

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

FEBRUARY 1, 1985

Rm 433, 1:30 P.M.

- PRESENT      Senators Noh, Beitelspacher, Budge, Carlson, Chapman, Crapo, Horsch, Little, Peavey, Ringert and Sverdsten. Senator Kiebert was absent.
- Chairman Noh called the meeting to order and asked Senator Crapo to report on his efforts of writing a statement of intent to accompany SB 1006 and SB 1008.
- Senator Crapo      Explained to the Senators they had the final version of the statement before them. He said the Attorney General, the Governor's office, Idaho Power and Senator Peavey had seen a copy and believes the statement is something all the negotiators and Senator Peavey can agree with. Senator Crapo then went through the statement pointing out the minor changes that had been made from one that had been handed out to the Senators the day before. (Statement attached)
- Senator Noh      My suggestion would be to consider the legislation first, SB 1006 and SB 1008, and if the legislation goes out, when it is on the floor, request the statement of intent be spread upon the pages of the Journal by unanimous consent.
- Senator Ringert      If this is going to be of any use in the future, he believes this statement of intent should be circulated to the Senators before the bills are considered on the floor.
- Senator Crapo      That is true and also believe the Resource Committee should vote on it now.
- Senator Noh      What do you mean by circulation?
- Senator Ringert      The statement should be circulated to all the Senators. My point is, when someone has a problem and it arises, and the court looks for legislative intent to explain a particular portion of it, if the legislature didn't consider this material before they voted on it, then it wouldn't play any role in shaping their intent.
- MOTION      Senator Beitelspacher moved the Chairman be instructed to distribute the legislative statement of intent that is now before us for S 1008 to all members of the Senate before such time we consider S 1008. (Motion died for lack of a second)
- Senator Noh      Maybe we should vote on the statement first. Perhaps we should first have a motion to see if the Committee wants to accept the statement of intent.

- MOTION            Senator Crapo moved the Senate Resources and Environment Committee adopt this statement of legislative intent on behalf of the Committee, seconded by Senator Beitelspacher. Motion carried.
- Senator Peavey     I just wonder how much effect a statement of intent will have when passed by one body and not the other and if this really isn't an exercise in futility. The case law pretty well defines what the law means. That is my problem. I feel this is extra baggage that I'm not sure is needed.
- Senator Ringert    I think the record should show that passing the motion and acceptance of the statement of intent should not be regarded as addressing anything except what is specifically set out in this statement of intent. There could very well be other matters within the bill that are not absolutely crystal clear.
- Senator Noh        Think that should be well understood.
- Senator Carlson    Now that we have accepted this as being reasonable and understandable, is there something more that needs to be done?
- Senator Noh        I would ask unanimous consent the Chairman be allowed to circulate this to all members of the Senate as soon as possible and that it is on the desk of the Senators when the bills are considered.
- There were no objections - consent was given.
- MOTION            Senator Peavey moved and Senator Beitelspacher seconded SB 1008 go out with a do pass recommendation. (Motion carried after a lengthy discussion. Senators Ringert, Little and Carlson voted no).
- Senator Crapo      I would support the motion but first I would like to ask a few questions of the negotiators. It is my understanding that with the date of October 1984 which was the cut off date for those dismissed from the action to whose rights Idaho Power is subordinated, that that situation applied regardless of the status of the minimum stream flow. Would you address for me the interplay between those water rights and the minimum stream flow?
- Tom Nelson  
I. P.            As I understand your questions, the contract of the October 25 agreement contains a sign-off by the Idaho Power Company that its rights are subordinated to actual use as of October 84. In other words regardless of the status of that water right relative to state law, to neighbors, what other problems they may have, the Company rights are subordinated to those rights. Now inherent in the discussion to date has been the assumption that the historic flow of 4500 is the flow. If that assumption is wrong, on the downside, that doesn't operate to the detriment of those particular users. In other words if there isn't 600 cfs there that does not affect their right. Likewise if there is more than 600 in the river then that agreement doesn't limit the use by other people of that either. Those folks are subordinated regardless of what happens ultimately to the stream flow.

- Senator Crapo Would it be fair to say then that Idaho Power assumes the risk of a actual stream flow below 3900 as far as priorities of that water?
- Tom Nelson That is correct to the existing users.
- Senator Crapo Can you tell me what would happen in Idaho law if something happened, say an earthquake, and the flow actually was less than 3900 or less than the amount these water users could use and still leave 3900 in the river. What would happen at that point?
- Tom Nelson As far as any Idaho Power Company rights would be concerned, the flows usually would be immune from any challenge by the Company. Now the state may develop in the future or may claim they have now some right relative to those users, but that is not defined by or limited by the agreement. So in that case the Power Company would watch the river flow go down as would everybody else. There would be no weapons to which to prevent it as to existing users. I want to make that clear.
- Senator Crapo How would Idaho Power purchase water at the present time if they desire to do so?
- Tom Nelson If it is a one year lease through the water supply bank that is handled as a delegation from the Department of Water Resources to the Committee of Nine. The Company leases water on a one year basis. If it wants a longer term of use than a year under the water supply bank, then it needs to apply for a change in place of use, point of diversion and nature of use with the Department of Water Resources. To the extent that application involves more than 50 cfs or I think its 5,000 acre feet, then it requires legislative approval. That is the existing law and of course this agreement and any of the legislation doesn't attempt to change that.
- Senator Crapo With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract. Would you clarify, what subsequent legislative changes would do to the status of Idaho Power water right with regard to changes in the minimum flow?
- Tom Nelson As the contract and the statute work together, the state could obviously increase the minimum flow at Murphy anytime they wanted. The Company would have no rights involved in that decision. If the state wanted to reduce that minimum flow below the seasonal 3900 and 5600 it certainly is at liberty to do that. However, the contractual recognition of the Company's water rights at that level would remain at those levels and therefore the Company's rights would not follow the minimum flow down in that instance. The contract would still define it as the seasonal 3900 and 5600.
- Senator Crapo I noted in the state water plan and this isn't particularly related to Idaho Power but wanted to see if you or anyone else, have a different understanding. The state plan calls for a

separate block of water set aside for thermal cooling development and as I understand the proposed changes to the state water plan, that development would be industrial development under the DCM block that has been set aside. Is that your understanding?

Tom Nelson

I think clearly thermal cooling would be an industrial use. To me the common understanding of the word, for example the way the Jim Bridger operators required water in Wyoming is under an industrial latitude. Yes, I would think thermal cooling is an industrial use.

Senator  
Ringert

Could you give us a brief overview of which negotiating party wanted which points included in this legislation? I would like to know what the negotiating blocks were.

Tom Nelson

That would be a fairly extensive endeavor if I did it in any detail. I will give you an overview and you can ask questions if you have any particular concerns. You have been at the hearings where the 3900 was arrived at. It was very scientific--there is 4500 cfs in the river now. The water plan says 3300; half way is 3900. Somewhat the same function was followed in winter flows to get the 5600--the Milner flows, look at the existing conditions in the winter the best you can estimate, and then back out the effect of developing the 600 cfs summer and you come out to approximately the 5600 winter figure.

Senator  
Ringert

Who wanted the 3900 and 5600?

Tom Nelson

The Company wanted both numbers higher and the state wanted them lower. I won't want to be understood that there are major and minor points to that agreement. The whole thing dovetails together, but one of the obvious factors involved was the public interest criteria and that was I think, as I look back on it, both the state and power company wanted some element of state control over the allocation of that water. If the race was to the swift, the swift was already afoot and in this situation the price of one man's failure is another man's inability to get started. The way of both the existing and developed applications and future uses outside those against some form of public interest criteria was I think a mutual desire. The form those criteria went through, probably 50 drafts, so to say where anyone of those five came from, I'm not prepared to even guess. It is obvious from where the parties were located, that the stricter they were the more opportunity there was to foreclose development and obviously that was where the Company was coming from. But the state wasn't necessarily speaking only for unrestricted development, so its hard to say where some of those things come from. Part of this was kind of a put up or shut up situation on both sides. The Company said it didn't want to be watermaster; the state said OK, then take yourself totally out of vestige of any control over the rights that you have defined.

We said alright, but if you are going to be the watermaster then you get out and you take care of it. So it was in that context that you find the adjudication requirement the thought being it doesn't make alot of sense to try and define what's in the river when you haven't the foggiest idea really of the details of the water uses now going on above Swan Falls. The scope of adjudication within the McCarran Amendment was simply an effort to make sure that for planning purposes the federal grant had to get involved because you can't plan the river with potentially large undefined claims that aren't part of the planning process. To that I think, was a mutual segment. The trust provision was an idea I think of the state. I seized upon it because it filled what I saw as a major problem the Company had in this thing throughout, which was we could get the state to sign, but how did we get the state to live up to what they said they would do and that was a major problem from our side. The trust provision could get us around the subordinated versus the subordinatable nature of the water above minimum flow. It remains unsubordinated but its held in trust by the state and it neatly side-stepped the problem but it left us we think with another club to use against the state if it tries to ignore the standard set by the legislation. I believe that would be the major elements of the bill.

Senator  
Ringert

Page 4 of the bill, section 42-203D, 2, lines 44-47, specifically says the "administrative proceedings" but it seems some of our other sections similar to this specifically mention the right to judicial review. Would you comment on whether the lack of that statement in this particular sentence would (1) preclude judicial review (2) if that is the case, is that the intent of it?

Tom Nelson

First, working backwards it was not the intent of the section to preclude judicial review, but I can't tell you without looking at the rest of 203 where that right to review exists but I believe in subsection 6, page 2, in the existing code there is a right of review which would I think apply to the entirety of 203.

Senator  
Ringert

I think the one on page two refers to proceedings under application and 203D on page 4 is review of existing permits, so I just wonder if we do have that coverage.

Tom Nelson

As I said, it was not intended to exclude it. My thought was section 203 in total already has the right of review and the 1701A is the section that creates administrative review, so I think you can incorporate it by reference there even if subsection 6 doesn't pick it up.

Senator  
Ringert

Just a comment, I wonder why we have to mention in some places that judicial review is available under 1701A and not mention it in others and I just see the opportunity for the court to decline jurisdiction with a neat little question sometime because of that.

- Norm Young 421710A, includes a specific allowance for judiciary review. That particular section a few years ago clarified anytime the Director made any decision with adverse effect to a water user or citizen on which there hadn't been a previous right for a hearing, that provision would kick in giving the right to an administrative hearing and judiciary review.
- Senator Tominaga What if in 5 or 10 years the state decides to lower the minimum stream flow from 3900, would the state have to compensate Idaho Power for that block of water for the reduction in the minimum stream flow?
- Tom Nelson As I have said, this whole approach is one of planning and the Company's position now is to watch the state to make sure its planning is aimed at compliance with the minimum flow in the contract. In your example, then the company would immediately to to court as I see it and attempt to force a change in their planning process to recognize the contractual right. That would be in advance hopefully of approval of any new uses. One option in that situation would be for the court or the state, or the legislature to say well, alright, you have a contract but your remedy is by compensation and not by stopping the state in its planning process. The initial attempt as we have explained it to the other negotiators would be to force compliance to the contract and only then if we weren't successful in doing that, would we, I think, be entitled to compensation. We would rather have the water than the money frankly.
- Senator Carlson Can you define "public interest" for me?
- Tom Nelson Senator, in Section 203 of Title 42 you find public interest defined in two places; in local public interest standard in (a) and the portion of public interest defined by (c). In that situation, local public interest may be applied under 203A and the economic portion of the public interest it will be found in 203C.
- Senator Carlson Would you illuminate for me, is the ratepayer, Idaho Power and others in the state of Idaho, is their interest involved and considered in this legislation?
- Tom Nelson Yes. The interest of the ratepayer is addressed in 203C, sub 2, (ii).
- Senator Carlson May I interrupt, is that the part that says that if you ever sell those water rights, the proceeds therefore will go to the customer?
- Tom Nelson No. Under (ii) the analysis there is that you look in (i) at the benefit of the new use and under (ii) you look at the detrimental effects of the new use on electrical rates. That is the other side of the coin. If it is worth "x" dollars to

have the new use in place to the economy of the state and it costs "y" dollars to have that water taken out of the river, then you have to balance "x" and "y." That is where the ratepayer's interest is addressed as part of the public interest.

Senator  
Peavey

What would be the flip side of Senator Tomlinaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

Tom Nelson

In a situation where the state raised the minimum flow, the Company's subordinated rights would remain at 3900 and 5600. However, that increase then would make the company the beneficiary of that increase flow and as I read both what we have as those minimum flows operate, the company would be a beneficiary of the higher flow and entitled to protect it or to try and make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

Senator  
Peavey

When you say "to protect the new higher minimum flow," you aren't saying then that the state couldn't after it had done that, relower that to 3900, that would be the state's option, would it not?

Tom Nelson

You are right. Anything above the minimum flow the state is free to do as it likes.

Senator  
Ringert

Page 3, line 43, says permit or license. My question is: I am concerned that this language would permit the Director to impose subordination on a licensed water right that didn't have that condition on the permit.

Tom Nelson

That is addressed in the last full sentence of sub. 6--shall not apply to licenses which have already been issued as the effective date of this act.

Senator  
Ringert

That is not my concern. My concern is that the small hydro operator who received a permit in 1990 and that permit doesn't have a subordination provision in it and he builds his plant and gets into operation and here comes the Director and looks at it and says I probably should have done this while a permit, but I am going to do it now.

Tom Nelson

That interpretation is obviously possible under that language. What the state wanted was that there are existing permits out there for hydropower purposes some of which may be unsubordinated. I think there is only a handful. They wanted the power to go back and subordinate those permits at the time they issue the license. So they were thinking of the existing situation not what happens in 1990. That interpretation would be possible, but this was the state's section and all I added as the last sentence to make sure they didn't undo everything we had done with the contract.

- Senator Crapo As I said, I will support the bill going to the floor, but with regard to this particular section dealing with essentially impacting the small hydro developments, there are some inequities in the bill to where we ought to at least address the type of discretion the Director should have to impose such restrictions. It is my understanding there will probably be some subsequent legislation introduced this term to address those issues. So I think we as a committee should be aware that there are some possible clarifications that need to be attached to that type of discretion on part of the Director.
- Senator Little What assurance does the small hydro people have there will be legislation coming to protect them?
- Senator Noh I presume the dedicated interest of the legislative representatives of these people.
- Senator Peavey What happens to this agreement if nothing gets through and the whole thing blows up? I think there are some misconceptions in certain parts of the state that they are going to be in better shape than they are now.
- Tom Nelson The lawsuits which precipitated the resolution are still pending. I can't give you an idea of what the time will be. Implementation of the agreement will be scratched and we will go back to war. So the problems that led to the pressures to develop the agreement still exist.
- Senator Peavey I thought I remembered seeing some dismissal notices. What portions of the lawsuits were dismissed?
- Tom Nelson We still have the problem of rights versus people, but to date, since the October 25 signing of the agreement we have dismissed in round numbers 4,000 filings from the suit. It is hard to tell in people because some of them have 10 people on them or you might have one guy with 10 filings. In terms of filings still subject to the suit, I would say there are 2500 to 3000, which is a rough estimate.
- Senator Peavey How would you classify the 2500?
- Tom Nelson As far as we know they would be undeveloped applicants and permits. We are in the process of sending out a questionnaire to try and locate those people in that group that are developed or have made the 1180 investment that we don't know about. By and large it will be undeveloped applicants and permits. Mostly large agricultural because we have dismissed to the extent that we can the commercial, industrial, municipal, domestic people.
- Senator Peavey To summarize it then we really shouldn't have any existing irrigators left in a status where they are locked in combat with the power company.
- Tom Nelson That is right. At least as soon as we can find out all of the 1180 beneficiaries that will be the case.



- Tom Nelson      Of course one of the big questions is what will future uses be of the remaining water.
- Senator Ricks    The group you discussed as being dismissed. They were dismissed with prejudice is that right?
- Tom Nelson      Yes.
- Senator Ricks    Does that mean they could not be sued in the future?
- Tom Nelson      The only meaning that has in the context in which that dismissal took place is that the power company is barred from ever challenging their water right. Whatever other problems there are they will continue to exist, but the power company is barred from challenging their water right.
- Senator Ricks    Do you have any idea about what quantity of the river that involved in terms of cfs as far as the permit holders are concerned?
- Tom Nelson      The estimates are very rough, Senator because when you are looking at a paper right, somebody who has not proved up but has a filing and it is on the basis of some of those filings that we did the dismissal, you will find you overfile on acreage and you overfile on amount. So if I was to go back to those people who have been dismissed and tell you what they showed on paper other than the licenses they had in, I would have a vastly overstated amount. We have gone back through to try and determine from the basis of acreage involved on the people we know are and then use a depletion based on the acreage and I come out in the vicinity of 1,000 cfs, but that is really a rough number because there are about three assumptions to even get that close. If you used the diversion numbers you could be talking about 10,000 to 15,000 to 20,000 cfs.
- Senator Ricks    That is the part I don't have clear in my mind. I am wondering if there is really any free water in that river and if we haven't used it all up in terms of permits. I recognize when a person seeks a water permit it is for "x" volume of water and rather we use it for two months during the year or 10 months, we still have the permit and right to that quantity of water. I just am trying to get clear in my mind if there really is any excess water in the river.
- Tom Nelson      That is one of the "ifs"--if our analysis was right that there was 4500 in the river. In other words if you repeated 1961 and 1985, the low flow of the river at Murphy gauge would be 4500. If that assumption is correct, then the conclusion is that all current development has been reflected in the river. In other words, we have now felt the effect of all that development. I am convinced from my conversations with experts in the Department and experts that we have and experts that other people have hired, that that is a supportable conclusion. If that is right, there

is 600 cfs in the river and that 1,000 cfs that we dismissed, if my number is right, is the 1,000 cfs that took it from 5500 to 4500. So they are already in the river; they have already been felt. The impact has been measured and the uses accounted for.

Marjorie  
Hayes

We have done some intensive research into the number of cfs in the Snake. The USGS maintains there are 6,056 cfs in the river. This is the average and what we should be considering so our contention is we are not starting from a valid point--there needs to be consideration of the 6,056 cfs as the average flow for the past 23 years.

Tom Nelson

So that no one gets confused about the 6,065 cfs. If you take June 27 of every year for the last 23 years you may very well come to a number like 6,056, but the USGS who runs the gauging station at Murphy recorded a flow on June 27, 1981 of 4,530 cfs. So what we are talking about here is a minimum flow. You don't swim in average depth rivers, commercial fish don't live in average depth rivers. This is a critical period planning mechanism. You look at the worse case and say, what can we accept in that river on the worse day that we can foresee we will have. That day to date has been 4530; not 6,065. If you want to go to an average number, then admittedly it will be much higher, but your exposure to flows an acceptable limit will be much greater.

SB 1006

PROVIDE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE POWER TO PROMULGATE RULES & REGULATIONS AND SUSPEND ISSUANCE OR FURTHER ACTION ON PERMITS OR APPLICATIONS

MOTION

Senator Budge moved and Senator Beitelspacher seconded SB 1006 go out with a do pass recommendation. Motion carried. Senators Ringert, Little and Carlson voted no.

There being no further business before the committee, the meeting adjourned.

  
Laird Noh, Chairman

  
Bev Mullins, Secretary

The Idaho  
Statesman

# The Valley

C  
Section

Monday  
January 26, 1985  
Boise, Idaho

Classified  
Pages 5-10C

## Water-rights sorting proves complex but not new



John Blackmer/Statesman

Sen. Bill Ringert, R-Boise, studies water-rights material during a recent committee meeting

By RON ZELLAR  
The Idaho Statesman

Idaho lawmakers are on unfamiliar ground — or water — as they ponder a proposal for a basinwide "adjudication" of Snake River water rights in connection with the Swan Falls blue-print for the river's future.

But the process for using Idaho courts to establish clear title to water has been around almost since statehood.

Howard Seebree, the owner of an irrigation ditch west of Caldwell, filed a protest in 1890 against the New York Canal project, claiming its completion would "cause a diminution of the water appropriated by us."

Twelve years later, the Seebree Canal became the focus of the first adjudication of Boise River water rights as Seebree's successors, the Farmer's Cooperative Ditch Co., filed suit against the neighboring Riverside Irrigation District Ltd.

Nearly 150 other defendants joined the case, each to reap its as-

sert claims of seniority for water, according to documents at the Idaho Historical Library.

Testimony covered 4,000 pages, including 2,500 when the case was on appeal. A decree listing the priority of water rights on the river was entered by 7th District Judge George H. Stewart in 1906, six years after the case began.

It's no wonder, then, that legislators have moved cautiously in considering an adjudication of the Snake River and all its tributaries, including the Boise and the Clearwater rivers.

The House Resources and Conservation Committee held three meetings on the bill authorizing the adjudication before even voting to introduce it. Cost has been the main objection, along with the fee formula to collect part of the money from water users.

"That innocuous little \$1 million is just the camel's head in the tent," said Sen. Bill Ringert, R-Boise, referring to the state tax money being asked this year to

See WATER, Page 5C.

### Legislators look cautiously at six bills

Legislators have been feeling their way through the Snake River water-rights mine field, six bills presented as a package for their approval.

Two Senate committees delayed action Friday on portions of the package. A House panel has scheduled a hearing Thursday on two other bills after delaying their introduction twice.

The complex legal and administrative issues contained in the so-called Swan Falls agreement are confusing not only to lawmakers viewing them for the first time, but also to veterans of the controversy.

Rep. M. Reed Hansen, R-Idaho Falls, a former chairman of the state Water Resources Board, said he learns something new every time the issue is discussed.

Sen. Lynn Tomlinaga, R-Paul, was executive assistant for the Idaho Water Users Association

before he left the organization three years ago to begin farming. Voters in Tomlinaga's district have told him to use his knowledge of the issue to protect their interests, but he too has questions.

The key elements of the package, designed to balance irrigation and hydropower uses of the river, are:

- An increase in the minimum stream flow to 1,900 cubic feet per second in the summer and 1,600 cfs in the winter, or halfway between the existing minimum of 1,300 cfs year-round and the low flows during dry years.

- New "public interest criteria" recognizing the benefits of hydroelectric power when the state considers new water permit applications.

- An administrative and court

See LEGISLATIONS Page 5C

## Bill seeks Indian talks over Snake

The Associated Press

A measure calling for the governor and attorney general to negotiate with Indian tribes over Snake River Basin water rights was introduced Thursday in the Idaho House.

The vote for introduction by the House Resources and Conservation Committee came after an attorney for the Shoshone-Bannock Tribes said the cost and time involved in sorting water claims could be cut drastically by negotiating rather than turning to the courts.

Part of a legislative package needed to implement the Snake River water-rights agreement that the state and Idaho Power Co. signed last year calls for the courts to untangle water rights in the Snake basin.

Backers of the agreement want a general adjudication that would draw Indian water rights into the state court system. Tribal attorney Howard Funke said that aspect of the pact led the Shoshone-Bannocks to believe they were headed for a major confrontation with the state.

But he told committee members during a hearing on proposed adjudication and its funding that a clash could be avoided if legislators would set up a framework for negotiations.

Funke also said estimates that adjudication will cost \$27 million are low. He said the cost is closer to \$40 million or \$50 million, and added that the federal court system probably would become involved in questions affecting Indian water rights.

Indians traditionally have sought to keep their water issues out of state courts because of local political influences there, Funke said, adding that tribes get more objective treatment in the federal system.

Players in the Snake River controversy have said their goal was to settle the issue as inexpensively and as quickly as possible.

"You've selected the most costly alternative and the most time-consuming alternative" by advocating a general adjudication, he told legislators.

Other water-rights cases involving tribes have shown court settlements are about 10 times more costly than negotiated settlements, Funke said.

He also said the Shoshone-Bannock Tribes stayed away from early developments in the battle over use of Snake River water because they felt secure in their water rights.

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# Swan Falls bill would remove most defendants

By SUSAN GALLAGHER  
Associated Press

Most of the 7,500 defendants in Idaho Power Co.'s Swan Falls lawsuit would be dropped from the case under a bill an Idaho House committee endorsed on Thursday.

But the measure, which mirrors an Idaho Power contract the governor refused to sign last year, was sent to the House floor with only a narrow endorsement.

The bill could be "strychnine with a little bit of sugarcoating," said Rep. Lyman Winchester, R-Kuna, one of the legislators who wanted to delay action.

Rep. Patricia McDermott, D-Pocatello, said water users mired in uncertainty over the Swan Falls water-rights controversy deserve relief.

She said before the vote by the House State Affairs Committee that the legislation simply will narrow the Swan Falls issue. Long-term studies and other action on the controversy won't be precluded, she said.

The legislation stems from the lawsuit Idaho Power filed last year to defend the utility's water rights against demands of irrigators and other Snake River water users upstream from Swan Falls Dam.

The suit arose after the Idaho Supreme Court ruled Idaho Power has Snake River water rights and is entitled to defend them.

A contract drawn up between Idaho Power and the state last year would have removed most of the 7,500 defendants from the suit. But Gov. John Evans refused to sign it after constitutional issues were raised.

Testimony on the legislation advocated by Idaho Power won support from water users before the committee's vote. The Idaho Citizens Coalition, a consumers' group, announced that its objections to the handling of the Swan

Falls issue will be discussed at a news conference today.

Attorney General Jim Jones told the committee that he questions the legislation's true intent. He said a court order spelling out obligations of Idaho Power and other water users in a settlement would be better than legislation.

"You'd have the power company's John Henry right there on the dotted line," Jones said.

The legislation is vague, doesn't bind Idaho Power adequately and is sure to be challenged in court, he said.

But irrigator Derrell Savage supported the bill, "recognizing maybe it isn't the whole piece of cake needed to straighten out the water mess the state is in." Savage is a farmer who manages the Bell Rapids Mutual Irrigation District in south-central Idaho.

He said thousands of water users cannot be expected to remain in limbo for the years it would take to resolve the entire Swan Falls issue in court.

Savage called for the state to develop a comprehensive water-management plan.

"The way we're going, we'll be 20 years in court," Savage said. "And my kid will be saying, 'Dad, where were you when all this was going on?'"

The bill, which advances to the House floor, is the second piece of Swan Falls legislation to clear a hurdle this week. Under normal procedures, the Swan Falls bill would come up for a final vote next week.

The other, unveiled by Jones and the governor, would place Idaho Power's water demand for hydroelectric generation beneath the needs of other Snake River users. That bill was won a courtesy introduction and will be considered later by the House Resources and Conservation Committee.

## STATEMENT OF LEGISLATIVE INTENT

S.B. 1008

Prepared by the Senate Resources and Environment Committee  
February 1, 1983

### I. INTRODUCTORY STATEMENT.

Beginning in approximately 1977, a significant controversy arose between Idaho Power Company and certain other water users in the State of Idaho over the extent of Idaho Power Company's water rights at the Swan Falls Dam. Ultimately litigation was instituted against numerous water users by Idaho Power Company to clarify the status of the disputed water rights. Both the Governor and the Attorney General of the State of Idaho became extensively involved in attempts to resolve this dispute. In 1983 and 1984, in two separate legislative sessions, the Idaho Legislature also grappled with the controversy unsuccessfully. At issue was whether the water rights of Idaho Power Company should be subordinated to future appropriators to encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho.

Ultimately, in October, 1984, an Agreement was reached between the Governor of the State of Idaho, the Attorney General of the State of Idaho and Idaho Power Company which resolved the controversy. The agreement required legislative action and was made contingent upon passage by the Idaho State Legislature of certain legislation which was referenced in the agreement. This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement.

### II. STATEMENT OF PURPOSE.

This legislation is intended to resolve conflicts over whether an existing water right for power is subordinated. The legislation resolves these conflicts by defining the nature of such water rights. It is also intended to assure that water is available for development in Idaho and to provide a basis for reallocation of water for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.

The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights. Finally, the legislation is an assertion by the Legislature of the State of Idaho of its authority to limit and regulate the use of water for power purposes.

### III. SECTION BY SECTION ANALYSIS.

#### A. SECTION 1. (AMENDING SECTION 42-203 OF THE IDAHO CODE.)

Section 1 amends Section 42-203 of the Idaho Code by renumbering the section to be Section 42-203A and adding new notice requirements for applications to divert in excess of ten (10) c.f.s. or one thousand (1,000) acre feet of water. Notice of such applications must be published statewide, once per week for two consecutive weeks. Section 1 also provides a mechanism by which persons interested in being notified of any proposed diversions may request in writing to be notified by the Department of Water Resources. Such requests may specify any class of notices of application. Persons making such requests must pay annual mailing fees to be established by the Department of Water Resources.

#### B. SECTION 2. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 2 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203B, Idaho Code. This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses. It also represents a legislative protection of the rights of a user of water for power purposes (1) against depletion to the extent of a minimum flow established by State action; and (2) to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to State law. The water right for power purposes shall not be subject to depletion up to the amount of the minimum flow as defined by any applicable contract with the State. As applied to the Swan Falls Agreement, the existing minimum stream flow at the Murphy U.S.G.S. gaging station is recommended for change to seasonal

flows of 3,900 c.f.s. and 5,600 c.f.s. The Agreement recognizes Idaho Power Company's rights as unsubordinated up to the amount of those flows. While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change. Valid subordination conditions governing any existing hydropower rights are not modified or removed by this legislation.

To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. The term "state action" refers only to action by the Idaho Department of Water Resources in compliance with all applicable law, and/or the establishment of minimum stream flows in the State Water Plan by the Idaho Water Resource Board, both of which actions are subject to ratification, modification or rejection by the Idaho State Legislature. To the extent of the established minimum flows and any right recognized by contract, such water rights for power purposes remain unsubordinated to all uses. The amount of water or water rights held in the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. No person to whom trust waters are reallocated shall be required to pay compensation to any party, other than appropriate administrative fees established by the director for processing of the reallocation.

The governor is given specific authority to enter into agreements with power users to define applicable minimum stream flows in accord with the terms of this section. These contracts must be ratified by the Idaho State Legislature.

Thus, existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the State. Hydropower rights in excess of such flows will be held in trust



by the State and are subject to subordination to, and to depletion by lawful beneficial uses. In addition, if the holder of such a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section.

The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

As Applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

C. SECTION 3. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

1. Section 3 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203C, Idaho Code. This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2:

First, the proposed use must be evaluated under the criteria presently existing in section 42-203A, including local public interest. (Senate Bill 1008 does not adversely affect the use of existing local public interest criteria. Review of these factors is separate from the new factors added by the bill in Section 42-203C.)

Second, if the proposed use meets these criteria, there must be a determination of whether the proposed use would "significantly reduce" the amount of water available to the power user whose rights are owned by the trust. If a significant reduction is not found, then the application should be granted.

Third, if a significant reduction is found, then the proposed use must be evaluated in terms of the criteria stated in Subsection 42-203C(2). The finding of a significant reduction does not infer that any portion of the trust waters should not be developed. Such a finding simply results in the necessity of evaluating the proposed use according to the terms of the criteria stated in Subsection 42-203C(2). These criteria focus on the benefits of the proposed use to the state and local economy, the impact on electric utility rates, the promotion of the family farming tradition, and the promotion of full economic and multiple use development of Idaho's water resources. The fifth criteria sets a cap on agricultural development above the Murphy Gauge.

Subsection 42-203C(2)(b) clarifies that the burden of proof in establishing that any of these criteria would prevent granting of the application is upon the protestant. This subsection was included to implement the specific legislative intent that the administrative burdens of meeting the new criteria would not block future development.

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

The criteria identified in Subsection 42-203C(2) are intended solely to guide the director of the Idaho Department of Water Resources in determining whether a proposed use has greater net benefits to the State than the existing hydropower use. The criteria identify those factors to be considered in making this determination. Proposed uses for domestic, commercial, municipal or industrial purposes and the like are not intended to receive less weight in the evaluation process simply because they are not mentioned specifically in the criteria. Nor is it intended that these uses be subject to the family farming standard contained in Subsection 42-203C(2)(ii), or the agricultural cap contained in Subsection 42-203C(2)(v). In such circumstances only the criteria relevant to the proposed use and its impact on hydropower would be pertinent.

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.

D. SECTION 4. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 4 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203D, Idaho Code. This section provides that the Idaho Department of Water Resources shall review all water permits issued by it prior to the effective date of this act; provided, however, that permits having been put to beneficial use prior to July 1, 1985 are exempt. These permits are to be reviewed to assure that they comply with the requirements of this act. The director is authorized to either cancel the permits or subject them to new conditions.

E. SECTION 5.

Section 5 clarifies that this act does not modify, amend or repeal and existing interstate compact.

F. SECTION 6.

Section 6 declares the provisions of this act to be severable in the event that any portion thereof is declared to be invalid or unenforceable.