

IN THE SENATE

SENATE BILL NO. 1008

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

1  
2 RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203,  
3 IDAHO CODE, TO REDESIGNATE THE SECTION, TO MAKE CERTAIN ORGANIZATIONAL  
4 CHANGES AND TO PROVIDE FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS;  
5 AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION  
6 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF  
7 WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR  
8 POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR  
9 LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM; AMENDING CHAPTER  
10 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C, IDAHO  
11 CODE, TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER CRITERIA WHEN AN  
12 APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER  
13 AVAILABLE FOR A SUBORDINATED POWER USE; AMENDING CHAPTER 2, TITLE 42,  
14 IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D, IDAHO CODE, TO PRO-  
15 VIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE  
16 EFFECTIVE DATE OF THIS ACT; PROVIDING THAT THE PROVISIONS OF THIS ACT  
17 SHALL NOT AFFECT ANY INTERSTATE COMPACT; AND PROVIDING SEVERABILITY.

18 Be It Enacted by the Legislature of the State of Idaho:

19 SECTION 1. That Section 42-203, Idaho Code, be, and the same is hereby  
20 amended to read as follows:

21 42-203A. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND  
22 FINDINGS -- APPEALS. ~~On and after the passage, approval and effective date of~~  
23 ~~this section, upon~~ (1) Upon receipt of an application to appropriate the  
24 waters of this state, the department of water resources, shall prepare a  
25 notice in such form as the department may prescribe, specifying: (a) the  
26 number of the application and; (b) the date of filing thereof; (c) the name  
27 and post-office address of the applicant; (d) the source of the water  
28 supply; (e) the amount of water to be appropriated; (f) in general the  
29 nature of the proposed use; (g) the approximate location of the point of  
30 diversion; (h) and the point of use. The department shall also state in  
31 said notice that any protest against the approval of such application, in form  
32 prescribed by the department, shall be filed with the department within ten  
33 (10) days from the last date of publication of such notice.

34 (2) The director of the department of water resources shall cause the  
35 notice to be published in a newspaper printed within the county wherein the  
36 point of diversion lies, or in the event no newspaper is printed in said  
37 county, then in a newspaper of general circulation therein. This When the  
38 application proposes a diversion in excess of ten (10) c.f.s. or one thousand  
39 (1,000) acre feet, the director shall cause the notice to be published in a  
40 newspaper or newspapers sufficient to achieve statewide circulation. Any  
41 notice shall be published at least once each week for two (2) successive  
42 weeks.

43 (3) The director of the department shall cause a copy of the notice of

1 application to be sent by ordinary mail to any person who requests in writing  
 2 to receive any class of notices of application and who pays an annual mailing  
 3 fee as established by departmental regulation.

4 (4) Any person, firm, association or corporation concerned in any such  
 5 application may, within the time allowed in the notice of application, file  
 6 with said director of the department of water resources a written protest  
 7 against the approval of such application, which protest shall state the name  
 8 and address of protestant and shall be signed by him or by his agent or attor-  
 9 ney and shall clearly set forth his objections to the approval of such appli-  
 10 cation. Hearing upon the protest so filed shall be held within sixty (60) days  
 11 from the date such protest is received. Notice of this hearing shall be given  
 12 by mailing notice not less than ten (10) days before the date of hearing and  
 13 shall be forwarded to both the applicant and the protestant, or protestants,  
 14 by certified mail. Such notice shall state the names of the applicant and  
 15 protestant, or protestants, the time and place fixed for the hearing and such  
 16 other information as the director of the department of water resources may  
 17 deem advisable. In the event that no protest is filed, then the director of  
 18 the department of water resources may forthwith approve the application, pro-  
 19 viding the same in all respects conforms with the requirements of this  
 20 chapter, and with the regulations of the department of water resources.

21 (5) Such hearing shall be conducted in accordance with the provisions of  
 22 section 42-1701A(1) and (2), Idaho Code. The director of the department of  
 23 water resources shall find and determine from the evidence presented to what  
 24 use or uses the water sought to be appropriated can be and are intended to be  
 25 applied. In all applications whether protested or not protested, where the  
 26 proposed use is such (1a) that it will reduce the quantity of water under  
 27 existing water rights, or (2b) that the water supply itself is insufficient  
 28 for the purpose for which it is sought to be appropriated, or (3c) where it  
 29 appears to the satisfaction of the department that such application is not  
 30 made in good faith, is made for delay or speculative purposes, or (4d) that  
 31 the applicant has not sufficient financial resources with which to complete  
 32 the work involved therein, or (5e) that it will conflict with the local public  
 33 interest, where the local public interest is defined as the affairs of the  
 34 people in the area directly affected by the proposed use. ~~The; the~~ director of  
 35 the department of water resources may reject such application and refuse issu-  
 36 ance of a permit therefor, or may partially approve and grant a permit for a  
 37 less smaller quantity of water than applied for, or may grant a permit upon  
 38 conditions. The provisions of this section shall apply to any boundary stream  
 39 between this and any other state in all cases where the water sought to be  
 40 appropriated has its source largely within the state, irrespective of the  
 41 location of any proposed power generating plant.

42 (6) Any person or corporation who has formally appeared at the hearing,  
 43 feeling aggrieved by the judgment of the director of the department of water  
 44 resources, may seek judicial review thereof in accordance with section  
 45 42-1701A(4), Idaho Code.

46 SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is  
 47 hereby amended by the addition thereto of a NEW SECTION, to be known and  
 48 designated as Section 42-203B, Idaho Code, and to read as follows:

49 42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER  
 50 RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO

1 LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that  
2 it is in the public interest to specifically implement the state's power to  
3 regulate and limit the use of water for power purposes and to define the rela-  
4 tionship between the state and the holder of a water right for power purposes  
5 to the extent such right exceeds an established minimum flow. The purposes of  
6 the trust established by subsections (2) and (3) of this section are to assure  
7 an adequate supply of water for all future beneficial uses and to clarify and  
8 protect the right of a user of water for power purposes to continue using the  
9 water pending approval of depletionary future beneficial uses.

10 (2) A water right for power purposes which is defined by agreement with  
11 the state as unsubordinated to the extent of a minimum flow established by  
12 state action shall remain unsubordinated as defined by the agreement. Any  
13 portion of the water rights for power purposes in excess of the level so  
14 established shall be held in trust by the state of Idaho, by and through the  
15 governor, for the use and benefit of the user of the water for power purposes,  
16 and of the people of the state of Idaho. The rights held in trust shall be  
17 subject to subordination to and depletion by future upstream beneficial users  
18 whose rights are acquired pursuant to state law.

19 (3) Water rights for power purposes not defined by agreement with the  
20 state shall not be subject to depletion below any applicable minimum stream  
21 flow established by state action. Water rights for power purposes in excess  
22 of such minimum stream flow shall be held in trust by the state of Idaho, by  
23 and through the governor, for the use and benefit of the users of water for  
24 power purposes and of the people of the state of Idaho. The rights held in  
25 trust shall be subject to subordination to and depletion by future upstream  
26 beneficial users whose rights are acquired pursuant to state law.

27 (4) The user of water for power purposes as beneficiary of the trust  
28 established in subsections (2) and (3) of this section shall be entitled to  
29 use water available at its facilities to the extent of the water right, and to  
30 protect its rights to the use of the water as provided by state law against  
31 depletions or claims not in accordance with state law.

32 (5) The governor or his designee is hereby authorized and empowered to  
33 enter into agreements with holders of water rights for power purposes to  
34 define that portion of their water rights at or below the level of the appli-  
35 cable minimum stream flow as being unsubordinated to upstream beneficial uses  
36 and depletions, and to define such rights in excess thereof as being held in  
37 trust by the state under subsection (2) of this section. Such agreements  
38 shall be subject to ratification by law. The contract entered into by the  
39 governor and the Idaho Power Company on October 25, 1984, is hereby found and  
40 declared to be such an agreement, and the legislature hereby ratifies the  
41 governor's authority and power to enter into this agreement.

42 (6) The director shall have the authority to subordinate the rights  
43 granted in a permit or license for power purposes to subsequent upstream bene-  
44 ficial depletionary uses. A subordinated water right for power use does not  
45 give rise to any claim against, or right to interfere with, the holder of  
46 subsequent upstream rights established pursuant to state law. The director  
47 shall also have the authority to limit a permit or license for power purposes  
48 to a specific term.

49 Subsection (6) of this section shall not apply to licenses which have  
50 already been issued as of the effective date of this act.

51 SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is

1 hereby amended by the addition thereto of a NEW SECTION, to be known and  
2 designated as Section 42-203C, Idaho Code, and to read as follows:

3 42-203C. HYDROPOWER WATER RIGHT -- CRITERIA FOR REALLOCATION -- WEIGHT --  
4 BURDEN OF PROOF. (1) If an applicant intends to appropriate water which is or  
5 may be available for appropriation by reason of a subordination condition  
6 applicable to a water right for power purposes, then the director shall con-  
7 sider, prior to approving the application, the criteria established in section  
8 42-203A, Idaho Code, and whether the proposed use would significantly reduce,  
9 individually or cumulatively with other uses, the amount of water available to  
10 the holder of a water right used for power production and, if so, whether the  
11 proposed reduction is in the public interest.

12 (2) (a) The director in making such public interest determinations for  
13 purposes of this section shall consider:

- 14 (i) The potential benefits, both direct and indirect, that the pro-  
15 posed use would provide to the state and local economy;
- 16 (ii) The economic impact the proposed use would have upon electric  
17 utility rates in the state of Idaho, and the availability,  
18 foreseeability and cost of alternative energy sources to ameliorate  
19 such impact;
- 20 (iii) The promotion of the family farming tradition;
- 21 (iv) The promotion of full economic and multiple use development of  
22 the water resources of the state of Idaho;
- 23 (v) In the Snake River Basin above the Murphy gauge whether the pro-  
24 posed development conforms to a staged development policy of up to  
25 twenty thousand (20,000) acres per year or eighty thousand (80,000)  
26 acres in any four (4) year period.

27 No single factor enumerated above shall be entitled to greater weight  
28 by the director in arriving at this determination.

29 (b) The burden of proof under the provisions of this section shall be on  
30 the protestant.

31 SECTION 4. That Chapter 2, Title 42, Idaho Code, be, and the same is  
32 hereby amended by the addition thereto of a NEW SECTION, to be known and  
33 designated as Section 42-203D, Idaho Code, and to read as follows:

34 42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. (1) The department  
35 shall review all permits issued prior to the effective date of this section,  
36 except to the extent a permit has been put to beneficial use prior to July 1,  
37 1985, to determine whether they comply with the provisions of chapter 2, title  
38 42, Idaho Code. If the department finds that the proposed use does not satisfy  
39 the criteria of chapter 2, title 42, Idaho Code, then the department shall  
40 either cancel the permit or impose the conditions required to bring the permit  
41 into compliance with chapter 2, title 42, Idaho Code. If the department finds  
42 that the permit satisfies the criteria established in chapter 2, title 42,  
43 Idaho Code, then the department shall enter an order continuing the permit.

44 (2) The department shall provide an opportunity for hearing in accordance  
45 with section 42-1701A, Idaho Code, and sections 67-5209 through 67-5215, Idaho  
46 Code, for each holder of a permit that is proposed either to be cancelled or  
47 made subject to new conditions.

48 SECTION 5. This act shall not be construed as modifying, amending, or

1 repealing any interstate compact.

2 SECTION 6. The provisions of this act are hereby declared to be severable  
3 and if any provision of this act or the application of such provision to any  
4 person or circumstance is declared invalid for any reason, such declaration  
5 shall not affect the validity of remaining portions of this act.

STATEMENT OF PURPOSE

RS 10984C1

This legislation would implement the state's authority under the 1928 Amendment to Article 15, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes.

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 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.

Future hydropower water rights could be subordinated to future upstream beneficial uses.

STATEMENT OF PURPOSE/FISCAL NOTE

S 1008