

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 18, 1985

RM 433, 1:30 p.m.

PRESENT: Chairman Noh, Senators Beitelspacher, Budge, Carlson, Chapman, Crapo, Horsch, Peavey, Ringert and Sverdsten. Senators Little and Kiebert were absent.

SB 1008 WATER RIGHTS FOR HYDROPOWER PURPOSES

Pat Costello Mr. Costello, representing the Governor's office, was the first to discuss SB 1008. He explained the Attorney General's office has provided a written outline of the two pieces of legislation (which is attached to the minutes). He briefly went through the sections and explained how SB 1008 fitted into the overall agreement.

SB 1006 TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATION.

This legislation will provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water rights permits or other action on permits or permit applications when necessary. It would also give the Director the authority to promulgate rules and regulations. This authority is necessary in order for the Department to carry out new State Water Plan and statutory mandates contemplated by the Swan Falls agreement. These include public interest review, imposition of mitigation conditions on certain new uses, water marketing, and general adjudication of the Snake River. He pointed out the only addition to this bill was the "so-called moritorium authority." Since the Swan Fall's lawsuit the Director has been imposing a moritorium and this law would merely confirm the authority. It would also give him authority to promulgate rules and regulations.

Pat Kole Mr. Kole, from the Attorney General's office, briefly went through SB 1008 by sections further explaining the legislation. He brought out the negotiators had two choices in Section 1; to redraft the Section or just make some additions, which they choose to do. Addition was made for a procedure to notify interested groups of new applications when it was in excess of 10 cfs acre feet. 42-303B does not change the public interest standard but is to put it in balance. Section 4 would meet the criteria for reviewing outstanding permits without creating liability to the state.

Tom Nelson Mr. Nelson, the attorney for Idaho Power, gave a status report on the various components of the agreement. Certain things were required as a condition of the agreement. The filing with the Idaho PUC has been done. PUC will await legislative action. The FERC filing has been made and the time for intervention has been run. One intervention by the National Marine Fishing Services, an

agency of the Department of Commerce has been filed. This seems to relate to the water budget under the NW Power Act. The bill on adjudication and related funding is in the House Resource Committee. The Bill on PUC jurisdiction is printed and is in the Senate State Affairs Committee. The Company made the decision no filing was needed with the PUC of Oregon so it was not done. It was filed with no formal request for action. The proposed amendments to the State Water Plan have been made and the Water Resource Board will begin hearings on January 28 in Idaho Falls. Mr. Nelson feels there are a lot of elements to the plan and did not want to give the impression the only important one was the minimum stream flow. Equally important part in view of the Company is the public interest criteria. The Company feels it is critical hydro-power be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development. The new public interest criteria, for the first time, recognize that impacts upon hydro generation must be considered by the Director of Water Resources when evaluating applications for diversion of water from those placed in trust.

Senator
Noh

Asked if someone would explain where we are in settling problems with the cost of adjudication for the city of Idaho Falls.

Pat
Costello

This question was brought up in the House Resource meeting when it was pointed out by several legislators from Idaho Falls as well as the Mayor of that city that the \$25 per cfs would cause a disproportionate amount of the fee on the city of Idaho Falls because they have roughly 20,000 cfs of hydropower rights there, which would result in them paying roughly 10% of the power adjudication when they generate only 1% of the power. We are looking at changing the formula to the "rated capacity" as being the measure to charge for hydropower. The overall amount to be generated for the adjudication from hydropower would remain constant at about 7.4 million overall for hydropower which is roughly what agricultural users would pay, but it will be based on number of cents per rated capacity.

Senator
Noh

Senator Noh said he understood the original formula had been reviewed by the city of Idaho Falls and approved but they subsequently discovered they had made mistakes. The error shouldn't be blamed on the people who developed the fee structure.

Senator
Crapo

Asked if the rate schedules had been broken down.

Pat Costello

Said he had that available and handed out copies. (Attached)

Senator
Ringert

What is the public interest that has been referred to? How is it defined?

Pat Kole

The public interest determination required pursuant to 203C is defined in 42-203C, 1-5. Those are the only factors the Director

will be considering in this particular determination. It is actually a two tier process. The Director initially considers all of the factors listed on page 2, par. 5, line 21. After that determination has been made, the Director then goes over to 203C and if the water is available because of a subordination condition, he then is required to make additional public interest determination as specifically defined in 203C-2A.

Senator
Ringert

Are you saying then the Director will not have authority to expand public interest beyond what is stated in this legislation in 2A?

Pat Kole

As I understand it, he would have the ability to more closely define what those factors are. He would not be able to adopt a rule and regulation that is in conflict with the specific criteria established here. If this bill did not pass, he would have to develop criteria on a case by case basis as each individual application came before him.

Senator
Ringert

Would someone explain why is it necessary to establish a trust for the 600 cfs water above the minimum stream flow available for appropriation.

Tom
Nelson

In the course of the negotiations, in the final stages, we were "laugerheaded" on the question of whether the Company's water rights above the minimum flow, would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone elses use. It was the Company's position then and still is, that you have an additional argument that the River is fully appropriated if you leave that hydro right in place until such time as it is reallocated pursuant to the statute. It became somewhat of a political problem. The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated, so as far as the agreement goes, it is an unsubordinated block of water. The state then takes that water and places it in the trust, subject to reallocation. This does two things; it makes clear the state's control of the allocation of the water and it left the water unsubordinated. So the Company retains its right to urge the state or force in the proper case to use that argument, and that is all it is, under Article 15, Section 3 of the Constitution. The state then does not have to allow the water to go to the first guy who comes down the pike. The trust got around that problem and I think tied it together to a point where it is a little more effective mechanism to accomplish the purchase of the agreement.

Senator
Ringert

Do you feel this is an effective end run on Article 15, Section 3?

Tom Nelson

I don't know. I can't obviously predict it will carry the day, but our position is the argument is worth preserving. I am certain as I stand here, some person with an undeveloped permit who will be adversely affected by this way of doing business, is going to challenge it and think it is an argument worth having.

- Senator Noh Asked if this would be an effective way to protect the minimum flow from appropriation.
- Tom Nelson That is correct. The minimum flow itself is subject to challenge by those people as being effectively a newly recognized instream use with a priority date and someone with a prior permit could take that water in spite of your minimum flow.
- Senator Ringert Does the state have any obligation to the people who took those permits out years and years ago and have been waiting for the problems to be solved.
- Pat Costello Certainly. To the extent that they have detrimentally relied and developed, then they can argue that it is a taking if you extinguish their rights. We are talking primarily about remassaging these undeveloped permits that have not been developed.
- Senator Ringert So, I take it the state feels no obligation unless they have spent money directly on the construction and development.
- Pat Costello We owe them the obligation to treat them fairly, but treated fairly under the new regime of the public interest criteria rather than under the old straight appropriation method.
- Pat Kole A couple additional points. The Hidden Valley Springs case shows the state does have the authority to recall the permits without creating liability, but in this case we have applied "grandfathering in" of anyone who has applied water to the land since the last irrigation season. If you will look at 203D on page 4, each one of those persons prior to having any property right taken from them will have an opportunity for a hearing and explain why their particular project should go forward. So there is procedural due process being applied.
- Senator Crapo As I review this legislation, it could be argued there is a bias against non-agricultural uses. How would a request for water from a non-agricultural use be dealt with, like INEL, particularly under 42-203C,2, (v)?
- Tom Nelson The criteria as written and as we have understood them and as you asked, would effect no application beyond the first two. In other words, if INEL came in and had a major application, first you would have to determine if there was a significant impact on hydropower production. Given the limited consumption of most industrial uses this is pretty difficult. Let's say they had a major use. You would look at (i) on the potential benefits and then (ii) for effect on the utility rates. In industrial settings, that analysis, at least the ones I have seen, would compel you to grant it. Obviously, you would have no impact on the family farming tradition. You might argue that it comes under the full and economical use of the water resources and would have no effect on the 20,000 acres. In that case, you would ignore the agricultural related factors. That was our intent, that the Director would only apply the ones that obviously make sense.

- Senator Crapo If I understand you, under (v) of 42-203C, this could not be used as to industrial uses to argue that the amount allowed could not exceed that which would fit this state's plan for agriculture.
- Tom Nelson That is correct. You also have the policy statements that have come out of the proposed Water Plan amendments which allocate 150 cfs to industrial uses. With that public policy statement in the Water Plan you have probably come a long ways toward approval of this standard in any event.
- Senator Crapo With regard to the 150 cfs that is being allocated for industrial use, is that 150 cfs out of the 600 cfs that is available?
- Tom Nelson That is correct.
- Senator Crapo Would that then be determined as a limit or is that a specified limit or is it a specified minimum or what exactly is intended by this specification of 150 cfs?
- Tom Nelson Senator, as I understand it, it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low. The race is not to the swift for industry as to that 150 cfs. It is there and when they need it, it will be available.
- Senator Beitelspacher In the same line of questioning as Senator Crapo, line 27 and 28 of same section: "no single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination." Does that not in itself preclude some further development of industrial development because of lines 23-25 of (v)?
- Tom Nelson As I say, that is not the intent and to me if you have a solely agricultural factor, such as (b), you couldn't apply it to industrial use. So when the Director got to that one, he would have to ignore it or otherwise the system doesn't make sense. You would only be entitled to develop agricultural uses which wasn't the intent.
- Pat Costello To follow up on (v). The policy referred to the staged development is more fully spelled out in the water plan amendment as drafted and its clear from that, that we are not saying there is a mandate to go out and develop any number of acres. All we are saying is that there is a cap at 20,000. I think what I am hearing is you are afraid this would prevent us from developing up to 20,000 or 80,000 in a four year period; that it would somehow conflict with (v) and that is not the case.
- Senator Crapo Let us suppose that industrial uses came along and used up 50 cfs in a year and enough agricultural applications were made to develop 20,000 acres, would both of those be able to be done in a single year?
- Pat Costello Yes, there would be no conflict.

- Senator Peavey Was there any room for consideration of fish and wildlife values in arriving at these criteria?
- Pat Costello The original reason they were left out is because there were two versions. (1) The plan of the old local public interest that had a comprehensive public interest determination similar to what was in the bill promoted last year by the Governor and Attorney General, which would have subordinated everything and put it through a new public interest review. We found there was resistance even from among some of the conservationist who felt that they did not want the old local public interest wiped out because they felt that did give them a useful tool. We had option 2 which was to leave the local public interest as is and simply add the new criteria that relates to the balance with hydropower, and felt that we certainly did not intend to make the ability to take fish and wildlife into account any less available but that was a separate issue since we are dealing here with protecting hydropower or water for hydropower because after all that was what was at issue in the lawsuit. Having said that, I would further say, it certainly is not the Governor's intention to imply that by leaving fish and wildlife off this list that somehow it is not in the public interest and if it needs to be stated more clearly in 42-203A that fish and wildlife can be considered under the local public interest we would support doing that. However, we are bound, and do support the existing 42-203C as written.
- Tom Nelson I agree with Mr. Costello. I think that the parties are not committed to preservation of 203A in its present form as a part of these preceedings. However, if there is going to be an attempt to change that, I think it should be in the form of a separate bill. We are tied to this program and are committed to it and if we start amending it, we will be in a real mess.
- Pat Kole I would agree with the comments of the other two negotiators. It was our thought that this was not really an issue directly involved in the lawsuit. While there may be concerns on that score, that should be addressed separately by the legislature.
- Senator Peavey In other words, any of us can propose additional criteria outside of this package and it will go on its own merit and that won't change things one way or another I guess. One of the things I thought we should look at is critical livestock range. It is real easy for the BLM to go out and give that range away but the state doesn't have to give the water away. I guess in a separate bill would be the place to address that.
- Senator Ringert Regarding 1006 bill, the second page, line 5 regarding the existing vested water rights. In making this determination, is the Director going to be able to consider the entire gamut or is he just going to look at adjudicated rights? The rights at Swan Falls, whatever they might be that precipitated the present situation, as I recall, they had been adjudicated between two parties back in 1907 or 1909 or something like that and far as

I can tell that is the only final judgement of adjudication that we have in respect to any of those water rights. The whole process was shut down because there was a determination of some sort made in a pending lawsuit that has not reached final judgement. So, what is the standard we are looking at when we use the term "existing vested water rights?"

Tom Nelson

The language was chosen in order to include a Constitutional right not represented by an adjudication, statutory right represented by license, or in my judgement, you can get into a vesting question at a proper stage in a permit process. So my understanding why we selected vested was to pick up water rights that fell into those categories. As far as Swan Falls is concerned, as an example, there are I think 3 water licenses at Swan Falls. In my judgement that is clearly a vested water right. There may be the adjudication as you point out. Probably, as we understand adjudication now it is probably too narrow to be much more than a statement of a constitutional right that is contemporaneous with the use. I think all of those water rights would be considered vested as I understand how that term is used here. Also, since this is broader than Swan Falls, the Director may be entitled to protect a well permit if the well were drilled and the water in use, I think that is vested to the point that the Director could try to protect it by putting a moratorium in an area while say, he looked at a critical ground water designation.

Senator Ringert

To pursue this further. It seems to me this procedure, in effect, will force the applicant to go through the administrative appeal or perhaps take it on up to the court. It further seems, it sort of puts the state in a position of saying, we are no longer going to have free wheeling appropriation. We are going to put the front end burden at least on the intending appropriator more so than in the past.

Tom Nelson

I think it has that potential in a given factual setting. Among my clients one of the things they like least about the present system is the fact that if there is a senior appropriator they have the burden of holding off the junior. They say, "why do I have to do that, I was here before he was--why is it my problem?"

Senator Noh

Under this agreement, what is to preclude a utility from buying up or leasing whatever water they can get their hands on and in effect take up all those remaining waters. As I read this, they are pretty well home free on all purchased and leased water.

Pat Costello

That is correct. They can acquire through purchase upstream stored water which they can run down the river, They are entitled to that and it can't be appropriated between the storage site and the hydro site. They would be free to do that.

Senator Noh

What about water that is lost for instance because someone fails to file a claim by the cut off date. Is that water in a situation where another party would have to file on the Water? Can you lease water that is lost for failure to file a claim?

- Pat Costello No, there would be no property right to acquire in that case. They would have difficulty establishing a right anywhere upstream from their facility because they would not be able to apply it to a beneficial use down below. It is difficult really for me to conceive of them acquiring any right other than a right to a certain amount of storage water in storage in the stream itself.
- Senator Budge Isn't that presently true?
- Pat Costello Yes.
- Senator Noh Where are we with the Spokane River system? If the Governor goes to Washington Water Power and says we want to negotiate a minimum flow so we can have further development and Washington Water Power says no, we won't negotiate. Then where are we?
- Pat Kole First off, I think it is probably not well known, but we have already opened up discussions with Washington Water Power and they have indicated that they do want to negotiate. So I would think the possibility of them absolutely refusing to negotiate is small. If they did, we would of course be in the same type of situation as we were with Idaho Power. We would be in a law suit. They have indicated that if this program passes and if they have the authority to negotiate with the Governor, they intend to do so.
- Senator Noh Looking at future hydro development, say for example on the Salmon River, is it possible for the Director to subordinate those future hydro rights without officially establishing a minimum flow on the stream?
- Pat Costello Yes. Subparagraph 6, under Sec. 2 of the main bill authorizes the Director to impose the subordination condition on new permits and licenses for power purposes. That is not anyway tied to the preceeding five paragraphs so it would be just a straight subordination condition. I think the real question you raised though, if he does that in the absence of a minimum flow, where is that right in terms of the regime established in the preceding paragraph, which talks about the rights below the minimum flow being un-subordinated, and the ones above it being held in trust. Clearly, that regime contemplates there would be a minimum flow there, and that we really did not intend that it would apply across the board if there were no minimum flows in place at that time.
- Senator Ringert Why is the provision in there that authorizes the Director to limit a permit or license for power purposes? Why is this any part of the Swan Falls settlement?
- Pat Kole Basically, there has always been a question as to what the state's authority is pursuant to the 1928 Constitutional amendment. In taking a look at that issue, while there is good authority for the proposition, that amendment was self executed as part of the settlement negotiations as the Attorney General felt there should be some specific authority given to the Director to subordinate hydropower water rights and that is what paragraph 6 does.

- Senator Ringert This agreement I feel is being promoted very heavily. The local newspaper is telling us through editorials that the Legislature should not mess around with the settlement in any way shape or form and I don't see any reason at all for that particular provision which will affect a great deal of small hydrop permits and applications and this tagging along on the emphasis that has been raised to settle the Swan Falls issue. The last one I saw like this was a rider on an 1888 appropriation bill in the U.S. Congress that tied up all the water in the western U.S. and lands for the next three years until they got to the 1891 amendment of the present land law. Will someone tell me why this has to be in the Swan Falls settlement?
- Pat Kole Basically all paragraph 6 does is grant authority and does not require the Director to subordinate hydropower rights nor does it make it mandatory. In certain situations where there is productive upstream land that could be developed, the Director will have to sit down and take a look at whether or not he should subordinate the hydropower right. Obviously the Director's determination cannot be arbitrary or capricious or contrary to the policy set down by the Legislature, then his decision could be appealed in court. I think the reason it is here, it was felt that the Swan Falls situation would not have arisen had the Legislature enacted similar laws back in 1928. The effort here was to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future. That is the reason why it is in the agreement and why we think it is necessary.
- Senator Noh In other words, we might head off a court case and legal costs sometime in the future by acting now.
- Pat Kole That is correct.
- Senator Ringert I think I know why it is here in this bill but nobody has yet said that it is essential to the settlement of the Swan Falls controversy.
- Ken Dunn The primary reason I see it there is to avoid Swan Falls re-occurring again. Without that if Idaho Power decides to build one of the dams they have proposed on the Snake River, we are back in the Swan Falls situation if there isn't clear subordination authority. The same is true on other rivers. It isn't just the small hydro. Virtually all the small hydros are high enough up in the basin that there is no development occurring above them.
- Senator Noh I would like to ask one of the PUC Commissioners to speak as to how they are viewing this agreement and particularly I have heard the question raised that the legislation as drafted to protect Idaho Power from claims for failure to defend their water rights would apply to all waters rather than just those placed in trust. Do you gentlemen feel you will have sufficient authority under the legislation to assure that the Company doesn't dispose of or sell its water rights other than those properly dealt with by this legislation?

- Mr. High
PUC I think the crucial issue with respect to your question is in bill 1007. This legislation I feel is extremely essential because in effect it clarifies the legal status of gains of sales and dedicates the benefits of these sales to the customers of the company rather than the shareholders of the company. It in fact, sets the title of the water in the ratepayers rather than the shareholders. Whatever happens to the other bills, that one should pass.
- Senator Noh How about the other bill that protects Idaho Power from claims by ratepayers. I've heard it argued the bill is too broad and would free Idaho Power from even protecting its unsubordinated water right included within the minimum flow and wouldn't just protect them from ratepayers for that water which in effect is subordinated through the agreement.
- Mr. High Speaking of that water below the 3900 minimum flow, I would think the power company would have no incentive to deal with that water if all the benefits went to the ratepayers. In other words, I can see where the water would be depleted down to 3900 cfs. This figure has been established by negotiation process, taking into account historic flows, updated current projected conditions and there is nothing more uncertain than stream flows and that uncertainty, perhaps the committee would like to take into effect and set aside 150 cfs for industrial future uses as a protection against that uncertainty factor.
- Senator Crapo Are you suggesting then we as a committee in the Legislature specify that certain amounts be set aside as dedicated to industrial uses and specifically subordinate other uses in that amount?
- Mr. High Yes. I think Mr. Nelson indicated that minimum flow has to be tied to the public interest criteria and if you take the minimum flow as something in the public interest, it is rather meaningless if the process gets you down to 3900 cfs and suddenly the long term climatic conditions change and you need to supply new municipal and other needs. A factor in your deliberations on public interest, I would suggest a paragraph be put in recognizing uncertainties and perhaps reserving something more than the 3900 cfs to recognize that.
- Mr. Swisher
PUC As for Senator Crapo's concern, historically water development has been based on the ability to assess the charges to those who gain from a project. Having watched three successive years of surplus run down the river, it seems some state policy, statewide not just Snake River basin, needs to be put in place for water retention other than pure diversion for beneficial use.
- Ward Conley
PUC Regarding 1005. It seems there is probably no question of the defense provided in SB 1005 being used for anything other than the matters specifically touched on in the contract. It is what lawyers call an affirmative defense. It would deprive the PUC of jurisdiction but first must pertain to something relating to the contract. Looks fine to me.

- Senator Beitelspacher Go to page 3, of SB 1008, between 5 and 6, we have the Governor to enter an agreement defining that portion of a water right being unsubordinated and then on 6, you have the Director having the authority to subordinate rights. As I recall, the Director works for the Water Board which the Constitution and the Supreme Court case we touched on the last few years set up as another entity, so to speak. Do we have a conflict there? Is there another constitutional body in a sense that is outside of the reach of the Governor that has the authority to subordinate water and another constitutional entity that has the authority
- Pat Costello The authority granted under paragraph 5 is to enter into contracts which are not self executing. All this does is really authorize the Governor to go out and negotiate contracts to bring to the Legislature for ratification. None of them take affect unless they are ratified by law and because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water Board, particularly given the passage of the contract.
- Senator Noh Along those same lines, would you care to outline briefly, just exactly what are the limits and extent of the Governor's power to grant water rights through the trust agreement? This trust agreement has sometimes been interpreted as granting the Governor an inordinate amount of authority in determining who gets water and who doesn't.
- Pat Costello Yes, as I was glancing through the Attorney General's testimony I was a little troubled by a statement here that the Governor would be empowered under this to approve of waters to be allocated under the trust. That is not really what is contemplated here at all. This is strictly a passive trust over which the Governor will not exert any active discretions. It is modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The Governor is named as trustee just because you need an individual to be sued in the event of some scabble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands if they are granted in accordance with state law. So, it simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the water as long as the trusts last. It is a passive trust.
- Senator Noh Mr. Kole and Mr. Nelson, do you concur with that interpretation?
- Pat Kole Yes. In looking at page 3 I think that is slightly inaccurate. The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the re-allocation determination. Basically, that last paragraph of the Attorney General's testimony, should read the "Director" will be

impoverished and not the "Governor" to release water.

Tom Nelson Yes, I think it is clear on page 3 the Senator referred to lines 16 through 19, the rights have to be acquired pursuant to state law and unless you change it, the Governor plays no part in that process.

Pat Kole On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.

Senator Crapo My question is primarily one of procedure here in committee. Surely everyone knows the answer but me because I am a freshman. But it seems to me we need to leave a very good track of legislative history on this legislation. As I study it it needs clarification in my mind and I am sure there will be a lot more testimony and evidence presented. Is it already set up by some mechanism that the testimony which is recorded here today and the prepared testimony presented here today to become part of a prepared record that is maintained so that in the future there can be reference made to it to ensure the intent of the legislation is followed?

Senator Noh Senator Crapo, my understanding is we have no financial provisions or procedures in precedent to do that. I personally have in mind ensuring that there is more than one copy of the tapes and they are placed in the records of the Department of Water Resources and the Law Library to create as good a record as we can.

Senator Ringert There is a problem even with the tapes because that is merely a record of the committee proceedings and does not necessarily reflect the intent of the other 30 senators on the floor. It is a very nebulous job in Idaho to determine what is the intent.

Senator Crapo I am aware of that. As an attorney I do a lot of searching through legislative history where it's available to figure out what the laws mean. It definitely in my opinion would be beneficial to have as much preserved as possible. For example, the written statement by Attorney General Jones and perhaps encourage those who appear before the committee in the future to be sure that their understanding of the bill is at least represented in the legislative history as something considered and that we make an avenue available for that to be done.

Senator Budge I think the nature of the legislation itself justifies very accurate records to be available.

Senator Horsch In the House by majority vote, we spread upon the pages of the Journal a letter of intent. You can make that as long as you want.

Senator Noh That is correct.

Senator Beitelspacher Back to number 6 of 42-203B, where the Director shall have the authoritywhere are we with compensation for the holder of a hydropower right at a later date? In the event I invest a substantial amount of money in a small hydro right and have it producing and PUC and FERC in their wisdom determine I should receive some compensation from a power company for that and Senator Peavey buys a sheep allotment and decides to water the grass up there. Where am I going to be with my investment once he starts pulling the water out of the creek for his sheep?

Tom Nelson If as is the practice now, your permit was subordinated when issued, you would be subject to Senator Peavey's watering his sheep. If your permit had been subordinated you would be subject to this depletion. If it were not subordinated and the Director decided in his wisdom you should have a chance to get your project paid out before the subordination took effect, then you might be compensated in that situation.

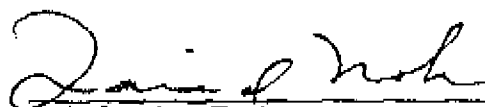
Senator Beitelspacher Is it all up to the Director whether I received compensation or not and is there anything in here that sets up criteria by which he shall determine how much I shall be compensated or is that promulgated by rule and regulation?


Tom Nelson The compensation issue would follow the subordination issue initially. If you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement that constitutional provision. So if he has no guidance, it is my guess that hen's teeth and unsubordinated power rights from now on are going to be about on a parity.

Ken Dunn One of the things we are trying to do on small hydros, as defined in rules and regulations, is that if just a small amount of water makes a drastic change in economic effect of it, we will issue the permit for a definite period of time. We look at the payout period on the project and at that time look at subordination and where it is necessary, we protect that project for a time so there isn't a danger of economic disaster.

The Chairman thanked all for their attendance and there being no further business before the committee, the meeting adjourned.

Tapes of this meeting will be on file at Water Resource and the Law Library.


Laird Noh, Chairman


Bev Mullins, Secretary

Prepared Testimony of Jim Jones,
Idaho Attorney General

on
Senate Bills 1006 and 1008

Senate Bills 1006 and 1008 are part of the Swan Falls legislative package. Both bills must be passed if the Swan Falls Agreement is to be implemented.

SB 1006

Senate Bill 1006 gives the director of the Idaho Department of Water Resources the authority to suspend the issuance of permits in certain instances and to promulgate all necessary rules and regulations regarding the agency's legislative mandates.

Presently, the director does not have express authority to suspend the issuance of permits. The Swan Falls conflict has made it abundantly clear that this authority is necessary to avoid exacerbating conflicts over the use of water. Though the department suspended issuance of permits and licenses pending resolution of the Swan Falls controversy, if challenged, it may have been required to issue permits and licenses, which would have subjected the department to increased financial liability.

The authority to promulgate rules and regulations is necessary to implement an effective system for the allocation of any water made available pursuant to the Argument. Further, rules and regulations will inform the general public about the

director of the department intends to exercise his legislative duties.

SB 1008

Senate Bill 1008 is the centerpiece of the Swan Falls Agreement. The bill represents a very delicate balance between the interests of hydropower producers and the interests of other water users and the State of Idaho.

Proposed section 42-203 addresses two problems. First, the section provides a method for resolving conflicts over whether an existing hydropower water right is subordinated and, if so, on what basis the water may reallocated. Second, the section provides that the director shall have the authority to subordinate all future hydropower water rights.

Subsections (1) through (5) of section 42-203B specifically address the Swan Falls controversy. The trust approach embodied in these subsections is an outgrowth of the difficulty the parties encountered in defining Idaho Power Company's Swan Falls water rights. From the outset of the negotiations with Idaho Power Company, the State insisted that it have ownership over those waters made available for future users as part of any settlement. Idaho Power Company, however, insisted that it retain control over any water made available until such time as the water was put to beneficial use.

The State's position that it must have ownership of water allocated to future use was based on the premise that if the Company retained ownership, it would be required to protest

every application for the water, thus frustrating the objective of making additional Snake River water available for appropriation. Further, the State was concerned that a subordinatable water right would be viewed as a sham transaction by the courts and struck down as a violation of Article XV, § 3 of the Idaho Constitution. Finally, the State felt that leaving ownership in the Company did not provide adequate protection for the citizens of Idaho.

Idaho Power Company contended that the State's insistence on complete subordination prevented the State from balancing hydropower benefits against the benefits of proposed uses. The Company wanted the State to use its right as a shield against possible constitutional challenges to the State's denial of certain uses as not being in the public interest.

As drafted, the State possess legal title to all waters previously claimed by the Company above 3,900 c.f.s. As trustee of the waters, the ~~Governor~~ ^{Directed by Committee Sec. per At Roll, A} will be empowered to ^{off} release water to any user that complies with existing state law and the new criteria for reallocation set forth in section 3 of this bill. The trust concept, thus, permits the state to assert that the stream is fully appropriated because of an existing claim while at the same time making water available to those uses that create a net benefit to the State.

Though, as is apparent from the previous discussion, the definition of the Company's right was very difficult, a major benefit from the negotiations is the establishment of a framework for resolving similar conflicts on other rivers in the State of Idaho. In order to avoid litigation regarding the State's power to subordinate an existing water right that is claimed to be unsubordinated, holder of a hydropower water right define a minimum flow for its facilities while at the same time receiving assurances that the balance of its claimed rights will not be appropriated unless the State determines that there is a higher and better uses for the water.

As briefly noted above, the State proposes to treat water that is placed in trust by an agreement negotiated pursuant to the authority of proposed subsection (5) of § 42-203B differently from other waters. In addition to meeting existing statutory criteria, a person contemplating the appropriation of trust waters must also satisfy the criteria of proposed section 42-203C.

The criteria set forth in proposed section 42-203C are supplemental to existing criteria. Though the section refers to public interest, it in no way limits the existing local public interest standard of Idaho Code § 42-203. In fact, the use of the term public interest could be misunderstood unless the history of this section is explained. During the early part of the negotiations, a total rewrite of I.C. § 42-203 was envisioned, with the local public interest standard being

incorporated into new public interest criteria. This concept was abandoned when the parties realized that a total rewrite was practically impossible, technically difficult, and tactically unwise. The criteria as written do not and are not intended to remove any existing protection for other in-stream values currently existing under Idaho law. Rather, the criteria are designed solely to guide the director in making reallocation decisions. Section 42-203C is intended solely for the purpose of determining whether a proposed use has greater net benefits to the State than the existing hydropower use. This section will not come into play unless the director determines that existing criteria are satisfied.

The criteria in 42-203(c)(2)(a) identify those factors that are critical to the determination of whether the proposed use is preferable to the continued allocation of the trust water to hydropower. Since the premise is that some future uses are desirable, the negotiators believed that the burden of proof should be placed on the protestant. Only if the protestant establishes a basis for its claim of adverse impact on hydropower needs will the applicant be required present evidence of public benefits flowing from the proposed use. It is very important to note that the water held in trust by the State subject to reallocation is tied to state law and not the public interest criteria. This is very important because it gives the State flexibility into the future. If the public interest criteria is not, after trial and error, precisely what the

legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.

Aside from providing a mechanism for resolving the subordination issue with regard to existing hydropower water rights, proposed section 42-203B(6) declares that the director may subordinate any future applications for hydropower use. This subsection is an express implementation of Article XV, § 3 of the Idaho Constitution. Clarification of the director's authority to subordinate hydropower use will ensure that future uses of the unappropriated waters of the state will not be precluded by future hydropower projects.

RECOMMENDED ADJUDICATION COST SHARING
For Snake River Above Lewiston

ADJUDICATION COST	\$ 27,369,000
(Discounted at 10% to July 1, 1986)	19,035,000

CLAIM FEES

\$50 per claim X 61,694 water rights	\$ 3,084,700
\$25 per claim X 52,332 domestic & stockwatering rights	1,308,300

VARIABLE WATER USE FEES*

Irrigation: \$1.00 per acre X 3,700,000 acres	\$ 3,700,000
Hydropower:	
\$25/CFS x 259,441 CFS Private or Municipal	6,486,000
\$25/CFS X 29,815 CFS USBR or COE	745,400**
Aquaculture: \$10 per CFS X 13,631 CFS water rights	136,300
Municipal: \$100 per CFS X 1,161 CFS water rights	116,100
Industrial: \$100 per CFS X 6,493, CFS water rights	649,300
Miscellaneous: filing fee only	0
Public: \$100 per CFS X 20,315.6 CFS water rights	<u>2,261,600***</u>
	\$ 18,487,700

STATE SEED MONEY	<u>1,000,000</u>
	\$ 19,487,700

* Claimants are allowed to spread variable water use fees exceeding \$1,000 over as many as five annual payments with 10% interest accruing on the unpaid balance. Monies in the Adjudication Account would be invested by the Treasurer, with interest accruing to the Account.

** This revenue is based upon the power plant capacities of the federal facilities.

***\$2,131,300 of this is a state obligation. This figure includes \$230,000 for raising the minimum flow at Murphy gauge from 3,300 CFS to 5,600 CFS in the winter. It does not include a \$1,300,000 fee that would result from setting a new minimum flow of 13,000 CFS at Lime Point.

CAUTIONS:

- 1) Water use numbers may be overestimated due to doublecounting, thus lowering revenues. The amount of water use on unrecorded rights is unknown.
- 2) The number of actual water rights is similarly unknown.
- 3) If all parties are not assessed within one year, revenues will be lower.
- 4) While domestic and stockwatering rights have been included in the adjudication, the cost of processing these claims has not been included and is unknown.

NUMBERS OF IDAHO WATER RIGHTS

USE	ABOVE SWAN FALLS		LEWISTON & ABOVE		ENTIRE STATE	
		%		%		%
Irrigation	32,137	88.4%	51,968	84.2%	61,441	83.3%
Hydropower	651	1.8%	1,267	2.1%	1,620	2.2%
Aquaculture	722	2.0%	1,063	1.7%	1,141	1.5%
Municipal	390	1.1%	773	1.3%	964	1.3%
Industrial	977	2.7%	2,745	4.4%	3,638	4.9%
Miscellaneous	742	2.0%	1,631	2.6%	2,202	3.0%
Public	747	2.1%	2,247	3.6%	2,743	3.7%
TOTAL	36,366		61,694		73,749	
Stockwater	8,601		19,836			
Domestic	10,026		32,496			
Subtotal	18,627		52,332			
GRAND TOTAL	54,993		114,026			

NOTES:

- 1) These numbers have been enlarged from the number of water rights actually on record by a factor of 1.74, which reflects the number of unrecorded water rights that past adjudications have turned up. Thus, these estimates may be high for some uses, particularly those with smaller numbers. In addition, some rights may be doublecounted under more than one use, when, in fact, one use is primary.
- 2) The number of water rights holders varies considerably from the number of water users. A single water right held by a municipality or irrigation district may serve hundreds of users.
- 3) Industrial uses include: industrial, mining, commercial.
- 4) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 5) Public uses include: wildlife (mostly held by Forest Service and FIM), water quality improvement, minimum instream flows.

MAXIMUM ENTITLEMENT OF WATER RIGHTS

	ABOVE SWAN FALLS		LEWISTON & ABOVE	
	CFS	1000 AF	CFS	1000 AF
Irrigation	140,930.0	101,850	184,770.0	133,533
Hydropower	163,062.0	117,845	289,256.0	209,045
Aquaculture	13,404.0	9,687	13,631.0	9,851
Municipal	723.0	523	1,161.0	839
Industrial	2,268.0	1,639	6,493.0	4,693
Miscellaneous	14,170.0	10,241	15,247.0	11,019
Public	5,802.6	4,194	20,315.6	14,682
TOTAL	340,359.6	245,979	530,873.6	383,662

Notes:

- 1) Water use may be doublecounted, particularly for miscellaneous and public uses. The same water right often lists several beneficial uses, of which one is primary. Thus, these numbers probably represent upper limits for the more minor uses. In addition, these figures include applications not as yet approved for all uses besides hydropower. Hydropower includes only permits, licenses, claims, and decrees.
- 2) Industrial uses include: industrial, mining, commercial.
- 3) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 4) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.
- 5) Domestic, stock watering, and groundwater recharge uses have been dropped. These rights are not normally disputed, but need to be quantified.

Division of Financial Management
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fmstat/dqmax