

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

FEBRUARY 15, 1985

Rm 433, 1:30 PM

PRESENT Chairman Noh, Senators Beitelspacher, Budge, Chapman, Crapo, Little, Ringert, Kiebert, Horsch and Peavey.

Senators Carlson and Sverdsten were absent.

Chairman Noh called the meeting to order.

Senator Budge moved and Senator Little seconded the minutes be approved from the previous meeting as written. Motion carried.

MOTION Senator Budge moved and Senator Ringert seconded that David Rydalch and Gene Gray be recommended for confirmation to the State Water Board. Motion carried.

Howard
Funke

Mr. Funke, counsel for the Shoshone-Bannock tribes appeared before the Committee and spoke on HCR 16 and went into some of the reasons why it has come about. He said the tribes had no problems with the Swan Falls negotiations until it began to effect their water rights through the proposed adjudication. At this point the tribes became directly involved. The tribes are not opposed to quantifying their water rights, but the question was "how"? The idea was to get a general stream adjudication and bring the Indian and federal people into the project. It was his belief that a general stream adjudication was the most costly and time consuming way to approach the subject. The Indian and state rights are different--state is first in time, first in right. The Indian's is from the date of creation of the reservation, in this case, Ft Hall was established in 1867. Another difference under the state system, water is measured by applying to a beneficial use. Indian water rights do not function under that rule. Present as well as future uses are secured. So any water the tribe puts into use as well as future uses becomes an Indian water right. The big question is, how do you go about measuring tribal water rights? (1) Litigation through adjudication or (2) through negotiations. After meeting with the concerned parties, it was decided to negotiate an agreement and thus HCR 16.

There are a couple of reasons for not going through the adjudication process: (1) State code is not designed to measure the Indian water rights. If the water question went through the state adjudication, it would allow the Director of the Water Resources to first define the Indian rights. (This is the main reason for not going through the state courts). Thus by going to the negotiation process, we can eliminate the question of state codes being

adequate to deal with the Indian water rights. Another reason is the scope of the whole case. Does it include all the tribes and all of the rivers? The whole issue of the scope could be avoided if the Indians sit down and negotiate rather than go to adjudication. If involved in adjudication, the Indians would argue that HB 71 would be unconstitutional and would not be an issue in any negotiations. This would be another issue the courts would have to decide if these assumptions are correct. The state water plan would be another problem as the Indians feel it is an attempt to by-pass the Constitution. Another thing to consider is the cost of adjudication. The 27 million does not include the cost of litigating the Indian water rights. It might be closer to 50-60 million dollars if their rights are involved.

After discussions among all the parties, Idaho Power, Attorney General, Governor's office and House Committee, it was agreed to try and avoid general stream adjudication and come up with the framework to negotiate the Indian claims. It has not been an easy task for the Indians to enter into this process but he believes they are committed to entering into a full and frank discussion on these claims.

- Senator Noh What about the Clearwater and Boise rivers?
- Mr. Funke If there is a general stream adjudication it is felt those rivers would have to be included to satisfy the McCarran Amendment.
- Senator Noh What is the geographic scope of the Shoshone-Bannock Indians interest in the water?
- Mr. Funke 540,000 acres for possible consumptive uses and also instream minimum flow in the Salmon drainage area for fish and wildlife.
- Senator Crapo If negotiations do not resolve the problems, where are we?
- Mr. Funke If negotiations break down, we would be back at general stream adjudication.
- Senator Crapo If negotiations did resolve the problems, would that memo of understanding be incorporated into the adjudication at that point?
- Mr. Funke Yes. It would be incorporated in the whole system. All three government entities would agree on that process.

Senator Ringert believes this resolution would create peace of mind on issues that he feels we are moving too fast and so made the following motion:

- MOTION Senator Ringert moved and Senator Horsch seconded HCR 16 be sent to the floor with a do pass recommendation. Motion carried after further discussion.

There was a short discussion on when the fees would be collected for adjudication which would not be until adjudication was filed with the court. Senator Peavey wanted to know how Mr. Dunn would proceed and Mr. Dunn said discussing adjudication doesn't effect the Swan Falls Agreement. He would have to be very conservative in issuing new permits without adjudication. With adjudication he could tell better what the effect of new permits would be; without it he will be moving very slowly. Senator Noh asked if the signing of the Swan Falls agreement will mean the adjudication can go forward with studies and preparation. Also the JFAC appropriation is presumably still necessary. Pat Kole and Mr. Nelson agreed this was correct. The filing will go on "hold" while negotiations with the tribe proceed.

HB 70 ADJUDICATION OF WATER RIGHTS

This legislation calls for a general adjudication of the Snake River Basin. The adjudication would include all tributary regions above Murphy gage and as much of the remainder of the basin as is necessary to obtain U.S. consent to include all federal claims in the adjudication under the terms of the McCarran Amendment.

HB 71 RELATING TO PRESUMPTIONS IN BASIN-WIDE ADJUDICATION OF WATER RIGHTS

The purpose of this legislation is to protect, to the extent legally permissible existing uses from being altered in a basin-wide adjudication through the creation of certain presumptions.

Sherl
Chapman

Mr. Chapman, Idaho Water Users Association, said he supported the legislation. His people feel the fees are the most equitable way to go. HB 71 is designed to clear up confusion with the development of water and clear up problems that have existed in the past.

A discussion followed on what hope HB 71 held for people who might be using more water than they have a right too. It was felt there was nothing in the law for the guy who conserves water and energy in the future. Also some points were brought up on new use of water and how HB 71 might effect it. The Chairman brought out this was an issue that is being studied by the subcommittee on marketing of water. Senator Ringert asked why the Boise should be included in adjudication since it had already been adjudicated. Efforts are being made to exclude the Boise and Payette.

MOTION Senator Peavey moved and Senator Budge seconded HB 70 go out with a do pass recommendation. Motion carried after the submotion failed. Senators Ringert and Carlson voted no.

SUB
MOTION

Senator Ringert moved to hold HB 70 in committee until the bill on excluding the Boise from adjudication is received, seconded by Senator Carlson. Motion failed on a roll call vote 2-8.

ROLL CALL VOTE Senators Beitelspacher, Budge, Chapman, Crapo, Horsch, Little, Noh and Peavey voted NO. Senators Ringert and Carlson voted YES.

MOTION Senator Peavey moved and Senator Budge seconded HB 71 go out with a do pass recommendation. Motion carried.

There being no further business before the Committee, the meeting adjourned at 3:00 p.m.


Laird Noh, Chairman


Bev Mullins, Secretary