

**MINUTES
NATURAL RESOURCES INTERIM COMMITTEE
August 12, 2008
10:00 a.m. to 4:00 p.m.
Room 204, Capitol Annex
Boise, Idaho**

Cochairman Senator Gary Schroeder called the meeting to order at 10:00 a.m. Members present were: **Cochairman Representative Dell Raybould**, Senators Brad Little, Charles Coiner, Clint Stennett, Jeff Siddoway; Representatives Bert Stevenson, Scott Bedke, Donna Pence; and ad hoc members Senator Lee Heinrich and Representative Jim Patrick. Absent and excused members were: Representative Mike Moyle and ad hoc members Senators Steven Bair and Dean Cameron; and Representatives JoAn Wood and Jim Clark. Staff members present were Katharine Gerrity and Twyla Melton.

Others present were: Director Dave Tuthill, Bob McLaughlin, Brian Patton and Tim Luke, Idaho Department of Water Resources; Rich Hahn and Jim Tucker, Idaho Power; Jane Wittmeyer, Intermountain Forest Association; Benjamin Davenport, Evans Keane; John J. Williams, Bonneville Power Administration; Brenda Tominaga, Idaho Irrigation Pumpers Association/IGWA; Lynn Tominaga, Idaho Ground Water Association; Norm Semanko, Idaho Water Users Association; Rich Rigby, Bureau of Reclamation; John Chatburn, Governor's Office; Dustin Miller, Office of Species Conservation; Jim Unsworth, Idaho Department of Fish and Game; Brad Smith, Idaho Conservation League; Randy McMillan, Clear Springs Foods; Steve Strack, Clive Strong, and Harriet Hensley, Idaho Attorney General's Office; Kent Lauer, Idaho Farm Bureau; Jerry Deckard and Roger Seiber, Capitol West/IDADA; Tom Arkoosh, Surface Water Coalition; Randy Budge, Idaho Ground Water Appropriators; Peter Anderson, Trout Unlimited; Stan Clark, Eastern Idaho Water Rights Coalition; Josh Tewalt, Department of Financial Management; Jody Lee, Idaho Public Television; and Colby Cameron, Sullivan & Reberger.

NOTE: All copies of presentations, reference materials, and handouts will be on file at the Legislative Services Office (LSO).

Cochairman Schroeder called for a silent roll call and requested a motion for the minutes of the last meeting. **Representative Stevenson moved to accept the minutes as written, Senator Coiner seconded the motion. The motion carried by unanimous voice vote.**

Cochairman Schroeder asked **Cochairman Raybould** to comment on a letter received from the Attorney General's Office.

Cochairman Raybould reported that the Attorney General's Office provided an unofficial opinion relating to a request made during the last committee meeting that the committee request a performance review of the Idaho Department of Water Resources. **Cochairman Raybould** noted that the Cochairmen also received a letter from the Director of the Department of Water Resources regarding the performance review request. He went on to say that the letter indicated that presenters at the last meeting of the committee addressed matters that are presently before IDWR and, because those issues are subject to challenge and judicial review, it would be inappropriate for him to discuss the issues before the committee. **Cochairman Raybould** stated that the Cochairmen decided that, before the Legislature became involved, there should be an Attorney General's opinion about whether or not it should be involved in asking for a review of the Department.

Cochairman Raybould read the opening paragraph and conclusion of the Attorney General's opinion as provided by Brian P. Kane, Assistant Chief Deputy:

"...Your letter of August 12, 2008, asks this office to address whether conducting a legislative performance review of proceedings and administrative orders issued by the Idaho Department of Water Resources ("Department") in ongoing contested cases governed by the Idaho Administrative Procedures Act ("Idaho APA" or "Act"), Idaho Code §§ 67-5201, *et seq.*, would violate the separation of powers doctrine.

After reviewing this question, it appears that the type of legislative performance review that is being contemplated would likely violate article II, § 1 of the Idaho Constitution, the separation of powers clause. Executive department actions, which are subject to judicial review, should not be substantively reviewed by the Legislature. This limitation assists in assuring that each branch of the government is appropriately checked and balanced by the others, without granting any one branch greater authority than another. Set forth below is a more complete analysis of this issue under both Idaho's Constitution and the Idaho APA..."

"...As outlined above, it is likely that the separation of powers provision of Idaho's Constitution would be violated by permitting the contemplated review of an article IV, § 20 Department by the Legislature, an article III entity. Additionally, the type of review asked for in this matter has been provided for and assigned by the Idaho Constitution to the Judiciary, an article V branch of government. Therefore, it would be improper for the Legislature to review and determine whether the Department has violated Idaho law in specific contested cases that affect individual legal rights.

Additionally, the procedural and substantive provisions of the APA control agency decision making through the specification of procedures, standards of judicial review, substantive limits agencies may not transgress, and substantive

considerations agencies are required to take in account. The APA provisions governing review of agency actions in contested case proceedings are consistent with the separation of powers principles embodied in the Idaho Constitution and govern the type of legal review requested.

This letter is provided to assist you. The response is an informal, unofficial, and preliminary expression of the view of this Office based upon the research of the author.”

Cochairman Schroeder said that, based on the letter from the Attorney General, the consideration of the request for a performance evaluation would not be pursued further at this point in time.

Senator Coiner commented that the question posed to the Attorney General was not his interpretation of what was contemplated. **Senator Coiner** said that he believed it was the processes and procedures the Department used, as well as timeliness of decisions, not the conclusions reached in the decisions, that were questioned.

Cochairman Schroeder stated, that if there is an appearance of an action of review, punitive or not, that links a decision and action, then the Legislature should not be involved. **Senator Coiner** agreed, but reiterated his interpretation of what was requested at the last meeting versus the question posed to the Attorney General. **Cochairman Schroeder** said that he gathered from Senator Coiner’s comments that he did not object to discontinuing the pursuit of the audit at this time. **Senator Coiner** agreed.

Representative Patrick commented that his interpretation of the purpose of the audit request was to improve the efficiency of the agency, not to review judicial matters. However, he stated that, under the conditions, he believes an audit should not be pursued.

Cochairman Raybould referred to the power point presentation given at the last meeting calling into question specific decisions made by the Director which he said confused the issue. He said that was the reason for the Attorney General’s opinion. **Cochairman Raybould** agreed with Senator Coiner that it may be good to have an audit at a later time to see if the Department is adequately staffed and funded, those kinds of actions that would make the Department more efficient in serving the people. He went on to say that the power point and newspaper articles that discussed appeals of those decisions indicate there is a concrete basis for this committee to delay until the legal/judicial actions are determined. **Cochairman Schroeder** agreed that the Department has functions that are important to many people and entities and resources should be available for efficient operation.

Cochairman Schroeder introduced **Jim Unsworth**, Deputy Director of Programs,

Idaho Department of Fish and Game, to address wolf management as well as **Mr. Steve Strack**, Idaho Attorney General's Office, and **Mr. David Hensley**, Office of the Governor, to address the wolf delisting litigation.

Mr. Unsworth told the committee that the Department is currently managing wolves under the new 10j Rule working with producers and others to coordinate management from a depredation standpoint and continuing to monitor and coordinate with the Nez Perce tribe. He went on to say that, due to the long winter and larger population numbers, wolves have been at lower elevations where they have not been seen in the past and there has been considerably more depredation of livestock this year. **Mr. Unsworth** also said that the difference in the new 10j Rule is the allowance for the protection of domestic dogs on public land and some protection of stock on public land.

Cochairman Schroeder commented about the public anger regarding the Montana judge's ruling relating to delisting. **Mr. Unsworth** added that sportsmen and citizens in general are frustrated. He said that the Commission and Department are also frustrated because of the hard work in preparing rules for the wolf management plan, including the development of quotas, establishment of management zones, and development of mechanisms for mandatory checks and harvest monitoring. **Representative Patrick** stated that the cattlemen in Owyhee County say there have never been wolves there and they shouldn't be allowed to enter that county. He asked whether there is a way to stop wolf rezoning. **Mr. Unsworth** responded that he was unsure if it would be possible to have a wolf-free zone. From a management standpoint, **Mr. Unsworth** said that the Southern Snake River Plain is an area where wolves are deemed inappropriate and that was an area where a "no quota" hunting zone was planned. He added that, as for now, this area is some distance from where the wolf populations exist.

Representative Stevenson followed up that wolves are within 40 miles of Boise so that is really close to Owyhee County if they keep moving down. **Mr. Unsworth** responded that there are actually wolves within 10 miles of Boise during the wintertime and that there was a pack at Bogus Basin Road last year.

Senator Siddoway asked whether the Department is taking some action in controlling the wolves that cause problems with livestock. He added that collaring those animals seems to be an exercise in futility for a variety of reasons and that the obvious answer seems to be to euthanize them. He also asked whether the Department will be involved as a friend of the court for the appeal. **Mr. Unsworth** responded that the Department works very closely with Fish and Wildlife and the rule of thumb is that they can take a couple of wolves immediately in certain areas but must use good judgement. He added that caution is used in certain areas because of the genetic interchange concern with Yellowstone Park, Idaho and Montana. **Mr. Unsworth** stated that as far as the litigation, the Department believes it is time for state management and it will help in whatever way possible.

The second set of speakers, **David Hensley**, Office of the Governor and **Steve Strack**, Idaho Attorney General's Office, Natural Resources Division, gave a joint presentation on the recent litigation before Judge Molloy in Montana.

Mr. Hensley explained that the Office of the Governor, Attorney General's Office and the Office of Species Conservation were engaged in the litigation and had intervened in the lawsuit involving claims by environmental groups that Fish and Wildlife was arbitrary and capricious in their decision to delist the grey wolf. He said that there was a motion for a preliminary injunction and the judge ruled that the states were precluded from managing the species under state management plans for the duration of the litigation.

Mr. Hensley stated that this leaves the Department of Fish and Game to manage the species under the new 10j Rule. He said that the Office of the Governor is looking at the best possible way to restore state management as quickly as possible but that this will be difficult given the judge's ruling as well as the court's belief that genetic exchange is not occurring between the Idaho, Montana, and the Yellowstone populations. **Mr. Hensley** noted that the state has requested genetic studies through the University of Idaho to see if there is evidence that can be presented to the court to persuade the judge that genetic exchange has been happening. He added that all parties are working on a litigation schedule to move forward with the case and discussing some options in response to the judge's preliminary injunction.

Mr. Strack discussed the options and substance of the judge's ruling. He told the committee the judge ruled that the Idaho management plan, in conjunction with Idaho's depredation statute, was sufficient to protect wolves within Idaho. He said that the only issue with Idaho's plan was the question of whether there were enough wolves in Idaho to provide the genetic interchange with the Yellowstone population. **Mr. Strack** said the other major impediment is the Wyoming management plan which provides that 90% of the state is a shoot-on-sight area. He said that the judge ruled the plan provides insufficient protection for the wolves and that there are an insufficient number of breeding pairs in the state.

Mr. Strack said that they can now either appeal to the Ninth Circuit (which he said is probably not the best course in this case because of timing) or proceed with the merits in the district court. He added that the record will be about 60,000 pages and it will take a substantial amount of time for the United States to process all the information. Given this fact, he said that the hearing will probably occur sometime next summer resulting in a ruling by sometime next fall.

In summary, **Mr. Strack** said that the best option is probably to proceed on the merits, address the genetic issues with Fish and Game as well as Montana and Wyoming, and complete the genetic testing now underway.

Cochairman Schroeder asked who makes the ultimate decision on how to proceed.

Mr. Strack responded that each party can make their own decisions on how to proceed

and whether it would be individually or in conjunction with any of the other parties. **Mr. Strack** added that the United States holds the record and independent evidence cannot be relied upon. **Cochairman Schroeder** asked what the path to the quickest delisting would be. **Mr. Strack** said that there are several options but the quickest would be through the district court, getting the decision on the merits and taking that forward. **Cochairman Schroeder** requested a timetable. **Mr. Strack** responded that the earliest time would be the fall of 2009. He added that another option would be for Fish and Wildlife to present an alternate rule to address the judge's concern but that, although possibly quicker, it is still not immediate because of federal time requirements for presenting such rules.

Cochairman Schroeder called attention to the fact that there will be a change of administration in Washington D.C. He also asked why the additional genetic information wasn't presented to the judge. **Mr. Hensley** explained that the genetic information that was presented to the court was that information available to Fish and Wildlife at the time they published the delisting rule which contained genetic samples from the Yellowstone population through 2005. He said that there have been other samples taken since then, specifically in 2005-2008, that are currently being analyzed. He added that there will be an attempt to get this new information before the court but cautioned that, in general, only information in the record is allowed.

Cochairman Schroeder asked if there was a possibility of Montana and Idaho proceeding and letting Wyoming stand on its own. **Mr. Hensley** explained that they are currently facing a prohibition of state management under Idaho's plan for the duration of the case and the Office of the Governor believes every option should be explored to reinstate state management at this time. The long-term issue is the eventual decision of whether delisting was appropriate.

Mr. Hensley continued, stating that the judge accepted the Idaho and Montana state management plans, finding that there is good genetic exchange between those states. He said that the judge's only question relating to Idaho and Montana was the exchange between those states and the Yellowstone population. **Mr. Hensley** stated that if evidence demonstrates there is genetic exchange, then the state can go to Fish and Wildlife and discuss further options outside the litigation for Idaho and Montana to proceed. He went on to say that the next presidential administration is being factored into these decisions and that the Governor has given some thought about relocation of Idaho wolves to Yellowstone which would necessitate working with Fish and Wildlife and the Park Service, with close coordination with the state of Wyoming.

Cochairman Raybould was concerned about basing the lawsuit on the genetic interchange between the states and Yellowstone because the initial introduction in all areas came from the same wolf pack in Canada. Given that fact, he questioned whether the genetics would follow back and be similar. **Mr. Hensley** pointed out that the judge was looking at the original Fish and Wildlife requirement that genetic exchange would

occur before delisting.

Representative Stevenson asked if the injunction included the new 10j Rule. **Mr. Strack** responded that there is a separate lawsuit challenging the revised 10j Rule and there is no injunction in that matter at this time.

Senator Little stated that this is all about Wyoming, the judge does not like that plan. **Mr. Hensley** responded that the judge is clearly focused on genetic exchange and the impact of Wyoming's plan on genetic exchange. He said that the judge is very concerned that Fish and Wildlife did not explain to his satisfaction why genetic exchange was less important at this time than it was originally.

Cochairman Schroeder asked what the impact would be if Wyoming agreed to manage for 15 packs, park and non-park, and modify their management plan. **Mr. Strack** responded that a firm commitment to manage 15 packs, regardless of the number of wolves in Yellowstone, was a primary concern. The judge was also concerned with shoot-on-sight in 90% of the state. He said that managing 15 packs and having a fixed trophy area would go a long way to alleviate the judge's concerns. Wyoming is working toward addressing some of these issues.

Cochairman Schroeder referred to the word "worrisome" in the Idaho statute and asked if that is a problem or not. **Mr. Strack** said that is not a concern for the judge.

Cochairman Schroeder wanted to know what the Legislature's role, if any, would be. **Mr. Hensley** urged caution. He requested that the Legislature work with the Office of the Governor. He said that they will keep the Legislature advised of any updates. He added that at this point in time the issue is squarely before the court and there may not be a role.

Senator Siddoway asked what kind of evidence is going to be required to show that the animals are going from area to area. **Mr. Strack** stated that the judge viewed the lack of proof as proof there is no genetic exchange. He added that Fish and Wildlife know there is an exchange and the job is to convince the judge that the level of proof he requires is unreasonable and he should defer to the determination of Fish and Wildlife. He said that the evidence in the record should be enough, provided the court applies the proper standards.

Cochairman Schroeder asked whether the judge was going to find some reason to turn the Wyoming plan down and relist. **Mr. Strack** said that if the proper case is presented, and the judge applies clearly stated standards, then he will rule in accordance with the law. He added that the chances of a favorable review in the Ninth Circuit are improving. He added that the recent Ninth Circuit case *Lands Council v. McNair*, No. 07-35000 (9th Cir. July 2, 2008) may be very important because it emphasizes the need to be deferential to scientific determinations by agencies, especially when there are

differences of opinion among experts.

Senator Little asked **Mr. Unsworth** for an update on the protocol when an action is taken relating to wolves and livestock. **Mr. Unsworth** responded that when someone shoots a wolf, the Department of Fish and Wildlife should be notified and that agency will determine whether there was proper depredation. He said that if the agency determines that it was proper, no action will be taken. However, he said, if there is an issue, enforcement protocols will be followed. **Senator Little** asked when incidents are referred to the Attorney General's office. **Clive Strong**, Division Chief, Natural Resources Division, stated that in terms of prosecution, cases are referred directly to the prosecuting attorney's office and that the Attorney General's Office only enters the case on request by the prosecuting attorney. **Cochairman Schroeder** asked what happens if local prosecutors won't file charges against Idaho residents when they kill wolves. **Mr. Strong** said that was a concern because if there is a delegated program there must be effective enforcement. The Attorney General's Office has offered assistance. If there is not effective enforcement at the local level, it will risk the overall state program.

Cochairman Schroeder asked whether a wolf would have to be carried out if it attacks a horse or livestock in the back country. **Mr. Unsworth** stated that there are no specific requirements but that the action must be reported.

Cochairman Schroeder noted that wolves are moving into more populated areas and public sentiment is changing.

Representative Bedke asked what the federal consequences were to someone who shot a wolf on sight like they do in Wyoming. **Mr. Unsworth** said the shoot-on-sight only happened in Wyoming during the period of delisting, with about 12 wolves being shot in two months. He explained that they are now back under the 10j Rule and protective status. **Cochairman Schroeder** reiterated that the old 10j Rule applied to working dogs only and the new rule applies to all domestic dogs.

The next speaker was **Director David Tuthill**, Idaho Department of Water Resources, who provided a water supply update for the committee, providing information relating to the reservoir status throughout the state, with a detailed status of the Upper Snake Basin and comments regarding springs in the Upper Snake Basin.

As an example, **Director Tuthill** noted that, as of August 11, 2008, American Falls is at 41% capacity. The long-term record for percent of average is only 67% but this is still 185% of last year. **Cochairman Raybould** asked how much water is in other upstream reservoirs that actually belong to American Falls and whether, if that other water is counted, it would be more than 41% full. **Director Tuthill** agreed if you include the other water rights. **Director Tuthill** told the committee that the technique is to hold the water upstream as long as possible because if there is a shortage of water the following year, the upstream reservoirs are the hardest to fill. He went on to say that, overall, the

reservoirs are in pretty good shape around the state, with some areas improved over last year, but still below average due to drought situations.

Director Tuthill reminded the committee that 2006 was a good year and 2007 was a poor year because not much water was received and it melted early. He said that in 2008 we received about the same amount of water as in 2006 but there was late moisture and late runoff. Given those facts, he said, this year was very good for irrigation supplies in the Upper Snake Basin with a good carryover.

Director Tuthill went on to say that looking at the storage content of the reservoir does not indicate what water rights have been filled. As an example he said that because American Falls was built prior to Palisades, the water rights at American Falls are senior in time and, although water may be captured at Palisades, the water rights are first filled at American Falls.

Director Tuthill also noted that the model also provides a good indication of where the water is flowing. He said that minimum and maximum flows going in and out of each reservoir are monitored and that there is a target minimum flow to accommodate the variety of users such as fisheries or power. **Director Tuthill** continued, indicating to the committee how the model shows when there are releases to allow for runoff and to control the flows so the reservoirs do not fill too fast or too slow. He added that, with a few exceptions, the flows are controlled to maximize irrigation.

According to **Director Tuthill**, at the beginning of 2008, there was less than 13.1% in storage, probably the lowest carryover we have seen. **Cochairman Raybould** agreed it was the lowest seen in many years. **Director Tuthill** continued, stating that by January 1st of this year the reservoirs were at 36.4% full. **Representative Bedke** asked whether the water flowing out of Milner is coming through the system or whether it is originating low in the system. He also asked why the water isn't going to Walcot. **Director Tuthill** responded that it was generated low in the system. **Senator Coiner** added further explanation for Representative Bedke.

Director Tuthill continued his demonstration of the model showing that the 2008 snow pack was far above 2007 and 105% of normal. He added that there was not much runoff through May. By the end of June, he said, the reservoirs were filling up and by August 7, there was 70% storage. He told the committee that there is a prediction for a 2008 carryover of 1.8 million af and that in most cases, the reservoirs will fill given the carryover for this year. He also noted that if 100,000 af was put in recharge, the likelihood of filling the reservoir system is about 80% and noted that the risks must be weighed for recharging or keeping the water in storage.

Senator Little asked whether there is a demand for water later in the year due to the increase in commodity prices and whether that is factored into the model. **Director Tuthill** said that when the carryover is predicted at this point, it is based on the

experience of the staff and prices are not factored into the model.

Representative Patrick asked whether flow augmentation for salmon is accounted for and **Director Tuthill** responded that it is.

Senator Coiner referred to 2008 stating that storage systems didn't fill and the mitigation water from 2007 was on a last-to-fill basis. He asked about the status of that water. **Director Tuthill** responded that the mitigation water is, in general, last-to-fill but only for one year according to the rules. **Director Tuthill** said there have been a number of changes but mitigation water is in the one year last-to-fill category.

Tim Luke, Water Distribution Section Manager, Idaho Department of Water Resources, was the next speaker and addressed the committee about selected spring locations stretching from Spring Creek near Pocatello to the springs in the Hagerman area. He said that discharge graphics are compiled annually by USGS. **Mr. Luke** discussed the average annual spring discharge to the Snake River between Milner and King Hill from 1902-2008 and followed up with graphs from more recent years. He reminded the committee that the peak discharge period for the Thousand Springs area was in the early 1950's and that there has been a downward trend over the last sixty years which flattened out over the last sixteen years. He said that there was a continual decline in both the spring discharge and the diversion from the Snake River. He added that some causes were changes in the winter diversion and in irrigation practices.

Mr. Luke noted that there is typically a lag time in the flows and the drop in the spring of 2008 is most likely a result of the poor water year in 2007. **Senator Coiner** pointed out that the Box Springs discharge had changed from an approximate average of 425 in the 1950's to about 300 from the early 1990's forward.

Cochairman Schroeder called for a recess for lunch. The committee reconvened at 1:29 p.m.

Brian Patton, Idaho Department of Water Resources, was the next speaker to address the committee relating to the current status of the Idaho Water Resource Board's aquifer recharge efforts on the Eastern Snake Plain.

Mr. Patton began by reminding the committee that in 2005 the Legislature authorized the Board to take all actions necessary to manage recharge projects. The Comprehensive Aquifer Management Plan (CAMP) advisory committee is currently considering various management options which will be presented to the Board and the Legislature. He noted that the Board currently owns a total of 2,000 cfs water rights for recharge with a 1980 priority date and in 1998 filed other water right applications for recharge. He said that, in broad, general terms, recharge above and below American Falls has different effects. He said that above American Falls the return is seen in about one year, whereas below American Falls there can be longer term gain through storage

in the aquifer.

Mr. Patton said that in the spring of 2006, the Board's recharge rights came into priority. **Senator Little** asked what "came into priority" means. **Mr. Patton** said there was enough water available to actually fill the Board's water right in that other senior water rights had been filled. Subsequently, he said, the Board asked a number of canals to divert this water into their canals for seepage into the aquifer. He said that approximately resulted in a total of 60,500 af recharge from the Snake and Wood Rivers. The Board addressed the canal companies' concerns about compensation by committing \$150,000 to pay delivery fees. However, he said, its water rights were not in priority in 2007 or 2008. **Mr. Patton** said that there are potential agreements with eight canal companies for the delivery of recharge water and the Board plans to continue efforts to develop these agreements.

Mr. Patton addressed the agreement with North Side Canal Company for water delivery which is in place as the Board constructs the W-Canal Pilot Recharge Project near Wendell. He said that the project is to determine the best way to develop "out-of-canal" recharge capacity and should be active this fall and that the Board has allocated funds to identify other potential sites.

Mr. Patton noted that there is some discussion between the ESPA CAMP advisory committee and others to evaluate the possibility of the Board undertaking a fall recharge effort using a portion of the estimated 1.8 million af storage in the Upper Snake River system. He said that the Board would have to approve this plan, allocate funding, and activate some of the canal delivery agreements. He added that this will be discussed at the Board's September 12th meeting in Burley. **Mr. Patton** said that if storage water was leased for recharge and limited to 100,000 af or less, the Department's hydrologists estimate that the Upper Snake reservoir system will fill to at least 80% in 2009.

Senator Little asked if it would affect the 80% if nothing was done. **Mr. Patton** said by taking out the 100,000 af, there may be less water in the system but it is not enough to affect the projection.

Representative Bedke stated that the system filled up because there was 105% of normal runoff. He asked what the reciprocating number would be for the 80%? **Mr. Patton** said he would get that number for the committee but that there will be a healthy carryover this year regardless of the runoff as long as there is some runoff.

Representative Bedke said they have watched the water numbers all year knowing that if there was about 105%, it would trigger all other actions. He added that it would be beneficial to know the numbers when the media releases the news to the public.

Director Tuthill commented that, looking back, this year started with a 500,000 af carryover which computed out at 105%. This year, he said, it is estimated that the carryover will be 1.8 million af and a 100,000 af recharge would be 5% of that amount.

Representative Bedke requested that a relationship scenario be set up. **Director**

Tuthill agreed to get that graph but noted that it would not be linear.

Senator Little presented a scenario of an irrigator at the end of the ditch, who won't get water because 100,000 af was taken out for recharge. **Director Tuthill** indicated that the canal companies take that risk when they make an agreement. **Cochairman Schoreder** asked if there was any legal exposure. **Director Tuthill** answered that canal companies put water into the rental pool every year and they gamble on the outcome.

Cochairman Raybould wanted to know how much water has flowed past Milner this season over and above the requirements of the Swan Falls agreement. **Mr. Patton** did not know but would follow with that information. **Cochairman Raybould** talked about using storage water in the fall for long-term recharge. He said that if there are recharge projects along the river, and surplus water flowing down the river that would exit the system over Milner, whether that wouldn't be the best use of water without jeopardizing any water rights. He added that this is a long-term issue that the Legislature and communities must plan for and that the amount of water exiting the system that could have beneficially been used for ground water recharge are numbers that need to be made available. **Mr. Patton** stated that those numbers have been developed for the CAMP process and will be provided.

Senator Coiner pointed out that water flowing past Milner this year would have zero storage potential. He said that there is no place to capture or store the water because it is generated within the system. **Cochairman Raybould** agreed theoretically, but factually, he said, water has gone past Milner this year that could have been diverted in a canal system to recharge projects. He said that It depends entirely on whether or not the minimums are being met at Swan Falls. He said that water may have to go past Milner to meet those minimums, but that anything over those minimums could and should be used for ground water recharge. **Senator Coiner** acknowledged that was true if senior water rights were ignored. He said that flow is fulfilling water rights and just because it goes by Milner does not mean it is being wasted. He added that, in priority, there is zero inappropriate water that has flowed past Milner in the last year.

Senator Little asked if part of the water going below Milner allows for the vagaries of weather. What is the season on recharge? **Director Tuthill** said that the current proposal is going to storage and the flow water rights are springtime. Springtime water cannot be used for recharge based on current water rights.

Senator Coiner said that way the water bank rules are structured, there is a last-to-fill in one year and that the injury is mitigated through the water bank rule. He added that the most junior water rights will not be mitigated for in the second year. **Director Tuthill** agreed.

Cochairman Schroeder announced that the floor was open to public testimony.

Rich Rigby, U.S. Bureau of Reclamation, spoke to the Bureau's perspective on the topic of recharge. He said that there are seven storage reservoirs in the reclamation system with a combined total capacity of just over 4.0 million af. He noted that there are two reservoirs not in the reclamation system, Milner and Henry's Lake. The system is currently 64% full with about 2.5 million af of water in storage.

Mr. Rigby said that this fall, water for recharge would have to come from one of two sources; the Board's natural fill right if it is in priority, or stored water in the Upper Snake aquifer. He said that the issue has been examined from the perspective of anticipated reservoir content this fall, anticipated water for spring and summer and the Bureau's obligations and interests.

Mr. Rigby stated that the Bureau is in agreement with the estimated reservoir content numbers presented by the Department which are about average according to the last 35-year record. He said that there is an 80-90% chance that all rights will fully fill next year. If the estimates are missed, he said that the Bureau has to look at its obligations and interests. He said that the Bureau takes no position with respect to decisions by others to recharge at Milner Dam and that since it is not going to storage, it can be diverted under the Board's actual flow recharge right if it is in priority. Diversions for recharge above American Falls are junior in priority to the Bureau's storage right and would have to come out of storage.

Mr. Rigby said that there are two potential impacts as a result of the recharge and these will only occur if the system does not fill. First, it can impact the fill of space belonging to junior spaceholders and second, the Bureau has a powerhead with a junior right that has been used as flow augmentation under the Nez Perce settlement. He said that it is the Bureau's position that these junior spaceholders should not pay a penalty for this and the way to address it is through last-to-fill. He noted that there is a concern that what happens this year does not affect junior spaceholders in a negative way and that this endeavor will take everyone working together to ensure its success.

Senator Coiner commented that in past discussions on the impacts of the water bank on junior storage spaceholders, the procedures applied were last-to-fill and that was permanent. It did not go away after just one year as they do now. He said that the Director has to guarantee that any water transfer does not injure any water holder and he thinks the one-year rule puts the Director in a difficult position. He said that with just a single year it seems like there is a likelihood that some of the junior water right holders will be injured. **Mr. Rigby** explained that an argument can be made that the people who did not participate in those leases were not impacted by those leases. **Mr. Rigby** will engage their hydrologist to investigate this issue. **Senator Coiner** emphasized that this issue needs to be reviewed.

Representative Bedke asked whether the revenues derived from private leases are, in part, commonly shared through the system to address the issue of the juniors being

impacted. **Mr. Rigby** said that was not his understanding. He said that those people that share in the income are subject to impact fees. He added that private leases mean those who pay for the water, get the water. **Senator Coiner** added that the private lease water was initially created to allow a water holder to put their storage water at risk. They would derive the benefit minus the percentage going to the Water Resource Board and the portion that goes to the water district. He said that they also have the burden of last-to-fill. He said that all impacts for that transaction were borne by people who got the money. However, he said, now the problem is that last-to-fill is only for one year and he thinks that needs to be reviewed.

Representative Bedke asked if some of the injury could be mitigated by getting some of the money. **Senator Coiner** stated that there would not be enough compensation to offset the loss of water.

Stan Clark, Eastern Idaho Water Rights Coalition, was the next speaker. He told the committee that his group has followed the CAMP process and, as a result, organized a recharge committee to develop recharge plans to be included in the comprehensive aquifer management plan. He said that they also have a legislative committee to work with the Legislature next session on water issues affecting eastern Idaho. **Mr. Clark** gave an overview of the activities of the coalition, those involved, their challenges, current actions/activities, and future plans.

Lynn Tominaga, Idaho Ground Water Association, also addressed the committee, remarking on some issues presented during the meeting. He said that the ESPA needs to be viewed as a complete system and that when recharge occurs, according to hydrologists, 85-90 percent of the water comes back into the system. He added that this improves natural flow and storage if done on a consistent basis. He also commented on priority and the fact that there is a 5700 cfs 1977 water right at Milner that has to be filled before the Board's 1980 water right.

Cochairman Raybould asked who holds the water right for the 5700 cfs going over Milner. **Mr. Tominaga** responded that it is a water right held jointly by Twin Falls and North Side Canal Company. **Director Tuthill** added that this 1977 priority water right permit is for power with no consumptive use associated with it.

Senator Little stated that there is a huge financial gain for adding efficiencies and the recharge issues discussed today may not be enough to offset those. **Mr. Tominaga** said that would be an issue the CAMP process will address in terms of setting policies that will not prevent efficiencies but will allow enough natural recharge.

Senator Coiner referred back to Milner and the water right held by Twin Falls and North Side that was used to procure a note to rebuild the privately-owned Milner Dam. He said that the power plant built by Idaho Power produces the return of revenue to pay off the note. **Representative Bedke** asked how many cfs are needed to run that power plant at

capacity. **Senator Coiner** responded that it was 5700 cfs. **Representative Bedke** said the model showed that much less ran through that area a lot of the time. **Senator Coiner** agreed. **Representative Bedke** pointed out that the financing could not have been based on having 5700 cfs going through those turbines all the time. **Senator Coiner** agreed.

Cochairman Raybould commented that the ground water issue began decades ago during the time flood irrigation changed to sprinklers and the diversion in the upper valley changed. He said that incidental recharge did not occur to maintain the levels of the 1960's. He went on to say that over the years, millions of af of water is sent to the ocean and facilities have not been developed for that available water to be diverted into the aquifer. He said that the state of Idaho must face up to the fact that recharge facilities must be built to be able to use the excess water in the years when there are floods. It will take large recharge projects to accomplish this. He went on to say that if this is not done, the way of thinking must be changed about how the aquifer is used. He said that water will not be taken away from the cities and other uses, that irrigated agriculture will suffer. He noted that there are unused gravel pits close to every freeway that could be filled and used for recharge projects. He concluded by saying that this is everyone's problem and Idaho must acknowledge that recharge facilities must be constructed because aquifers in all areas are at risk. This is not a little problem, Idaho must be prepared to take advantage of the floods and put that water into the huge underground storage system.

Senator Coiner requested cost numbers for recharge efforts. **Mr. Patton** stated that they do have projected cost numbers for the CAMP project and will get that information. **Senator Coiner** asked to also have the projected cost of water added. **Mr. Patton** said they have not looked at water costs on a long-term basis, that they are primarily looking at the natural flow rights when they occur.

Director Tuthill provided some closing statements and projections. A few pilot projects are anticipated and they will continue to look at the pros and cons of putting water into storage in the fall. He said that the Board has an ongoing desire to use recharge water in the spring to the extent it is available.

Senator Coiner asked to be included on the list of participants for existing and new projects. **Director Tuthill** said he would be, although those have not yet been determined.

Cochairman Schroeder adjourned the meeting at 2:45 p.m.