motor vehicle, vessel, equipment or parts thereof on which any numbers described in subsection (1) of this section, have been defaced, altered, removed, covered, destroyed or obliterated.

(3) Any person who shall deface, alter, remove, cover, destroy or obliterate the motor number, manufacturer's number, or identification number of any vehicle, vessel, equipment or parts thereof described in subsection (1) of this section, or places or stamps any such serial number, engine number, or any other number upon such a vehicle, vessel, equipment or parts thereof unless such number is assigned thereto by the transportation department is guilty of a felony and is punishable as provided by section 18-112, Idaho Code.

(4) Any person or persons, who knowingly disposes of, sells or offers for sale any vehicle, engine or parts removed from a vehicle, vessel, equipment or parts thereof described in subsection (1) of this section from which the manufacturer's number, motor number, identification number or any assigned or replacement number issued by the transportation department has been defaced, altered, removed, covered, destroyed or obliterated is guilty of a felony and punishable as provided by section 18-112, Idaho Code.

Approved March 20, 1985.

CHAPTER 118
(H.B. No. 267)

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS IN THE SNAKE RIVER BASIN; AMENDING SECTION 42-1406A, IDAHO CODE, AS ENACTED BY HOUSE BILL NO. 70, FIRST REGULAR SESSION, FORTY-EIGHTH IDAHO LEGISLATURE, TO PROVIDE INSTRUCTIONS TO THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES WHEN HE ADJUDICATES THE SNAKE RIVER BASIN FROM THE OREGON BORDER UPSTREAM; TO ALLOW THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO ADJUDICATE THE WATER RIGHTS OF THE MAIN STEM OF THE SNAKE RIVER WHICH FORMS THE BOUNDARY BETWEEN THE STATE OF

STATEMENT OF PURPOSE

RS 10961C.4

This legislation calls for a general adjudication of the Snake River Basin. This adjudication would include all tributary regions above Murphy gage and as much of the remainder of the basin as is necessary to obtain U.S. consent to include all federal claims in the adjudication under the terms of the McCarran Amendment. The legislation further sets a schedule of claim fees to be paid when water right holders file their claim in the district court. These claim fees would be deposited into a Water Resources Adjudication Account, a dedicated fund created by this act.

FISCAL NOTE

An appropriation of \$1,000,000 is required in FY 1986 to enable the Department of Water Resources to commence the adjudication process, notify water right holders, and begin receiving the claim fees which will finance the remainder of the adjudication.

In addition, the state would be required to pay \$1,901,320 in claim fees for minimum streamflow rights held by the Idaho Water Resource Board for the state. Water Resource Board actions to increase the winter streamflow at Murphy gage from 3300 to 5600 cfs and to create a minimum streamflow of 13,000 cfs at Lime Point would add an additional \$230,000 and \$1,300,050 for a total General Account obligation in future years of \$3,431,370. These claim fees would be due in FY 1987 with the option of deferring payment over five years with 10 percent interest on the unpaid balance.

STATEMENT OF PURPOSE/FISCAL NOTE

H 70