MINUTES
NATURAL RESOURCES INTERIM COMMITTEE MEETING
JUNE 10, 2005

The meeting was called to order by Cochairman Senator Don Burtenshaw at 9:35 a.m. Other Committee members present were Cochairman Dell Raybould, Senator Gary Schroeder, Senator Stan Williams, Senator Chuck Coiner, Senator Clint Stennett, Representative Bert Stevenson, Representative Scott Bedke. Representative Wendy Jaquet and Representative Jim Clark were absent and excused. Ad hoc members present were Senator Brad Little, Senator Skip Brandt, Representative Pete Nielsen and Representative Mike Moyle. Representative Jack Barraclough and Representative Donna Pence were absent and excused. Legislative Services staff members present were Katharine Gerrity, Toni Hobbs and Ray Houston.

Others present included Linda Lemmon and Thorleif Rangen, Thousand Springs Water Users; Director Karl Dreher, Dave Tuthill, Thomas Grant, Hal Anderson and Phil Rassier, Idaho Department of Water Resources; Ted Dieh, North Snake Canal Company; Dan McFadden, Lower Snake River Aquifer Recharge District (LSRARD); Dick Rush, IACI; Dave Hovland, Idaho Department of Environmental Quality; Randy MacMillan and Larry Cope, Clear Springs Foods; John Simpson, BRS; Brian Wonderlich and Gayle Batt, Idaho Water Users Association; Michael Creamer, Givens Pursley; Greg Panter, Idaho Power; Tim Deeg, Brenda Tominaga and Lynn Tominaga, Idaho Ground Water Users; Mike Freese, Senator Larry Craig's Office; Justin May, Rangen, Inc.; Bert Bowler and Matt Yost, Idaho Rivers United; Jane Wittmeyer, IFA; Dustin Miller, IFBF; Dennis Tanikuni, Farm Bureau; Dar Oldberding, Idaho Grain Producers; Dan Chadwick, Idaho Association of Counties and Ken Harward and City of Eagle Mayor Nancy Merrill, Idaho Association of Cities.

After opening remarks from the cochairmen, **Mr. Hal Anderson** was introduced to discuss the Bell Rapids Purchase. He explained that, consistent with the Strawman Proposal, the Idaho Water Resources Board issued an invitation for offers to sell Snake River and tributary water rights on December 7, 2004, to qualified water right holders. The conditions that were included in this solicitation were similar to what was included in the previous year's lease arrangements with the Bureau of Reclamation and provided for leasing during 2005 with a purchase option.

Mr. Anderson stated that this solicitation resulted in approximately 65,000 acres and 165,000 acre-feet of water being offered. However, not all of the offers qualified. Bell Rapids was the largest offer with about 25,000 acres. During the 2005 legislative session HB392 was passed which provided a $21,300,000 short term loan, to be paid back to the General Fund with 3%

interest by July 2006, to purchase the Bell Rapids water rights. He added that there was also $7.2 million allocated to the Water Resource Board from the liquor tax to provide for the acquisition of water rights. This money was transferred to the Water Resource Board's revolving development account. The final asset purchase and sale agreement was completed on May 10, 2005. The final sales price was $24,375,000 with an initial payment of $16 million. The remaining $8,375,000 is payable interest free over a five year term. The General Fund loan repayment will be made with water rental fees charged to the Bureau of Reclamation for Salmon flow augmentation.

Mr. Anderson noted that the Water Resource Board is leasing 4,645 acre-feet of water submitted by water right holders that responded to the solicitation and on May 13, 2005, they approved a resolution to loan funds to the Idaho Ground Water Appropriators (IGWA) to lease water for 2005. IGWA is proposing to lease 63,055.5 acre-feet of water for $2,625,504.70. Repayment of this loan will be at 4% interest for a three year term. The loan agreement has been submitted to IGWA and, to date, signatures have been received from four of the five ground water districts involved.

The next step for the Bell Rapids purchase is to get the final sale agreement signed. The tentative closing date is June 15, 2005. Federal funding needs to be authorized so that the General Fund loan can be repaid but, in the meantime, a contingency plan for a bridge loan is being worked on in case federal funds are not available by July 1, 2006.

In response to a question from **Senator Little, Mr. Anderson** said that the collateral for the loans would be the assessment for each of the districts. He added that the ground water districts are not holding up the process in terms of getting the final district's signature submitted. He anticipates it will be forthcoming at any time. In response to a question from **Senator Stennett** relating to concerns about dust associated with the Bell Rapids property, **Mr. Anderson** said that from the Water Resource Board's perspective, they are only involved in the water right aspect, not the property.

Representative Nielsen asked if there is expected to be any delay in the federal funding. **Mr. Anderson** said that he was not sure how long it would take to secure the funding. The agreements being worked on, as far as he is aware, are for 2008. **Rich Rigby, Bureau of Reclamation,** stated that there is not enough money in the budget at this time. He said they are trying to round up money from all available sources to pay it off as soon as possible. He added that the goal is to pay it off in the next couple of years. The key is making sure they pay enough so that the state does not have to issue bonds.

Karl Dreher, Director of the Idaho Department of Water Resources, was the next speaker. He began by discussing the Bureau of Reclamation water exchange. The federal money that is being secured is for the purpose of renting 60,000 acre-feet of Bell Rapids water for use in flow augmentation pursuant to the Nez Perce agreement. According to **Director Dreher,** that quantity of water is not eligible for exchange against storage releases in the upper Snake River. This 60,000 acre-feet is on top of whatever storage releases would be available from that area for

flow augmentation. He explained that there is potential confusion between the 60,000 acre-feet that the Bureau of Reclamation is renting from the state and the approximate 65,000 acre-feet that the ground water districts are leasing using funding from the state. He clarified that the approximate 65,000 acre-feet the ground water districts are leasing is potentially exchangeable. This is one of the hold-ups in completing the exchange agreement with the ground water districts. Everyone involved, in **Director Dreher's** opinion, is basically in agreement with the terms that are set forth in the exchange agreement. Missing are the applications from the ground water districts or from the right holders to put water into the water bank. Also missing are the applications from the ground water districts to lease that water out of the water bank. **Director Dreher** said that until those are filed, there is no way to know exactly where the water is that is being leased and so the state cannot complete its evaluation process to see if that water is eligible for exchange with the Bureau of Reclamation. In addition, the Bureau of Reclamation cannot determine whether they are willing to accept that water in exchange for storage releases. Once those applications are filed, a number of things will fall into place.

Director Dreher explained that the basic premise relating to whether water is exchangeable or not is that if the water would have been in the river anyway, it would not be eligible for exchange. It is his understanding that whatever water will be eligible is presently in the river and presumably the Bureau of Reclamation will take credit for flow augmentation for whatever part of that water is in the river during the window for which they are required to provide flow augmentation. The exchange will be against storage water (powerhead water) that will be made available through use of the rental pool. The scheduled release of that powerhead water, according to **Director Dreher,** is set to begin June 20, 2005. He explained that is the period of time left to complete these remaining matters. If that is not done by June 20, 2005, the Bureau of Reclamation could choose to begin releasing water out of the powerhead space down the river. If the exchange is in place and functioning, that physical release would not take place and the ground water districts would begin to acquire interest for use for other purposes relating to that powerhead space.

Representative Nielsen asked why the applications are not in. **Director Dreher** said that he was not sure but said that it is either the right holders or ground water districts that have to make the applications and the arrangement is between those two groups. **An audience member** stated that part of the applications have been completed.

Director Dreher explained that much of the water the ground water districts are seeking to use is water the Bureau of Reclamation has previously leased so it does meet part of the eligibility criteria. Once this is figured out, it will not be much of a problem. The ground water districts are aware of the process and the need for applications. He stated that part of the problem is that water right holders are hesitant to apply to put their water into the water bank until they are sure they will be paid. The state will also be hesitant to loan the money until it knows that the water is eligible. In his opinion, for those people that have made the decision not to plant and plan to lease their water, there is nothing that would prevent them or the ground water district from filing the application to put the water into the water bank with a condition that the water could not be leased out of the water bank until they are paid.

Representative Bedke asked how much the state is obligated to provide for the 427,000 acre-feet of water. **Director Dreher** said that none of that is allocated because it is part of the new rental pool procedure.

In response to a question from **Representative Stevenson, Tim Deeg** stated that the reason for some of the delay, in his opinion, is that the formality for going through the applications has been an additional burden for the ground water districts. He pointed out that this is breaking new ground for ground water districts to lease high lift water so it is taking some time. He said that they should be able to meet the June 20, 2005, deadline.

Director Dreher, in response to a question from **Representative Nielsen,** said that there is no provision in the 427,000 requirement for an adjustment to the April 1 availability deadline due to the amount of rain the state has received. He added that the rain will help the Bureau of Reclamation get closer to the 427,000.

Representative Bedke asked whether the agreement to lease the 63,055.5 acre-feet of water for approximately $2.6 million, or $41.00 an acre foot as noted in the previous presentation, includes an option to buy. **Director Dreher** said that it does include an option to buy. He stated that he did not know how much the option payment was. **Representative Raybould** added that it would be up to the individual water user whether or not to put water into the water bank. There was 3% of their allotment put into the water bank to cover agreements but due to the rain and additional storage, there probably will be water users that have additional storage that they may like to put into the rental pool that would enhance the amount the Bureau of Reclamation could rent. In response to a question from **Representative Bedke, Mr. Rich Rigby** said that Bureau of Reclamation has an objective to reach the 427,000 acre-feet of water this year. The second priority is to complete the lease of the Bell Rapids water. **Senator Coiner** clarified that there is a provision in the water pool regarding procedures that allows for private leases. So the Bureau of Reclamation would have the option to lease water from individual water users or companies and then this water would go to the water bank.

Senator Burtenshaw asked if the reservoir were to fill, would there be any relief to the ground water users who, by right of the call, had to furnish so much water. **Director Dreher** stated that, in his opinion, in spite of the rains, the level of conflict that exists has not diminished. There is a provision in his order that was amended on May 2, 2005, that provides that water supply conditions will be closely monitored through the coming irrigation season and, based on water supply conditions, an adjustment of the amount required can be made. He stated that, as of June 10, 2005, we have not seen enough of the irrigation season to warrant such an adjustment and the initial requirements still stand.

Mr. Tim Deeg, in response to the earlier discussion regarding applications from ground water districts and water users, reported to the Committee that the applications were submitted to the Department on Wednesday. The Department confirmed the receipt and determined that the applications were inadvertently sent to someone who was on vacation this week.

Mr. Wayne Hammon, Farm Service Agency, was introduced to give an update relating to the Conservation Reserve Enhancement Program (CREP). He explained that on April 12, 2005, Governor Kempthorne submitted a proposal to the USDA secretary. The basic premise remains the same as discussed last year. The plan is to voluntarily retire 100,000 acres of irrigated crop ground. The proposal will cost the state $74 million over the life of the program which is a 15 year span. Of that, $47 million is in existing funds either at the Idaho Department of Water Resources, DEQ, Fish and Game etc. and $27 million will be new money over the 15 years including 3 FTEs and $3 million in cash payments to program participants through legislation that was approved this year.

On May 17, 2005, the Attorney General's Office received the first response to the proposal from the national Farm Service Agency (FSA) requesting clarification relating to about 30 different aspects of the proposal, most involving technical issues. **Mr. Hammon** said that the CREP working group executive committee has met and assignments have been made as to who will prepare the responses to the different issues.

FSA's response includes two significant issues with regard to the proposal.

The first deals with monitoring. FSA wants to know how the state will prove to the national government that water is being saved. **Mr. Hammon** noted that Idaho Department of Water Resources does have a plan for that outlined in the proposal. The FSA wants more detail.

The second issue is more troubling. **Mr. Hammon** explained that the FSA is requiring the State of Idaho to include more funding for the program in actual cash. The current proposal suggests a $3 million contribution from the state. The FSA is suggesting that the state contribute 10% of the total cost or about $23 million.

Mr. Hammon stated that the working group hopes to be able to address all the other 29 issues and reiterate that the $74 million over the life of the project is more than the required 20% in-kind match with $3 million in cash and see where the negotiation might lead. In his opinion, once all of the other concerns are addressed, this may be a negotiable item.

The target for having the redraft of the proposal completed is by the end of June.

Mr. Hammon said that on June 6, 2005 the first draft of the programatic environmental assessment was received and is being reviewed. In his opinion, from reading the summary, it looks good and it looks like the program can achieve its goals of water savings and improved wildlife habitat. This should be open for public comment by July 1.

In response to a question from **Representative Stevenson, Mr. Hammon** explained that Nebraska has a program very similar to Idaho's proposed plan. He noted that they were required to put in about 15% of the total cost of the program in cash. This came from a variety of sources and is going to payments to producers and to cover the cost of seed to implement the program.

Senator Williams asked if the program was on track. **Mr. Hammon** said yes, and the hope is for a sign up period this fall. Nebraska was able to begin their sign up period within one month of the agreement being signed and it is **Mr. Hammon's** belief that Idaho can do the same. In his opinion, if the redraft is back to FSA by the end of June, and an agreement can be worked out over the money, there is no reason the program cannot begin this fall. He said it would be important to have the land owners know as early as possible before they start getting ready for spring planting.

Senator Stennett asked whether the plan could be altered if it is determined that too much money is being required for the state to pay. He asked if producers could put up some of the money. **Mr. Hammon** said that option could be explored. In this first submission, an estimate on the amount the farmers would have to pay to enroll the land is included and they were told the farmer's out of pocket expense cannot be included as part of the state match. He suggested negotiating a better price with FSA before exploring such an option.

In response to a question from **Senator Little, Mr. Hammon** stated that the amount of wet water this plan is aiming to produce is 200,000 acre-feet. There is a provision in the plan to allow the land owner three years to get everything established but the national FSA policy provides for twelve months.

Mr. Hammon stated that tributaries on the Big Lost River are the one area in which surface water is being considered. The plan was tailor made for this area just as it was tailored to address problems in Elmore County.

In response to a question from **Representative Bedke, Mr. Hammon** said that the number of acres that will be eligible or available in each county was not included in the original proposal but it will be in the redraft. He explained that the statute limits dry land CRP and CREP program land to 25% of the crop land in any county. Today, Power County has 29% of the county enrolled in dry land CRP so they would not be eligible for CREP. He added that this 25% cap is controversial nationwide.

The proposal includes a ranking sheet that no one likes. The national office commented that it would be better not to use the ranking sheet and take land on a first come-first serve basis. The national office also requested the removal of the preference given to larger pieces of land. They feel that this is discriminatory against farmers with smaller acres.

Representative Bedke stated that it was his understanding that the retirement of the 100,000 acres was supposed to happen where it would do the most good within the context of the current water issues. He sees that as a problem for a farmer in an area of less impact due to the fact that they will not know if any of these acres will be available and will not be able to plan ahead. The issue, in his opinion, is not whether the ranking sheet is environmentally or producer friendly, it is a logistics issue. He asked how that will be addressed. **Mr. Hammon** said that national office also wanted further explanation of how the process worked; who takes application, how does it go to Idaho Department of Water Resources and how people are notified. Under this system

everyone learns whether their offer was accepted the same day. This is also how the national CRP program works. In **Mr. Hammon's** opinion, he feels that not all of the 100,000 acres will be located in the area with the most water issues. He thinks there will be enough to go around.

Director Dreher was the next speaker to address the committee. **Director Dreher** explained that the Idaho Department of Water Resources was given spending authority up to a cap of $1.2 million subject to adjustment annually by JFAC to provide funds to monitor ground water conditions on the Eastern Snake River Plain, to provide on-going funds for updating the ground water model, provide on-going funds for updating the surface water model and to provide funds for updating water right accounting of both surface and ground water along the Eastern Snake River Plain. The appropriation was for spending authority only with the intent that the moneys that would be spent be allocated to water districts that administer water rights from sources that are hydrolically connected to the Eastern Snake River Plain Aquifer. It was also intended that these funds be allocated in proportion to water use in those various water districts. **Director Dreher** noted that this is a new area for the Idaho Department of Water Resources and specific items like this have not previously been identified.

Director Dreher went on to explain the initial estimate for the $1.2 million. He explained that $600,000 of the $1.2 million was designated for monitoring. This monitoring cost is initially broken down as follows:

, $200,000 to identify or establish dedicated monitoring wells for annual measurements of ground water levels;

, $75,000 annually used to conduct mass ground water level measurements, probably not more often than once every 5 years;

, $125,000 to establish and collect continuous spring flow measurements for select sentinel springs;

, $75,000 to continue to make return flow measurements; and

, $125,000 to perform annual acoustic Doppler current profiling or install additional stream gages for reach gains/losses.

Director Dreher noted that $425,000 of the $1.2 million is to be used for maintenance and updating of the Eastern Snake Plain Aquifer Ground Water Model, broken down as follows:

, $125,000 used annually to update the water budget (recharge and discharge);

, $150,000 to develop and apply methodology to annually determine evapotranspiration for irrigated lands; and

, $150,000 to develop and apply improved methodology for quantifying tributary

underflow.

$125,000 of the $1.2 million was set aside for maintenance and updating of water rights accounting and other modeling tools as follows:

, $50,000 to update Water District 01 water rights accounting to provide improved visualization and transparency, near real-time output, and an improved link with the Eastern Snake Plain Aquifer ground water model; and

, $75,000 to evaluate and implement other water modeling tools to assist with conjunctive administration and management of surface water and ground water.

Director Dreher explained that the final $50,000 of the $1.2 million was set aside to continue the Eastern Snake Plain Aquifer technical advisory committee.

He added that it is not intended that the water districts include in their budgets moneys for non-essential activities. The activities that are intended to be funded are those that are essential for monitoring, maintenance of the models, and water measurement.

Representative Stevenson asked if they planned to continue using the University of Idaho research group in the area of methodology to determine evapotranspiration. **Director Dreher** said that the principal researcher at the University of Idaho that has been involved is active on the technical advisory committee.

Director Dreher clarified that the money will be available in 2006.

Director Dreher's next presentation addressed the 2005 water supply as compared to the water supply in 2004. His presentation included a number of graphs which will be available as an attachment to these minutes at: www.legislature.idaho.gov/

Director Dreher explained that for Lewis Lake, precipitation was below average, the snow/water equivalent was below average, and runoff occurred earlier. He added that this shows that the rain that occurred in April and May did not significantly effect the higher elevation locations.

Another chart in the presentation shows that the April/May precipitation in the Upper Snake River Basin in 2005 was much higher than 2004 as well as being above the 1971-2000 average. **Director Dreher** noted that generally the upper basin location deviations were less than those at the lower elevations. This means that because of the large amounts of rain received, especially in Twin Falls and Burley, irrigation diversions were much lower than normal for this time of year. **Director Dreher** said that some systems in the Upper Snake have only recently been turned on to charge. He explained that this means that since there wasn't as much demand to divert under natural flow water rights, the storage water rights remained in priority and water was able to be stored in significant amounts.

Director Dreher said that the reservoir storage in American Falls, as these spring rains occurred, actually jumped above the long term average. Storage is also well above 2004. The situation is similar for storage in Palisades Reservoir. Jackson Lake storage is above 2004 but not above the 30 year average. In his opinion, Jackson Lake will come a lot closer to filling than it did last year. **Director Dreher** stated that overall in the Upper Snake River Basin the total amount of water in storage is about 83% of capacity.

Director Dreher's presentation included other areas of interest such as the Big Lost River Basin, the Big Wood River Basin, the Bear River Basin, the Boise River Basin, the Payette River Basin, the Salmon River Basin and Northern Idaho River Basins. The Big Lost, Big Wood and Bear River Basins all showed significant increases in storage water due to the spring rains that have been received.

Director Dreher explained that the Boise area received above average precipitation from April/May 2005 resulting in higher storage through June 8, 2005 than 2004. Unfortunately, due to the fact that the snow/water equivalent and subsequent melt was significantly lower in 2005, **Director Dreher** noted that the Governor has approved the designation of Ada County as a drought emergency area. Conditions are better because of the rains but shortages are anticipated.

Director Dreher stated that Northern Idaho areas do not look this good due to the fact that they did not benefit from the rain storms to the same extent as the southern part of Idaho. The snow/ water equivalent in the Salmon River Basin was significantly lower than 2004. In his opinion this is going to make flow conditions in the Salmon River challenging.

Senator Coiner asked if ground water levels have changed due to the rain that has been received. **Director Dreher** said that undoubtedly there has been some change in ground water levels but the response is harder to detect than with surface water. In his opinion, it would be premature to look at ground water levels at this time. He stated that on an average annual basis from the year 1980 through 2001, the amount of recharge to the Eastern Snake Plain from precipitation was 2.2 million acre-feet. He noted that in a year like 2005, that has seen reduced demand and increased precipitation, in his opinion, ground water levels will respond.

In response to another question from **Senator Coiner, Director Dreher** explained that the water for Jackson Lake comes from other subbasins, such as Lewis Lake, that benefitted from some of the storms that did not make it to Jackson Lake. He said that other stations around Jackson show a positive deviation.

Senator Williams asked whether it was too early to see if there is any increase in spring flow. **Director Dreher** said that there will be some increase in spring flows but it is too early to measure. It will take about six months to see this.

Senator Stennett asked, recognizing Idaho Power's rights, how much recharge could have been done if everything had been in place. **Director Dreher** said he did not know but it would be

interesting to do a hypothetical. He added that in years like this, recharge is feasible but the question is how to do it while at the same time protecting Idaho Power's rights.

Mr. Phil Rassier, Deputy Attorney General for Idaho Department of Water Resources, was the next speaker. He gave an update on the status of curtailment orders and mitigation efforts. His entire power point presentation will also be available as an attachment to these minutes at: www.legislature.idaho.gov/

Mr. Rassier explained that the delivery calls made by Rangen, Inc. made on September 23 and October 6, 2003, gave rise to the activities of the interim committee last year. The initial call was for administration of all junior water rights impacting Rangen's water right numbers 36-15501, 36-02551 and 36-07694 used at fish hatchery facilities near Hagerman, Idaho. **Mr. Rassier** stated that the Director issued his order on that delivery call in the spring of 2004. Curtailment was averted when the State of Idaho and the parties involved entered into the Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement for 2004 on March 20, 2004. The agreement expired on March 15, 2005. At the time the agreement was signed, the Legislature directed the Natural Resources Committee to look at ways that water conditions on the Eastern Snake Plain could be addressed, as well as other aquifers, to see what could be done.

During the same time period, the Idaho Department of Water Resources and its contractors completed work on a reformulated and recalibrated ground water model for the Eastern Snake Plain Aquifer. The reformulated ground water model includes significant refinement allowing for the allocation of calculated depletions to springs in the Thousand Springs area to be apportioned among six separate spring complexes, including the Curren Spring from which the Rangen rights are diverted.

Due to the fact that the ground water model relied upon for the Director's March 10, 2004, order no longer represented the best science available, the Director rescinded the order on March 14, 2005, and issued a second amended order in response to the Rangen call on May 16, 2005, which denied the Rangen call. **Mr. Rassier** explained that the Director, relying upon the reformulated model, determined that the delivery call would be futile because curtailing all affected ground water rights junior in priority to July 13, 1962, would increase the spring discharge in the Thousand Springs to Malad Gorge spring reach, which includes Curren Spring, by a total average amount of only 0.4 cfs at steady state conditions.

Mr. Rassier said that there is also a call that was filed by seven canal companies and irrigation districts in the Twin Falls area, known as the Surface Water Coalition, in January, 2005. The Director responded to that call initially with an order in February. **Mr. Rassier** added that the petition requests several types of relief including:

, Curtailment of junior priority ground water rights within Water District No. 120;
, Curtailment in American Falls Ground Water Management Area (GWMA);
, Administration of water within areas of the Eastern Snake Plain that are not in a water

district or GWMA;
, Designation of the Eastern Snake Plain Aquifer as a GWMA.

According the **Mr. Rassier,** the Director divided the requests into separate contested cases and he denied the request for designation of the Eastern Snake Plain Aquifer as a ground water management area on February 14, 2005.

On April 19, 2005 the Director issued an order responding to the delivery call for curtailment of junior priority ground water rights within Water District 120. In response to the delivery call, he determined that there was material injury being caused to the petitioning members of the Surface Water Coalition. The Director issued an Amended Order on May 5, 2005. The Amended Order required consumptive ground water rights in Water Districts No. 120 and 130 with priority dates of February 27,1979 and later, to provide replacement water to the members of the Surface Water Coalition for depletions to reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage or be curtailed.

Based upon water supply forecasts available at the time of the Amended Order, the Director determined that the material injury represented by water shortages plus storage carryover shortfalls for the Coalition members caused by junior priority ground water depletions in 2005 would be equal to 133,000 acre feet, over time.

The Director further determined the amount of that 133,000 acre feet of depletion over time that would be experienced as shortages by the Coalition members in 2005 and thus required to be provided through mitigation in 2005 was 27,700 acre feet. **Mr. Rassier** said that the ground water users have responded by submitting a replacement water plan.

The next water call was made by the Blue Lakes Trout Farm, Inc. on March 22, 2005. The Director's order that was issued May 19, 2005, found material injury as a result of ground water depletions in the amount of 33 cfs and allowed that to be addressed over a five year time period with a minimum of 10 cfs required to be provided through mitigation this year.

Other pending deliver calls include:

, Clear Springs Snake River Farm
, Crystal Springs Trout Farm
, Billingsley Creek Ranch
, John W. Jones Ranch

Representative Stevenson asked if any credit was being given to some of the sites along the North Side Canal that have been used as recharge and water management sites for the water that has been used. **Mr. Rassier** said that the ground water users have been asked to resubmit or respond further to the Director's last order. In **Mr. Rassier's** opinion, the reason credit was not given for this was because the incidental recharge that occurred at these sites could not really be documented and it could not be determined how those activities were different from the normal

activities of the operation of the canal companies.

Representative Stevenson distributed a handout containing recommendations regarding aquifer recharge from the Idaho Water Alliance. He explained that the Idaho Water Alliance is a group that has been involved with recharge for about ten years. Membership includes cities, counties and ground water districts. The recommendations include:

- It must be determined where the water for aquifer recharge will be obtained.
- Engineering studies must be completed which define the recharge potential of a site and also the cost.
- Funding must be identified.
- There must be a legal entity responsible for conducting managed recharge.
- A committee representing principle water interests within the water user community should be established to advise the legislative interim committee.
- It must be recognized that the canal companies are key to getting water to ground water conversion sites and recharge sites and that canals are a primary provider of recharge to the aquifer through canal leakage.

Mr. Brian Patton, Idaho Department of Water Resources, was introduced to discuss the implementation plan for managed recharge of the Eastern Snake Plain Aquifer. His complete presentation is available as an attachment to these minutes at: www.legislature.idaho.gov/

Mr. Patton explained that the recharge implementation plan is based on several factors including:

- Ongoing recharge site studies by Idaho Department of Water Resources personnel.
- The need to develop a recharge program that achieves desired results with minimal risk.
- Inclusion of ground water-to-surface water conversion projects as part of the recharge program.

According to **Mr. Patton,** throughout 2004 and 2005, Idaho Department of Water Resources personnel have continued to evaluate proposed recharge sites on the Eastern Snake Plain. The results of these ongoing evaluations indicate that the 1999 Recharge Feasibility Report probably overstated the recharge capacity of many proposed recharge sites.

One example is the Milepost 31 Site Characterization. The 1999 Recharge Feasibility Report estimated the recharge capacity at 1500 cfs. However, upon further investigation, it has been determined that there are several vertical feet of fine grained soils consisting of 25% clay and 75% silt present in the basin. This is material with very low permeability. Using soil permeability calculations and operational experience of recharge done in fine grained soils, the actual recharge capacity would be between 20 cfs and 200 cfs with active soil management. Drilling logs from monitoring wells indicate massive unfractured basalts to a depth of 300 ft below the site.

From these site studies, **Mr. Patton** said that they have learned that fine grained soils present a challenge for successful, long-term managed recharge. Soil clogging is the leading detrimental factor affecting recharge capacity. Fine grained soils present in many proposed recharge sites can clog relatively quickly. This leads to the need to locate recharge sites in areas with highly permeable soils. **Mr. Patton** explained that these types of sites are relatively few and far between. He added that there are several blocks of high permeability soil located on state ground.

Conclusions based on the results of the site studies are that the use of natural basins as outlined in the 1999 Recharge Feasibility Report has low potential for success. We need to develop recharge sites that have long-term sustainable recharge capacities. We should design and construct infiltration basins with known recharge capacities. Recharge sites should be designed to allow for the management of soils within the infiltration basins to prevent soil clogging.

Mr. Patton went on to discuss proposed recharge implementation projects for 2006. These include:

, **Janss Project**
Located approximately 6 miles west of Wendell
300 acre-feet of reservoir storage for conversion project to offset ground water pumping
Injection wells with sand filter to recharge 5 cfs
Estimated Cost - $150,000

Mr. Patton said that this site is being proposed as a site from which ground water pumpers can draw from to offset ground water pumping. This would include an injection well component to allow for recharge.

, **W-Canal Project**
Located on state land about 3 miles east of Wendell.
Recharge project with up to 120 cfs capacity.
Estimated Cost at full development - $2 million.
The Department has applied for a Water 2025 grant to construct the first phase of the project (25% of full capacity).
If 2025 funding is received, the first phase could be operational by the spring of 2006.
Estimated cost of first phase - $520,000.

, **Sugar Loaf Retrofit**
Increase recharge capacity at the Sugar Loaf site.
New facilities to deliver water to this site were built in 2002, however the actual recharge capacity is just a few cfs.
Complete investigation by Fall 2005.
If additional capacity can be developed, prepare plans and specifications by Spring 2006 and construct when funding becomes available.

Mr. Patten said that other recharge project work proposed for 2006 include beginning geotechnical investigations at the K-Canal site and if favorable, proceed with plans and specifications and NEPA compliance. The Department would also like to hire an independent consultant to review findings at the Milepost 31 site.

Mr. Patton stated that it is believed that ground water-to-surface water conversions should be part of the program, or at least closely coordinated with it, due to the similar hydrologic benefits to the aquifer. It is also believed that conversions may be more economical than recharge due to reductions in pumping costs. Because of that cost savings, the ground water users that directly benefit may be able to assume obligations for operation and maintenance of the projects.

Approximately 6,000 acres of potential farm-level conversions have been identified adjacent to the Milner-Gooding Canal. These conversion projects would be similar to those done under the North Side Canal at an infrastructure cost estimated at $200/acre.

Several large scale conversion projects have been identified for future consideration. These would yield a fairly large reduction in ground water use, but also have high construction costs. Those projects for future consideration include:

A&B East: 4,222 acres
- Pump plant & pipeline from MID Main Canal
- Estimated cost: $3 Million

A&B West: 4,286 acres
- Pump & pipeline from Milner-Gooding Canal
- Estimated cost: $4 million

Hazleton Butte: 9,120 acres
- Pump plant & pipeline from Milner Dam
- Estimated cost: $6 Million

Mr. Patton said that they would also continue to investigate potential conversion projects in Basin 110 and 120.

Representative Raybould stated that there is a large facility north of Idaho Falls that attracted his attention regarding possible recharge sites. A group dug a gravel pit that is an estimated 20 to 30 acres in size and about 50 or 60 feet deep. He said that these types of pits are located all along the freeway wherever the state has built interchanges to the interstate or state highway system. These are almost all gravel that would provide good infiltration for water into the aquifer as well as a good filter for the water for environment concerns. He suggested that Idaho Department of Water Resources take a survey of where these gravel pits are located and how close they may be to canal facilities and do a cost comparison with those that are presently proposed **Mr. Patton** said they would take a look at these types of sites.

In response to a question from **Senator Little, Mr. Patton** explained that there is no difference, in terms of net hydrologic benefit to the aquifer, between putting 10,000 acre feet into the

ground through a recharge project or whether 10,000 acre feet is delivered directly to ground water pumpers and they stop pumping. The net effect would be exactly the same. He added that direct diversions are in many cases more cost effective due to the reduction in power load to the ground water users.

Senator Stennett asked for clarification of Water 2025. **Mr. Patton** explained this program has been in place for two years through the Bureau of Reclamation. They allocate money for projects with a primary goal of lessening conflict between water uses around the western states.

In response to another question from **Senator Stennett, Mr. Patton** said that the large conversion projects he discussed have a total acreage of about 17,000 acres and the net hydrologic benefit would be about 35,000 acres in reduction in ground water use. **Senator Stennett** said that the cost to convert seems quite high. He asked if there is a cut off point as to when a project is not worth converting. **Mr. Patton** said there was no rule of thumb. He said they are looking for the most cost effective projects.

Senator Stennett asked if natural recharge will also be reviewed. **Mr. Patton** stated that would be looked at through the CREP program.

Senator Williams asked what regulations a person has to go through to qualify a site as a recharge site. **Mr. Patton** explained that pursuant to rules promulgated by the Department of Environmental Quality, all recharge operations, except injection wells, must operate under a DEQ monitoring plan. Idaho Department of Water Resources is working with DEQ on this but it has been very time consuming. **Mr. Patton** said there is no time frame as to how long qualification and approval of a monitoring plan will take.

Mr. Hal Anderson, Idaho Department of Water Resources, was the next speaker to address the Committee regarding institutional barriers to managed recharge. This presentation, prepared by **Mr. Jerry Rigby, Idaho Water Resources Board,** will also be available as an attachment to these minutes at: www.legislature.idaho.gov/

Mr. Anderson stated that the implementation of managed recharge is much more complicated than was originally anticipated. This does not mean that it is unattainable, it will just require more diligence and will be more costly.

Mr. Anderson explained that the Eastern Snake Plain Aquifer Conceptual Settlement Framework (better known as the Strawman Proposal) identified a series of items to accomplish the objective of effectuating a net change in the water budget for the Eastern Snake Plain in the neighborhood of 600,000 to 900,000 acre-feet annually. Water supply project targets included the state seeking to acquire 200,000 to 260,000 acre-feet of natural or storage water rights above Hells Canyon dam from willing sellers. **Mr. Anderson** noted that acquiring the Bell Rapids water is part of this target.

He said that the CREP program is another component of the Strawman Proposal with about

another 150,000 to 200,000 acre-feet of water. A third component is managed recharge. This is an opportunity to adjust supply and demand.

Mr. Anderson stated that implementation of managed recharge faces a number of constraints that the state is going to have to address. He summarized the constraints as:

, Water Right injury issues.

This constraint involves hydropower rights owned by Idaho Power as well as those owned by canal companies in Milner dam. It also involves other water right issues associated with the diversion of water for managed recharge projects.

, Supply of natural flow and storage water.

As was mentioned earlier, because of the water situation this year, there was potential opportunity for managed recharge. Water years like this are when the infrastructure for managed recharge needs to be in place.

, Environmental compliance at recharge sites and with Snake River flows.

This constraint includes meeting federal requirements for ESA and NEPA. **Mr. Anderson** added that Idaho Fish and Game is concerned with how diverting water for managed recharge might affect sturgeon and the fisheries in the middle Snake River.

, Entity responsible for conducting managed recharge.

Currently, the entity would be the Idaho Water Resource Board.

Mr. Anderson went on to discuss the Idaho Water Resource Board's role in managed recharge. He stated that the state water plans says "it is the policy of Idaho that managed recharge be encouraged, pursuant to state law."

The Water Resource Board has been involved in recharge activities for some time. In 1995, the Fifty-third Legislature appropriated $945,000 to the Idaho Water Resource Board to purchase water for the purpose of providing artificial recharge of the Snake River Plain Aquifer. Not all funds were used during the 1995 irrigation season, so with legislative (JFAC) approval, remaining funds have been used for water rental, conveyance fees and recharge facilities in Water District 01.

The Board filed a 1998 priority date water right application for recharge purposes on 19 canal systems in Water District 01. Due to protests, the Board requested, and was granted by the Director, a delay in processing applications to appropriate state waters.

The Board accepted water rights for recharge from Snake River, Big Wood and Little Wood

Rivers from Lower Snake River Aquifer Recharge District. In FY2002, the Legislature appropriated $60,000 to the Board for the construction of the Sugar Loaf recharge project. This money was contracted back to the Northside Canal Company to actually do the work.

In 2005, the Legislature appropriated $7.2 million dollars to the Board for water projects and to lease water rights. A 2025 grant request was submitted to the Bureau of Reclamation for a recharge project on the Northside system which, if accepted and given Board approval, will use $210,000 of the $7.2 million as a state match requirement.

In summary, **Mr. Anderson** stated that according to **Mr. Jerry Rigby, Chairman of the Idaho Water Resource Board,** the Idaho Water Resource Board supports and continues to be involved in managed recharge projects. The Board is willing to take a more responsible leadership role for recharge implementation, if supported by the Governor, water users and funded by the Legislature.

Senator Schroeder asked if there has ever been a contamination of an aquifer in an attempt to do managed recharge. **Mr. Anderson** said that he was not aware of this ever happening.

In response to another question from **Senator Schroeder, Mr. Anderson** said that above ground storage was being considered for smaller projects.

Senator Schroeder asked if water is left in a the Cascade Reservoir in the future, how will that impact what is being planned for the Eastern Snake Plain and the Boise area. **Mr. Anderson** said that is a big question. This involves the Prior Appropriation Doctrine and if water is going to be redistributed, a mechanism has to be in place to provide mitigation to those that could be injured.

Senator Little asked if there has been any analysis done regarding what would happen if canal companies stopped fixing the leaks in some of the lined canals. **Mr. Anderson** said that has been discussed.

Representative Raybould said that there are water right holders that do not have winter water savings so they are precluded from running water after November 1. In his opinion, this may have to be reviewed because running winter water has been done for ground water recharge, stock watering and other things historically since the early 1900s. He suggested revisiting those rules to find out why this process was changed.

Representative Stevenson, in response to **Senator Little's** question about not fixing leaks in canals, said that in a water short year, lining the canals and making sure they do not leak is very important to making sure someone has enough water at the end of the season.

Mr. Anderson said that the state is at the point in time where everyone needs to be open to creative thinking. There are opportunities that exist but they may be different than what has been done in the past. In his opinion all options should at least be considered.

Mr. Clive Strong commented that **Mr. Patton and Mr. Anderson's** presentations show that managed recharge has been discussed for many years. Other than the projects **Mr. Anderson** explained, a concerted effort has not really been taken to make the determination of whether managed recharge is a viable part of the long term plan. Under this action plan, the idea would be to work on two items.

The first would be to start with two pilot projects. One of these is the Janss Project. This is an area that has a severe water shortage and if the project works, it would have significant benefits to the users in that area. The project is also on private land so the state would avoid some of the federal entanglements some other projects might have. **Mr. Strong** said the other project is located on state endowment land near Wendell in an immediate area to provide benefits.

He said that it appears that the state has gone as far as possible with studies and it is time to begin actual projects. The proposal is to move forward with these two pilot projects and see it the idea of managed recharge will be part of the long term plan. **Mr. Patton** has stated that more constructive recharge sites are needed. **Mr. Strong** noted that this means more cost, but it also means more flexibility to be able to put the recharge sites where they will do the most good. He said that the proposal before the Committee is to be able to move forward on those projects to see if they are viable and at the same time being able to begin serious discussions to work through the institutional problems. This will involve bringing representatives from water user groups, the Legislature, and the Idaho Department of Water Resources together to meet with the Bureau of Reclamation and Idaho Power to get real answers to the questions of what institutional barriers are insurmountable and whether the projects are still viable.

Representative Raybould asked if this interim committee had the authority to appoint a subcommittee to move the process along. **Mr. Strong** said this Committee could appoint a subcommittee of legislators to help but the subcommittee would also need representatives from local constituencies, water users, spring users and others that will actually be affected by these projects.

Representative Raybould made a motion that the interim committee authorize the cochairmen, in conjunction with Mr. Strong and Director Dreher, to appoint a subcommittee to study the suggestions that Mr. Strong discussed above.

Representative Stevenson asked if someone from the Water Resource Board would be on the subcommittee. **Representative Raybould** said yes, as would someone from Idaho Power, etc.

Representative Stevenson seconded the motion and it carried by voice vote unanimously.

Mr. Dave Tuthill, Idaho Department of Water Resources, was introduced to discuss the Idaho Department of Water Resources role relative to domestic water use based on what the interim committee looked at last year. This presentation is also available as an attachment to these minutes at: www.legislature.idaho.gov/

He said that for the context of this discussion, domestic use refers to the small or de minimis uses. He added that the term "municipal use" normally refers to systems of 10 or more users and is not included in his discussion.

Mr. Tuthill said that regarding guidance for existing domestic use there are constitutional provisions, statutory provisions and provisions for handling water short areas. Article XV, Section 3 of the state constitution states in part that priorities (for condemnation) are:

- Domestic
- Mining (in mining districts)
- Agriculture
- Manufacturing

He clarified that relative to the delivery of water rights, domestic rights do not take preference, normally it is first in time, first in right. When it comes to condemnation, domestic users can obtain water from the other uses.

Section 42-111, Idaho Code, defines domestic use as:

- (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

Mr. Tuthill explained that for domestic uses from surface water sources a water right is required. Any new appropriation requires an application for permit. In other words, if a person wants to divert water from a spring for their household, they are required to get a water right and to make application for a permit. However the SRBA does not require recording of de minimis domestic surface water rights.

Mr. Tuthill noted that a well is different. If someone wants to drill a well for a household, they can do that anywhere in the state. Section 42-227, Idaho Code, provides that for wells drilled for domestic purposes, an application for permit to acquire a water right is not required. Instead, rights to ground water for such purposes may be acquired by withdrawal and use. The uses of a single household domestic use earns a water right just by diverting for beneficial use. The first day of use, the water right is developed. The SRBA does not require recording of de minimis domestic ground water rights.

In a water-short area, domestic exemptions provide opportunities to appropriate water in otherwise closed water systems. For people in critical ground water areas, ground water management areas and moratorium areas, domestic uses or combinations of them are still

allowable for defined uses.

Mr. Tuthill explained the quantification of domestic uses as follows:

, Single in-house use
-Typical use is less than 500 gallons per day (depends on family size, cost, etc.)
-Non-consumptive
-Typically 0.6 acre-feet per acre per annum is allowed

, Out-of-house use
-Up to 13,000 gallons per day
-Can be highly consumptive
-Can irrigate up to ½ acre
-Cumulative impact can be significant

Mr. Tuthill noted that Idaho has on record more that 69,000 domestic water rights. Use in the Eastern Snake Plain Aquifer is about 3% of the total diversion rate of water or 912.1 cfs. Municipal use in this area is only 759.0 cfs. The domestic use is more significant in the northern region relative to the total number of water rights.

Last year, the Mountain Home Working Group recommended that the Legislature analyze the existing definition of domestic use in Section 42-111, Idaho Code, and the associated exclusion from the requirement to apply for a water right contained in Section 42-227, Idaho Code, to determine whether there is a need for revision. The reason for this is because the Mountain Home area has a declining aquifer, where increasing domestic diversions contribute to the decline.

In addition, last year, this interim committee discussed the impact of domestic wells being used to irrigate more than one-half acre and the associated cumulative impact. **Mr. Tuthill** said that has not been defined at this point. He said that the adjudication process is serving to quantify the existing rights so when the adjudication of the basin is complete, it should show which domestic uses are being used excessively. He added that the Idaho Department of Water Resources staff spends a tremendous amount of time resolving questions about domestic uses and that it would be very easy to focus solely on domestic issues due to high counts, thus reducing focus on the majority of water deliveries.

Mr. Tuthill said that the impact of full water right processing for domestic uses would be large. Currently the four Idaho Department of Water Resources Regional Offices have between one and three staff members who review new water right applications. These staff members are already overwhelmed with existing work loads. Requiring full water right processing for all domestic wells (including advertising) would require several additional technical and clerical positions at each regional office.

Mr. Tuthill explained the suggested action plan for addressing known domestic use issues and

problems as follows:

- Include domestic use in the planning for adjudicating Northern Region Basins;
- Include domestic use in requirements for mitigation, due to cumulative impacts;
- Review mechanisms for cost-effective means of assessing mitigation for de minimis domestic uses;
- Do not require full water right processing for de minimis domestic uses from ground water – use well drilling permits to identify new uses;
- Consider initiating a review of other states regarding exempted maximum daily limits (13,000 gallons per day is generally higher than other states); and
- Seek appropriate staffing for enforcement of domestic use limits for existing water rights.

Representative Raybould asked where municipal wells fit into this. He asked what effect calls on irrigation wells have on municipal wells and what would they have to do to keep the well operating. **Mr. Tuthill** said that this is further down in the mitigation process but municipal wells do have an impact on the aquifer so they are to be included eventually. **Mr. Strong** said that to the extent that municipal wells are involved in irrigation, they are subject to curtailment or to calls.

Representative Nielsen commented that, in his opinion, domestic use should always have priority and suggested that they be required to acquire a water right first. This would be especially true in the low aquifer areas. **Mr. Tuthill** said that could become necessary in critical ground water areas.

Senator Little asked if the ability to sell the water right off of irrigated ground is creating more incentive for development of irrigated ground over dry ground and how other states handle this issue. **Mr. Tuthill** said that representatives from the cities and counties are going to discuss this today. He said that some states have a requirement that as new ground is brought in to a municipality, that ground has to have with it a sufficient water right. He is not sure whether that is state law or local code. **Representative Nielsen** commented that the City of Mountain Home had recently purchased some water rights so they will have the water necessary for development. In his opinion, this is a step in the right direction.

Mr. Dan Chadwick, Idaho Association of Counties, was the next speaker. He explained that county government has a keen interest in the issue of domestic water. He said that counties are not responsible for municipal systems but are interested in domestic wells located in counties. In response to an earlier question regarding bringing water rights to the table, **Mr. Chadwick** said that the Land Use Planning Act requires cities and counties to look at the issue of water as they develop their comprehensive plans. Under that plan, in his opinion, there is sufficient authority allowing cities and counties to adopt ordinances to require developers to bring water to the table when they consider developing parcels of property. The issue of selling the water right and then coming to the cities or counties and trying to develop property using additional water is a major issue and needs to be looked at.

Mr. Chadwick stated that the real issue for the counties is related to future development. He said they do not have a clear picture of what is available and what counties and cities need to do with regard to the regulatory effort in managing domestic water supplies.

In his opinion, cities and counties need more information to allow them to make better decisions. Monitoring would be one way to help them know what is available. He also said that regional summits would be a good way to deal with these issues. He noted that they had John Tracy, from the Idaho Water Research Institute, speak to a commissioners conference on how to incorporate water management policy into land use planning. He suggested having Mr. Tracy speak to the interim committee to inform them what has been done with regard to management of domestic wells and their relation to development.

Mr. Chadwick stated that the cities and counties both agree that local public interest is really just that. He emphasized that the needs and concerns of cities and counties need to be taken into consideration as the process moves forward.

Representative Stevenson said that during a meeting in Mountain Home it appeared that commissioners were unsure what their responsibilities were regarding the creation of ground water districts. He suggested having the Association of Counties bring them up to speed in that area. **Mr. Chadwick** said he would do that at the next conference they have scheduled in September.

In response to a questions from **Senator Burtenshaw, Mr. Chadwick** agreed that a sewer system is much better for people and subdivisions than individual septic tanks. He said that a few years ago they came to the Legislature when they were dealing with failed systems. At that time they wanted to give county commissioners authority to deal with failed systems. In his opinion, this is going to have to be dealt with.

Mr. Ken Harward, Idaho Association of Cities, was the next speaker. He said that response from cities had shown very strong support of the legislation requiring the use of surface water where reasonably available to irrigate lawns and landscaping. He explained that at meetings last year, Representative Raybould and others appeared to encourage cities to do something by ordinance to address the issue of developments coming into a city and bringing the water supply with them.

He introduced **Nancy Merrill, Mayor of Eagle,** to give examples of what the City of Eagle has done. She stated that cities pledge to do their part to help solve this problem and want to be partners with the counties and the state to take care of our water.

Ms. Merrill explained that the City of Eagle has passed its first water ordinance that requires ground water stay with the land. This means that when a developer wants to develop a subdivision, the water rights must stay with the land and be given to the city to take care of the homes that are built on the land. This water will then be added to the municipal system and put

in water tanks for storage to be used for the homes on that land. She said that it is her understanding that several other cities are also considering this approach.

Representative Stevenson commended the City of Eagle for doing such a good job of moving forward with this issue.

In response to a question from **Representative Nielsen, Ms. Merrill** explained that instead of buying the water, as the City of Mountain Home did, Eagle is requiring that the water stay with the land and be transferred to the city to become part of the municipal system. She said that Eagle has tried to buy water rights but has not found any willing sellers.

Mr. Vern Brewer, an engineer for Holiday Engineering which is the engineering designate for the City of Eagle was the next speaker. He stated that Holiday Engineering is also the engineering designate for 17 other cities in Southwest Idaho and Eastern Oregon. He explained that it the their belief that a municipal system is more protective of the resource, more protective of the residents in general and can actually practice water conservation to a much higher degree than each home having an individual well. A municipal system is also believed to allow much more control with regard to fire fighting.

He said that with the current system, certain cities have been trying to get municipal rights for as long as three years and the process is still open. In the meantime, the developers and economic drivers are making decisions not to go through that lengthy process. Instead they build individual wells and as **Mr. Tuthill** said, once the well is drilled and the water is turned on, the water right is in place. In his opinion, there is something in this system that is not equitable and does not bode well for the development of municipal systems.

Speaking as an advocate of city water systems, **Mr. Brewer** said that when push comes to shove on waiting for decisions to be made, the developers are driven to making economic decisions that are not in the best interest of the resource. This is a big concern of his company. He suggested that the Committee focus on water as the resource, not the land use issue. He went on to suggest that the focus should be on the management of the resource to the utmost degree possible. He added that he believes the decisions about local public interest should be on the table early and the determinations should be made early, giving weight to municipal systems that have the storage and large, well constructed and well protected wells.

Mr. Brewer, in response to **Representative Nielsen's** earlier question, clarified that this ordinance states that if a development comes in, it has to bring sufficient water into the municipal system to deal with the requirements of that development. If more water is available on that land, the developer is free to do whatever he wants with the extra. They must simply supply what will be used by the people in the development. By those people annexing into the city, they do retain ownership of that water. The intent is to protect the resource within the limits and impact area the cities have. **Representative Raybould** clarified that since the development is coming into the city limits, they are going to be a beneficiary of the city water system. Eagle is requiring, as the development's contribution for that service from the city, that

the development provide enough water to support itself. It is a type of exchange. **Mr. Brewer** agreed. He said that the language is very specific. **Representative Bedke** added that the city will not grant the permit for development unless this is done.

In response to a question from **Senator Little, Mr. Brewer** said that currently if the land is not annexed into the city, the minimum plot size would be ten acres. This would be an option for those that do not want to provide the water necessary for larger developments within the city.

In response to a question from **Senator Stennett, Mr. Brewer** explained that there is a district that is transferring ground water irrigation rights to municipal rights that involves a degrading of those rights. Typically ground water withdraws for agricultural purposes are seasonal whereas a municipal withdraw is year round. **Mr. Brewer** said that there is a scale that allows someone to get about 70% of their ground water appropriation for agricultural purposes transferred into a municipal right. He noted that he is not that familiar with this scale. As far as the surface water rights go, **Mr. Brewer** said that the language of the ordinance asks that is someone has water amenities and irrigation, the city is requiring pressurized irrigation of surface water. If someone has 40 acres with surface water irrigation and it takes 11 shares of water to serve that pressurized irrigation system, that is required to stay as part of that development. If the person owns more than the 11 shares necessary to serve the system, they are free to do whatever they want with the extra shares.

Senator Stennett asked what the biggest impediment is to getting a municipal right. **Mr. Brewer** said that biggest impediment is the way due process is set up under the law. Currently a person can protest for any number of reasons such as local public interest. In protesting for this reason, a person can say that the land use being proposed is not what they want to see and that the use of water for municipal purposes is not in the local public interest. A carefully planned protest action, according to **Mr. Brewer,** can cause a one, two or even three year delay in acquiring that municipal water right and can stop all development of that site. **Senator Stennett** added that instead of waiting for a municipal water right, due to these types of protests and problems, a person will instead dig individual wells on each lot rather than wait and build one large well. He asked what the interim committee should look at to help solve this. **Mr. Brewer** suggested working with the Idaho Department of Water Resources to refine policies on how these protests are handled so that the municipal actions have storage and highly qualified and constructed wells and that the local public interest be carefully crafted to favor a municipal supply rather than the individual wells being drilled for each individual home. In that process he said that he would like to see the early determination of whether a protest is in the public interest or not.

Mr. Clive Strong, Attorney General's Office, gave an update of the Snake River Water Rights Agreement of 2004. **Mr. Strong** explained that once they get the remand back from the Idaho Supreme Court, they will be in a position to submit to the SRBA District Court those documents, including the decrees for various water rights, that would allow finalization of this agreement. **Mr. Strong** stated that all documents that will be required to be submitted to the courts have been drafted and are only waiting for the remand from the Supreme Court.

Mr. Strong went on to discuss Judge Redden's decision to issue an injunction ordering the federal government to spill water over the federal dams in Oregon in order to provide mobility for the anadromous fish. This order is limited solely to spill, it does not address the issue of additional flow augmentation. **Mr. Strong** said that with respect to flow augmentation, the Judge has basically indicated that the parties are to meet and discuss that issue. The Judge has also entered an order that the 2004 biological opinion will remain in place temporarily. A briefing has been scheduled for next week.

Mr. Strong said that Judge Redden found the 2004 biological opinion invalid based on the federal agencies attempt to segregate discretionary and nondiscretionary actions.

The 2004 biological opinion proposed to analyze only those discretionary actions the agency included. Nondiscretionary actions were viewed as baseline. Judge Redden viewed that as being inconsistent with the requirements of the ESA and found that to be an invalid analysis.

In segregating the discretionary and nondiscretionary decisions, Judge Redden said that NOAA failed to aggregate the impacts from the effects of the actions. According to Judge Redden's view, the ESA requires that all three, baseline, cumulative effects and the effects of current actions, be aggregated in order to make the determination of whether the operation causes jeopardy of the endangered species.

According to Judge Redden, the 2004 biological opinion failed to analyze critical habitat necessary for recovery. Judge Redden also found that the analysis in the 2004 opinion was insufficient because they relied on an uncertain long term premise and did not analyze the short term effects of the proposed action.

Judge Redden indicated that in order to do the jeopardy analysis, the agencies are also required to take into account the effects of the proposed action on the potential recovery of the species.

Mr. Strong said that this decision by Judge Redden is ground breaking and has potential long term negative effects in terms of the ability to define projects that would be satisfactory to the ESA. Aspects of the decision have potential implications for operation of the upper Snake River projects and the biological opinion that was issued. It also has potential implications for Section 6 agreements that the state is working on as part of the Nez Perce Agreement. **Mr. Strong** stated that Idaho is trying to reconcile our proposal and activities of the Nez Perce Agreement with Judge Redden's decision to try to avoid complications.

In response to a question from **Senator Burtenshaw, Mr. Strong** said that he was not necessarily speaking of the Snake River Water Rights Agreement of 2004. He was speaking of the implications of the challenge of the operation of the lower Columbia River projects that are part of the middle Columbia River Power System. There was a biological opinion issued by NOAA Fisheries that the operation of those projects would not cause jeopardy to the species and Judge Redden has found that, in his opinion, this is not the case. **Mr. Strong** said this does not nullify the Snake River Agreement. It is still in place and its biological opinion is still in place,

but it could be challenged by third parties.

Senator Burtenshaw said that the biological opinion was part of the reason the Nez Perce Agreement was reached. He asked what would happen if the biological opinion is found to be invalid. **Mr. Strong** said that he was not sure what effect that would have on the agreement. He added that the agreement is not in effect yet but things are moving forward on target. In response to a question from **Senator Stennett, Mr. Strong** said that he would not recommend unwinding the agreement at this time. The important thing to note is that there are still issues to be worked out.

Mr. Strong clarified that for the agreement to go into effect, the biological opinion had to be issued, the instream flows had to be approved, congressional appropriations needed to be made and certain land transfers had to be made. If the agreement goes into effect and the biological opinion is shown to be invalid, that will not upset the Nez Perce Agreement. It will upset the expectations, but the agreement only requires that a biological opinion be issued.

Representative Bedke asked about the timetable for these legal challenges. **Mr. Strong** said environmental groups filed a motion for summary judgment on the operation of the FCRPS projects and the biological opinion. Judge Redden found that the biological opinion is invalid and an injunction has been issued relating to the operation of those projects. This does not directly affect the Snake River projects because we have a separate biological opinion.

Mr. Strong explained that what will happen is that there will be a decision made by the United States as to whether it will appeal the Judge's decision. This should be made soon due to the potential implications it has on the operation of the projects. If an appeal is taken, it goes directly to the 9th Circuit Court of Appeals. The other option is for the parties to reach some other resolution of their issues.

In response to a question from **Senator Schroeder, Mr. Strong** explained that the water that is required to be spilled over the dam is not new water, it is water that is coming down the river and instead of going to turn the turbines, it will be required to go over the spillways. The important point is that the injunction was not issued on the flow augmentation side. In **Mr. Strong's** opinion, they do not expect any new demands on water from Idaho.

Senator Stennett stated that, due to the Bell Rapids purchase, he had asked the Legislative Council and they have agreed to ask the Department of Commerce and Labor, to write rules regarding mitigation and what might be needed on a local level. He said that they are going to specifically look at Buhl, Hagerman and Glenns Ferry because they surround the Bell Rapids project.

The meeting was adjourned at 4:00.