

Orr Affidavit

Exhibit 23

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DEPARTMENT OF
WATER RESOURCES

Transcript of IDWR public hearing
on proposed rules and regulations
for water appropriation
(Jan. 14, 1986)

Fourth Orr Affidavit
Exhibit 55:

**Transcript of the Idaho Department of
Water Resource's Public Hearings on
Proposed Rules and Regulations for
Water Appropriation
January 14, 1986, 2:20 p.m.**

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

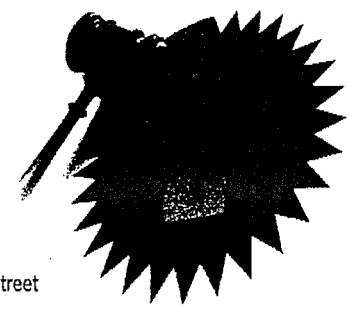
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RE: WATER ALLOCATION RULES AND :
REGULATIONS HEARINGS. :
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TRANSCRIPT OF PROCEEDINGS REQUESTED BY
ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND
MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES

January 14, 1986, 2:20 p.m.

BONNEVILLE COUNTY COURTHOUSE
IDAHO FALLS, IDAHO

Transcribed by
Frances J. Morris
CSR No. 696



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A P P E A R A N C E S

BLAIR GROVER
LEO AVERY
DON CHINTEN
ELDRED LEE

Water Allocation Rules and Regulations Hearings 1/14/1986

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1 STATE OF IDAHO 2 DEPARTMENT OF WATER RESOURCES 3 -----X 4 : 5 RE: WATER ALLOCATION RULES AND : 6 REGULATIONS HEARINGS. : 7 : 8 -----X 9 10 11 TRANSCRIPT OF PROCEEDINGS REQUESTED BY 12 ATTORNEY GENERAL LAWRENCE WASDEN OF AUDIOTAPES HELD AND 13 MAINTAINED BY THE DEPARTMENT OF WATER RESOURCES 14 15 January 14, 1986, 2:20 p.m. 16 17 18 BONNEVILLE COUNTY COURTHOUSE 19 IDAHO FALLS, IDAHO 20 21 22 23 24 Transcribed by 25 Frances J. Morris CSR No. 696	1 IDAHO FALLS, IDAHO 2 January 14, 1986, 2:20 p.m. 3 4 THE HEARING OFFICER: (Tape begins in mid 5 sentence) is to provide an opportunity for formal 6 testimony or statements, either oral or written 7 form, relative to the department's proposed rules 8 and regulations for allocation of water within the 9 state of Idaho. These are the first rules and 10 regulations to be adopted in the history of this 11 state regarding the procedures for the 12 appropriation of water in the state. 13 This hearing is required by the 14 provisions of the Administrative Procedures Act, 15 Title 67, Chapter 52, Idaho Code, and will be 16 conducted pursuant to the department's rules and 17 regulations for practice and procedure. 18 Cross examination or questioning of 19 witnesses will not be permitted. All those who 20 wish to testify will be allowed to do so before 21 anyone will have an opportunity to be heard a 22 second time. The rules will implement provisions 23 of Section 42-203, Idaho Code, which were amended 24 during the last session of the Idaho legislature. 25 Authority for adoption of the rules is provided by
Page 2	Page 4
1 APPEARANCES 2 3 BLAIR GROVER 4 LEO AVERY 5 DON CHINTEN 6 ELDRED LEE 7 * * * * * 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	1 Section 42-1805(8), Idaho Code. 2 Briefly what the department has done 3 regarding these rules is that, in May of 1985, we 4 sought input from water users on suggestions as to 5 what should be contained in the rules and 6 regulations by holding several meetings throughout 7 the state. Then in October of 1985, we conducted 8 some public information meetings with draft copies 9 of rules and regulations, again, seeking comments 10 to what we had at that time proposed. We received 11 several comments, and the rules that are before 12 the hearing today reflect some 32 significant 13 changes that were made in that initial draft. 14 This hearing has been advertised on 15 December 5th, 12th, and 19th in the Post Register, 16 the Idaho Statesman, the Times News, and the 17 Coeur d'Alene Press. Notice was provided to all 18 those people who requested notice of rule 19 adopting, and I've mailed over 6,000 copies of the 20 rules to various people who are on our mailing 21 list. 22 After this hearing and the other 23 hearings throughout the state, the record will 24 remain open until January 27th of 1986 for any 25 written information that you may wish to submit.

1 (Pages 1 to 4)

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1 The rules and regulations are available here today 2 and also available in any of our offices or in the 3 format you see here, newspaper-type format, and 4 will be a part of the record for today's hearing. 5 A general procedure for adopting is to 6 hold this hearing under the Administrative 7 Procedures Act which is required by law. Then, 8 based on the testimony I receive here and at other 9 meetings, we will revise the rules as appropriate 10 and then adopt final rules. I expect to have that 11 completed by February 10th of this year. Then 12 I'll file the rules in the central office of the 13 department and also submit copies to the law 14 library who will then forward them to the 15 legislature for the legislative review and 16 hopefully approval during this session of the 17 legislature. 18 It's important, I think, to get these 19 adopted during this session of the legislature so 20 we are not faced with another year of not having 21 rules and regulations, especially given the 22 settlement to the Swan Falls agreement and the 23 public interest criteria that all water rights 24 have to now come under. I think it's important 25 that the rules and regulations be in place.	1 Upper Valley between Blackfoot and Rexburg. 2 I suspect that most of what I say you 3 have heard before, but I think it probably should 4 be a matter of record here. Obviously, there has 5 been a lot of discussion about whether or not the 6 rules should apply; particularly, the public 7 interest criteria should apply above Milner. And 8 The Protective Union, I think, wants to be on 9 record of opposing application of these rules 10 above Milner. 11 I am aware that the department's view 12 of the legislation is that it cannot fill that 13 kind of a request believing that the legislation 14 as passed requires the rules to apply to the 15 entire stretch of the river. I guess my position 16 would be on behalf of The Protective Union, it 17 doesn't say that, doesn't say that it has to apply 18 above Milner. On the other hand, it doesn't say 19 that it does not apply above Milner. 20 It's my understanding that several of 21 Eastern Idaho legislators believed, when the 22 legislation was passed, that they were not passing 23 it for application above Milner. And perhaps 24 legislative effort should be made to clarify the 25 legislation so that it does not apply above
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1 Today is January 14, 1986. The time is 2 2:20. This hearing is being conducted in the 3 courthouse in the city of Idaho Falls. 4 There is a roster that has been sent 5 around, and we have asked you to sign that for two 6 purposes: One, if there are significant changes 7 that we make in these rules when they are 8 reprinted, if your name is on the list you will be 9 certain of receiving a copy of those; and, two, if 10 you wish to make formal testimony today, I need to 11 have some indication on the register. 12 Reviewing the sign-up sheet, I don't 13 see anybody who specifically said they wanted to 14 testify. Some of you may want to and just did not 15 put a check, or I can't find it. So absent that, 16 is there anybody here that does want to provide 17 some formal testimony today? 18 Mr. Grover, do you want to come forward 19 and be the initial person? And if you would state 20 your name when you begin your testimony that will 21 help my secretary sort out the comments. 22 MR. GROVER: My name is Blair Grover. I am 23 an attorney from Rigby, Idaho, and I am appearing 24 today on behalf of the Protective Union which is 25 an organization of canal companies located in the	1 Milner. But we want to be on record, I think, of 2 opposing the application of, particularly the 3 public interest criteria and the trust doctrine 4 water, above Milner. 5 One of the reasons for that, in talking 6 with people who have knowledge of water rights, 7 applying that doctrine above Milner really creates 8 some problems that I don't think were anticipated 9 nor intended by the legislation. Even with flood 10 waters, we get into difficult problems if we apply 11 trust doctrine above Milner, because technically, 12 the way water has been delivered and flood waters 13 have been treated, we are going to be treating -- 14 procedure that's been followed will be dealing 15 technically with what, I guess, are trust waters 16 and will not be able to continue even with the use 17 of flood waters the way we have in the past. And 18 I don't think that the legislation was intended to 19 upset the procedures that have been followed in 20 the practice that's been followed here. 21 A second thing that bothers me with 22 regard to the rules is that Rule 5,3 where we talk 23 about the department considering many, many 24 factors and then determining, I think the language 25 is, "the greater public interest" in grant or

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1 denial of an application. And I am aware that the
2 department's view is that that's required by the
3 language in the Trout-Co case or the holding in
4 the Trout-Co case. I guess I disagree that the
5 court intended that kind of a result from their
6 holding in the Trout-Co case. We have, as
7 everyone knows, well established in this state a
8 doctrine of first in time, first in right
9 established not only by legislation, I think, and
10 case law, but also by constitutional provision.
11 And I don't think that the supreme court, even if
12 they had intended to interfere with that doctrine
13 could lawfully do so. I don't think that they
14 interfere with the first in time, first in right
15 doctrine. And if we adopt a greater public
16 interest criteria, the kind of thing where the
17 department's going to weigh three or four
18 applications instead of taking the one that was
19 first filed and consider it and say if that meets
20 all the criteria the water right is granted,
21 rather than doing that, if it considers three or
22 four applications on file and maybe deciding the
23 third one is in the greater public interest and
24 therefore that's the one that receives the water
25 right, I think that's a significant change from

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1 the practice and procedure that we have had in the
2 past and do not believe that that is required by
3 the decision in the Trout-Co case.
4 THE HEARING OFFICER: If I might ask,
5 Mr. Grover, on the trust water above Milner, are
6 you talking only of surface water?
7 MR. GROVER: Yes. Well, I guess I am
8 talking about all the water, but primarily I think
9 we are talking about surface water.
10 THE HEARING OFFICER: I was wondering how
11 you would handle the groundwater where it comes in
12 below Milner, and it does create a problem.
13 MR. GROVER: We'd like to see it apply
14 across the board, but we would certainly be
15 happier with just surface water.
16 THE HEARING OFFICER: Thank you very much.
17 Anybody else? Yes.
18 MR. AVERY: I am Leo Avery, water manager
19 for Rudy Canal, Rigby Canal, Harrison Canal, Clark
20 Edwards Canal. I will talk on behalf of theirs.
21 I'm wishing for more of a clarification of whether
22 flood waters is what -- or relationship flood
23 waters has with trust waters. Now, in the past,
24 when we have been having flood waters, we use
25 those flood waters, we could use all we could take

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1 care of in the canal system. Now, then, if it was
2 changed to the point where flood waters was --
3 instead of using flood waters over any decreed
4 water we have, if there is any change in that,
5 then we would be using stored water at the time
6 when the Bureau of Reclamation or the Water
7 Resource Board was advertising on the radio there
8 is flooding down around Shelley, Blackfoot, and so
9 forth, use all the water you can.

10 So this is why we would like to have a
11 clarification on that because flood waters is
12 very, very important to the canal systems, not
13 only the ones that I am talking and mention I was
14 managing, but all canal companies, due to the fact
15 we need these flood waters to help string along
16 and make it so that they are decreed water and
17 stored water will last the full season. In other
18 words, the longer that the flood waters can last
19 for us, the more chances we have got of going
20 through our growing seasons in the Upper Snake
21 River Valley without running out of stored water
22 or decreed water.

23 And so I'd like to make my formal
24 protest or clarification of what flood waters is
25 in relation to the trust waters. And if it was

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1 going to change anything that we have been doing
2 in the past 30 or 40 years, it would be
3 detrimental to our canal systems.
4 THE HEARING OFFICER: If I might summarize,
5 Mr. Avery, what you would like to see is the
6 unrestricted use of water while the spills are
7 going past Milner --
8 MR. AVERY: Yes.
9 THE HEARING OFFICER: -- which would mean
10 water that would be in excess of --
11 MR. AVERY: The same as we have had in the
12 past. Now, then, I kind of got the idea that, if
13 this particular thing went through, then even
14 though there was water going and spilling over
15 Milner, if we were using over our decreed water,
16 we would be charged with stored water for that.
17 And that would be what would be really damaging in
18 killing canal systems.
19 THE HEARING OFFICER: Thank you.
20 Someone else wish to testify? Don
21 Chinten?
22 MR. CHINTEN: I really just had a comment to
23 make, Ken. My name, however, is Don Chinten. I
24 am a water master for Water District No. 31 and
25 32C.

3 (Pages 9 to 12)

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1 I am somewhat embarrassed today because 2 I got down here without the piece of paper I had 3 my marks on and without my glasses. So I can't 4 get my glasses out to see what number I want to 5 refer to or what page. 6 THE HEARING OFFICER: I have a pair you can 7 borrow. 8 MR. CHINTEN: However, I think I can get my 9 point across here, or hopefully I can. 10 I noticed in there that somewhere in 11 there that you give a frost date. And along with 12 a frost date, you restrict the irrigation time on 13 the use of water. And this concerns me because, 14 with my experience in the field of distributing 15 water in the areas in which I distribute it, this 16 is absolutely just backwards. 17 Now, it looks to me like that you have 18 got Medicine Lodge and the Beaver Creek -- I can't 19 tell exactly on your map because it don't show 20 counties -- but you restrict them to usage 21 starting May 1 instead of April 1. And it looks 22 like the justification is frost date. But the 23 people that use the water first on all these 24 tributaries are the higher elevation peoples for a 25 number of reasons. Usually it's because of the	1 MR. CHINTEN: But I distribute it, yeah, on 2 May 1. Very definitely. The daily record books 3 will bear that out -- 4 THE HEARING OFFICER: Sure. 5 MR. CHINTEN: -- year after year. So that's 6 a concern of mine. 7 THE HEARING OFFICER: Our intent is not to 8 say that nobody can use the water. We were 9 putting that in for distribution purposes. I 10 think it's potentially saying that that's when the 11 system comes online in most years in terms of the 12 water master. 13 MR. CHINTEN: Well, that's not true in this 14 area. I think, also, in relationship, another 15 thing that concerned me a little bit -- I wish I 16 could just refer to it; I apologize for that -- 17 but it says something in there that it could be 18 changed at the director's discretion or like 19 wordage, does it not? 20 THE HEARING OFFICER: Yes, yes. 21 MR. CHINTEN: Okay. But that don't really 22 say too much to me. I mean, you may want to be 23 conservative and Norm might want to be liberal, 24 you know, if one or the other, if he was the 25 director.
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1 gravel, the condition of the soil or something, 2 and they are never caught up. They are always 3 behind. And a lot of these people use this water 4 even April 15th in this area where you're trying -- 5 to limit this to May 1. And that's a concern to 6 me. 7 THE HEARING OFFICER: In the use of that 8 water, do you distribute that water on a priority 9 basis that early, or do they just take it and use 10 it? 11 MR. CHINTEN: Both. They take it and use 12 it, but I distribute it always on May 1, unless 13 it's a year that's like two years ago. But the 14 daily record books are kept May 1, and there is a 15 high consumptive use on these streams of Beaver 16 and Medicine Lodge, Camas, even before the Mud 17 Lake area which is at a later frost date. And 18 they also use it later into the year. 19 THE HEARING OFFICER: But you don't 20 distribute it on a priority basis after -- before 21 May 1 or after November? 22 MR. CHINTEN: Not normally. I have been 23 called on an April on a short year. 24 THE HEARING OFFICER: Sure, when there isn't 25 sufficient water need --	1 THE HEARING OFFICER: Well, that's right. 2 And that's one of the reasons for adopting these 3 is, up until now, it's been the total discretion 4 of the director to set those. But, yeah, we will 5 look at that and see if we can get -- 6 MR. CHINTEN: I'd like to ask that it be 7 moved up to May 1 as practice has been. 8 THE HEARING OFFICER: Sure. I would 9 appreciate, when you get home and find your 10 glasses, if you would jot something down so that 11 we make sure we have all the comments that you 12 wanted to bring in case you've forgotten any. I 13 appreciate that. Thank you. 14 MR. CHINTEN: Thank you. 15 THE HEARING OFFICER: Mr. Lee? 16 MR. LEE: My name is Eldred Lee. I am the 17 secretary of the Great Feeder. I just have a 18 couple of comments. I agree with those that have 19 been made. In my memory -- and I can't verify 20 this -- it appears to me that I've been at two 21 meetings in which I specifically asked the 22 question of whether the Swan Falls agreement would 23 affect the flow above Milner. And I was assured 24 that under no circumstances would the Swan Falls 25 agreement affect any of the diversion of water

1 under any circumstances above Milner.
 2 If I read the regulations correct, that
 3 the regulations applied to all waters in the Snake
 4 River rather than just from Milner down. Is that
 5 not correct?
 6 THE HEARING OFFICER: Correct.
 7 MR. LEE: Then just a comment. The water
 8 users that I have talked to feel as if they have
 9 been deceived by action -- and I don't know who is
 10 responsible. If it is the department, then I
 11 think we should be notified of that; and if it's
 12 the governor's office and those who drew those
 13 bills, then I think that should be clarified so
 14 that a person would know what appropriate action
 15 to take. There is really -- you know, after being
 16 promised one thing and here we come and we find
 17 that all of our water rights may be in jeopardy --
 18 or some of them, at least -- or that new
 19 development may be minimized because of the rules
 20 and regulations and the laws that are now made, it
 21 appears to us that it's pure deception. And I
 22 think, in my opinion, that that should be
 23 corrected and clarified. And I'd like to see the
 24 department propose legislation that would clarify
 25 that principle. Because if not, then there is

1 going to be a lot of fault-finding, unrest,
 2 dissatisfaction with the whole procedure that we
 3 are now attempting to set up and clarify.
 4 I don't think you realize how the
 5 farmers feel, how the people feel, about that very
 6 principle. Now, I don't know whose fault that is,
 7 and I'm not laying fault to anybody. But in the
 8 procedures that have been set up, it has come to
 9 pass.
 10 Another thing that I just jotted down,
 11 in reading those rules and regulations -- and you
 12 would correct me if I have read them wrong --
 13 there is no opportunity or procedure for appeal
 14 from your decision.
 15 THE HEARING OFFICER: You are wrong.
 16 MR. LEE: I am wrong?
 17 THE HEARING OFFICER: You are wrong.
 18 MR. LEE: Okay. Then I missed it.
 19 THE HEARING OFFICER: Without question, any
 20 decision of the director is appealable.
 21 MR. LEE: But it has to be done by the
 22 courts and not through -- where is the procedure
 23 in here for appeal?
 24 THE HEARING OFFICER: The statutes provide
 25 that, if there has not -- if you have not had a

1 hearing, and I make a decision, you're entitled to
 2 an administrative hearing. If there has been an
 3 administrative hearing and you're not satisfied
 4 with the results of that, then you can appeal it
 5 to the courts --
 6 MR. LEE: Now --
 7 THE HEARING OFFICER: -- in every decision.
 8 MR. LEE: Since all of the authority is
 9 given to you as the director, then, after the
 10 administrative hearing, then who makes the
 11 decision?
 12 THE HEARING OFFICER: After the
 13 administrative hearing, the appeal is to the
 14 district court. And that's the way it has been
 15 for a hundred years.
 16 MR. LEE: Well, I didn't read --
 17 THE HEARING OFFICER: Please don't change
 18 that.
 19 MR. LEE: But that's a court procedure.
 20 THE HEARING OFFICER: Yes.
 21 MR. LEE: That is the next --
 22 THE HEARING OFFICER: Oh, yes.
 23 MR. LEE: Well, I realize that you can
 24 always go to court, but I felt somewhere that --
 25 and I'm not faulting you or anything, but one

1 person should not have the responsibility of
 2 determining who should have a water right. I
 3 mean, there should be other procedures available
 4 to the common layperson. Sometimes it isn't worth
 5 it to go to court.
 6 THE HEARING OFFICER: Can I ask this? Have
 7 you been satisfied in the past the way it's
 8 worked?
 9 MR. LEE: Well, I haven't had anything to do
 10 with this since -- so I can't say whether I am
 11 satisfied or not. But that's the thought that
 12 came to me that everybody ought to have an
 13 opportunity to appeal any decision that is made by
 14 one individual --
 15 THE HEARING OFFICER: And that's --
 16 MR. LEE: -- whether it's you or anybody.
 17 THE HEARING OFFICER: The reason I asked
 18 that is because the procedures that we would
 19 follow after these rules are the procedures that
 20 we followed since the Department of Water
 21 Resources has been administering water law. And
 22 that is, if you're not satisfied with the
 23 decision, there is an administrative hearing held
 24 by the director. And if you're not satisfied with
 25 that, you can go to court. And that system has

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1 served us for nearly a hundred years, and I would 2 be reluctant to change it right now. 3 MR. LEE: If it's worked, that's the thing I 4 didn't get out of this. I couldn't read anywhere 5 where there is an opportunity for appeal. As far 6 as I am concerned, it should be clarified. I 7 mean, it would be perfectly all right to write 8 those procedures in here so that everybody knew 9 that they had an opportunity. 10 THE HEARING OFFICER: Sure. We will do 11 that. I just wanted to clarify where we were 12 going. 13 MR. LEE: No, I'm not -- that's all that I 14 have. Thank you. 15 THE HEARING OFFICER: Thank you. 16 Is there anyone else who wishes to 17 testify today? Last chance. 18 Well, hearing no other people coming 19 forward to provide testimony, I'll again remind 20 you that we will hold hearings in Twin Falls 21 tomorrow and in Boise on January 16th and an 22 additional hearing here in Idaho Falls tonight at 23 7:00 p.m. Beyond that, the hearing record will be 24 kept open until January 27th for anyone wishing to 25 submit written testimony. And you can submit that	1 REPORTER'S CERTIFICATE 2 3 4 I, Frances J. Morris, Court Reporter, a 5 Notary Public, do hereby certify: 6 That I am the reporter who transcribed 7 the proceedings in the form of digital recording 8 in the above-entitled action in machine shorthand 9 and thereafter the same was reduced into 10 typewriting under my direct supervision; and 11 That the foregoing transcript contains a 12 full, true, and accurate record of the proceedings 13 to the extent they were audible and intelligible 14 in the above and foregoing cause, which was heard 15 in various cities at Idaho Falls, Idaho. 16 IN WITNESS WHEREOF, I have hereunto set 17 my hand this _____ day of _____ 2008. 18 19 20 21 22 Frances J. Morris, Court Reporter 23 CSR No. 696 24 25
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1 to any office of the Department of Water 2 Resources: The one here in Idaho Falls, Twin 3 Falls, Coeur d'Alene, or Boise. And I urge you, 4 if you do have comments, do that. 5 There are no further people wishing to 6 testify. This hearing is closed. 7 (End of proceeding.) 8 -o0o- 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	

Water Allocation Rules and Regulations Hearings 1/14/1986

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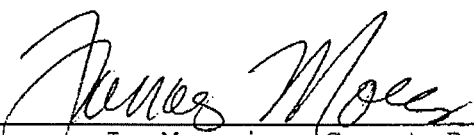
R E P O R T E R ' S C E R T I F I C A T E

I, Frances J. Morris, Court Reporter, a
Notary Public, do hereby certify:

That I am the reporter who transcribed
the proceedings in the form of digital recording
in the above-entitled action in machine shorthand
and thereafter the same was reduced into
typewriting under my direct supervision; and

That the foregoing transcript contains a
full, true, and accurate record of the proceedings
to the extent they were audible and intelligible
in the above and foregoing cause, which was heard
in various cities at Idaho Falls, Idaho.

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



Frances J. Morris, Court Reporter
CSR No. 696

