Minutes
Natural Resources Interim Committee
July 12, 2006
10:00 a.m.
JFAC Meeting Room, Statehouse

*(Subject to Approval of the Committee)*

The meeting was called to order at 10:10 a.m. by cochairman Senator Don Burtenshaw. Other Committee members present included cochairman Representative Dell Raybould, Senator Gary Schroeder, Senator Stan Williams, Senator Chuck Coiner, Senator Clint Stennett, Representative Bert Stevenson, Representative Scott Bedke, Representative Mike Moyle and Representative Wendy Jaquet. Ad hoc members present were Representative Jack Barraclough, Representative Donna Pence, Representative Pete Nielsen, Senator Skip Brandt and Senator Brad Little. Ad hoc member Representative Jim Clark was absent and excused. Legislative Services Office staff members present were Katharine Gerrity and Toni Hobbs.

Others present were Bruce Wright, Basic American Foods; John J. Williams, Bonneville Power Administration (BPA); Kevin Lewis, Idaho Rivers United; Dennis Tanikuni, Farm Bureau; Dean Mortimer; Mike Schroeder, City of Twin Falls Water Department; Albert Lockwood, North Side Canal Company and Committee of 9; Norm Semanko, Jonathan Parker and Zachary Hauge, Idaho Water Users Association; Cindy Robertson and Walt Poole, Idaho Department of Fish and Game; Ronald E. Abbott, USDA-FSA; Rich Rigby and Gail McGarry, Bureau of Reclamation; Roger Seiber, Capitol West; Clive Strong and Steve Strack, Natural Resources Division, Idaho Attorney General's Office; John Simpson, Twin Falls Canal Company, North Side Canal Company and Surface Water Coalition; C. Tom Arkoosh, American Falls Reservoir District #2 and Surface Water Coalition; Jeff Allen, State Controller's Office; Rich Hahn, Idaho Power; Director Karl Dreher, Hal Anderson, Phil Rassier, and David Blew, Idaho Department of Water Resources; Director Toni Hardesty and Barry Burnell, Idaho Department of Environmental Quality; Nathan Olsen, Olsen Legal Services; Brenda Tominaga, Idaho Ground Water Users Association and Idaho Irrigation Pumpers Association; Lynn Tominaga, Idaho Ground Water Users Association; Linda Lemmon, Thousand Springs Water Users Association; William F. Hazen, University of Idaho; Russell Westerberg, PacifiCorp; Kent Lauer, Idaho Farm Bureau; and Julie May, Rangen, Inc.

**Mr. Steve Strack, Attorney General's Office, Natural Resource Division** was the first speaker. He was introduced to give an update relating to the May 26, 2005, decision by U.S. District Judge James Redden. His presentation also included information relating to the Upper Snake River Biological Opinion and challenges to that opinion.

**Mr. Strack** told the Committee that when the state entered into the Nez Perce Water Rights Agreement, the Snake River water rights component called for continuation of the existing flow augmentation program, with 427,000 acre feet of storage water to be provided plus an additional 60,000 acre feet of natural water rights which we acquired and now lease to the Bureau of Reclamation. It was understood that this agreement was a proposed action that would have to undergo consultation under the Endangered Species Act (ESA). **Mr. Strack** went on to explain that the purpose of consultation is to determine whether an action undertaken by a federal agency will jeopardize the continued existence of the listed species. In this case, the listed species are Spring Chinook, Fall Chinook, Steelhead and Sockeye. The state knew there would be challenges so some sideboards were added to the consultation as part of the agreement. Two of those sideboards were:

- The consultation would have to happen separately from the ongoing consultation on the federal Columbia River Power System (CRPS); and

- If the consultation resulted in jeopardy to the species, any of the parties to the agreement could terminate the flow augmentation component and proceed separately.

**Mr. Strack** informed the Committee that the biological opinion, which found no jeopardy, was issued on March 31, 2005, and shortly thereafter several environmental groups brought an action in the federal district court of Oregon before Judge Redden, the same judge that hears the challenges to the CRPS biological opinion. **Mr. Strack** said the action basically challenged both of the sideboards.

According to **Mr. Strack**, summary judgment was scheduled and, after about one year of briefing, a hearing was held where the judge issued a summary judgment decision upholding the approach that the Upper Snake undergo a separate consultation from the CRPS. **Mr. Strack** said this means that Idaho can go forward with a separate consultation for the Upper Snake River. He said this is important because it keeps the state out of the proposed action for the CRPS and gives Idaho entities more control over what the proposed action will look like.

**Mr. Strack** said that the judge added a caveat stating that even though Idaho can have a separate consultation, there must be a *comprehensive* analysis of all effects throughout the CRPS on the species. **Mr. Strack** said this comes out of the judge's fairly rigid view of what is required for a jeopardy determination when you do a biological opinion.

**Mr. Strack** explained that the purpose of a consultation is to determine whether the proposed action will jeopardize the continued existence of the listed species. In doing so, he said that regulations require you to look at all existing effects on the fish including effects from federal, state and private actions. He noted that this is called the environmental baseline. He went on to explain that you then have to look at the effects that will occur during the term of the proposed action, in this case the proposed action is over a term of 30 years. He said that these are known as the cumulative effects. He continued that you then have to look at the proposed action in the

context of *all* these other effects.

**Mr. Strack** gave the following example. He said that for our proposed action they have isolated the effects of the Bureau of Reclamation operations in the Upper Snake and the operation of the flow augmentation program and determined in the biological opinion that there would be an approximate 3/10 of 1% decline in system survival for juvenile Spring Chinook. On the other hand there would be a 6% increase in the juvenile system survival for Fall Chinook. He explained that the result is a negligible effect for one species and a beneficial effect for another species, and using their discretion, and viewing this action against the context of all of the other effects that are expected to occur during the next 30 years, it was determined that the proposed action does not result in jeopardy to Fall or Spring Chinook or any other anadromous listed species in the Columbia River system.

**Mr. Strack** stated that the judge has a very different view of what is required for a jeopardy analysis. Rather than looking at the proposed action in the context of all of the other effects, the judge held that you have to aggregate the effects, taking all the effects in the baseline effects and all the effects in the cumulative effects, adding in the proposed action, and if it stacks up to jeopardy then you are in jeopardy.

**Mr. Strack** continued by explaining that under the judge's analysis, if the baseline is so bad that the fish are already in jeopardy, then *any* action undertaken by the federal government is also going to result in a jeopardy determination - even if, as here, it is beneficial. **Mr. Strack** reiterated that the state contests this determination. He went on to say that this is the reason the judge struck down the Upper Snake Biological Opinion and it was the same basis the judge used to strike down the CRPS Biological Opinion.

**Mr. Strack** went on to say that at this point in time Idaho has to follow the judge's ruling. He said that it is very difficult to reach a no jeopardy opinion until the CRPS process, which has been ongoing for about seven months and should be finished sometime early next year, is completed. He said that this is important to the Upper Snake Biological Opinion because if the CRPS is unable to reach a no jeopardy determination then, under Judge Redden's analysis, neither can Idaho.

**Mr. Strack** indicated that the present plan is to move forward with the CRPS Biological Opinion. It is hoped that they will come to some reasonable and prudent alternatives or a proposed action that moves them far enough below the jeopardy analysis that there will be enough room for the negligible and beneficial effects of the Upper Snake proposed action to slip under the jeopardy threshold.

**Mr. Strack** said there are several other off ramps available. The first involves the case of Northwest Wildlife Federation vs. National Marine Fisheries Service where there was a summary judgment opinion that vacated a biological opinion. **Mr. Strack** said that the federal government and state appealed that decision to the Ninth Circuit where briefing has taken place and a decision is expected before the end of the summer. One of the issues in that case is exactly

the issue that has come up in regard to the Upper Snake, that being whether the appropriate jeopardy analysis is an aggregate analysis or a comparative analysis. **Mr. Strack** said the bad news in this case is that the panel contains three Clinton appointees and is also the same panel that heard the preliminary injunction appeal from the lower river case. He said in that case they described the comparative approach as "novel" and the aggregate approach as the "normal" approach. In **Mr. Strack's** opinion, it does not look hopeful but, he said, the panel did not have the extent of briefing they now have when they made that determination.

**Mr. Strack** said that the other off ramp is to work within the context of the judge's opinion and work with the agencies to get the lower river action to a point where Idaho can slip under the jeopardy threshold and still maintain a no jeopardy opinion under the judge's aggregate analysis.

In terms of the current status, **Mr. Strack** said that a motion has been filed by the plaintiffs to reconsider the judge's Order that Idaho can proceed with a separate biological opinion for the Upper Snake. The motion has been briefed and he said he would expect a ruling by the end of the week. **Mr. Strack** said he does not think the motion has a lot of merit. On the other hand, he said the judge did state in his opinion that he was ruling reluctantly on allowing the separate biological opinion. The judge said, in his view, a consolidated consultation would be a much better way to proceed.

**Mr. Strack** said there is also the option of proceeding with an appeal of Judge Redden's summary judgment decision in our case. He indicated they would have to wait to see what the Ninth Circuit does before deciding if it is worth pursuing.

After that point, **Mr. Strack** said that Idaho has the opportunity to shape the remand in front of the judge. He explained that the judge has given the parties opportunities to provide proposals for what the remand would look like but at this stage everyone is waiting on the pending motion for reconsideration. **Mr. Strack** said the CRPS remand process has been very complicated and in the Upper Snake case they are trying to have a much simpler remand that basically remands back to the agencies to do what they are supposed to do without a collaborative process. He said that they don't want input from the lower river tribes or the states of Washington or Oregon because these groups have very different viewpoints than Idaho. He also said they have had very good cooperation from the federal government, the Nez Perce Tribe and the water users in supporting the biological opinion.

**Representative Raybould** commented that since this is a federal situation he would assume there is nothing that could be changed in the Idaho statutes to help bolster the case. **Mr. Strack** agreed. He said that on the federal level there are some options such as exempting the Upper Snake from some of the biological opinion requirements. This was explored as part of the water rights settlement but it was blocked by a senator. He said it is his understanding that there is renewed interest in this option. Interests may be shifting and they are working with the delegation. **Representative Raybould** said he does not think many people are too optimistic about a decision from the Ninth Circuit on this particular case and asked whether the U.S. Supreme Court is an option and if so, would they hear it and would Idaho bring the action or

would it be a coalition. **Mr. Strack** said they have been working on this. If the decision from the Ninth Circuit is adverse, they will be working immediately to convince the Solicitor General that this is a case they should get behind. He said that because this is not a direct circuit conflict, this will be a fairly unique ruling if they reach the aggregation versus the comparative effect issue. He noted that if they can convince the Solicitor General this is a cert worthy issue, then they will have a much better chance of taking it to the Supreme Court. In response to another question from **Representative Raybould, Mr. Strack** said that there is a possibility that a coalition would join Idaho in this appeal. He said they have had excellent cooperation with groups such as NOAA Fisheries, Bonneville Power Administration, the Nez Perce Tribe and others and hope it will continue. He said they would be working along those lines.

**Senator Williams** asked whether an adverse decision would require more water from the Upper Snake and, if so, whether that would void the Nez Perce Agreement. **Mr. Strack** said the decision right now is just to redo the biological opinion. In his opinion, there are opportunities even within Judge Redden's view of the ESA to come to a no jeopardy determination. If that happens, there is no additional risk to Idaho water. He said if, for some reason, it keeps going down this line, there may be opportunities for the plaintiffs to seek injunctive relief as they have done in the CRPS. They have not done so this year. He noted that the judge has been fairly skeptical in the past about the need for additional flow augmentation from the Upper Snake. He added, however, that if we have a bad water year, there is a risk they could come after more Idaho water but it would be, at best, temporary relief pending the outcome of a new biological opinion. He said that once we get to a no jeopardy determination and get the incidental take statement in place they cannot come after additional Idaho water. **Senator Williams** commented that a lot of the votes for the agreement in the Senate happened because they were promised that Upper Snake River water would be secure. He asked whether coming after that water would be a violation of the Nez Perce Agreement. **Mr. Strack** said the agreement has an off ramp so that if we do not get a no jeopardy biological opinion with the protections that come with an incidental take statement, any party to the agreement can terminate that portion of the agreement and proceed separately. Of course that carries its own risk of an action brought by environmental groups under Section 9 of the ESA which prohibits the take of endangered species. He said there is no reason to believe, at this point, that they cannot reach a no jeopardy biological opinion one way or another, or go to Congress and try to get some type of relief specific to the Upper Snake operations.

**Mr. Ron Abbott, Farm Services Agency (FSA)**, was introduced to give an update on the CREP program. He distributed a handout that is available in the Legislative Services Office. He explained that CREP is an enhancement of the existing conservation reserve program (CRP). He said there are over 800,000 acres of dry farmland enrolled in CRP with participants in almost every Idaho county. The payment rate for CRP is $30 to $60 per acre.

**Mr. Abbott** explained that CREP combines CRP with a state match to bring the program to irrigated ground. The goal is to conserve 200,000 acre feet of water inside the Eastern Snake Plain Aquifer and to improve wildlife habitat. Producers sign 14 or 15 year contracts with FSA not to farm cropland and FSA issues annual rental payments of between $114 and $134 per acre

and provides cost-sharing for implementing the program. Producers also sign contracts with IDWR not to divert water. In addition to the federal payments, some producers qualify for a one-time $30 per acre payment from the state.

The CREP area includes all or part of Elmore, Camas, Blaine, Gooding, Jerome, Minidoka, Twin Falls, Lincoln, Butte, Jefferson, Clark, Bingham, Power, Oneida, Madison, Bonneville, Bannock and Cassia counties. The incentive area that qualifies for the one-time $30 payment includes Minidoka, Lincoln, Jefferson, Gooding, Jerome, Power, Blaine, Butte, Clark, Bonneville, Bingham and Bannock counties. His handout includes maps showing these counties in more detail.

To qualify for CREP the land must be located within the project area. It must either be located in a conservation priority area or meet highly erodible land eligibility and must have been irrigated for at least four of the years between 1996 and 2001. It must have been irrigated within the last 24 months or have been part of an approved mediation program. The ground must be physically and legally capable of producing a crop. Due to potential water curtailment in June, the ground will be eligible provided that the producer has signed a register in the FSA office prior to being notified of curtailment. If the owner signs up the land, they must have owned it for 12 months and if the operator signs up the land, they must have a written 15 year lease.

**Mr. Abbott** explained the CREP payments as follows:

- October 2006
  - State issues $30 incentive
- Fall/Winter 2006/2007
  - $100 signing incentive payment for certain practices
  - Practice incentive payment for certain practices (equal to 40% of expense)
  - Cost-share assistance (equal to 50% of expense)
- October 2007-2021
  - Annual rental payment

Total Costs

- Federal $183 million
- State $ 75 million
- Total $258 million

(plus the expenses to establish cover crop borne by producers)

The timeline:

- FSA began registering producers on May 30, 2006
- FSA will conduct one-on-one appointments with producers to complete paperwork

between June 19-July 28, 2006
- IDWR and ISCC will complete necessary contracts and plans by August 31,2006
- FSA will issue final approval in September 2006

Enrollment:

- CREP register started at 8:00 a.m. on Tuesday, May 30
  - Signed on 5/30 - 228 individuals/110,940.35 acres
  - Signed on 5/31 - 58 individuals/25,642.5 acres
  - Signed between 6/1 and 6/10 - 123 individuals/38,057.2 acres
  - Signed after 6/10 - 120 individuals

- CREP register facts:
  - 529 individuals on register
  - Some individuals with multiple farms, some farms with multiple individuals
  - Approximately 190,000 acres on register
- FSA offices meeting with people who signed register on either May 30 or 31
  - 17 producers approved for enrollment
    - These will be sent to IDWR and ISCC this week
  - 51 producers determined ineligible

**Senator Stennett** asked what accounting was used or what priority has been given to those with priority water rights. **Mr. Abbott** said that IDWR makes those determinations for FSA. **Senator Stennett** asked whether more priority is given to those with senior water rights. **Mr. Abbott** said he did not know. In response to another question from **Senator Stennett** regarding the federal payment limitation of $50,000 per year, **Mr. Abbott** said that the payment limitation is applicable to an individual (this includes entities, corporations and LLCs, etc.). He said if a person or entity enrolled more acres that would take them over $50,000, the contract could be approved but the payment would stop at $50,000. **Senator Stennett** asked whether the Gooding, Lincoln, Jerome, Minidoka priority area has exceeded the 25% limitation regarding the amount of ground allowed to be retired in a certain area. **Mr. Abbott** said no.

**Representative Nielsen** said he was concerned whether any of the allotted amount will be available in Elmore county. **Mr. Abbott** said he thinks the allotted amount will be used up but not in this first go-round. He said the order of approval is based on the date and time the producer signed the register. He said there is no per-county allocation of number of acres. **Representative Nielsen** asked whether the point system is done on a basin basis or whether it is based on earlier water rights. He said that if priority dates are used, Elmore County will not be eligible for much of anything. **Mr. Abbott** said that the point system will not be used until they get close to the end, if at all. The contracts will be approved based on the date and time participants signed up. He said he does not know about water right priority.

**Senator Burtenshaw** asked what areas had the largest number of people signing up. **Mr. Abbott** said Bingham County has the largest number and Minidoka also has a large number of

participants. In response to another question from **Senator Burtenshaw, Mr. Abbott** said that 61 people have been into the FSA office for appointments and 241 have scheduled appointments. He said that 17 completed applications have been sent on to IDWR. **Mr. Abbott** referred the question of what IDWR looks for once they get the application to the Department.

**Senator Stennett** said he would like a breakdown of the number of acres and where they are located.

**Senator Schroeder** asked if IDWR could answer Senator Stennett's question regarding how much weight is given to priority water right holders when determining who qualifies. **Director Karl Dreher** said the criteria developed are aimed at giving weight to the older water rights that are less likely to be curtailed at some point. Then those rights that are in closest proximity to the troubled areas are given consideration. He said he would provide the Committee the criteria information they are using. **Senator Stennett** asked whether IDWR will make the final decision based on the priority dates. **Director Dreher** said that IDWR will review the applications and send them back to FSA for the final decision. **Senator Stennett** asked if there ends up being excess acres, how will they decide which ones to approve. **Director Dreher** said that is the purpose of IDWR's analysis and he said he presumes that FSA will not ignore that analysis. IDWR will prioritize the applications according to how they benefit the state from a water resource benefit basis but FSA will make the final decision. **Senator Stennett** asked FSA how they will make their decision if IDWR gives them a list saying certain acres are higher priority. **Mr. Abbott** said the date and time of registration is the ultimate determiner. He said eligibility because of the conservation priority area in Gooding, Lincoln, Minidoka and Jerome automatically shifts weight into those areas. That ground is automatically eligible and there will be more acres there than anywhere else. He said all other eligibility requirements being the same, the person who signed the register at 8:00 a.m. on the first day would have priority.

In response to a question from **Senator Burtenshaw, Mr. Abbott** said he did not think there would be any problem reaching the maximum acres allowed.

**Director Karl Dreher, Idaho Department of Water Resources,** was introduced as the next speaker to discuss the North Idaho Adjudication and the Bell Rapids Water Rights Purchase. His complete powerpoint presentation is available from the Legislative Services Office.

**Director Dreher** explained that the reason for the adjudication of water rights in North Idaho is that the state cannot manage or administer what has not been defined. He gave the following explanation of water rights that have and have not been defined in North Idaho.

- Water rights permitted or licensed by the Department have been defined
- Water rights that were established prior to permitting/licensing have not been defined
- Water rights reserved under Federal law or tribal treaties have not been defined
- Unauthorized uses have not been fully identified

The benefits of adjudication include:

- Beneficial use rights are determined
- Unused water rights are culled
- Provides basis for administration
- Federal and tribal rights are determined
- Dormant problems are resolved
- Enhances the opportunity to resolve interstate issues

**Director Dreher** noted that this is one component that will help Idaho resolve interstate issues with the state of Washington. He added that until Idaho gets these water rights defined, it will be difficult to come to any meaningful, equitable agreement with Washington in terms of how the joint ground water resources will be managed.

Issues involved in the adjudication include the following:

- Cost
  - Water right holders
  - Legislative resources
  - Judicial resources
  - Governmental agency resources
  - Public – General Fund
- Federal and tribal claims are asserted
- Dormant problems are discovered

The Director's powerpoint presentation included maps showing the scope of the adjudication. He said the adjudication will be phased in beginning with the Rathdrum Prairie, continuing with the Moscow/Pullman aquifer system and then the remainder of the North Idaho river basins that have not been previously adjudicated. **Director Dreher** said the legislation was structured so that the adjudication will proceed only if appropriations come from the Legislature.

**Director Dreher** went on to say that statutory provisions relating to adjudications were amended to provide that the district court having jurisdiction does not have to be located in the basins being adjudicated and is to be selected by the Idaho Supreme Court. He said these changes were made so that the option would be available to use the Snake River Basin Adjudication (SRBA) court in Twin Falls. To make that work, connectivity will be enhanced between claimants, the IDWR and the attorneys using video teleconferencing facilities. Options are being researched at this time.

Other statutory changes were made doubling the fees claimants are required to pay when claims are filed. He said that the reason for this was because the fee structure was put in place in 1987 and never updated. He noted that an exception was made for previously unrecorded domestic wells. These fees will also be double again what the fee for *recorded* domestic wells will be. **Director Dreher** said that in instances where someone establishing a domestic right came to the Department and actually went through the permitting and licensing process, IDWR is given a good idea what the right is. However, he said, for those that took advantage of the domestic well

exemption and just got a well construction permit, the Department does not know anything about those water uses. They may or may not be consistent with the domestic use exemption. He said during the SRBA, the Department spent an inordinate amount of resources trying to sort out previously unrecorded domestic wells.

**Director Dreher** said that the date for recognizing an accomplished transfer was also changed from 1987 to January 1, 2006. He said that this means that if someone has transferred a water right prior to January 1, 2006, without going through the formal transfer process, there is a way to recognize it as part of the adjudication process. He continued by informing the Committee about the following projected fiscal milestones:

Projected fiscal year 2007:

- Prepare updated claims-taking software
  - *Design of software has been initiated*
- Develop on-line claims filing capability
  - *Development has been initiated*
- Obtain GIS images and layers
  - *Overflight of Northern Idaho to collect imagery has been conducted*

Projected fiscal year 2008:

- Commence the Rathdrum Prairie Adjudication
- Conduct public information meetings
- Round one service to all potential claimants
- Conduct filing of water rights claims

Projected fiscal years 2009-2010:

- Conduct field examinations
- Prepare recommendations for decrees

Projected fiscal year 2011:

- File Director's report for decree recommendation

Projected fiscal year 2012 :

- Resolution of objections to recommendations

Director Dreher's presentation also included a table showing these fiscal year milestones broken down by basin commencing in the current fiscal year and ending in fiscal year 2012. **Director Dreher** said that if the Legislature chooses to proceed with the Moscow/Pullman aquifer system

(Basin 87) and the remainder of the North Idaho basins (Basins 96, 97 and 98) and provides funding, this chart is the preliminary schedule that has been identified. He noted that if the Legislature decides to stop the adjudication, they can. They can also step up the schedule as long as the funding is provided.

**Director Dreher** also reviewed the fund history of the Bell Rapids water right purchase:

- 04/15/2005 – $21.3 million transferred from General Fund pursuant to H392, Section 3
- 06/30/2005 – $16.0 million paid to Bell Rapids Mutual Irrigation Company
- 09/15/2005 – Lease agreement with Bureau of Reclamation executed
- 09/30/2005 – $5.1 million lease payment from Bureau of Reclamation
- 10/05/2005 – $1.7 million lease payment from Bureau of Reclamation
- 12/13/2005 – $3.0 million lease payment from Bureau of Reclamation
- 06/14/2006 – $1.0 million lease payment from Bureau of Reclamation
- 06/29/2006 – $6.8 million received from revenue note purchased by U.S. Bank
- 06/30/2006 – $1.3 million paid to Bell Rapids Mutual Irrigation Company (1st of 5 annual payments)
- 06/30/2006 – $0.6 million interest credited by State Treasurer
- 07/01/2006 – $22.1 million paid back to General Fund, includes $0.8 million interest at 3 % annual rate

In response to a question from **Representative Raybould** regarding the cost of the North Idaho adjudication and how much of that cost will be covered by fees, **Director Dreher** said that the costs have been worked out but were not included in his presentation. He said he would get that information for the Committee. **Representative Raybould** said he would like to have some indication of what the state's obligation will be for each year of this adjudication. **Director Dreher** said they do have it broken down by year for the General Fund as well. He said they are generally following the same sharing of expenditures as was used in the SRBA where roughly half of the costs are paid by claimants themselves and, at this point, the remaining costs are proposed to be paid from the General Fund.

**Senator Schroeder** asked whether having the southern Idaho district court handle the northern Idaho adjudication will result in any logistical disadvantages or additional costs to claimants in North Idaho. **Director Dreher** said there will not be any additional costs because the court understands that it will have to travel to North Idaho frequently. He noted that the Twin Falls court adjudicated water from the Wyoming border to North Idaho during the SRBA. North Idaho claimants will not have to travel to Twin Falls because of the audio visual technology that is going to be used. In his opinion, North Idaho claimants have an advantage because the court has gone through this before and is more experienced and there will be less time involved in this adjudication. Establishing a new court in North Idaho would take much longer because everyone would be starting all over and the start-up costs would be substantial.

**Senator Schroeder** asked whether owners of private domestic wells in North Idaho should

expect to pay an administration fee in the future. **Director Dreher** said they should, but how much depends on the adjudication process. He said, as part of the process, he intends to create a water measurement district in the Rathdrum Prairie system that will require water users to measure and report their use of ground water. He added that this is provided in statute passed by the Legislature in 1994, and is not optional. He said that the Legislature directed that all areas of the state not in an organized water district were to be put in a water measurement district. The cost of the water measurement district will be borne by the holders of individual ground water rights including individual domestic wells. **Director Dreher** pointed out that in the SRBA, domestic well owners had the option of filing a claim to get a decree for their water right. If they did not file a claim, the domestic well owners did not lose their water right. In the North Idaho adjudication, domestic well use is such a large portion of the overall ground water use, they are not exempt from the adjudication. They will have to file claims and their rights will have to be adjudicated.

**Senator Brandt** asked how the Legislature will be able to stop the process once it goes to court. **Director Dreher** said he was not exactly sure how that would work. He said what may happen is once the claims are filed, if there is a suspension, these claims could be refiled in federal court.

**Senator Brandt** asked whether the state has talked with the tribes over the issue. **Director Dreher** said there have been no face-to-face meetings of which he is aware. He stated that there were some tribal members at a public information meeting where he spoke about this issue so they are aware of what is happening and that they will have to file their claims.

In response to another question from **Senator Brandt** regarding whether this adjudication process might be put under a gag order such as the SRBA, **Mr. Clive Strong, Deputy Attorney General,** stated that he did not know at this time but it is possible. That is something that would develop during the course of litigation.

**Senator Brandt** asked whether there is anything that stops federally-recognized tribes from out-of-state from filing a claim. **Mr. Strong** said that any person who has the money and standing can attempt to file a claim. He said he would question whether any out-of-state tribe would have any type of standing in Idaho.

**Senator Burtenshaw** asked for more information regarding the disagreement between Idaho and Washington regarding water rights. **Director Dreher** explained that the Rathdrum Prairie/SpokaneValley aquifer system does not stop at the state line. Most of the aquifer lies in the State of Idaho but a significant portion lies underneath Washington state. He said that the aquifer is the sole source of drinking water supply for Spokane, Coeur d'Alene, Post Falls and other communities. Over the past five to ten years, he said, the City of Spokane has encountered difficulties meeting the Clean Water Act requirements below its sewage treatment facility on the Spokane River. He stated that the Rathdrum Prairie/Spokane Valley aquifer system is not hydraulically connected to any surface water source in Idaho but about seven miles into Washington, there is a connection.

**Director Dreher** continued that Washington State is incurring substantial costs in meeting the Clean Water Act requirements and they believe that ground water use in Idaho is reducing reach gains in Washington that would have otherwise occurred. They believe that if these reach gains were not reduced, their costs for sewage treatment would have been reduced or even eliminated. He said they are also concerned that ground water use in Idaho will deprive the state of Washington from having sufficient ground water in the future.

**Director Dreher** continued that there have been a lot of fragmented studies done on the aquifer in the past, but nothing comprehensive until Idaho convinced Washington to do a collaborative hydrogeologic characterization involving the USGS to determine what the facts are. He said this is a big step that is necessary before the issue can be solved. **Director Dreher** also noted that there is an environmental group in Washington that has raised the specter of Washington filing an equitable apportionment action in federal court seeking to have a determination as to how much ground water each state is entitled to. He said it will be very difficult for Idaho to defend itself in an equitable apportionment action without knowing how much water is being used. Washington has not adjudicated their water rights either.

**Director Dreher** said that Washington has discussed a compact to solve the issue. Under a compact, each state passes identical legislation that allocates the water among the states. That action is concurred with by Congress and a compact is formed with a compact commission that has a federal chair. He said he is not aware of any compacts that have been established since the Clean Water Act and Endangered Species Act were put in place. His concern about a compact is that an advocacy group could convince Congress that ratification of the compact is a significant federal action and requires an environmental impact statement (EIS). **Director Dreher** said that Idaho does not need to get the federal government involved.

**Representative Bedke** said he has heard that the first state to define its rights or limit its water consumption loses because that limits them when dealing with other states. **Director Dreher** said it is interesting how the process of defining existing rights is misunderstood. The reason for defining the rights that have been established is so the state can adequately simulate, using a computer model, how our ground water use is or is not affecting flows in the Spokane River in Washington. He added that adjudication does not limit future use and he does not think this will limit Idaho's use of water. He added that the interest in water use was sparked by three applications for natural gas fired combustion turbines. These applications filed claims to use ground water for cooling. He said these applications were ultimately denied because the technology they used was the most water-consumptive way to cool water.

**Mr. Dave Blew, Idaho Department of Water Resources,** was introduced to give an update relating to managed recharge. His complete powerpoint presentation is available at the Legislative Services Office.

**Mr. Blew** explained that the Spring 2006 managed recharge effort diverted water under the Idaho Water Resource Board's Snake River and Little Wood/Big Wood recharge water rights. Both water rights were placed into the water bank to include additional points of diversion. He

stated that recharge began in late March and concluded in mid-May. He said most of this recharge was done incidental to loss that was occurring in some early diversions that took place in the canals. Weather (flooding/rain/snow) hampered efforts by delaying canal repairs and limiting the amount of water that could be delivered to some sites being reserved for flood control.

The results of the recharge are as follows:

- Little Wood/Big Wood River- 22,500 acre feet (Large amount of unmeasured recharge occurred in the Big Wood River)
- Snake River – 38,000 acre feet
- Henrys Fork – No estimates at this time

Also as part of the 2006 managed recharge, water quality monitoring was conducted at the Lower Snake River Aquifer Recharge District Shoshone site and the Devil's Headgate on the Richfield Canal. This monitoring was paid for by the Lower Snake River Aquifer Recharge District and the Idaho Department of Environmental Quality.

**Mr. Blew** said that five pressure transducers were installed in monitoring wells along the Aberdeen Springfield Canal to monitor ground water level responses. He said they are continuing to work with the Aberdeen Springfield Canal Company on ground water level measurements. He said that part of that data will be used as a refinement to the ESPA ground water model.

**Mr. Blew** said the Department is very concerned about incidental losses in canals and, at the end of March, they secured use of an acoustic doppler current profiler to measure canal flow. He said that this will give them some idea of what the incidental recharge from canal losses are. He explained that an acoustic doppler current profiler makes water measurement much easier and less time consuming. It allows them to make multiple readings on one canal in one day.

**Mr. Blew** went on to say that numerous canal companies and irrigation districts provided high levels of cooperation to accommodate recharge this spring and that IDWR appreciates the effort these groups went to.

**Mr. Blew** made the following general observations regarding what they learned during the Spring 2006 managed recharge:

- Early spring recharge will require canal companies and irrigation districts to adjust canal repair schedules
- Weather conditions will have an impact on spring recharge
- Increased cost may necessitate reimbursement of canal companies and irrigation districts
    - Need to bring personnel on early
    - Extra equipment to repair canals
    - Pay water district cost of water deliveries

- Extra cost to measure return flows
- It is important to make use of natural systems, like the Big Wood River, to maximize recharge capabilities

**Mr. Blew** said they estimate the recharge from the Big Wood River just above the city of Shoshone at about 50,000 acre feet. He said that the water levels in the monitoring wells near this recharge site actually rose by about 45 feet and it is believed that was in response to water being recharged incidentally through the Big Wood River.

**Mr. Blew** also brought the Committee up to date on the W-Canal pilot project. He stated that the first order of business is the geotechnical investigation. The RFP was issued on June 12, 2006, and those proposals are due by July 14, with the selection to be made by July 28. He explained that the geotechnical investigation is divided into the following six tasks:

- Task I - Review of literature relevant to managed recharge on the Eastern Snake River Plain
- Task II - Characterization of unconsolidated soils
- Task III - Characterization of geologic materials
- Task IV – Prepare technical report with recommendations
- Task V – Prepare final design and construction specifications
- Task VI – Construction Management

**Mr. Blew** said that other steps involved in the W-Canal project include:

- NEPA compliance (Draft EA by 7/30/06)
- Easements across private land and permits to use state lands (private land easements secured 6/30/06; permits for state lands will be issued after consultant is selected)
- Conveyance and operation agreement with NSCC (In discussion)
- Final Design (Tentative due date October 30, 2006)

**Mr. Blew** went on to discuss the predicted steady-state response due to recharge at the W-Canal site as follows:

| | |
|---|---|
| Above Milner: | 7% |
| Devil's Washbowl to Buhl: | 30% |
| Buhl to Thousand Springs: | 30% |
| Thousand Springs: | 19% |
| Thousand Springs to Malad: | 2% |
| Malad: | 12% |
| Malad to Bancroft: | 0% |

**Mr. Blew** reminded the Committee that the W-Canal project is using a natural basin located on state land just outside of Wendell delivering water through the North Side Canal Company's W-

Canal. His presentation includes maps and photos of the actual site. He noted that if this project is successful there is enormous potential for expansion.

**Senator Coiner** commented regarding the water right that was used for this project and the rarity of that right being in priority. He asked what other sources of water are being looked at to allow use of this site. **Mr. Blew** said they have looked at water from the rental pool in the Upper Snake River basin. He commented that in his opinion this water right will be in priority more often than originally believed and there should be adequate water available. He said that water right stayed in priority this year until the first of June. **Senator Coiner** asked for clarification of this. He asked how that right, which was junior to a power right at Milner, could be in priority. **Director Dreher** said it was his understanding that the right is in priority as long as there are spills at Milner. Once the spills stop, water is no longer diverted. **Senator Coiner** asked how spills at Milner are defined, is it water beyond the required 5,000 acre feet, or is it any water going past Milner? **Director Dreher** explained that spills include water going past Milner that is not being used or called by any senior priority right. **Senator Coiner** asked for a report on that water right in reference to when it was used and how much.

**Senator Coiner** asked whether any studies have been done on the reach between Idaho Falls and Blackfoot and the additional recharge that happens in good water years versus drought years. **Mr. Blew** said that some of this has been done through the model but he is not familiar with it. **Senator Coiner** asked for another report on that portion of the river over the last 5 years to see the difference.

**Senator Stennett** asked for data showing water that is available from the Big Lost River and how much that helps recharge of the aquifer. **Mr. Blew** said he would get that for the Committee.

**Representative Barraclough** asked for information regarding preliminary studies of the infiltration rate of the W-Canal and estimates of its recharge quantity per year. **Mr. Blew** said they did some infiltration tests on a site just north of the W-Canal called the X1 site. These tests got about 8/10 feet per day to 1.2 feet per day. He said they would like to get those infiltration rates upwards of four feet per day.

**Senator Williams** asked whether any measurements were taken in the Thousand Springs area when the Big Wood and Big Lost River were flooding. **Mr. Blew** said the area has a relatively slow response time and, in his opinion, any response would not be seen for some time. **Senator Williams** said he remembered from the computer model that it showed any increase in water added to the aquifer up-gradient caused a pressure factor that would increase the flows. **Mr. Blew** said there is a delayed response time. He said there is the increased head in the aquifer but there is also the resistance of all of the material in the aquifer that slows that pressure head from reaching the springs. He noted that the quickest response is what is seen as incidental recharge from the North Side system because those canals lie essentially on top of the springs.

**Senator Coiner** commented that the limitation of using natural flow is that it is limited to late

spring when irrigation systems are already being used and an advantage of using storage water is that it can be used at other times of the year. He asked what work is being done to look for a source of storage water to do recharge in late summer, fall or earlier in the spring. **Mr. Blew** said that ground water districts are looking for those sources of water. He said the Department would like to be able to provide those districts with a place to put that water where it can be measured and be prevented from spilling off of the canals. He said the ground water people are working with North Side to figure out how to recharge up to 500 cfs without having that water spill off the system.

**Mr. Blew** said that IDWR issued a report to this Committee in 2004 that looked at three options for recharge including using water bank water, as well as what it would cost.

**Mr. Hal Anderson, Idaho Department Of Water Resources**, spoke to the Committee regarding the ESPA Aquifer Management Plan. His complete powerpoint presentation is available at the Legislative Services Office. **Mr. Anderson** was speaking to the Committee on behalf of **Mr. Jerry Rigby, Idaho Water Resource Board,** in regard to the ESPA Aquifer Management Plan.

**Mr. Anderson** explained that the statement of purpose for SCR136 (2006 Legislative Session) provides, in part, that "(t)hese parties are negotiating a framework for (that) settlement that makes it critical that the State of Idaho Water Resource Board establish public policy with regard to future management of the aquifer system..." He noted that this language is a key component to consider as to the reason the Legislature tasked the Board with developing an aquifer management plan for the Eastern Snake Plain aquifer.

**Mr. Anderson** said that a framework plan will be presented to the Legislature in 2007. The second phase, depending on guidance from the Legislature, will be development of a comprehensive management plan.

He explained the scope of the plan as follows:

- Process to be open to public;
- Plan to be comprehensive but have sideboards;
- Plan Framework should include interim measures that can be implemented before final plan;
- Plan should address aquifer management goals and level of management to adjust demand and legally useable supply.

**Mr. Anderson** said that the context for the plan framework includes:

- Legal constraints and precedents;
- Technical/modeling tools; and
- Existing studies and plans.

**Mr. Anderson** went on to say that the Board has determined that the most effective way to engage the public, affected parties to ongoing litigation, and stakeholder groups is to formulate a series of aquifer management alternatives which will be based on adjusting or balancing water demand and legally and administratively-available supply. Options include minimal, modest and aggressive alternatives. His presentation included a chart showing these alternatives and what actions might be taken to make adjustments to supply and demand. These adjustments include managed recharge and the CREP program. He said the costs reflected in the chart are just for implementation. He added that aquifer water budget components for recharge and discharge will be the quantification targets associated with the options.

According to **Mr. Anderson**, the approach includes specific measures and techniques that can be used to accomplish the desired water budget adjustments. Costs for implementation of the various management levels will be determined. Initial evaluation of the state and local economic cost/benefit of the alternatives will be undertaken. Adaptive mechanisms to quantify progress and adjust implementation measures will also be incorporated. Funding mechanisms, including development of a fee structure, to support selected management alternatives, will be developed.

**Mr. Anderson** stated that the process includes a facilitator. He said the facilitator will be someone that can help the Board with the process, facilitate the public meetings and be the contact with the local community as an unbiased third party. He said, according to **Mr. Jerry Rigby,** that if the Water Board had their own executive director, a facilitator would not be necessary. **Mr. Anderson** continued that the preliminary schedule anticipates presentation of management options, opportunity for public comment, and development of the initial framework plan. The process will also include additional public meetings to present the preliminary framework recommendations, along with presentation of the framework plan and summary of public comment to the 2007 Legislature.

**Senator Coiner** asked about the manner in which the facilitator position was advertised. **Mr. Anderson** said that the Water Board Chairman directed staff to work with the Attorney General's Office, Idaho Power and other groups who had gone through similar processes to solicit names of potential candidates. Those resumes were put on the IDWR website for review and then candidates were interviewed.

**Senator Coiner** commented that the Department has a backlog of work to be done that just continues to grow. In his opinion many of the problems could have been solved if the Department was able to get their work done. He asked whether the Water Resource Board has thought of hiring an outside company that has qualifications to do the plan instead of using the Department. **Mr. Anderson** said that was the Board's desire, realizing there were not existing staff resources available that could satisfy the demands for this additional work load. He noted that the Legislature did appropriate money to the Water Board to assist in that process. This is the money that will be used for the facilitator who will be doing a large part of the work associated with the development of the framework. **Mr. Anderson** said Department staff in the division he is responsible for, in the planning bureau, provide support to the Water Resource Board. He said they will also be providing support to the facilitator. **Senator Coiner** said, in his

opinion, if a plan is going to be created that has an open process, it would be better to identify another organization besides the Department to handle it. **Mr. Anderson** said he believes that is the reason the Water Board was chosen. He said his job with the Department is to provide assistance to the Water Board.

**Mr. Phil Rassier, Deputy Attorney General, Idaho Department of Water Resources,** was introduced to give an overview of Judge Barry Wood's Order issued on June 2, 2006, voiding the Conjunctive Management Rules. His complete powerpoint presentation is available at the Legislative Services Office.

**Mr. Rassier** explained that the present litigation before Judge Wood had its background in a water delivery call that was made by the Surface Water Coalition. Before proceeding to Judge Wood's decision, **Mr. Rassier** reviewed that action for the Committee.

He stated that the Plaintiffs filed their complaint for declaratory relief on August 15, 2005, against the Department of Water Resources and the Director seeking a declaration that the Conjunctive Management Rules were unconstitutional both on their face and as applied by the Director. The Plaintiffs are the American Falls Reservoir District #2, the A&B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls Canal Company. The Plaintiffs include five of the seven-member Surface Water Coalition, excluding the Milner Irrigation District and the North Side Canal Company, that filed a water delivery call with the Director on January 14, 2005, seeking the administration and curtailment of junior-priority ground water rights diverting from the Eastern Snake Plain Aquifer (ESPA). In addition to the five Surface Water Coalition members as Plaintiffs, and the Department and the Director as Defendants, the following entities were granted intervener party status in the lawsuit:

- Clear Springs Foods, Inc.;
- Idaho Power Company;
- Thousand Springs Water Users Association;
- Rangen, Inc.; and
- The Idaho Ground Water Appropriators, Inc.

**Mr. Rassier** said that the Department's initial response to the litigation was to seek its dismissal, arguing that the lawsuit represented a premature challenge, or premature seeking of judicial review, of the decision the Director had taken to date in response to the delivery call. He said that the delivery call Order that the Director had issued *could* have been final but, because it was issued prior to holding a hearing, Idaho statutes provide that opportunity has to be given to any party who is aggrieved by that decision to request a hearing. He said, in this instance, both the surface water users and the ground water users who were subject to the decision did request a hearing before the Department. **Mr. Rassier** reiterated that the Director had issued a response to the water delivery call.

**Mr. Rassier** explained that the Director responded to the Surface Water Coalition's January 14, 2005, delivery call with an Order on February 14, 2005, that recognized the right of the Coalition

members to make the call and designated the matter as a contested case under the Department's Conjunctive Management Rules promulgated in 1994. The February 14 Order described the process the Director would follow in taking further action on the delivery call.

**Mr. Rassier** stated that the Director's Order providing relief was issued on April 19, 2005. He said that the Order required all holders of consumptive ground water rights in Water District No. 120 and No. 130, with priority dates of February 27, 1979, and later, to either curtail their diversions or provide replacement water to the members of the Surface Water Coalition to make up for depletions and to reach gains in the Snake River between the Near Blackfoot Gage and the Minidoka Gage. **Mr. Rassier** said that the Director later amended this Order on May 2, 2005, and recognized in his May 2 Order "the importance under Idaho law of protecting the interests of a senior priority water right holder against interference by a junior priority right holder from a tributary or interconnected water source."

**Mr. Rassier** went on to say that, based upon water supply forecasts available at the time of the May 2 Order, the Director determined that the material injury represented by water shortages plus storage carryover shortfalls for the Surface Water Coalition members caused by junior priority ground water depletions in 2005, would be equal to 133,000 acre-feet, over time. He said that the Director further determined that the amount of the 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 replacement in 2005, was 27,700 acre-feet.

**Mr. Rassier** said it was interesting in that the Director provided that relief but throughout much of this case, there have been repeated assertions that no relief was provided because the hearing has not been held yet allowing the parties to make argument or provide additional evidence as to why the May 2 Order should be modified. **Mr. Rassier** said it is clear that the Director did provide relief in response to the call.

Below is the abbreviated procedural history of the case in 2005 and 2006:

**2005**

| | |
|---|---|
| August 15 | Complaint filed by Plaintiffs |
| September 7 | Defendants' Motion to Dismiss |
| October 14 | Plaintiffs' Motion for Summary Judgment |
| November 4 | Court denied Motion to Dismiss |
| December 16 | Court clarified its position regarding "facial" versus "as applied" analysis and the use of underlying facts in deciding the facial challenge to the rules. |

**2006**

| | |
|---|---|
| March 28 | Briefing completed |

| | |
|---|---|
| April 11 | Oral argument on Motions for Summary Judgment |
| June 2 | Order on Plaintiffs' Motion for Summary Judgment |
| June 30 | Judgment Granting Partial Summary Judgment |
| July 11 | Hearing on Certifying Judgment as Final |

**Mr. Rassier** stated that the Judge entered a Rule 54(b) certification that means that portion of the case involved in the partial summary judgment is final for purposes of appeal. As a result, the Department filed a notice of appeal with the District Court.

According to **Mr. Rassier**, holdings in Judge Wood's decision include:

1. The rules are constitutionally deficient for failure to integrate the required legal tenets and procedures regarding burden of proof and evidentiary standards that apply when the Director responds to a water delivery call.

2. The Director acted outside his legal authority in adopting the Conjunctive Management Rules, which are not in accord with Idaho's version of the Prior Appropriation Doctrine.

3. The factors and policies contained in the rules and to be applied by the Director can be construed consistent with the Prior Appropriation Doctrine – *albeit – with due caution as to the context in which such are used (understanding that some are not used in the context of curtailment cases).*

**Mr. Rassier** explained the factors and policies discussed included:

- Reasonable use and reasonable diversion;
- Material injury;
- Full economic development;
- Right of junior to provide replacement water to avoid injury to senior;
- Water right represents a right to use water, not ownership of the water;
- Right holder only entitled to divert the amount that can be beneficially used, regardless of the quantity decreed; and
- Requirement for a written delivery call is valid and necessary.

4. The rules are facially unconstitutional due to the omission of necessary components of the prior appropriation doctrine, including:

- presumption of injury;
- burden of proof;
- objective standards for review; and
- failure to give due effect to the partial decree for a senior water right.

5. The rules' exclusion of domestic water rights from ground water sources is both

facially unconstitutional and is in violation of Sections 42-602, 42-603, and 42-607, Idaho Code.

6. The "reasonable carryover" provision of the rules is unconstitutional, both facially and as threatened to be applied.

7. The rules' disparate treatment of the holders of junior ground water rights and junior surface water does not violate Equal Protection; does serve a legitimate state interest; and is rationally related to that interest.

8. Under the rules, the untimely administration of water rights, and in particular irrigation rights, constitutes an unconstitutional taking without just compensation.

**Mr. Rassier** said that holding #8 is perplexing to him because the Director did provide relief. He said the Court and the Plaintiffs in this case seem to be of the view that because the hearing has not been held, no relief has been provided. He noted that the Director did order curtailment for replacement water or mitigation. Although that water was not provided in 2005, a follow-up Order was issued in which a deadline of July 9, 2006, was given for them to provide that water.

**Senator Coiner** said he does not believe that relief was provided. He said that in 2005, the water users were looking at a short water year and wondering if they would have an adequate water supply. These water users had to make a decision as to what to plant without knowing whether they would have a full year of water. **Senator Coiner** said that decisions were made to grow more low-water, lower-profit crops, such as barley and wheat. He said 2005 ended up being a pretty good water year. To say that relief was given, in his opinion, is not true because any relief they received came this week, not in 2005. The relief for 2005 came in July 2006, and they still haven't received mitigation for 2004. **Mr. Rassier** said he was trying to explain that the Order issued by the Director provided relief but that he is not saying that the water actually came down the river. Whether that is carried out in a manner that meets the water user's satisfaction is a separate question. The question can always be asked as to what would happen if the Director had curtailed all ground water use based on the assumption, at the time, that the water supply in 2005 would be much less adequate.

**Mr. Rassier** noted that once an appeal is filed, an automatic 14-day stay goes into effect but any party may request that Judge Wood enter an order staying the effect of his decision pending an appeal to the Idaho Supreme Court. If Judge Wood denies the stay request, the party may petition the Idaho Supreme Court for a stay of the District Court's decision pending appeal.

**Senator Stennett** asked what the timeline is for when the Legislature will be able to deal with this. **Mr. Rassier** said he would advise waiting until the Supreme Court has reviewed the Order. It is very difficult to say how long that will take. **Mr. Rassier** said there will probably be some interest to see if the Supreme Court will expedite the case but that he has no idea on a time frame. He said it will be at least six to eight months. **Senator Stennett** asked about the Department's position and how they are administrating rules as a result of the District Court's

decision. **Mr. Rassier** said that issue has not been fully resolved yet. He said up until the Court issued its judgment, the Director continued issuing orders.

**Representative Raybould** commented that in the last two years there has been a lot of talk about futile calls. He explained that on the surface system, if a junior appropriator upstream is asked to shut off because of a low water supply for a senior water user downstream, and that water will not reach the senior user's diversion due to conditions of the streamflow, that is termed a futile call. In such a case the junior user is not shut off upstream. He asked whether the Judge addressed this issue in the Snake River Plain area. **Mr. Rassier** stated that the Judge did briefly address futile call in his decision. It was his sense that the rules, as they presently existed, did an inadequate job of explaining how the futile call would apply. One of his suggestions was that it may be necessary or appropriate for the Legislature to revisit the futile call issue. **Mr. Rassier** agreed with **Representative Raybould's** description of how a futile call operates in a surface water setting. He said one of the major objectives or purposes of the Conjunctive Management Rules was to modify that application of the futile call doctrine in a surface water setting and to recognize that, in a ground water setting, the effects of ground water depletions often do not show up as quickly. He said the cumulative effect of those ground water depletions does reduce the amount of water available to surface water users and one of the major reasons for the Conjunctive Management Rules was to implement a process where that delayed effect could be taken into account. He went on to say that in that respect this is a variation or modification of the normal futile call doctrine.

In response to another question from **Representative Raybould** regarding injury and the delayed reaction to curtailment and how the Legislature could address this, **Mr. Rassier** said there is a lot of uncertainty as to what future water supplies will be. He said the concept under the Conjunctive Management Rules is that, if there is uncertainty, and if they are going to err somewhat, they want to err in favor of the senior users rather than the junior users. However, he added, the attempt was to drive somewhat down the middle of the road; not holding that the senior users are entitled to the full capacity of the reservoirs, whether or not they need the water to provide a supply for a particular year, but requiring some mitigation or curtailment from the junior ground water users to ensure that the supply the senior right holders get is adequate. He said meeting that line is very challenging.

**Representative Bedke** asked, aside from the futility issue, whether there are any other issues that both sides agree need statutory changes. **Mr. Rassier** said one area would be the domestic use exception.

**Representative Bedke** asked whether the statutes involved in the first point in Judge Wood's decision dealing with burden of proof, and how the Director applies that burden, are too vague. **Mr. Rassier** said he would not necessarily say the statutes are vague. He said the Director, because he is the agency head of the Department, proceeds under the Administrative Procedures Act and those were the statutes that controlled how he proceeded. **Mr. Rassier** said the Judge was looking at old case law and wanting to see the case dealt with in the manner that it would be if, for example, a senior surface water user had gone to court and sued junior ground water users.

It is two different ways to proceed. He thinks they need that issue to be decided on appeal.

**Representative Bedke** asked whether the actions of the Director are deemed unconstitutional, and if he made his decision based on statutes, does that make the statutes unconstitutional. **Mr. Rassier** said he does not think anyone is arguing that any provision of the Administrative Procedure Act is unconstitutional. He said he thinks it is more a question of what path the Director should be following. He said the Legislature may be able to specify for the Director what path or statutes to follow in a delivery call situation. **Representative Bedke** said it seems that the burden of proof part of the Administrative Procedure Act is on the junior right holder, not the senior. **Mr. Rassier** said that from the Director's perspective, the determination of injury was up to the Director, not either the junior or senior water users. He does not believe the burden was more heavy on one party rather than on another.

**Senator Little** asked whether the Legislature can address the issue of futile call without addressing many of the other issues at the same time. **Mr. Rassier** said the Legislature is free to address as much or as little as they want. He said the futile call issue raises concern among ground water users as to whether they should be required to curtail if the effect is not going to show up for a lengthy period of time. He added that we do have some statutory provisions now relating to full economic development. In response to another question by **Senator Little**, **Mr. Rassier** said futile call is located in case law and in the rules, not in the statutes.

**Senator Stennett** asked, since the case law dealing with futile call was developed for surface water users versus surface water users, whether it has been tested in the case of ground water users versus surface water users. **Mr. Rassier** responded that it has not been in Idaho, but he was not sure about other western states. **Senator Stennett** asked whether the Legislature needs to look at administrative rules dealing with futile call in the immediate future. **Mr. Rassier** said he would like to wait to see what the Supreme Court has to say about Judge Wood's decision before answering that.

**Senator Coiner** commented that the Judge's decision found that the rules were inadequate, not the statutes. He said that over the last 100 or more years surface water users have been curtailed. He said the watermaster simply goes out and administers the water based on priority. According to **Senator Coiner,** the struggle today is how to administer ground water after about fifty years of being relatively free from any administration. In his opinion, it seems premature to go back and look at these statutes that have been used for surface water users. There are rules that were deemed unconstitutional and, depending on what happens there, **Senator Coiner** said we might need new rules for conjunctive management. He said he would not want to start rewriting the statutes until it is decided where the rules are going.

In response, **Mr. Rassier** said that he thinks the Legislature did foresee this issue twenty years ago and that is the reason the Snake River Basin Adjudication was initiated. This was initiated so that ground water rights could be quantified and placed in water districts and the Department could begin administering these ground water rights that are hydraulically connected to surface water rights.

**Representative Stevenson** added a comment relating to supplemental rights. He noted that some of the surface water users put wells into the ground to supplement water so they are not curtailed. He asked whether supplemental rights need to be identified differently than other rights. **Mr. Rassier** responded that he did not think so.

**Director Toni Hardesty, Department of Environmental Quality (DEQ),** was the next speaker. She was introduced to give the Committee an overview of recent issues that could potentially affect DEQ.

**Representative Raybould** noted that he asked **Director Hardesty** to discuss an issue regarding the Shoshone/Bannock Tribe asserting authority to police the Snake River and the American Falls Reservoir within the boundaries of their reservation and applying to the U.S. government for that authority under the Clean Water Act. He said they have always considered that the Department should have those responsibilities within the state.

**Representative Raybould** also asked for information regarding the fact that the U.S. government was issuing permits for the discharge of treated effluent into canal systems under the authority that the waters in those canals were waters of the U. S. **Representative Raybould** noted that in Idaho, it has always been thought that once that water was diverted from the river, it was private water used under state law.

**Director Hardesty** said that the Shoshone/Bannock Tribe did apply for treatment as a state by submitting an application to EPA on December 2004. The state responded in comment in June 2005. She noted that the Coeur d'Alene Tribe previously applied for treatment as a state and has actually received treatment as a state this past year. Treatment as a state allows the Tribes to do the following things:

- Develop and implement water quality programs and their own standards for waters those programs and standards apply to;
- To do what are known as a 401 certifications;

**Director Hardesty** said this means that if an NPDES permit is issued, the Tribe gets to certify that the permit meets their water quality standards.

- Allows them to apply for federal grants.

She said this is regulated under the federal Clean Water Act. The federal regulation lays out four criteria that a Tribe has to meet before they can be granted treatment as a state. The four criteria are:

- Have to be recognized as an Indian Tribe;
- Have to show they have a governing body that is capable of carrying out these responsibilities;
- Have an inherent interest and responsibility for the water quality within their

jurisdictional boundary; and

- Have the capability and staff to carry these out.

**Director Hardesty** said the state has two opportunities to weigh in on the issues. The first opportunity is very limited and involves the jurisdictional boundary. This means that once application is submitted, the state responds with regard to the boundary the Tribe states they have authority over. She stated that the state's 2005 letter is quite extensive and the majority of that is focused on whether the Tribe has jurisdiction over a portion of the Snake River and a portion of the Blackfoot River. She said the Tribe asserted in their application that the dividing line was halfway down both rivers so they had half of each. The state asserted back that it did not believe that was the case. Conversations continue and the Deputy Attorney General is working with the EPA.

**Director Hardesty** said this is similar to what happened with the Coeur d'Alene Tribe and that it took almost six years to resolve their jurisdictional issue.

**Director Hardesty** said once the Tribe is granted treatment as a state, they can develop their own water quality standards. She said this is the second area of opportunity where the state can weigh in. The state gets to comment on those water quality standards. She said the state is working with the Coeur d'Alene tribe trying to get those water quality standards to be as close as possible to those of the state and the state would have the same opportunity to do this with the Shoshone/Bannock Tribe if they receive treatment as a state.

In response to **Representative Raybould's** question regarding whether there is anything the state can do, or what type of legal authority the state might have, **Director Hardesty** said this is a federal law and the two options she explained are the only options the state has.

**Director Hardesty** stated that across the U.S., 57 of 562 federally-recognized Indian Tribes have applied for treatment as a state; of that 57, EPA has approved 32, and 24 of these 32 have water quality standards. According to **Director Hardesty,** only one other state has been able to implement a law that has some degree of control over the treatment as a state process. That was done in Oklahoma at a federal level. Oklahoma's action was attached to an appropriation bill that required the Tribe to work with the state and enter into agreements with the state and EPA before treatment as a state status would be granted.

**Senator Schroeder** commented that Lake Coeur d'Alene has heavy metals in it. He asked what would happen if the Tribe and the state went in different directions as to how to deal with it. **Director Hardesty** stated that this would be similar to two states with separate water quality standards. She said if the Tribe developed more stringent water quality standards, they could ask the state that would be discharging into their portion to do something to reduce the impact on downstream users. She said this is typically implemented on a point source. The Tribe has to show that their water quality standards were not being met due to a specific pollutant or discharge.

**Director Hardesty** went on to discuss the issue of effluent discharge into canals. She said in Idaho there are some NPDES permits issued by EPA that allow point sources (industrial facilities, municipalities) to discharge into canals and then those canals ultimately discharge into other receiving waters. She said she thinks the question is whether by granting those permits, the state or EPA is allowing or authorizing that discharge into the canals. She noted that Idaho does not have NPDES primacy so DEQ does not issue those permits - EPA does. She added that DEQ does issue 401 certifications saying these permits meet Idaho water quality standards.

**Director Hardesty** stated that Idaho's position is that by granting an NPDES permit, EPA is not necessarily indicating or saying that source has the authority to discharge into the canal. The position has been that by granting the NPDES permit, they are regulating the *kind* of discharge and what the water quality will be. She said the question with regard to whether a municipality or an industrial facility would have the ability to discharge into a canal if the canal system did not want it, is a separate legal question. She said there has been some precedent, in that some industrial facilities have requested to discharge into canals and have been told "no."

**Representative Nielsen** asked whether standards can be relaxed in years with tremendous runoff for the quality of recharge water. **Director Hardesty** said that DEQ is working with IDWR to develop an adaptive monitoring plan for recharge. She said the concern with recharge is contamination that may occur to drinking water wells. She said DEQ also recognizes that different scenarios are going to have different risk levels and they are trying to put together an adaptive approach.

In response to a question from **Representative Raybould**, **Mr. Norm Semanko** stated that it needs to be made clear to an NPDES applicant, that just because a permit has been approved, it does not guarantee them permission to use a canal, and that they need separate permission.

In response to a question from **Representative Stevenson** regarding water that comes into a canal that is not discharged back into a river, **Director Hardesty** responded that the EPA has treated such canal water as waters of the U.S., however, Idaho law has an exception that provides that irrigation return flow is not a point source and, therefore, is not regulated nor does it need an NPDES permit. She said there have been recent court cases with regard to that determination of whether waters are waters of the U.S. **Representative Nielsen** asked whether irrigation drainage ditches qualify as waters of the U.S. **Director Hardesty** said the issue only comes up if you have an NPDES discharger. If someone is going to discharge into one of those drainages, the question would come up.

With no further business, the meeting was adjourned at 3:30 p.m.