

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

February 11, 1985

TIME: 2:50 PM

PLACE: Room 412 - Statehouse

PRESENT: All members present except:

EXCUSED: Representatives Wood and Stucki

GUESTS: Mr. Pat Costello, attorney, Office of the Governor; Mr. Pat Kola, attorney, Office of Attorney General; Mr. Rob Holland, Idaho Water Users Association; Mr. Fred Stewart; Ms. Helen Chenoweth, consultant, small hydro; Mr. Tom Nelson, attorney, Idaho Power Company; and Mr. John Hatch, Idaho Farm Bureau.

Chairman Chatburn called the meeting to order.

MOTION: Representative Sutton moved and Representative Edwards seconded that the Minutes of February 7, 1985, be approved.

MOTION CARRIED.

S 1005: Mr. Costello told the committee this proposed legislation determines that the Swan Falls agreement entered into by the Governor, Attorney General and Idaho Power Company on October 25, 1984, is in the public interest. It also revokes the PUC's jurisdiction to reach a contrary finding.

Mr. Stewart spoke against S 1005. He explained this is the bill the legislature declares whether or not the agreement is accepted. All of the other bills are mandatory to it. He distributed (Attachment #1) a copy of HCR 48 passed in 1978. The seconded handout (Attachment #2) was distributed by the Idaho Water Users Association, dated January 12, 1978. (Attachment #3) is a copy of the final conclusionary remarks of Supreme Court Justice Shepard on Swan Falls I. (Attachment 4) is a letter from the Department of Water Resources which states the agreement, as well as the contract. (Attachment #5) is a copy of "Currents", a publication of energy and water information published by the Idaho Department of Water Resources. (Attachment #6) is the statement of Idaho Power Company in support of Senate Bill 1008. He stated that Idaho Power, if they are controlled by California, can purchase, lease, own or otherwise acquire any amount of water upstream from Hells Canyon and convey all of our water from Idaho.

Mr. Nelson reiterated this is part of the group of bills involving the Swan Falls compromise. It has been discussed with the PUC and they testified in the Senate that they did not disagree with how the bill was drafted in its intent to affect commission jurisdiction.

Representative Little asked if all these bills are passed as written and fulfill the agreement made between the power company and then decide two years from now we don't like it and parts are repealed, will that affect the agreement made between the power company and the state.

Mr. Nelson answered there is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have power to do, would be to change the contractual recognition of the company's water rights at Murphy gage.

S 1006: RELATING TO THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-1605, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATIONS.

Mr. Costello explained the purpose of this bill is to provide statutory authority to the Director of the Department Water Resources to suspend issuance of water rights permits or other action on permits or permit applications when necessary. There is currently an informal moratorium in effect on Snake River water rights permit applications for uses above Swan Falls dam due to pending litigation over Idaho Power's water rights at that facility. Should a similar situation arise in the future, the Director would have express authority to impose such a moratorium when is necessary to protect vested water rights or to prevent violation of applicable minimum streamflows. In addition, the Director would also be given authority to suspend action on permits and applications pending implementation of the new public interest review called for under the Swan Falls agreement entered into by the Governor, the Attorney General and Idaho Power, dated 10/25/84. Finally, this bill would give the Director the authority to promulgate rules and regulations. Such authority is necessary in order for the Department to carry out the many 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.

Ms. Chenoweth remarked her firm deals primarily in the development of small hydroprojects. For this reason, they have some concerns about the bill. She referred to page 2, lines 4 through 7 "... (7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan. This new section that is proposed made them realize that simply after notice, the Director of the Department Resources can suspend any further action on permits. Many people, including small hydrodevelopers, on the basis of approved application, have submitted that application to financiers, along with their Federal Energy Regulatory Commission license. That in itself has been enough for, not only small hydro people, but also potential agricultural developers to go ahead and secure financing for the development of their project whether it be for consumptive or non-consumptive use. Once the water has been put to use, they have a permit and the licensing procedure goes forth. However, most of the time financing is brought forth on the basis of a permit. If simply after notice, without any public hearings, these permits can be suspended, that can be very devastating. In line 6, one of the criteria is "...to prevent violation of minimum flow provisions of the state water plan." Article 15 of the State Constitution which was adopted in 1928, set forth a specific criteria by which the state, through the department, could grant water rights. Certainly a minimum stream flow on a public interest criteria basis, combining this bill with S 1008, could possibly cause a constitutional problem. Some may find it necessary to challenge this in another court action.

Representative Hawkins inquired if this could be addressed by excluding nonconsumptive permits.

Ms. Chenoweth responded that it could be done if the legislature would deal with the criteria based on Article 15, which is consumptive uses.

Mr. Kile commented that he believed Ms. Chenoweth's arguments are without merit and require some correction. Referring to line 4 "... (7) After notice..." - the reason for that language is to comply

with the due process requirements of the Idaho Constitution. The reason for the language is to limit what the director can do so that someone after receiving notice, desires to challenge what the director is doing, they have an opportunity to go to court and get an order restraining the director from exercising his discretion in this area. Also, in relationship to lines 6 and 7, that issue has been addressed quite recently by the Idaho Supreme Court in the Hidden Springs Trout case which clearly indicated there was no constitutional prohibition with the director suspending permits or imposing new conditions upon permits. The provision here is intended to act as a limitation on the director as opposed to granting him additional power.

- S 1007: RELATING TO WATER RIGHTS; AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B, IDAHO CODE, TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

Mr. Costello stated this proposed legislation would clarify the appropriate rate-making treatment of gain upon sale of a public utility's water right for hydro-power generation. Existing law would probably require that gain upon such sale would benefit ratepayers rather than utility company shareholders. It is extremely difficult, if not impossible, to sell a hydropower right without selling the facility, too. In order to do that, the utility would have to get the permission of the PUC; and unless the person acquiring the right was going to use it for a facility, they would have to get approval of the director of the department for a change in the nature of use. If it is a large enough hydroproject, it would also require the approval of the legislature.

Chairman Chatburn mentioned the question was brought to his attention - what if there was a loss on the sale - would the customer bear it.

Mr. Nelson answered that the prohibition of sale arose with the Lucky Peak project and it is a much different problem. What if Idaho Power Company sold all its water rights - it would need Federal Energy Regulatory approval, PUC approval, Department of Water Resources approval and then approach the legislature. He said it is ridiculous to contemplate a situation where all the physical and legal constraints could be met on selling that water right.

- S 1008: RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, TO REDESIGNATE THE SECTION, TO MAKE CERTAIN ORGANIZATIONAL CHANGES AND TO PROVIDE FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE DATE OF THIS ACT; PROVIDING THAT THE PROVISIONS OF THIS ACT SHALL NOT AFFECT ANY INTERSTATE COMPACT; AND PROVIDING SEVERABILITY.

Mr. Costello said this bill is the centerpiece of the Swan Falls agreement. This legislation implements the state's authority under the 1928 Amendment to limit and regulate the use of water for power purposes.

He continued by explaining Section 1 would add new notice and publication requirements when the Department of Water Resources receives a water right application. Section 2 sets out the nature and extent of water rights for power purposes. Existing hydropower rights which are subject to valid enforceable subordination conditions are unaffected by this legislation. 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 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. Future hydropower water rights could be subordinated to future upstream beneficial uses. Section 3 exempts existing licenses from the subordination authority granted under Section 2. Section 4 provides additional criteria which must be met when applying for a right to appropriate water available due to a subordination condition. Protestors have the burden of proving the applicant has not met these criteria. Section 5 makes pending water right permits subject to the new criteria imposed by Section 4. Section 6 saves existing compacts from this Act. Section 7 declares provisions of this Act to be severable. He added that direct pump diversion out of the stream down near Murphy gage is probably going to be disfavored because it is exact one to one depletion immediately during the peak irrigation season. On the other hand, ground water diversion further away from the stream, the impact is not immediate and is also spread out through the entire year. More agriculture can be developed for the same amount of stream flow. It also encourages the development of new uses which create jobs.

Representative Hansen asked if the time arrives for rebuilding the Teton dam, there would not be a problem.

Mr. Costello replied that is correct.

Representative Edwards asked whatever happened to the old criteria - first in time, first in right. She asked why new criteria is needed.

Mr. Costello responded that this is the first criticism that is made whenever someone has proposed some kind of criteria beyond first in time, first in right which the constitution guarantees. The key is the right is to appropriate the unappropriated waters of the state. Under this agreement they have setup a system where there is no unappropriated waters on the Snake River drainage above Swan Falls.

Representative Edwards continued her question to include that this applies to every river in the state of Idaho.

Mr. Costello answered it would apply to systems that had a Swan Falls type situation.

Representative Edwards inquired if this only applies to the Snake River basin.

Mr. Costello replied that it is not altogether clear if there are other rivers in this situation.

Mr. Kule referred to first in time, first in right. He said to look at the second page beginning with line 21 through 40. There are a number of criteria there that apply to limit the first in time, first in right.

Mr. Holland told the committee that this a compromise for everyone but endorse the entire Swan Falls package.

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Mr. Hatch said the Idaho Farm Bureau also supports the entire proposed legislation.

RS 11430: RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING CHAPTER 2 TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM, AND TO PROVIDE FACTORS THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IS TO CONSIDER IN LIMITING PERMITS OR LICENSES FOR POWER PURPOSES TO A SPECIFIC TERM.

Ms. Chenoweth pointed out this affects only hydropower rights.

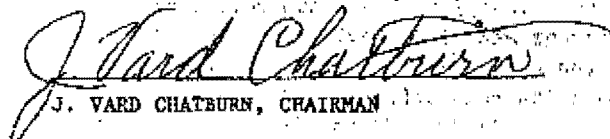
Chairman Chatburn asked if this eliminates subordination for small hydropower.

Ms. Chenoweth answered that subordination would still apply if there were an upstream user but it would give them an actual water right.

MOTION: Representative Edwards moved and Representative Winchester seconded that RS 11430 be introduced.

MOTION CARRIED.

The meeting adjourned at 5:20 PM.


J. VARD CHATBURN, CHAIRMAN

Linda Magstadt, Secretary

Representing Over 2,700,000 Acres of Irrigated Land

Idaho Water Users Association, Inc.

AFFILIATED WITH NATIONAL WATER RESOURCES ASSOCIATION
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January 12, 1978

Mr. Reed W. Budge
Idaho State Legislature
State Capitol Building
Boise, Idaho 83720

Dear Mr. Budge:

The Idaho Water Users Association supported the passage of House Bill 14 during the First Regular Session of the Idaho 44th Legislature. It was our opinion that the Legislature is the true reflective body of the wishes of Idaho citizens and that the implementation of the Idaho State Water Plan should be with full legislative approval. Even though more than half of the recommended policies require specific legislation for adoption it was our feeling that the Department of Water Resources and the Water Resource Board should be guided by decisions of the Legislature in their administrative direction. It was to this end our organization supported the enactment of HB-14.

Our Association presented oral testimony at two of the hearings held by the Interim Legislative Committee organized by the Legislature and submitted detailed written testimony on nearly all of the policies and recommendations for consideration prior to the recommendation to the Legislature in 1978 by the Interim Committee. After reviewing the decisions of that committee, it is the feeling of the Board of Directors of IWUA that the considerations and wishes expressed on behalf of agriculture were ignored to a great extent. The recommendation of the Committee has resulted in two major problems that will face the Legislature and the agricultural community this year. The first is that many of the policies and recommendations supported by IWUA as being beneficial to the agricultural community were rejected in the recommendation of the Interim Committee. The second is that the recommendations have resulted in a great deal of support for the "Hydropower Protection and Water Conservation Act," an initiative supported by such individuals as John Peavey, Matt Mullaney, Mary Meek, Jeff Fereday and others. That initiative is considered by our organization as probably the most dangerous and

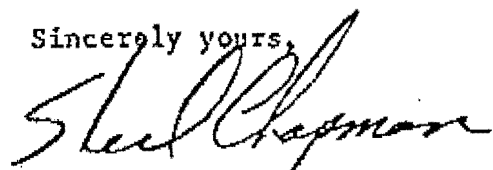
destructive act that could be pushed upon the agricultural sector of our economy. Unfortunately, the backers of this initiative are now finding a great deal of support and, in all likelihood, the measure will be on the ballot in 1978. It is the feeling of the Board of Directors of IWUA that unless a significant portion of the State Water Plan is enacted during this session of the Legislature the environmental groups in Idaho will be successful in getting the initiative passed.

It is for the above described reasons that the IWUA Board of Directors, at it's winter board meeting January 4, 1978, took several formal action that will govern our position through this Legislature. The first is that our organization would support a repeal of House Bill 14 enacted last year. It is our opinion that because more than half of the State Water Plan will require legislative approval through specific legislation we will still have an opportunity for significant input into the primary policies and recommendations included in the State Water Plan. Secondly the removal of the legislative ratification would allow the Water Plan to be formally adopted, which would take a great deal of steam out of the momentum developed by the backers of the initiative petition.

Our board, additionally, directed the Legislative Committee of the Association to meet with the Department of Water Resources and the Water Resource Board to formulate legislation regarding policy recommendations #1 and #6, the areas of widest controversy and differences between the Board and the Water Users Association. That meeting is scheduled for the 19th of January and it is my hope that a compromise acceptable to all might be developed in order to resolve the controversy. Even though there are many areas within the State Water Plan that will require a good deal of debate, negotiation, and compromise, the enactment of the "Hydropower Protection and Water Conservation Act" would not allow any compromise nor would it provide the safeguards for vested water rights and the agricultural and industrial community that can be achieved through specific legislation. As we all know, administration through initiative can be disastrous. It is my hope that this letter will explain the position of the Association and the reasons for the shift in our direction and I would be most happy to visit with you on these or other issues.

Thank you for your cooperation in this matter.

Sincerely yours,



Sheri L. Chapman
Executive Director

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license. However, we hold that that subordination clause applies only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver. We hold that by accepting the subordination clause for the Hells Canyon project, Idaho Power has not waived its compensation for any taking of its Swan Falls water rights. Having differed in the latter two conclusions from the decision of the district court, we must remand this cause for further proceedings on the issues of abandonment and forfeiture, since those matters were raised below and not there decided. With respect to the statutes requiring Public Utilities Commission approval of transfers of utility property, we hold that the statutes do not apply to water rights subordinated when acquired, nor do they apply to water rights which have been abandoned or forfeited. Finally, we hold that the State Water Plan does not take Idaho Power's water rights at Swan Falls without payment of compensation. We have not specifically dealt with a number of arguments raised by the parties which we deem to have been subsumed by our discussion of the issues, and therefore, we intimate no views on the validity of those arguments.

The judgment of the district court is affirmed in part, reversed in part, and remanded. Each party to bear its own costs.

BAKES, C.J., McFADDEN, BISTLINE and DONALDSON, JJ., concur.

(McFADDEN, J., registered his vote prior to his retirement on August 31, 1982.)

Refer to page 81
line 13 FERC 404
licensing for Swan Falls

Justice Shepard's Ruling
on Swan Falls #1



State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Deputy

Mailing address
Statehouse
Boise, Idaho 837
(208) 334-4441

February 11, 1985

Honorable Mark Ricks
Idaho Senate
Statehouse
Boise, ID 83720

Dear Senator Ricks:

At your request I have had the flow rates represented by the water rights dismissed from the "7500" lawsuit added up. The results are as follows:

	Rate of Flow in Cubic Feet Per Second
First Dismissed	14,084.85
Second Dismissed	345.09
Third Dismissed	615.43
TOTAL	15,045.47

This flow rate should not be used to draw conclusions as to the effect of these dismissals on either the flow of Snake River or on Idaho Power Company's water rights because of the following and other factors:

1. Part of the development has been completed and the river flow has already been affected.
2. The uses do not all occur simultaneously at peak diversion rates.
3. The uses are at least partly non-consumptive and a significant amount are totally non-consumptive.
4. Return flows will significantly alter river flows.
5. The diversion rates for each of the rights represent a maximum rate which if ever fully developed would only be used for a fraction of the year.

Effects on river flows are probably more directly related to the consumptive use, that is to the amount of water actually permanently removed from the river

Honorable Mark Ricks

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system. The information available does not allow an accurate estimate of the consumptive use attributable to the rights involved in these dismissals.

The estimate cost of generating this number was \$640. However, the information concerning which rights have been dismissed from the lawsuit has been retained in the computer so that further manipulations of the data can now be readily made if you have need for more information on this matter.

Sincerely,



NORMAN C. YOUNG

Administrator

Resource Administration Division

NCY:alw

STATEMENT OF IDAHO POWER COMPANY
IN SUPPORT OF SENATE BILL 1008

FILE - 1985

Presented to the Senate Resources and Environment
Committee

January 25, 1985

This statement is not intended to be a detailed analysis of the bill, but to respond to certain comments concerning it. As a preliminary explanation, the combining of certain exhibits to the Swan Falls Agreement into SB 1008 has made it somewhat awkward to define the Company's position on parts of the bill. Idaho Power Company is not required by the Swan Falls Agreement to support Section 2 of SB 1008, found on pages 2 and 3 of the printed bill, because its support of that section could raise implications of a voluntary transfer of its water rights. In fact, the basis for Section 2 is the State's power to "regulate and limit" the use of water for hydropower purposes.

The application of Section 2 to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimum flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right.

One further comment on this subject is in order. Testimony has been submitted on behalf of the Attorney General. Those comments were not reviewed by the other parties to the agreement and do not necessarily reflect the views of anyone but the Attorney General.

One acknowledged typographical error is on page 3, of the Attorney General's testimony, to the effect that the Governor, as trustee, would be empowered by Section 2 of SB 1008 to release trust water to new uses that comply with state law. Those decisions would be made by the Idaho Department of Water Resources under the criteria set out in §42-203C Idaho Code, not by the Governor as trustee.

Specific comments on SB 1008 are:

Section 1, Page 1, lines 37-40. A comment was made that this publication requirement was excessive. However, if 10 cfs were applied at the rate of one-half inch per acre, the 10 cfs would irrigate 1,000 acres. This is a substantial development, and is deserving of statewide notice.

Section 2, page 2, lines 42-48. Certain comments which have been made relating to this section are potentially misleading, in the context of due process concerns. A subordination condition inserted prior to development of a hydropower project is much different in effect than one sought to be inserted after license procedures and construction are complete. This distinction needs to be kept in mind when discussing this section, particularly if claims of violation of due process of law are advanced.

Section 3, lines 14-28. Some question was raised concerning the application of the criteria to non-irrigation uses. As written, and as intended by the parties to the agreement, the family farming tradition (iii) and the development cap (V) would have no application to non-irrigation uses and would be ignored in the review process. Irrigation uses not involving the area above Swan Falls also would not be subject to the 20,000 acre cap.

Concern was also expressed that (V) was a directive to allow development of 20,000 acres per year, regardless of the impact of the other criteria. This concern focuses only on the word "conforms" and ignores the words "up to" and also ignores the next sentence which prohibits giving more weight to one factor than another. The interpretation advanced as a matter of concern would give conclusive weight to (V) in derogation of the other factors listed. §42-203C(2)(a)(V) was intended as a cap, and does not compel the approval of any amount of development which does not meet the other criteria listed.

Another concern expressed was over the perceived need to weight the criteria. The criteria are weighted in the bill: "No single factor . . . shall be entitled to greater weight . . .". The weighting established by the bill is obviously that all factors are equal in weight.

The relationship of existing criteria under §42-203A to the criteria set forth in §42-203C has been questioned. §42-203C specifically requires a three-step process:

1. Review of the proposed use under existing criteria, including local public interest; (§42-203A)
2. Determination of the question of significant reduction of water available for hydropower purposes; (§42-203C)
3. Determination of public interest under §42-203C. It is clear that SB 1008 does not, and cannot, adversely affect use of existing local public interest criteria, since that review is required by SB 1008 to be separate from the §42-203C review.

If the existing local public interest standard of §42-203A is inadequate to permit review of all relevant factors, the parties to the Swan Falls Agreement did not address those issues in writing §42-203C. Any claimed inadequacies of existing standards should be addressed by separate legislation.