

IN THE SENATE

SENATE BILL NO. 1358

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

1 RELATING TO TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT;
2 AMENDING SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT A USER OF WATER FOR
3 POWER PURPOSES SUBORDINATED BY AN AGREEMENT OR BY A PERMIT ISSUED AFTER
4 JULY 1, 1985, OR BY A LICENSE ISSUED AFTER JULY 1, 1985, MAY CONTINUE
5 USING THE WATER PENDING APPROVAL OF DEPLETIONARY FUTURE BENEFICIAL USES,
6 TO CLARIFY APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE
7 OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER UPSTREAM FROM MILNER DAM, TO
8 PROVIDE APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR
9 GROUND WATER TRIBUTARY TO THE SNAKE RIVER DOWNSTREAM FROM MILNER DAM
10 REGARDING THE DETERMINATION AND ADMINISTRATION OF RIGHTS TO THE USE OF
11 CERTAIN WATERS OF THE SNAKE RIVER, AND TO PROVIDE REFERENCES TO IDAHO CODE
12 CITATIONS; AMENDING SECTION 42-203C, IDAHO CODE, TO PROVIDE IF AN APPLI-
13 CANT INTENDS TO APPROPRIATE WATER WHICH IS HELD IN TRUST BY THE STATE OF
14 IDAHO PURSUANT TO CERTAIN LAW, THE DIRECTOR OF THE DEPARTMENT OF WATER
15 RESOURCES SHALL CONSIDER WHETHER THE PROPOSED USE INDIVIDUALLY OR
16 CUMULATIVELY WITH OTHER EXISTING USES OR USES REASONABLY LIKELY TO EXIST
17 WITHIN TWELVE MONTHS OF THE PROPOSED USE WOULD SIGNIFICANTLY REDUCE THE
18 AMOUNT OF TRUST WATER AVAILABLE TO THE HOLDER OF THE WATER RIGHT USED FOR
19 POWER PRODUCTION, WHICH IS DEFINED BY AN AGREEMENT PURSUANT TO IDAHO LAW;
20 AND AMENDING SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF
21 THE DEPARTMENT OF WATER RESOURCES SHALL REVIEW ALL PERMITS ISSUED PRIOR TO
22 JULY 1, 1985, WHICH PROPOSE TO DIVERT WATER HELD IN TRUST BY THE STATE OF
23 IDAHO PURSUANT TO CERTAIN STATE LAW, TO DETERMINE WHETHER THEY COMPLY WITH
24 CERTAIN STATE LAW, TO PROVIDE IF THE DEPARTMENT FINDS THAT PROPOSED USE IS
25 ALLOWED UNDER CERTAIN STATE LAW, THEN THE DEPARTMENT SHALL ENTER AN ORDER
26 CONTINUING THE PERMIT, TO CLARIFY LANGUAGE AND TO PROVIDE CORRECT CITA-
27 TIONS; AND DECLARING AN EMERGENCY.
28

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

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

32 42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER
33 RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO
34 LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that
35 it is in the public interest to specifically implement the state's power to
36 regulate and limit the use of water for power purposes and to define the rela-
37 tionship between the state and the holder of a water right for power purposes
38 to the extent such right exceeds an established minimum flow. The purposes of
39 the trust established by subsections (2) and (3) of this section are to assure
40 an adequate supply of water for all future beneficial uses and to clarify and
41 protect the right of a user of water for power purposes subordinated by an
42 agreement or by a permit issued after July 1, 1985, or by a license issued
43 after July 1, 1985, to continue using the water pending approval of
44 depletionary future beneficial uses.

1 (2) A water right for power purposes which is defined by agreement with
2 the state as unsubordinated to the extent of a minimum flow established by
3 state action shall remain unsubordinated as defined by the agreement. Any
4 portion of the water rights for power purposes in excess of the level so
5 established shall be held in trust by the state of Idaho, by and through the
6 governor, for the use and benefit of the user of the water for power purposes,
7 and of the people of the state of Idaho; provided, however, that application
8 of the provisions of this section to water rights for hydropower purposes on
9 the Snake river or its tributaries downstream from Milner dam shall not place
10 in trust any water from the Snake river or surface or ground water tributary
11 to the Snake river upstream from Milner dam. For the purposes of the determi-
12 nation and administration of rights to the use of the waters of the Snake
13 river or its tributaries downstream from Milner dam, no portion of the waters
14 of the Snake river or surface or ground water tributary to the Snake river
15 upstream from Milner dam shall be considered. The rights held in trust shall
16 be subject to subordination to and depletion by future upstream beneficial
17 users whose rights are acquired pursuant to state law, including compliance
18 with the requirements of section 42-203C, Idaho Code.

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 consumptive
26 upstream beneficial users whose rights are acquired pursuant to state law,
27 excluding compliance with the requirements of section 42-203C, Idaho Code.

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

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

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

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

52 (7) The director in the exercise of the authority to limit a permit or
53 license for power purposes to a specific term of years shall designate the
54 number of years through which the term of the license shall extend and for
55 purposes of determining such date shall consider among other factors:

1 (a) The term of any power purchase contract which is, or reasonably may
2 become, applicable to, such permit or license;

3 (b) The policy of the Idaho public utilities commission (IPUC) regarding
4 the term of power purchase contracts as administered by the IPUC under and
5 pursuant to the authority of the public utility regulatory policy act of
6 1978 (PURPA);

7 (c) The term of any federal energy regulatory commission (FERC) license
8 granted, or which reasonably may be granted, with respect to any partic-
9 ular permit or license for power purpose;

10 (d) Existing downstream water uses established pursuant to state law.

11 The term of years shall be determined at the time of issuance of the permit,
12 or as soon thereafter as practicable if adequate information is not then
13 available. The term of years shall commence upon application of water to bene-
14 ficial use. The term of years, once established, shall not thereafter be modi-
15 fied except in accordance with due process of law.

16 SECTION 2. That Section 42-203C, Idaho Code, be, and the same is hereby
17 amended to read as follows:

18 42-203C. HYDROPOWER WATER RIGHT -- CRITERIA FOR REALLOCATION -- WEIGHT --
19 BURDEN OF PROOF. (1) If an applicant intends to appropriate water which is or
20 ~~may--be--available--for--appropriation--by--reason--of--a--subordination--condition~~
21 ~~applicable--to--a--water--right--for--power--purposes;--then~~ held in trust by the
22 state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the
23 director shall consider, prior to approving the application, the criteria
24 established in section 42-203A, Idaho Code, and whether the proposed use would
25 ~~significantly--reduce,~~ individually or cumulatively with other existing uses,
26 ~~or uses reasonably likely to exist within twelve (12) months of the proposed~~
27 ~~use, would significantly reduce~~ the amount of trust water available to the
28 holder of a the water right used for power production that is defined by
29 agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if
30 so, whether the proposed reduction is in the public interest.

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

33 (i) The potential benefits, both direct and indirect, that the pro-
34 posed use would provide to the state and local economy;

35 (ii) The economic impact the proposed use would have upon electric
36 utility rates in the state of Idaho, and the availability,
37 foreseeability and cost of alternative energy sources to ameliorate
38 such impact;

39 (iii) The promotion of the family farming tradition;

40 (iv) The promotion of full economic and multiple use development of
41 the water resources of the state of Idaho;

42 (v) In the Snake River Basin above the Murphy gauge whether the pro-
43 posed development conforms to a staged development policy of up to
44 twenty thousand (20,000) acres per year or eighty thousand (80,000)
45 acres in any four (4) year period.

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

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

50 SECTION 3. That Section 42-203D, Idaho Code, be, and the same is hereby
51 amended to read as follows:

1 42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. (1) The director
2 of the department of water resources shall review all permits issued prior to
3 the-effective-date-of-this-section July 1, 1985, which propose to divert water
4 held in trust by the state of Idaho pursuant to subsection (5) of section
5 42-203B, Idaho Code, except to the extent a permit has been put to beneficial
6 use prior to July 1, 1985, to determine whether they comply with the provi-
7 sions of chapter-2,-title-42 section 42-203C, Idaho Code. If the department
8 finds that the proposed use is allowed under section 42-203C, Idaho Code, then
9 the department shall enter an order continuing the permit. If the department
10 finds that the proposed use does-not-satisfy-the-criteria-of-chapter-2,-title
11 42 is not allowed under section 42-203C, Idaho Code, then the department shall
12 either cancel the permit or impose the conditions required to bring the permit
13 into compliance with chapter-2,-title-42 section 42-203C, Idaho Code. If--the
14 department-finds-that-the-permit-satisfies-the-criteria-established-in-chapter
15 2,-title-42,-Idaho-Code,-then-the-department-shall-enter-an-order-continuing
16 the-permit.

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

21 SECTION 4. An emergency existing therefor, which emergency is hereby
22 declared to exist, this act shall be in full force and effect on and after its
23 passage and approval.

STATEMENT OF PURPOSE

RS12550

This bill contains revisions of the Swan Falls legislation passed last year. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. Some of the important aspects of this proposed bill include: (1) clarification that trust waters do not extend to the Snake River or tributary ground or surface water above Milner, (2) clarification of those agreements to which the criteria in I.C. 42-203C apply, (3) clarification of the application of the "significant reduction" criterion of I.C. 42-203C, (4) clarification of the review of existing permit applications, and (5) clarification that only trust waters are subject to the criteria of I.C. 42-203C.

FISCAL IMPACT

NONE.

S1358

5/25/00