

**ATTACHMENTS
TO
NOTICES OF CHANGE
IN
WATER RIGHT OWNERSHIP**

Water Right Nos.:

02-2001A, 02-2001B, 02-2036, 02-2056, 02-2057, 02-2059,
02-2060, 02-2064, 02-2065, 02-10135, 36-2013, 26-2026,
37-20709, 37-20710, 02-4000, 02-4001, 02-2032

SRBA



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Tab

1. Swan Falls Agreement
2. FERC Docket No. EL85-38-000 (Idaho Power Company petition for declaratory order regarding effect of Swan Falls Agreement)
 - a. Order of March 25, 1988
 - b. Joint Agreement Regarding Fish & Wildlife Studies, filed May 25, 1988
3. Swan Falls Agreement Legislation
 - a. 1985 Sessions Laws
 - i. Chapter 14 – SB 1005 (Findings, IPUC jurisdiction, statutory exemption)
 - ii. Chapter 16 – SB1007 (Allocation of gain on sale of water right)
 - iii. Chapter 17 – SB1008 (Trust and subordination provisions, public interest criteria)
 - iv. Chapter 224 – HB186 (amendments to SB1008)
 - v. Chapter 204 – SB1205 (Ratification of Water Plan amendments)
 - b. 1986 Session Laws Chapter 116 – SB1358 (amendments to Idaho Code 42-203B)
 - c. Idaho Code Provisions:
 - i. Idaho Code § 42-203A
 - ii. Idaho Code § 42-203B
 - iii. Idaho Code § 42-203C
 - iv. Idaho Code § 42-203D
 - v. Idaho Code § 61-502B
4. Legislative History of Swan Falls Agreement Legislation
 - a. Senate Journal, February 6, 1985: Statement of Legislative Intent re: SB1008
 - b. Committee Minutes:
 - i. Senate Resources & Environment: Jan. 1, 1985
 - ii. Senate Resources & Environment: Jan. 11, 1985 SB1008
 - iii. Senate Resources & Environment: Jan. 18, 1985 SB1008
 - iv. Senate Resources & Environment: Jan. 21, 1985 SB1008
 - v. Senate Resources & Environment: Jan. 25, 1985 SB1008

vi.	Senate State Affairs: Jan. 25, 1985	SB1005, SB1007
vii.	Senate Resources & Environment: Feb. 1, 1985	SB1008
viii.	Senate State Affairs: Feb.1, 1985	SB1005, SB1007
ix.	House Resources & Conservation: Feb. 1, 1985	SB1008
x.	House Resources & Conservation: Feb. 11, 1985	SB1005, SB1008
xi.	House Resources & Conservation: Feb. 11, 1985	SB1005, SB1008
xii.	House Resources & Conservation: Feb. 11, 1985	HB186
xiii.	House Resources & Conservation: Feb. 19, 1985	HB186
xiv.	Senate Resources & Environment: March 4, 1985	SB1205
xv.	House Resources & Conservation: March 7, 1985	SB1205
xvi.	Senate Resources & Environment: Feb. 19, 1986	SB1358
xvii.	House Resources & Conservation: March 13, 1986	SB1358

5. District Court Orders:
 - a. Consent Judgment in Ada County Case No. 81375
 - b. Consent Judgment in Ada County Case No. 62237
 - c. Order for Entry of Judgment in Ada County Case No. 62237
 - d. Stipulation for Entry of Judgment in Ada County Case No. 62237

6. 1180 Contract

7. 1180 Contract Legislation:
 - a. 1983 Session laws ch 259 (SB1180)
 - b. Idaho Code Provisions:
 - i. Idaho Code § 61-539
 - ii. Idaho Code § 61-540

8. 1180 Legislative History
 - a. Senate Resources & Environment: March 30, 1983
 - b. Senate Resources & Environment: April 4, 1983
 - c. House Resources & Conservation: April 8(A), 1983
 - d. House Resources & Conservation: April 8(B), 1983

9. Legal Descriptions





AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

- B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.
- C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

- A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

- B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.
- C. Establishment of an effective water marketing system.
- D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.
- E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.
- F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.
- G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

- A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.
- B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

- C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.
- D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.
- E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.
- F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

- A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

- B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).
- ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.
- iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

- C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.
- D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

- A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:
 - i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;
 - ii. Enactment of the legislative program outlined in paragraph 6;
 - iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;
 - iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);
 - v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;
 - vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

IDAHO POWER COMPANY

By: 

JOHN V. EVANS
Governor of the
State of Idaho

By: 

JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

By: 

JIM JONES
Attorney General of the
State of Idaho

ATTEST:

Pete T. Cenarrusa

PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)



(Corporate Seal of Idaho
Power Company)

ATTEST:

Paul L. Jauregui
Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE
OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and
2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and
3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.



A handwritten signature in cursive script, reading "Pete T. Cenarrusa".

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Daniel L. Jones
NOTARY PUBLIC FOR IDAHO
Residing at *Basin, Idaho*

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Daniel L. Jones
NOTARY PUBLIC FOR IDAHO
Residing at *Basin, Idaho*

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

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

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

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. ~~On and after the passage/ approval and effective date of this section/~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; and (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

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

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

(6) Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

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

42-203C. PUBLIC INTEREST DETERMINATION — CRITERIA — WEIGHT — BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

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

- (i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;
- (ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;
- (iii) the promotion of the family farming tradition;
- (iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;
- (v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

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

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

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

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

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

BILL NO. _____

BY _____

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT.

(1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

- (a) the boundaries of the entire system within the state to be adjudicated;
 - (b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and
 - (c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.
- (2) Upon issuance of an order by the district court which:
- (a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;
 - (b) defines the system boundaries;
 - (c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and
 - (d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights The department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-2211, Idaho Code, except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court, the claimant shall pay a filing fee of only

ten dollars (\$10/00) fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. Provided/ However/ that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1977/ was enacted/ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-watering rights \$25.00
2. Claims for all other rights. \$50.00

B. Additional variable water use fee for each claim filed:

1. Irrigation use: \$ 1.00 per acre.
2. Power: \$ 25.00 per c.f.s.
3. Aquaculture: \$ 10.00 per c.f.s.
4. Municipal, Industrial, Commercial, Mining, Heating, Cooling: \$100.00 per c.f.s.
5. Public: \$100.00 per c.f.s.
6. Miscellaneous: flat fee only.

C. Payment of a variable water use fee of more than \$1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE
DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

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

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of \$200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

BILL NO. _____

BY _____

AN ACT

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

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

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept--as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the []
shall not constitute a sale, assignment, conveyance or
transfer within the meaning of §§61-327, 61-328, 61-329,
61-330, and 61-331, I.C., to the extent any of those sections
may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.
2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.
3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.
4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.
5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

[The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, 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.

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

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

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

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

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO ESTABLISH RULES AND REGULATIONS.

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

SECTION 1. That Section 42-1805, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES — In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.



Westlaw

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 1

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

*1 Commission Opinions, Orders and Notices

Idaho Power Company
Docket No. EL85-38-000

Order Pursuant to an Act of Congress, Dismissing
Petition for Declaratory Order, and Granting
Interventions

(Issued March 25, 1988)

Before Commissioners: Martha O. Hesse,
Chairman; Anthony G. Sousa, Charles G. Stalon,
Charles A. Trabandt and C. M. Naeve.

Pub. L. No. 100-216, approved December 29,
1987, directs certain actions concerning a petition
by Idaho Power Company (IPC) for a declaratory
order and an attached settlement agreement (Swan
Falls water rights settlement) between IPC and the
State of Idaho relating to eight of IPC's licensed
projects on the Snake River. ^{FN[FN1]} This order
implements section 1 of Pub. L. No. 100-216.

Summary of Pub. L. No. 100-216

Section 1(a) of Pub. L. No. 100-216 authorizes
and directs the Commission, "in lieu of the petition
[for declaratory order] request," to issue an order
under the Federal Power Act (FPA) providing that
the Swan Falls water rights settlement shall not be
considered by the Commission, in any proceeding
before the Commission during the remaining term
of the licenses for the eight projects, to be either:

(1) inconsistent with the terms and conditions
of such licenses concerning the retention of
project property; or

(2) imprudent for purposes of section 205 of
the FPA. The order shall be issued within ninety
calendar days after enactment of Pub. L. No.
100-216 and shall take effect on the date and as
provided in section 3 of Pub. L. No. 100-216.

Section 1(b) provides that, notwithstanding the
issuance of an order pursuant to the section (except

for the specific terms and conditions of the license
and the specific provisions of the FPA referred to
above), the Commission may at any time consider,
in accordance with existing and applicable law,
whether the settlement agreement and the licensee
are in full compliance with:

(1) any terms and conditions of the license
(including those relating to the protection,
mitigation, and enhancement of fish and
wildlife); and

(2) any other applicable provision of federal
environmental law (including section 10 of the
FPA).

Section 1(c) provides that, in issuing an order
pursuant to the section, the Commission shall accept
and adopt as part of the order the offers of
settlement, pending before the Commission on
enactment of Pub. L. No. 100-216, between the
licensee, the State of Idaho, the Secretary of the
Interior, the National Marine Fisheries Service
(NMFS), and others.

Section 2 sets out three savings provisions.
Subsections (a) and (b), respectively, provide that
nothing in section 1 shall be construed as (1)
affecting any stipulation or other agreement entered
into by the State of Idaho or IPC prior to enactment
of Pub. L. No. 100-216 relating to any fish and
wildlife matters affected by any of the eight
projects, or (2) modifying, changing, expanding, or
limiting the authority of the Commission under the
FPA or other applicable law relating to fish and
wildlife. Subsection (c) contains specific
disclaimers regarding water, water-related, and
Indian rights. The subsection provides that nothing
in Pub. L. No. 100-216 shall be construed as (1)
affecting the rights or jurisdiction of the United
States, the states, Indian tribes, or other entities over
waters of any river or stream or over any ground
resources, (2) altering or establishing the respective
rights of states, the United States, Indian tribes, or
any person with respect to any water or
water-related right, or (3) altering, amending,
repealing, interpreting, modifying, or being in
conflict with, the treaty rights or other rights of any

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

Indian tribe.

*2 Section 3 calls for a joint agreement to conduct detailed evaluations and studies and for a report thereon. The studies are to concern "the timing, quantity, and quality of instream flows and related matters to protect, enhance, and mitigate fish and wildlife resources, including anadromous fish and related habitat of the Snake River and the Deer Flat National Wildlife Refuge." ^{FN[FN2]}

Section 3(a)(1) requires the federal and licensee parties to the offers of settlement and the settlement agreement (i.e., Interior, NMFS, and IPC), immediately after enactment of Pub. L. No. 100-216, to enter into good faith negotiations for a joint agreement. The negotiations shall be completed and a joint agreement entered into by all the parties shall be filed with the Commission not later than sixty calendar days after issuance of this order pursuant to section 1. After it is filed, the agreement shall be considered as part of the order issued pursuant to section 1.

Section 3(a)(2) provides that if the joint agreement is not entered and filed within the sixty-day period, the Commission shall, within an additional sixty-day period, ^{FN[FN3]} issue an order requiring the undertaking of the evaluations and studies and prescribing the duties and responsibilities of the parties to finance them. In issuing an order under the subsection, the Commission may take into consideration such information as the parties may stipulate and file with the Commission resulting from such negotiations. In any judicial review of the order issued under section 1, the order (or the adequacy thereof) issued under this paragraph of section 3 shall not be a basis for that review or for a stay of the effective date of the order issued under section 1.

Section 3(a)(3) provides that the order referred to in section 1 shall be effective and final when the joint agreement referred to in paragraph (1) of section 3(a) is filed by all the parties with the Commission, or not later than sixty calendar days after such order is issued, whichever comes first. The order referred to in paragraph (2) of section 3(a) shall be effective and final when issued. ^{FN[FN4]}

Section 3(a)(4) requires that the studies and evaluations and the report thereof required by subsection (a) shall be made available by the federal parties to the public and the Commission and shall be considered by the Commission in accordance with existing and applicable law. A floor amendment by the Senate during final passage and agreed to by the House of Representatives ^{FN[FN5]} added a provision that nothing in Pub. L. No. 100-216 requires the Commission to take any action pursuant to such consideration by the Commission or authorizes or grants the Commission any authority to take any action based on the findings, recommendations, results, or conclusions of the required study. Thus, any further action that might be taken by the Commission as a result of the studies and report would need to be based on authority other than Pub. L. No. 100-216.

Section 3(a)(5) provides that any final order issued pursuant to Pub. L. No. 100-216 shall be subject to judicial review in the same manner as orders under the FPA are subject to judicial review under the FPA.

*3 Section 3(b) provides for participation by the Governor of the State of Idaho. At any time prior to the effective date of the order issued under section 1(a), the Governor shall have the option to participate in good faith in the negotiations required by section 3. In exercising such option, the Governor shall agree to carry out the state's responsibilities under the agreement or any order issued by the Commission under section (a)(2).

Section 3(c) provides for funding for the federal share of the studies. For carrying out the evaluations and studies required by Pub. L. No. 100-216, the federal agencies referred to, Interior and NMFS, shall, subject to applicable appropriation acts, utilize such funds as may be available and are authorized and directed to seek further appropriations as may be necessary. The federal share of the costs of carrying out the evaluations and studies shall be determined pursuant to the joint agreement under subsection (a) (or the Commission order under subsection (a)(2), if applicable). Subsection (c) also requires the federal agencies to provide for consultation with the affected Indian tribes and other interested public or private persons during the conduct of any study conducted pursuant

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 3

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

to Pub. L. No. 100-216.

Section 4 requires the Commission, Interior, and NMFS to provide information to Congress on the status of all actions taken or required by Pub. L. No. 100-216 and of any delays (and the reasons therefor) in implementing such actions.

Background

The immediate impetus for the petition for a declaratory order in this proceeding apparently was litigation concerning IPC's water rights on the Snake River, particularly at its Swan Falls Project No. 503, and allegations that IPC had failed to protect and preserve its water rights and that, by so doing, IPC had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers. ^{FN[FN6]} Following the Idaho Supreme Court decision in the above litigation, in 1984 IPC and the State of Idaho entered into an agreement (the Swan Falls water rights settlement), and IPC filed with the Commission a petition for a declaratory order, with the agreement between it and Idaho attached and incorporated. The petition asked for a declaratory order that implementation of the agreement would assure a sufficient supply of water for IPC's eight licensed projects and that the agreement would be in the public interest. While the provisions of the agreement are rather complex, one of the provisions (paragraph 7) apparently would have recognized IPC's right to minimum flows at the Swan Falls project to be at substantially lower levels than the disputed water right ^{FN[FN7]} it holds for the project.

Numerous filings were made concerning the petition for declaratory order. NMFS, the Fish and Wildlife Service of the Department of the Interior, the Idaho Natural Resources Legal Foundation, Inc. (INRLF), the Golden Eagle Audubon Society, the Idaho Wildlife Federation (IWF), the Idaho Consumer Affairs, Inc., the Nez Perce Indian Tribe, the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, and the Washington Departments of Fisheries and Wildlife, as well as IPC and the State of Idaho, have variously submitted comments, motions to intervene, offers of settlements, or other pleadings.

*4 As demonstrated by the filings in this proceeding, two interrelated points became increasingly apparent. First, there was growing environmental concern, and opposition, respecting approval of the settlement. Second, it became increasingly apparent that there was not readily available sufficient information to resolve the concerns and to provide an adequate basis for decision.

While the matter was pending before the Commission, legislation was introduced in the Congress. Late in the 99th Congress, the House of Representatives and the Senate agreed to limited legislation as part of the Appliance bill, H.R. 5465. As stated in H.R. Rep. No. 418, 100th Cong., 1st Sess. (1987), at 4, on the bill that became Pub. L. No. 100-216, both Houses in the 99th Congress agreed that IPC's petition was far too broad and granted authority for a more limited Commission order. The legislation in the 99th Congress did not receive Presidential approval, however, for reasons unrelated to the Swan Falls provisions.

In the 100th Congress, the Swan Falls legislation (H.R. 519 and S. 214) was again introduced. As subsequently modified and clarified ^{FN[FN8]} and amended during final passage, ^{FN[FN9]} the legislation became Pub. L. No. 100-216.

Discussion

This order, as noted above, implements section 1 of Pub. L. No. 100-216. Pursuant to section 1 and the pertinent legislative history, Ordering Paragraphs (A) and (B) dismiss the petition for declaratory order and provide the required action with respect to the settlement agreement dated October 25, 1984, that the petition for declaratory order concerned.

Ordering Paragraph (C) accepts and adopts as part of this order the offers of settlement pending before the Commission on enactment of Pub. L. No. 100-216. There are two offers of settlement that are within the provisions of section 1(c) of Pub. L. No. 100-216 and are accepted and adopted as part of this order, pursuant to section 1(c).

One is an offer of settlement between NMFS and INRLF, and IPC and the State of Idaho, filed on

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 4

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

July 31, 1985. The parties agreed to clarify the October 25, 1984 settlement agreement between the State and IPC, in that (1) the settlement agreement was not presented to the Commission as a comprehensive plan under section 10(a) of the FPA; (2) NMFS and INRLF do not agree that the settlement agreement represents a comprehensive plan under section 10(a) which fully takes into account the public interest in anadromous fish; and (3) the settlement agreement shall not operate to preclude or compel compliance with existing flow regimes nor to prevent, compel, or limit the Commission's consideration of other flow regimes or fisheries conditions for licensed projects in the Snake River basin.

The second is an offer of settlement between the Department of the Interior, and IPC and the State of Idaho, filed on March 17, 1986. The first and third points in this offer of settlement are basically the same as the corresponding points in the NMFS and INRLF offer of settlement with IPC and the State, discussed above. The second point is modified somewhat to state that Interior does not agree that the settlement agreement represents a comprehensive plan under section 10(a) of the FPA which fully takes into account the public interest in preserving anadromous or resident fisheries or the wildlife habitat of the Deer Flat National Wildlife Refuge. This second offer of settlement also added a fourth point, namely, that nothing in the settlement agreement shall operate in any way to interfere with, preclude, limit, or prejudice the assertion of and quantification of federal reserved water rights in the Snake River basin.

*5 Ordering Paragraph (D) acts on pending motions to intervene. Pub. L. No. 100-216 does not expressly require the grant or denial of intervention; H.R. Rep. No. 418, supra, at 14, states that the Committee leaves to the Commission the decision whether to act upon or dismiss the motions to intervene.

The State of Idaho, the National Marine Fisheries Service, and the Idaho Natural Resources Legal Foundation, Inc. have been granted intervention by operation of the Commission's rules. Late motions to intervene, which are pending, have been filed by the Idaho Wildlife Federation, the Department of the Interior, the Nez Perce Tribe, the Columbia

River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, the Washington Department of Fisheries, and the Washington Department of Wildlife. Except for DOI's motion, responses in opposition to each of these pleadings were filed by IPC, the State, or both. IPC and the State argue that good cause has not been sufficiently shown for lateness, there would be disruption to the proceeding, the movants are already adequately represented, and a general adjudication of water rights is now underway in state court. Although we are concerned that the movants waited so long to file their motions to intervene, we will nevertheless grant their intervention because of the unique circumstances of this proceeding. Each of the movants has an interest ^{FN[FN10]} in the results of the studies that Congress has directed be carried out under Pub. L. No. 100-216. In addition, we see no prejudice, disruption, or additional burden to this proceeding by granting intervention out of time.

This order implementing section 1 of Pub. L. No. 100-216 will also have the effect of establishing time-tables for other actions under Pub. L. No. 100-216, more specifically, those required by section 3, briefly discussed above. Section 3 calls for immediate negotiations by the federal and licensee parties to the offers of settlement and the settlement agreement (i.e., Interior, NMFS, and IPC) for a joint agreement. The joint agreement is to be for conducting and financing detailed evaluations and studies, and for a report on fish and wildlife resources, as discussed above. The negotiations shall be completed and a joint agreement entered into by all the parties shall be filed with the Commission not later than 60 calendar days after this order is issued under section 1 of Pub. L. No. 100-216. Pursuant to section 3(b), at any time prior to the effective date of the section 1 order, the Governor of the State of Idaho shall have the option to participate in the negotiations; in exercising the option, the Governor shall agree to carry out the State's responsibilities under the agreement or any order issued by the Commission under section 3(a)(2). ^{FN[FN11]}

We do not anticipate that the parties will not be able to enter into and file the section 3(a)(1) study agreement within the 60-day period. We believe, however, particularly in light of the time constraints

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 5

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

in section 3(a)(2), and the fact that the Commission is not designated as a party to the negotiations, that it would be helpful to include in this order certain provisions to be applicable in the event the parties are unable to agree on the section 3(a)(1) study within the allowed period of time.

*6 These provisions are set out in Ordering Paragraph (E). They provide procedures for the filing of information that will be helpful to the Commission in the event that it must issue a further order pursuant to section 3(a)(2) because there is no joint agreement under section 3(a)(1).^{FN[FN12]} What, if any, additional procedures may be appropriate can best be determined later in the event there is no joint agreement pursuant to section 3(a)(1).

Ordering Paragraph (F) requests the Governor to advise the Commission of the exercise of his option to participate under section 3(b). The provision would be applicable only in the event a section 3(a)(1) joint agreement, showing the Governor's decision to be a designated participant, is not filed within the 60-day period after issuance of this order. Such a provision is appropriate so that the Commission's records will definitely show how the Governor has exercised his option under section 3(b). Further, in the event a section 3(a)(2) order becomes necessary, the Commission should know, at an early date, whether the Governor has decided to participate or not participate.

Ordering Paragraph (G) of this order implements section 3(a)(3) of Pub. L. No. 100-216.^{FN[FN13]} The Ordering Paragraph provides that this order shall be final and effective when the joint agreement pursuant to section 3(a)(1) is filed with the Commission, or 60 calendar days after issuance of this order, whichever comes first.

The Commission orders:

(A) The petition for a declaratory order filed on November 26, 1984, in Docket No. EL85-38-000 is dismissed.

(B) During the remainder of the current license terms for Project Nos. 18, 503, 1975, 2055, 2061, 2726, 2777 and 2778, in no proceeding before the Commission shall the Commission consider the

settlement agreement between Idaho Power Company and the State of Idaho, dated October 25, 1984, to be either (1) inconsistent with the terms and conditions of the licenses identified above concerning the retention of project property, or (2) imprudent for purposes of section 205 of the Federal Power Act.

(C) The offer of settlement, filed on July 31, 1985, between the National Marine Fisheries Service and the Idaho Natural Resources Legal Foundation, and the State of Idaho and Idaho Power Company, and the offer of settlement, filed on March 17, 1986, between the Department of the Interior, and the State of Idaho and Idaho Power Company, are accepted and adopted as part of this order.

(D) The motions to intervene in Docket No. EL85-38-000 filed by the Idaho Wildlife Federation, the Department of the Interior, the Nez Perce Indian Tribe, the Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, the Washington Department of Fisheries, and the Washington Department of Wildlife are granted.

(E) In the event a joint study agreement pursuant to section 3(a)(1) of Pub. L. No. 100-216, approved December 29, 1987, is not filed within 60 calendar days after issuance of this order:

*7. (a) the Idaho Power Company, the National Marine Fisheries Service, the Department of the Interior, and the Governor of the State of Idaho (if the Governor has exercised his option to participate) shall, within 70 calendar days after issuance of this order, each file with the Commission, with supporting documentation, the entity's proposals and recommendations for the section 3 joint study and report, the entity's proposals or recommendations concerning responsibilities for conducting and financing the study and preparing the report, and the entity's estimate of time required to complete the evaluations and studies and file the report;

(b) each entity filing under (a) of this ordering paragraph shall at the same time serve a copy of its filing on each other party to this proceeding, in accordance with the Commission's Rules of Practice and Procedure

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 6

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

(18 C.F.R. Part 385); and

(c) if any party desires to respond to the filings made under (a) and (b) of this ordering paragraph, such responsive pleadings shall be made within 15 days after the date of service required under (b) above.

(F) In the event a joint study agreement, pursuant to section 3(a)(1) of Pub. L. No. 100-216, approved December 29, 1987, which agreement shows the decision of the Governor of the State of Idaho to be a designated participant, is not filed within 60 calendar days after issuance of this order, the Governor is requested, within 60 calendar days after issuance of this order, to file with the Commission a statement of his exercise of his option to participate pursuant to section 3(b) of Pub. L. No. 100-216.

(G) This order shall be effective and final when the joint agreement pursuant to section 3(a)(1) of Pub. L. No. 100-216 is filed with the Commission, or 60 calendar days after issuance of this order, whichever comes first.

FN1. This declaratory order proceeding has been designated as *Idaho Power Company*, Docket No. EL85-38-000. The eight licensed projects are: Project Nos. 18 (Twin Falls); 503 (Swan Falls); 1975 (Bliss); 2055 (C. J. Strike); 2061 (Lower Salmon); 2076 (Upper and Lower Malad); 2777 (Upper Salmon); and 2778 (Shoshone Falls).

FN2. The wildlife refuge is located on the Snake River, downstream of the Swan Falls Project No. 503, which is one of the eight licensed projects to which the petition for a declaratory order and settlement agreement relate.

FN3. The Commission may for good cause extend the time for issuance for an additional period of not more than forty-five calendar days.

FN4. When effective, each order issued and joint agreement adopted shall be enforced by the Commission under the FPA, and the licensee shall pay its assigned share at the time and in the manner directed by the Commission.

FN5. See 133 Cong. Rec. S18,443-451 (daily ed. December 18, 1987) and 133 Cong. Rec. H11,884-85 (daily ed. December 18, 1987).

FN6. See *Idaho Power Co. v. State*, 661 P.2d 741, 748 (Idaho 1983); see also S. Rep. No. 8, 100 Cong., 1st Sess. 1-2 (1987).

FN7. In *Idaho Power Co. v. State*, the court held that IPC's water rights at the Swan Falls project were vested but remanded for further proceedings on affirmative defense issues raised below and not there decided. 661 P.2d at 752, 756.

FN8. See H.R. Rep. No. 418, *supra*.

FN9. See n. 5 and accompanying text.

FN10. Although the House report leaves action on intervention to the Commission, the act and the report, by reference to Indian tribes and others, recognize the interest of those entities in this proceeding. Indeed, the House report, at p.17, amplifies on the section 3(c) requirement for consultation by the federal agencies with Indian tribes or others during the section 3 studies, by stating that "[p]resumably, the agencies will consult during the negotiations as well."

FN11. Under section 3(a)(2), as discussed above, if the parties do not enter into and file the joint agreement within the 60-day period, the Commission *within prescribed times* must issue an order requiring the evaluations and studies and prescribing the duties and responsibilities of the parties to conduct and finance them.

FN12. In the event the Commission must act pursuant to section 3(a)(2), paragraph (2) gives the Commission discretion as to the procedures it will follow, rather than setting out particular procedures to be observed. That the Commission is given discretion is also shown by H.R. Rep. No. 418, *supra*, which states, at 16:

If the Commission has to exercise this authority because of a failure of the parties to reach an agreement, FERC may, but is not required to, obtain written comments or hold hearings. Further, FERC, in order to facilitate its efforts, is authorized to consider any information provided by stipulation by the parties that result from their negotiations. FERC, however, is not limited to relying on only stipulated information, nor is FERC precluded from considering input from other

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

Page 7

(Cite as: 42 FERC P 61375, 1988 WL 244129 (F.E.R.C.))

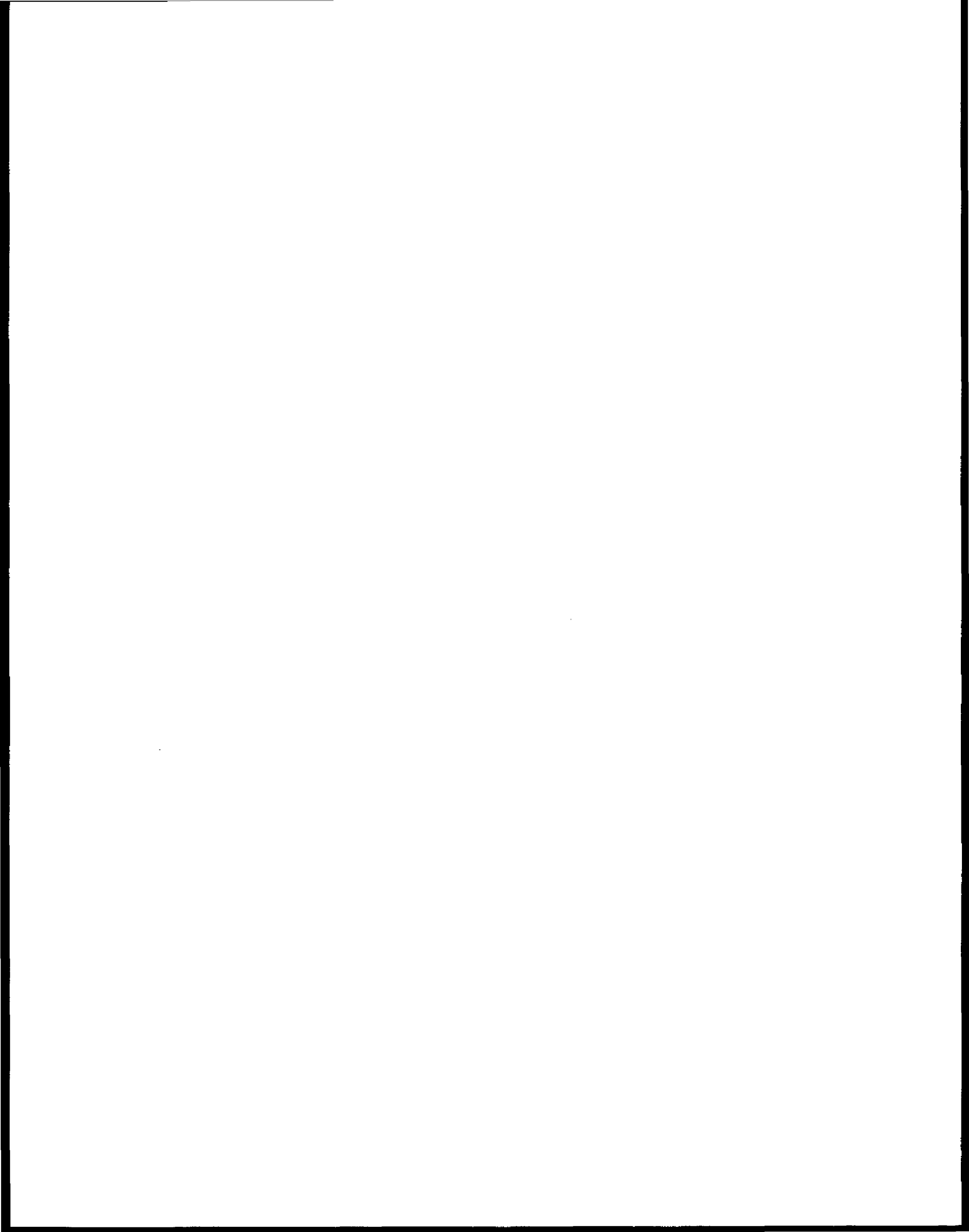
public or private entities or persons. FERC should act on the best information available.

FN13. As noted above, section 3(a)(5) provides that any final order issued pursuant to Pub. L. No. 100-216 shall be subject to judicial review in the same manner as final orders under the FPA are subject to judicial review under the FPA.

Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works

42 FERC P 61375, 1988 WL 244129 (F.E.R.C.)

END OF DOCUMENT





United States
Department of the Interior

Fish and Wildlife Service

Lloyd 500 Building, Suite 1692
500 N.E. Multnomah Street
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

Docket No. EL 85-38-000


MAY 20 1988

Ms. Lois D. Cashell
Acting Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Dear Ms. Cashell:

Enclosed for filing and to be considered as part of the Commission order of March 25, 1988, is the joint agreement pursuant to Publ. L. 100-216 signed by the Department of the Interior, National Marine Fisheries Service, and Idaho Power Company.

Sincerely,


Rolf L. Wallenstrom
Regional Director

Enclosure

RECEIVED

MAY 25 1988

BOISE FIELD OFFICE
U.S. F W S

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Idaho Power Company)
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)
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Docket No. EL83-38-000
JOINT AGREEMENT REGARDING
FISH AND WILDLIFE STUDIES

The National Marine Fisheries Service, the United States Department of the Interior, and the Idaho Power Company, the parties to this Agreement, agree as follows:

I

PREAMBLE

- 1.1 On March 25, 1988, the Federal Energy Regulatory Commission issued an Order in accordance with Section 1(a) of the Act of December 29, 1987, Pub. L. No. 100-216, 101 Stat. 1450 (1987).
- 1.2 Section 3(a)(1) of Pub. L. No. 100-216, 101 Stat. 1450 (1987) directed the parties to this Agreement to enter into good faith negotiations regarding joint studies of fish and wildlife resources within the Snake River.
- 1.3 The parties to this Agreement desire to enter in a joint agreement in accordance with Section 3(a)(1) of Pub. L. No. 100-216, 101 Stat. at 1451.

II

DEFINITIONS

- 2.1 The following definitions apply for the purpose of this Agreement:

- A. "Commission" means the Federal Energy Regulatory Commission.
- B. "Interior" means the United States Department of the Interior.
- C. "IPCo" means the Idaho Power Company.
- D. "NMFS" means the National Marine Fisheries Service.

III

FRAMEWORK FOR

SNAKE RIVER FISH AND WILDLIFE STUDIES

- 3.1 The parties have agreed upon a framework for the Snake River fish and wildlife studies set out in the Appendix, which is attached hereto and incorporated herein by reference. The parties agree to develop detailed study plans through an Interparty Coordinating Committee as provided for in Section IV of this Agreement. The parties will cooperate fully in the design and conduct of studies under this Agreement.
- 3.2 The parties disagree upon the scope of studies required by Pub. L. No. 100-216. In order to avoid litigation, however, the parties have agreed to the inclusion of certain studies in this Agreement that some parties contend are outside the scope of Pub. L. No. 100-216, upon the condition that those parties desiring the studies pay for them. The parties agree that they will not object to the inclusion of these studies in the Commission Order issued pursuant to Section 1 of Pub. L. No. 100-216. Further, the inclusion of these studies in this Agreement shall not be deemed a waiver of any objections that a party may have to the validity of the completed studies or to the Commission's consideration of the studies.
- 3.3 The parties recognize that there are significant Federal interests in fish and wildlife values in the Snake River system above Milner Dam (for example, habitat for whooping cranes, bald eagles, peregrine falcons, waterfowl, game birds, big game animals, and sensitive subspecies of cutthroat trout) which may be impacted by water management options developed in the studies detailed in the framework attached as the Appendix to this Agreement. Interior will investigate the need for, and scope of, any additional studies necessary to protect those values.

INTERPARTY COORDINATING COMMITTEE

- 4.1 In order to implement this Agreement, the parties agree to form an Interparty Coordinating Committee (Committee), consisting of equal representation of each party to this Agreement, to facilitate cooperative action by the parties. The Committee shall be responsible for resolving funding and policy issues that may arise in connection with the design and conduct of the studies required by this Agreement. Recognizing the responsibility of the Federal parties to provide for consultation with the affected Indian tribes and other interested public or private persons, the parties further agree that meetings of the Committee shall be open to the public. The Committee shall operate by the unanimous consent of the parties funding a particular study except that the parties agree that the United States Fish and Wildlife Service as an Interior representative also will have a vote on all fish and wildlife issues not funded by Interior.
- 4.2 The parties shall seek and allow the non-voting participation of the affected Indian tribes and the State of Idaho. Prior to taking any action which may affect Indian tribal interests at a Committee meeting, the Federal parties shall caucus with tribal representatives present at the meeting.
- 4.3 The parties shall establish a technical subgroup or subgroups to develop design specifications for each of the studies required by this Agreement. The technical subgroup(s) shall be responsible for oversight of technical issues that may arise in connection with the studies. The technical subgroup(s) shall submit study designs and specifications to the Committee for review. Any technical subgroup shall be composed of only those individuals with appropriate technical skills necessary for the design and implementation of the studies. A party may request such qualified technical assistance from interested entities or persons as that party deems appropriate. Disagreements within a technical subgroup shall be referred to the Committee for resolution.
- 4.4 All study data and reports shall be made available to the Committee and technical subgroup participants as soon as reasonably possible. Draft study reports will be circulated for comment. Final reports will either incorporate the comments or attach them in an appendix.

- 4.5 Notice of Committee and technical subgroup meetings shall be given to the participants in accordance with guidelines established by the Committee.

V

DISPUTE RESOLUTION

- 5.1 In the event of a dispute that is not resolved by the Committee, the disputing parties agree to seek the assistance of a mediator, to be selected by unanimous consent of the disputing parties, and to share equally the costs of such services. The mediator will make a recommendation that will not be binding on the parties unless otherwise agreed.
- 5.2 In the event that the dispute is not resolved through mediation, the parties agree that any party may submit the dispute to the Commission or any other appropriate forum for resolution. By so agreeing, no party necessarily concedes that the Commission or other forum would have jurisdiction over such dispute.

VI

FUNDING

- 6.1 The governmental parties' responsibilities to expend monies or perform work under this Agreement are contingent upon congressional appropriations or allotments being made. Each party covenants to make a good faith effort to obtain necessary funding for their responsibilities under this Agreement. Each party agrees not to interfere with the funding efforts of any of the other parties.
- 6.2 In the event of inadequate funding for full participation by one or more of the governmental entities: (i) the parties may agree to reallocation of available funding which shall be subject to the establishment of priorities by the Committee, or (ii) any party may seek additional funding.

- 6.3 Each party agrees to seek adequate funding for the participation of its representatives on the Committee and the technical subgroup(s).
- 6.4 The Federal parties' expenditure of monies and performance of work under this Agreement will be pursuant to Federal acquisition procedures. Where appropriate, these procedures may involve memoranda of understanding, cooperative or interagency agreements, grants, or contracts.
- 6.5 A party is not required to provide funding for a particular study unless and until other participants in the study have acquired funding for the study.

VII

GENERAL PROVISIONS

- 7.1 This Agreement has been reached in the process of good faith negotiations for the purpose of complying with the requirements of Pub. L. 100-216. All parties agree that no statements, conclusions, or offers of any party made in the course of negotiating this Agreement shall be construed as admissions against interest, nor shall any party offer such statements, comments, conclusions, or offers into evidence against any other party in any administrative or judicial proceeding, hearing, or action.
- 7.2 This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings currently existing between the parties as to this proceeding. The parties contemplate that future agreements, understandings, grants, or contracts may be necessary to design and implement the studies described herein.
- 7.3 Statements made in the course of any study required by this Agreement shall not be construed as an admission against interest nor shall any party offer such statements of any other party into evidence against any party in any administrative or judicial proceeding, hearing, or action. This section, however, shall not preclude a party from offering into evidence any statements or conclusions contained in the final study reports made available to the Commission.

- 7.4 Any party may offer into evidence the data developed in these studies in any proceeding, hearing, or action. Although a party may seek to use interpretations or conclusions contained in the studies in any proceeding, hearing, or action, no party waives any objections to the admissibility of the interpretations or the conclusions.
- 7.5 Nothing contained in this Agreement requires, authorizes, or grants the Commission any authority to take any action based upon the findings, recommendations, results, or conclusions of the studies, nor shall this Agreement be construed to modify, change, expand, or limit the authority of the Commission under the Federal Power Act or other applicable laws relating to fish and wildlife.
- 7.6 No waiver, modification, or amendment of this Agreement shall be valid unless in writing duly executed by the parties. The parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.
- 7.7 Section headings in this Agreement are not to be construed as interpretations of the text but rather are inserted for convenience and reference only.
- 7.8 The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.
- 7.9 The parties hereby assure that no member of or delegate to Congress, or resident Commissioner, shall be admitted to any share or part of this Agreement, or any agreement, understanding, grant, or contract developed pursuant to this Agreement or to any benefit that may arise from them. This clause shall not be construed to extend to this Agreement or any agreements, understandings, grants, or contracts pursuant to this Agreement to the extent they are made with a corporation or company for its general benefit.
- 7.10 Each party to this Agreement hereby represents and acknowledges that it has full legal authority to execute this Agreement and shall be fully bound by the terms hereof.
- 7.11 This Agreement is not severable except by unanimous consent of the parties.
- 7.12 The parties consent to the submission of this Agreement to the Commission for the purpose of complying with Section 3(a)(1) of Pub. L. No. 100-216, 101 Stat. 1450 (1987).

7.13 This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

This Agreement shall be effective upon the date of the last signature hereto.

May 20, 1988
Date

Roland A. Schmitt
Roland A. Schmitt, Regional Director
National Marine Fisheries Service

May 20, 1988
Date

Rolf L. Wallenstrom
Rolf L. Wallenstrom, Regional Director
Fish and Wildlife Service
United States Department of the Interior

May 20, 1988
Date

Robert J. O'Connor
Robert J. O'Connor, Chairman
of the Board and Chief Executive Officer
Idaho Power Company

APPENDIX: FRAMEWORK FOR SNAKE RIVER

FISH AND WILDLIFE STUDIES

The two study categories selected are: anadromous fish (Section I); and resident fish and wildlife (Section II). Section III, hydrology, has been included to identify supporting hydrologic analyses not already specifically identified in Sections I and II.

I. STUDY PLAN FOR ANADROMOUS FISH

A. Water Supply Studies to Promote Juvenile Anadromous Fish Migration.

Identify sources of additional water within the Snake River basin to provide for migrating juvenile anadromous fish by evaluating several alternatives. Most of the hydrologic work would be performed by simulation of the Snake River system under existing and alternative management conditions, using appropriate models. Water supply studies will be conducted considering flows of 85,000 and 140,000 cfs at Lower Granite Dam during the period of juvenile migration.

1. Existing Storage and Marketing.

a. Compile information on existing Federal storage capacities and constraints on use of that storage contained in project authorizations, project water rights, contracts between the Federal Government and storage users, and other possible factors governing storage operation to provide a base for alternative management conditions.

Review and evaluate the Snake River Optimization Study (Bureau of Reclamation, in progress), existing studies on economics and water marketing, and other relevant information to determine the feasibility of water marketing and transfer mechanisms that could be used for improvement of instream flows for juvenile anadromous fish. If sufficient information is not available, make recommendations as to further analyses or studies needed.

b. Evaluate the possible effects on existing values and uses of providing flows for anadromous fish smolt migration using existing storage at Federal projects in the Snake River drainage. Coordinate this evaluation with similar evaluations for resident fish (II.B.6.) and wildlife (II.C.6.).

2. Energy storage.

Assess legal/institutional issues regarding: (a) energy/capacity exchanges and storage agreements among Northwest utilities and the Bonneville Power Administration and/or other entities, and (b) the feasibility of using or modifying such exchanges and agreements to improve flows for juvenile anadromous fish.

3. New storage opportunities.

Review available literature and studies addressing opportunities for development of additional storage capacity, including the Corps of Engineers' study of the Galloway Project (Corps of Engineers, in progress); the Snake River Optimization Study; and the Columbia River Inter-Tribal Fish Commission (CRITFC) study (in progress). Summarize available information obtained from reviews of available literature and studies and identify: (a) potential new storage sites in the basin, and (b) the legal/institutional/environmental issues connected with development of such sites. The technical subgroup will make recommendations as to further analyses needed, if any.

4. Changes in project operations.

Review and analyze available literature and studies, including the Corps of Engineers' study on rule curve modifications (Corps of Engineers, in progress) and the CRITFC study. On the basis of such review and analysis, summarize the feasibility of modifying project operations to improve flows for juvenile anadromous fish migration. The technical subgroup will make recommendations as to further analyses needed, if any.

5. Water conservation opportunities and trends.

Review and analyze available literature of existing water use trends with the Snake River system and

potentially useful approaches in water conservation. Identify conservation strategies that may result in net gain of water supplies available to improve flows for juvenile anadromous fish migration.

B. Alternative Flow Regime Studies.

1. Estimate future water use conditions that would result in the low mean daily flows at Murphy being reduced to 3,900 cfs.
2. Run trial simulations (monthly) which result in low flows in this range.
3. Define changes in Brownlee operation (if any) that would stem from the reduced inflow.
4. Compare the flows during juvenile anadromous fish migration at Lower Granite Dam computed in the simulation with base condition flows. (See III.A.)

C. Instream Flows for Anadromous Fish Downstream From Hell's Canyon Dam.

1. Conduct a preliminary study to determine the need for evaluating habitat/discharge relationships for fall chinook salmon and steelhead trout in the Snake River below Hell's Canyon Dam. Coordinate this with a similar study on the possible need for evaluating habitat/discharge relationships for resident fish in this reach (II.B.2.). The technical subgroup shall determine whether biologically significant changes in flow are predicted for the reach below Hell's Canyon Dam.
2. Evaluate the anadromous fish spawning and rearing habitat/discharge relationships between Hell's Canyon Dam and Lower Granite Dam using the United States Fish and Wildlife Service's Instream Flow Incremental Methodology (IFIM). Where appropriate, coordinate this study with studies to evaluate the same relationships for resident fish habitat downstream of Hell's Canyon Dam (II.B.2.).

Conduct a literature search to identify anadromous fish (Snake River fall chinook salmon and steelhead) habitat suitability index curves to be used in this study. Where needed, modify or develop habitat suitability curves.

Identify appropriate instream flow regimes below Hell's Canyon Dam to protect and enhance anadromous fish resources.

II. STUDY PLAN FOR RESIDENT FISH AND WILDLIFE, SNAKE RIVER BIRDS OF PREY NATURAL AREA, AND DEER FLAT NATIONAL WILDLIFE REFUGE

A. Assumptions.

1. Resident Fish Studies.

a. The U.S. Geological Survey (U.S.G.S.) proposal for a hydraulic model using a step-backwater technique (step-backwater model), as described at II.C., or other river profiling methods will be implemented. (The resident fish IFIM studies are in part dependent upon this study.)

b. The proposed IFIM studies for anadromous fish downstream from Hell's Canyon Dam, as described at I.C.l.d., will be performed. (The resident fish IFIM studies are in part dependent upon this study.)

c. Resident fish IFIM studies will be performed. (Estimates of future fish habitat are dependent upon this study).

d. Predictions from hydrologic studies (III.) of future annual hydrographs (monthly mean flows) and monthly hydrographs (daily mean flows) for critical months will be available to support estimates of future resident fish habitat.

2. Wildlife Studies.

a. An acceptable habitat inventory of existing conditions does not exist.

b. The step-backwater model (II.C.3.) or other river profiling methods will provide accurate information on water levels occurring around islands and adjacent riparian zones within the

study reaches. The model will be developed for islands and adjacent shorelines of the Snake River in the Birds of Prey Natural Area (Birds of Prey) and Deer Flat National Wildlife Refuge (Refuge) area between C.J. Strike Dam and the Oregon border. Additional river profiling will be performed in the vicinity of select islands upstream of C.J. Strike Dam.

c. The study reach will extend from the backwaters of Brownlee Reservoir to Milner Dam, excluding reservoirs.

d. Operation of run-of-the-river hydroelectric projects will remain unchanged from current conditions.

e. Fish and Wildlife Service false color infrared aerial photography used for the National Wetlands Inventory will be available and of sufficient scale and quality for use in this study.

B. Study Proposals for Resident Fish.

1. Literature Search.

Conduct a literature search for available information on resident fish in the Snake River from Lower Granite Pool to Milner Dam and prepare an annotated bibliography. The literature search should target:

- (a) Species composition of defined reach.
- (b) Presence or absence of candidate species for Federal listing under the Endangered Species Act.
- (c) Population abundance estimates of species present.
- (d) Life history information of species present, especially:
 - (1) White Sturgeon, and
 - (2) Endangered, threatened, and candidate species.
- (e) Habitat preference curves for game species and candidate species present.
- (f) Preferred food items of some species and preferred habitat of those food items.

(g) Preferred aquatic prey for raptors living or migrating through the study reach.

(h) Preferred habitat for aquatic prey base of raptors.

2. Stage/discharge relationships for resident fish.

Conduct Instream Flow Incremental Method (IFIM) study for select resident target species (to be determined by the technical subgroup) of the Snake River in selected reaches as follows:

a. Lower Granite Pool to Hells Canyon Dam -- Potential species that should be considered: rainbow trout, smallmouth bass, channel catfish, and white sturgeon;¹

b. Brownlee Pool to Swan Falls Dam -- Potential species that should be considered: smallmouth bass, flathead catfish, channel catfish, white sturgeon, whitefish, and rainbow trout;²

c. Swan Falls Pool to C. J. Strike Dam -- Potential species that should be considered: smallmouth bass, flathead catfish, channel catfish, white sturgeon, whitefish, and rainbow trout;²

d. C. J. Strike Pool to Lower Salmon Dam -- Potential species that should be considered: smallmouth bass, white sturgeon, rainbow trout, and whitefish; and

e. Upper Salmon Falls Pool to Milner Dam -- Potential species that should be considered: rainbow trout, whitefish, and smallmouth bass.

Existing preference curves for each target species and life stage shall be evaluated as to suitability to each study reach. The parties are unaware of existing preference curves for white sturgeon. Feasibility of curve development for white sturgeon should be assessed and that determination will dictate the type of IFIM that

¹ This study will be coordinated with and partially supported by the anadromous fish IFIM study. (II.C.).

² This study will be coordinated with and partially supported by the step-backwater study. (II.C.3.).

would be employed in the study of habitats for that target species. If preference curve development is not feasible, the results of Cochnauer's³ (1977) rainbow trout, whitefish, and smallmouth bass.

Estimates of flows required for white sturgeon will be added. Additional studies of white sturgeon flow requirement may still be needed downstream from Hell's Canyon Dam.

Using the results of the preliminary study in I.C., the technical subgroup will determine whether biologically significant changes in flow are predicted for the reach below Hell's Canyon Dam. IFIM studies below Hell's Canyon Dam should be implemented if significant changes in flow are predicted for that reach.

3. Stage/discharge relationship for candidate species. Determine if either an IFIM procedure or flows from Cochnauer (1977) would adequately protect the species present in the Snake River between C. J. Strike Pool and Shoshone Falls that are candidates for Federal listing pursuant to the Endangered Species Act: three invertebrates (mollusks) and one fish (Shoshone sculpin). This may require life history investigations and use of existing inventories.

4. Stage/discharge relationship(s) for water quality.

Determine if IFIM water quality model is appropriate for the Snake River. If appropriate, determine data requirements and collect data necessary for input to IFIM water quality model. Coordinate with the IFIM studies for resident (II.B.2) and anadromous fish (I.C.). Investigate availability of historic empirical water quality data and use where applicable to determine relationship(s). Overall methods development should include water quality prediction at stage/discharge. Data collected should include but not be limited to: water temperature, dissolved oxygen (24-hour basis), pH, conductivity, and total gas pressure.

³Cochnauer, Tim. 1977. Snake River Stream Resource Maintenance Flow Studies 1975-1976. FAFR Project F-66-R-2, Job II. Idaho Department of Fish and Game. 14 pp.

5. Effect of Swan Falls Agreement on NPDES permits.

Determine the number of NPDES permits that have been issued in the flow-affected reach between Milner and Lower Granite Reservoir, which will require coordination with the Idaho Department of Health and Welfare and the United States Environmental Protection Agency. Determine those permits which would require modification to stay within existing water quality standards.

6. Estimates of Future Resident Fish Habitat.

Interface the outputs from the IFIM studies (II.B.2.) with results from hydrologic modeling (III.) to predict available habitat and water quality at any assumed stage/discharge, including provision of Water Budget flows (Columbia River Fish and Wildlife Program), future flow regimes, and optimization flow regimes.

7. Fishery Implications of Changes in Reservoir Operations at Brownlee.

Conduct studies to determine the impact of possible future operational changes in selected resident fish in Brownlee Reservoir. Effects on other reservoirs may have to be addressed if operational changes would occur.

C. Study Proposals for Wildlife.

1. Quantification of effects: Conduct a baseline inventory of existing conditions in the Snake River reaches between Milner Dam and the backwaters of Brownlee Reservoir.

a. An inventory of existing habitat structure (aerial photography (scale 1:5,000 to 1:6,000), mapping, and ground truthing.

b. An inventory of associated wildlife, including a comprehensive literature review, which should include at least one full year of wildlife census data for each cover type mapped.

c. A Habitat Evaluation Procedure (HEP) of wetland, riparian, and island habitats to quantify and qualify existing habitat conditions.

d. A HEP of wetland, riparian, and island habitats should be applied to the Swan Falls Agreement flows.

2. Predation and flow relationship.

Hypothesis: Bridging of islands during critical wildlife periods (March-June) would result in an increase in predation on important wildlife species.

Establish a relation between river flow and predation of waterfowl nests, using existing Fish and Wildlife Service refuge notes maintained since 1953, and USGS flow data. (II.C.3.b.) Analysis of Fish and Wildlife Service records maintained over the past four years, which is presently underway and may be available as early as the fall of 1988, should be used in determining the magnitude of predation occurring to nesting waterfowl.

Obtain and evaluate data concerning use of Snake River islands by deer and upland game birds. Obtain and evaluate data concerning the presence or absence of predator populations. This study should be done in conjunction with studies described at II.C.1.

3. Swan Falls Flows and Predation.

a. Estimate all reasonably foreseeable future levels of predation by conducting a literature search and reviewing and evaluating: data collected under II.C.1. and II.C.2.; data generated by the step-backwater model study (II.C.3.b.) and the hydrologic modeling (III.).

b. The objectives of the step-backwater analyses are to: (1) Develop a hydraulic model that will reliably identify water-surface elevations at island nesting areas in the Refuge and Birds of Prey areas of the Snake River for sustained and varied streamflows, including 3,900 cfs, and (2) collect data on velocity distribution, pH, dissolved oxygen (DO), temperature, and specific conductance data at select locations in the study areas that could be used to assess impacts of reduced flows on the white sturgeon and other resident fish populations.

The study will be performed in three separate reaches of the Snake River. They are: (1) The upper Refuge area or that part of the Snake River between Swan Falls Dam and the Oregon Border which

corresponds to the confluence of the Owyhee and Boise Rivers with the Snake River (Reach 1); (2) the Birds of Prey area, or that part of the river between C.J. Strike and Swan Falls Dams (Reach 2); and (3) select islands from the backwaters of C.J. Strike Reservoir to King Hill (Reach 3).

The simultaneous evaluation of data collected at numerous cross sections in each of the three reaches will identify water-surface elevations for varied river discharge assuming streamflow is sufficiently sustained to achieve approximate equilibrium in the reaches. The location of the cross sections will be influenced by the presence of island nesting areas, valuable riparian areas, and additional data requirements of the model. Aerial photographs and site reconnaissance will be used to assist in locating the cross sections.

Once all cross section sites are established, velocity and water-quality profiles will be performed using a HydroLab Surveyor III to obtain water depth, DO, temperature, and specific conductance. The March-McBirney velocity meter will be used to obtain water velocity. Both instruments will be coupled with a datalogger to facilitate data acquisition. Data obtained using the datalogger can be input directly to the computer for data processing. Although the DO, temperature, and specific conductance data are not germane to the step-backwater model, the water quality data will aid the technical subgroup in its assessment of stream flows and resident fish populations. Depths determined for each of the cross sections will constitute the most important data set for input to the step-backwater analyses.

All cross sections will be revisited and a second set of data obtained showing water-surface elevation, water depth, and velocity. Site visits will be coordinated with low flows in the river to ensure a more stable discharge. During this time, discharge measurements, DO, temperature, and specific conductance determinations will only be obtained at about one-fourth of the sites.

After the model is calibrated and verified for known elevations of flow, water-surface elevations will be generated for projected flows in the river, water-surface elevations will be generated for projected flows in the river of 3,900 cfs at Swan Falls Dam and examined in the vicinity of existing island habitat areas to determine whether the formation of land bridges is likely. The model can also project water-surface elevations at

flows greater or less than 3,900 cfs. Results of the step-backwater analyses will be published in a report in the U.S. Geological Survey's Water Resources Investigation series. The report will include an evaluation of the survey techniques used in establishing the cross sections, a description of each cross section, and a description of the hydraulic model and step-backwater analyses and its use to determine water-surface elevations. Maps outlining the river and land areas, and depths of water at each cross section of 3,900 cfs and select discharges in the river at Swan Falls Dam, will also be included in the report.

4. Waterfowl Nesting Sites.

Conduct a literature search on the nesting requirements of the Canada goose and mallard and other representative species as determined by the technical subgroup and prepare an annotated bibliography. Produce a usable definition of the nesting requirements of these waterfowl species.

Studies will focus on the Canada goose and the mallard duck as two principal waterfowl species using the Snake River Islands as nesting habitat. While the nesting requirements of these two species would encompass the requirements of some of the nesting waterfowl on the islands, the requirements of certain other nesting waterfowl are different than that of the Canada goose and mallard.

5. Critical time periods for island habitat maintenance.

Conduct a review of existing literature regarding predator habitat requirements and prepare an annotated bibliography. Incorporate the literature review with data gleaned from studies proposed earlier in this report (II.C.1.,4.) in order to develop a comprehensive chronology of critical periods for these types of islands. On larger islands capable of maintaining predator populations, but which do not presently have such, critical time periods extend throughout the year. Sufficient literature exists to demonstrate increased predation would occur if predator populations became established on these islands. On smaller islands, not capable of supporting a resident predator population, critical time periods probably involve only the breeding seasons (March-June).

The literature review and annotated bibliography should

be sufficient to determine which islands would be capable of supporting predator populations. This task could be combined with other studies proposed herein (II.C.1.).

6. Relationship between stage/discharge and (1) goose nesting habitat and island integrity; (2) raptor and prey production and island integrity; (3) riparian habitat; and (4) human disturbance.

The HEP process discussed in II. C.1. should provide an estimate of habitat value (quality and quantity) for the species in question. Specific information about limiting factors is not available and must be defined in studies regarding selected species:

a. Goose nesting: Evaluate the possible effects of various flow regimes (from hydrologic modeling in III) on goose production through an evaluation of the step-backwater model or other river profiling methods. Use existing data regarding goose nesting chronology to predict the effects of flow fluctuation on goose nesting success. Water fluctuation should include at least two types of negative impacts; impacts related to high flow levels once nesting has commenced (nest flooding) and low flow impacts (increased predation). This evaluation is anticipated to be included in the analysis of nesting data presently being performed by the Fish and Wildlife Service and expected to be available in the fall of 1988.

b. Raptor production and prey production: Evaluate the possible effects of various flow regimes (from hydrologic modeling, III) through an evaluation of the step-backwater model or other river profiling methods. Existing data are available regarding raptor nesting chronology that would allow a prediction of the effects of flow fluctuation on birds of prey which may use the riparian zones and islands. Review data and produce a report specific to riparian habitat use.

c. Riparian habitat: Assume that the short-term relationship between stage/discharge and riparian habitat is not expected to modify existing habitat conditions.

Evaluate possible influences of various flow regimes on riparian and wetland habitats through the use of the step-backwater model study (II.C.3.b.), the results of hydrologic modeling (III.C.), and possible soil moisture work.

d. Human disturbance: Assume that human activities occurring on the river produce a negative impact on nesting waterfowl although the magnitude of such an impact is unknown. Primary recreation which may impact islands is associated with boating activity. Obtain and evaluate base line human use data during the biologically critical period (March-June).

7. Literature/data searches.

Conduct literature searches and develop annotated bibliographies regarding all studies listed in II.C.

III. STUDY PLAN FOR HYDROLOGY

This section describes proposed hydrologic studies of the Snake River, some of which are described above, to be used for: assessment of impacts, if any, on wildlife, resident fish, and downstream anadromous fish. The hydrological response to possible methods of flow augmentation to protect, enhance, or mitigate fish and wildlife resources will be tested.

Flow simulation will be performed with an appropriate model of the Snake River system and its major regulated tributaries using either the model developed by the Idaho Department of Water Resources (IDWR model) and currently used by the Bureau of Reclamation (BR) or other appropriate models. These models could be used to satisfy planning or operational aspects of flow simulation.

A. Updated Base Study

Update the data base study of the IDWR model to 1988 to use as a basis for comparison. (The IDWR model is currently calibrated for the period 1928-83.) Extend the simulated period of the IDWR model from 1983 to 1988. Recalibrate the IDWR model for 1988 conditions. (1985 conditions for the Snake River have been described in an IDWR open file report.⁴) Provide access to the IDWR model to the parties. Costs associated with such access shall be paid by the party requesting the access.

⁴Robertson, et al. 1986. Stream Flows in the Snake River Basin, 1985 Conditions of Use and Management. IDWR (02-70-510-1101). 29 pp.

B. Depletions Studies.

Upon completion of the base study, perform simulations for a series of up to seven alternative future levels of streamflow depletion, including a simulation representing conditions that would result in the lowest monthly flows in the driest years corresponding to a minimum daily flow of 3,900 cfs at the Murphy gage, as described under I.B. Results of the depletion studies would depict future flows which could occur within the context of the Swan Falls Agreement. To display flow sequences for shorter durations than the model-generated monthly numbers, it would be necessary to disaggregate changes from base conditions for sample months in recently observed hydrographs. River simulations generate flow data at nearly all long-record stream gage sites within the basin so that flow effects on resident fish and wildlife at the Refuge and on the anadromous fish could be estimated.

C. Augmentation Studies

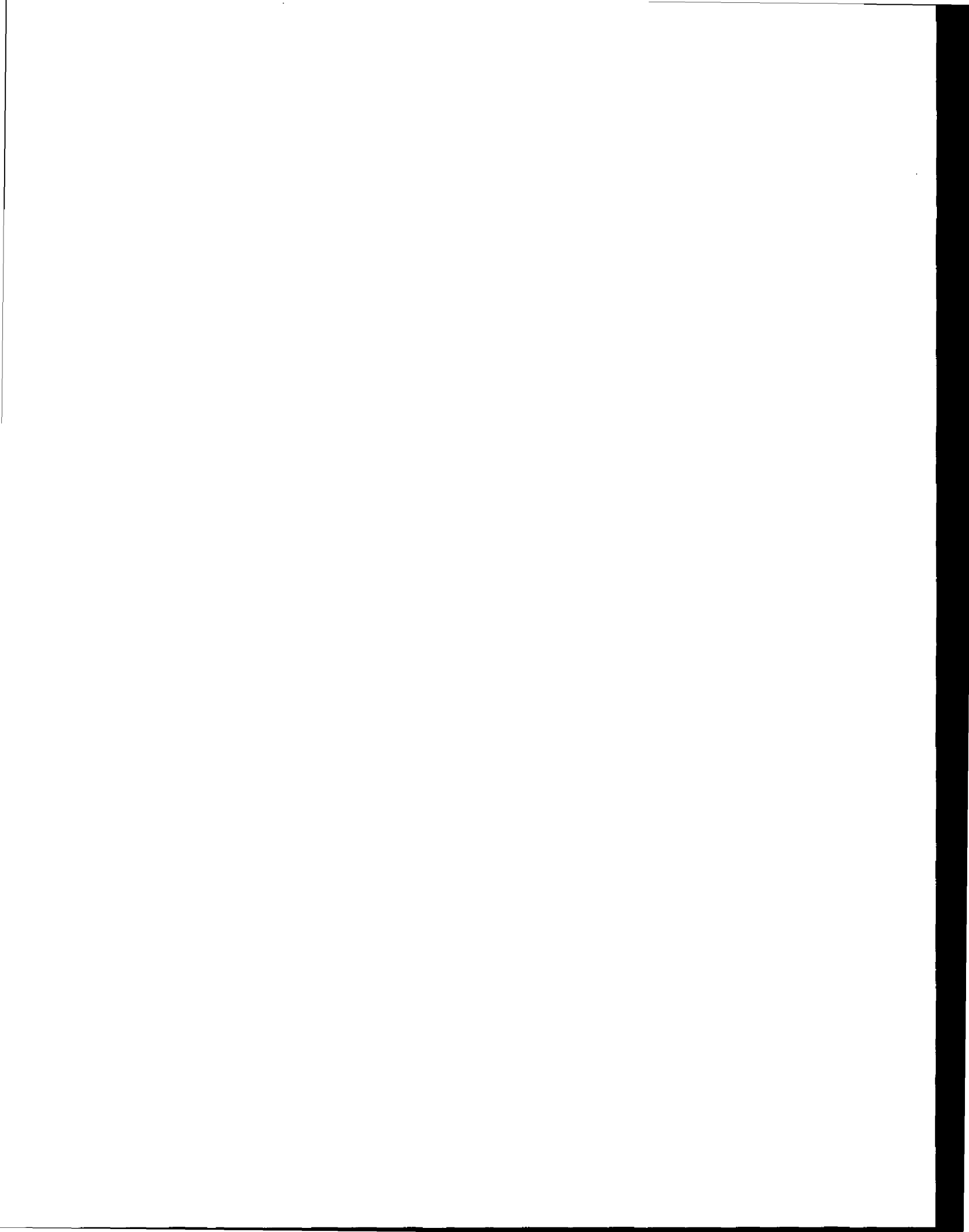
Run simulations of flow augmentation for anadromous fish and/or resident fish and wildlife. Test target flow rates in appropriate river reaches, as specified by the technical subgroup, against alternative uses of existing and possible new storage in the basin. Final simulations for the lower river would require assumptions of regulation schedules by Brownlee Reservoir.

Run trial studies to determine the feasibility of augmenting existing flows to achieve target flows. With/without flows and reservoir contents in all reaches would be generated so that gains and losses as well as third party impacts could be evaluated.

D. Withdrawal Decline Study

Given recent changes in management of the Snake River system, including decreases in agricultural diversions over the past 10 year period (appropriately 800,000 acre feet per year), assess the effect of the declines in diversions on river flows in the Milner to Weiser reach of the Snake River (as well as the lower river). Evaluate the effect of projected levels of reduced diversions, to be identified by the technical subgroup, on the Snake Plain aquifer at equilibrium conditions by use of the IDWR Snake Plain ground-water model or other appropriate ground-water models. Compute modified aquifer discharge with the ground-water

models. Input these reduced outflows as well as the reduced diversions into the IDWR model to simulate possible flow conditions in the refuge reaches as well as further downstream.



CHAPTER 14
(S.B. No. 1005)

AN ACT

RELATING TO THE PUBLIC UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENTS AND OTHER REGULATORY IMPLICATIONS OF THE SWAN FALLS COMPROMISE.

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

SECTION 1. FINDINGS AND STATEMENT OF PURPOSE. After hearing testimony from the office of the governor, the office of the attorney general, the Idaho public utilities commission, the Idaho department of water resources, the Idaho water resources board, the Idaho department of fish and game, other governmental entities and other interested groups and individuals of the state of Idaho, the legislature hereby finds that while portions of the testimony differ, the contract entered into by the governor and the Idaho Power Company on October 25, 1984, is in the public interest for all purposes including, but not limited to, all purposes under the public utilities law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S. gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2. PUBLIC UTILITIES COMMISSION -- JURISDICTION. The Idaho public utilities commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, including Idaho Power Company, should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with the contract entered into by the governor and the Idaho Power Company on October 25, 1984.

SECTION 3. IPUC -- EFFECT OF AGREEMENT. In any proceeding before the Idaho public utilities commission including, but not limited to, a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility, including Idaho Power Company, the commission shall accept as reasonable and in the public interest for all purposes, the contract entered into by the governor and the Idaho Power Company on October 25, 1984, including without limitation, the effects of implementation of such contract on the utility's revenue requirements and hydroelectric generation.

SECTION 4. EXEMPTION. Implementation of such contract shall not constitute a sale, assignment, conveyance or transfer within the meaning of sections 61-327, 61-328, 61-329, 61-330 and 61-331, Idaho Code, to the extent any of those sections may apply.

Approved February 28, 1985.

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CHAPTER 15
(S.B. No. 1006)

AN ACT

RELATING TO THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATIONS.

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

SECTION 1. That Section 42-1805, Idaho Code, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES. In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

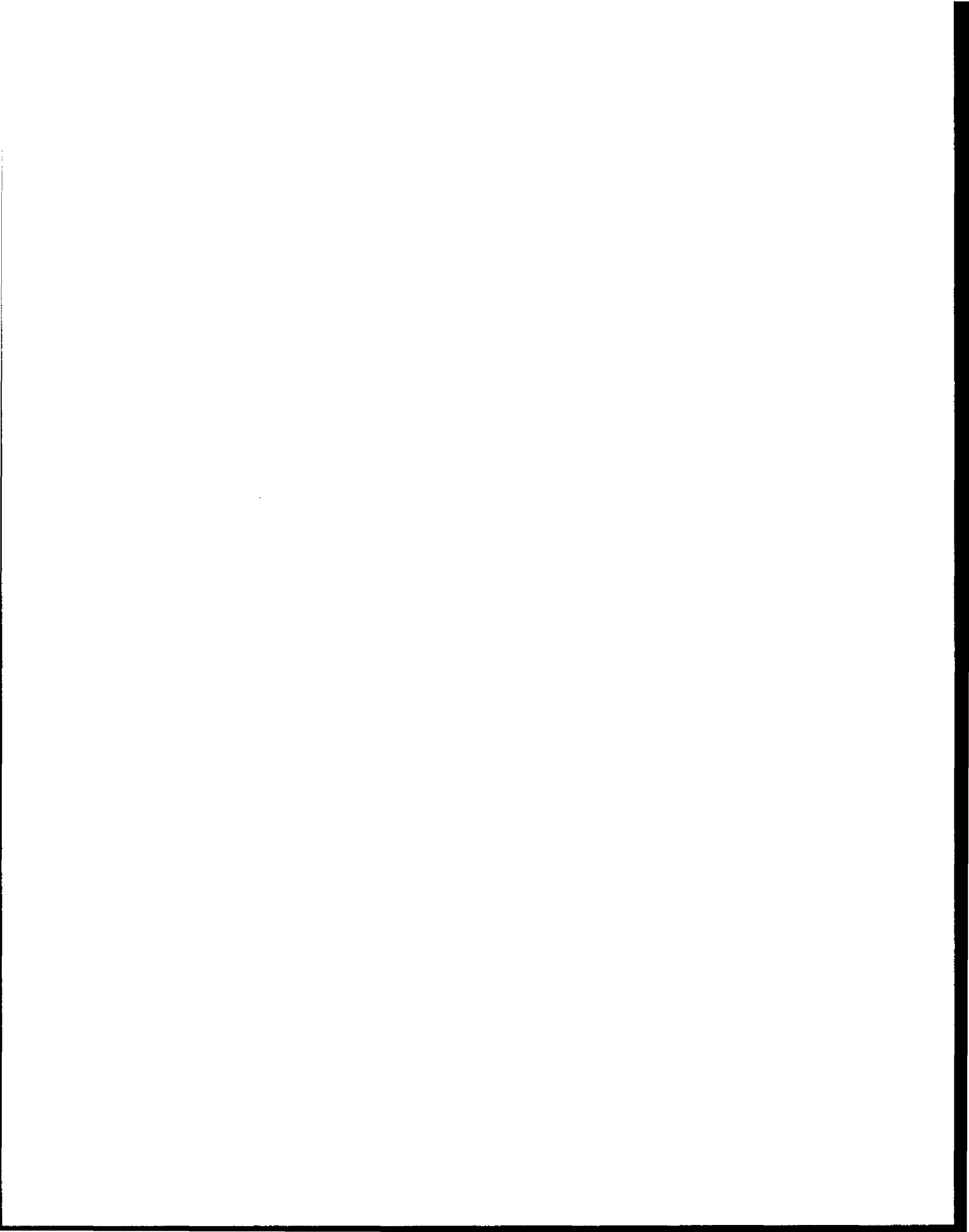
(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and

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information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notices of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(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.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

Approved February 28, 1985.

CHAPTER 16
(S.B. No. 1007)

AN ACT

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.

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

SECTION 1. That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT. The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

Approved February 28, 1985.

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CHAPTER 17
(S.B. No. 1008)

AN ACT

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 INTER-STATE COMPACT; AND PROVIDING SEVERABILITY.

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

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

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

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

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

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

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

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

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

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses.

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

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

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

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power

Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

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

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

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

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

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

(i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

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

(iii) The promotion of the family farming tradition;

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

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

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

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

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

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

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

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SECTION 5. This act shall not be construed as modifying, amending, or repealing any interstate compact.

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

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Approved February 28, 1985.

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CHAPTER 18
(H.B. No. 70)

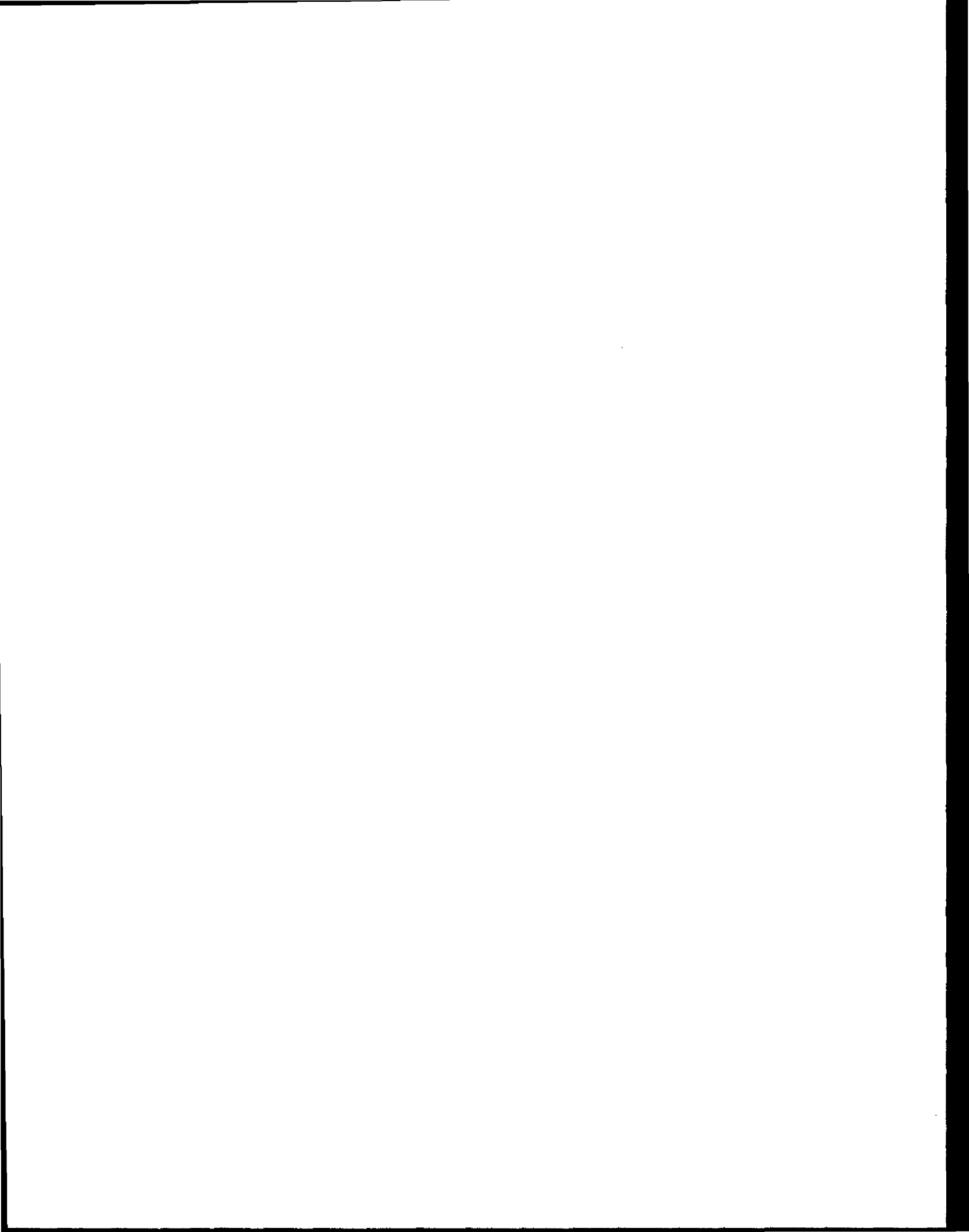
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AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS; AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A, IDAHO CODE, TO PROVIDE FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1409, IDAHO CODE, TO PROVIDE THAT IN AN ORDER REQUESTING JOINDER OF CLAIMANTS TO WATER IN A SYSTEM, THE ORDER SHALL INDICATE THAT A NOTICE OF CLAIM NEED NOT BE FILED FOR A WATER RIGHT EVIDENCED BY A VALID APPLICATION OR PERMIT ON FILE WITH THE DEPARTMENT OF WATER RESOURCES FOR WHICH PROOF OF BENEFICIAL USE HAS NOT BEEN FILED AND TO PROVIDE THAT A COURT IN A SUBSEQUENT ORDER OF JOINDER SHALL AUTHORIZE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO ORDER A NOTICE OF CLAIM TO BE FILED ON EACH PERMIT FOR WHICH PROOF OF BENEFICIAL USE HAS BEEN FILED PRIOR TO FILING WITH THE COURT OF THE REPORT OF PROPOSED FINDING OF WATER RIGHTS REQUIRED BY LAW; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY

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mined by the governing body, not to exceed eight per cent (8%) per month, may be deducted from the salary of each police officer and placed in said "policeman's retirement fund" by the treasurer. When all claims against the fund have been satisfied, the authority to levy according to this section shall terminate.

Approved March 21, 1985.

CHAPTER 224
(H.B. No. 186, As Amended)

AN ACT

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.

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

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses.

(2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state

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

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

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

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

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

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

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

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

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

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

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

Approved March 21, 1985.

CHAPTER 225
(H.B. No. 190)

AN ACT

RELATING TO A FREE FISHING DAY; AMENDING SECTION 36-401, IDAHO CODE, TO PROVIDE THAT NO FISHING LICENSE SHALL BE REQUIRED FOR ANY PERSON TO FISH ON A FREE FISHING DAY AS MAY BE DESIGNATED BY THE FISH AND GAME COMMISSION.

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

SECTION 1. That Section 36-401, Idaho Code, be, and the same is hereby amended to read as follows:

36-401. HUNTING, TRAPPING, FISHING OR CARRYING UNCASSED FIREARM -- LICENSE REQUIREMENT -- EXCEPTIONS. It is a misdemeanor for any person to hunt, trap, or fish for or take any wild animal, bird or fish of this state or have in his possession any uncased firearm while in the fields or forests of the state, without first having procured a license as hereinafter provided. Provided that no license shall be required:

(a) Uncased Firearms. For residents of this state to carry uncased firearms on property owned, leased or controlled by them or on adjoining property for the purpose of taking predatory animals.

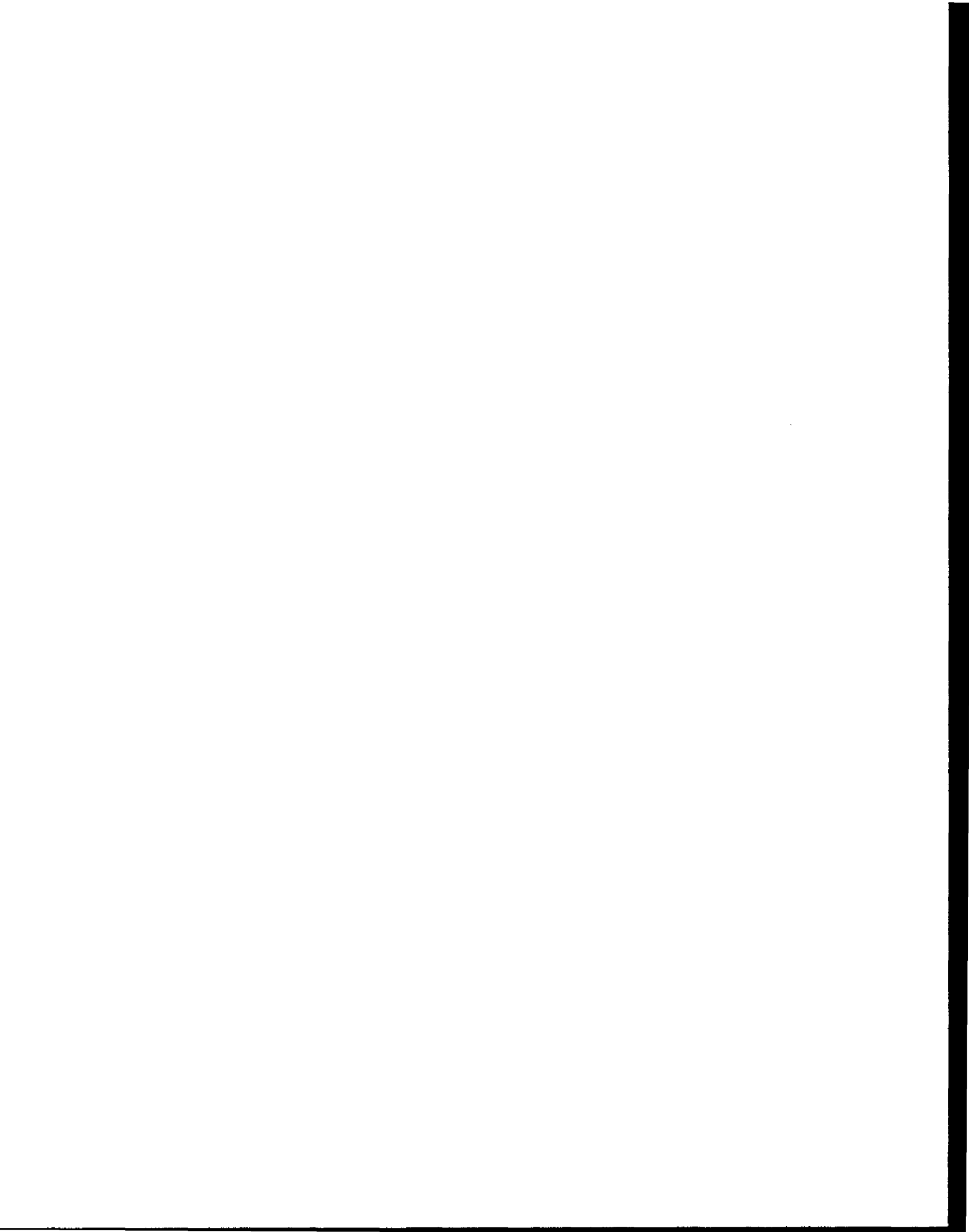
(b) 1. For children under the age of fourteen (14) years who are residents of this state to fish during the open season therefor.

2. For nonresident children under the age of fourteen (14) years to fish during the open season therefor provided they are accompanied by the holder of a valid fishing license, and provided further that any fish caught by such nonresident children shall be included in the bag and possession limit of such license holder.

3. For resident children under the age of twelve (12) years to hunt, take or kill predatory, unprotected birds and animals by means other than with firearms.

4. For resident children under the age of fourteen (14) years to trap muskrats from irrigation ditches or property on which they live during the open season.

(c) For any person to fish on a "free fishing day" as may be



CHAPTER 204
(S.B. No. 1205)

AN ACT
RELATING TO THE STATE WATER PLAN; RATIFYING AND APPROVING AMENDMENTS
TO POLICY 32 OF THE STATE WATER PLAN ADOPTED BY THE WATER RESOURCE
BOARD ON MARCH 1, 1985; AND REPEALING SECTION 42-1736A, IDAHO
CODE.

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

SECTION 1. That the amendments to Policy 32 of the Idaho State
Water Plan, which amendments were adopted by Resolution of the Idaho
Water Resource Board on March 1, 1985, be, and the same are hereby
ratified and approved.

SECTION 2. That Section 42-1736A, Idaho Code, be, and the same is
hereby repealed.

Approved March 22, 1985.

CHAPTER 205
(S.B. No. 1208)

AN ACT
APPROPRIATING MONEYS TO THE SUPREME COURT FOR FISCAL YEAR 1986.

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

SECTION 1. There is hereby appropriated to the Supreme Court the
following amount from the listed account for the period July 1, 1985,
through June 30, 1986:

FROM:

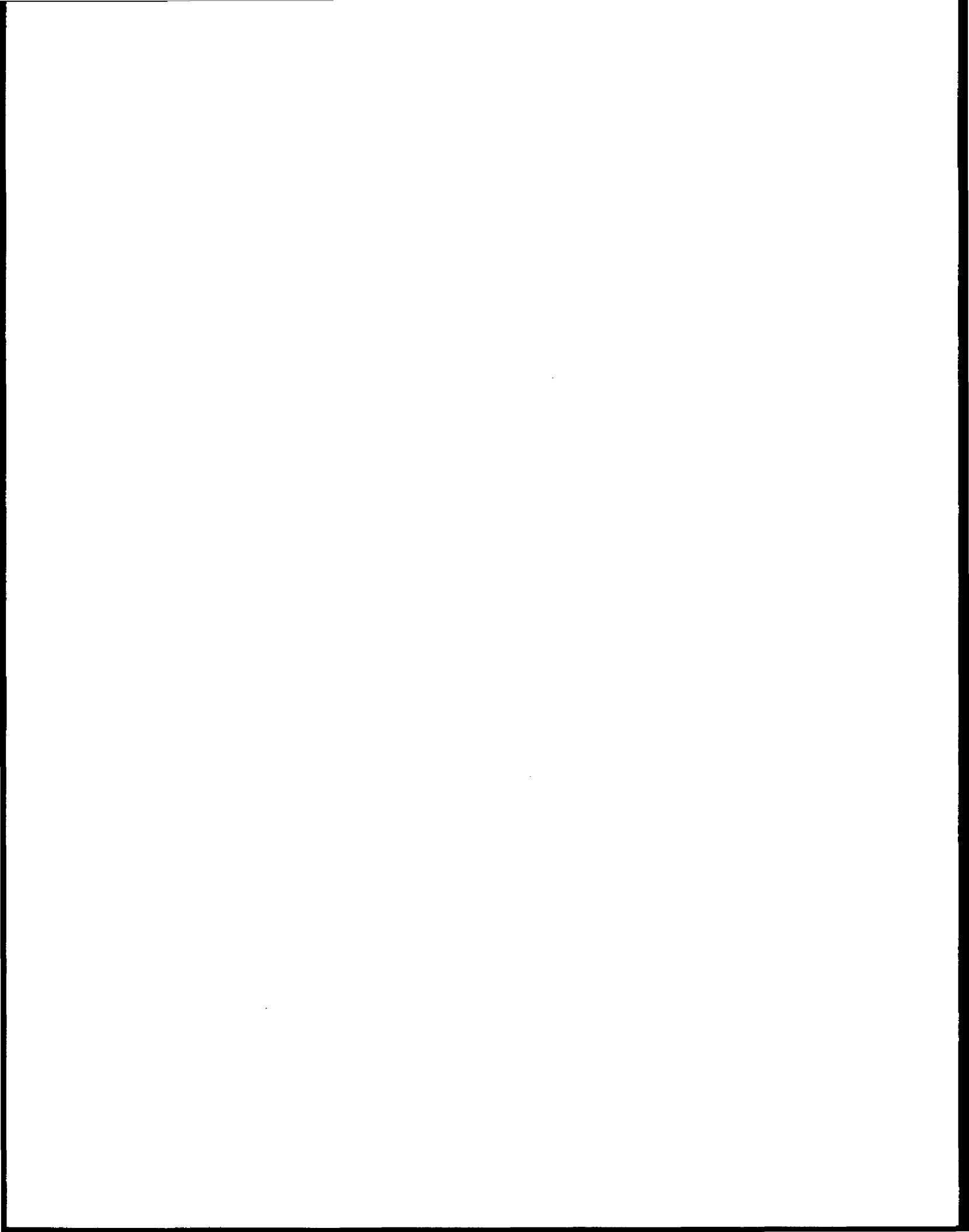
General Account \$117,500

Approved March 22, 1985.

CHAPTER 206
(S.B. No. 1209)

AN ACT
APPROPRIATING MONEYS TO THE DEPARTMENT OF PARKS AND RECREATION FOR
FISCAL YEAR 1986.

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



pay all actual burial costs. In case a person confined or detained was initially arrested by a city police officer for violation of the motor vehicle laws of this state or for violation of a city ordinance, the cost of such confinement or detention shall be a charge against such city by the county wherein the order of confinement was entered. All payments under this section shall be acted upon for each calendar month by the second Monday of the month following the date of billing.

Approved March 24, 1986.

CHAPTER 116
(S.B. No. 1349)

AN ACT
RELATING TO PUBLIC DEPOSITORIES; REPEALING SECTION 57-133A, IDAHO
CODE.

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

SECTION 1. That Section 57-133A, Idaho Code, be, and the same is hereby repealed.

Approved March 24, 1986.

CHAPTER 117
(S.B. No. 1358, As Amended)

AN ACT
RELATING TO TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT; AMENDING SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT A USER OF WATER FOR POWER PURPOSES SUBORDINATED BY A PERMIT ISSUED AFTER JULY 1, 1985, OR BY AN AGREEMENT, MAY CONTINUE USING THE WATER PENDING APPROVAL OF DEPLETIONARY FUTURE BENEFICIAL USES, TO CLARIFY APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER UPSTREAM FROM MILNER DAM, TO PROVIDE APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER DOWNSTREAM FROM MILNER DAM REGARDING THE DETERMINATION AND ADMINISTRATION OF RIGHTS TO THE USE OF CERTAIN WATERS OF THE SNAKE RIVER, AND TO PROVIDE REFERENCES TO IDAHO CODE CITATIONS; AMENDING SECTION 42-203C, IDAHO CODE, TO PROVIDE IF AN APPLICANT INTENDS TO APPROPRIATE WATER WHICH IS HELD IN TRUST BY THE STATE OF IDAHO PURSUANT TO CERTAIN LAW, THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL CONSIDER WHETHER THE PROPOSED USE INDIVIDUALLY OR CUMULATIVELY WITH OTHER EXISTING USES OR USES REASONABLY LIKELY TO EXIST WITHIN TWELVE MONTHS OF THE PROPOSED USE WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF TRUST WATER AVAILABLE TO THE HOLDER OF THE

WATER RIGHT USED FOR POWER PRODUCTION, WHICH IS DEFINED BY AN AGREEMENT PURSUANT TO IDAHO LAW; AND AMENDING SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL REVIEW ALL PERMITS ISSUED PRIOR TO JULY 1, 1985, WHICH PROPOSE TO DIVERT WATER HELD IN TRUST BY THE STATE OF IDAHO PURSUANT TO CERTAIN STATE LAW, TO DETERMINE WHETHER THEY COMPLY WITH CERTAIN STATE LAW, TO PROVIDE IF THE DEPARTMENT FINDS THAT PROPOSED USE IS ALLOWED UNDER CERTAIN STATE LAW, THEN THE DEPARTMENT SHALL ENTER AN ORDER CONTINUING THE PERMIT, TO CLARIFY LANGUAGE AND TO PROVIDE CORRECT CITATIONS; AND DECLARING AN EMERGENCY.

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

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

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

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

(3) Water rights for power purposes not defined by agreement with

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the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

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

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

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

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

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

- (a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
- (b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);
- (c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;
- (d) Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the

permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

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

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

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

(i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

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

(iii) The promotion of the family farming tradition;

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

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

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

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

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

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. (1) The director of the department of water resources shall review all permits issued prior to the effective date of this section July 1, 1985, which propose to divert water held in trust by the state of Idaho pursuant

to subsection (5) of section 42-203B, Idaho Code, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of ~~chapter 2, title 42~~ section 42-203C, Idaho Code. If the department finds that the proposed use is allowed under section 42-203C, Idaho Code, then the department shall enter an order continuing the permit. If the department finds that the proposed use ~~does not satisfy the criteria of chapter 2, title 42~~ is not allowed under section 42-203C, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with ~~chapter 2, title 42~~ section 42-203C, Idaho Code. ~~If the department finds that the permit satisfies the criteria established in chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.~~

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

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

Approved March 24, 1986.

CHAPTER 118
(S.B. No. 1417)

AN ACT

RELATING TO PORT DISTRICT PURCHASING PROCEDURES; AMENDING SECTION 70-1612, IDAHO CODE, TO INCREASE THE MINIMUM PURCHASE REQUIRING PUBLIC BIDDING.

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

SECTION 1. That Section 70-1612, Idaho Code, be, and the same is hereby amended to read as follows:

70-1612. PURCHASING PROCEDURES -- CONTRACTS. (1) Upon all purchases and/or works involving five ten thousand dollars (\$510,000) or less, based upon the liability assumed by a port district thereon, all material required by a port district may be procured in the open market or by contract and all work ordered may be done by contract or day labor. All such purchases and/or works involving in excess of five ten thousand dollars (\$510,000), as so measured, shall be let upon contract in the manner herein provided. All such contracts shall be let at public bidding upon notice published at least once in a newspaper in the district at least ten (10) days before the letting, calling for sealed bids upon the work, plans and specifications for which



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I.C. § 42-203A

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West's Idaho Code Annotated Currentness

Title 42. Irrigation and Drainage--Water Rights and Reclamation

Chapter 2. Appropriation of Water--Permits, Certificates, and Licenses-- Survey (Refs & Annos)

→ § 42-203A. Notice upon receipt of application--Protest--Hearing and findings--Appeals

(1) Upon receipt of an application to appropriate the waters of this state, the department of water resources shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; (b) the date of filing thereof; (c) the name and post-office address of the applicant; (d) the source of the water supply; (e) the amount of water to be appropriated; (f) in general the nature of the proposed use; (g) the approximate location of the point of diversion; and (h) the point of use. The department shall also state in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

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

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest, together with the statutory filing fee as provided in section 42-221, Idaho Code, against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with

I.C. § 42-203A

which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

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

S.L. 1929, ch. 212, § 1; S.L. 1935, ch. 145, § 2; S.L. 1967, ch. 374, § 2; S.L. 1969, ch. 469, § 1; S.L. 1978, ch. 306, § 1; S.L. 1980, ch. 238, § 2; S.L. 1985, ch. 17, § 1; S.L. 1990, ch. 141, § 4; S.L. 1994, ch. 64, § 1; S.L. 2003, ch. 298, § 2.

Codifications: C.S. 1919, § 5569A; I.C.A., § 41-203.

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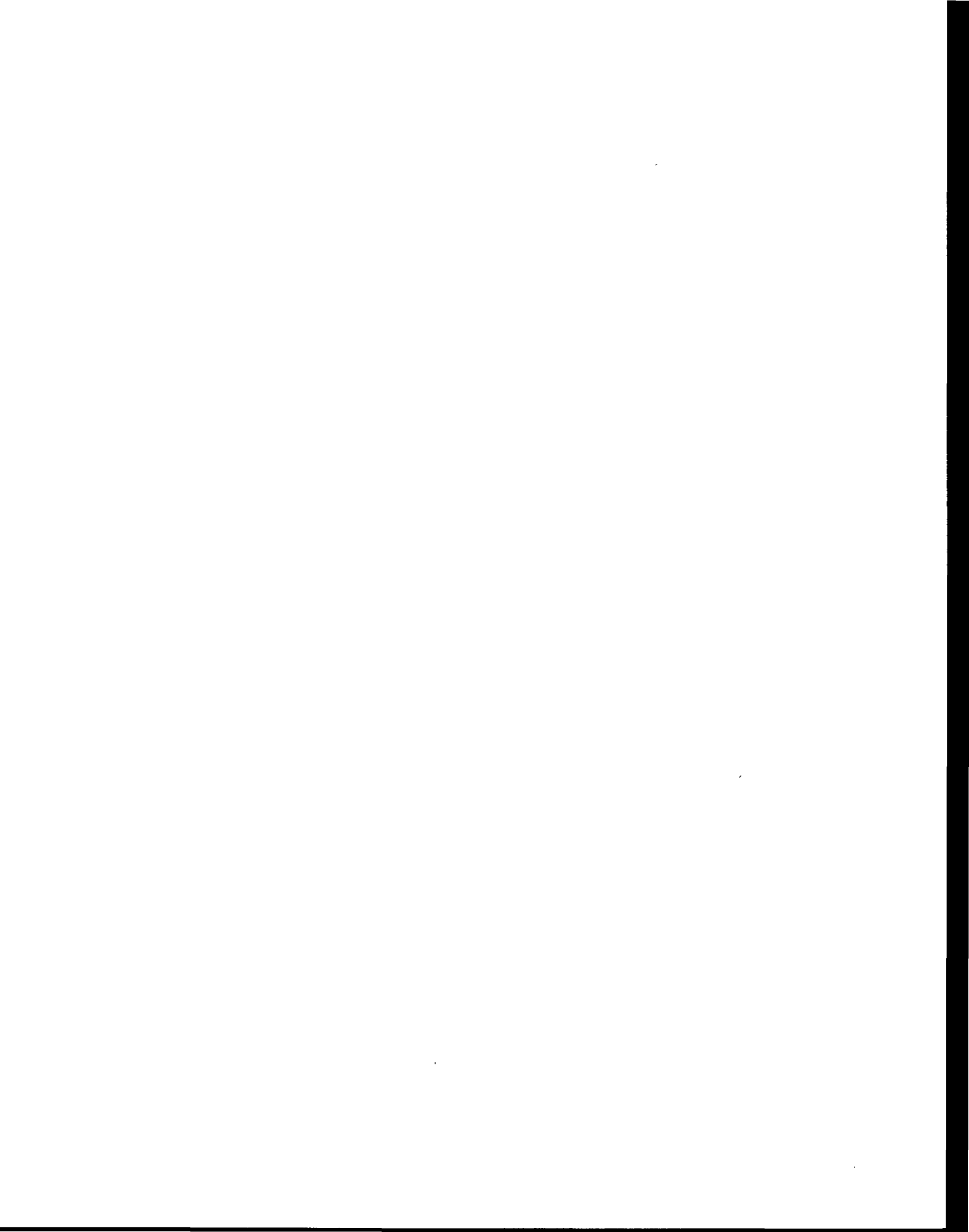
Law of Water Rights and Resources § 5:35, Priority -- Modification of Priority -- Administrative Suspension and Subordination.

Law of Water Rights and Resources § 5:47, Administrative Permits -- Procedure.

NOTES OF DECISIONS

Amendment of permits 6

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Westlaw

Page 1

I.C. § 42-203B

C

West's Idaho Code Annotated Currentness

Title 42. Irrigation and Drainage--Water Rights and Reclamation

Chapter 2. Appropriation of Water--Permits, Certificates, and Licenses-- Survey (Refs & Annos)

→ § 42-203B. Authority to subordinate rights--Nature of subordinated water right and authority to establish a subordination condition--Authority to limit term of permit or license

(1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

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

(3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

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

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

I.C. § 42-203B

authority and power to enter into this agreement.

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

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

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

- (a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
- (b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA) [FN1];
- (c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;
- (d) Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

S.L. 1985, ch. 17, § 2; S.L. 1985, ch. 224, § 1; S.L. 1986, ch. 117, § 1.

[FN1] 16 U.S.C.A. § 2601 et seq.

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I.C. § 42-203B

Treatises and Practice Aids

Law of Water Rights and Resources § 5:35, Priority -- Modification of Priority -- Administrative Suspension and Subordination.

NOTES OF DECISIONS

Judicial review 1

Water Rights-Subordination 2

1. Judicial review

Supreme Court was not precluded by doctrine of separation of powers from reviewing constitutionality of statute implementing agreement between state and power company regarding competing water rights, even though the advisability of the agreement, supported by both the executive and legislative branches, was not a proper subject for a judicial deliberation, where issue presented was whether the statute violated due process and equal protection. Laws 1985, c. 14, §§ 1 et seq., 2, 3; c. 15, § 1 et seq.; c. 16, § 1 et seq.; c. 17, § 1 et seq.; c. 18, §§ 1, 3, 4; c. 162, § 1 et seq.; c. 204, § 1 et seq.; I.C. § 42-203B; Const. Art. 2, § 1; U.S.C.A. Const.Amend. 14. Miles v. Idaho Power Co., 1989, 116 Idaho 635, 778 P.2d 757. Constitutional Law ⇐ 70.1(9); Constitutional Law ⇐ 73

2. Water Rights-Subordination

I.C. § 42-203B, ID ST § 42-203B

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Page 1

I.C. § 42-203C

C

West's Idaho Code Annotated Currentness

Title 42. Irrigation and Drainage--Water Rights and Reclamation

Chapter 2. Appropriation of Water--Permits, Certificates, and Licenses-- Survey (Refs & Annos)

→ § 42-203C. Hydropower water right--Criteria for reallocation--Weight--Burden of proof

(1) If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.

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

(i) The potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

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

(iii) The promotion of the family farming tradition;

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

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

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

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

S.L. 1985, ch. 17, § 3; S.L. 1986, ch. 117, § 2.

LAW REVIEW AND JOURNAL COMMENTARIES

A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy. Jeffrey C. Fereday and Michael C. Creamer, (1991- 1992). 28 Idaho L. Rev. 573.

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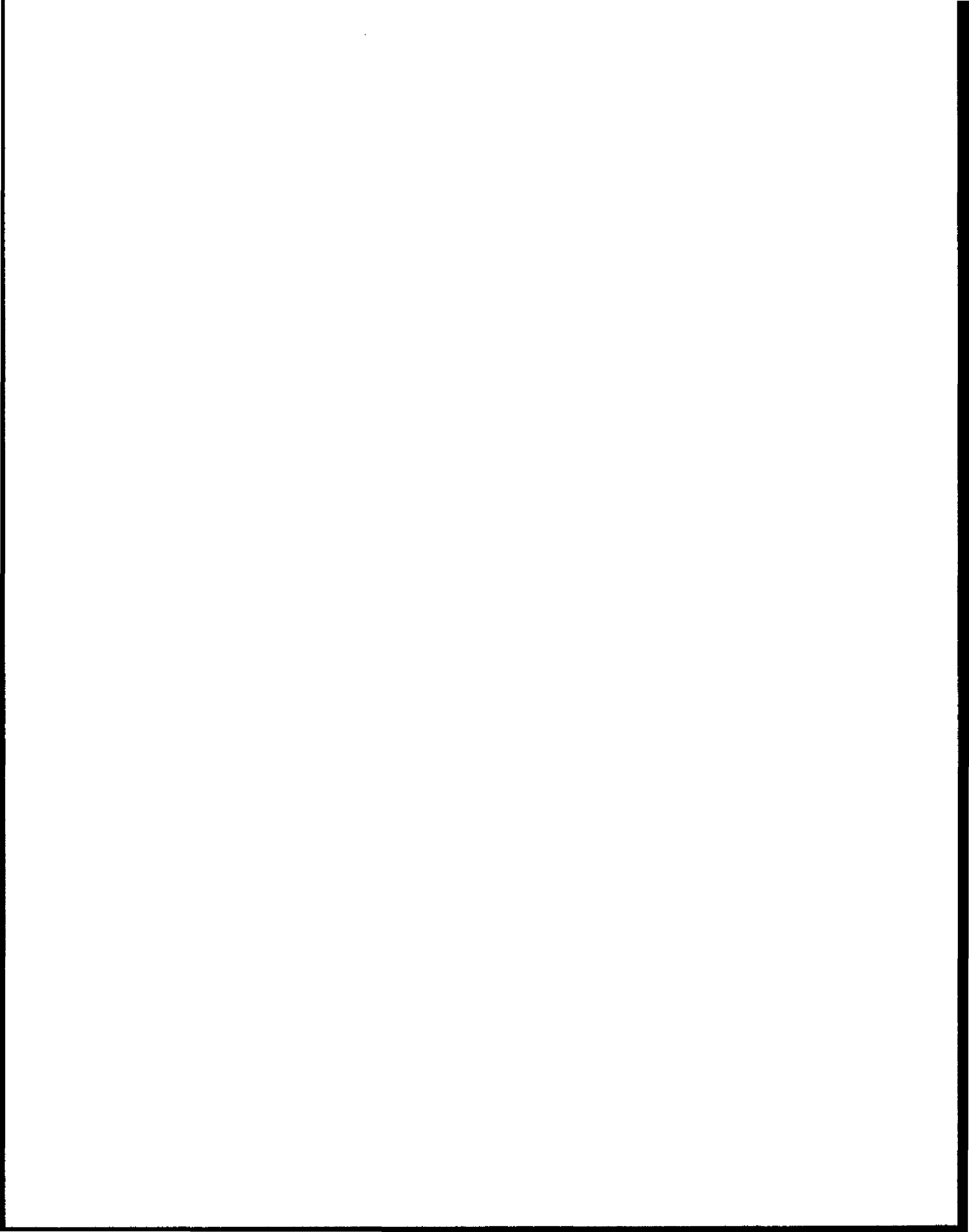
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I.C. § 42-203C, ID ST § 42-203C

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58th Legislature, Ch. 1

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Page 1

I.C. § 42-203D

C

West's Idaho Code Annotated Currentness

Title 42. Irrigation and Drainage--Water Rights and Reclamation

Chapter 2. Appropriation of Water--Permits, Certificates, and Licenses-- Survey (Refs & Annos)

→ § 42-203D. Review of permits--Opportunity for hearing

(1) The director of the department of water resources shall review all permits issued prior to July 1, 1985, which propose to divert water held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of section 42-203C, Idaho Code. If the department finds that the proposed use is allowed under section 42-203C, Idaho Code, then the department shall enter an order continuing the permit. If the department finds that the proposed use is not allowed under section 42-203C, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with section 42-203C, Idaho Code.

(2) The department shall provide an opportunity for hearing in accordance with section 42-1701A, Idaho Code, and chapter 52, title 67, Idaho Code, for each holder of a permit that is proposed either to be cancelled or made subject to new conditions.

S.L. 1985, ch. 17, § 4; S.L. 1986, ch. 117, § 3; S.L. 1993, ch. 216, § 32.

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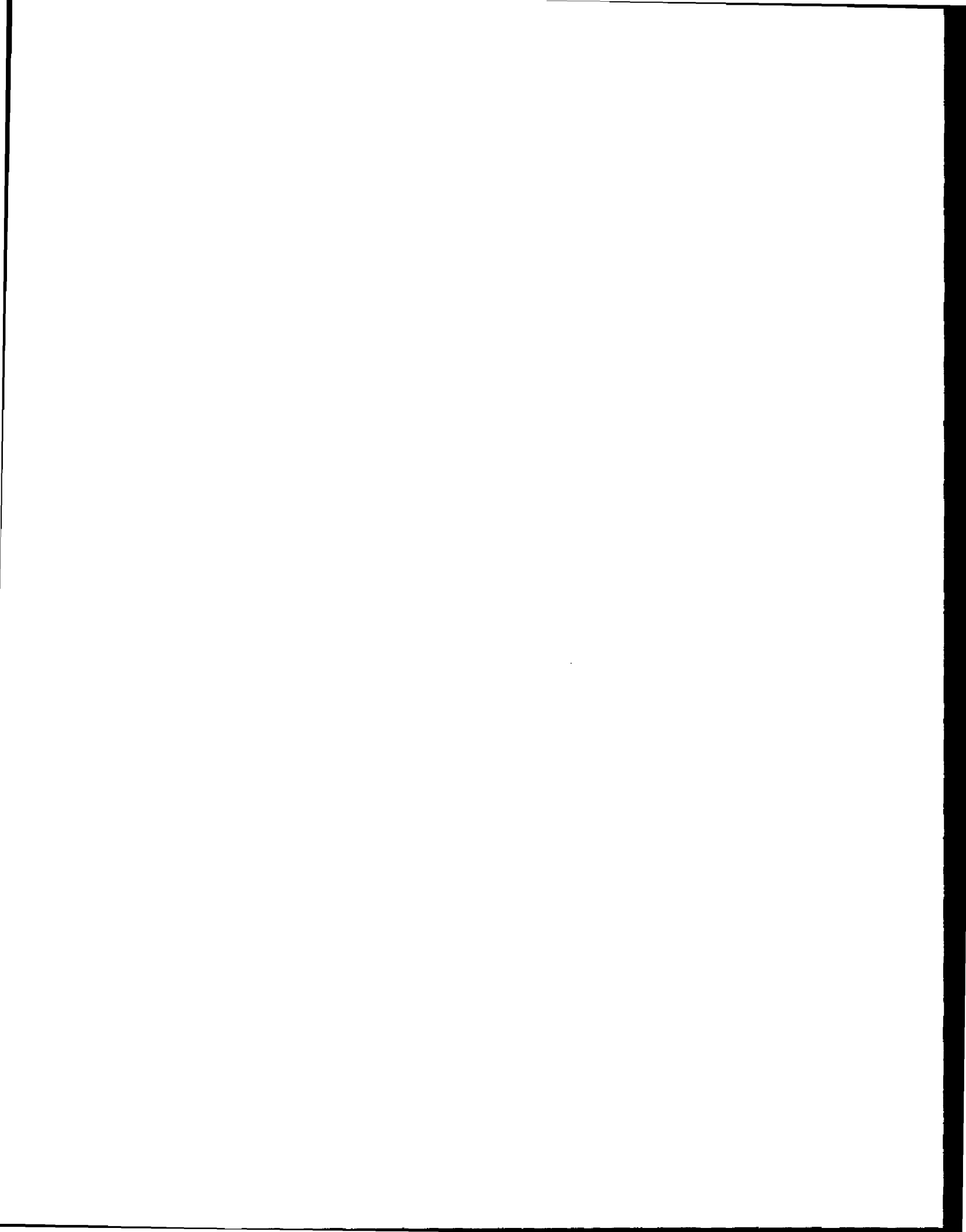
C.J.S. Waters §§ 333 to 337, 357, 359 to 360, 362 to 364, 367, 391, 435.

I.C. § 42-203D, **ID ST § 42-203D**

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58th Legislature, Ch. 1

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Page 1

145k11.3(1)

I.C. § 61-502B

C

West's Idaho Code Annotated Currentness

Title 61. Public Utility Regulation

Chapter 5. Powers and Duties of Public Utilities Commission (Refs & Annos)

→ § 61-502B. Allocation of gain upon sale of water right

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

S.L. 1985, ch. 16, § 1.

LIBRARY REFERENCES

Electricity ☞ 11.3(1).

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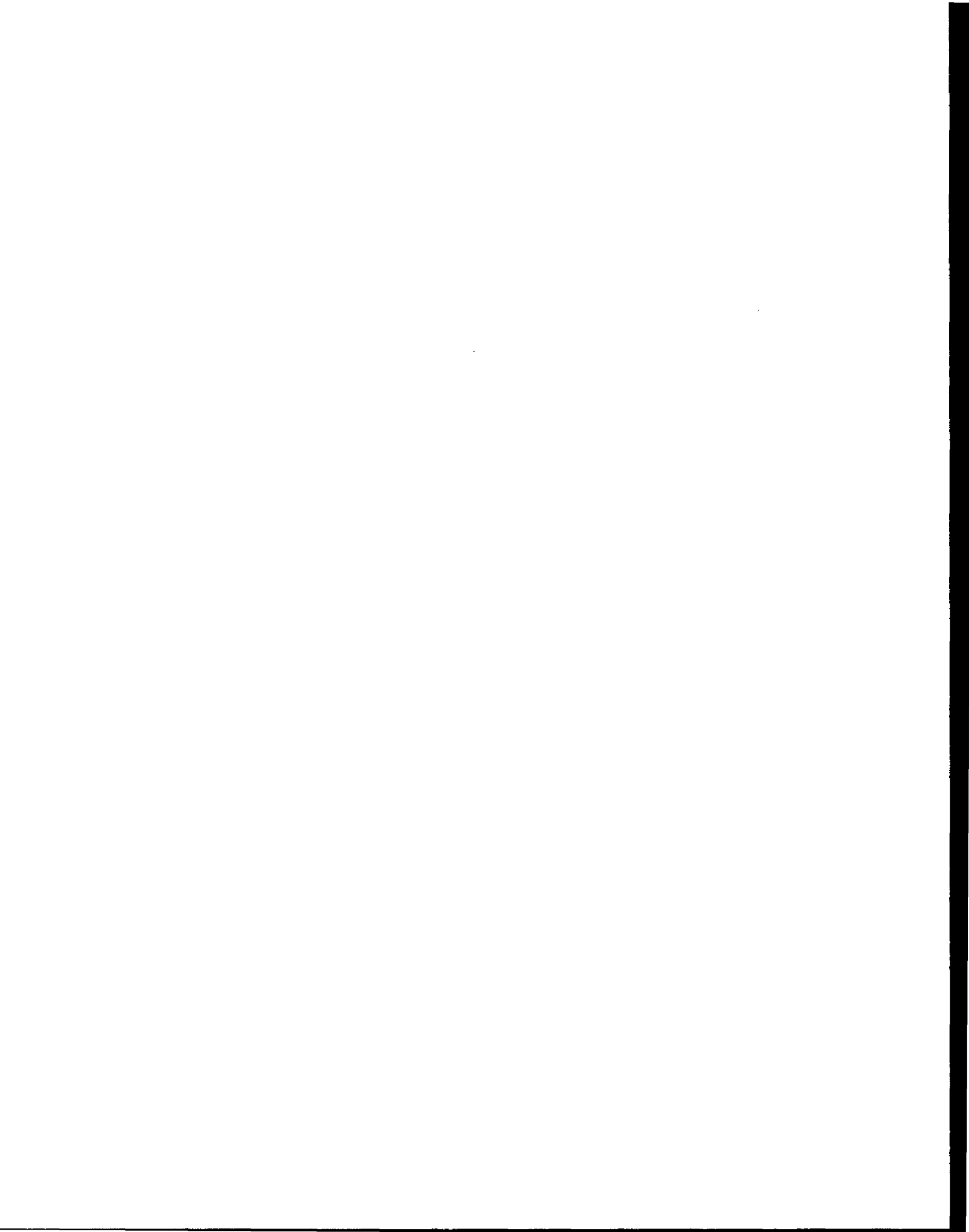
C.J.S. Electricity §§ 30, 32.

I.C. § 61-502B, ID ST § 61-502B

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FOR WHICH THE DIRECTOR MAY REFUSE TO ISSUE OR REFUSE TO RENEW A CERTIFICATE OF REGISTRATION.

S 1095
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO IMPLEMENTS OF HUSBANDRY; AMENDING SECTION 49-101, IDAHO CODE, TO INCLUDE MINT TUBS AND MINT WAGONS UNDER THE DEFINITION OF "IMPLEMENTS OF HUSBANDRY"; AND DECLARING AN EMERGENCY.

S 1096
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE DISTRIBUTION OF FEES FROM SNOWMOBILE FEES; AMENDING SECTION 49-2608, IDAHO CODE, TO PROVIDE FOR THE DISTRIBUTION OF MONEYS, TO CREATE THE SEARCH AND RESCUE ACCOUNT, TO PROVIDE FOR USES OF MONEYS IN THE SEARCH AND RESCUE ACCOUNT; TRANSFERRING MONEYS FROM A CERTAIN ACCOUNT IN THE DEDICATED FUND TO THE SEARCH AND RESCUE ACCOUNT, AND PROVIDING FOR THE USES OF SUCH MONEYS; AND DECLARING AN EMERGENCY.

S 1097
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE TRANSPORTATION OF ALCOHOLIC BEVERAGES, WINE AND BEER; AMENDING SECTION 23-505, IDAHO CODE, TO PROHIBIT THE TRANSPORTATION OF OPEN CONTAINERS OF ALCOHOLIC LIQUOR, WINE AND BEER.

S 1098
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO MOTOR VEHICLE LIENS AND ENCUMBRANCES; AMENDING SECTION 49-412, IDAHO CODE, TO PROVIDE THAT IF A TITLE APPLICATION IS RETURNED FOR CORRECTION AND IS NOT RETURNED WITHIN A SPECIFIED TIME THE ORIGINAL DATE AND HOUR OF RECEIPT SHALL BE VOID.

S 1090, S 1091, S 1092, S 1093, S 1094, S 1095, S 1096, S 1097, and S 1098 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 19, by Education Committee, was introduced, read the first time at length, and referred to the Education Committee.

Second Reading of Bills

S 1054, by Local Government and Taxation Committee, was read the second time at length and filed for third reading.

H 28, by Resources and Conservation Committee, was read the second time at length and filed for third reading.

S 1052, by State Affairs Committee, was read the second time at length and filed for third reading.

S 1044, by Judiciary and Rules Committee, was read the second time at length and filed for third reading.

S 1066, by Education Committee, was read the second time at length and filed for third reading.

Third Reading of Bills

On request by Senator Ricks, granted by unanimous consent, S 1006, S 1007, S 1006, and S 1005 were placed at the head of the calendar.

S 1008 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Tomlinaga, Twiggs, Watkins, Yarbrough. Total - 34.

NAYS—Batt, Carlson, Crystal, Ricks, Ringert, Rydahl. Total - 6.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1008 passed, title was approved, and the bill ordered transmitted to the House.

On request by Senator Noh, granted by unanimous consent, the President ordered the Statement of Legislative Intent relating to S 1008 spread upon the pages of the Journal.

STATEMENT OF LEGISLATIVE INTENT
S 1008

Prepared by Senator Michael D. Crapo
of the Senate Resources and Environment Committee
February 1, 1985

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. gauging station is recommended for seasonal flows of 3,900 c.f.s. and 5,800 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 any 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.

S 1007 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Batt, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Crystal, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 36.

NAYS—Carlson, Ricks, Rydalch, Tominaga. Total - 4.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1007 passed, title was approved, and the bill ordered transmitted to the House.

S 1006 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins. Total - 30.

NAYS—Anderson, Batt, Carlson, Crystal, Parry, Ricks, Ringert, Rydalch, Tominaga, Yarbrough. Total - 10.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1006 passed, title was approved, and the bill ordered transmitted to the House.

S 1005 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 33.

NAYS—Batt, Carlson, Crystal, Gilbert, Ricks, Rydalch, Tominaga. Total - 7.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1005 passed, title was approved, and the bill ordered transmitted to the House.

S 1015, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

On request by Senator Darrington, granted by unanimous consent, S 1015 was referred to the Fourteenth Order of Business, General Calendar.

S 1016, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Moved by Senator Anderson, seconded by Senator Beck, that S 1016 be referred to the Fourteenth Order of Business for amendment.

An amended motion was made by Senator Ricks, seconded by Senator Kiebert, that the Senate recess until 1:30 p.m. of this day.

The question being, "Shall the amended motion pass?"

The amended motion passed by voice vote, and the Senate recessed until 1:30 p.m. of this day.

**RECESS
AFTERNOON SESSION**

The Senate reconvened at 1:30 p.m., pursuant to recess, President Lacy presiding.

Roll call showed all members present except Senators Bilyeu, Kiebert, Lannen, Peavey, and Tominaga, absent and excused; and Senators Lacy and Little, absent and formally excused by the Chair.

Prior to recess the Senate was at the Thirteenth Order of Business, Third Reading of Bills.

Senator Peavey was recorded present at this order of business.

The President announced that the motion to refer S 1016 to the Fourteenth Order of Business, General Calendar, was before the Senate for consideration, the question being, "Shall the motion pass?"



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 9, 1985

Room 433, 1:30 p.m.

PRESENT: Chairman Noh, Senators Beitelspacher, Budge, Carlson, Chapman, Crapo, Horsch, Little, Peavey, Ringert and Sverdsten.

Chairman Noh called the meeting to order.

The following rules and regulations were assigned for review:

Department of Lands - Senator Sverdsten

Outfitters and Guides- Senator Beitelspacher

Department of Water Resources - Senators Ringert and Peavey

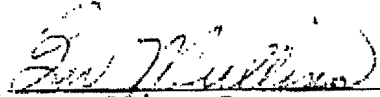
Department of Fish and Game - Senators Crapo and Horsch

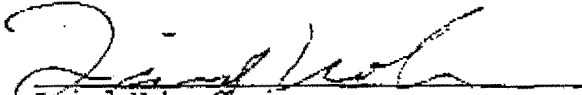
Chairman Noh said he had hoped to have the Swan Falls legislation ready for introduction today. However, some technical errors were found in two of the bills so he will hold all the bills and they can all be introduced at one time. There will be four bills to introduce in the Senate and one in the House.

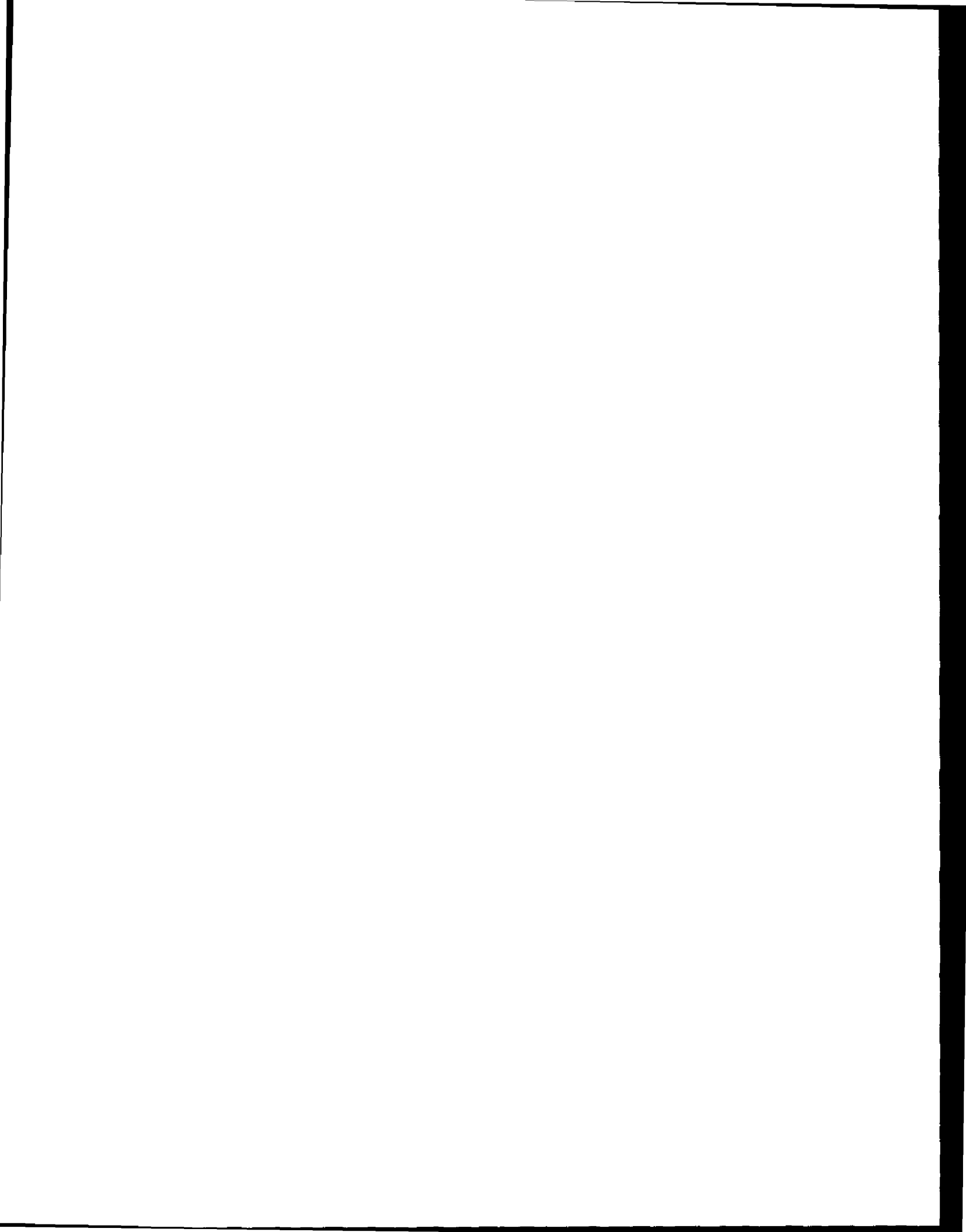
The meeting on January 11 will be a presentation by the Department of Parks and Recreation.

In the near future, the Chairman said he hopes to arrange to have a representative of the U.S. Forest Service meet with the committee. He will also try to get someone to speak to the committee on the Priest Lake land exchange.

The meeting adjourned at 1:50 p.m.


Bev Mullins, Secretary


Laird Noh, Chairman



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 11, 1985

Rm 433, 1:30 P.M.

PRESENT: All members of the committee were present.

Chairman Noh called the meeting to order.

Senator Beitelspacher moved and Senator Ringert seconded the minutes of the previous meeting be approved as written. Motion carried.

RS 10886 PROVIDE THAT GAIN ON SALE OF PUC WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

The legislation would clarify the appropriate rate-making treatment of gain upon sale of a public utility's water right for hydro-power generation. The bill expressly states such sale would benefit the ratepayers.

MOTION Senator Peavey moved and Senator Beitelspacher seconded the RS be sent for introduction. Motion carried.

Senator Ringert did express that he had problems with the concepts of the bill.

RS 10887 REVOKE PUC JURISDICTION

The legislation would provide a legislative determination 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 would also revoke PUC jurisdiction to reach a contrary finding.

Pat Costello, from the Governor's office, explained this would only be a session law and would not be codified. There would be no need to put it in the code, but it will be the law.

Senator Ringert said he had some problems with the statement of purpose as felt it went beyond what is necessary. He also wanted to know where in the package this bill would be.

Pat Costello pointed out these bills are a package and need to be passed as a package.

MOTION: Senator Beitelspacher moved and Senator Peavey seconded the RS be sent for introduction. Motion carried.

RS 10923 PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATIONS AND SUSPEND ISSUANCE OR FURTHER ACTION ON PERMITS OR APPLICATIONS.

The purpose of this legislation is to provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water right permits or other action on permits or permit applications when necessary. It would also give the Director the authority to promulgate rules and regulations.

MOTION: Senator Peavey moved and Senator Kiebert seconded this RS be sent for introduction. Motion carried.

Senator Ringert said he had some reservations about the legality of some points of the legislation. One point mentioned was why was it necessary for it to apply to every stream in the state.

Pat Kole, Attorney General's office, said there would be a problem with changing the language as to get concessions in the language, all three parties would have to agree. Also, there are problems with other streams in the state.

RS 10984C1 WATER RIGHTS FOR HYDROPOWER PURPOSES

The 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.

MOTION: Senator Peavey moved and Senator Beitelspacher seconded the RS be sent for introduction. Motion carried.

The Chairman asked for discussion on when the committee would like to have the bills before them for discussion and it was decided they would be on the agenda January 18. A Public Hearing would be held on January 21.

Bob Meinen, Director, Department of Parks and Recreation introduced the members of the Park's Board. He then presented a short slide show and general summary of what the Department is doing and some of their needs. He feels the Department should be maintained at its present level and improvements made. He feels the Department does play a vital role in the

state. In his presentation before JFAC, he said he asked for the fund shift be shifted back to the capital improvement account. He also is asking for nine full time employees. As to where the department is going, he sees the necessity to put the department in a stable financial condition to take care of the parks and their maintenance. Also to work hand in hand with the Tourism Department. He sees no major undertaking, but rather good management and efficient use of the resources they have.

The meeting adjourned at 2:30 p.m.


Laird Noh, Chairman


Bev Mullins, Secretary



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 18, 1985

RM 433, 1:30 p.m.

PRESENT: Chairman Noh, Senators Beitelspacher, Budge, Carlson, Chapman, Crapo, Horsch, Peavey, Ringert and Sverdsten. Senators Little and Kiebert were absent.

SB 1008 WATER RIGHTS FOR HYDROPOWER PURPOSES

Pat Costello Mr. Costello, representing the Governor's office, was the first to discuss SB 1008. He explained the Attorney General's office has provided a written outline of the two pieces of legislation (which is attached to the minutes). He briefly went through the sections and explained how SB 1008 fitted into the overall agreement.

SB 1006 TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATION.

This legislation will provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water rights permits or other action on permits or permit applications when necessary. It would also give the Director the authority to promulgate rules and regulations. This authority is necessary in order for the Department to carry out 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. He pointed out the only addition to this bill was the "so-called moratorium authority." Since the Swan Fall's lawsuit the Director has been imposing a moratorium and this law would merely confirm the authority. It would also give him authority to promulgate rules and regulations.

Pat Kole Mr. Kole, from the Attorney General's office, briefly went through SB 1008 by sections further explaining the legislation. He brought out the negotiators had two choices in Section 1; to redraft the Section or just make some additions, which they choose to do. Addition was made for a procedure to notify interested groups of new applications when it was in excess of 10 cfs acre feet. 42-303B does not change the public interest standard but is to put it in balance. Section 4 would meet the criteria for reviewing outstanding permits without creating liability to the state.

Tom Nelson Mr. Nelson, the attorney for Idaho Power, gave a status report on the various components of the agreement. Certain things were required as a condition of the agreement. The filing with the Idaho PUC has been done. PUC will await legislative action. The FERC filing has been made and the time for intervention has been run. One intervention by the National Marine Fishing Services, an

agency of the Department of Commerce has been filed. This seems to relate to the water budget under the NW Power Act. The bill on adjudication and related funding is in the House Resource Committee. The Bill on PUC jurisdiction is printed and is in the Senate State Affairs Committee. The Company made the decision no filing was needed with the PUC of Oregon so it was not done. It was filed with no formal request for action. The proposed amendments to the State Water Plan have been made and the Water Resource Board will begin hearings on January 28 in Idaho Falls. Mr. Nelson feels there are alot of elements to the plan and did not want to give the impression the only important one was the minimum stream flow. Equally important part in view of the Company is the public interest criteria. The Company feels it is critical hydro-power be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development. The new public interest criteria, for the first time, recognize that impacts upon hydro generation must be considered by the Director of Water Resources when evaluating applications for diversion of water from those placed in trust.

Senator Noh Asked if someone would explain where we are in settling problems with the cost of adjudication for the city of Idaho Falls.

Pat Costello This question was brought up in the House Resource meeting when it was pointed out by several legislators from Idaho Falls as well as the Mayor of that city that the \$25 per cfs would cause a disproportionate amount of the fee on the city of Idaho Falls because they have roughly 20,000 cfs of hydropower rights there, which would result in them paying roughly 10% of the power adjudication when they generate only 1% of the power. We are looking at changing the formula to the "rated capacity" as being the measure to charge for hydropower. The overall amount to be generated for the adjudication from hydropower would remain constant at about 7.4 million overall for hydropower which is roughly what agricultural users would pay, but it will be based on number of cents per rated capacity.

Senator Noh Senator Noh said he understood the original formula had been reviewed by the city of Idaho Falls and approved but they subsequently discovered they had made mistakes. The error shouldn't be blamed on the people who developed the fee structure.

Senator Crapo Asked if the rate schedules had been broken down.

Pat Costello Said he had that available and handed out copies. (Attached)

Senator Ringert What is the public interest that has been referred to? How is it defined?

Pat Kole The public interest determination required pursuant to 203C is defined in 42-203C, 1-5. Those are the only factors the Director

will be considering in this particular determination. It is actually a two tier process. The Director initially considers all of the factors listed on page 2, par. 5, line 21. After that determination has been made, the Director then goes over to 203C and if the water is available because of a subordination condition, he then is required to make additional public interest determination as specifically defined in 203C-2A.

Senator Ringert Are you saying then the Director will not have authority to expand public interest beyond what is stated in this legislation in 2A?

Pat Kole As I understand it, he would have the ability to more closely define what those factors are. He would not be able to adopt a rule and regulation that is in conflict with the specific criteria established here. If this bill did not pass, he would have to develop criteria on a case by case basis as each individual application came before him.

Senator Ringert Would someone explain why is it necessary to establish a trust for the 600 cfs water above the minimum stream flow available for appropriation.

Tom Nelson In the course of the negotiations, in the final stages, we were "laugerheaded" on the question of whether the Company's water rights above the minimum flow, would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone else's use. It was the Company's position then and still is, that you have an additional argument that the River is fully appropriated if you leave that hydro right in place until such time as it is reallocated pursuant to the statute. It became somewhat of a political problem. The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated, so as far as the agreement goes, it is an unsubordinated block of water. The state then takes that water and places it in the trust, subject to reallocation. This does two things; it makes clear the state's control of the allocation of the water and it left the water unsubordinated. So the Company retains its right to urge the state--or force in the proper case--to use that argument, and that is all it is, under Article 15, Section 3 of the Constitution. The state then does not have to allow the water to go to the first guy who comes down the pike. The trust got around that problem and I think tied it together to a point where it is a little more effective mechanism to accomplish the purchase of the agreement.

Senator Ringert Do you feel this is an effective end run on Article 15, Section 3?

Tom Nelson I don't know. I can't obviously predict it will carry the day, but our position is the argument is worth preserving. I am certain as I stand here, some person with an undeveloped permit who will be adversely affected by this way of doing business, is going to challenge it and think it is an argument worth having.

- Senator Noh Asked if this would be an effective way to protect the minimum flow from appropriation.
- Tom Nelson That is correct. The minimum flow itself is subject to challenge by those people as being effectively a newly recognized instream use with a priority date and someone with a prior permit could take that water in spite of your minimum flow.
- Senator Ringert Does the state have any obligation to the people who took those permits out years and years ago and have been waiting for the problems to be solved.
- Pat Costello Certainly. To the extent that they have detrimentally relied and developed, then they can argue that it is a taking if you extinguish their rights. We are talking primarily about remassaging these undeveloped permits that have not been developed.
- Senator Ringert So, I take it the state feels no obligation unless they have spent money directly on the construction and development.
- Pat Costello We owe them the obligation to treat them fairly, but treated fairly under the new regime of the public interest criteria rather than under the old straight appropriation method.
- Pat Kole A couple additional points. The Hidden Valley Springs case shows the state does have the authority to recall the permits without creating liability, but in this case we have applied "grandfathering in" of anyone who has applied water to the land since the last irrigation season. If you will look at 203D on page 4, each one of those persons prior to having any property right taken from them will have an opportunity for a hearing and explain why their particular project should go forward. So there is procedural due process being applied.
- Senator Crapo As I review this legislation, it could be argued there is a bias against non-agricultural uses. How would a request for water from a non-agricultural use be dealt with, like INEL, particularly under 42-203C,2, (v)?
- Tom Nelson The criteria as written and as we have understood them and as you asked, would effect no application beyond the first two. In other words, if INEL came in and had a major application, first you would have to determine if there was a significant impact on hydropower production. Given the limited consumption of most industrial uses this is pretty difficult. Let's say they had a major use. You would look at (i) on the potential benefits and then (ii) for effect on the utility rates. In industrial settings, that analysis, at least the ones I have seen, would compel you to grant it. Obviously, you would have no impact on the family farming tradition. You might argue that it comes under the full and economical use of the water resources and would have no effect on the 20,000 acres. In that case, you would ignore the agricultural related factors. That was our intent, that the Director would only apply the ones that obviously make sense.

- Senator Crapo If I understand you, under (v) of 42-203C, this could not be used as to industrial uses to argue that the amount allowed could not exceed that which would fit this state's plan for agriculture.
- Tom Nelson That is correct. You also have the policy statements that have come out of the proposed Water Plan amendments which allocate 150 cfs to industrial uses. With that public policy statement in the Water Plan you have probably come a long ways toward approval of this standard in any event.
- Senator Crapo With regard to the 150 cfs that is being allocated for industrial use, is that 150 cfs out of the 600 cfs that is available?
- Tom Nelson That is correct.
- Senator Crapo Would that then be determined as a limit or is that a specified limit or is it a specified minimum or what exactly is intended by this specification of 150 cfs?
- Tom Nelson Senator, as I understand it, it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low. The race is not to the swift for industry as to that 150 cfs. It is there and when they need it, it will be available.
- Senator Beitelspacher In the same line of questioning as Senator Crapo, line 27 and 28 of same section: "no single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination." Does that not in itself preclude some further development of industrial development because of lines 23-25 of (v)?
- Tom Nelson As I say, that is not the intent and to me if you have a solely agricultural factor, such as (b), you couldn't apply it to industrial use. So when the Director got to that one, he would have to ignore it or otherwise the system doesn't make sense. You would only be entitled to develop agricultural uses which wasn't the intent.
- Pat Costello To follow up on (v). The policy referred to the staged development is more fully spelled out in the water plan amendment as drafted and its clear from that, that we are not saying there is a mandate to go out and develop any number of acres. All we are saying is that there is a cap at 20,000. I think what I am hearing is you are afraid this would prevent us from developing up to 20,000 or 80,000 in a four year period; that it would somehow conflict with (v) and that is not the case.
- Senator Crapo Let us suppose that industrial uses came along and used up 50 cfs in a year and enough agricultural applications were made to develop 20,000 acres, would both of those be able to be done in a single year?
- Pat Costello Yes, there would be no conflict.

- Senator Peavey Was there any room for consideration of fish and wildlife values in arriving at these criteria?
- Pat Costello The original reason they were left out is because there were two versions. (1) The plan of the old local public interest that had a comprehensive public interest determination similar to what was in the bill promoted last year by the Governor and Attorney General, which would have subordinated everything and put it through a new public interest review. We found there was resistance even from among some of the conservationist who felt that they did not want the old local public interest wiped out because they felt that did give them a useful tool. We had option 2 which was to leave the local public interest as is and simply add the new criteria that relates to the balance with hydropower, and felt that we certainly did not intend to make the ability to take fish and wildlife into account any less available but that was a separate issue since we are dealing here with protecting hydropower or water for hydropower because after all that was what was at issue in the lawsuit. Having said that, I would further say, it certainly is not the Governor's intention to imply that by leaving fish and wildlife off this list that somehow it is not in the public interest and if it needs to be stated more clearly in 42-203A that fish and wildlife can be considered under the local public interest we would support doing that. However, we are bound, and do support the existing 42-203C as written.
- Tom Nelson I agree with Mr. Costello. I think that the parties are not committed to preservation of 203A in its present form as a part of these proceedings. However, if there is going to be an attempt to change that, I think it should be in the form of a separate bill. We are tied to this program and are committed to it and if we start amending it, we will be in a real mess.
- Pat Kole I would agree with the comments of the other two negotiators. It was our thought that this was not really an issue directly involved in the lawsuit. While there may be concerns on that score, that should be addressed separately by the legislature.
- Senator Peavey In other words, any of us can propose additional criteria outside of this package and it will go on its own merit and that won't change things one way or another I guess. One of the things I thought we should look at is critical livestock range. It is real easy for the BLM to go out and give that range away but the state doesn't have to give the water away. I guess in a separate bill would be the place to address that.
- Senator Ringert Regarding 1006 bill, the second page, line 5 regarding the existing vested water rights. In making this determination, is the Director going to be able to consider the entire gamut or is he just going to look at adjudicated rights? The rights at Swan Falls, whatever they might be that precipitated the present situation, as I recall, they had been adjudicated between two parties back in 1907 or 1909 or something like that and far as

I can tell that is the only final judgement of adjudication that we have in respect to any of those water rights. The whole process was shut down because there was a determination of some sort made in a pending lawsuit that has not reached final judgement. So, what is the standard we are looking at when we use the term "existing vested water rights?"

Tom Nelson

The language was chosen in order to include a Constitutional right not represented by an adjudication, statutory right represented by license, or in my judgement, you can get into a vesting question at a proper stage in a permit process. So my understanding why we selected vested was to pick up water rights that fell into those categories. As far as Swan Falls is concerned, as an example, there are I think 3 water licenses at Swan Falls. In my judgement that is clearly a vested water right. There may be the adjudication as you point out. Probably, as we understand adjudication now it is probably too narrow to be much more than a statement of a constitutional right that is contemporaneous with the use. I think all of those water rights would be considered vested as I understand how that term is used here. Also, since this is broader than Swan Falls, the Director may be entitled to protect a well permit if the well were drilled and the water in use, I think that is vested to the point that the Director could try to protect it by putting a moratorium in an area while say, he looked at a critical ground water designation.

Senator Ringert

To pursue this further. It seems to me this procedure, in effect, will force the applicant to go through the administrative appeal or perhaps take it on up to the court. It further seems, it sort of puts the state in a position of saying, we are no longer going to have free wheeling appropriation. We are going to put the front end burden at least on the intending appropriator more so than in the past.

Tom Nelson

I think it has that potential in a given factual setting. Among my clients one of the things they like least about the present system is the fact that if there is a senior appropriator they have the burden of holding off the junior. They say, "why do I have to do that, I was here before he was—why is it my problem?"

Senator Noh

Under this agreement, what is to preclude a utility from buying up or leasing whatever water they can get their hands on and in effect take up all those remaining waters. As I read this, they are pretty well home free on all purchased and leased water.

Pat Costello

That is correct. They can acquire through purchase upstream stored water which they can run down the river, They are entitled to that and it can't be appropriated between the storage site and the hydro site. They would be free to do that.

Senator Noh

What about water that is lost for instance because someone fails to file a claim by the cut off date. Is that water in a situation where another party would have to file on the Water? Can you lease water that is lost for failure to file a claim?

- Pat Costello No, there would be no property right to acquire in that case. They would have difficulty establishing a right anywhere upstream from their facility because they would not be able to apply it to a beneficial use down below. It is difficult really for me to conceive of them acquiring any right other than a right to a certain amount of storage water in storage in the stream itself.
- Senator Budge Isn't that presently true?
- Pat Costello Yes.
- Senator Noh Where are we with the Spokane River system? If the Governor goes to Washington Water Power and says we want to negotiate a minimum flow so we can have further development and Washington Water Power says no, we won't negotiate. Then where are we?
- Pat Kole First off, I think it is probably not well known, but we have already opened up discussions with Washington Water Power and they have indicated that they do want to negotiate. So I would think the possibility of them absolutely refusing to negotiate is small. If they did, we would of course be in the same type of situation as we were with Idaho Power. We would be in a law suit. They have indicated that if this program passes and if they have the authority to negotiate with the Governor, they intend to do so.
- Senator Noh Looking at future hydro development, say for example on the Salmon River, is it possible for the Director to subordinate those future hydro rights without officially establishing a minimum flow on the stream?
- Pat Costello Yes. Subparagraph 6, under Sec. 2 of the main bill authorizes the Director to impose the subordination condition on new permits and licenses for power purposes. That is not anyway tied to the preceeding five paragraphs so it would be just a straight subordination condition. I think the real question you raised though, if he does that in the absence of a minimum flow, where is that right in terms of the regime established in the preceding paragraph, which talks about the rights below the minimum flow being un-subordinated, and the ones above it being held in trust. Clearly, that regime contemplates there would be a minimum flow there, and that we really did not intend that it would apply across the board if there were no minimum flows in place at that time.
- Senator Ringert Why is the provision in there that authorizes the Director to limit a permit or license for power purposes? Why is this any part of the Swan Falls settlement?
- Pat Kole Basically, there has always been a question as to what the state's authority is pursuant to the 1928 Constitutional amendment. In taking a look at that issue, while there is good authority for the proposition, that amendment was self executed as part of the settlement negotiations as the Attorney General felt there should be some specific authority given to the Director to subordinate hydropower water rights and that is what paragraph 6 does.

- Senator Ringert This agreement I feel is being promoted very heavily. The local newspaper is telling us through editorials that the Legislature should not mess around with the settlement in any way shape or form and I don't see any reason at all for that particular provision which will affect a great deal of small hydrop permits and applications and this tagging along on the emphasis that has been raised to settle the Swan Falls issue. The last one I saw like this was a rider on an 1888 appropriation bill in the U.S. Congress that tied up all the water in the western U.S. and lands for the next three years until they got to the 1891 amendment of the present land law. Will someone tell me why this has to be in the Swan Falls settlement?
- Pat Kole Basically all paragraph 6 does is grant authority and does not require the Director to subordinate hydropower rights nor does it make it mandatory. In certain situations where there is productive upstream land that could be developed, the Director will have to sit down and take a look at whether or not he should subordinate the hydropower right. Obviously the Director's determination cannot be arbitrary or capricious or contrary to the policy set down by the Legislature, then his decision could be appealed in court. I think the reason it is here, it was felt that the Swan Falls situation would not have arisen had the Legislature enacted similar laws back in 1928. The effort here was to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future. That is the reason why it is in the agreement and why we think it is necessary.
- Senator Noh In other words, we might head off a court case and legal costs sometime in the future by acting now.
- Pat Kole That is correct.
- Senator Ringert I think I know why it is here in this bill but nobody has yet said that it is essential to the settlement of the Swan Falls controversey.
- Ken Dunn The primary reason I see it there is to avoid Swan Falls re-occurring again. Without that if Idaho Power decides to build one of the dams they have proposed on the Snake River, we are back in the Swan Falls situation if there isn't clear subordination authority. The same is true on other rivers. It isn't just the small hydro. Virtually all the small hydros are high enough up in the basin that there is no development occurring above them.
- Senator Noh I would like to ask one of the PUC Commissioners to speak as to how they are viewing this agreement and particularly I have heard the question raised that the legislation as drafted to protect Idaho Power from claims for failure to defend their water rights would apply to all waters rather than just those placed in trust. Do you gentlemen feel you will have sufficient authority under the legislation to assure that the Company doesn't dispose of or sell its water rights other than those properly dealt with by this legislation?

Mr. High
PUC

I think the crucial issue with respect to your question is in bill 1007. This legislation I feel is extremely essential because in effect it clarifies the legal status of gains of sales and dedicates the benefits of these sales to the customers of the company rather than the shareholders of the company. It in fact, sets the title of the water in the ratepayers rather than the shareholders. Whatever happens to the other bills, that one should pass.

Senator Noh

How about the other bill that protects Idaho Power from claims by ratepayers. I've heard it argued the bill is too broad and would free Idaho Power from even protecting its unsubordinated water right included within the minimum flow and wouldn't just protect them from ratepayers for that water which in effect is subordinated through the agreement.

Mr. High

Speaking of that water below the 3900 minimum flow, I would think the power company would have no incentive to deal with that water if all the benefits went to the ratepayers. In other words, I can see where the water would be depleted down to 3900 cfs. This figure has been established by negotiation process, taking into account historic flows, updated current projected conditions and there is nothing more uncertain than stream flows and that uncertainty, perhaps the committee would like to take into effect and set aside 150 cfs for industrial future uses as a protection against that uncertainty factor.

Senator Crapo

Are you suggesting then we as a committee in the Legislature specify that certain amounts be set aside as dedicated to industrial uses and specifically subordinate other uses in that amount?

Mr. High

Yes. I think Mr. Nelson indicated that minimum flow has to be tied to the public interest criteria and if you take the minimum flow as something in the public interest, it is rather meaningless if the process gets you down to 3900 cfs and suddenly the long term climatic conditions change and you need to supply new municipal and other needs. A factor in your deliberations on public interest, I would suggest a paragraph be put in recognizing uncertainties and perhaps reserving something more than the 3900 cfs to recognize that.

Mr. Swisher
PUC

As for Senator Crapo's concern, historically water development has been based on the ability to assess the charges to those who gain from a project. Having watched three successive years of surplus run down the river, it seems some state policy, state-wide not just Snake River basin, needs to be put in place for water retention other than pure diversion for beneficial use.

Ward Conley
PUC

Regarding 1005. It seems there is probably no question of the defense provided in SB 1005 being used for anything other than the matters specifically touched on in the contract. It is what lawyers call an affirmative defense. It would deprive the PUC of jurisdiction but first must pertain to something relating to the contract. Looks fine to me.

- Senator Baitelspacher Go to page 3, of SB 1008, between 5 and 6, we have the Governor to enter an agreement defining that portion of a water right being unsubordinated and then on 6, you have the Director having the authority to subordinate rights. As I recall, the Director works for the Water Board which the Constitution and the Supreme Court case we touched on the last few years set up as another entity, so to speak. Do we have a conflict there? Is there another constitutional body in a sense that is outside of the reach of the Governor that has the authority to subordinate water and another constitutional entity that has the authority
- Pat Costello The authority granted under paragraph 5 is to enter into contracts which are not self executing. All this does is really authorize the Governor to go out and negotiate contracts to bring to the Legislature for ratification. None of them take affect unless they are ratified by law and because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water Board, particularly given the passage of the contract.
- Senator Noh Along those same lines, would you care to outline briefly, just exactly what are the limits and extent of the Governor's power to grant water rights through the trust agreement? This trust agreement has sometimes been interpreted as granting the Governor an inordinate amount of authority in determining who gets water and who doesn't.
- Pat Costello Yes, as I was glancing through the Attorney General's testimony I was a little troubled by a statement here that the Governor would be impowered under this to approve of waters to be allocated under the trust. That is not really what is contemplated here at all. This is strictly a passive trust over which the Governor will not exert any active discretions. It is modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The Governor is named as trustee just because you need an individual to be sued in the event of some scabble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands if they are granted in accordance with state law. So, it simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the water as long as the trusts last. It is a passive trust.
- Senator Noh Mr. Kole and Mr. Nelson, do you concur with that interpretation?
- Pat Kole Yes. In looking at page 3 I think that is slightly inaccurate. The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the re-allocation determination. Basically, that last paragraph of the Attorney General's testimony, should read the "Director" will be

impovered and not the "Governor" to release water.

- Tom Nelson Yes, I think it is clear on page 3 the Senator referred to lines 16 through 19, the rights have to be acquired pursuant to state law and unless you change it, the Governor plays no part in that process.
- Pat Kole On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.
- Senator Crapo My question is primarily one of procedure here in committee. Surely everyone knows the answer but me because I am a freshman. But it seems to me we need to leave a very good track of legislative history on this legislation. As I study it it needs clarification in my mind and I am sure there will be alot more testimony and evidence presented. Is it already set up by some mechanism that the testimony which is recorded here today and the prepared testimony presented here today to become part of a prepared record that is maintained so that in the future there can be reference made to it to ensure the intent of the legislation is followed?
- Senator Noh Senator Crapo, my understanding is we have no financial provisions or procedures in precedent to do that. I personally have in mind ensuring that there is more than one copy of the tapes and they are placed in the records of the Department of Water Resources and the Law Library to create as good a record as we can.
- Senator Ringert There is a problem even with the tapes because that is merely a record of the committee proceedings and does not necessarily reflect the intent of the other 30 senators on the floor. It is a very nebulous job in Idaho to determine what is the intent.
- Senator Crapo I am aware of that. As an attorney I do alot of searching through legislative history where its available to figure out what the laws mean. It definitely in my opinion would be beneficial to have as much preserved as possible. For example, the written statement by Attorney General Jones and perhaps encourage those who appear before the committee in the future to be sure that their understanding of the bill is at least represented in the legislative history as something considered and that we make an avenue available for that to be done.
- Senator Budge I think the nature of the legislation itself justifies very accurate records to be available.
- Senator Horsch In the House by majority vote, we spread upon the pages of the Journal a letter of intent. You can make that as long as you want.
- Senator Noh That is correct.

Senator Beitelspacher Back to number 6 of 42-203B, where the Director shall have the authority ...where are we with compensation for the holder of a hydropower right at a later date? In the event I invest a substantial amount of money in a small hydro- right and have it producing and PUC and FERC in their wisdom determine I should receive some compensation from a power company for that and Senator Peavey buys a sheep allotment and decides to water the grass up there. Where am I going to be with my investment once he starts pulling the water out of the creek for his sheep?

Tom Nelson If as is the practice now, your permit was subordinated when issued, you would be subject to Senator Peavey's watering his sheep. If your permit had been subordinated you would be subject to this depletion. If it were not subordinated and the Director decided in his wisdom you should have a chance to get your project paid out before the subordination took effect, then you might be compensated in that situation.

Senator Beitelspacher Is it all up to the Director whether I received compensation or not and is there anything in here that sets up criteria by which he shall determine how much I shall be compensated or is that promulgated by rule and regulation?

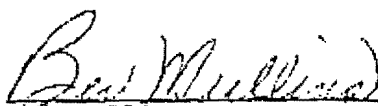
Tom Nelson The compensation issue would follow the subordination issue initially. If you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement that constitutional provision. So if he has no guidance, it is my guess that hen's teeth and unsubordinated power rights from now on are going to be about on a parity.

Ken Dunn One of the things we are trying to do on small hydros, as defined in rules and regulations, is that if just a small amount of water makes a drastic change in economic effect of it, we will issue the permit for a definite period of time. We look at the payout period on the project and at that time look at subordination and where it is necessary, we protect that project for a time so there isn't a danger of economic disaster.

The Chairman thanked all for their attendance and there being no further business before the committee, the meeting adjourned.

Tapes of this meeting will be on file at Water Resource and the Law Library.


Laird Noh, Chairman


Bev Mullins, Secretary

Prepared Testimony of Jim Jones,
Idaho Attorney General

on
Senate Bills 1006 and 1008

Senate Bills 1006 and 1008 are part of the Swan Falls legislative package. Both bills must be passed if the Swan Falls Agreement is to be implemented.

SB 1006

Senate Bill 1006 gives the director of the Idaho Department of Water Resources the authority to suspend the issuance of permits in certain instances and to promulgate all necessary rules and regulations regarding the agency's legislative mandates.

Presently, the director does not have express authority to suspend the issuance of permits. The Swan Falls conflict has made it abundantly clear that this authority is necessary to avoid exacerbating conflicts over the use of water. Though the department suspended issuance of permits and licenses pending resolution of the Swan Falls controversy, if challenged, it may have been required to issue permits and licenses, which would have subjected the department to increased financial liability.

The authority to promulgate rules and regulations is necessary to implement an effective system for the allocation of any water made available pursuant to the Argument. Further, rules and regulations will inform the general public about the

director of the department intends to exercise his legislative duties.

SB 1008

Senate Bill 1008 is the centerpiece of the Swan Falls Agreement. The bill represents a very delicate balance between the interests of hydropower producers and the interests of other water users and the State of Idaho.

Proposed section 42-203 addresses two problems. First, the section provides a method for resolving conflicts over whether an existing hydropower water right is subordinated and, if so, on what basis the water may be reallocated. Second, the section provides that the director shall have the authority to subordinate all future hydropower water rights.

Subsections (1) through (5) of section 42-203B specifically address the Swan Falls controversy. The trust approach embodied in these subsections is an outgrowth of the difficulty the parties encountered in defining Idaho Power Company's Swan Falls water rights. From the outset of the negotiations with Idaho Power Company, the State insisted that it have ownership over those waters made available for future users as part of any settlement. Idaho Power Company, however, insisted that it retain control over any water made available until such time as the water was put to beneficial use.

The State's position that it must have ownership of water allocated to future use was based on the premise that if the Company retained ownership, it would be required to protest

every application for the water, thus frustrating the objective of making additional Snake River water available for appropriation. Further, the State was concerned that a subordinatable water right would be viewed as a sham transaction by the courts and struck down as a violation of Article XV, § 3 of the Idaho Constitution. Finally, the State felt that leaving ownership in the Company did not provide adequate protection for the citizens of Idaho.

Idaho Power Company contended that the State's insistence on complete subordination prevented the State from balancing hydropower benefits against the benefits of proposed uses. The Company wanted the State to use its right as a shield against possible constitutional challenges to the State's denial of certain uses as not being in the public interest.

As drafted, the State possess legal title to all waters previously claimed by the Company above 3,900 c.f.s. As trustee of the waters, the ~~Governor~~ ^{Director of Committee Sec. per At Roll, A} will be empowered to ^{off} release water to any user that complies with existing state law and the new criteria for reallocation set forth in section 3 of this bill. The trust concept, thus, permits the state to assert that the stream is fully appropriated because of an existing claim while at the same time making water available to those uses that create a net benefit to the State.

Though, as is apparent from the previous discussion, the definition of the Company's right was very difficult, a major benefit from the negotiations is the establishment of a framework for resolving similar conflicts on other rivers in the State of Idaho. In order to avoid litigation regarding the State's power to subordinate an existing water right that is claimed to be unsubordinated, holder of a hydropower water right define a minimum flow for its facilities while at the same time receiving assurances that the balance of its claimed rights will not be appropriated unless the State determines that there is a higher and better uses for the water.

As briefly noted above, the State proposes to treat water that is placed in trust by an agreement negotiated pursuant to the authority of proposed subsection (5) of § 42-203B differently from other waters. In addition to meeting existing statutory criteria, a person contemplating the appropriation of trust waters must also satisfy the criteria of proposed section 42-203C.

The criteria set forth in proposed section 42-203C are supplemental to existing criteria. Though the section refers to public interest, it in no way limits the existing local public interest standard of Idaho Code § 42-203. In fact, the use of the term public interest could be misunderstood unless the history of this section is explained. During the early part of the negotiations, a total rewrite of I.C. § 42-203 was envisioned, with the local public interest standard being

incorporated into new public interest criteria. This concept was abandoned when the parties realized that a total rewrite was practically impossible, technically difficult, and tactically unwise. The criteria as written do not and are not intended to remove any existing protection for other in-stream values currently existing under Idaho law. Rather, the criteria are designed solely to guide the director in making reallocation decisions. Section 42-203C is intended solely for the purpose of determining whether a proposed use has greater net benefits to the State than the existing hydropower use. This section will not come into play unless the director determines that existing criteria are satisfied.

The criteria in 42-203(c)(2)(a) identify those factors that are critical to the determination of whether the proposed use is preferable to the continued allocation of the trust water to hydropower. Since the premise is that some future uses are desirable, the negotiators believed that the burden of proof should be placed on the protestant. Only if the protestant establishes a basis for its claim of adverse impact on hydropower needs will the applicant be required present evidence of public benefits flowing from the proposed use. It is very important to note that the water held in trust by the State subject to reallocation is tied to state law and not the public interest criteria. This is very important because it gives the State flexibility into the future. If the public interest criteria is not, after trial and error, precisely what the

legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.

Aside from providing a mechanism for resolving the subordination issue with regard to existing hydropower water rights, proposed section 42-203B(6) declares that the director may subordinate any future applications for hydropower use. This subsection is an express implementation of Article XV, § 3 of the Idaho Constitution. Clarification of the director's authority to subordinate hydropower use will ensure that future uses of the unappropriated waters of the state will not be precluded by future hydropower projects.

RECOMMENDED ADJUDICATION COST SHARING
For Snake River Above Lewiston

ADJUDICATION COST	\$ 27,369,000
(Discounted at 10% to July 1, 1986)	19,035,000
 CLAIM FEES	
\$50 per claim X 61,694 water rights	\$ 3,084,700
\$25 per claim X 52,332 domestic & stockwatering rights	1,308,300
 VARIABLE WATER USE FEES*	
Irrigation: \$1.00 per acre X 3,700,000 acres	\$ 3,700,000
Hydropower:	
\$25/CFS x 259,441 CFS Private or Municipal	6,486,000
\$25/CFS X 29,815 CFS USBR or COE	745,400**
Aquaculture: \$10 per CFS X 13,631 CFS water rights	136,300
Municipal: \$100 per CFS X 1,161 CFS water rights	116,100
Industrial: \$100 per CFS X 6,493, CFS water rights	649,300
Miscellaneous: filing fee only	0
Public: \$100 per CFS X 20,315.6 CFS water rights	<u>2,261,600***</u>
	\$ 18,487,700
 STATE SEED MONEY	 <u>1,000,000</u>
	\$ 19,487,700

* Claimants are allowed to spread variable water use fees exceeding \$1,000 over as many as as many as five annual payments with 10% interest accruing on the unpaid balance. Monies in the Adjudication Account would be invested by the Treasurer, with interest accruing to the Account.

** This revenue is based upon the power plant capacities of the federal facilities.

***\$2,131,300 of this is a state obligation. This figure includes \$230,000 for raising the minimum flow at Murphy gauge from 3,300 CFS to 5,600 CFS in the winter. It does not include a \$1,300,000 fee that would result from setting a new minimum flow of 13,000 CFS at Lime Point.

CAUTIONS:

- 1) Water use numbers may be overestimated due to doublecounting, thus lowering revenues. The amount of water use on unrecorded rights is unknown.
- 2) The number of actual water rights is similarly unknown.
- 3) If all parties are not assessed within one year, revenues will be lower.
- 4) While domestic and stockwatering rights have been included in the adjudication, the cost of processing these claims has not been included and is unknown.

NUMBERS OF IDAHO WATER RIGHTS

USE	ABOVE SWAN FALLS		LEWISTON & ABOVE		ENTIRE STATE	
		%		%		%
Irrigation	32,137	88.4%	51,968	84.2%	61,441	83.3%
Hydropower	651	1.8%	1,267	2.1%	1,620	2.2%
Aquaculture	722	2.0%	1,063	1.7%	1,141	1.5%
Municipal	390	1.1%	773	1.3%	964	1.3%
Industrial	977	2.7%	2,745	4.4%	3,638	4.9%
Miscellaneous	742	2.0%	1,631	2.6%	2,202	3.0%
Public	747	2.1%	2,247	3.6%	2,743	3.7%
TOTAL	36,366	77	61,694		73,749	
Stockwater	8,601		19,836			
Domestic	10,026		32,496			
Subtotal	18,627		52,332			
GRAND TOTAL	54,993	100	114,026			

NOTES:

- 1) These numbers have been enlarged from the number of water rights actually on record by a factor of 1.74, which reflects the number of unrecorded water rights that past adjudications have turned up. Thus, these estimates may be high for some uses, particularly those with smaller numbers. In addition, some rights may be doublecounted under more than one use, when, in fact, one use is primary.
- 2) The number of water rights holders varies considerably from the number of water users. A single water right held by a municipality or irrigation district may serve hundreds of users.
- 3) Industrial uses include: industrial, mining, commercial.
- 4) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 5) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.

MAXIMUM ENTITLEMENT OF WATER RIGHTS

	ABOVE SWAN FALLS		LEWISTON & ABOVE	
	CFS	1000 AF	CFS	1000 AF
Irrigation	140,930.0	101,850	184,770.0	133,533
Hydropower	163,062.0	117,845	289,256.0	209,045
Aquaculture	13,404.0	9,687	13,631.0	9,851
Municipal	723.0	523	1,161.0	839
Industrial	2,268.0	1,639	6,493.0	4,693
Miscellaneous	14,170.0	10,241	15,247.0	11,019
Public	5,802.6	4,194	20,315.6	14,682
TOTAL	340,359.6	245,979	530,873.6	383,662

Notes:

- 1) Water use may be doublecounted, particularly for miscellaneous and public uses. The same water right often lists several beneficial uses, of which one is primary. Thus, these numbers probably represent upper limits for the more minor uses. In addition, these figures include applications not as yet approved for all uses besides hydropower. Hydropower includes only permits, licenses, claims, and decrees.
- 2) Industrial uses include: industrial, mining, commercial.
- 3) Miscellaneous uses include: recreation, private fire protection, individual heating or cooling, aesthetics.
- 4) Public uses include: wildlife (mostly held by Forest Service and BLM), water quality improvement, minimum instream flows.
- 5) Domestic, stock watering, and groundwater recharge uses have been dropped. These rights are not normally disputed, but need to be quantified.

Division of Financial Management
 1.17.85
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RESOURCES AND ENVIRONMENT COMMITTEE

PUBLIC HEARING

MINUTES

TIME: January 21, 1985, 7:00 P.M.

PLACE: Room 420, Statehouse, Boise, Idaho

SUBJECT: SB 1006 and SB 1008 RELATING TO SWAN FALLS AGREEMENT

PRESENT: All members of the Senate Resources Committee except Senator Kiebert. Fourteen members of the House Resources Committee were also present.

The hearing was chaired by Senator Laird Noh who explained the hearing was for the purpose of hearing testimony on the multi package agreement dealing with Swan Falls. The main two bills for consideration tonight are SB 1006 and SB 1008. Briefly SB 1008 would implement the state's authority under the 1928 amendment to the Idaho Constitution to limit and regulate the use of water for power purposes. It would also add notice and publication requirements when the Department of Water Resources receives a water right application and sets out the nature and extent of water rights for power purposes.

SB 1006 is to provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water right permits or other action on permits or permit applications when necessary. The bill would also give the Director the authority to promulgate rules and regulations.

There were nine people who signed up to testify before the meeting with two more asking to testify at the meeting. There were approximately 75 people in attendance. The three parties who worked on the agreement were also represented; Pat Kole from the Attorney General's office, Tom Nelson, representing Idaho Power and Pat Costello from the Governor's office.

PAT COSTELLO, the Governor's chief legal advisor, explained the bills are part of a larger compromise package that was arrived at between the Governor and Idaho Power and Attorney Jim Jones this summer and late fall. The agreement came about from a controversy over hydroelectric assets and other beneficial uses, especially agriculture. In the past several years interests have been at odds at how we should allocate the water of Snake River. After years of struggling over this issue the Governor concluded it was essential at this point to end this controversy if possible and to try and come up with a fair compromise that balanced the interests. The five pieces of legislation that have been introduced so far in the legislature as well as one that will be introduced in the next week or so, are the core of the agreement that was entered into. In order to implement the agreement, all of these pieces of this legislation need to pass. Mr. Costello at this point briefly went over the legislation pointing out the various features of the agreement and the reasoning behind them. A final

benefit in this agreement is that hopefully agreement can be reached without enormous litigation costs to the state and power company and ultimately to the ratepayers and without an inordinate delay. If the legislation is adopted, the Water Resources Department by the end of the year will be able to begin processing applications for water uses on the Snake under the new management criteria we have proposed.

PAT KOLE, from the Attorney General's office, said three results were attempted in the negotiations. The first, to give effect to the philosophy that Idaho water belongs primarily in the state of Idaho and used here. Secondly, that decisions as to the use and allocations of Idaho water must be made here by Idaho public officials and third in the future in order to protect Idaho from potential threats not only from the federal government but from our downstream sister states, we needed to get this issue resolved and present a united front to protect our water users. I believe the agreement that we have arrived at achieves all three of these goals. The important thing is that where the line is drawn is not magic, but what has been achieved is if the line has been drawn in the wrong spot, the legislators will be able to come back and redraw the line in the future at a different spot. Believe that is an important element of this package. It restores control over Idaho water to members of the legislature.

TOM NELSON, attorney for Idaho Power, believes there is one thing to keep in mind on this. The approval of this package is necessarily chopped up, so you only see pieces of it now and then in the legislature. Remember it was negotiated by us and approved by the principles as a package and should be accepted or rejected as a package. For your information as to where the rest of the conditions for implementation are, a petition has been filed with the Idaho PUC by the Power Company. The PUC has deferred action on that petition until the legislature has acted. A petition has been filed with the FERC and the time for intervention has run and to my knowledge there has been one intervention by the National Marine Fishery Service at the Federal Energy Regulatory Commission. The bill on adjudication was introduced for printing today in the House and a bill on PUC is in the Senate State Affairs. The Company determined that no filing was needed with the PUC of Oregon so none has been made. The amendments to the state water place have been proposed to the Water Resource Board and they will be going to public hearings beginning next week. It is recognized there are pieces of this agreement no one loves, but as a package, it is a rational, well balanced, resolution of the litigation that fostered the negotiations.

MARJORIE G. HAYES, Idaho Consumer Affairs, spoke against the legislation and would like to see the Swan Falls water continue completely unsubordinated. (A copy of the testimony is attached)

SHERL CHAPMAN, Director of Idaho Water Users Association, Inc., spoke in favor of the legislation. In a recent convention of water users here in Boise, after much discussion, the members voted with the except of a few members, to support this package. It is the feeling it is time to settle this issue which he had fought long and hard, but now feels this agreement is a fair way to settle it. They urge favorable consideration of the bills.

HAROLD C. MILES, speaking for the Golden Eagle Audubon Society and the Idaho Wildlife Federation, was not in favor of the legislation as he believes it does not serve the public interest of most Idahoans nor take steps to preserve its fisheries, recreation, riparian, water fowl and raptor values. Also the low electrical rates in the state due principally to the Company's large hydro generating capacity is an economic value to Idaho's economy. (A copy of the testimony is attached).

BEN CAVANESS, attorney from American Falls, speaking for himself, said SB 1006 is relatively non-controversial. Water users have no objections to this but hope that the Director of Water Resources would not keep a moratorium indefinitely but make some decisions on permits. As a water user and an attorney who works extensively in the water area, he felt that the overall package is a fair one for all concerned and as fairly as possible reconciles the conflicting uses for the limited resource of water in this state. He commended both bills and asked for a favorable consideration.

FRED STEWART, a water user, spoke against this agreement, as he believes it sets up a vehicle to give our water to California. Mr. Stewart's testimony covered a "wide" range; from the bills in question to the history of how this problem came about. He strongly opposes the agreement. (Some supporting information he handed out is attached).

FORREST HYMAS, speaking for the Idaho Water Rights Defense Group, made up of business people, agricultural interest, recreational interests, professional interests and domestic interests, spoke in support of the two pieces of legislation. He said not all the people in the lawsuit were released by Idaho Power, but they realize they will have to live by this agreement. When the people of the state look at this agreement, it would seem this is the best agreement for the people of the state.

SENATOR HORSCH, I am sure your group has analyzed this legislation. Do you see holes in this legislation that would give our water to California?

MR. HYMAS We do not see this as a problem as the public interest criteria would cover that.

JOHN HATCH, Director, Public Affairs for the Farm Bureau, said as a whole the Farm Bureau does support the agreement. The Bureau has been involved in this issue since its inception. It has been a very difficult issue for the farm community and it has been difficult for them to accept the package. It is a compromise and I would urge the Committee not to tamper with it. The following policy was adopted at our convention in December: "We support a state of Idaho negotiated settlement with Idaho Power as a solution to the Swan Falls issue. This should include a contractual agreement by Idaho Power to allow state appropriation of water for upstream development down to the statutory minimum flow of 3900 cfs in the summer and 5700 cfs in the winter at Murphy. This also should include complete adjudication of the Snake River and its tributaries above Lewiston to be paid for by an equitable distribution of the costs among all said parties."

JOHN RUNFT, attorney, representing the Salmon River Hydro Company. This company consists of 27 small hydropower projects. All of these projects are located on

the main reaches of the main Salmon and the Little Salmon, all well above Swan Falls. All of these projects have received preliminary permits from FERC or exemptions or have licenses pending. All are bona fide projects that are under way. He is not here tonight to attack the agreement, but rather here to make some comments on the bills that he feels would add to the overall agreement and addressing concerns of the small hydropower projects. Mr. Runft felt several provisions affecting small hydros should be clarified or changed. He expressed concern about their water permits which might be too short to allow economic development. (Statement attached)

PAT FORD, speaking for himself, expressed support for SB 1006 and directed his comments toward SB 1008, looking at that bill from the point of fish and wildlife and recreation; specifically at the public interest criteria. He expressed that this was a fragile package and hoped his comments would be taken in the spirit of helping to make this bill a better one. His comments were directed toward the five criteria for public interest with regard to fish and wildlife and recreation which he feels have not been dealt with adequately and feels they can be dealt with without destroying the entire package. He urged the consideration of adding the criteria that does mention fish and wildlife and recreation in the same way hydropower is mentioned.

AL FOTERGILL, Director of Idaho Coalition, felt the electrical consumers would be paying a very high price for the benefit of new irrigation development and the agreement could be made fair with an amendment requiring other consumers to be fully compensated for the cost of reducing the Snake River's flow and for the cost of serving new irrigation or other major additions to energy demand created by reducing the river's flow. The PUC could determine what the costs are and impose charges on the new loads to recover the cost. In summary, the interest of consumers was ignored when this agreement was put together.

ART MARTINS, representing the Little Pilgrim Irrigation Company, believes this agreement is a job well done and the answer to a situation that has been unresolved for too many years. (Testimony attached)

There being no more people wishing to testify, the meeting was adjourned at 9:30 P.M.


Laird Noh, Chairman


Bev Millins, Secretary



IDAHO CONSUMER AFFAIRS, INC.

AFFILIATE OF CONSUMER FEDERATION OF AMERICA

OLD BOISE / 106 NORTH 6TH / SUITE 3 / BOISE, IDAHO 83702
TELEPHONE: 208 / 343-3554

HEARING BEFORE THE LEGISLATURE ON THE SWAN FALLS ISSUE January 21, 1955

Mr. Chairman... Gentlemen,

I appeared before you last year on this issue and was the next to the last to be heard... This gave me time to hear Mr Ferry Swisher of the Idaho Public Utilities Commission as he gave his impassioned appeal to this body not to get into this Pandoras box because of the legal ramifications that would ensue from a "taking" of a water right from The Idaho Power Company. He warned that a Circuit Court Judge in San-Francisco would be making a determination upon a subject about which he had very little knowledge... That Judge would be determining the future of our water in Idaho... After he left, a lawyer, who had earlier identified himself as the legal counsel for a group of Irrigators, called out that Mr. Swisher did not know anything about water and this was picked up and repeated all around the room. I couldn't believe my ears, for water is the base of our hydro-electric system in Idaho and Mr. Swisher is one of our three Commissioners on Energy... To show his ability to assess a problem we now only have to look at a case that is on file at the Public Utilities Commission. A Declaratory Order there is awaiting the outcome of this Legislative Session. It states "Regarding Agreement Dated October 25, 1984, among the State of Idaho, by and through the Governor, John V. Evans, in his official capacity as Governor, Jim Jones in Official Capacity as Attorney General of the State of Idaho, and the Idaho Power Company... It would appear that the Idaho Power Company Officials are putting on public notice that any effect upon the Idaho Power Company's hydro generation by this taking process will not be grounds for a finding or an order reducing Idaho Power Company's present or future revenue requirement or any future rate, tariff, schedule or charge... One cannot help but admire Idaho Power Company's percipency, for they are a business and must keep financially healthy, but I tremble for the rate payers in the Idaho Power territory, for we may very likely be paying for a dead horse, if this madness of dividing up another's resource continues.

Another aspect to this case is again in the legal area... If the Govern and the Attorney General of this State can take a water right that has been declared by the Supreme Court of the State (opinion # 49, 1983) as being unsubordinated to upstream diversion and consumptive use, what is going to stop them or any future Governor and Attorney General from doing the same to you, and you, and you? This is a dangerous precedent both for now and for future generations.

There is another road that we can choose... maintain the 6,065 cfs, which has been the average minimum daily discharge at Murphy for the past twenty three (23) years (records of the United States Geological Survey) and let it work for us to help replace the very scarce capital that is the root of our struggle to meet the economic needs of our schools, our social programs, our build-industries, and our Service Organizations in Idaho.

For there is a very exciting movement taking place in the Northwest... Our own Peter Johnson, who as you know is the Director of the Bonneville Power Administration, is returning the cheaper preference power to the public to whom it was, by law, originally intended (see chp 720, 75th Congress, 1st Session, Aug 20, 1927). He is doing this through the Investor Owned Utilities of which Idaho Power Company, is one.

This is the essence of the plan that is being proposed:

" The Firm Displacement Power Concept was first proposed as a rate in BPA's 1985 Rate Case. The concept would allow utilities to buy power from BPA to serve their Pacific Northwest loads, displacing power from their own generating resources currently used to meet regional loads. This would increase the amount of power the utilities would have to sell to California on a firm basis."

The key to this concept is firm power; for the Northwest Utilities have been selling their surplus non-firm energy to California for years at unbelievably cheap rates... My husband and I attended an Energy Conference in Seattle, Washington where this concept was under discussion. We were told by one of California's Energy Commissioners that they were buying non-firm power for "mills", but would be willing to pay anywhere from five (5¢) to nine (9¢) a kw hr. (depending upon our skill in bargaining) for firm power... With firm power, a power upon which they could depend, they could moth-bull their costly oil fired plants... At the minimal five cent (5¢) per kw hr we could superinsulate every home and mobil home in the Pacific Northwest Utilities Service Areas. (thus generating an additional source of energy)... This should be done without cost to the Consumer, for they have initially paid, through their taxes, for the development of the preference power which will be sold by the BPA to make this plan possible.

A Bureau of Reclamation Water Report for Brownlee shows that over a fifty (50) year period there have been seven (7) dry years which leaves forty three (43) years with average or better water... In order for the Investor Owned Utilities to protect their own Consumers from rate increases during those short fall years a sum should be set aside to purchase power. The true interest, adjusted to inflation, could go to the Investor Owned Utilities for collecting, handling, and book-keeping costs for this operation.

One more point... There is very likely a possibility that the Investor Owned Utilities will really get involved in going after energy to market. A very negative conotation would be a shift to the development of low head hydro in the anadromous fish spawning streams... These fish require pristine water for spawning and rearing purposes ... We should consider putting in place the following:

- (1) A moratorium on any development in the anadromous fish spawning areas of our State for we are going to need to restore that high grade protien source for a rapidly expanding National and World Population.
- (2) We are going to need stiff building codes to protect the integrity of a super-insulation program. It is my understanding from talking to some of the people at the Kood River Project that the States of Oregon and Washington already have these in place in anticipation of an early start.

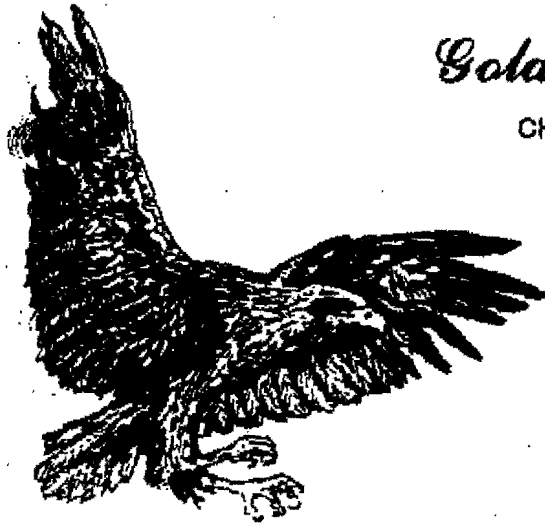
In summary it would appear that we have the following choices to make,ie

(1) To continue the subordination of the Swan Falls water, which by Court Decree has been determined to belong to another... A taking process

(2) Leave this decision to a lower court, where it belongs, hoping that they will sustain the Supreme Court Decision for now ... letting this water stay in the Snake to help generate capital for our schools, our social programs, our building industries, and our service organizations... If, in fifteen (15) years or so, the vast agricultural surpluses have been reduced and we would not be further jeopardizing the price for farmers by over-production, we might take another look at this issue... for if the water is left in the Snake for the production of energy, it is not going anywhere... There is another very important factor to consider here... California is becoming desperate for water. If our hydro system is working to produce energy for them, they are not likely to cut their own throats to get at our water.

Marjorie G. Hayes
Marjorie G. Hayes
Idaho Consumer Affairs, Inc.

WE CARE ABOUT YOU.



Golden Eagle Audubon Society

CHAPTER OF THE NATIONAL AUDUBON SOCIETY
P.O. BOX 8261, BOISE, ID 83707

January 19, 1985

TESTIMONY OF THE GOLDEN EAGLE AUDUBON SOCIETY &
THE IDAHO WILDLIFE FEDERATION submitted to the
Idaho Senate Resources and Environment Committee
on Monday, January 21, 1985 in Boise, Idaho., by:

Mr. Harold C. Miles, Authorized spokesperson for
both organizations.

Chairman Noh and members of the Committee.

My name is Harold C. Miles, residing at 316 Fifteenth Ave. South, Nampa, Idaho 83651, and I am representing the Golden Eagle Chapter of the National Audubon Society, and the Idaho Wildlife Federation affiliate of the National Wildlife Federation at this hearing concerning S.B. 1006 and S.B. 1008 in particular, consequently we wish to submit the following changes and comments to these proposed pieces of legislation; first, thanking the Committee for allowing us to present testimony concerning our views regarding the Swan Falls controversy.

Relative to S.B. 1006, we request that at the end of the sentence in Section 1 (3) instead of the period after the word "water" a comma be inserted and the following words be added, "to insure an adequate supply of water, at all times, in all major streams to support the game fish fishery."

As previously stated, we have grave concern regarding S.B. 1008, consequently, we propose the following additions and deletions to this bill's language.

Section 1 (5)(d) lines 30-32, we feel limiting water to only those with sufficient financial resources, as the language implies, will preclude small irrigators from further irrigation development.

Section 1 (5)(e) line 34, after the word use, a comma instead of a period, adding, "and maintaining the sport fishery in the local streams in accordance with the recommendations of the Idaho Department of Fish & Game".

Section 2 (1) line 5 after the words "minimum flow" insert a comma instead of a period and adding, "providing Idaho Power Co's (IPCo) water rights for its Swan Falls Dam are maintained in accordance with the 1983 opinion No. 49 of the Idaho Supreme Court."

Section 2 (2) line 16, after the word "Idaho," strike the following sentence which ends on line 18.

Section 2 (3) line 24, after the word "Idaho," strike the following sentence which ends on line 26.

Section 2 (5 & 6) strike these two subsections beginning on line 32 and ending on line 48.

Section 3 (2)(a) line 13 after words, "shall consider" remove ":" and add, "maintaining adequate stream flows to maintain the sport fishery in accordance with the latest stream survey of stream's reaches, or the recommendation of the Idaho Department of Fish & Game in the absence of a survey for that stream or its affected reaches:"

Section 3 (2)(a)(i) line 15 after word "economy" remove ":" and add "including fishery and recreational values;"

Section 3 (2)(a)(ii) line 19 after word "impact ;" remove ";" and add "such costs shall be fully born by the holders of any newly acquired water right:"

Section 3 (2)(a)(iii) line 20 after word "tradition;" remove ";" and add "to be defined as those persons living on the family farm or within 100 miles adjacent thereto;"

Section 3 (2)(a)(v) line 23 after the word "Murphy gauge" strike the remaining words of the sentence and the next sentence through line line 28 and insert the following "no additional water permits will be issued by the Director for new irrigated land development until such a time as all the agricultural acreage removed from agricultural production under any of the U.S. Department's acreage limitation programs are put back into agricultural production and the value of the crops raised thereon shall equal parity, based on the U.S.D.A's definition of parity."

We hold this proposed S.B. 1008 violates the "Public Trust Doctrine" relied upon by the Idaho Supreme Court in its 1983 Opinion No. 49, regarding the subordination of IPCo's water rights at Swan Falls. In this connection, we respectfully call the committee's attention to the fact that the U.S. Circuit Court for the District of Idaho decreed in 1907 that the Trade Dollar Mining Co. had a 10,000 CFS water right for their Swan Falls Dam, which IPCo acquired when it purchased Swan Falls Dam from the Trade Dollar Mining Co. In addition, IPCo acquired a 4,000 CFS water right, License No. 14,362, on July 29, 1919, which was 9 years before the Constitutional Amendment to the Idaho Constitution was adopted in 1928, which Governor Evans referred to in his January 8, 1985, "State of the State" address to the Idaho Legislature.

The "Public Trust Doctrine" should not be violated by the Idaho Legislature. If it does, such action is tantamount to stealing navigable water, with its many beneficial uses, from All the people of the State of Idaho, in our view.

The Idaho Legislature does not have the Legal, let alone the MORAL right, to reduce the flow of the Snake River to the extent that such reduction seriously harms the Snake River fishery below Swan Falls Dam, ^{in our opinion,} and should take note of the 1976 survey made by the Idaho Fish & Game Department that a minimum average of 5,500 CFS is required in the Snake's reaches from Swan Falls to Brownlee Reservoir. In addition, we call the committee's attention to the fact that the average minimum daily flows of the Snake at Murphy from 1961 through 1983, was 6,065 CFS and the average instantaneous flow for this same time period was 5,616 CFS, according to USGS records. Thus, reducing the flow at Murphy will be catastrophic to not only the fishery below Swan Falls, but the hydroelectric generating capacity of IPCo's major generating facilities since Brownlee requires 33,000 CFS to operate all 5 of its generators at full capacity and 20,400 to operate the 4 smaller units at full generating capacity. Also, on July 1, 1977 the inflow into Brownlee Reservoir would have been only 3,111 CFS if the flow at Murphy was 3,900 CFS. In addition, we would like to point out that on December 31, 1984, IPCo had 252,592 customers in Idaho, of which only 10,383 were irrigation customers, or 4% of IPCo's total Idaho customers. Furthermore, it is our view, any Golden Eagle/Idaho Wildlife testimony (3)

IPCo irrigation customer, who does not have a
operation and where electrical rates affect his farm's profitability, is at great
financial risk, if the Snake's flows are reduced to 3,900 CFS, for most assuredly
IPCo's irrigation rates will dramatically increase, as will the rates to all of the
other classes of IPCo's customers, if S.B. ^{No. 1008} is enacted into law in its present form.
Furthermore, the commodity prices irrigation farmers will receive, most likely will
be less if additional acreage is put into irrigated production, especially in light
of the proposed reduction in Federal price supports in the upcoming Federal farm bill.

We again call the committee's attention, based on the required minimum flow for
Brownlee Reservoir of 4,750 CFS, the minimum flow at Weiser Gauge, the active storage
of Brownlee Reservoir can be drawn down in 17.4 days with all 5 generators operating
at full hydraulic capacity, or in 31.5 days with only the 4 smaller units operating
at full capacity. Will the upstream developers be willing to pay for the imported
power IPCo will require to serve its customers during the rest of the summer season?

We regard it as the duty of the Legislature to protect ALL of Idaho's citizens'
rights to adequate Snake River Water for preserving its fishery, recreation, riparian
water fowl, and adjacent raptor values. In addition, the committee and legislature
should take note that maintaining IPCo's low electrical rates, due principally to its
large hydro generating capacity, is of as great an economic value to Idaho as is the
raising of surplus agricultural crops, on which Idahoans as well as all U.S. citizens
who pay Federal income taxes, are being taxed in the form of Federal Crop Subsidy
payments, or other farm set aside programs, (see our exhibit No. 1), and noting fur-
ther that in 1984, 677,948 acres in Idaho were held in the Federal PIX or ACR or
ACP programs. Furthermore, the Zilog Company of Nampa recently has stated publicly
that one of the reasons their plant was located there was due to the low rates of
IPCo. Thus, low electrical rates for industry are beneficial for Idaho's economy.

Idaho's electrical ratepayers should not be made the sacrificial lambs of agr-
cultural land developers. Therefore, Mr. Chairman and Committee members, we impl-
you to hold S.B. 1008 in committee, for by no stretch of the imagination can it be
determined its passage will serve the "Public Interest" of most Idahoans. Thank Y

Respectfully submitted, *Harold C. Miles* Harold C. Miles
Golden Eagle Audubon Society/Idaho Wildlife Federation testimony (4)

From: Fred R Stewart
Rt. 4, Box 4824
Jerome, Idaho 83338

To: Members of the first regular session of the 48th Idaho Legislature.

Date: Jan. 14, 1985

Subject: Implementation of Governor John V. Evans & Jim Jones
Agreement with Idaho Power Company. Do not Implement.

Greetings:

As a defendant in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 42237 (Swan Falls # 1) and in Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375 (Swan Falls # 2) I say to you----

DO NOT IMPLEMENT THIS AGREEMENT

If you do you will place 200,000 holders of Idaho water rights in jeopardy. I refer you to page 41 State Water Plan Part Two. "About 215,000 or 84 percent of the existing uses of water are not on record and are subject to some future determination." This Water Plan was adopted by the Idaho Water Resource Board in December 1976 and declared to be the law by the Idaho Supreme court in Swan Falls # 1. In 1978 the Legislature passed Senate Bill no. 1622, Idaho code 42-245 (see enclosure) "Failure to file claim waives and relinquishes right". The cutoff date for filing was set at 6-30-1983 then extended to 6-30-1984 then extended to 5-30-1985. To date only 9,000 have filed. If 6,000 more files by 6-30-1985 that leaves the 200,000 up for grabs to any claim jumper. Ken Dunn, State Water Resources Director, has testified that if this AGREEMENT is implemented that he will start adjudication on July 1, 1985, the day after the cut off date for filing. At this date claim jumping can commence.

I refer you to the AGREEMENT, page 4 Part E. "Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities." What a stranglehold Idaho Power will have on the people of Idaho. All they will have to do on July 1st is obtain a up to date computer read out from Ken Dunn on those that have filed and those that have not filed. You dont think they would do it??? Just considered the 2,000 water permit holders that they filed suit against in Swan Falls # 2. Ninety per cent of who had a superior right to their Dec. 1982 (their license expired in 1970 after 50 years and they were not issued a new one till 1982) they have held these 90% as hostage to try to force this AGREEMENT.

I refer you to Exhibit 4 of the AGREEMENT "AN ACT 61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT." What SALE???? I also refer you to Exhibit 5 of the AGREEMENT SECTION 2 "The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights".

WHY SWAN FALLS ONE and SWAN FALLS TWO and this AGREEMENT????????

Answer---TO TAKE SNAKE RIVER WATER TO CALIFORNIA AND ARIZONA

Consider the following facts--

In 1963 after 20 years of litigation the U.S. Supreme Court awarded Arizona half of California's adjudicated right in the Colorado River. These waters will be taken at the completion of the CAP (Central Arizona Project) in the next two years.

page 3 Stewart's letter to the Legislature

the second part of

1982 In his opinion on SWAN FALLS ONE Judge Allen Shepard goes to great length to show that FPC (Federal Power Comm. forerunner FERC) had insisted on subordination of the Idaho Power's three Hells Canyon dams. But when the FERC issued the 40 years Swan Falls license in 1932 they would not subordinate it. HOW NICE FOR CALIFORNIA. Force the water past Swan Falls but it does not have to go past the three large dams except for the minimum stream flow. (refer to plat)

Dec. 15, 1982 Tom Nelson, lawyer for Idaho power, sent a letter (copy enclosed) to all the defendants counsels in SWAN FALLS ONE in which he says that none of the defendants are going to appeal the courts ruling on the subordination of the three dams (why should the defendants? why not Idaho Power appeal?) dam then they, Idaho Power would like to hook up some irrigation pumps between Swan Falls Dam and the three lower dams. What he does not say is if it is some farmer that wants to hook up a hundred horse power pump or California to hook up enough pumps to convey five to fifteen million acre feet of water to California as shown by the enclosed Modified Snake-Colorado Project plan.

Dec. 28, 1983 Idaho Power filed SWAN FALLS TWO (Case No. 81375) against 7,000 defendants. As stated earlier in this letter 90 percent of them should never been included. Any one with filings before Idaho Power received their 40 year license in Dec. 1982 should never been included.

1948 a ten year moratorium on water diversion studies was put through the U.S. Congress. In 1978 this moratorium was extended for another ten years to run until 1988.

1983 Rep Robert Ligonarsino, R-California introduced a bill to lift the rest of the moratorium.

1930's Powers from the Los Angeles area legally stole the water from from the Owen River Valley. These are the same Powers that are after our waters.

I ask--who has been in 'cahoots' with these Powers from California and Arizona to legally steal our waters. They should be apperant to anyone who will take the blinders off and look.

Is it too late to save our water??? Almost but not quite.

What to do???

1. Throw this John Evans, Jim Jones Idaho Power Company AGREEMENT in the trash can where it belongs.
2. ~~Pass~~ ^{Amend} Senate Bill no. 1432 Idaho code 42-245 (see enclosure) and thus preventing Idaho Power or any other 'high-binder' from claim jumping 200,000 Idaho water rights.
3. ~~Allow SWAN FALLS ONE to go back to the district court to see if whether or not Idaho Power has lost their rights.~~
4. ~~If the courts find that Idaho Power has not lost their rights then the State should exercise its powers of eminent domain and buy the Swan Falls Dam from Idaho Power and thus put the State back in the drivers seat instead of Idaho Power. (I would like to point out that there is a world of difference in taking through the powers of eminent domain and taking through subordination).~~

LET'S SAVE IDAHO'S WATER FOR IDAHO.


Fred G. Stewart

filed shall be forwarded to the claimant by the department of water resources. Such claims may be corrected by the claimant only by filing of an amended claim in the same form as the original, which shall be recorded and numbered by the department the same as the original, and for which no additional filing fees shall be required. [I.C., § 42-225b, as added by 1967, ch. 338, § 3, p. 974; I.C., § 42-244, as changed and amended by 1978, ch. 345, § 7, p. 884.]

Compiler's notes. This section was redesignated as § 42-244 by § 6 of S.L. 1978, formerly compiled as § 42-225b and was ch. 345.

→ 42-245. Failure to file claim waives and relinquishes right. — Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title or interest in said right. [I.C., § 42-245, as added by 1978, ch. 345, § 8, p. 884.]

42-246. Filing of claim not deemed adjudication of right — Evidence. — The filing of a claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one (1) or more water use claimants and another or others. A statement of claim filed pursuant to section 42-243, Idaho Code, shall be admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the claim. A claim shall not otherwise be evidence of the priority of the claimed water right. [I.C., § 42-246, as added by 1978, ch. 345, § 9, p. 884.]

42-247. Notice of chapter provisions — How given — Requirements. — To ensure that all persons referred to in sections 42-242 and 42-243, Idaho Code, are notified of the provisions of this chapter, the department of water resources is directed to give notice of the provisions of this chapter as follows:

(1) It shall cause a notice in writing to be placed in a prominent and conspicuous place in at least one (1) newspaper published and of general circulation in each county of the state, if there is such newspaper, otherwise in a newspaper of general circulation in the county, at least once each year for five (5) consecutive years.

(2) It shall cause a notice substantially the same as a notice in writing to be broadcast by each commercial television station operating in the state, and by at least one (1) commercial radio station operating from each county of the state having such a station, regularly, at six (6) month intervals for five (5) consecutive years.

(3) It shall cause a notice in writing to be placed in a prominent and conspicuous location in each county courthouse in the state.

(4) The court of one (1) or more in writing and statement of the property. A suit supplied to each Resources before.

The director any other man. § 42-247, as ad 720.]

Compiler's notes ch. 345 is compiled Section 12 of E provisions of this severable and if

API

SECTION
42-304. Hearings
42-305 — 42-307

42-304. If such contest shall file such may desire. tional evidence department under the f enable it to such exami examinatic estimate a amount so ment shall additional time the would see with seci contestee Code, of: § 3265d:

Compil
"examinatic
Section

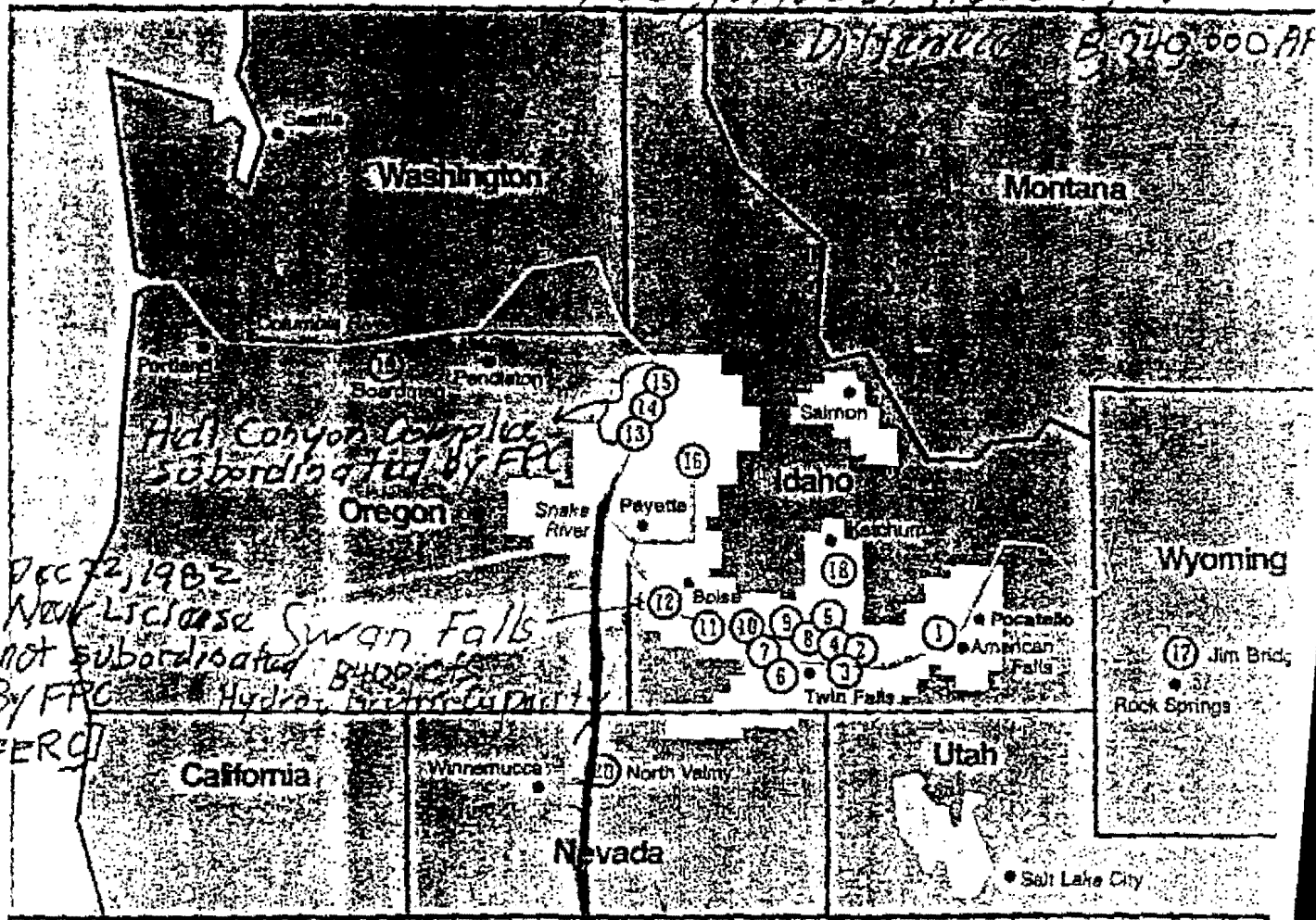
1940 - 1945

OF 3,420,000 Acre Feet

Lines in service: Transmission, 4,712 miles;
overhead distribution, 16,643 miles;
underground distribution, 1,128 miles; total, 22,663 miles.

Average Flow of Water 12,160,000 AF

Distributed 8,240,000 AF



Dec 22, 1962
New License
not subordinated
By FERC
[FERC]

5 million Acre feet to California ← Modified Snake-Colorado Project
Hydro Estimated Capacity & Arizona [Dunn Plan] Thermal Capacity

① American Falls	92,340 Kw	⑨ Lower Malad	15,000 Kw	⑰ Jim Bridger	678,077 Kw
② Twin Falls	10,000 Kw	⑩ Bliss	80,000 Kw	⑱ Combustion Turbine	50,000 Kw
③ Shoshone Falls	12,600 Kw	⑪ C. J. Strike	89,000 Kw	⑲ Boardman	53,000 Kw
④ Clear Lake	2,400 Kw	⑫ Swan Falls	12,000 Kw	⑳ North Valmy	126,960 Kw (second unit under construction)
⑤ Thousand Springs	8,000 Kw	⑬ Brownlee	675,000 Kw		
⑥ Upper Salmon	39,000 Kw	⑭ Oxbow	220,000 Kw		
⑦ Lower Salmon	70,000 Kw	⑮ Hells Canyon	450,000 Kw		
⑧ Upper Malad	9,000 Kw	⑯ Cascade	12,800 Kw (under construction)		

Central Division • Boise, Idaho
Western Division • Payette, Idaho
Southern Division • Twin Falls, Idaho
Eastern Division • Pocatello, Idaho

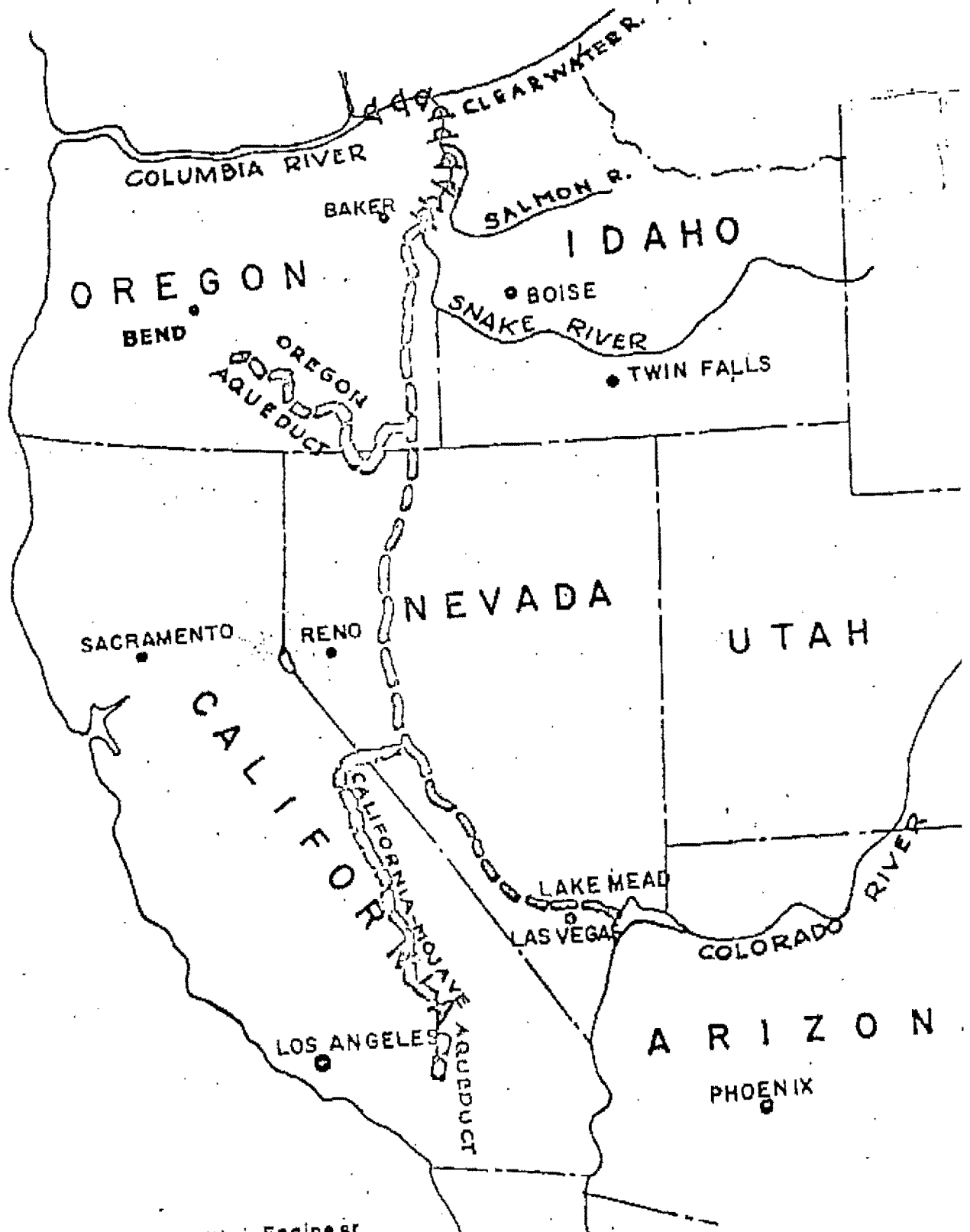
Idaho Power Hells Canyon Hydro Capacity 1,345,000 Kw
All others 446,000 Kw

SNAKE - COLORADO PROJECT

REVISED SEPT. 1965

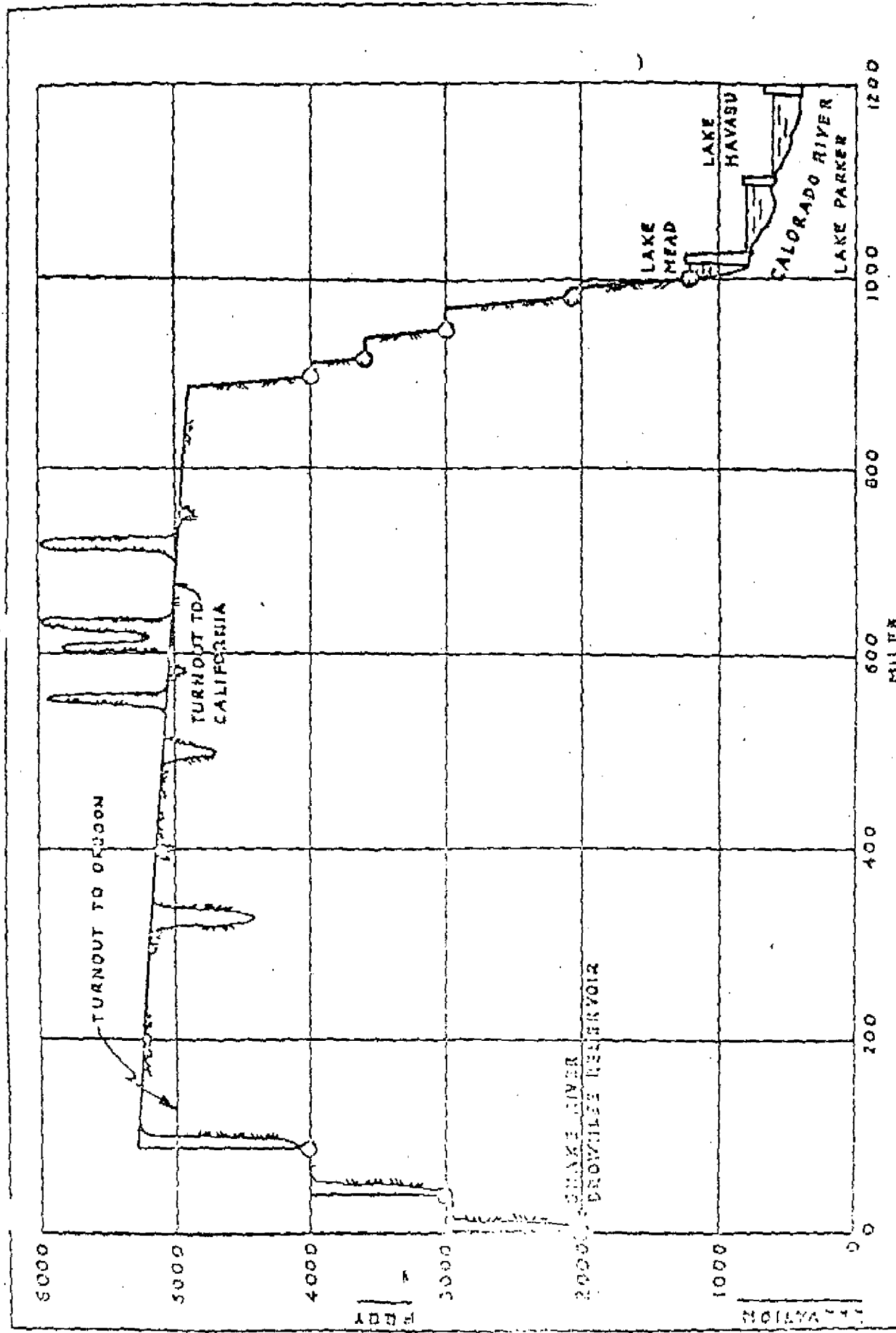
LEGEND

- □ □ □ AQUEDUCT
- ⊕ ⊕ ⊕ ⊕ PUMP-BACK



Willem G. Dunn, Consulting Engineer
San Jose, Calif.

110



MODIFIED SNAKE COLORADO PROJECT
 PROFILE - BROWNLEE RES. TO COLORADO R
 WILLIAM G. DUNN
 CONSULTING ENGINEER
 SAN JOSE
 SEPT. 1965

LEGEND
 ○ PUMP STATION
 ◡ POWER PLANT

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THOMAS G. NELSON
JOHN A. ROSSHOLT
J. EVAN ROBERTSON
STEVEN K. TOLMAN
JAMES C. TUCKER

December 15, 1982

To All Counsel

Re: Idaho Power Co. vs. State

Gentlemen:

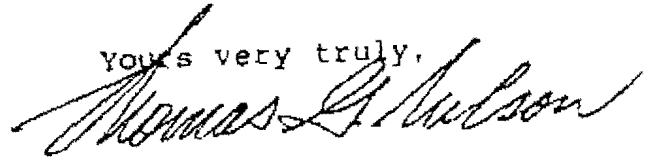
The potential for an appeal on the question of the validity of the Hells Canyon FPC license subordination gives rise to a problem for Idaho Power Company. As you know, in December of 1977, the company placed a moratorium on new hook-ups which would deplete flows in the Snake River below Milner and above Hells Canyon.

Given the Supreme Court's decision upholding the validity of the FPC subordination, the basis for the moratorium below Swan Falls disappears, except insofar as it might remain in place while a party appeals on that issue.

The company does have a few requests for irrigation pumping service in that reach of the river. If no one is going to appeal on that issue, then there appears to be no reason not to hook up those applicants. In fairness to them, I would like to avoid a several month delay in letting them know the company's intentions.

I would appreciate hearing from each of you concerning your intention to seek review of the Idaho Supreme Court's decision affirming the validity of the FPC license subordination of the Hells Canyon project. I am not seeking, by this letter, any statement concerning intentions to seek review on other issues.

Yours very truly,



THOMAS G. NELSON

TGN:cw

\$500 in any one case) caused by the negligent operation of motor vehicles under such appropriations.

(June 25, 1946, ch 472, § 2, 60 Stat. 306.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section formerly appeared as 31 USCS § 693, prior to the enactment of Title 31 into positive law by Act Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 877.

CHAPTER 32. COLORADO RIVER BASIN PROJECT

§ 1511. Reconnaissance investigations by Secretary of the Interior; reports; 10 year moratorium on water importation studies

Pursuant to the authority set out in the Reclamation Act of June 17, 1902, 32 Stat. 388 and Acts amendatory thereof or supplementary thereto, and the provisions of the Water Resources Planning Act of July 22, 1965, 79 Stat. 244, as amended, with respect to the coordination of studies, investigations and assessments, the Secretary of the Interior shall conduct full and complete reconnaissance investigations for the purpose of developing a general plan to meet the future water needs of the Western United States. Such investigations shall include the long-range water supply available and the long-range water requirements in each water resource region of the Western United States. Progress reports in connection with these investigations shall be submitted to the President, the National Water Commission (while it is in existence), the Water Resources Council, and to the Congress every two years. The first of such reports shall be submitted on or before June 30, 1971, and a final reconnaissance report shall be submitted not later than June 30, 1977: Provided, That for a period of ten years from the date of the enactment of the Reclamation Safety of Dams Act of 1978 [enacted Nov. 2, 1978], any Federal official shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin from any other natural river drainage basin lying outside the States of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural drainage basin of the Colorado River.

(As amended Oct. 3, 1980, P. L. 96-375, § 10, 94 Stat. 1507.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1980, Act Oct. 3, 1980, substituted "any Federal official" for "the Secretary".

§ 1526. Authorization of appropriations

(a) [Unchanged]

(b) There is also authorized to be appropriated \$100,000,000 for construction of distribution and drainage facilities for non-Indian lands plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering and cost indices applicable to the types of construction involved therein from the date of the Colorado River Basin Project Act [enacted Sept. 30, 1968]: Provided, That the Secretary shall enter into agreements with non-Federal interests to provide not less than 20 per centum of the total cost of such facilities during the construction of such facilities. Notwithstanding the provisions of section 403 of this Act [43 USCS § 1543], neither appropriations made pursuant to the authorization contained in this subsection (b) nor revenues collected in connection with the operation of such facilities shall be credited to the Lower Colorado River Basin Development Fund and payments shall not be made from that fund to the general fund of the Treasury to return any part of the costs of construction, operation, and maintenance of such facilities.

(As amended Dec. 20, 1982, P. L. 97-373, § 1, 96 Stat. 1817.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1982, Act Dec. 20, 1982, in subsec. (b), substituted the sentence beginning "There is also authorized . . ." for one which read: "There is also authorized to be appropriated \$100,000,000 for construction of distribution and drainage facilities for non-Indian lands."

REVISED AND SUPPLEMENTED TESTIMONY BY JOHN L. RUNFT
BEFORE THE IDAHO SENATE COMMITTEE ON RESOURCES AND ENVIRONMENT
January 21, 1985

Subject: Testimony regarding Senate Bills
1008 and 1006; Gold Room, Statehouse;
7:00 p.m. - January 21, 1985

Mr. Chairman and members of the committee, for the record my name is John L. Runft and I am an attorney practicing here in Boise, Idaho. This evening I come before you representing Salmon River Hydro Company, Inc., which consists of a group of developers of small hydroelectric facilities under the Public Utility Regulatory Practices Act (PURPA). My clients are presently developing 27 small hydro power projects, all of which are located on the reaches of the little and main Salmon Rivers, and all of which would be directly and materially impacted by the legislation proposed in Senate Bill 1008 and Senate Bill 1006. Let me emphasize for the purposes of this evening's hearing that these projects are located far downstream from the Swan Falls Dam and on a different river system.

In order to lay a proper foundation for the perspective from which my clients view the proposed legislation contained in Senate Bills 1008 and 1006, let me briefly review with you the status of their small hydro power projects. My clients have, every one of them, expended substantial money and time in an effort to develop their hydro electric projects as envisioned under PURPA. All 27 projects have been granted preliminary permits, or exemptions, or have licenses pending under the Federal Energy Regulatory Commission (FERC). Applications for water permits have either been accepted or have been granted on all of the projects by the Idaho Department of Water Resources. In summary, these are serious projects in which considerable engineering and development work has been done and in which citizens of Idaho have expended substantial sums of money and time.

We come before you with no claim of expertise on the subject legislation. We took no part in the litigation or in the protracted negotiations for settlement of what has come to be called the Swan Falls controversy. Able counsel and technical experts have spent untold hours hammering out not only the settlement between the State of Idaho and Idaho Power Company on the question of subordinative water rights, but also many more hours in an effort to recognize and account for other interests and the rights of the public at large in working out the language of the two bills before this committee. As the witnesses on behalf of the parties to the controversy have made clear, the proposed legislation constitutes the last chapter of the settlement of that controversy, and they have urged that the subject legislation be considered as a "package" with that settlement.

We do not come to attack the fabric of the agreement that has been woven. Frequently, however, a fresh perspective on a "final rough draft" has value. It is, then, in this context of constructive criticism and recommendations for change that we address this committee with regard to Senate Bills 1008 and 1006. I will endeavor to limit my comments to the principal concerns of my clients by making one general observation and seven specific recommendations for change.

My general observation is that one is left with the impression that we have in Senate Bill 1008 a hybrid that may have been better left in two parts:

(a) A bill ratifying the agreements reached in the "Swan Falls" settlement and addressing the issues involved in that controversy;

(b) A bill relating to water rights for hydro power purposes generally and providing for true statewide criteria, standards and procedures for treating those rights.

An example of this dichotomy is the apparent failure of the bill to address those situations where the prospect of depletionary use of water does not exist upstream from water rights granted for power purposes. There are many such areas in our state. My clients with their mountain stream hydro projects fall into that category. The bill provides in Section 42-203B(5) that the Governor or his designee is authorized to enter into water rights agreements for power purposes "to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions." The effect of this provision is that all water above the level of minimum stream flow in all rivers and streams in this state must be placed in the trust provided for in subsections (2) and (3) of this section. However, the purposes of the trust are expressly limited to be those of assuring "an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses." (See Section 42-203B(1)) Clearly, in stream reaches where use for power purposes is the only reasonable beneficiary use available, there is no need to place in trust that portion of the water above minimum stream flow. Such "protection" is not needed nor is it desired by hydro power developers in such circumstances. We submit that water users for power purposes should not be subjected to the provisions of this statute if their water rights are reasonably free from the possibility of upstream depletionary uses.

We recommend that authority be vested in the Governor or his designee to exempt such water rights granted for power purposes from subordination and from the authority of the director to limit such permits or licenses to a specific term. Exemptions for such hydro power water rights could be granted

after an appropriate investigation and hearing by the Department of Water Resources. Provision for such exemptions would properly limit the function of the water trust and the authority of the director to subordinate power water rights and to impose time terms on such rights to the real purposes of this legislation: i.e. to establish a means for handling conflicting depletionary (irrigation) and non-depletionary (power) uses of water in this state.

Let me turn now to some specific observations and recommendations regarding the proposed bills, beginning with Senate Bill 1008:

1. Section 42-203B(3). With regard to setting minimum stream flows in the first sentence of subsection (3), the words "state action" would appear to be too broad.

We recommend that such state action should be specifically defined to mean approval by the Department of Water Resources (or the board) with legislative ratification.

2. Section 42-203B(6). We submit that the language granting the director "the authority to subordinate the rights" of license and permit holders is too broad. Even though the 1928 amendment to the Idaho Constitution vested in the state the power to regulate and limit the use of water for power purposes, water rights once granted still constitute property rights. Even though water rights for power purposes are subject to regulation and limitation by the state, such regulation and limitation must be made part of the right at the time it is granted or otherwise the exercise of such authority by the director could face the constitutional objection of taking of property without due process of law.

We recommend that the description of this authority be statutorily set forth so as to provide a guide for the promulgation of subsequent regulations.

3. Section 42-203B(6). Vesting authority in the director to limit a permit or license for power purposes to a specific term without any apparent limitation or guidelines is of the greatest concern to my clients. As mentioned above, where the issue of subordination of water rights for power purposes is not an issue, there should be an exemption for holders of water rights for power purposes. The mere existence of this broad statutory "authority to limit a permit or license for power purposes to a specific term" will have severe impact on the capability of small hydro developers to obtain financing. The primary economic reality regarding the small power projects is that the financing is based principally upon the viability of the project and not upon the financial well being of the developer. Central to the financial strength and viability of the project is the unconditional water right. Lenders and investors will simply not invest in a project where the underlying water right is subject to delimitation at any time by act of the director. Short term water rights (around 5 years) to cover the

period of return of capital or pay-off of the development loan will likewise not suffice. Frequently in these projects there are second levels of financing by the developers and their partners which must be taken care of after the institutional lenders have been paid. Such developmental partners cannot be acquired on the basis of short-term power rights.

Also, there are the terms of the power contracts to be considered. Virtually all of the contracts for sale of power with the major power companies necessarily contain severe recapture provisions if there is a default in the supply of power during the term of the contract, which is generally 35 years in length. To put it bluntly, time limitations on the water rights for power purposes will reek havoc on the projects of small hydro developers.

As above stated, we recommend that an exemption procedure be established for power water rights associated with projects on stream reaches where subordination to subsequent upstream beneficial depletionary uses will not be a factor. Such exempted water rights would not be subject to subordination or time limitation. This exemption process would also serve to properly limit the resolution of the Swan Falls controversy to the issues and circumstances actually involved therein.

We recommend that the statutory language be amended to require that limitation of a permit or license for power purposes shall not be for a term less than the term of the standard power purchase contract of the utility designated by the water right holder as the utility with which it will seek a power purchase contract. In the event there be no standard power purchase contract or standard contract term available as regards the designated utility, then, in the alternative, the water rights should be for 35 years, which term appears to be the industry standard.

We strongly urge the committee, at the very least, to provide that limitations of permits or licenses for power purposes to specific terms be for a period not less than 35 years. The impact of shorter terms on the economic viability has been discussed above. These economic ramifications not only negatively affect lenders, co-developers and the ability to perform under the power purchase contract, but also would have a deleterious effect on the ability of the developer to obtain a license from the Federal Energy Regulatory Commission (FERC). Economic viability of projects is one of the primary considerations of license grants by FERC. Moreover, imposition of terms shorter than 35 years on water rights for power purposes would clearly constitute state action severely curtailing the incentive for the development of small hydro power as a renewable resource, encouragement of which development is a primary purpose of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. 2601. See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

4. Section 42-203B(6). The last sentence of this subsection provides that it "shall not apply to licenses which have already been issued as of the effective date of this act."

We recommend that permits should be so grandfathered as well as licenses. Water permits are a defeasible property right which may be terminated if the permit holder does not prove up on the development for which the right was granted. Permittees, such as my clients, have spent considerable sums of money in reliance upon their right to prove up on the permit and eventually secure a license. Likewise, other investors, lenders and governmental agencies (FERC) have acted in reliance upon the viability of these permits. We submit a serious issue of taking without due process of law could be raised by this ex post facto imposition of the provisions of subsection 6 on permits.

5. Section 42-203C(1). For clarification purposes, we recommend that the words "for upstream depletionary use" be inserted following the words "appropriate water" in the first line of subparagraph (1).

6. Section 42-203C(2). The criteria to be considered by the director in making a water reallocation decision present a problem from the standpoint of what weight to give to each of the listed criteria. The statutory language provides that no single factor "shall be entitled to greater weight." Yet at least two of the five criteria would never be applicable to hydro projects such as those of my clients in the mountain reaches of the Salmon River. Furthermore, the language of the statute would allow the director to give greater weight to factors not listed in his determination of the public interest.

We recommend deletion of the provision limiting the director from giving greater weight to any of the enumerated factors. A public interest determination made by the director under this section must include consideration of the listed factors as well as other matters brought up by the parties which are relevant to the statutory purposes.

7. Section 42-203D. This section provides that all permits presently in effect, except for those put to beneficial use prior to January 1, 1985, shall be reviewed for compliance with this new legislation.

As stated above, we recommend that permits already issued should be grandfathered along with licenses. In any event, if these issued permits are to be reviewed, they should all be subject to exemption from the provisions of the proposed legislation in all cases where no subordination issues are reasonably applicable to the uses involved.

The provisions of this section effectively grandfather all permits which can be put to beneficial use prior to July 1, 1985. One assumes the reason for this grandfathering is founded


upon the logic that those permit holders who have spent substantial sums on proving up their permit would be in a position of putting the permit to beneficial use by July 1, 1985. Such presumptions fail badly in the circumstances of small hydro developers, where the beneficial use of the water right cannot be accomplished until final approval by FERC and final agreement with the power company. As discussed above, after-the-fact impositions of restrictions and limitations upon a property right already granted, especially where considerable sums have been expended in reliance upon that right as granted, will most likely raise serious issues of taking property without due process of law.

It is our recommendation that the language of 42-203D be stricken and replaced with a section providing for procedures and standards whereby the director can exercise his authority to subordinate water rights in the future and for the granting of exemptions under appropriate circumstances.

8. Section 1006; Section 42-1805(7). We recommend that the director's authority to suspend the issuance or further action on permits or applications in order to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code, be limited to certain geographical areas faced with subordination problems (e.g. upstream from the Swan Falls Dam on the Snake River), and limited to certain type of permits or applications (e.g. old irrigation applications).

We recommend that this subsection 7 should be divided into two subsections, one of which would deal with suspension to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code (which would be limited as above recommended), and the other subsection to provide for suspension on a more broad basis to protect existing, vested water rights and to prevent violation of minimum flow provisions of the state water plan. These latter concerns are of statewide concern and application. The subordination issues contained in Chapter 2, Title 42 are of limited application and should be dealt with differently.

RESPECTFULLY SUBMITTED.


JOHN L. RUNFT, Legal Counsel to
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Mr. Chairman, Ladies & Gentlemen

I represent Little Pilgrim Irrigation Co, a proposed development laying South & Southwest of the Bell Rapids Project in Elmora, Ouzykee & Twin Falls Counties.

~~By~~ the project has been designed to utilize off-stream storage requiring a minimum of 125 CFS pumped from the river on a 12 month basis into a 55,000 acre foot storage reservoir. In addition to the System being totally self-contained in underground pipe to reduce water losses, a hydro power plant located at the inlet sight of the reservoir will give a net return of approximately

\$1,000,000^{PER YEAR} and make the project even more feasible.

Dav Company feels that the advantages and benefits derived from a project such as this would far outweigh any increased power costs or other losses if there were

lets consider:

1. The increased tax base for the County and state, making more available for education, etc.

2. The increased employment, which would help local businesses and could help reduce money spent for welfare and increase Sales Tax Collection

3. With more money available, maybe

Dolley, the State, & all the people would
benefit.

Therefore, we as a company, are 100% in
favor of the Swan Falls Agreement and
would like to urge those involved to
favorably evaluate all the factors and
support.

It is hard to give all the credit due
to those individuals, whose time and efforts
have made this agreement possible. I
think it is a job well done and the answer
to a situation that has been unresolved
for far too many years.

Thank you



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 25, 1985

RM 433, 1:30 p.m.

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

Chairman Noh called the meeting to order. He explained the Secretary was working on the previous minutes, so there were none to be approved.

SB 1018 ACQUIFER RECHARGE DISTRICTS

Senator Noh explained this legislation would allow parties to serve as directors or officers of the district even though their place of residence was outside the district.

MOTION Senator Horsch moved and Senator Ringert seconded the bill go out with a "do pass" recommendation. Motion carried.

Chairman Noh called upon the negotiators to discuss some of the concerns that were raised in the public hearing on January 21.

Tom Nelson I.P. Mr. Nelson said he would start off the discussion and pointed out he had handed out a written statement in response to certain comments raised at the hearing. (Attached)

Pat Kole Mr. Kole also handed out a written statement addressing concerns raised by John Runft, who testified at the public hearing on behalf of the small hydropower interests. (Statement attached)

Senator Ringert Why do you need review authority on existing permits?

Pat Kole It is our understanding there are enough permits out there, if they were all to be developed, to, in effect, take all of the water available for appropriation in the Snake River system. By reevaluating and looking at those permits in accordance with the new public interest criteria, we believe we will more effectively manage the resource and get additional development over that which could occur if we were to follow a strict priority approach.

Senator Ringert What makes you believe that?

Pat Kole I would like to defer that question to Mr. Dunn as he has completed the analysis of those permits.

Ken Dunn Water Res. The number of outstanding permits, if all developed would lower the minimum flow of the Snake River to the present minimum flow

Ken Dunn of 3,300 cfs and that is based on those permits on file in 1976. Since that time there have been a number of others that have been approved. Once you have put the lid on others may rush to develop because it is the last opportunity one may have. What we propose here starts making people develop economically that might not otherwise. So there are outstanding applications and permits to do that, if they were all developed.

Senator Ringert Won't the priority system take care of the existing water rights and protect them or doesn't the priority system work any more?

Ken Dunn The priority system works if it weren't for the moratoriums and other things involved. The moratorium I'm talking about is the Bureau of Land Management; their management of lands. As you know, the Desert Entry and Carey Act filings have not been approved for a number of years. That builds up a big backlog of things. The water right filings that have been made were a situation where people who were not going with the Carey Act or BIM and some were able to go around that, have developed and they have a later priority than some of these outstanding permits. It is just a fact of life, once you start managing a resource and you start approaching the end of the development, the priority system creates a lot of additional problems. Later rights developed, earlier rights undeveloped and no water. If you develop the earlier one you have to go in and shut off the later one.

Senator Ringert Isn't that the appropriators risk, Ken? He has his land available first, that is one thing, but shouldn't he recognize that if his permit is of a later priority date he runs the risk that he might wind up short of water if someone else comes on line in accordance with the priority of their permit?

Ken Dunn That is right if you have a normal system operating, which we do not have. We have government in the process of having messed it up to begin with. The decision, right or wrong, was not to create a land rush; therefore, the development didn't occur.

Senator Ringert Are we then adopting a policy in this state where land and not water sets priority?

Ken Dunn With this bill we can do it different than that. You start setting the priorities in terms of economic development. For example, of the outstanding permits left, many are for extremely high lift pumping, directly out of the Snake River. Once that occurs you will have an immediate depletion and the amount of land you can develop shrinks dramatically because you don't have recurring flows. Economic expansion in the state is going to be very small. That is one of the reasons why in all of our discussions we have said the best development would be further upstream in the Snake system. The high level pumping is a direct diversion from the River, has an

immediate effect on hydropower and also requires substantial energy to lift the water. If somebody knows, whoever they are, that this is the last opportunity they will have to get water, they will do it now. You start driving the decision not based on good economics, but on fact if I put it in, I might make it, it's worth the change.

Senator Ringert

I personally doubt if there will be any more high lift projects of great consequence, particularly if they are direct diversion during irrigation season so they have to have enough capacity to pump their needs 24 hours a day throughout the irrigation season. Then are we coming to the point where your Department's assessment of economic feasibility, suitability and efficiency is going to determine the priority of use of water?

Ken Dunn

I think we are coming to the point in time in the Snake Basin where there isn't going to be enough water to meet the needs. In this situation we are not coming to the point where my Department is going to make the decision of priority, we are coming to the point where the legislation you pass, the rules and regulations I adopt and you approve, will set some general priorities of what has to be done in order for somebody to be able to use water in the state. It will not be a strict first in time, first in right. No matter what you get, the water is an extremely scarce resource. I think those changes are needed.

Pat Costello

I would just associate myself with the remarks of Mr. Kole and Mr. Nelson. The one additional point I would cover concerns comments at the public hearing, regarding the absence of mention in the public interest criteria in SB 1008 of uses other than agricultural. I would like to point out that you don't even reach those public interest criteria unless you first find that the proposed use would result in significant reduction of water available for hydropower. Most of the other uses, the non-agricultural uses, particularly domestic, commercial, municipal and industrial, are almost entirely non-consumptive and virtually all of those uses would never reach the public interest criteria. The only exception would be some particular industrial applications. Another hydro project would be strictly non-consumptive and the public interest criteria would not even come into play.

Senator Crapo

Did the negotiators get into what is meant by the term "significantly" reduced?

Pat Costello

No we did not. That would be left to be fleshed out by Department regulations as the criteria themselves would have to be further detailed.

Senator Crapo

I wonder if any of the negotiators even have any ideas or guesstimates of what that phrase means. For example, would it be a significant reduction if the well was going to have an impact 10 years down the line of some small amount? Is it defined in the terms of time, terms of amount or what is contemplated by the term?

Pat Costello The phrase is "individually or cumulatively" with other uses. So, if you had a well pumping from the aquifer which would not impact the river for 10 years but you could project that if there were a number of wells in the same vicinity and that would have a result at Thousand Springs of "x" cfs in year 2000 or whatever, yes, it would be possible in my view to find it a significant impact.

Tom Nelson I don't think that phrase is much different than the burden the Company faces in the existing lawsuit. I think in order to get relief from the courts it is incumbent on us to show a potential for a significant impact from either an area or group of people or however the court wanted to analysis it. To me when you look at the sophistication of the gauging systems on the Snake, you may be looking at something you could theoretically measure in the river. We are now to the point where we are talking about 600 cfs. If you look at 1 cfs out of 600, that could be significant even if cumulative effects would have to be 2, 3 or 4. The problem we have is the hydrology of the basin is such that you can argue an isolated effect in a certain part of the aquifer. So significant reduction was intended to allow people to argue with the hydropower right holder that they are contributing in a significant sense, but then to get more specific than that because of the unknown. I think that is the burden we have right now. If we couldn't show the potential for significant effect in the pending lawsuit I don't think we would get any relief.

Senator Crapo I am interested in seeing that the 600 cfs that is made available through the trust is made liberally available and I am wondering is that the intent of the negotiators or is it the intent that each time an appropriations is applied for there is going to be alot of hurdles that any prospective developer must go through. Maybe the only way to answer my question is to say yes or no. Do we intend for the legislature to make this something that is liberally available or are we going to make it restrictive? I really don't know what this is saying, but I want to know what we intend it to mean.

Tom Nelson I can tell you where I came down when we were looking at how this would work. Concerns were expressed that you are going to have the Ma and Pa farm walk in and all of a sudden you have a hearing room full of people in there to oppose a 10 acre addition to their existing farm. That is addressed a couple of ways; (1) The burden on the protestor. The real protection against that kind of an administrative ambush if you will, is just the way the administrative process works. For example, any time you go to the PUC on an electric rate case, in theory, you can start at A and go to Z and litigate in front of the commission every issue that's possible to raise a utility rate case. The fact is, when you get there usually you are down to a couple of things like how are you going to measure the rate base and what is going to be your return on the power rate base. By and large the commission's previous decisions tell you what kind of a rate you are going to get if you want to litigate the other parts of that

rate case, so you don't litigate. In this situation I have the belief, based on conversation with my counterparts and Ken Dunn, that this is how it will develop. We will either have an area wide proceeding or a group entry proceeding. We won't be faced with a situation where every 10 acres comes up for a hearing on economic grounds. So the administrative part is not going to be a problem once we get use to it. On the issue of whether water is liberally or niggardly available, from our standpoint the fox is probably in the henhouse. The decision here is going to be made by a department that for 100 years has had no constraints except the availability of water on proving new developments. So this is a whole new ballgame for them. It is our belief that those decisions will be made on a relatively liberal basis if you can show the economics are there. It is not going to be a closed issue. For example one of the offers I made last year in the subordination fight was that we will subordinate and put these decisions in the Fish and Game Committee. The attitude of the Agency you are before determines alot of how things are done. In my view, if the economics are there for a particular use, it will probably be approved. This is not saying anything against Mr. Dunn and what he has been doing.

Pat Kole

Just to add one comment. As we went through the negotiations we tried to protect the small farmer. That is why we specifically mentioned the family farming tradition. The idea was that if somebody had started a development, they had 120 acres under cultivation but wanted to add 20 or 30 acres, that type of operation would have a little bit of advantage in the statutory process.

Senator
Ringert

On the 42-203D review of permits, I am looking at that and also the fiscal note. Now I am sure you have some idea of how many permits are outstanding and what kind of review process will be necessary. Do you have anything for review; if so how long will it take and how much will it cost the state?

Ken Dunn

I do not look at the review as being a detailed review of every permit. We will have some area of claims that are going to be applicable to alot of permits. The first few will be extensive by area and type and after that, as Mr. Nelson said if you have the answers on most of the things you start getting into the one or two items we will have to look at. My proposal is to raise the fees for water rights so that this will cover the major portion of that cost.

Senator
Ringert

Will your present staff be adequate to handle the review and if you already have enough permits issued to use up all the water in the river, when can we expect to have money flowing in from new applications that will help offset some of the cost?

Ken Dunn

We do have sufficient applications to use up the 600 cfs. Time-wise I would anticipate by the first of the fiscal year we would have rules and regulations developed with emergency rules so that we can get started and will proceed as rapidly as we can. We are

not going to clear all those up in the first six months. We have on file I would guess 3,000 water rights applications. I would not plan on adding any staff because it will be one of those heavy workloads and then back to the normal routine so we will just stretch it out a little longer. As far as fees, we presently have fees to get us through FY 1986 at the rate we have been spending and still are receiving applications.

Senator
Sverdsten

Concerning the hydroelectric units on the Little Salmon, how will you proceed with those in relation to the bill. Are you holding them up to an extent; will they be handled soon or just what will you do in that area?

Ken Dunn

For non-consumptive uses such as that, fish farms, and others, we would process them and have been processing them in a normal time limit. This would not hold them up because they don't create problems of consumptive use.

Senator
Crapo

At the hearing there was a concern raised if Idaho could protect its water for use in Idaho over other states. I am not sure if this is a legitimate concern or not and if it is possible for other states to get a hold of Idaho water. Would someone tell us how another state or entity outside Idaho would go about getting control of the water. Is this a real threat?

Tom Nelson

We didn't specifically deal with that. There is a court case dealing with ground water and the court made it pretty clear that the state's ability to discriminate in favor of its citizens opposed to citizens of other states is pretty limited. Let's take the specter that is raised about major diversions out of the Snake above the Hell's Canyon project for example. If we had a statute or even constitutional provision that says we flat can't divert water out of the Snake for use in other states, then you are wasting your time to even pass it. Basically, the state's system of allocation and appropriation will be honored in that situation, as opposed to interstate equitably apportionment suit in the Supreme Court. I think that probably the most effective thing is the minimum flow and other existing rights on the Snake River which would be impacted by that kind of major diversion from the Snake, say by Arizona or California. We didn't address it and I don't think it can be addressed directly. I would point out that both the FCC and state license subordinate for all of the licenses at Hells Canyon, except maybe the Brownlee Reservoir, all say they are fully subordinated for uses only in the Snake River watershed. So anyone proposing a massive diversion for use outside the watershed would run headon into the 35,000 cfs water right at Brownlee and I think that would just about take up the Snake. I don't think it is a real concern given the policies we have in place in terms of minimum flows and existing water rights on the Snake.

Senator
Crapo

My understanding then is that basically the state is protected by Idaho Power Company's water rights because they are not subordinated for uses outside the basin.

Tom Nelson

That is right.

- Senator Crapo I have heard figures, that even over a period of years even though there has been a lot of water appropriated from the river, flows have not dropped significantly. I don't know if those figures are correct and that is probably a good reason to have a hydrologic study. If this study shows that some of the diversions we are using now, for say agricultural or other uses, appear to somehow recharge the aquifer and if that study shows we had more water available than we contemplate, would that have any impact on the ability of Idaho Power Company's water right to protect us from claims there was extra water available for out of state diversion?
- Tom Nelson My example of the Hell's Canyon water and the protection there is that the water would have to remain in the river in Idaho at least to those points. If it was determined the aquifer could safely yield more than our supposed 600 cfs, I don't see that as having any impact on the Hell's canyon issue. It may have an impact on how much you can develop. The agreement isn't written around the 600 cfs being available for development, it is written around the minimum flow. So if there is more than 600 cfs available for development, it's available.
- Senator Crapo So, if I understand correctly, what we pass here today doesn't say that there is 600 cfs available, it says there may be 600, 500, or 1,000 or whatever, but the minimum flow can't drop below the established points at certain times of the year.
- Tom Nelson That is exactly right.
- Senator Noh Would anyone else care to comment on this?
- Ken Durn I would like to talk about the other out of state diversion and that is water staying in the stream and appropriated by downstream state. The protection you have there is one, the power company rights remain in place until the water is used by users in the state so there is an existing right. Secondly, if there is a call on it, again the best protection is what the downstream water rights are. There have been some equitable apportionate cases in the U.S. and they vary back and forth as to what the court says. In some cases they say each state or each entity has a right to a good portion of that water. In a recent case in Colorado, Colorado wanted to require more efficient diversions downstream to make water available in Colorado and the court said no.
- Senator Tominaga The negotiators talk about protection for the small farmer. This irrigation company is thinking of picking up 5-10 acres here and there but the total would probably add up to 4 to 5,000 acres in a fairly concentrated area. Would that significantly reduce those flows and would that development not take place as by adding the cumulative up it would be significant but taken on an individual basis, it would not.
- Pat Costello It would clearly, to me, meet the significant reduction test and therefore you would have to pass the public interest criteria.

However, I think it would probably fare well under that criteria because the water would be used for a number of small farm operations within the irrigation company and probably fits the small farming preference.

Senator Tomlinaga Then that could happen in a cumulative basis all across the state. If there is enough cumulative sooner or later the water will run out. How will that be handled?

Pat Costello Eventually it will run out, but by giving preference to location primarily upstream and ground water rather than direct pumping, we hope to make it last as long as possible. There is an end point. At that point there won't be an end to development but will be under a market system rather than appropriation system.

Senator Noh Senator Crapo has raised the question with me of developing some formal legislative intent to be inserted in the record.

Senator Crapo It is my concern that when I first read the legislation I didn't really understand what the intent was and we have had 3 very good hearings now and think I pretty well understand the intent. I think in the future if this ever gets to court or the Department of Water Resources needs guidance on how to interpret different aspects of this, it would be very beneficial if we, as a committee, develop a statement of intent or legislative purpose to accompany this. I'm not sure this can be accomplished as there may be too much divergence among the committee. It seems if there is a divergence among the committee, it should be resolved now before the bill goes to the floor.

Senator Noh Asked what the committee's pleasure was regarding this and said he wasn't opposed to appointing a committee of two to work on the intent. He didn't think it would be a good idea to hold the bills in committee since the statement of intent can be placed in the Journal at any time.

There was a fairly lengthy discussion by the Committee on the need and lack of need to develop this statement of intent. Senator Ringert explained that in most cases at the state level we do not establish a good statement of intent. If there are ambiguities in the bill, it becomes a statute and if there is a contest over it and goes to court, one effort in court is to try and figure out what the legislature intended when it used this work or phrase. A statement of intent is very helpful in that respect. In the federal congress, they print a formal committee report that becomes part of the permanent record and those reports go to the floor with the bill. So down the line when someone is looking at the bill, they can at least tell some of the expression when they voted on the measure.

MOTION

Senator Ringert moved and Senator Crapo seconded the legislation be held in committee for one week for the specific purpose of working on a statement of intent. Motion carried 8-4 after a submotion failed.

More discussion followed this motion on the pros and cons, and then Senator Peavey made the following motion:

SUB
MOTION

Senator Peavey moved to send SB 1006 and SB 1008 to the floor, seconded by Senator Budge, with a do pass recommendation. The motion failed 6-6.

Once again there was discussion on the motion. Senator Budge said he had never heard of what was being attempted here today. He felt the letter of intent could be done from the floor and the rules allowed for that. Senator Beitelspacher also felt this letter of intent could be accomplished on the floor and felt like it was time to move the bills on. Senator Crapo felt another week for the bills in the committee was not too much when they are so important and if there was a difference of opinion, that was the place it should be discovered and could be worked on.

A short break was taken until Senator Little could be called back to the committee to vote.

The Chairman went over the motions for the benefit of the Committee before voting.

ROLL CALL
VOTE ON
SUBMOTION

Senators Beitelspacher, Budge, Kiebert, Noh, Peavey and Sverdsten voted YES. Senators Carlson, Chapman, Crapo, Horsch, Little and Ringert voted NO. Motion failed on tie vote of 6 to 6.

ORIGINAL
MOTION

Senators Carlson, Chapman, Crapo, Horsch, Little, Noh, Ringert and Sverdsten voted YES. Senators Beitelspacher, Budge, Kiebert and Peavey voted NO. Motion carried 8-4.

Senator Noh appointed Senators Crapo and Peavey to work on the statement of intent and they are to report on a week from today.

RS 11082C1

AUTHORIZING THE CONTINUATION OF IDAHO'S PARTICIPATION IN THE WESTERN STATES FORESTRY TASK FORCE.

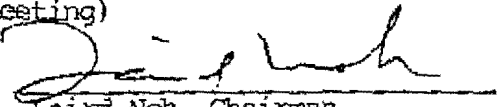
Senator Kiebert briefly explained the legislation which would allow the state to continue to participate in the Western States Forestry Task Force which pursues several subjects important to forest management.

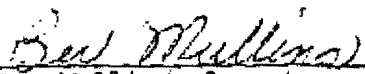
MOTION

Senator Beitelspacher moved and Senator Sverdsten seconded the RS be sent to print. Motion carried.

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

(Tapes are on file of this meeting)


Laird Noh, Chairman


Bev Mullins, Secretary

Supplemental Testimony of Attorney General Jim Jones
Before the Idaho Senate Committee on
Resources and Environment

Subject: Comments of Attorney John L. Runft.

On January 21, 1985, John L. Runft, Attorney at Law, appeared before the Committee and provided an analysis of Senate Bills 1006 and 1008. It is important that the Committee carefully analyze Mr. Runft's testimony because it raises several concerns about the agreement. The concerns raised by Mr. Runft were considered by the negotiators and were either rejected as incompatible with resolution of the Swan Falls controversy or provided for by the mechanisms in the agreement. It is my belief that upon careful reflection and thorough analysis that the Committee will find the points advanced by Mr. Runft have been addressed.

The first general observation made by Mr. Runft is that Senate Bill 1008 represents a hybrid that would be better left in two parts 1) resolution of the Swan Falls controversy and 2) standards and procedures for treating hydropower water rights. Mr. Runft's analysis is correct that the bill addresses both of these problems. Yet, the two problems are one in the same. Further, the reason for the structure of the agreement is to prevent future Swan Falls types of situations from arising and

to provide a mechanism under which current Swan Falls type problems can be resolved without expensive litigation. As pointed out earlier, the Spokane River is a prime example of another potential Swan Falls type controversy. The negotiators believed and still believe that a mechanism must be created in state law to provide a resolution process for addressing these problems.

Mr. Runft's second suggestion is to create an exemption process whereby certain hydropower water rights could be specifically exempted from a subordination provision. Senate Bill 1008 in conjunction with S.B. 1006 does in fact provide this type of mechanism. Under S.B. 1008 the director is granted the authority to specifically implement the 1928 constitutional amendment and limit and regulate hydropower water rights. The director has in fact been subordinating hydropower water rights since 1977 and has issued in excess of 252 such rights. What S.B. 1008 and S.B. 1006 do, is to require the director to set forth in rule and regulation form, standards under which hydropower water rights will or will not be subordinated. Those rules and regulations will, of course, come back to the legislature for their review. In effect, these two bills accomplish precisely what Mr. Runft desires; that is, 1) certainty for the holder of a hydropower water right, and 2) a procedure for evaluating whether or not the director's determination is consistent with the intent of the legislature or rather is arbitrary and capricious.

Mr. Runft's third point is that the words "state action" in section 42-203B(3) is too broad. Unfortunately, the analysis overlooks the fact that minimum stream flows can only be set in accordance with state law. The negotiators specifically chose the words "state action" in contemplation of the passing of SJR 17 as this and future legislatures may wish to become more actively involved in the setting or review of minimum stream flows. We believe this latitude should be maintained.

Mr. Runft next submits that the authority to subordinate the hydropower water rights granted to the director is too broad. As noted above, when read in conjunction with S.B. 1006, it is clear that the director will be required to set standards that will be reviewed and analyzed by the Idaho Legislature. We suggest that the provision as currently phrased is adequate.

Mr. Runft next contends that the small hydro developer will be unable to obtain financing if the director has the authority to subordinate hydropower water rights. This argument is factually erroneous. To date, as mentioned above, the Department has issued over 216 subordinated water rights for power purposes. Not one of these projects had difficulty in obtaining financing and in fact many are now completing construction and are obtaining long-term financing.

Mr. Runft's objection to term permits is also without merit. The director has established a policy of issuing water right licenses for power purposes to a term consistent with the

Federal Energy Regulatory Commission license. To date both lenders and investors have found this practice to be satisfactory. We would strongly suggest that the original language remain in place as the factors cited by Mr. Runft are simply not accurate. Additionally, the director should maintain a certain amount of discretion in this area as the future predictability of the need for electrical energy or the need for additional water for agricultural purposes becomes apparent over a period of time in the future.

Mr. Runft next argues that 42-203B(6) should be amended to not affect permits which have been issued as of this date. His analysis overlooks the Hidden Springs Trout Ranch case, see 102 Idaho 623, which allows the State to restrict permits that have not yet been fully developed into property rights. There is simply no taking issue presented by 42-203B(6). The same argument would apply to Mr. Runft's suggested clarification of 42-203C(1).

Mr. Runft next recommends the deletion of the statutory language in section 42-203C(2) relating to the weight to be given to the various public interest criteria. As indicated in the earlier testimony provided by Mr. Nelson to the Committee, it is clear that if a factor does not apply, then the director would not consider it in making a determination. It is critical to a full and fair decision making process that some standard guiding the director in terms of weighing the various criteria be maintained.

Section 42-203D relates to permits not put to beneficial use prior to January 1, 1985. For consistency sake we believe that if agricultural permits are to be re-evaluated in relationship to the new law, water rights for power purposes should also be so re-evaluated.

Finally, Mr. Runft suggests that the authority of the director to suspend issuance of the permits or applications should be limited to the geographical area above Swan Falls dam. Once again this argument overlooks the fact that Swan Falls types of problems are developing throughout the State. Further, before the director may suspend issuance of permits he must make a finding of need, which is subject to judicial review. Thus, it is imperative that this legislature act to alleviate those type of problems now so that further problems are not brought forward and, of course, the resulting legal expenses to the State and private parties will thereby be avoided.

STATEMENT OF IDAHO POWER COMPANY
IN SUPPORT OF SENATE BILL 1008

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:

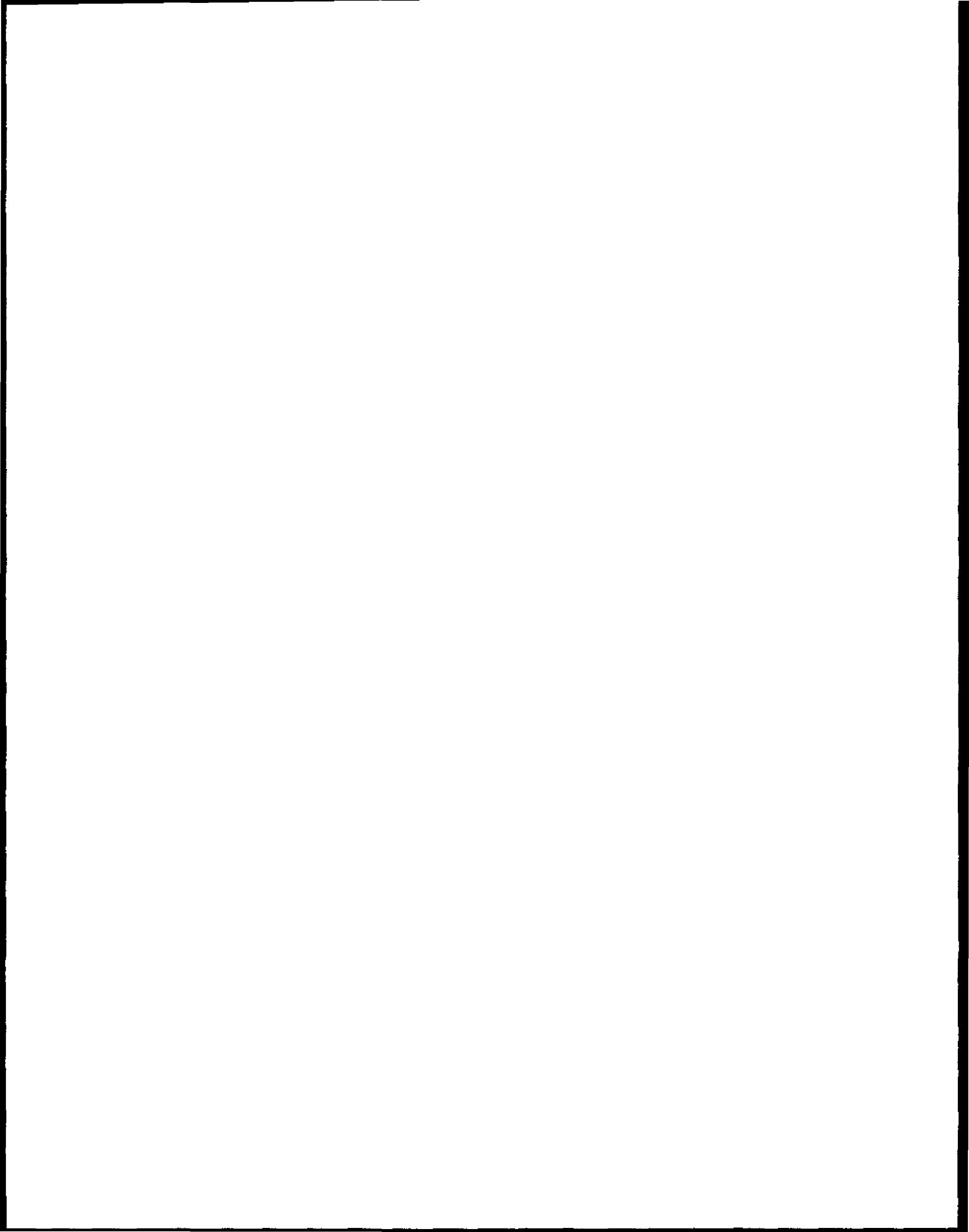
1. Review of the proposed use under existing criteria, including local public interest; (§42-203A)

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.

4

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.



STATE AFFAIRS COMMITTEE

MINUTES

January 25, 1985

Room 350

3 pm

PRESENT: All committee members were present.

Chairman Yarbrough called the meeting to order.

Moved by Sen. Budge, seconded by Sen. Ricks, that the minutes of the previous meeting be accepted as written. Motion carried.

Chairman Yarbrough advised the committee that as directed he had contacted the chairmen of the germane committees relative to the three reappointees, namely, Will Defenbach, Thomas V. Campbell and Lester Clemm, that were voted on at the regular meeting of January 14, and that they did not feel it necessary to have these reappointees come before their committees.

MOTION: Moved by Sen. Budge, seconded by Sen. Crystal, that the three reappointments now be sent to the floor of the Senate with the "do confirm" recommendations previously voted on. Motion carried.

S 1005

SWAN FALLS AGREEMENT RECOGNIZED

Tom Nelson, attorney for Idaho Power Co., explained this bill is one of several in a package to implement the Swan Falls compromise agreement. He added that it is one of the Governor's bills and referred to Pat Costello.

Pat Costello, Governor's office, stated that S 1005 would provide a legislative determination that the Swan Falls agreement is in the public interest and that it would revoke Public Utilities Commission jurisdiction to reach a contrary finding or determination. In answer to questions he stated it was their hope that the several bills in the package would end up becoming law at about the same time; that this bill by itself doesn't make a lot of sense without the agreement; and that it would be advantageous if the bills are held together.

Pat Kole, Attorney General's office, urged favorable consideration of the bill by the committee.

There was considerable discussion and questions concerning the necessity of the bills reaching the Governor at approximately the same time and also concerning the ramifications of the legislation.

MOTION: Moved by Sen. Peavey, seconded by Sen. Budge, that S 1005 be sent to the floor with a "do pass" recommendation.

Sherl L. Chapman, Executive Director of the Idaho Water Users Association, stated his Association has reviewed the settlement and the package and feels that this is part of the agreement. His Association supports this legislation.

Fred Stewart, Rt. 4, Jerome, Idaho, spoke on the ramifications of this legislation, quoting from the Special Swan Falls Edition II

issue of Currents, January 1985, which contained the complete text of the final Swan Falls Agreement, and also reading Section 42-245, Idaho Code, and parts of other publications and correspondence pertaining to water rights and the implementation of the Agreement, copies of which he provided to the committee members. He urged the committee to vote against this legislation.

Ken Dunn, Director of the Department of Water Resources, stated he thinks this is in the interest of Idaho and answered questions of the committee members pertaining to water diversions, water rights, etc.

Mike Gilmore, Deputy Attorney General assigned to PUC, stated that this only takes away from the Commission the authority to review the agreement - everything else is still there.

Dick High, PUC Commissioner, spoke briefly, saying that he has no objections to this legislation.

Marjorie Hayes, Boise, stated she has been to California and that they are losing their water and are trying to buy it all over. She urged the committee not to support this at this time - maybe in 10 or 15 years when we need food this can be reviewed again, but not now.

Sen. Crystal stated he does not see the necessity for rushing this through and that he would like to study the other bills and go to some more hearings.

SUBSTITUTE

MOTION: Moved by Sen. Crystal, seconded by Sen. Ricks, that S 1005 be held in committee for further study.

John Hatch, Idaho Farm Bureau, read the policy statement of their organization concerning this matter. They support the agreement as a whole.

Sen. Noh, Chairman of Resources and Environment Committee, in response to questions as to the outcome of the bills of the package in his committee stated that today his committee had voted to hold the bills for one week for a subcommittee to work out a statement of legislative intent. He felt this legislation can do no harm if this passes and the others fail but that he would just as soon see them go together; that they are designed to be treated as a package; that they were not drafted together because of having different sections of the Code in one bill; and that in the package there are 2 bills in the House, 2 in the Resources Committee and the 2 in this committee.

There was considerable discussion as to the disposition of the bills in relation to the other bills catching up.

AMENDED
ORIGINAL
MOTION:

With his second's consent, Sen. Peavey offered an amended original motion to send S 1005 out with a "do pass" recommendation to be held until a week from next Monday (Feb. 4).

Sen. Crystal stated his attorney, who is a water specialist, will be in town on Monday and that he would like to confer with him before he makes a commitment. The committee discussed a time certain to consider the bills again, and Sen. Crystal stated he would prefer next Wednesday.

AMENDED With his second's consent, Sen. Crystal offered an amended
SUBSTITUTE substitute motion to hold S 1005 until a time certain to be
MOTION & voted on next Wednesday (Jan. 30). After a voice vote, the
VOTE Chairman declared the motion carried.

S 1007 WATER RIGHT SALE, GAIN TO RATEPAYER

Sherl L. Chapman, Executive Director of the Idaho Water Users Association, explained that this bill is part of the package and added that any gain from a sale goes to the ratepayers. He asked the committee to support the bill.

Pat Costello, Governor's office, urged favorable consideration of this legislation.

Fred Stewart, Jerome, Idaho, spoke briefly against the bill.

Mike Gilmore, Deputy Attorney General assigned to PUC, in response to a question by Sen. Sweeney, explained that any gain would be purchase price less the tiny initial application fee.

UNANIMOUS On request by Sen. Ricks, granted by unanimous consent, S 1007
CONSENT will also be held until Wednesday (Jan. 30) and then brought up for vote along with S 1005.

RS 10796 DISTRIBUTION OF HORSE RACING BETTING PROCEEDS

Sen. Risch explained that this legislation clarifies the language of Section 54-2513, Idaho Code, which distributes horse racing betting proceeds.

MOTION: Moved by Sen. Ricks, seconded by Sen. Crystal, that RS 10796 be printed. Motion carried.

RS11040C1 RELATING TO INTEREST EARNED ON INVESTMENT OF IDLE MONEYS

Marjorie Ruth Moon, State Treasurer, explained the purpose of this bill is to allow separate investment by the State Treasurer of funds received from the federal government if any federal law, regulation or federal-state agreement requires such separate investment. It also provides for an investment administration fee to be charged against state funds or accounts (other than General Account) which receive investment income from the investments administered by the State Treasurer.

MOTION: Moved by Sen. Sweeney, seconded by Sen. Crystal and Sen. Batt, that RS11040C1 be printed. Motion carried.

RS 11129 DISCLOSURE OF INFORMATION BY STATE EMPLOYEES

Sen. Anderson explained that this legislation will allow state employees to disclose information regarding waste in state government to appropriate governmental agencies and to the public and will allow those employees to be protected from retaliation by their superiors.

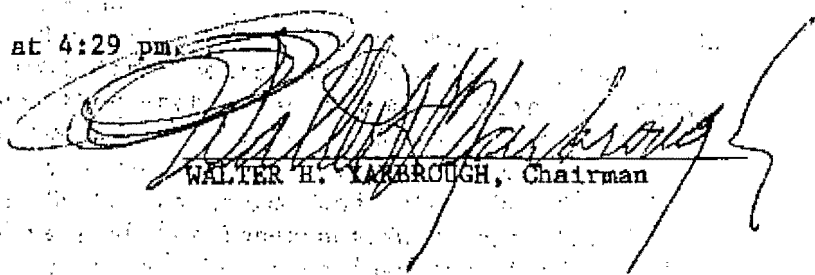
MOTION: Moved by Sen. Peavey, seconded by Sen. Risch, that RS 11129 be printed. Motion carried.

RS 11122 APPOINTMENT AND TERMS OF DIRECTOR AND MEMBERS OF TRANSPORTATION BOARD

Sen. Kiebert explained that this legislation provides that Transportation Board members shall serve at the pleasure of the Governor for a fixed term and also provides that the Governor shall appoint the Director of the Department with the advice and consent of the Senate.

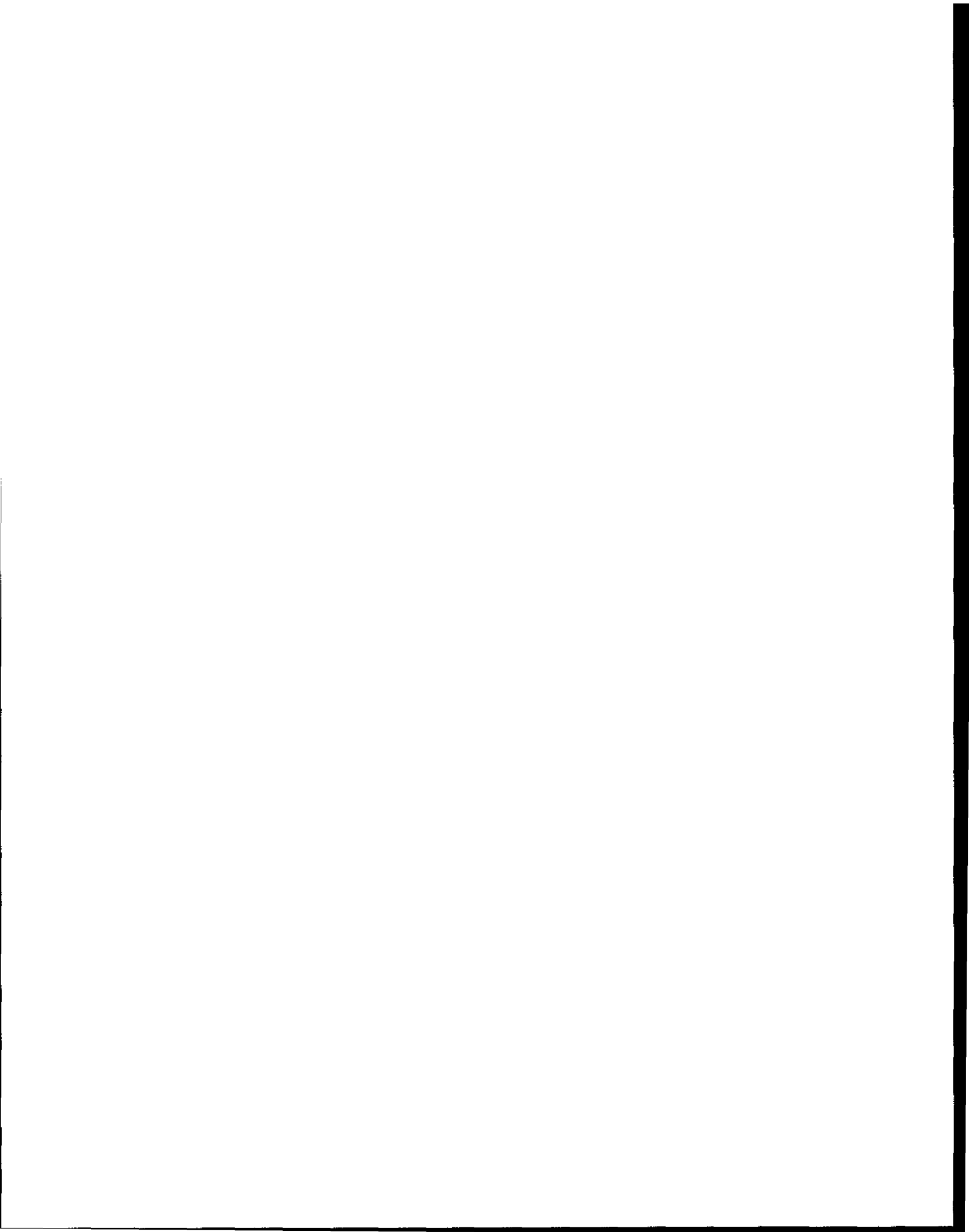
MOTION: Moved by Sen. Batt, seconded by Sen. Sweeney, that RS 11122 be printed. Motion carried.

Meeting adjourned at 4:29 pm.



WALTER H. YAMBROUGH, Chairman

Bert Bays
Bert Bays, Secretary



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 Kiebart 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 DCMI 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 came 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 a lot 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 it's 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 Tomlinaga 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 now 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 ratepaper's interest is addressed as part of the public interest.

- Senator Peavey What would be the flip side of Senator Tominaga'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 admitably 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

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 blueprint 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 Sebree, 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 Sebree Canal became the focus of the first adjudication of Boise River water rights as Sebree'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 trying to 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 1908, 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 Tominaga, R-Paul, was executive assistant for the Idaho Water Users Association

before he left the organization three years ago to begin farming. Voters in Tominaga'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 3,000 cubic feet per second in the summer and 5,000 cfs in the winter, or halfway between the existing minimum of 3,300 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 LEGISLATORS, Page 5C

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-Focatello, 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, 1985

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.

STATE AFFAIRS COMMITTEE

MINUTES

February 1, 1985

Room 350

3 pm

PRESENT: All committee members were present except Sen. Kiebert.

Chairman Yarbrough called the meeting to order.

Moved by Sen. Budge, seconded by Sen. Batt, that the minutes of the previous meeting be accepted as written. Motion carried.

RULES AND REGULATIONS

Sen. Budge reported that he and Sen. Kiebert had reviewed the rules and regulations pertaining to the Public Utilities Commission and found no problems with them.

MOTION: Moved by Sen. Budge, seconded by Sen. Peavey, that the report be accepted. Motion carried.

S 1027

MULTIPLE CUSTODIANS OF STATE'S TIME DEPOSITS

Marjorie Ruth Moon, State Treasurer, explained that this legislation clarifies two sections of the Idaho Code involving the duties of the State Treasurer as custodian of the money and securities held by the State. Presently the State Treasurer is the custodian for all state money, bonds, debentures and other securities and must appoint additional or multiple custodians. If deposits are set up in the names of different combinations of official custodians, each combination has separate FDIC or FSLIC insurance. Lately the FDIC reinterpreted their rule to say that the different combinations of custodians are insured separately if the state law requires multiple custodians to appear on deposit accounts. She feels Idaho's law already does this but not in so many words. To erase any doubt and to make sure that she gets all the insurance possible on the state's time deposits, this bill requires multiple custodians where their appointment by the State Treasurer would increase the federal deposit insurance on the state's time deposits. The bill spells out specifically a thing that is already being done so that there is no doubt in anybody's mind, especially the feds.

MOTION: Moved by Sen. Batt, seconded by Sen. Sweeney, that S 1027 be sent out of committee with a "do pass" recommendation. Motion carried.

S 1037

RELATING TO INTEREST EARNED ON IDLE MONEYS

Marjorie Ruth Moon, State Treasurer, explained that this legislation deals with the investment of so-called idle moneys and provides for separate investment by the State Treasurer of funds received from the federal government if any federal law, regulation or federal-state agreement requires separate investment. She added that the language covering this provision is on page 2, lines 15-19 of S 1037. The second part of this bill covers another problem resulting from more and more state

entitles requesting their own interest from investments. This legislation would take care of the cost and workload required of the State Treasurer's office when those accounts are invested separately. She stated that the fee is small (.02% per month of the average daily balance), but it would cover costs that are increasing. In response to questions, she added that the general fund supports her budget; and if she can collect this fee from the individual agencies, it will in fact help the general fund.

MOTION: Moved by Sen. Sweeney, seconded by Sen. Peavey, that S 1037 be sent out with a "do pass" recommendation. Motion carried.

GUBERNATORIAL APPOINTMENT

Brian Wardle - Commission of the Blind

The committee discussed the problems of the two opposing camps involved in the confirmation of this appointment. Sen. Batt reported that he and Sen. Crystal had visited with the Governor and that he, also, wants to solve this problem. The committee further discussed the makeup of the Commission and the possible solution of expanding the Commission with representatives from each camp, or possibly with someone who belongs to neither side inasmuch as the two sides seem to be irreconcilably split.

Sen. Batt suggested the appointment be held in committee until next Monday (Feb. 4) so a solution might be reached. There was a question as to whether or not that would be sufficient time.

UNANIMOUS
CONSENT

On request of Sen. Ricks, granted by unanimous consent, this appointment will be held in committee until some future date as determined by the Chairman. Sen. Batt thought it should be scheduled far enough ahead to be prepared.

S1005 SWAN FALLS AGREEMENT RECOGNIZED (FINAL CONSIDERATION)

MOTION: Moved by Sen. Peavey, seconded by Sen. Budge, that S 1005 be sent out of committee with a "do pass" recommendation.

SUBSTITUTE

MOTION: Moved by Sen. Ricks, seconded by Sen. Crystal, that S 1005 be held in committee at least until the next meeting.

Sen. Ricks stated he is still troubled about some of the aspects of this bill; and if voted on today, he will have to vote against it. At the request of the Chairman, Sen. Peavey, a member of the Senate Resources Committee, reported on the companion bills that are a part of this legislation, stating that the House had sent the adjudication bill out today with a "do pass" recommendation and that the Senate Resources Committee had sent out their two bills with a "do pass" recommendation. Sen. Crystal felt that at this point if this legislation could be held at least another meeting that he could probably vote for it; but if today, he would have to vote against it.

VOTE ON

SUBSTITUTE After a voice vote, the Chairman requested a roll call vote on the substitute motion to hold S 1005 until next meeting.

MOTION

Voting AYE: Senators Crystal, Ricks and Batt. Voting NO: Senators Yarbrough, Budge, Risch, Peavey and Sweeney. (Absent: Sen. Kiebert) Motion failed 3-5.

VOTE ON ORIGINAL MOTION After a voice vote on the original motion to send S 1005 out with a "do pass" recommendation, the Chairman declared the motion carried.

S 1007 WATER RIGHT SALE, GAIN TO RATEPAYER (FINAL CONSIDERATION)

MOTION: Moved by Sen. Peavey, seconded by Sen. Budge, that S 1007 be sent out of committee with a "do pass" recommendation. Motion carried.

At this time, Sen. Batt reported that they are progressing on their study of S 1021 which relates to the retirement eligibility age and the refinement of the 80/90 rule. He added that Robert Venn, Director of the Retirement System, has been extremely cooperative in providing information.

GUBERNATORIAL APPOINTMENTS

Chairman Yarbrough called attention of the committee members to the list of gubernatorial appointees and asked for their decision on appearance before the committee of certain of the nominees.

MOTION: Moved by Sen. Ricks, seconded by Sen. Sweeney, that the appointment of Sen. William Ringert to the State Building Authority be sent out of committee with a "do confirm" recommendation. Motion carried.

MOTION: Moved by Sen. Risch, seconded by Sen. Ricks, that the appointment of Russell Westerberg to the Horse Racing Commission be sent out of committee with a "do confirm" recommendation. Motion carried.

It was decided by the members that in addition to those already scheduled that Emery Hedlund (Tax Appeals Board), Rep. Paul Keeton (Endowment Fund Investment Board), Perry Swisher (PUC) and George Miller (Endowment Fund Investment Board) be asked to appear before the committee.

RS 11260 ENDORSEMENT OF CANDIDATES BY PARTY CONVENTIONS FOR PRIMARIES

Sen. Batt was explaining this legislation when it was discovered there was an error on page 1, starting with line 13, as it pertained to dates of the state conventions. RS 11260 was returned to Sen. Batt for necessary corrections.

RS11274C1 REPORT OF PERSONNEL COMMISSION AND GOVERNOR REGARDING COMPENSATION FOR STATE EMPLOYEES

Sen. Batt explained that this proposed Concurrent Resolution is to act upon the report of the Idaho Personnel Commission and the Governor regarding the compensation for state employees.

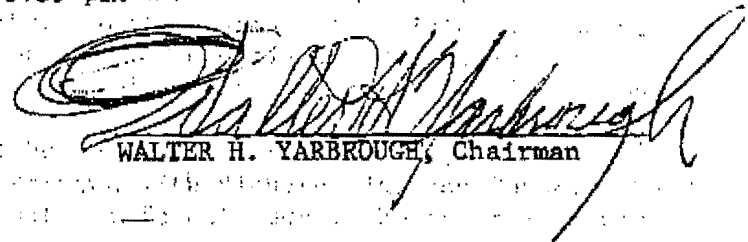
MOTION: Moved by Sen. Risch, seconded by Sen. Budge, that RS11274C1 be introduced. Motion carried.

RS11262 COMPENSATION - SENATE EMPLOYEES

Sen. Risch explained that this proposed Senate Resolution is to increase the salaries of Senate Pages and Messengers by \$1 a day in order to conform with the salaries paid to House Pages and Messengers. This Resolution supersedes SR 101, but the only change made is that of the increase for Pages and Messengers which will be retroactive to the start of this session.

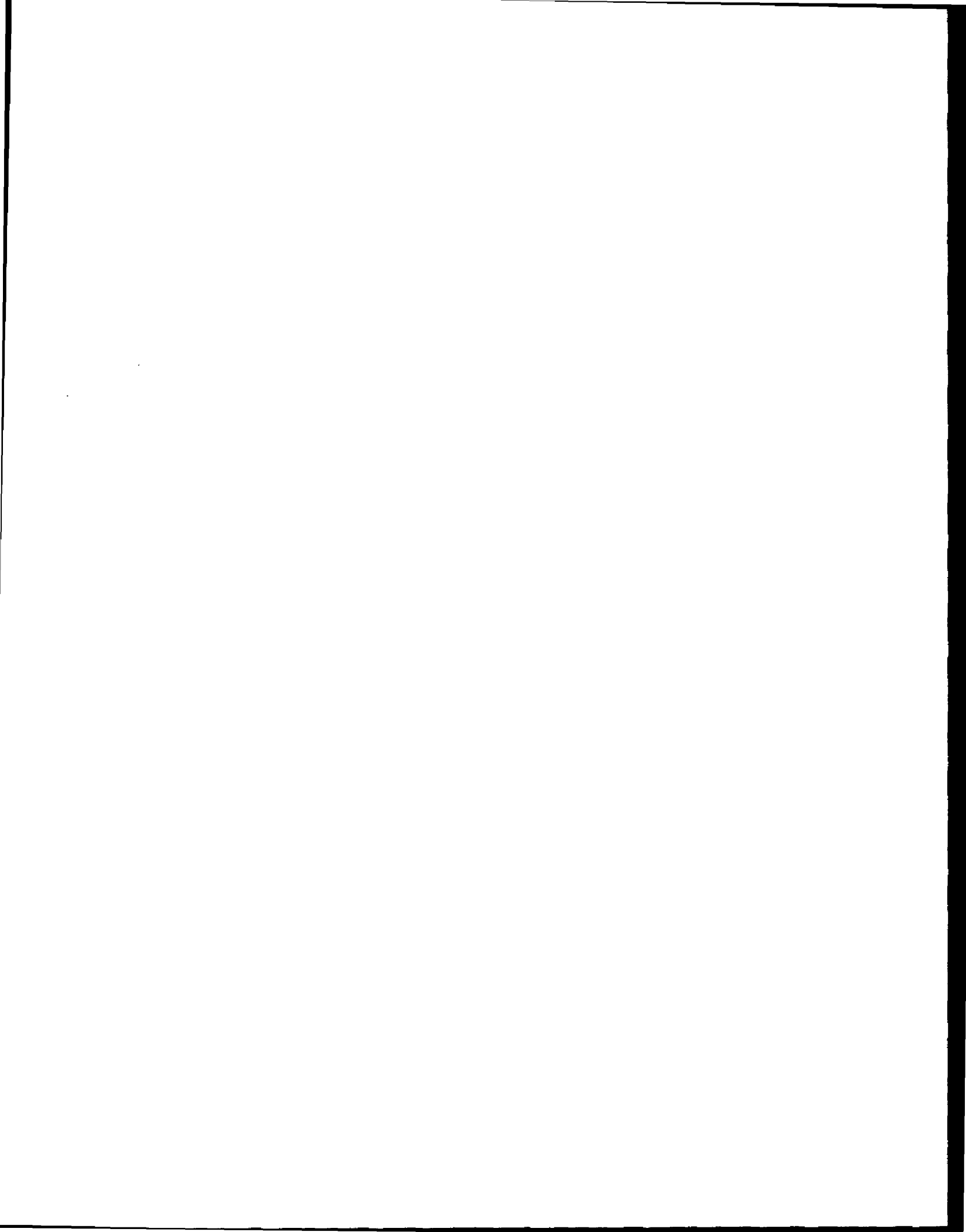
MOTION: Moved by Sen. Budge, seconded by Sen. Sweeney, that RS11262 be printed. Motion carried.

Meeting adjourned at 3:59 pm.



WALTER H. YARBROUGH, Chairman

Bert Bays
Bert Bays, Secretary



1/31/85

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

February 1, 1985

TIME: 1:16 PM

PLACE: Room 412 - STATEHOUSE

PRESENT: All members present

GUESTS: Mr. Kenneth Dunn, Director, Department of Water Resources; Dr. Dick Gardner, Department of Financial Management; Mr. Howard Funke, Attorney; Mr. Sherl Chapman, Idaho Water Users Association; and Mr. Kenneth McClure, attorney.

Chairman Chatburn called the meeting to order.

MOTION: Representative Sutton moved and Representative Edwards seconded that the Minutes of January 29, 1985 be approved.

MOTION CARRIED.

H 70: ADJUDICATION OF SNAKE RIVER BASIN

Representative Wood asked for a point of clarification directed to Mr. Dunn. She stated that in the testimony given at the Public Hearing by Mr. Stewart, there was question as to what would happen with the water rights of the people who had not filed up to the date that has been set for the deadline this year. She said it was her understanding they would lose their water rights.

Mr. Dunn answered that as it stands right now, that was correct. It is subject to forfeiture; however, there is legislation prepared that has not been submitted pending what happens with the adjudication bill. It will increase the filing fee for water rights and remove the July 1, 1985 date and merely says a late claim would have a fee. The present fee is \$200 and it has been proposed to raise it to \$400.

MOTION: Representative Little moved that H 70 be held in committee and seconded by Representative Winchester.

Representative Little commented that this would not be to kill the bill but that there is a need for more information. That HCR 16 clearly stated that is the case - if the rights can be negotiated - it will cost ten percent of what it would be if done in the courts. There is a question on what has to be done with the McCarran Amendment and how far adjudication will have to be on the Snake River Basin - whether the Boise, Clearwater, Weiser and Lemhi Rivers are included or just adjudicated down to Swan Falls or Murphy.

Representative Winchester also stated it was not his intention to try to stop H 70 from proceeding through this session; however, he has been in contact with his constituents in the five districts that the Boise project serves from here to Adrian which have gone through adjudication. If negotiations can be opened up as has been done with the Indian tribes, the same courtesy can be extended to the river systems who have gone through an adjudication process.

Representative Edwards asked if anyone could answer the question "if we can adjudicate as needed and not involve the other rivers that have already been adjudicated?"

Mr. Dunn answered that, no, it cannot be said that they will be exempted because the requirements are not known from the federal government and the Indians. If the McCarran Amendment is applied, it has

RESOURCES AND CONSERVATION COMMITTEE

February 1, 1985

Page 2

to be satisfactory to those parties. If the rivers in question are not adjudicated, they may very well say it does not meet their needs.

Representative Edwards then made reference to "list in order of preference." She asked if adjudication could be started at the upper Snake and work down as is needed to reach the quantity required to satisfy the rights.

Mr. Dunn answered, "Yes, but that also is accomplished through negotiation." He said they would not include any more than they had to include.

SUBSTITUTE: Representative Bateman moved Representative Johnson seconded that
MOTION H 70 be sent to the floor with a "DO PASS" recommendation.

Mr. Funke said it was up to a federal judge to determine whether the Boise, Lemhi, Clearwater and other rivers in question are adjudicated and whether that is in the scope to satisfy the McCarran Amendment. They are proposing that to eliminate that open question, it is possible to sit down with the tribes and other federal interests and deal with those water rights. After that is accomplished, there is no need for general stream adjudication. The water rights are measured and are put in place without going to total stream adjudication. The disagreement is that the Indians want all of the rivers included; and if a settlement can be reached through negotiation, a confrontation at the federal level will be avoided. Mr. Funke felt H 70 should be passed as well as HCR 16.

Chairman Chatburn told the committee he has a new resolution. In order to eliminate confusion, it is the intention of the chair that if H 70 can be acted upon, they will take action on HCR 16. The committee will then discuss the new resolution to see if it is needed as well.

AMENDED: Representative Winchester moved and Representative Sutton seconded
MOTION that H 70 be held until Tuesday, February 5, 1985.

Chairman Chatburn relinquished the chair to Vice-Chairman Winchester after Representative Edward's request that he voice his opinion regarding H 70. Representative Chatburn then addressed the committee, remarking that they have been told the Payette and Lemhi having been adjudicated, largely at state expense, would not be charged. They could plug in when it comes to that point. The Statement of Purpose of H 70 states "...This 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." In his opinion, that clearly indicated that not anything more be done than is entirely necessary to qualify under the McCarran Amendment. They could, if they so desire as a committee, have the Statement of Purpose incorporated in the Journal of Proceedings, along with the bill. He said he hoped the committee could report the bill to the floor with a "DO PASS" recommendation. If something comes up that needs attention on the legislation, it could be held on the calendar.

AMENDED MOTION FAILED.

SUBSTITUTION MOTION PASSED. There was a Roll Call vote request - 14 AYE AND 6 NAY. (Chatburn, Stoicheff, Bateman, Stanger, EchoHawk, Dewey, Johnson, Linford, Hawkins, Duffin, , Jonas, Hansen, Wood and Stucki voting "AYE." Winchester, Little, Edwards, Sutton, Haagenson and Brackett "NAY.")

MOTION: Representative Winchester moved and Representative EchoHawk seconded that HCR 16 go the floor with a "DO PASS" recommendation.

MOTION CARRIED.

RESOURCES AND CONSERVATION COMMITTEE

February 1, 1985

Page 3

MOTION: Representative Wood moved and Representative Linford seconded that H 71 be sent to the floor with a "DO PASS" recommendation.

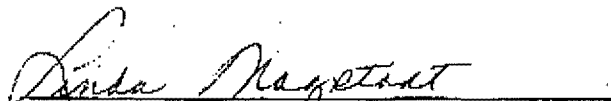
MOTION CARRIED.

Chairman Chatburn referred to Senate Bills 1006 and 1008 and asked Mr. Chapman to address the committee regarding them.

Mr. Chapman said that S 1006 relates to the authorization of the Department of Water Resources to put a moratorium on issuance of water right permits or applications as necessary to protect the existing vested right and allows the department to develop the rules and regulations that are necessary to implement the public interest criteria that is in S 1008. S 1008 really is the bottom line for the Swan Falls settlement and provides for the trust of the new minimum stream flow and the new public interest criteria which takes into account economic factors in the issuance of new water rights for the remaining waters held in trust by the state of Idaho after the settlement.

There being no further business to come before the committee, it adjourned at 2:35 PM.


J. VARD CHATBURN, CHAIRMAN


Linda Magstadt, Secretary

Spencer

2-1-85
H 70

ROLL CALL VOTING

AYE NAY

Chatburn	<input checked="" type="checkbox"/>	
Winchester		<input checked="" type="checkbox"/>
Little		<input checked="" type="checkbox"/>
Stoicheff	<input checked="" type="checkbox"/>	
Bateman	<input checked="" type="checkbox"/>	
Edwards		<input checked="" type="checkbox"/>
Sutton		<input checked="" type="checkbox"/>
Stanger	<input checked="" type="checkbox"/>	
EchoHawk	<input checked="" type="checkbox"/>	
Dewey	<input checked="" type="checkbox"/>	
Johnson (27)	<input checked="" type="checkbox"/>	
Haagenson		<input checked="" type="checkbox"/>
Linford	<input checked="" type="checkbox"/>	
Hawkins	<input checked="" type="checkbox"/>	
Duffin	<input checked="" type="checkbox"/>	
Jones	<input checked="" type="checkbox"/>	
Hansen	<input checked="" type="checkbox"/>	
Wood	<input checked="" type="checkbox"/>	
Stucki	<input checked="" type="checkbox"/>	
Brackett		<input checked="" type="checkbox"/>

DATE _____
BILL NO. _____
AYES _____
NAYS _____
EXCUSED _____

Carried _____ Failed _____

14 6

ROLL CALL VOTING

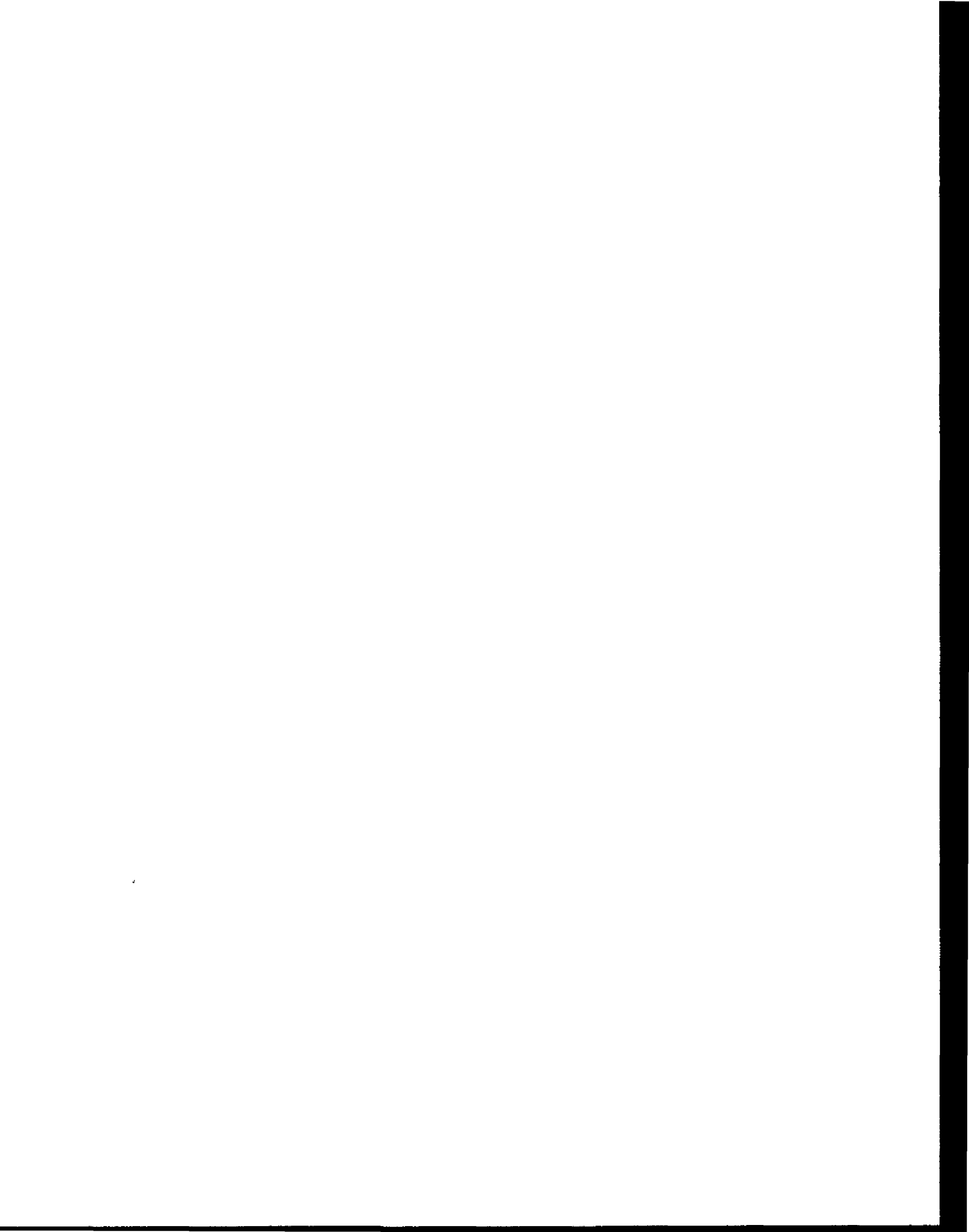
AYE NAY

Chatburn		
Winchester		
Little		
Stoicheff		
Bateman		
Edwards		
Sutton		
Stanger		
EchoHawk		
Dewey		
Johnson		
Haagenson		
Linford		
Hawkins		
Duffin		
Jones		
Hansen		
Wood		
Stucki		
Brackett		

DATE _____
BILL NO. _____
AYES _____
NAYS _____
EXCUSED _____

Carried _____ Failed _____

U. S. Fish and Wildlife as to what these damage control moneys that they furnish should be used.



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 Kole, 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 42-1805, 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. Kole 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.

§ 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.

§ 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. Kole 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.

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

Idaho Water Users Association, Inc.

AFFILIATED WITH NATIONAL WATER RESOURCES ASSOCIATION
4708 FAIRVIEW AVE. BOISE, IDAHO 83704

TELEPHONE 376-8131

SHERL L. CHAPMAN
Executive Director

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

to implement the public interest criteria. It would also give him the authority, that in the event of another situation similar to Swan Falls, to impose a moratorium when necessary to protect existing vested water rights. He said that after Monday's meeting they had met with the some of the small hydro people and believes their problems have been worked out.

MOTION: Representative Hansen moved and Representative Dewey seconded that S 1006 go to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Hansen will sponsor.

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President
- CHARLES ROSEBERRY
Vice President
- JOHN A. RISHOLT
Director, NWRA

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Associate Member
- RONALD BUCK
Associate Member

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 IWDA 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 IWDA Board of Directors, at it's winter board meeting January 4, 1978, took several formal actions 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

SIC:kje

#3

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, HIRSTLINE and DONALDSON, JJ., concur.

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

Refer to page 81
line 13 - FERC 40 yr
license for Swan Falls

Justice Shepard's Ruling
on Swan Falls #1

-29-

to implement the public interest criteria. It would also give him the authority, that in the event of another situation similar to Swan Falls, to impose a moratorium when necessary to protect existing vested water rights. He said that after Monday's meeting they had met with the some of the small hydro people and believes their problems have been worked out.

MOTION: Representative Hansen moved and Representative Dewey seconded that S 1006 go the the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Hansen will sponsor.



4

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

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

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	545.09
Third Dismissed	615.43
TOTAL	<u>15,045.47</u>

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

to implement the public interest criteria. It would also give him the authority, that in the event of another situation similar to Swan Falls, to impose a moratorium when necessary to protect existing vested water rights. He said that after Monday's meeting they had met with the some of the small hydro people and believes their problems have been worked out.

Representative Dewey seconded that

Honorable Mark Ricks

- 2 -

February 11, 1985

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

FEB = 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.

STATEMENT OF IDAHO POWER COMPANY
IN SUPPORT OF SENATE BILL 1008 - 1

to implement the public interest criteria. It would also give him the authority, that in the event of another situation similar to Swan Falls, to impose a moratorium when necessary to protect existing vested water rights. He said that after Monday's meeting they had met with the some of the small hydro people and believes their problems have been worked out.

MOTION: Representative Hansen moved and Representative Dewey seconded that S 1006 go the the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Hansen will sponsor.

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.

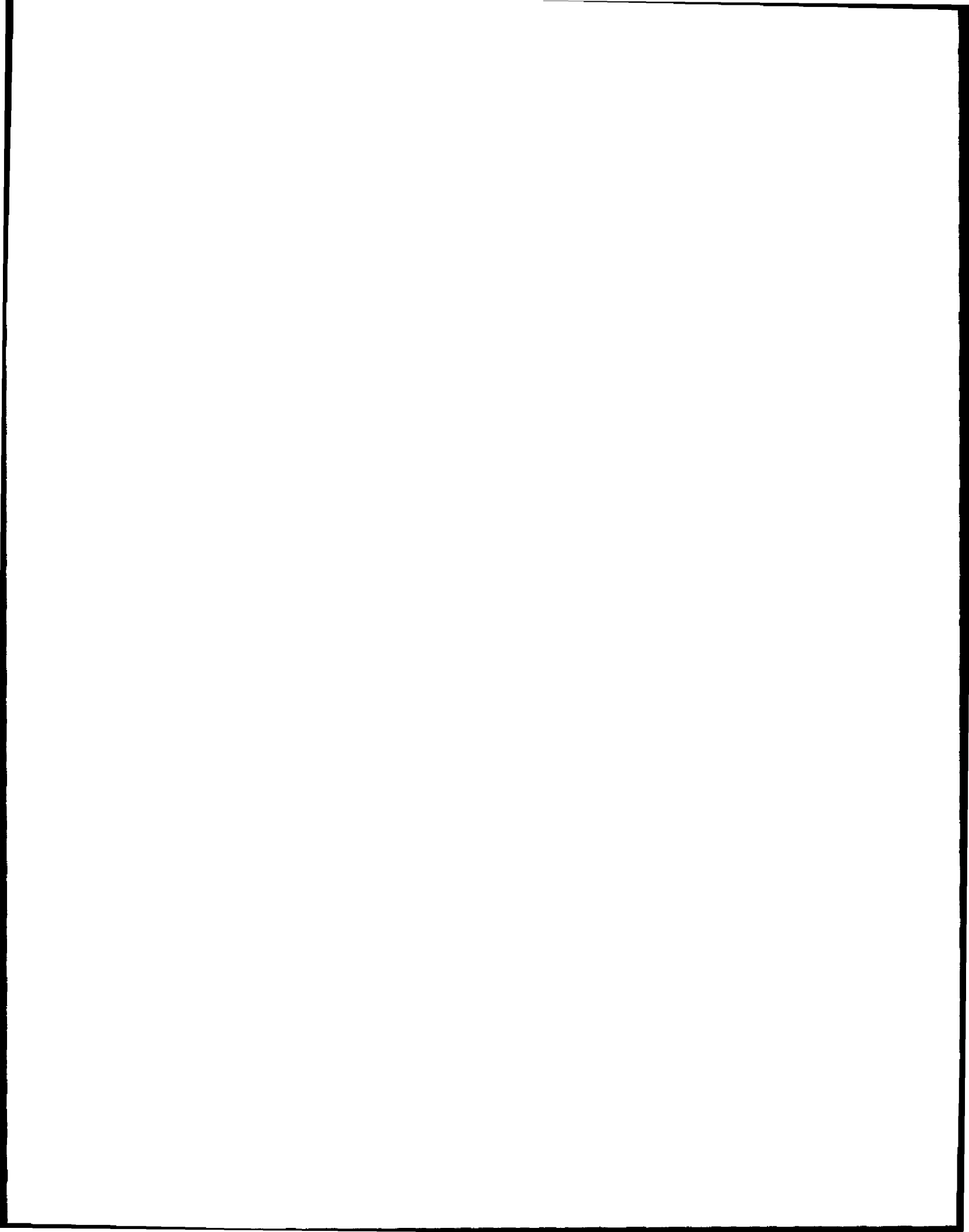
Another concern expressed was over the perceived need to weight the criteria. The criteria are weighted in the bill: "No single factor . . . shall be entitled to greater weight . . .". The weighting established by the bill is obviously that all factors are equal in weight.

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.



MINUTES

RESOURCES AND CONSERVATION COMMITTEE

February 13, 1985

TIME: 1:40 PM

PLACE: Room 412 - Statehouse

PRESENT: All members present except:

EXCUSED: Representative Brackett

GUESTS: Mr. Jerry Conley, Director, Department of Fish and Game; Mr. Pat Costello, attorney, Office of the Governor; Mr. John Runft, attorney; Mr. Amos Garrison, Idaho Association of Soil Conservation Districts; Mr. Mike Anderson, Soil Conservation Society of America; Dr. Dick Gardner, Department of Financial Management; Ms. Rena Quick, Idaho Conservation League; and Mr. Rob Holland, Idaho Water Users Association; and Mr. Dan John, Idaho Tax Commission.

Chairman Chatburn called the meeting to order.

MOTION: Representative Winchester moved and Representative Sutton seconded that the Minutes of February 11, 1985, be approved.

MOTION CARRIED.

RS 11373: RELATING TO A FREE FISHING DAY; AMENDING SECTION 36-401, IDAHO CODE, TO PROVIDE THAT NO FISHING LICENSE SHALL BE REQUIRED FOR ANY PERSON TO FISH ON A FREE FISHING DAY AS MAY WELL BE DESIGNATED BY THE FISH AND GAME COMMISSION.

Mr. Conley explained this would permit anyone to fish free for one day. He said he considered it a good-will gesture to encourage people to try fishing rather than some other sport.

MOTION: Representative Wood moved and Representative Stoicheff seconded that RS 11373 be introduced.

MOTION CARRIED.

S 1005: SWAN FALLS AGREEMENT RECOGNIZED.

Mr. Costello said this proposed legislation expresses that this agreement is in the public interest.

MOTION: Representative Bateman moved and Representative Linford seconded that S 1005 go to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Bateman will sponsor.

S 1006: WATER RESOURCES DIRECTOR - ADOPTION OF RULES

Mr. Costello told the committee this would give the director authority to implement the public interest criteria. It would also give him the authority, that in the event of another situation similar to Swan Falls, to impose a moratorium when necessary to protect existing vested water rights. He said that after Monday's meeting they had met with some of the small hydro people and believe their problems have been worked out.

MOTION: Representative Hansen moved and Representative Daway seconded that S 1006 go to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Hansen will sponsor.

S 1007: WATER RIGHT SALE, GAIN TO RATEPAYER

Mr. Costello stated the proceeds from the gain of sale of a public utility's water right for hydro-power generation benefit the rate-payer rather than the shareholder.

MOTION: Representative Winchester moved and Representative Little seconded that S 1007 be sent to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Duffin will sponsor.

S 1008: WATER RIGHTS, SUBORDINATION

Mr. Costello commented S 1008 is the main Swan Falls agreement bill. It establishes a uniform system for the regulation of hydro-power in Idaho. 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. Hydro-power rights in excess of such flows will be held in trust by the state and are subject to subordination to and depletion by lawful beneficial uses. Such agreements must be ratified by law.

Representative Hawkins inquired about small hydropower.

Mr. Costello replied that Mr. John Runft is working with them on follow-up legislation and that small hydro power producers were satisfied with the changes.

MOTION: Representative Johnson moved and Representative Daway seconded that S 1008 be sent to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Representative Chatburn will sponsor.

Representative Edwards asked for UNANIMOUS CONSENT to have Mr. Runft address the proposed bill pertaining to small hydropower.

Mr. Runft commented that the so-called hydropower interests are multi-represented. There have been extensive negotiations with parties to the Swan Falls settlement and an understanding has been reached. The concerns were mainly with Section 6 of S 1008 - expressly, subsection 6 of 42-203B, having to do with the authority of the director to place a time limit on the permit or license. As a result of the negotiations and work by all parties, they have reached a satisfactory result which is contained in the proposed follow-up bill. It provides a Section 7 which would follow when the legislation becomes a statute.

S 1018: AQUIFER RECHARGE DISTRICTS, DIRECTORS.

Chairman Chatburn relinquished the chair to Vice Chairman Winchester so that he could speak to S 1018. Representative Chatburn explained this legislation is necessitated by the fact that when the aquifer recharge districts were set up, there was no provision made for directors of those districts to live outside of the district. The occasion has arisen where one of the persons involved heavily in the water recharge district, lives outside the boundary. This would necessitate amending the statute.

MOTION: Representative Stucki moved and Representative Edwards seconded that S 1018 be sent to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Chairman Chatburn will sponsor.

H 105: RIPARIAN LAND, INCOME TAX CREDIT

Mr. Anderson said this legislation provides incentives to farmers, ranchers and other landowners for voluntary riparian land restoration, improvements or protection projects. Such improvements will benefit all residents of the state by reducing soil erosion, improving agriculture, improving streambank stability, reducing flooding, increasing stream storage capacity, prolonging stream flow, improving livestock forage and improving stream water quality and fish and wildlife habitat. The incentive is an income tax credit (maximum of \$2,500) for restoration and improvement costs incurred in riparian land rehabilitation. The economic impact would be approximately \$20,000 to \$60,000 per year lost to the state as income tax credits.

Mr. Garrison supports the legislation. He said it fits well with the 51 soil conservation districts.

Dr. Gardner spoke in opposition to the bill on behalf of the Governor. They view this bill as narrowing the tax base and diluting the ability of the state to raise revenue. The intent of the bill is good; however, a tax credit is not an appropriate way to do this. In fact, a tax credit is comparable to an openended, indirect appropriation.

Representative Hawkins asked if Mr. John of Revenue and Taxation had been consulted.

Mr. John stated the Tax Commission has no opinion on the legislation.

Representative Hawkins asked what the fiscal impact would be to the commission with the implementation of this legislation.

Mr. John answered that normal cost would be \$16,000 the first year and the cost would be less after that.

Mr. Holland spoke in favor of H 105. (Attachment #1)

Ms. Quick testified that she supported H 105.

MOTION: Representative Jones moved and Representative Bateman seconded that H 105 be sent to the floor with a "DO PASS" recommendation.

AMENDED MOTION: Representative Winchester moved and Representative Johnson seconded that H 105 be sent to the floor with a "DO PASS" recommendation but that it be referred to the Revenue and Taxation Committee.

AMENDED MOTION FAILED.

ORIGINAL MOTION CARRIED. Representative Jones will sponsor.

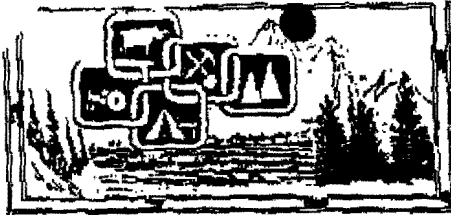
RS 11452: RELATING TO THE REQUIREMENT FOR CLAIMING PREVIOUSLY UNRECORDED WATER RIGHTS; AMENDING SECTION 42-221, IDAHO CODE, TO EXTEND THE LAST DATE THAT LATE CLAIMS MAY BE FILED; AND AMENDING SECTION 42-243, IDAHO CODE, TO EXTEND THE LAST DATE THAT CLAIMS MAY BE FILED.

Chairman Charburn relinquished the chair to Vice Chairman Winchester.

Representative Charburn explained there is one change in the legislation which changes the cutoff date from June 30, 1985 to June 30, 1988.

MOTION: Representative Stoicheff moved and Representative Little seconded that RS 11452 be introduced.

MOTION CARRIED.



Alliance for Recreation
and
Resource Management
P.O. BOX 5755 BOISE, IDAHO 83705

ARRM CREED

We believe:

That the value of the land is the voice of the future.
That it is possible to increase resource and recreational
availability while conserving environmental quality.

That resource and recreational management can best be
practiced by responsible use, reasonable access and proper
protection.

And that public policy can best be set by promulgation of
environmental conservation, preservation and utilization
policies which will benefit all citizens.

*"Conservation means development as much as it does
protection... We must conserve the forests, not by disease, but
by use, making them more valuable at the same time that we
use them."*

-Theodore Roosevelt

February 13, 1985

To: Members of the House Resources
and Conservation Committee

Ref: House Bill 105
Relating to Riparian Land

Dear Committee Member:

The Alliance for Recreation and Resource Management (ARRM) urge
committee passage of HB105.

This bill will enhance wildlife habitat, control erosion factors, and
aid in soil conservation and water quality enhancement.

This is a positive bill. All too often, legislation has been considered
in negative approaches which tend to present a burden to private property
owners and provide for penalties for non compliance. This bill, however,
creates incentives to private property owners who have streams with
adjacent vegetation communities running on or through their private
property to conserve environmental quality by encouraging responsible
resource management.

This bill (HB105) has been reviewed by the ARRM Board of Directors and
support approved on February 9, 1985.

The Alliance for Recreation and Resource Management is a grassroots
organization of over 2200 sportsmen, recreationists, fishermen, conservationists,
resource users, economists, environmentalists, agriculturists, businesses,
organizations, industrialists, governmental officials, hunters and concerned
citizens dedicated to responsible use, reasonable access and proper protection
of our environment and natural resources.

Respectfully submitted,

[Signature]
John Holland
ARRM Lobbyist

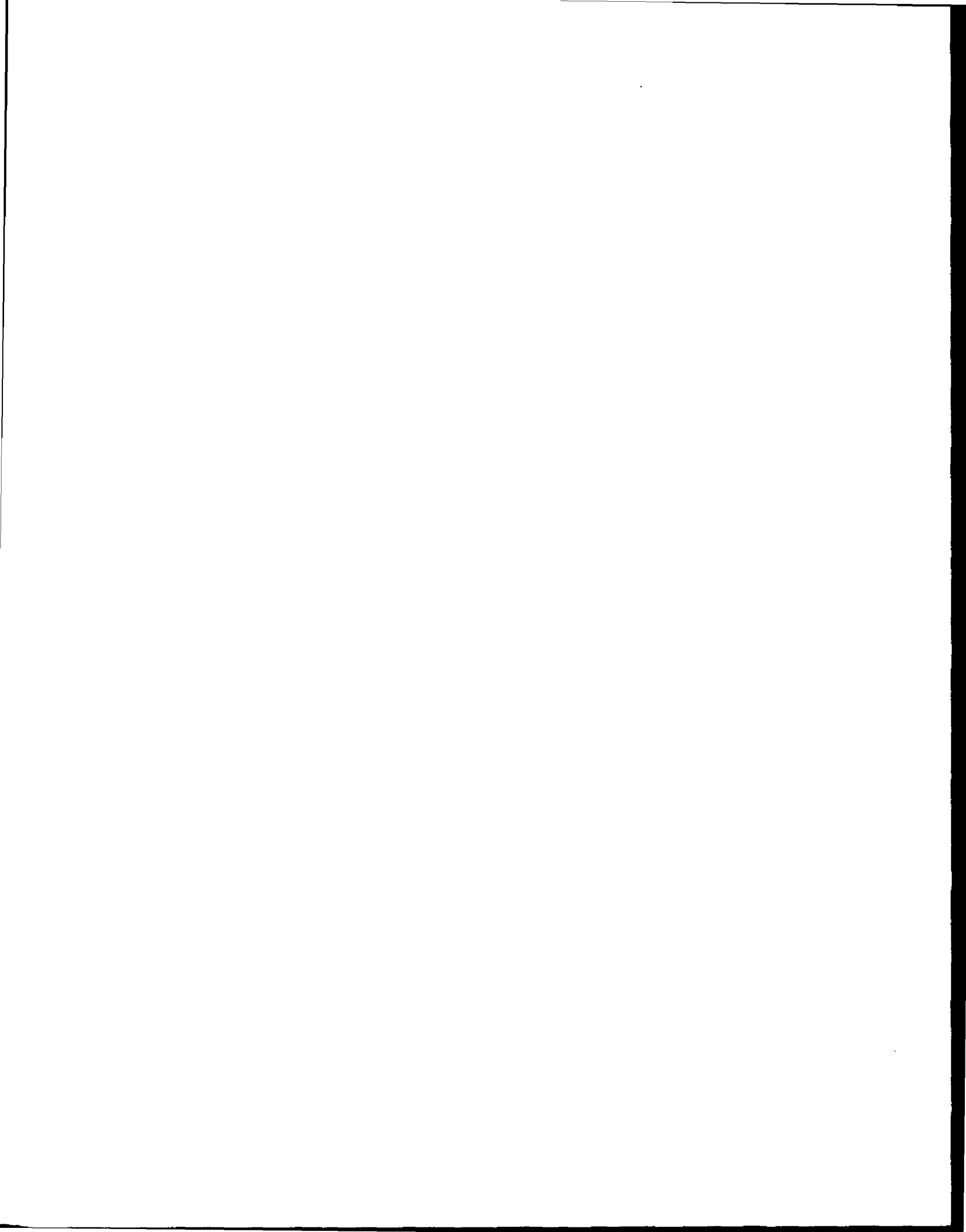
CC: ARRM Board of Directors

Ms. Hayes she is representing several organizations to ask that a
one-year moratorium be granted for these bills because the chief
BPA power will be given back to the people.

Mr. Coartello confirms that the Office of the Governor supports
H 186 and is an improvement to S 1008.

Mr. Kueny supports H 186.

Mr. Holland said they also support H 186 and that it a valid addition to
S 1008.



MINUTES

RESOURCES AND CONSERVATION COMMITTEE

February 15, 1985

TIME: 2:15 PM

PLACE: Room 412 - Statehouse

PRESENT: All members present except:

EXCUSED: Representatives Bateman and Dewey

GUESTS: Mr. John Runft, attorney for Salmon River Hydro, Inc; Mr. Vernon Ravenscroft; Ms. Hayes, Idaho Consumer Affairs; Mr. Pat Costello, attorney, Office of the Governor; Mr. Pat Koeny; Mr. Rob Holland, Idaho Water Users Association; Mr. Kenneth Norrie, Department of Fish and Game; and Mr. James Barham, Idaho Hunter Education.

Mr. Eugene Edwards is serving as substitute for Representative Jones.

Chairman Chathurn called the meeting to order.

MOTION: Representative Winchester moved and Representative Wood seconded that the Minutes of February 13, 1985, be approved.

MOTION CARRIED.

H 186: TO PROVIDE THAT THE DIRECTOR 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.

Mr. Runft told the committee he had distributed prepared testimony on H 186 (Attachment #1). He said this bill represents a compromise that has been endorsed by all of the negotiating parties to the Swan Falls compromise. It takes care of a dichotomy that previously existed in the Senate bill between permit and license. There is a change in the language of H 186 - the word "consumptive" is added on line 40, Page 1. Subsection 7 is all new language and is the essence of this bill. He said, however, that the last five lines under (d) lines 37 through 41 should not be part of criterion (d).

Chairman Chathurn pointed out to the committee that lines 37 through 41 should be set out so they correspond with lines 24 through 26 because they have no bearing on item (d).

Mr. Ravenscroft said he is personally pleased with the compromise that came out of the Swan Falls question. He added it is an intelligent balance between some ability for further development in the river basin above Swan Falls as well as a deterrent to increase hydroelectric charges to the consumers in the Idaho Power Company system.

Ms. Hayes she is representing several organizations to ask that a one-year moratorium be granted for these bills because the chief EPA power will be given back to the people.

Mr. Costello confirms that the Office of the Governor supports H 186 and is an improvement to S 1008.

Mr. Koeny supports H 186.

Mr. Holland said they also support H 186 and that it a valid addition to S 1008.

MINUTES
RESOURCES AND CONSERVATION COMMITTEE
February 13, 1985
Page 2

MOTION: Representative Little moved and Representative Stoicheff seconded that H 186 be sent to General Order with amendments attached so that the afore-mentioned corrections can be made.

MOTION CARRIED. Representative Brickett will sponsor.

HCR 18: OVERVIEW OF THE LEGISLATURE ON PUBLIC LANDS TRADED BY THE DEPARTMENT OF LANDS.

Representative Stoicheff testified this bill replaces H 30.

MOTION: Representative Haaganson moved and Representative Little seconded that HCR 18 go to the floor with a "DO PASS" recommendation.

MOTION CARRIED.

RS 1166C1: RELATING TO CERTIFICATION OF COMPETENCY IN HUNTER EDUCATION; AMENDING SECTION 36-411, IDAHO CODE, TO REQUIRE CERTIFICATION OF COMPETENCY IN HUNTER EDUCATION OF PERSONS BORN ON OR AFTER JANUARY 1, 1971, OR PROOF OF A PREVIOUS VALIDATED LICENSE PRIOR TO ISSUANCE OF A HUNTING LICENSE, TO PROVIDE FOR THE ACCEPTANCE OF EQUIVALENT TRAINING IN ANOTHER STATE OR FOREIGN COUNTRY AND TO PROVIDE THAT AN EXPIRED HUNTING LICENSE IS PROOF OF COMPETENCY.

Mr. Barham presented this proposed legislation.

Representative Hawkins asked why the language is date of birth rather than age.

Mr. Barham replied that presently anyone now 15 years of age or older is not required to have any training in hunter education. It has been changed so that anyone born on or after January 1, 1971, would be required to have the hunter education.

Representative Hawkins commented he has a problem with having a date of birth rather than an age and asked what other states use age.

Mr. Barham listed numerous states and their language relevant to age vs. date of birth.

MOTION: Representative Edwards moved and Representative Sutton seconded that RS 1166C1 be introduced.

SUBSTITUTE MOTION: Representative Stoicheff moved and Representative Stucki seconded that RS 1166C1 be returned to sponsor.

SUBSTITUTE MOTION CARRIED.

RS 11371: RELATING TO REIMBURSEMENT DAMAGES; AMENDING SECTION 36-1404, IDAHO CODE, TO PROVIDE THAT COURTS SHALL ENTER JUDGMENTS ORDERING REIMBURSEMENT DAMAGES IN SOME CASES, LIMITING THE AMOUNT OF TIME WITHIN WHICH THE REIMBURSEMENTS MAY BE MADE AND REQUIRING THE DEFENDANT'S HUNTING, FISHING OR TRAPPING PRIVILEGES BE REVOKED UNTIL THE JUDGMENT OF REIMBURSEMENT IS PAID.

Mr. Norris reminded the committee that H 27 was before the committee last week and made three major changes in the civil penalty's provision which is now in the statute. After discussion with the committee, it had some concerns about removing judicial discretion. It was suggested at that time, that rather than have the bill go to the floor under General Orders for amendment, that a new RS be drafted. This bill would leave the judicial discretion in - also, the defendant would have in no case more than one year to pay the civil penalty; and until it is paid, their privileges would be revoked.

Representative Wood asked where the changes were made.

Mr. Norrie answered that in H 27, line 15 states it is "...mandatory"
The word mandatory was removed.

Representative Wood asked Mr. Norrie if the word "shall" in line 31
would be equivalent to mandatory.

Mr. Norrie replied that one would think so but it is very clear from
the auditor's report, that the courts took it to be judicial discretion.

MOTION: Representative Haagenon moved and Representative Johnson seconded
that RS 11371 be introduced.

SUBSTITUTE MOTION: Representative Stoicheff moved and Representative Brackett seconded
that RS 11371 be introduced with one change. The word "shall" be
changed to "may" in line 31, page 1. "...obtained shall enter judg-
ment..."

SUBSTITUTE MOTION FAILED.

ORIGINAL MOTION CARRIED.

RS 11480: RELATING TO THE ENCOURAGEMENT OF WATER MARKETING

Chairman Chatburn told the committee that they were given material
on this subject to study and if they were desirous of having it
printed, it would be introduced. Subsequently, the Chairman would
appoint a subcommittee to work on it with the Senata and make a recom-
mendation to this committee.

MOTION: Representative Little moved and Representative Echohawk seconded that
RS 11480 be introduced.

MOTION CARRIED.

RS 11481: RELATING TO PARTICIPATION BY LOCAL GOVERNMENTS IN LOCAL PLANNING AND
ZONING; AMENDING SECTION 67-6503, IDAHO CODE, TO PROVIDE FOR THE QUES-
TION OF PLANNING AND ZONING AT AN ELECTION, PROVIDING THAT A MAJORITY
VOTE IS REQUIRED FOR SUCH ELECTION, PROVIDING FOR A PETITION TO REQUIRE
AN ELECTION BY THE GOVERNING BOARD ON THE QUESTION OF PLANNING AND
ZONING, AND PROVIDING SUCH PETITION SHALL CONTAIN THE SIGNATURES OF AT
LEAST FIFTEEN PER CENT OF THE QUALIFIED VOTERS VOTING IN THE LAST
GENERAL ELECTION.

Representative Winchester explained this would return genuine control
to the local planning act.

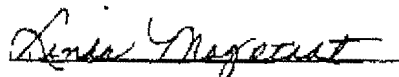
MOTION: Representative Wood moved and Representative Winchester seconded that
RS 11481 be introduced.

MOTION CARRIED.

The meeting adjourned at 3:45 PM.



J. VARD CHATBURN, CHAIRMAN



Linda Magstadt, Secretary

STATEMENT BY JOHN L. RUNFT BEFORE THE
THE IDAHO HOUSE COMMITTEE ON RESOURCES AND CONSERVATION

Vard Chatburn, Chairman
February 15, 1985
1:30 p.m., House Minority Caucus Room

Subject: Testimony regarding House Bill 186
Regarding Proposed Supplemental Language
to Senate Bill 1008 by adding a new sub-
section (7) to Section 42-203B of Senate
Bill 1008.

Mr. Chairman and members of the committee, for the record, my name is John L. Runft and I am an attorney practicing in Boise, Idaho. I appear before this committee representing Salmon River Hydro Company, Inc., an Idaho corporation, and Renewable Resources Development Company, a general partnership. Both of these organizations are composed of developers of small hydro-electric facilities under the Public Utility Regulatory Practices Act (PURPA). My clients are together presently developing 27 small hydro-power projects, all of which are located on the reaches of the Little and Main Salmon Rivers, and all of which would be directly and materially impacted by the legislation proposed in Senate Bill 1008. These developers have expended substantial money and time in an effort to develop their respective hydro-electric projects as envisioned under PURPA. All 27 projects have been granted preliminary permits or exemptions, or have licenses pending under the Federal Energy Regulatory Commission (FERC). Applications for water permits have either been accepted or have been granted on all of the projects by the Idaho Department of Water Resources. In summary, these are serious projects in which considerable engineering and development work has been done and in which citizens of Idaho have expended substantial sums of money and time.

In previous testimony before this committee, I have had the privilege of advising the committee that we have been able to work out a satisfactory compromise regarding the concerns the small hydro-power developers have had with Senate Bill 1008. This compromise has been worked out among my clients, other small hydro-power developers, the Idaho State Department of Water Resources, the Governor's office, and Idaho Power Company. This compromise is incorporated in and forms the essence of House Bill 186 which is before you now.

TESTIMONY (February 15, 1985) - 1

the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

Let me state at the outset that my clients, as well as the other small hydro developers with whom we have had contact, support the sensible, needed compromise envisioned in Senate Bill 1008 and its attendant bills. Our purpose in urging passage of House Bill 186 is to accommodate the concerns of the small hydro developers without negatively impacting the purposes of and effectiveness of Senate Bill 1008. It is my understanding that Idaho Power Company has no objection to House Bill 186 and that the State of Idaho affirmatively supports this bill. House Bill 186 in effect amends Senate Bill 1008 by adding new language to Section 42-203B of Senate Bill 1008. The additions to Section 42-203B are addition of the word "consumptive" in the last sentence of subsection 3 and the addition of a new subsection 7.

The addition of the word "consumptive" in the last sentence of 42-203B(3) merely serves to clarify and emphasize that any future depletion of the subordinated water rights held in trust is limited to consumptive upstream beneficial use by the holders of rights acquired pursuant to state law. This emphasis and limitation to consumptive use is in harmony with the purpose and meaning of Senate Bill 1008.

The proposed subsection (7) of section 42-203B contains the language meeting the principal concerns of the small hydro-power developers, and to a considerable extent this language serves to limit and modify the provisions of the preceding subsection (6) of Section 42-203B of Senate Bill 1008. My clients were concerned that the language in subsection (6) granting the director "the authority to limit a permit or license for power purposes to a specific term" is too broad. Even though the 1928 amendment to the Idaho Constitution vested in the state the power to regulate and limit the use of water for power purposes, water rights, once granted, still constitute property rights. Even though water rights for power purposes are subject to regulation and limitation by the state, such regulation and limitation must be made part of the right at the time it is granted or otherwise the exercise of such authority by the director could face the constitutional objection of taking property without due process of law.

The issue of subordination of water rights granted for power purposes is not being raised here. Subordination of these rights is viewed by all parties as a necessary element in the underlying agreements reached in forging Senate Bill 1008.

At issue here are the means and procedures through which the director's authority granted in subsection (6) will be exercised. Subsection (7) sets forth four factors, which among other factors the director must consider. These factors perform a mandatory guideline for the procedure by which the director will determine the term of years to be granted for a specific license. In shorthand, these factors require consideration of matters relating to:

TESTIMONY (February 15, 1985) - 2

the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

(a) The length of the term of any relevant power purchase contract;

(b) Idaho Public Utilities Commission (IPUC) policy regarding the term of power purchase contracts in conjunction with the IPUC's adjudicatory administration of federal law (PURPA, FERC);

(c) The term of years in any relevant FERC license;

(d) Existing, legal downstream water uses.

The final three sentences of subsection (7) modify the foregoing language of subsection (7). These sentences provide that the determination of the term of years shall be made at the time of the issuance of the permit, or as soon thereafter as possible. They provide that the term of years shall commence upon the application of water to beneficial use. They provide that the term of years, once established, shall not thereafter be modified, except in accordance with due process of law.

Subsection (7) solves an important procedural problem arising out of the dichotomy presented by the granting of permits on one hand and licenses on the other. In exercising his authority to limit such a permit or license to a specific term of years, the term of years so designated shall apply only to the license, even though the designation may be first stated in the permit. Hence, if a permit is "proved up" and the water put to beneficial use within the permit period, then the term of years granted by the director will commence to run for purposes of the license. The license when granted will refer back to the date of application to beneficial use as the time of the commencement of the license term.


Finally, the last sentence of subsection (7) provides economic protection to the small hydro project developer. A developer's investment in a hydro-electric project can be very substantial and is generally totally committed and spent by the time the water is actually put to beneficial use. Any subsequent curtailment of the term of years in the water right is made subject to due process of law, which would require a court's consideration of economic loss faced by a developer of a project by any such time curtailment of his water right occurring under the subordination doctrine. These losses could be considerable if such curtailment results in the project owner's breach of the power purchase contract with the utility to which he has agreed to supply power. Virtually all of these power purchase agreements have severe economic penalties for failure on the part of the small hydro producer to continue power production for the term of power purchase contract.

TESTIMONY (February 15, 1985) - 3

the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

Finally, these guidelines and due process provisions of subsection (7) will serve to create a sound, reasonable basis for considerations to be made by FERC in granting licenses to Idaho developers of small hydro and for the IPUC in exercising its policies under federal law relevant to these matters.

We respectfully urge the passage by the committee of House Bill 186.


JOHN L. RONFT, Legal Counsel
to Salmon River Hydro Company,
Inc. and Renewable Resources
Development Company
P.O. Box 1960
Boise, ID 83701
(208) 344-6100

TESTIMONY (February 15, 1985) - 4

the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

RESOURCES AND CONSERVATION COMMITTEE

~~HOUSE BILL 186 AMENDS SENATE BILL 1008 IN TWO RESPECTS. ON PAGE 1, PARAGRAPH 6, LINE 40, THE WORD "CONSUMPTIVE" IS ADDED BETWEEN "FUTURE" AND "UPSTREAM". THE PURPOSE OF THIS AMENDMENT IS TO MAKE IT CLEAR THAT WATER RIGHTS FOR POWER PURPOSES ARE SUBJECT TO SUBORDINATION AND DEPLETION BY FUTURE CONSUMPTIVE UPSTREAM BENEFICIAL USERS. THIS WAS THE INTENT OF THE ORIGINAL LEGISLATION AND IS ADDED FOR CLARIFICATION PURPOSES.~~

subordinate to subsequent upstream beneficial uses approved in accordance with state law. In effect, this amendment would afford, if the ANALYSIS OF HOUSE BILL 186 is adopted, the same protection to small hydropower producer as will exist for Idaho House Bill 186 amends Senate Bill 1008 in two respects. On page 1, paragraph 6, line 40, the word "consumptive" is added between "future" and "upstream". The purpose of this amendment is to make it clear that water rights for power purposes are subject to subordination and depletion by future consumptive upstream beneficial users. This was the intent of the original legislation and is added for clarification purposes.

The second change made to S.B. 1008 by H.B. 186 is the addition of paragraph 7 on page 2, line 23. The purpose of this change is to provide guidance to the director of the Department of Water Resources when he sets a specific term of years for a water permit or license for power purposes. The proposed amendment sets forth specific criteria which the director must consider in setting that term. The purpose of these amendments is to make sure the director does not inadvertently set too short a period of time in the permit or license, thus preventing the financing of small hydropower projects.

This does not eliminate, nor does this amendment speak to, the subordination condition contained within the permit. Thus, the water right issue for hydropower purposes would still be

RESOURCES AND CONSERVATION COMMITTEE

AMENDMENT TO THE SWAN FALLS AGREEMENT OF 1963, DEPARTMENT OF WATER RESOURCES AND CONSERVATION, THE WATER RIGHTS OF THE MAIN STEM OF THE SWAN RIVER WHICH FORMS THE BOUNDARY BETWEEN THE STATE OF IDAHO AND

TIME: 1:35 PM

PLACE: Room 452 - Statehouse

subordinate to subsequent upstream beneficial uses approved in accordance with state law. In effect, this amendment would afford, if the director, Mr. [Name], found, the same protection to small hydropower producer, as will exist for Idaho Power at its hydroelectric facilities should the entire Swan Falls Agreement become law. It is not the intent of this legislation to unshoordinate small hydropower water rights.

The amendment also provides that small hydropower producers will be afforded due process of law prior to their subordinated water right being reallocated to other uses.

SECTION 42-140A, IDAHO CODE, AUTHORIZES THE DISTRICTS OF A COUNTY TO RELOCATE WATER RIGHTS TO OTHER USES. THIS SECTION IS PART OF THE IDAHO CODE, PROVIDING AUTHORITY TO IRRIGATION DISTRICTS TO CONVEY WATER RIGHTS TO OTHER USES.

Mr. Brisley explained this bill is proposed by a group of irrigators in West Cache County, an area that is currently faced with a rather severe ground water problem. This district is faced with short water supplies, falling water tables and rising power costs. They face reversion of their existing irrigated lands back to dry-land status. Natural recharge of this area has been estimated at 31,000 to 66,000 acre feet per year, discharge currently 170,000 to 100,000 acre feet per year which results in a causing storage of about 100,000 to 250,000 acre feet. This storage drops to between 20,000 and 100,000 acres of irrigated lands that have a potential of being reverted back to dry-land status. Currently, there is not an entity on the table that will allow creation of a management organization to solve these problems. This management entity needs the ability to identify and negotiate for potential sources of water and possibly the authority to construct facilities and improvements to utilize the water.

Representative Linford asked if this legislation would apply to all of the state.

Mr. Brisley stated that it would.

Representative [Name] asked if this legislation would apply to all of the state.

SECTION 42-140A

RELATING TO THE ADMINISTRATION OF WATER RIGHTS IN THE SWAN FALLS AGREEMENT, AMENDING SECTION 42-140A, IDAHO CODE, AS AMENDED BY HOUSE BILL 1981, FIRST REGULAR SESSION 1972, THE POINT TO BE MADE IS THAT THE PROVISIONS IN THE BILLING OF THE DEPARTMENT OF WATER RESOURCES WOULD BE ADJUSTIVE THE SWAN RIVER BASTIN RIVER



MINUTES
RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 4, 1985

Room 433, 1:30 P.M.

PRESENT Chairman Noh, Senators Beitelspacher, Budge, Carlson, Crapo, Horsch, Little, Peavey, Ringert and Sverdsten. Senator Chapman was excused and Senator Kiebert was absent.

The meeting was called to order by Chairman Noh.

Wayne Haas Mr. Haas, Department of Water Resources, explained Policy 32 of the State Water Plan, section by section, pointing out the various changes and the reasoning behind them. (See resolution attached)

In Policy 32A, Water Held in Trust by the State, Senator Ringert asked what "deemed appropriated" meant. Pat Costello, Governor's office, believed it referred to the state recognizing Idaho Power had a valid water right up to 8400 cfs. Other parties could still pursue legal arguments that Idaho Power does not have a valid water right.

In response to Senator Ringert's question, Mr. Kole, Attorney General's office, said the wording in effect would give the state a shield through the trust system to deny water permits that the state does not feel are valid--to get around a problem of appropriating unappropriated water. Senator Ringert wanted to know if this was to get around other parties using as an argument the abandonment and forfeiture, etc. and Mr. Kole said no.

Senator Crapo questioned Mr. Haas if Policy 32B would include thermal cooling and he said yes. He also asked if there was a policy decision being made here to restrict the amount to less than in the past. Mr. Haas explained in looking at the needs for the near future, it is felt the 150 cfs is adequate and the Board could look at the amount five years down the road if conditions change. Mr. Haas could see nothing in the policy to discourage development at INEL.

Senator Crapo had further questions regarding surface storage with regard to rebuilding the Teton Dam. As he understood the policy, that dam would not be subject to the policy if it was to be rebuilt. Mr. Kole said their understanding in looking at an "approved project," is that it is approved if the state permit is cancelled or not. Mr. Nelson was in agreement.

Senator Ringert expressed concern about protecting the water at the source of diversion, mentioning the fish hatcheries along the Snake. Mr. Haas believes the water right is protected but the user may have to "chase the water." The language does not represent a policy change.

Senator Crapo commented he wasn't sure why the state should get involved in acquiring water for storage. Mr. Haas said by having this cushion it would make it easier for the state to manage the minimum flow and give the state some flexibility in management.

Sherl
Chapman

Mr. Chapman, from the Water Users, said they did have some concerns over the modifications of the Water Plan Policy but they are minor compared to the problems there would be if the agreement fails. He believes the Board has been fair and that the Water Users can work with the Board to solve any problems. He urged the committee to pass the legislation.

MOTION

Senator Budge moved and Senator Peavey seconded the bill go out with a "do pass" recommendation. Motion carried.

HB 142

RELATING TO THE DISTRIBUTION OF FUNDS COLLECTED BY THE STATE DEPARTMENT OF FISH AND GAME: TO INCREASE THE MONEYS DISTRIBUTED TO THE PREDATORY ANIMALS ACCOUNT FROM TWELVE THOUSAND DOLLARS TO FIFTY THOUSAND DOLLARS.


The proposed legislation would change the amount of the distribution of funds collected by the Department of Fish and Game allotted to the predatory animals account from \$12,000 to \$50,000.

There was no discussion on the bill.

MOTION

Senator Peavey moved and Senator Little seconded the bill go out with a "do pass" recommendation.

The time for the meeting having run out, the committee was adjourned.


Laird Noh, Chairman


Bev Mullins, Secretary

For Monday - Res.

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF)
POLICY 32 OF THE)
STATE WATER PLAN)
_____)

A RESOLUTION

WHEREAS, pursuant to Chapter 17, Title 42, Idaho Code, the Idaho Water Resource Board (Board) has the power and duty to adopt a comprehensive State Water Plan; and,

WHEREAS, portions of the Snake River Water Rights Agreement (Agreement) entered into by the Governor, the Attorney General, and the Idaho Power Company on October 25, 1984 are not in accord with the State Water Plan; and,

WHEREAS, the Board has conducted 12 formal hearings in affected areas of the state on proposed changes to Policy 32 of the State Water Plan;

NOW, THEREFORE, BE IT RESOLVED that, the Idaho Water Resource Board under its authority to establish water policy amends Policy 32 of the State Water Plan to read as follows:

Policy 32 - Snake River Basin

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station, 3900 cfs from April 1 to October 31 and 5600 cfs from November 1 to March 31 measured at the Murphy gaging station, and 4750 cfs measured at the Weiser gaging station. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. Lower flows may be permitted at Lime Point only during the months of July, August, and September.

Waters not held in trust by the State in accordance with Policy 32A shall be allocated according to the criteria established by Idaho Code 42-203A.

The minimum flows established for the Snake River at the Murphy and Weiser gaging stations are management constraints; they further insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife, and recreational purposes. The establishment of a zero minimum flow at the Milner gaging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Article 43 of the power license provides that:

"The project shall be operated in the interest of navigation to maintain 13,000 cfs flow in the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 cfs at Johnson's Bar"

Snake River flows above the hydropower right at any Idaho Power facility are considered unappropriated and therefore are not held in trust by the state. This distinction is further addressed in Policy 32A.

Policy 32A - Water Held in Trust by the State

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

The agreement between the state of Idaho and Idaho Power Company dated October 25, 1984 provides that Idaho Power's

claimed water right of 8400 cfs at the Swan Falls dam may be reduced to 3900 cfs. The claimed water right of 8400 cfs is deemed appropriated and the amount above the minimum flow established in Policy 32 up to the 8400 cfs is held in trust by the state. The agreement further provides that Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 32 at the Murphy gaging station. The 8400 cfs claim of the power company has not historically been available during summer months.

The 8400 cfs claimed right is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to October 1, 1984 even if such uses would violate the minimum flows established in Policy 32. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law plus criteria the Legislature is requested by the agreement to establish as Idaho Code 42-203C. These additional criteria supplement Policy 1 of the Water Plan which urges that conformance with the State Water Plan be considered evidence of the public interest. The Idaho Water Resource Board recognizes that the specific criteria for defining public interest established by Idaho Code 42-203C are to be used in addition to the criteria set forth in Policy 1 for the reallocation of of hydropower rights.

Policy 32B - Domestic, Commercial, Municipal and Industrial (DCMI)

It is the policy of Idaho that 150 cfs of water for consumptive purposes held in trust by the state pursuant to Policy 32A be reallocated to meet future DCMI uses in accordance with state law.

While most DCMI uses are nonconsumptive or only partially consumptive, future growth in Idaho's population and commercial and industrial expansion will require an assured supply of water.

A continuous flow of 150 cfs provides approximately 108,600 acre-feet of water per year. This volume of water is assigned to consumptive uses within the basin for domestic, commercial, municipal, and other industrial purposes. Industrial purposes include processing, manufacturing, research and development, and cooling.

Adequate records should be kept and reviewed so that this reallocation can be modified as necessary. Increases in the

DCMI allocation, if necessary, will reduce the amount of water available for agricultural uses. The allocation will be reviewed as part of every Water Plan update.

Policy 32C - Agriculture

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 32A, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 32B, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D.

The policy allows for new and supplemental agricultural development through the reallocation of water held in trust by the state. The 1982 State Water Plan allocated water for a minimum level of new irrigation development of 850,000 acres plus supplemental water for 225,000 acres by the year 2020 over that which existed in 1975. This policy rescinds the 1982 allocations since there are no acres specified in that the type, location, and amount of use is unknown as is the effect of the evaluation called for in Policy 32A.

During the 8 year period from 1975 to 1983, about 140,000 acres of new development occurred within the basin. While the amount of new acreage varied significantly from year to year, the average was approximately 17,500 acres. Data are not available to estimate the number of acres that received supplemental water during this period. Idaho Code Section 42-203C limits the rate of new development in the basin above Murphy gaging station to 80,000 acres in any four year period. Therefore, the maximum development to the year 2020 above Murphy gaging station assuming no water supply constraint is 700,000 acres. Criteria placed on the reallocation of hydropower rights, limits on the rate of new development, plus the requirement that approval of new storage projects that divert water between November 1 and April 1 from the Snake River between Milner Dam and Murphy gaging station must mitigate the impact of diversions on hydropower generation (Policy 32I), will undoubtedly limit development to less than 700,000 acres.

Policy 32D - Hydropower

It is the policy of Idaho that hydropower use be recognized as a beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 32 is not in the public interest.

The 1982 State Water Plan allocated 170,000 acre-feet for consumptive use in cooling thermal power plants. By establishing a minimum daily flow of 3300 cfs at Murphy and 4750 cfs at Weiser, stabilized flows were guaranteed for hydropower generation. The minimum daily flows for hydropower generation are now increased as stated in Policy 32. In addition, this policy specifically recognizes hydropower generation as a beneficial use of water and acknowledges the public interest in maintaining the minimum river flow at key points. Any water depletion for thermal power generation would now come from the block of water allocated to DDMI uses.

Policy 32E - Navigation

It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

Commercial navigation enroute to Lewiston via the Columbia River and Lower Snake River can be accommodated with the flows leaving Idaho in the Snake River at Lewiston. Above Lewiston, commercial and recreational navigation should be accommodated within the protected flows on the Snake River and tributary streams.

Policy 32F - Aquaculture

It is the policy of Idaho that water necessary to process aquaculture products be included as a component of DDMI as provided in Policy 32B. The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

Policy 32G - Fish, Wildlife, and Recreation

It is the policy of Idaho that the minimum flows established under Policy 32 are sufficient and necessary to meet the minimum requirements for aquatic life, fish, and wildlife, and to provide water for recreation in the Snake River below Milner Dam. Streamflow depletion below the minimum flows is not in the public interest.

The policy reiterates the view that the minimum flows established in Policy 32 will protect fish, wildlife, aquatic life and recreation within the Snake River Basin at acceptable levels and that this is in the public interest. State law provides for the Water Resource Board to apply for a water right for unappropriated water for minimum flows necessary "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." The minimum stream flow legislation, where appropriate, can be used on the Snake River and tributary streams to enhance these values. Tributary streams in the Snake River Basin which the Board has identified as key river segments needing protection are identified in Policy 7.

Policy 32H - Water Quality and Pollution Control

It is the policy of Idaho that the use of water to provide pollution dilution is not a beneficial use of water.

Existing state and federal water quality programs should be sufficient to protect the current high water quality associated with streams within the basin. Any allocation of water for minimum streamflow is directed towards meeting fish, wildlife, and recreational needs, not to the dilution of pollution.

Policy 32I - New Surface Storage

It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved when it is determined that those projects are needed to meet new uses after consideration of then existing public interest criteria. Approval of new storage projects that would divert water from the mainstem of the Snake River between Milner and the Murphy Gaging station during the period November 1 to March 31 should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

This policy addresses the approval of new surface storage in the basin but does not apply to already approved projects. A study of all existing social, legal and economic constraints on allocation and use of water in existing storage facilities will be made to determine whether new storage projects are needed. An attempt will be made to modify those constraints that are found to prevent reasonably full use of existing storage. Such study shall not delay applications for new storage projects. In addition, permits for these new projects may be issued during the study period, if they are found to be in the public interest. Public interest as used within this policy does not include the provisions of § 42-203 (c) Idaho Code.

"Large surface storage projects" are those which have the potential for significantly impacting existing uses. Projects for which approval is required under § 42-1737, Idaho Code, would be such projects. Smaller projects could also have significant impacts, but stock water ponds, and waste water re-pumping ponds would not be included, for example.

New storage projects that would divert water from the Snake River between the Milner and Murphy gaging stations during the November 1 to April 1 period are subject to the requirement that the impact such depletions have on hydropower generation is mitigated. Mitigated is defined as causing to become less harsh or hostile, and is used here rather than compensate which connotes equivalence. Methodology will be developed by the Water Resource Board for use in calculating impacts on hydropower generation.

Policy 32J - Stored Water For Management Purposes

It is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

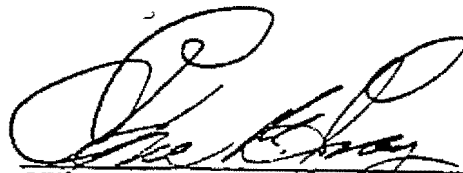
The Department of Water Resources is expected to allocate the unappropriated waters and the power rights held in trust by the state in such a manner as to assure minimum flows at designated key points on the Snake River. The impacts of groundwater use within the basin on the timing of aquifer discharge to the river is such that at some time stored surface water may be necessary to maintain the designated minimum flows.

At this time there is unallocated reservoir storage within the basin which could be acquired by the state. These waters would provide flexibility for management decisions and provide assurance that the established minimum flows can be maintained.

The state should act to acquire sufficient reservoir storage for this purpose. In the future no unallocated stored water will be available and it may be impossible to acquire sufficient water to satisfy river demands. Until such time as these waters are needed for management purposes, they shall be credited to the Water Supply Bank and funds obtained from their lease or sale shall accrue to the Water Management Account.

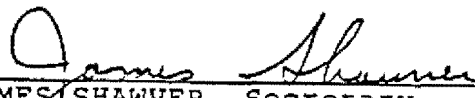
PASSED AND APPROVED this 1st of March, 1985.





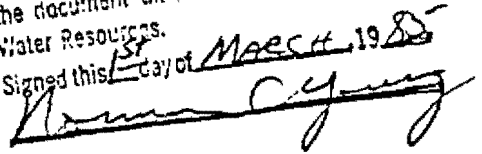
GENE M. GRAY, Chairman

ATTEST:



JAMES SHAWVER, Secretary

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 1st day of MARCH, 1985





MINUTES

RESOURCES AND CONSERVATION COMMITTEE

March 7, 1985

TIME: 1:15 PM

PLACE: Room 412 - STATEHOUSE

PRESENT: All members present

GUESTS: Mr. Joe Hinson, Executive Director, Idaho Forest Industry Council; Mr. Dave Bivens, Idaho Cattle Association; Mr. Dennis Gratton, Citizens Against Poaching; Mr. Fred Christianson, Idaho Fish and Game Commission; Mr. Greyson Andrist, Idaho Hunter Association; Mr. Ron Mitchell, Idaho Sportsmen's Coalition; Mr. Hugh Harper, Audubon Society; Mr. Mike Nugent, Legislative Council; Mr. Martin Galvin; Mr. Frank Nesmith, Department of Fish & Game Bureau Chief; Mr. Stan Hamilton, Director, Department of Lands; Mr. Pat Costello, attorney, Office of Governor; Mr. Pat Kole, attorney, Office of the Attorney General; and Representative Sorensen.

Chairman Chatburn called the meeting to order.

MOTION: Representative Sutton moved and Representative Winchester seconded that the Minutes of March 5, 1985 be approved.

MOTION CARRIED.

H 334: Mr. Hinson explained that this legislation would require that the Department of Fish and Game comply with certain provisions of the administrative procedures. The Fish and Game Department is now beginning to prepare a five-year plan that spells out management strategy for big game herds, habitat needs and in doing so, those decisions could have some serious impact for the management of public lands. He feels they should be subject to the normal administrative process spelled out in the code with hearings and legislative review. They discussed this with Fish and Game and much of this would be done any way, but they would feel more comfortable if the entire process were spelled out.

Representative Stoicheff asked who brought this legislation to the committee.

Mr. Hinson replied the Idaho Forest Industry Council and Mr. Bivens.

Representative Edwards inquired if this bill would change or provide any overview of what has happened and how it would benefit the legislature to change rules, etc.

Mr. Hinson responded that he would anticipate the benefit would be that they would know what conflicts they might be facing over the next five years.

Mr. Bivens said his organization feels the legislature should have an opportunity to take a look at the five-year plan as it developed and get some feedback. He noted that in looking at lines 10 through 13 of page 3, there is some doubt as to whether it would fall under the plan.

Representative Dewey asked if there would be a fiscal impact.

Mr. Bivens replied it was indicated there would be none.

Mr. Gratton said he had some concerns about the additional costs to the Fish and Game Department for management which would affect the sportsman. He feels the money should be spent in the field.

MINUTES
RESOURCES AND CONSERVATION
March 7, 1985
Page 2

Mr. Christianson opposes H. 334. He declared this legislation is a step backwards. He admitted they have made mistakes but they have made progress toward rectifying them. They are here today, mainly, because of the misunderstanding about what they have allegedly said, what duties are in the planning process as far as fish and wildlife is concerned. They have met with industry and resolved many things but admitted they had not extended as much effort to ask those people to participate in the process as they should have. The department has many hearing but will now send industry people a special invitation to attend the hearings. He said he thought they would have a year to work out these plans.

Mr. Conley remarked that after listening to the proponents of H 334, it seems like an easy thing to do. He said he thought the bill would be creating a legislative nightmare when it came to the paper work and the problems it would involve. He remarked that inserting the plans into the administrative process is not the right place to put a plan.

Representative Jones asked how much it cost to prepare the fish plan.

Mr. Conley could not give an answer other than it involves much money.

Mr. Andrist said his organization supports H 334. He believes it is in the long term best interest that Idaho's basic industries are permitted to thrive. The Idaho Hunter's Association is dedicated to increasing the numbers of harvestable game but they do not believe it has to be done to the detriment of the basic industries. He said the Department of Fish and Game should be more fully scrutinized.

Mr. Mitchell testified that they agreed with the Department of Fish and Game that attempting to place plans into the administrative process is not workable.

Mr. Harper agrees with the Department of Fish and Game in that it would seriously limit the flexibility it needs to manage fish and wildlife resources.

Representative Winchester asked Mr. Nugent if there are technical problems with this legislation.

Mr. Nugent answered that currently the department has exemption from the publication requirements and named the requirements that are necessary.

Representative Jones said he considers this to be a good bill and there should be an overview by the legislature.

MOTION: Representative Wood moved and Representative Jones seconded that H334 go to the floor with a "Do Pass" recommendation.

SUBSTITUTE MOTION: Representative Dewey moved and Representative Stoicheff seconded that H 334 be held in committee.

SUBSTITUTE MOTION FAILED.

ORIGINAL MOTION CARRIED. Representative Jones will sponsor.

H 337: FLOOD CONTROL DISTRICT, TERRITORY ADDED

Mr. Galvin passed out his testimony (Attached)

Representative Little asked Mr. Dunn if this legislation would help the Department of Water Resources.

Mr. Dunn responded that it would not and he does not support the bill.

MINUTES
RESOURCES AND CONSERVATION COMMITTEE
March 7, 1985
Page 3

There being no objection, the committee recessed subject to call of the chair.

Meeting recessed at 2:40 P. M.

Chairman Chatburn called the meeting to order at 5:45 PM.

Mr. Hamilton reported he would not be able to support H 337.

MOTION: Representative Winchester moved and Representative Hansen seconded that H 337 be held in committee.

MOTION CARRIED.

S 1138: GAME, FISH ILLEGAL POSSESSION

Mr. Gratton said that basically this legislation would increase the penalties for commercial poaching of certain high value animals and fish and allow some cases to be treated as felonies.

MOTION: Representative Winchester moved and Representative Wood seconded that S 1138 be held in committee.

Representative Winchester said a misdemeanor is a misdemeanor and the penalty is too high.

Mr. Gratton answered that is the purpose of the bill - the magistrate wants more latitude.

Mr. Norrie explained this legislation applies to the hard-core poacher who is convicted the second time for selling whole or parts of game.

Representative Linford said this addresses the problem of commercial poaching.

SUBSTITUTE MOTION: Representative Linford moved and Representative Sutton seconded that S 1138 go to the floor with a "Do Pass" recommendation.

SUBSTITUTE MOTION CARRIED: Representative Linford will sponsor.

S 1103: LAND, STATE, RENTAL RATE

Mr. Hamilton explained that the purpose for this legislation is to amend Section 58-304 which currently requires six months notice to state land lessees before an increase in rental rate is to take effect. Grazing leases expire December 31 and new leases begin on January 1, but the Idaho Code Section 58-307 states the rental for grazing is not due until May 1. It is unclear whether notice must be given six months before the date new leases begin (January 1) or six months before the grazing lease rental is due and payable. To clarify the matter S 1103 proposes that six months notice be required before the rent is due and payable on May 1.

MOTION: Representative Stucki moved and Representative Sutton seconded that S 1103 be sent to the floor with a "Do Pass" recommendation.

MOTION CARRIED. Representative Stucki will sponsor.

S 1133: OIL AND GAS LEASES, ROYALTIES, RENTALS

aa

Mr. Hamilton told the committee the amendment on page 1 of the bill, line 14 following the character ".", inserted "Royalties shall be paid in addition to rental payments at the discretion of the board of land commissioners".

MOTION: Representative Jones moved and Representative Stucki seconded that S 1133aa be sent to the floor with a "Do Pass" recommendation.

MOTION CARRIED. Representative Duffin will sponsor.

S 1205: RELATING TO THE STATE WATER PLAN

Mr. Costello explained the purpose of this legislation is to provide legislative ratification of the amendments to Policy 32 of the State Water Plan adopted by the Idaho Water Resource Board regarding the Snake River Water Rights Agreement. This puts the "stamp of approval by the legislature."

Mr. Kole said this agreement meets with the approval of the Attorney General and Idaho Power Company.

MOTION: Representative Winchester moved and Representative Stucki seconded that 1205 go to the floor with a "Do Pass" recommendation.

MOTION CARRIED. Representative Winchester will sponsor.

S 1111: DISPOSAL OF PROPERTY IN AN URBAN RENEWAL AREA

Representative Sorensen told the committee this legislation was sponsored by Senator Gilbert. The bill disallows the sale of urban renewal property to a non-profit or public organization until after the municipal elections in November 1985. It will allow the electorate to have a voice in the direction and policy of Boise.

MOTION: Representative Sutton moved and Representative Stucki seconded that S 1111 be sent to the floor with a "Do Pass" recommendation.


MOTION CARRIED. Representative Sorensen will sponsor.

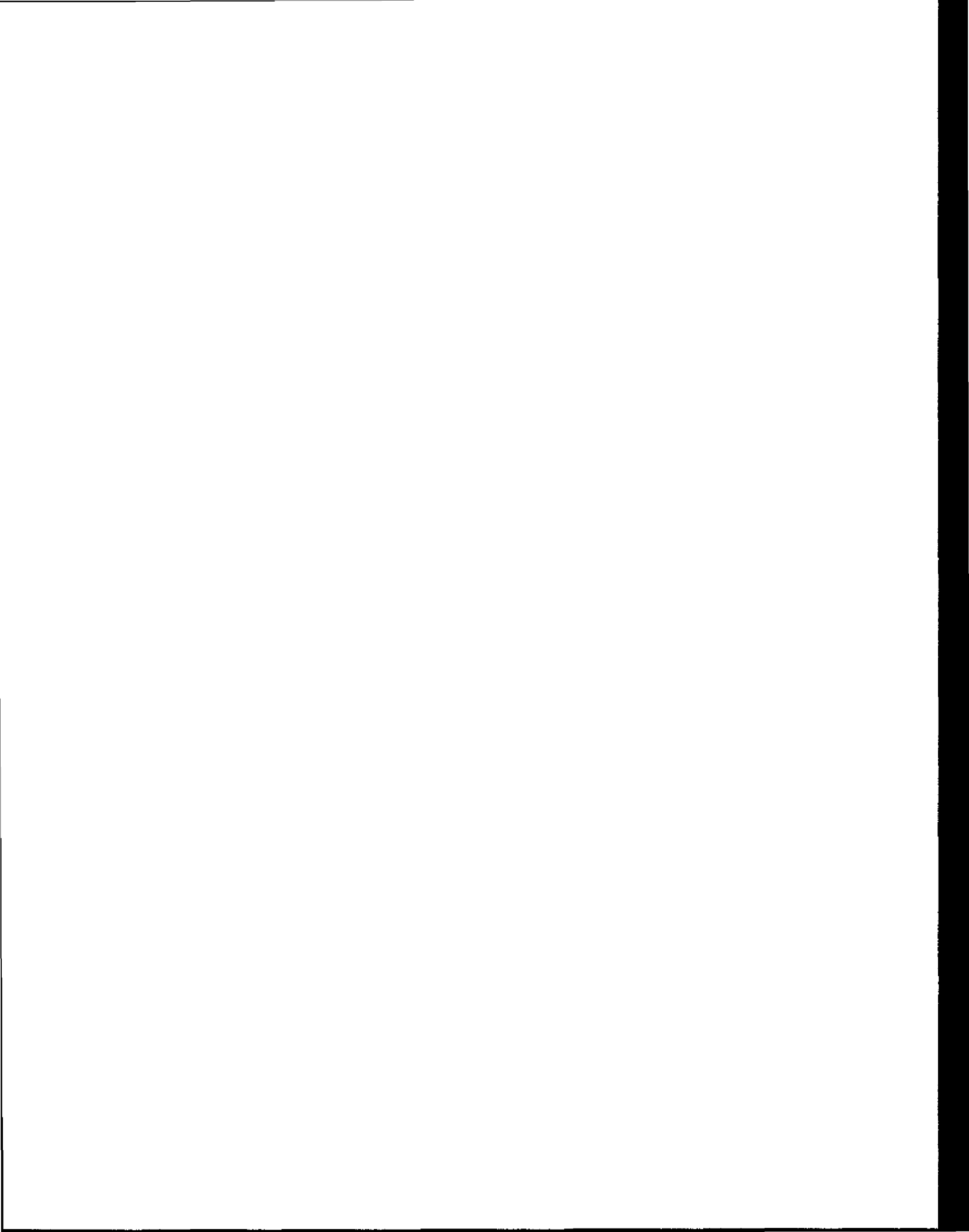
S 1086: RELATING TO IRRIGATION, DRAINAGE, AND WATER RIGHTS AMENDING IDAHO CODE TO PROVIDE FOR THE OFFICE OF SECRETARY/TREASURER

Mr. Holden gave a brief explanation of the legislation.

The meeting adjourned at 6:45 P. M.


J. VARD CHATBURN, CHAIRMAN


Linda Magstadt, Secretary



MINUTES
RESOURCES AND ENVIRONMENT COMMITTEE

FEBRUARY 19, 1986

Rm 433, 1:30 pm

PRESENT: All members were present except Senators Ringert and Horsch.

Chairman Noh called the meeting to order.

Senator Little moved and Senator Sverdsten seconded the minutes of the previous meeting be adopted. Motion carried.

Chairman Noh advised the Committee of what was going on with the proposed sale of BPA. He has asked some people to monitor current and future activity and in a few weeks they will report back to the Committee. They will be working with Senator McClure's office. The people involved are: Dick High, Ray Rigby, Jack Peterson, Fred Christensen, Bud Tracy, Jim Wrigley and Jim Gollar.

SB 1358 TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT

Senator Crapo explained the bill contained revisions of the Swan Falls legislation passed last year and is intended to merely clarify the agreement. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. As a result, negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties. He again pointed out, nothing was changed in the agreement, but this is merely clarification. He said he would like to send the bill to the 14th order as there was a change to be made on lines 42-43, page 1.

Sherl Chapman, Water Users, said this organization supported the legislation and concur in the proposed amendment.

Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said they too supported the bill and the change.

MOTION Senator Crapo moved and Senator Beitelspacher seconded the bill be sent to the 14th order. Motion carried.

SCR 110 MINIMUM STREAM FLOW ON THE PAHISIMEROI

The legislation would be approving an application to appropriate water for the minimum stream flow on the Pahisimeroi. No discussion took place on the legislation.

MOTION Senator Kiebert moved and Senator Beitelspacher moved the bill go out with a "do pass" recommendation. Motion carried.

SB 1285 LAND DEPARTMENT: DEFINE "SALABLE MINERALS"

Stan Hamilton, Director, Dept of Lands, explained the bill would amend the Idaho Code to include and define "salable minerals" for purposes of reserving and leasing such products. The bill had been before the Committee at an earlier date and more information had been requested by some members and Mr. Hamilton said that had been supplied to them. Mr. Hamilton stated the bill is to try and make a clear policy for the future and effects nothing in the past and would take effect July 1.

There was general discussion but mainly centered around the definition of "salable minerals" which was to include "common earth minerals" and also the "what if" situations and the reservation in the bill. Senator Budge and Little expressed concern with the legislation perhaps causing some problems to an individual who buys land and then later finds he has some "salable minerals." Some discussion also about "fossils." Were they a "salable mineral?" Mr. Hamilton said he was unsure about that and would be something the legal department would have to decide.

Chairman Noh said it was his understanding that the state has lost some court cases because the statutes were not clear. This bill would merely make the statutory language clear. He pointed out the mining industry has shown no opposition to the bill.

MOTION Senator Crapo moved and Senator Sverdsten seconded the bill be sent to the floor with a "do pass" recommendation. The motion carried.

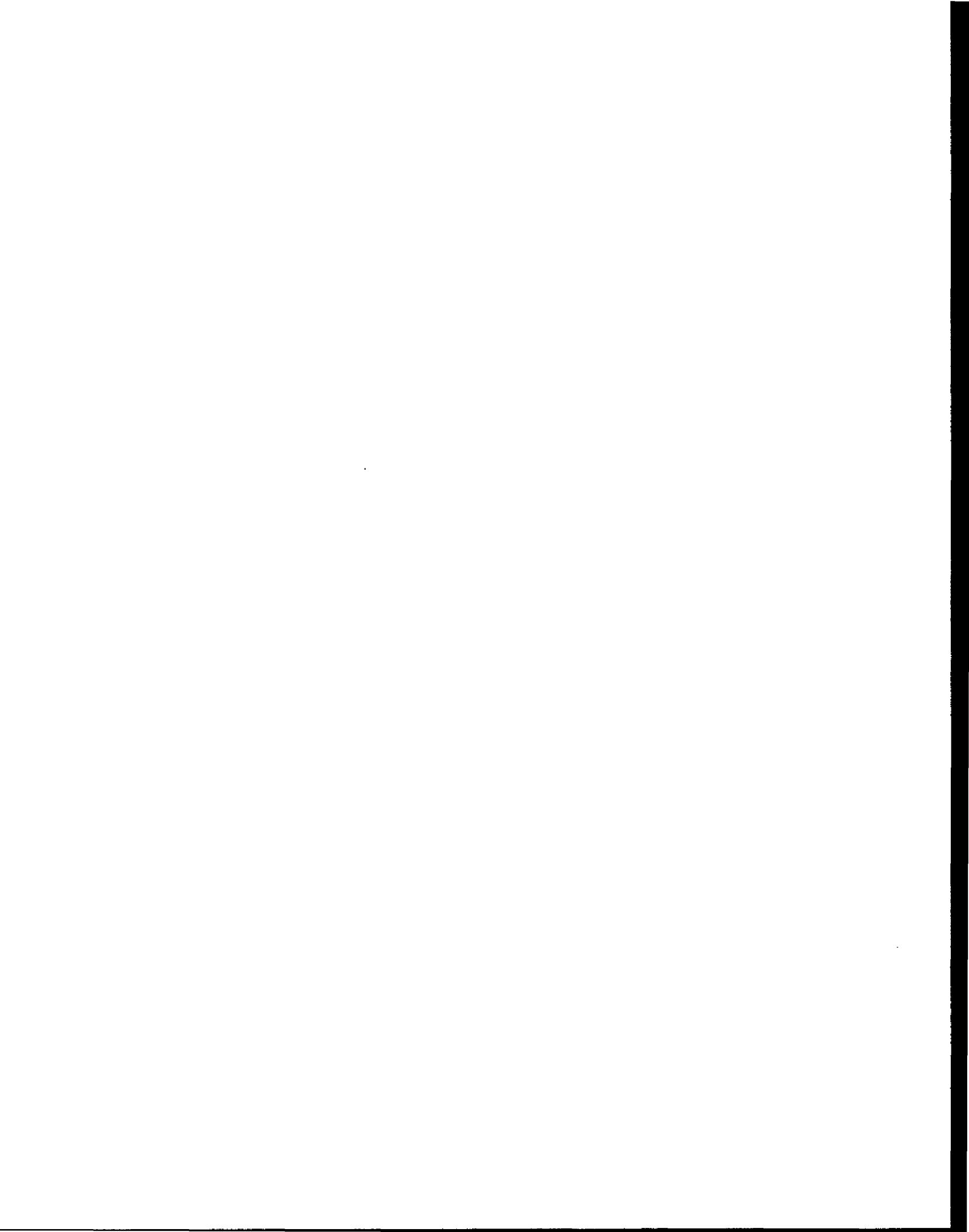
Time for the Committee to meet was over, and no further business was possible and the meeting adjourned.



Laird Noh, Chairman



Bev Mullins, Secretary



MINUTES

RESOURCES AND CONSERVATION COMMITTEE

March 13, 1986

3:40 p.m.

Room 412 - Statehouse

All members present except:

Representative Crozier

Stan Hamilton and Fred Kisabeth, Department of Lands, Ken Dunn, Department of Water Resources, Ken Norris, Fish and Game, Sherl Chapman, Idaho Water Users Association, Stan Boyd, Idaho Wool Growers, Dave Bivens, Idaho Farm Bureau, and Senator Michael Crapo.

Representative Stucki moved and Representative Wood seconded that the minutes of the March 11, 1986, meeting be approved.

MOTION PASSED.

RELATING TO TERMS OF SALE OF STATE LANDS; TO PROVIDE THAT PAYMENT TERMS ON SALES OF STATE LANDS BE CASH ON THE DAY OF SALE UNLESS OTHERWISE PROVIDED BY THE STATE BOARD OF LAND COMMISSIONERS AND TO PROVIDE PARAMETERS FOR INSTALLMENT SALES; AND REPEATING SECTION RELATING TO STUMP LANDS.

Mr. Stan Hamilton explained that this legislation would provide for the State Land Board to establish a policy for the different categories of land that are for sale. Cash payment, by the purchaser, on the day of sale would be expected. The Board may sell state lands on instalments with the down payment, number of instalments and interest deferred to be set by the Board. The down payment could not be less than 10% of the purchase price or the number of annual payments greater than 20. Mr. Hamilton said that currently land sales are not made for cash but they are done on a term basis and when the sale involves a small parcel of land and/or a small amount of money, this procedure is costly to the Department. He stated that there have been some problems in the past in collection of monies and that there are many requests for extensions. The Department would like to see 10-year structured instalments rather than the 20 year plan now in effect.

Representative Edwards moved and Representative Little seconded that MS 1281 be sent to the floor with a "Do Pass" recommendation.

MOTION CARRIED. Representative Little will sponsor.

RELATING TO TRUST WATERS ON THE SNAKE RIVER ESTABLISHED PURSUANT TO AGREEMENT; TO PROVIDE THAT A USER OF WATER FOR POWER PURPOSES SUBORDINATED BY AN AGREEMENT OR BY A PERMIT ISSUED AFTER 7/1/85, OR BY A LICENSE ISSUED AFTER 7/1/85, MAY CONTINUE USING THE WATER PENDING APPROVAL OF DEPLETIONARY FUTURE BENEFICIAL USES TO CLARIFY APPLICATION TO CERTAIN WATERS OF THE SNAKE RIVER OR A SURFACE OR GROUND WATER TRIBUTARY UPSTREAM FROM MILNER DAM & DOWNSTREAM FROM MILNER DAM REGARDING THE DETERMINATION AND ADMINISTRATION OF RIGHTS TO THE USE OF CERTAIN WATERS OF THE SNAKE RIVER; TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL REVIEW ALL PERMITS ISSUED PRIOR TO 7/1/85; TO CLARIFY LANGUAGE AND TO PROVIDE CORRECT CITATIONS.

Senator Crapo explained that this legislation is to clarify language in all Sections regarding minimum stream flows, ground water and tributary waters upstream and downstream from Milner Dam, actions the Director may take to review permits relating to trust waters, etc.

Sherl Chapman told the Committee of his group's support of this legislation.

Representative Wood moved and Representative Winchester seconded that S 1358a be sent to the floor with a "Do Pass" recommendation.

MOTION PASSED. Representative Wood will sponsor.

1282: RELATING TO DISPOSAL OF SURPLUS REAL PROPERTY BY THE STATE BOARD OF LAND COMMISSIONERS; TO PROVIDE FOR NOTICE OF THE PROPERTY SALE TO BE ADVERTISED IN A NEWSPAPER PUBLISHED IN THE COUNTY WHERE THE PROPERTY IS LOCATED FOR FOUR CONSECUTIVE WEEKS & TO STRIKE THE REQUIREMENT THAT NOTICE MUST ALSO BE PROVIDED IN A NEWSPAPER PUBLISHED IN BOISE.

Mr. Hamilton explained that this legislation reduces from 6 to 4 the number of weeks property must be advertised for sale. It also removes the requirement that the advertisement be published in the City of Boise. A \$300.00 savings per parcel advertised is expected by the Department.

MOTION: Representative Winchester moved and Representative Edwards seconded that S 1282 be sent to the floor with a "Do Pass" recommendation.

MOTION PASSED. Representative Echohawk will sponsor.

1283: RELATING TO THE APPRAISEMENT OF STATE LANDS AND TIMBER THEREON; TO ELIMINATE THE APPRAISEMENT FEE OF TWENTY CENTS PER ACRE FOR TIMBER, TO PROVIDE THAT THE APPRAISEMENT FEE FOR STATE LANDS MAY BE THE ACTUAL COST OF THE APPRAISAL AND TO ELIMINATE THE APPRAISEMENT FEE OF FIVE CENTS PER ACRE FOR LAND.

Mr. Hamilton explained that this legislation deals with appraisal costs and eliminates fees that are outdated. Several years ago JYAC instructed the Department to create a special fund for appraisals, charge the actual amount for appraisals, and keep the fund revolving. This legislation will cover the actions currently being taken by the Department.

MOTION: Representative Sutton moved and Representative Stucki seconded that S 1283 be sent to the floor with a "Do Pass" recommendation.

MOTION PASSED. Representative Sutton will sponsor.

1284: RELATING TO MINERAL RIGHTS IN STATE LANDS, TO PROVIDE THAT THE BOARD OF LAND COMMISSIONERS CAN WITHDRAW STATE LANDS UNDER THEIR CONTROL & JURISDICTION FROM MINERAL ENTRY.

Representative Wood requested that this bill be held in Committee until next week and the request was met without objection.

1464: RELATING TO MEMBERSHIP OF THE IDAHO FISH & GAME COMMISSION; TO REQUIRE THAT NOT LATER THAN 1989, NO LESS THAN TWO MEMBERS OF THE FISH & GAME COMMISSION SHALL BE INDIVIDUALS WHOSE PRINCIPAL OCCUPATION IS AN AGRICULTURAL PURSUIT.

Representative Jones told the Committee he feels this legislation would allow for more cooperation between the Commission and landowners if the farmers and ranchers had more voice on the Board. Dave Rivens and Stan Boyd also spoke in favor of this bill stating the great deal of work that landowners do to support wildlife and the Commission.

Ken Norriu stated that the Fish and Game Department has problems with the bill and feels that it may set a precedent for special interest groups. He continued that the agriculture industry has always been represented on the Commission by membership.

MOTION: Representative Little moved and Representative Jones seconded that H 464 be sent to the floor with a "Do Pass" recommendation.

SUBSTITUTE

MOTION: Representative Raagenson moved and Representative Edwards seconded that H 464 be held in Committee.

MOTION FAILED.

ORIGINAL

MOTION: Moved and seconded that H 464 be sent to the floor with a "Do Pass" recommendation.

MOTION CARRIED.

There being no further business before the Committee, the meeting adjourned at 5 p.m.



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JOHN BASTIDA, CLERK
BY [Signature]

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO POWER COMPANY,) Case No. 81375
a corporation,)
)
Plaintiff,)
)
vs.) CONSENT JUDGMENT
)
STATE OF IDAHO, IDAHO DEPARTMENT)
OF WATER RESOURCES, et al.)
)
Defendants.)

Upon stipulation of Plaintiff and the State
Defendants, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Idaho Power Company's water rights shall be as
follows (bracketed names below refer to Company projects):

- A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average

1 daily flow from April 1 to October 31, and
2 5600 c.f.s. average daily flow from November
3 1 to March 31, both to be measured at the
4 Murphy U.S.G.S. gauging station immediately
5 below Swan Falls. These flows are not
6 subject to depletion. The Murphy gauging
7 station is located at latitude 43°17'31",
Longitude 116°25'12", in NW1/4 NE1/4 SE1/4
of Section 35 in Township 1 South, Range 1
West, Boise Meridian, Ada County Hydrologic
Unit 17050103, on right bank 4.2 miles
downstream from Swan Falls Power Plant, 7.5
miles NE of Murphy, at river mile 453.5.

8 B. The Company is also entitled to use the
9 flow of the Snake River at its facilities to
10 the extent of its actual beneficial use, but
11 not to exceed those amounts stated in State
12 Water License Numbers 36-2013 (Thousand
13 Springs), 37-2128 & 37-2472 (Lower Malad),
14 37-2471 (Upper Malad), 36-2018 (Clear Lake),
15 36-2026 (Sand Springs), 02-2057 (Upper
16 Salmon), 02-2001A, 02-2001B, 02-2059,
17 02-2060 (Lower Salmon), 02-2064, 02-2065
18 (Bliss), 02-2056 (Twin Falls), 02-2036
19 (Shoshone Falls), 02-2032, 02-4000, 02-4001,
20 and Decree Number 02-0100 (Swan Falls), but
21 such rights in excess of the amounts stated
22 in 1(A) shall be subordinate to subsequent
23 beneficial upstream uses upon approval of
24 such uses by the State in accordance with
25 State law unless the depletion violates or
26 will violate paragraph 1(A). Company
27 retains its right to contest any
28 appropriation of water in accordance with
State law. Company further retains the
right to compel State to take reasonable
steps to insure the average daily flows
established by this Agreement at the Murphy
U.S.G.S. gauging station. Average daily
flow, as used herein, shall be based upon
actual flow conditions; thus, any
fluctuations resulting from the operation of
Company facilities shall not be considered
in the calculation of the minimum daily
stream flows set forth herein. This
paragraph shall constitute a subordination
condition.

C. The Company's rights listed in
paragraph 1(A) and 1(B) are also subordinate
to the uses of those persons dismissed from
this case pursuant to the contract executed
between the State and Company implementing
the terms of Idaho Code §§61-539 and 61-540.

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D. The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

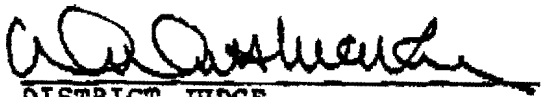
2. The above-captioned case is hereby dismissed without prejudice as to all remaining defendants other than the State defendants.

3. The above-captioned case is hereby dismissed with prejudice as against the State defendants as to all claims of plaintiff not resolved by the decisions of the Idaho Supreme Court reported as Idaho Power Company v. State of Idaho, 104 Idaho 570, 661 P.2d 736 and 104 Idaho 575, 661 P.2d 741 (1983) or by the entry of this Judgment.

4. The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect independent of this Judgment.

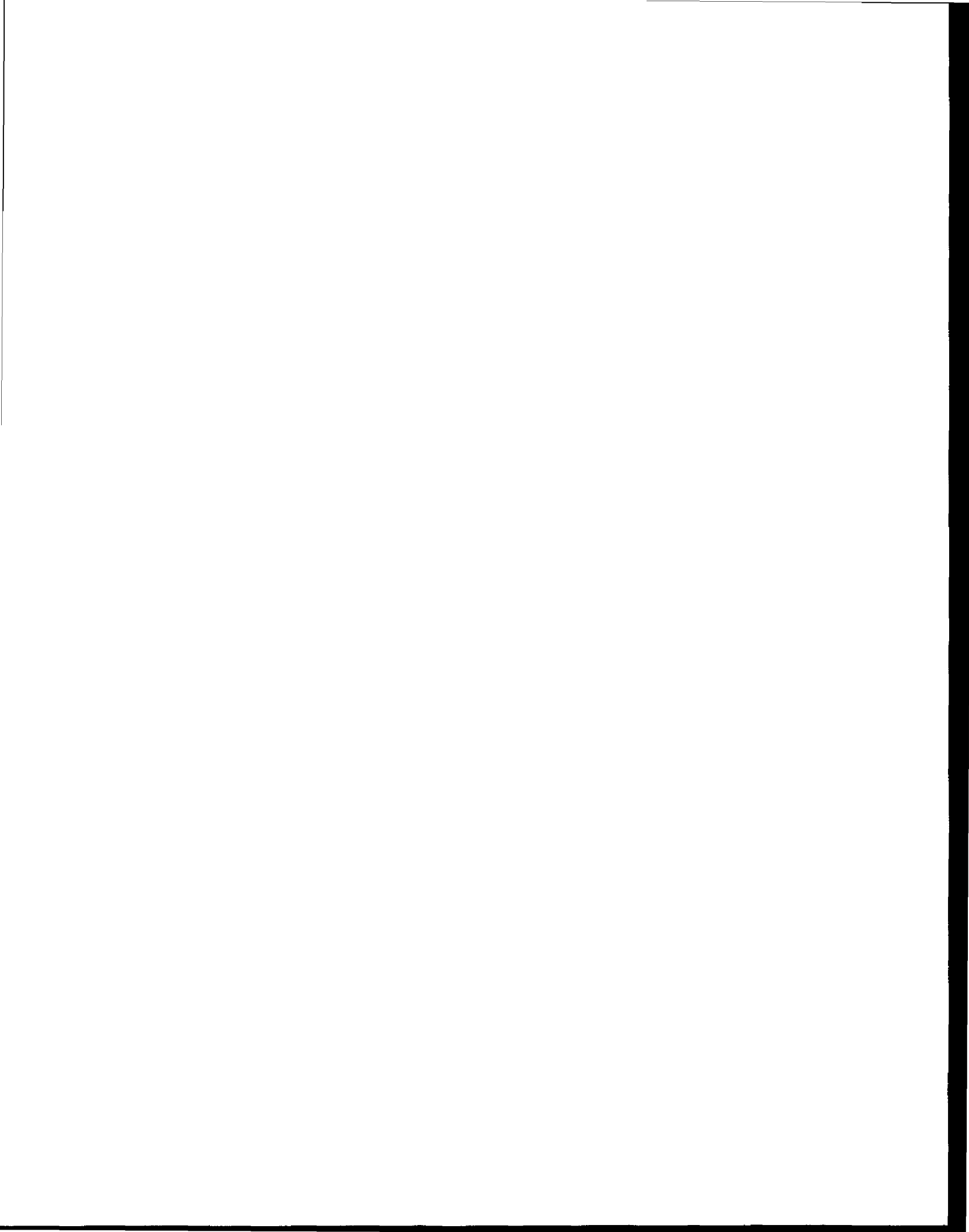
5. Each and all parties shall bear their own costs.

DATED this 12th day of February, ¹⁹⁹⁰ 1989.


DISTRICT JUDGE

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JOHN EASTDA CLERK
BY Michael M. Martney DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * * * *

IDAHO POWER COMPANY,) Case No. 62237
a corporation,)
Plaintiff,)
vs.) CONSENT JUDGMENT
STATE OF IDAHO, IDAHO DEPARTMENT)
OF WATER RESOURCES, et al.)
Defendants.)

* * * * *

Upon stipulation of Plaintiff and the State
Defendants, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Idaho Power Company's water rights shall be as
follows (bracketed names below refer to Company projects):

- A. State Water License Numbers 36-2013
(Thousand Springs), 37-2128 & 37-2472 (Lower
Malad), 37-2471 (Upper Malad), 36-2018
(Clear Lake), 36-2026 (Sand Springs),
02-2057 (Upper Salmon), 02-2001A, 02-2001B,
02-2059, 02-2060 (Lower Salmon), 02-2064,
02-2065 (Bliss), 02-2056 (Twin Falls),
02-2036 (Shoshone Falls), 02-2032, 02-4000,
02-4001, and Decree Number 02-0100 (Swan

1 Falls) entitle the Company to an
2 unsubordinated right of 3900 c.f.s. average
3 daily flow from April 1 to October 31, and
4 5600 c.f.s. average daily flow from November
5 1 to March 31, both to be measured at the
6 Murphy U.S.G.S. gauging station immediately
7 below Swan Falls. These flows are not
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station is located at latitude 43°17'31",
Longitude 116°25'12", in NW1/4 NE1/4 SE1/4
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West, Boise Meridian, Ada County Hydrologic
Unit 17050103, on right bank 4.2 miles
downstream from Swan Falls Power Plant, 7.5
miles NE of Murphy, at river mile 453.5.

9 B. The Company is also entitled to use the
10 flow of the Snake River at its facilities to
11 the extent of its actual beneficial use, but
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14 Springs), 37-2128 & 37-2472 (Lower Malad),
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21 and Decree Number 02-0100 (Swan Falls), but
22 such rights in excess of the amounts stated
23 in 1(A) shall be subordinate to subsequent
24 beneficial upstream uses upon approval of
25 such uses by the State in accordance with
26 State law unless the depletion violates or
27 will violate paragraph 1(A). Company
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right to compel State to take reasonable
steps to insure the average daily flows
established by this Agreement at the Murphy
U.S.G.S. gauging station. Average daily
flow, as used herein, shall be based upon
actual flow conditions; thus, any
fluctuations resulting from the operation of
Company facilities shall not be considered
in the calculation of the minimum daily
stream flows set forth herein. This
paragraph shall constitute a subordination
condition.

29 C. The Company's rights listed in
30 paragraph 1(A) and 1(B) are also subordinate
31 to the uses of those persons dismissed from
32 Ada County Case No. 81375 pursuant to the

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contract executed between the State and Company implementing the terms of Idaho Code §§61-539 and 61-540.

D. The Company's rights listed in paragraph 1(A) and 1(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.


2. The above-captioned case is hereby dismissed without prejudice as to all remaining defendants other than the State Defendants.

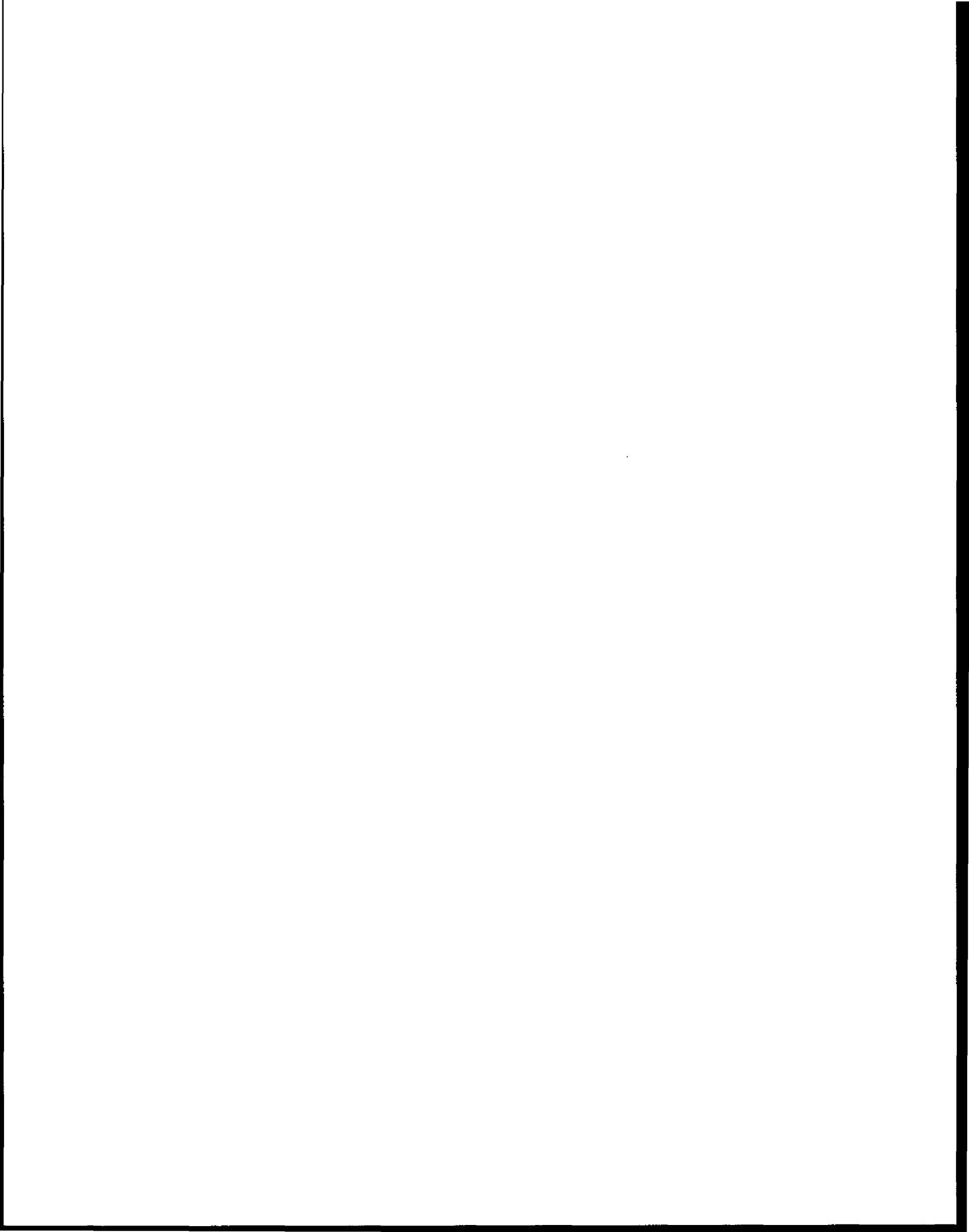
3. The above-captioned case is hereby dismissed with prejudice as against the State defendants as to all claims of plaintiff not resolved by the decisions of the Idaho Supreme Court reported as Idaho Power Company v. State of Idaho, 104 Idaho 570, 661 P.2d 736 and 104 Idaho 575, 661 P.2d 741 (1983) or by the entry of this Judgment.

4. The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect independent of this Judgment.

5. Each and all parties shall bear their own costs.

DATED this 17th day of March, 1990


DISTRICT JUDGE



COPY

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FILED _____
P.M. _____

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JOHN BASTIDA, Clerk
By REBECCA CASTANEDA
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * * * *

IDAHO POWER COMPANY,)	
)	
Plaintiff,)	Case No. 62237
)	
vs.)	
)	
STATE OF IDAHO, ACTING BY AND)	ORDER FOR
THROUGH THE DEPARTMENT OF)	JUDGMENT
WATER RESOURCES, ET AL.,)	
)	
Defendants.)	

* * * * *

ORDER FOR JUDGMENT

Upon stipulation of the remaining parties, and good cause appearing, IT IS HEREBY ORDERED:

1. The Consent Judgment attached to the Stipulation, filed August 3, 1989, should be detached from the Stipulation, executed by the Court, and filed.

2. Upon filing of the Judgment, counsel for Idaho Power Company will serve a true and correct copy of the Judgment as entered upon the persons and entities appearing on the service list previously prepared by counsel for Idaho Power Company.

3. The issue of attorney fees to be asserted by Defendants Mud Flat Canal Company, Cottonwood Mutual Canal

1 Company and Dwayne McAndrew is hereby reserved for later
2 decision. Any attorney fees later awarded will be incorporated
3 in a supplemental judgment to be entered solely for that
4 purpose.

5 4. Counsel for Defendants Mud Flat Canal Company,
6 Cottonwood Mutual Canal Company and Dwayne McAndrew will have
7 sixty (60) days from the date hereof within which to serve and
8 file a cost bill and a brief in support of the cost bill.
9 Counsel for Idaho Power Company will have twenty-one (21) days
10 thereafter to respond to the cost bill and the brief in support.

11 5. The Court will notify counsel when the case may
12 be noted for hearing.

13 DATED this 3 day of Jan, 1990.

14 ALAN M. SCHWARTZMAN

15 District Judge

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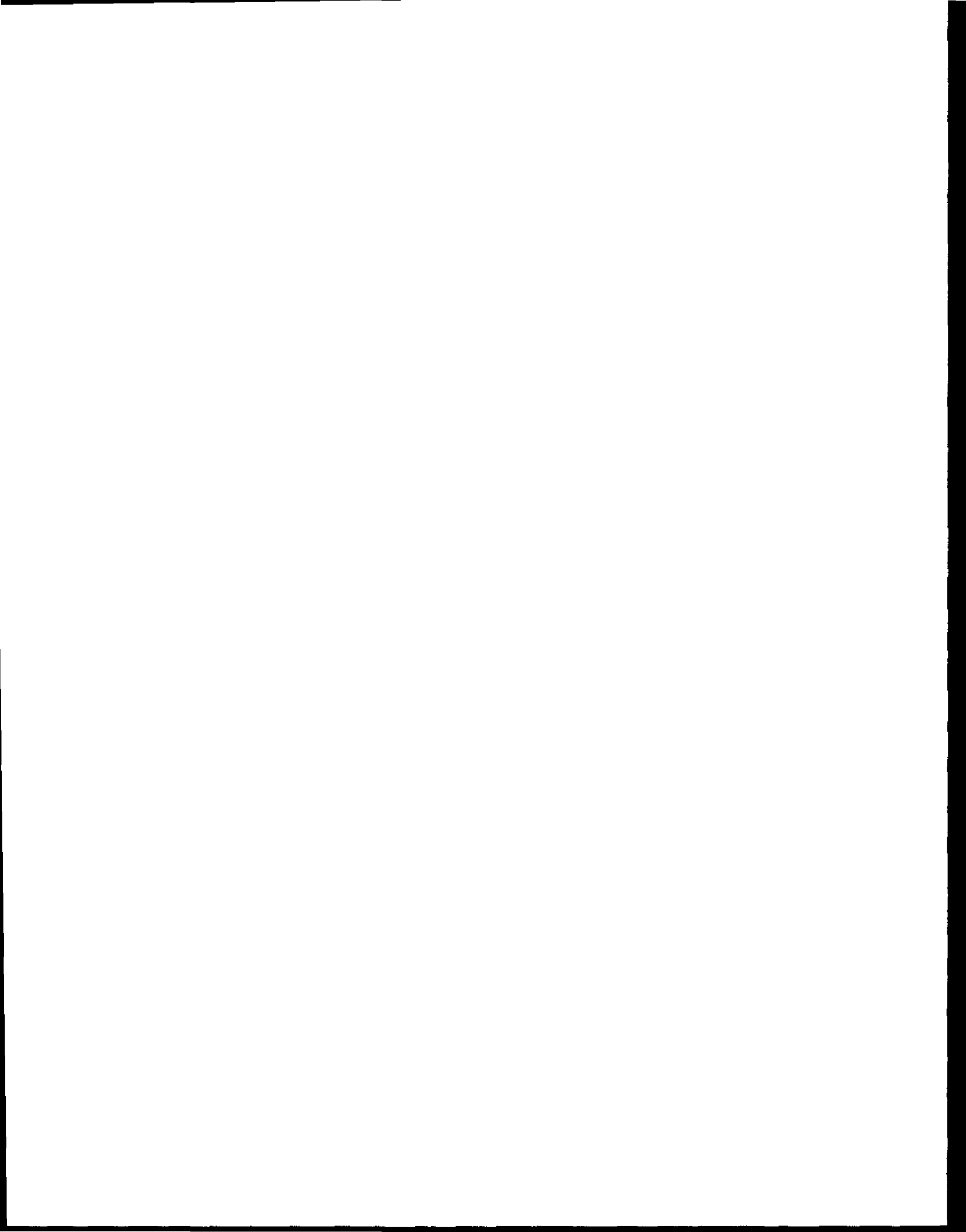
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AUG 3 1989

JOHN EASTIDA, CLERK
BY Rebecca Casaneda

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

* * * * *

IDAHO POWER COMPANY,)	
)	
Plaintiff,)	Case No. 62237
)	
vs.)	
)	
STATE OF IDAHO, ACTING BY AND)	STIPULATION FOR ENTRY
THROUGH THE DEPARTMENT OF)	OF JUDGMENT
WATER RESOURCES, ET AL.,)	
)	
Defendants.)	

* * * * *

COME NOW the Plaintiff herein, by and through the firm of Nelson, Rosholt, Robertson, Tolman & Tucker and Defendants State of Idaho, Idaho Department of Water Resources, Idaho Water Resource Board, Idaho Public Utilities Commission and the Commissioners thereof, (hereinafter referred to as "State Defendants"), by and through the office of the Attorney General, State of Idaho, and stipulate and agree that the Court may enter the Consent Judgment attached hereto.


The parties stipulate and agree that the Court may consolidate the hearing on the Motion for Entry of Judgment filed contemporaneously herewith with a similar hearing in the case of Idaho Power Company v. Idaho Department of Water

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Resources, et al., Civil No. 81375, currently pending in this Court.


DATED this 21st day of July, 1989.

NELSON, ROSHOLT, ROBERTSON
TOLMAN & TUCKER

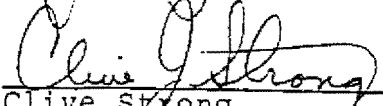


Thomas G. Nelson

STATE OF IDAHO

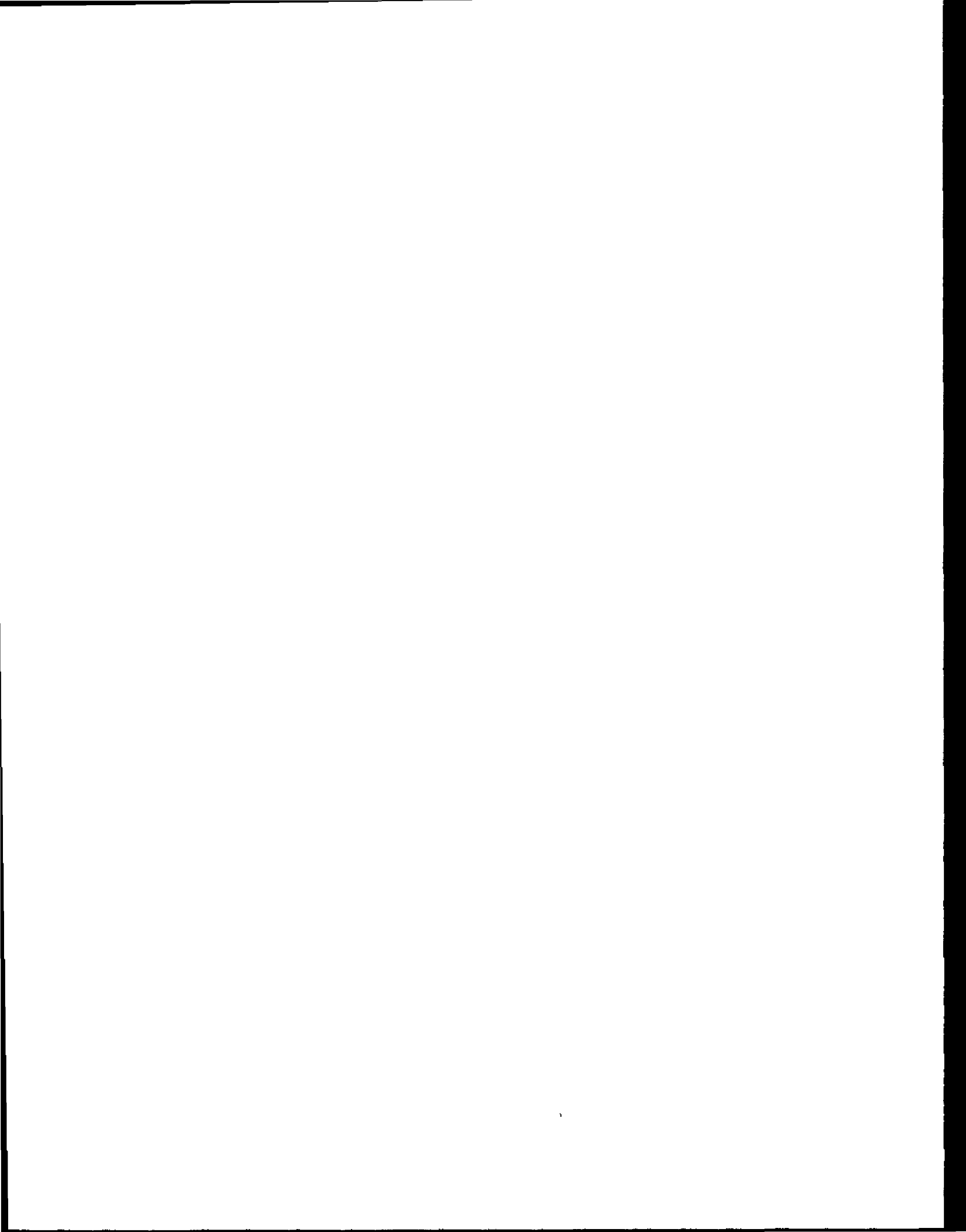


Jim Jones
Attorney General



Clive Strong
Deputy Attorney General

1593p



CONTRACT TO IMPLEMENT
Chapter 259, Sess. Laws, 1983

THIS CONTRACT, Made and entered by and between the STATE OF IDAHO, hereinafter referred to as "Idaho", acting by and through the Governor of the State of Idaho, pursuant to the provisions of Senate Bill No. 1180, 1983 Idaho Session Laws, Chapter 259, and the IDAHO POWER COMPANY, a Maine corporation, qualified to do business in Idaho, with its principal offices in Boise, Idaho, hereinafter referred to as the "Company";

W I T N E S S E T H:

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereby agree as follows:

CONTRACT PROVISIONS

1. Definitions

- (a) The phrase "consumptive water uses for domestic uses" means water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of said households where total use, other than water for irrigation of the residential lot, does not exceed thirteen thousand (13,000) gallons per day. The above definition applies whether such uses are direct or from a municipal water supply. The term "residential lot" means either a lot in an approved subdivision or a lot created by metes and bounds description, which lot had been platted or described prior to November 19, 1982, or meets the minimum residential lot size requirement in effect on November 19, 1982, of the local government agency having jurisdiction. The minimum lot size may be changed by the government agency, but shall not exceed two and one-half acres. The term "consumptive water for domestic uses" shall include, in addition to the uses listed above, use of water for livestock.

SwanFalls - 2620

- (b) "Nonconsumptive Commercial, Nonconsumptive Municipal, Nonconsumptive Industrial Use" means any CMI use which does not deplete the water of the Snake River system above Swan Falls more than two acre-feet per day.
- (c) The phrase "substantial investment in irrigation wells and irrigation equipment" means an actual expenditure or written commitment, pursuant to a water right application filed prior to November 19, 1982, or pursuant to a water right permit issued prior to November 19, 1982, for a portion of the costs of construction or purchase of a well, or of equipment to be used primarily for irrigation purposes which meets the following requirements:
1. The actual expenditure or written commitment for irrigation wells or for irrigation equipment equals or exceeds the amount of fifteen thousand dollars (\$15,000) or the actual expenditure or written commitment equals or exceeds twenty-five (25) percent, whichever is less, of the total projected cost of the irrigation project; and
 2. The actual expenditure or written commitment must have been made prior to November 19, 1982.
 3. The parties have determined that the disjunctive "wells or equipment" more clearly effectuates the legislature's intent in this regard, notwithstanding the appearance of the conjunctive "wells and equipment" in § 61-540, Idaho Code.
- (d) The acronym "IPUC" refers to the Idaho Public Utilities Commission and to any agency successor in function.
- (e) The phrase "Ada County Civil No. 81375" refers to the following legal action: Idaho Power Company vs. Idaho Department of Water Resources, et al., Ada County Civil No. 81375.

2. Mutual Covenants

- (a) Notwithstanding the pending district court action in Ada County Civil No. 81375 all water users as

defined in paragraphs 1(a), and 1(b), and all consumptive water users who have beneficially used water prior to November 19, 1982, pursuant to a valid permit, license or decreed right existing prior to November 19, 1982, or valid beneficial use claim, and any persons who have previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, even though such irrigation wells or irrigation equipment were not in operation prior to November 19, 1982, may continue the perfection of such water right in compliance with Idaho law without protest or interference by the Company.

- (b) As soon as practicable after the effective date of this contract, the Company and Idaho shall dismiss with prejudice its pending case, Ada County Civil. No. 81375, as to those persons who in the opinion of the Company and Idaho, come within the class of users identified in paragraph 2(a) above.
- (c) As to those persons whom the Company and Idaho cannot initially determine, based upon the information available to them, whether or not they come within the class of users identified in paragraph 2(a) above, the Company and Idaho acting through the Idaho Department of Water Resources, shall endeavor to obtain the information necessary to make a decision as to such persons. To the extent it is requested by the Company to provide information, the Idaho Department of Water Resources shall recover its legally authorized costs for researching and producing data including copies. The Company shall subsequently dismiss with prejudice the pending case as to any other persons who are determined by the Company and Idaho based upon the information received to come within the class of users identified in paragraph 2(a) above.
- (d) The Company and Idaho shall not assert any claim for injunctive relief or compensation for depleted flows at the Swan Falls Dam or other Company dam from those persons dismissed from Ada County Civil No. 81375, and will not protest the issuance of a permit or license to such persons on account of the depletion of flows at the

Company's hydro dams for water uses coming within the provisions of Idaho Code § 61-539.

- (e) The Company and Idaho shall not name as defendants in any action, or assert any claim against, holders of consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial, or nonconsumptive municipal uses from the Snake River watershed above Swan Falls Dam occurring from and after November 19, 1982, unless such action or claim is unrelated to such uses, or unless such uses would result in a violation of the Company's water right as defined in paragraph 7(A) of the contract attached hereto as Exhibit A, or in a violation of the minimum stream flow established by the State Water Plan.

3. Intent of the Act and of the Contract

- (a) It is the intent of the Act (Chapter 259, S.L. 1983) and of this Contract, and the interpretation of both parties hereto, that dismissal of defendants by the Company pursuant hereto and failure of the Company to pursue any remedies against persons coming within the terms of paragraphs 2(d) and 2(e) hereof during the existence of this contract shall not expose the Company to claims before the IPUC in the event of later termination of this contract under the provisions of paragraph 7(a), and that the IPUC will lack jurisdiction of such claims in the event of termination of this Contract under the provisions of paragraph 7(a).
- (b) In order to implement the Act and this contract in accordance with the intent, the Company and Idaho shall move the District Court in Ada County Civil No. 81375 under the provisions of I.R.C.P. 41(a)(2) to dismiss said case with prejudice as to the defendants entitled to dismissal under this Contract. The provisions of I.C. 61-539 relating to IPUC jurisdiction shall only apply as to the qualifying uses of each defendant so dismissed.
- (c) The dismissal shall be binding upon the plaintiff irrespective of any declaration by a court of competent jurisdiction that S.B. 1180 is null,

void or of no effect. The dismissal shall be construed as an abandonment by the Company of that portion of its claims for damage against the state and its agencies arising from the issuance of permits or licenses to those holders or their predecessors.

4. Third Party Beneficiaries

Persons coming within the class of users identified in paragraphs 2(a), 2(d) or 2(e) above are third party beneficiaries of this contract who may seek enforcement of applicable provisions, except as to paragraph 3, in accordance with the laws of the State of Idaho. By executing this contract, the Company agrees that its claimed water rights are subordinate to the rights coming within the provisions of paragraphs 2(a), 2(d) and 2(e).

5. Exceptions

No provision of this Contract is intended, nor shall it have the effect of limiting in any manner the nature or scope of the claims or defense which may be utilized by any party to the action remanded to district court by the Idaho Supreme Court in Case No. 13794. The parties agree that by executing this Contract, the State is not conceding nor agreeing that the users or uses identified in paragraphs 2(a), 2(d) or 2(e) in fact interfere with the Company's claimed water rights or that the surface water or ground water used or to be used by such users or uses does in fact contribute to the flow of the Snake River. The parties agree that by executing this Contract the Company is not conceding nor admitting that it cannot state or prove a claim against those water users identified in 2(a), 2(d) or 2(e), nor any other users or potential users of water from the same sources. Neither the plaintiff nor the defendant by this contract makes any admission regarding the nature or quality of the water rights at issue in this or any other litigation. Nor does the state make any admission that the ground waters or various reaches of the Snake River are an interconnected water system.

6. Term

This Contract shall take effect when executed and shall continue in effect until terminated in accordance with the provisions of paragraph 7 hereof.

7. Termination

- (a) In the event the Act is amended or repealed, this Contract shall terminate on the effective date of said law amending or repealing the Act, unless the parties keep this contract in force by way of written addendum. In the event of termination under paragraph 7(a), this contract shall be null and void on and after the date of termination except as to paragraphs 1, 3, 7, and 8, which shall continue in force and effect.
- (b) In addition to any termination that may occur under the provisions of paragraph 7(a) hereof, this contract shall terminate (1) on the date the contract has been performed according to its terms or (2) on the date any decree entered in Ada County Civil No. 81375 is final following on appeal or expiration of the period for appeal, whichever of the foregoing (1) or (2) occurs later. In the event of termination under paragraph 7(b), this contract shall be null and void on and after the date of termination, except as to paragraphs 1, 2(d), 2(e) and 3 which shall continue in force and effect.
- (c) In the event that the agreement between the Governor, the Attorney General and the Company dated October 24, 1984 and attached hereto as Exhibit A is not implemented or is terminated by breach, then this contract shall also terminate, except to the extent this contract has been performed as of the date of termination.

8. Waiver of Defenses

In the event the Contract is terminated under the provisions of paragraph 7(a), the defenses of statute of limitations, abandonment, adverse possession, statutory forfeiture, laches, waiver and other applicable common law defenses due to action or inaction of the Company during the period the Contract was in existence shall not be available against the Company on behalf of persons against whom the Company did not attempt to state a claim based on the existence of this contract for a period of two (2) years after the date of such termination, unless the parties keep this Contract in force by way of written addendum.

9. Authority of Department of Water Resources not affected

This Contract shall not be construed to limit nor interfere with the authority and duty of the Idaho Department of Water Resources to enforce and administer any of the laws of the State which it is authorized to enforce and administer.

10. Modification

This Contract may not be modified except in writing, executed by both of the parties hereto.

11. Successors

The provisions of this contract shall bind and inure to the benefit of the respective successors and assigns of the parties.

12. Entire Agreement

This Contract sets forth all the covenants, promises, provisions, agreements, conditions and understandings between the parties implementing the Act, and there are no covenants, provisions, promises, agreements, conditions or understandings, either oral or written between them other than are herein set forth.

13. Nonlimitations

This Contract is not intended, nor shall it be construed, to limit the rights of either party to prevent the institution or continuance of water uses not in compliance with the laws of the State of Idaho.

14. Effect of Section Headings

The section headings appearing in this Contract are not to be construed as interpretations of the text but are inserted for convenience and reference only.

15. Multiple Originals

This Contract is executed in triplicate. Each of the three contracts with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this agreement at Boise, Idaho.

STATE OF IDAHO

IDAHO POWER COMPANY

By: *John V. Evans*
JOHN V. EVANS
Governor of the
State of Idaho

By: *James E. Bruce*
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer



ATTEST:

Paul L. Jauregui (Seal of the State of Idaho)
Secretary of State

(Corporate Seal of Idaho
Power Company)

ATTEST:

Paul L. Jauregui
Secretary of Idaho Power

APPROVED AS TO FORM:

Jim Jones
JIM JONES
Attorney General of the
State of Idaho

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

- (1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the

corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui

Paul L. Jauregui
Secretary of Idaho Power Company

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or identified to me to be the President and Secretary, respectively of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Laril Knowlton

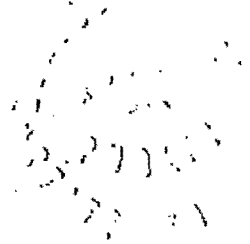
NOTARY PUBLIC FOR IDAHO
Residing at Basin, Idaho

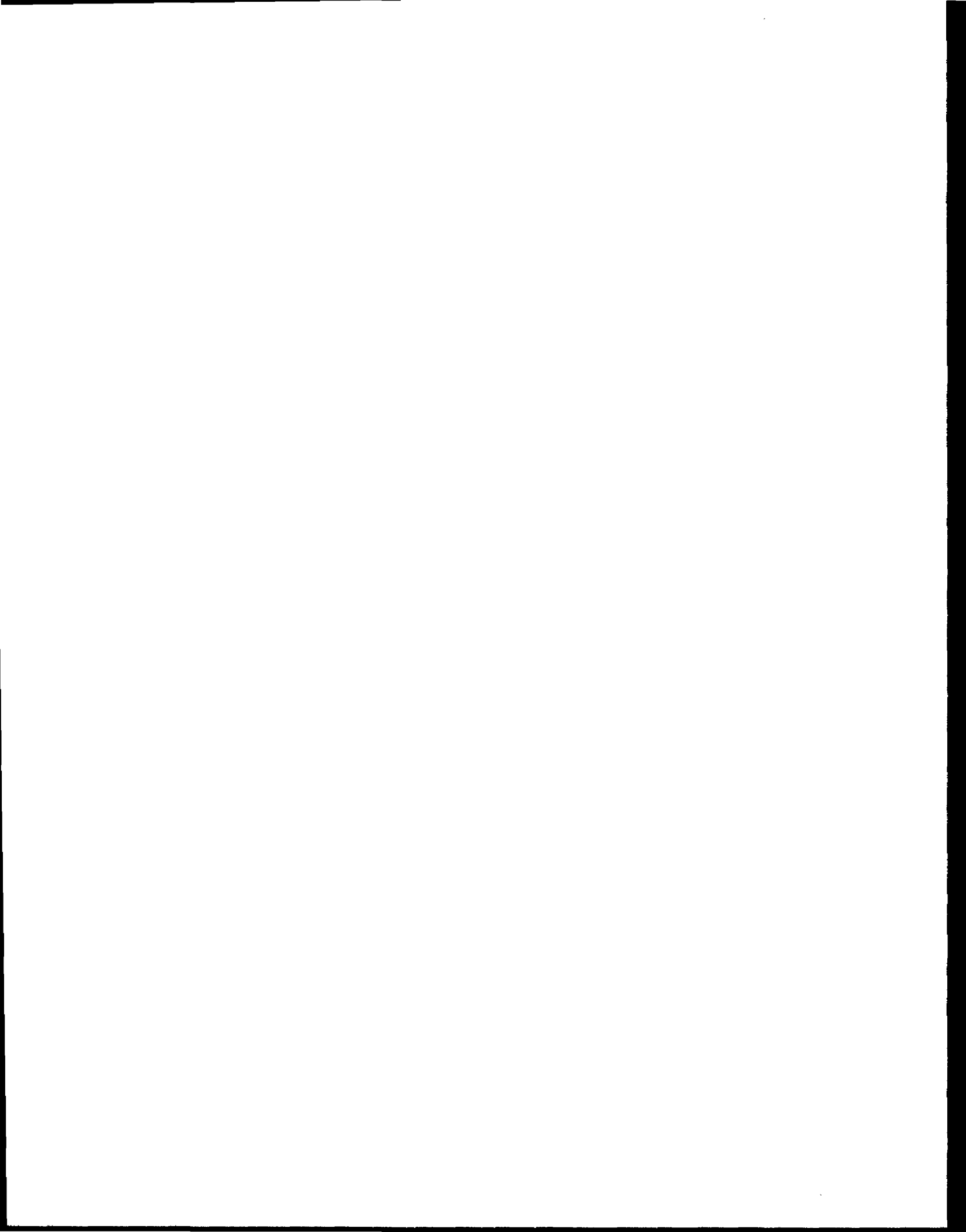
STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

David K. ...
NOTARY PUBLIC FOR IDAHO
Residing at *Boise, Idaho*





Internal Revenue Code.

SECTION 2. It is not the intention of the legislature, by enacting this legislation, to limit the application of Idaho income tax regulation 27-4.1.a.ii.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1983.

Approved April 20, 1983.

CHAPTER 259
(S.B. No. 1180, As Amended)

AN ACT

RELATING TO JURISDICTION OVER THE WATER RIGHTS OF AN ELECTRICAL CORPORATION BY THE IDAHO PUBLIC UTILITIES COMMISSION AND TO CONTRACTS BETWEEN AN ELECTRICAL CORPORATION AND THE STATE OF IDAHO RELATING TO SUCH WATER RIGHTS; AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-539, IDAHO CODE, TO PROVIDE THAT THE COMMISSION HAS NO POWER OR JURISDICTION TO MAKE ANY DETERMINATION, DECISION, RULE, DEMAND, REQUIREMENT, OR ISSUE ANY ORDER OR DECREE INVOLVING OR RELATING TO THE FAILURE OR REFUSAL OF AN ELECTRICAL CORPORATION TO PROTECT ITS WATER RIGHTS FROM DEPLETION OR LOSS TO JUNIOR PRIORITY CONSUMPTIVE USES PRIOR TO NOVEMBER 19, 1982, CERTAIN CONSUMPTIVE USES FOR IRRIGATION PURPOSES WHERE SUBSTANTIAL INVESTMENT IN IRRIGATION WELLS AND IRRIGATION EQUIPMENT WAS MADE PRIOR TO NOVEMBER 19, 1982, BUT WERE NOT IN OPERATION IN 1982, AND JUNIOR PRIORITY CONSUMPTIVE USES FOR DOMESTIC, NONCONSUMPTIVE COMMERCIAL, NONCONSUMPTIVE INDUSTRIAL OR NONCONSUMPTIVE MUNICIPAL USES AFTER NOVEMBER 19, 1982, AND PROVIDING APPLICABILITY TO SPECIFIED COMMISSION PROCEEDINGS; AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-540, IDAHO CODE, TO PROVIDE FOR NEGOTIATION AND EXECUTION OF A CONTRACT ON BEHALF OF THE STATE OF IDAHO WITH ELECTRICAL CORPORATIONS RELATING TO CERTAIN WATER RIGHTS OF AN ELECTRICAL CORPORATION AS A RESULT OF IDAHO SUPREME COURT OPINION NO. 13794 FILED NOVEMBER 19, 1982, AND PROVIDING THE GUIDELINES FOR CERTAIN PROVISIONS WHICH SHALL BE INCLUDED IN ANY SUCH CONTRACT; AND DECLARING AN EMERGENCY AND PROVIDING THE EFFECTIVENESS OF SECTION ONE IS CONTINGENT UPON THE SIGNING OF A CERTAIN CONTRACT BY CERTAIN PARTIES.

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

SECTION 1. That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be

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known and designated as Section 61-539, Idaho Code, and to read as follows:

61-539. WATER RIGHTS OF AN ELECTRICAL CORPORATION -- NO COMMISSION JURISDICTION. The commission shall have no power or jurisdiction to make any determination, decision, rule, demand, requirement, or issue any order or decree involving or related to the failure or refusal of an electrical corporation to protect its hydropower water rights from depletion or loss to (1) junior priority consumptive water uses for any consumptive purpose prior to November 19, 1982, (2) junior priority consumptive water uses for irrigation where substantial investments in irrigation wells and irrigation equipment were made prior to November 19, 1982, but were not operating in 1982, and (3) junior priority consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial or nonconsumptive municipal uses occurring from and after November 19, 1982.

This section shall apply not only to future proceedings concerning claims the cause for which arose prior to November 19, 1982, but also to proceedings pending before the commission at the time this act becomes effective, and any claims which might be asserted against the electrical corporation for depletions from uses within (1), (2) or (3) above.

SECTION 2. That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-540, Idaho Code, and to read as follows:

61-540. AUTHORIZING NEGOTIATION AND EXECUTION OF CONTRACTS BY THE STATE OF IDAHO WITH ELECTRICAL CORPORATIONS REGARDING CERTAIN WATER RIGHTS IDENTIFIED IN SECTION 61-539, IDAHO CODE. The governor of the state of Idaho or his designee is hereby empowered to negotiate and the governor to execute a contract on behalf of the state of Idaho with any electrical corporation which has filed or may file suit against water users or possible water users, said electrical corporation seeking to stop junior prior consumptive water uses as a result of Idaho Supreme Court Opinion No. 13794 in "Idaho Power Company vs. State of Idaho, et al," filed November 19, 1982. Each contract shall provide, among other things, that (1) all consumptive water users who have beneficially used water for any consumptive purpose prior to November 19, 1982, or any person or persons who have previously made substantial investments in irrigation wells and irrigation equipment and have pending a water permit or application, even though such irrigation wells and irrigation equipment were not in operation prior to November 19, 1982, may continue the water licensing process, (2) persons included within the provisions of (1) above are third party beneficiaries of said contract, (3) the electrical corporation shall, where any suit is pending in which a person is within the class of consumptive users identified in (1) above, move the court for the dismissal from the suit of such person or persons, (4) said contract shall be conditional upon the passage and approval of this act but shall terminate if section 61-539 or 61-540, Idaho Code, be subse-

requently amended or repealed, and (5) in the event this act be amended or repealed, the defenses of statute of limitations, abandonment, adverse possession, statutory forfeiture, laches, waiver, estoppel and other applicable common law defenses shall not be available against said electrical corporation following said contract termination for a period of two (2) years, unless the parties mutually consent to keep said contract in effect by addendum.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, provided, however, that the provisions of Section 1 of this act shall be in full force and effect only after the signing of the contract provided for in Section 61-540, Idaho Code, by the Governor of the State of Idaho and an appropriate electrical corporation.

Approved April 25, 1983.

CHAPTER 260
(S.B. No. 1200)

AN ACT

EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO THE TOTAL APPROPRIATION OF THE OFFICE OF THE GOVERNOR; APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR AND DESIGNATING PROGRAM LIMITS FOR FISCAL YEAR 1984; EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO THE COMMISSION FOR THE BLIND; AND REAPPROPRIATING CERTAIN MONEYS TO THE MILITARY DIVISION.

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

SECTION 1. It is legislative intent that the total appropriation for the Office of the Governor not exceed the following amounts from the listed accounts, for the period July 1, 1983, through June 30, 1984:

FROM:	
General Account	\$ 4,582,700
Interagency Billing and Receipts Account	190,600
Pacific Northwest Regional Commission Account	285,200
Comprehensive Employment and Training Act Account	40,200
State Planning Account	14,200
Idaho Travel and Convention Account	2,133,600
Idaho Development and Publicity Account	111,900
Economic and Community Affairs Account	6,321,600
Public Employees' Retirement System Account	1,113,100
Liquor Account	6,095,600
State Insurance Fund Account	1,383,900
Office on Aging Account	1,266,700
Older Americans Account	2,959,900



Westlaw

Page 1

I.C. § 61-539

C

West's Idaho Code Annotated Currentness

Title 61. Public Utility Regulation

Chapter 5. Powers and Duties of Public Utilities Commission (Refs & Annos)

→ § 61-539. Water rights of an electrical corporation—No commission jurisdiction

The commission shall have no power or jurisdiction to make any determination, decision, rule, demand, requirement, or issue any order or decree involving or related to the failure or refusal of an electrical corporation to protect its hydropower water rights from depletion or loss to (1) junior priority consumptive water uses for any consumptive purpose prior to November 19, 1982, (2) junior priority consumptive water uses for irrigation where substantial investments in irrigation wells and irrigation equipment were made prior to November 19, 1982, but were not operating in 1982, and (3) junior priority consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial or nonconsumptive municipal uses occurring from and after November 19, 1982.

This section shall apply not only to future proceedings concerning claims the cause for which arose prior to November 19, 1982, but also to proceedings pending before the commission at the time this act becomes effective, and any claims which might be asserted against the electrical corporation for depletions from uses within (1), (2) or (3) above.

S.L. 1983, ch. 259, § 1.

LIBRARY REFERENCES

Electricity k8.1.

Westlaw Key Number Search: 145k8.1.

C.J.S. Electricity §§ 10(2) to 11.

C.J.S. Industrial Co-Operative Societies §§ 1 to 43.

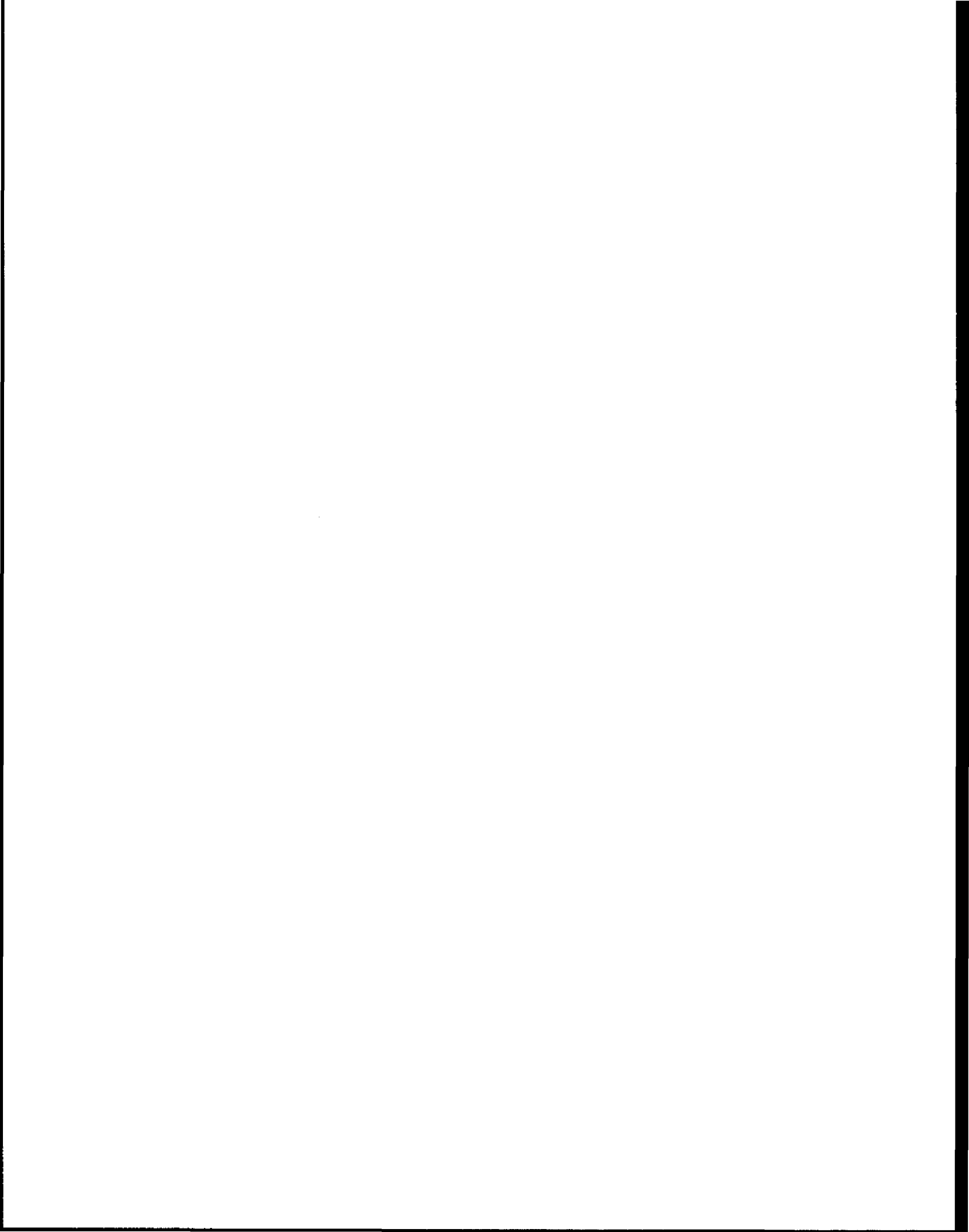
I.C. § 61-539, ID ST § 61-539

Current through the 2006 1st Extraordinary Session of the
58th Legislature, Ch. 1

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END OF DOCUMENT

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Page 1

I.C. § 61-540

C

West's Idaho Code Annotated Currentness

Title 61. Public Utility Regulation

* Chapter 5. Powers and Duties of Public Utilities Commission (Refs & Annos)

→§ 61-540. Authorizing negotiation and execution of contracts by the state of Idaho with electrical corporations regarding certain water rights identified in section 61-539, Idaho Code

The governor of the state of Idaho or his designee is hereby empowered to negotiate and the governor to execute a contract on behalf of the state of Idaho with any electrical corporation which has filed or may file suit against water users or possible water users, said electrical corporation seeking to stop junior prior consumptive water uses as a result of Idaho Supreme Court Opinion No. 13794 in "Idaho Power Company vs. State of Idaho, et al," filed November 19, 1982. Each contract shall provide, among other things, that (1) all consumptive water users who have beneficially used water for any consumptive purpose prior to November 19, 1982, or any person or persons who have previously made substantial investments in irrigation wells and irrigation equipment and have pending a water permit or application, even though such irrigating wells and irrigation equipment were not in operation prior to November 19, 1982, may continue the water licensing process, (2) persons included within the provisions of (1) above are third party beneficiaries of said contract, (3) the electrical corporation shall, where any suit is pending in which a person is within the class of consumptive users identified in (1) above, move the court for the dismissal from the suit of such person or persons, (4) said contract shall be conditional upon the passage and approval of this act but shall terminate if section 61-539 or 61-540 [this section], Idaho Code, be subsequently amended or repealed, and (5) in the event this act be amended or repealed, the defenses of statute of limitations, abandonment, adverse possession, statutory forfeiture, laches [laches], waiver, estoppel and other applicable common law defenses shall not be available against said electrical corporation following said contract termination for a period of two (2) years, unless the parties mutually consent to keep said contract in effect by addendum.

S.L. 1983, ch. 259, § 2.

LIBRARY REFERENCES

Electricity k8.1.

Westlaw Key Number Search: 145k8.1.

C.J.S. Electricity §§ 10(2) to 11.

C.J.S. Industrial Co-Operative Societies §§ 1 to 43.

I.C. § 61-540, ID ST § 61-540

Current through the 2006 1st Extraordinary Session of the
58th Legislature, Ch. 1

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I.C. § 61-540

END OF DOCUMENT



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 30, 1983

Room 433, 1:30

PRESENT

All members of the Committee were present.

Chairman Noh called the meeting to order.

RS 9409
Senator Noh

This legislation is to protect existing water users in the Snake River basin above Swan Falls from legal challenges by Idaho Power and to gain control for the state of Idaho our future uses of the unappropriated flowing water of the state.

RS 9410

The legislation will do as above plus establish a minimum stream flow at Murphy of 5,400 cfs, which will automatically return to the current minimum of 3,300 cfs at the end of two years.

RS 9413C1

This legislation will do as RS 9409 and provide for management purposes, that diversion will not be made directly from the main stem of the Snake from Milner Dam to Swan Falls for a period of two years.

RS 9420

This will protect existing water users in the Snake River Basin above Swan Falls from legal challenges by Idaho Power Company.

Senator Noh asked Mr. Dunn, Water Resources, to what degree each of the above bills would affect the issuance of water permits.

Mr. Dunn

RS 9409: I could issue water permits with conditions. RS 9410: Under this, I could not issue any permits unless it could be proved the permits would not impact the 5,400 cfs. RS 9413C1: Any application I have on hand I could not approve if it directly diverted water from the main stem of the Snake from Milner Dam to Swan Falls.

MOTION

Senator Reilly moved and Senator Ringert seconded all four pieces of legislation be sent to print.
(No action taken)

MINUTES

Resources & Environment

- 2 -


March 30, 1983


The Chairman said his intentions are to vote on these bills before taking action on SB 1180. This comment brought forth a substitute motion.

SUB MOTION

Senator Peavey moved and Senator Williams seconded all four RS's be printed and then considered along with SB 1180 at the same time. Motion carried on voice vote.

There being no further business, the meeting adjourned.


Bev Mullins, Secretary


Laird Noh, Chairman

LAIRD NOH
DISTRICT 25
TWIN FALLS COUNTY

HOME ADDRESS
ROUTE 1, BOX 65
MERLY, IDAHO 83341
SIDENCE (208) 733-3617
TEHOUSE (208) 334-2000

COMMITTEES
CHAIRMAN
RESOURCES AND ENVIRONMENT
HEALTH, EDUCATION
AND WELFARE
TRANSPORTATION

Idaho State Senate

CAPITOL BUILDING
BOISE
83720

March 31, 1983

TO: RESOURCES AND ENVIRONMENT COMMITTEE MEMBERS

FROM: SENATOR WILLIAMS, ACTING CHAIRMAN

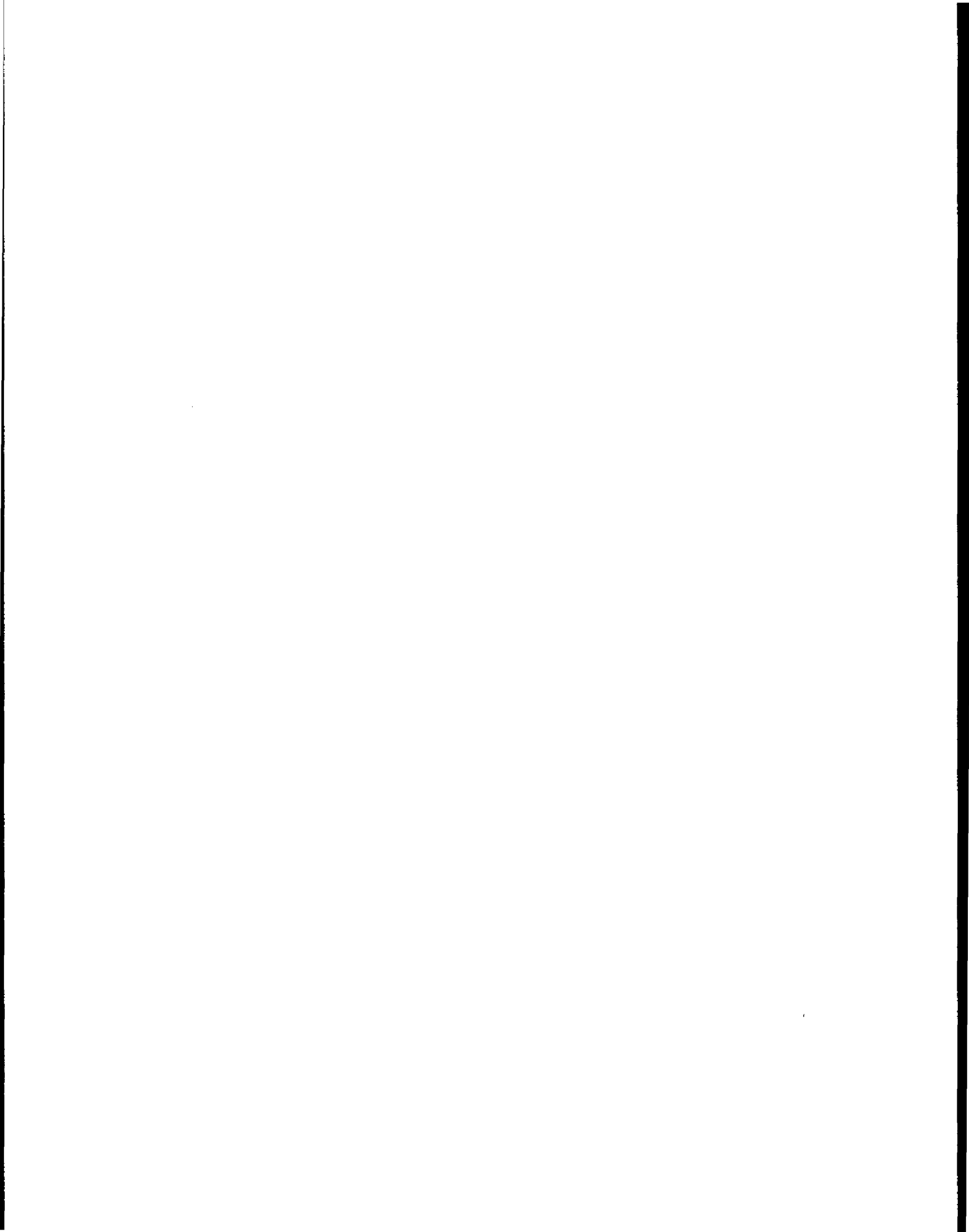
Attached is a copy of RS 9427. Please review and indicate below your approval or disapproval of sending it to be printed.

Initial your desire below:

AYE

NAY

	AYE	NAY
NOH		
WILLIAMS	<i>WWS</i>	
LITTLE	<i>W.L.</i>	
SVERDSTEN	<i>[Signature]</i>	
CHAPMAN		
RINGERT	<i>[Signature]</i>	
KIEBERT	<i>[Signature]</i>	
BEITELSPACHER	<i>[Signature]</i>	
PEAVEY	<i>[Signature]</i>	
REILLY	<i>TR</i>	



MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

APRIL 4, 1983

Room 433, 1:30

PRESENT

All members of the Committee were present.

Chairman Noh called the meeting to order.

Chairman Noh opened the meeting with the remark that due to a recent Supreme Court ruling SB 1187 was unconstitutional as the legislature does not have the power to change the water policy set by the Water Resource Board.

SB 1186

The bill subordinates all water for hydro power purposes. It will protect all those using water prior to November 19, 1982. Those with substantial investments in irrigation wells and/or equipment as of November 19, 1982 will be allowed to finish licensing process. Future domestic, municipal for household purposes, and nonconsumption municipal, commercial, and industrial use will be allowed. Idaho Power is protected from claims by ratepayers for failure to protect its water rights from those water users listed above. Protection for both Idaho Power and water users occurs upon the signing of the contract by the Governor and Idaho Power. All portions of the act are severable.

SB 1188

Same as SB 1186 except that no direct diversions from the Snake River from Milner Dam to Murphy gauge would be allowed from the date of the act until March 10, 1985. This will allow well permits to be issued during this period, and also diversions from tributary streams, with the notification that compensation may be required pending outcome of Idaho Power court challenges to subordination.

SB 1180

This legislation is an Idaho Power proposal. It includes only their language for protecting existing water uses and some future uses, and protection for Idaho Power from failure to defend their water rights. It differs in this respect from SB 1186:

a. Future domestic, municipal for household purposes and other nonconsumptive uses are not protected by contract. Idaho Power is not protected from claim for municipal use for household purposes.

b. Idaho Power is protected from actions by the PUC upon passage of the bill, but protection for water users is not realized until Idaho Power and the Governor sign the contract.

SB 1189

Subordination language only.

Reg Panter
Idaho Power

Regarding bills 1186, 1187 and 1188, there is a constitutional question on their unity of subject matter and they would also violate the fundamental requirements of due process; i.e. notice to affected individuals, an opportunity to be heard and present evidence and an order based upon the evidence. Idaho Power would like to see SB 1180 go out and if the committee sees fit, they can act on SB 1189 and that way the two issues would be acted on separately.

Mike Gilmore
PUC

The PUC is not particularly concerned about the problem raised by Idaho Power. It is felt the language in SB 1186 and SB 1188, Section 2, 61-589, (b) should also be in SB 1180. If the PUC does not have any power, then the Legislature should over what the "reasonable level" of hydroelectric production is for Idaho Power.

Senator Peavey asked Mr. Lanham what he thought about an amendment to SB 1180 as suggested by the PUC. Mr. Lanham said he didn't think the Legislature should get involved in the rate-making process.

Senator Noh said he has heard concerns regarding a water bank.

Ken Dunn
Water Resource

Believes a water bank is a couple of years away before being viable and for this reason feels subordination is important.

Motion
SB 1180

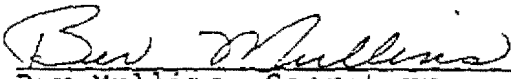
Senator Williams moved and Senator Little seconded SB 1180 go out with a "do pass" recommendation. (No action taken as substitute motion passed)

- Sub. Motion 1180 Senator Peavey moved and Senator Kiebert seconded SB 1180 go to the 14th order. Motion carried on a 6-4 roll call vote.
- Roll Call Vote AYE: Senator Williams, Little, Chapman, Kiebert, Beitelspacher and Peavey. NO: Senators Noh, Sverdsten, Ringert and Reilly.
- Amended Sub. Motion 1188 Senator Reilly moved and Senator Sverdsten seconded the bill go to the floor "without recommendation." Motion failed on roll call vote of 4-6. Vote was then taken on the substitute motion which passed.
- Roll Call Vote AYE: Senators Noh, Sverdsten, Ringert and Reilly. NO: Senators Williams, Little, Chapman, Kiebert, Beitelspacher and Peavey.
- Motion 1189 Senator Beitelspacher moved SB 1189 be sent to the 14th order, seconded by Senator Kiebert. Motion carried on voice vote after substitute motion failed.
- Sub. Motion 1189 Senator Williams moved and Senator Ringert seconded the bill go out with a "do pass" recommendation. Motion failed 5 to 5. Vote then taken on original motion which passed.
- Roll Call Vote AYE: Senators Noh, Williams, Sverdsten, Chapman and Ringert. NO: Senators Little, Reilly, Kiebert, Beitelspacher and Peavey.
- HCR 13 A concurrent resolution directing the Department of Water Resources to conduct studies of water projects on the Weiser River Basin be continued and, in particular, that a site for a major storage project on the Weiser River be identified.
- Motion Senator Beitelspacher moved and Senator Ringert seconded the bill go out with a "do pass" recommendation. Motion carried.

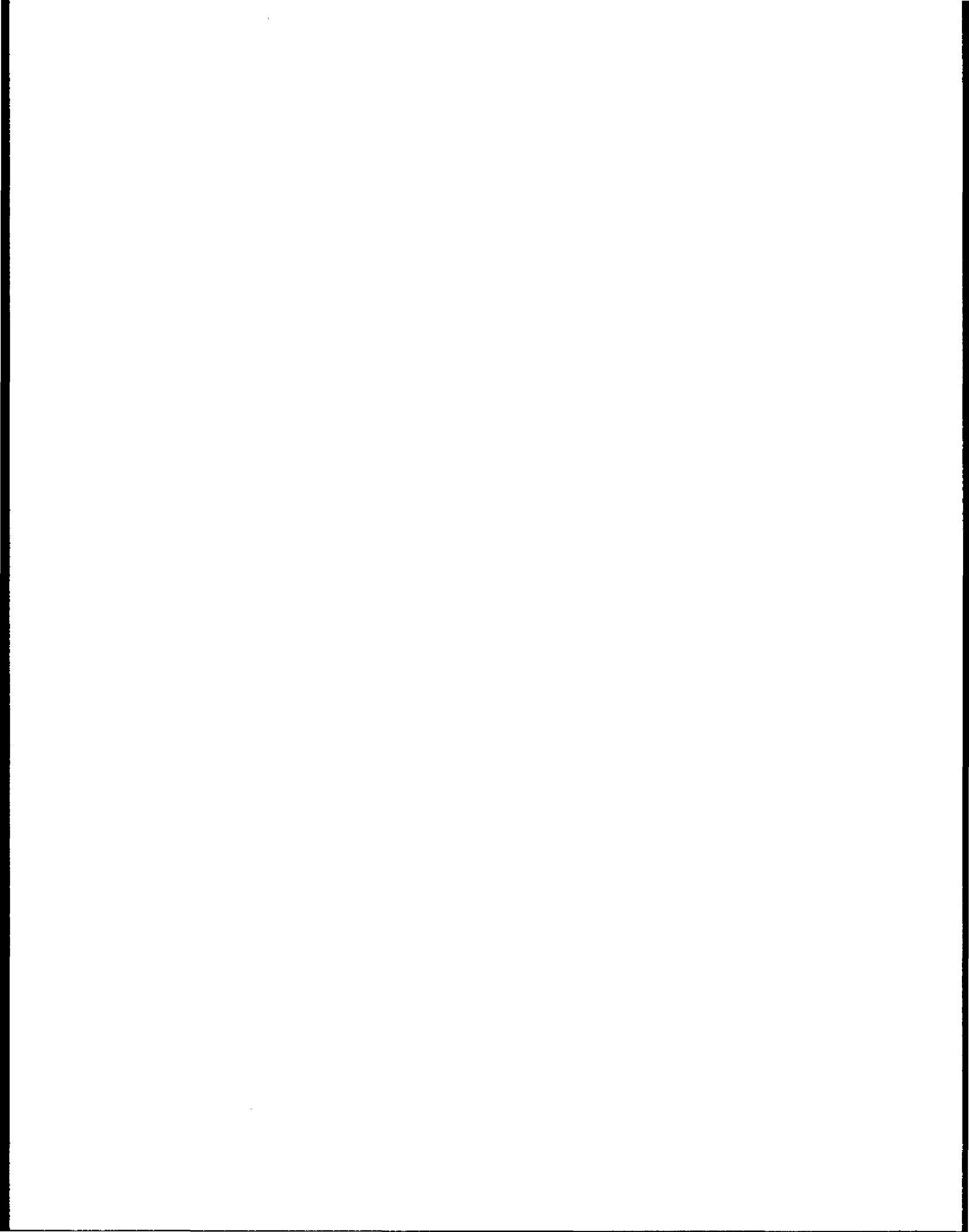
Meeting adjourned 2:55 p.m.



Laird Noh, Chairman



Bev Mullins, Secretary



MINUTES

RESOURCES AND CONSERVATION COMMITTEE

April 8, 1933 (A)

TIME: 1:00 P. M.

PLACE: Room 412 - Statehouse

PRESENT: All Members present, except:

ABSENT: Representatives Winchester, Stucki, Orme, Trillhaase, Reynolds, Edwards, Tucker, Johnson (35) and Mitchell.

TESTIMONY: Mr. Gordon Trombley, Department of Lands

Chairman Chatburn called the meeting to order at 1:00 P. M.

ACTION: Representative Sutton moved and Representative Judd seconded that the Minutes of the previous meeting be approved.

NOTION CARRIED.

109: STATING LEGISLATIVE FINDINGS AND DIRECTING THE LEGISLATIVE COUNCIL TO ESTABLISH A COMMITTEE TO UNDERTAKE AND COMPLETE A STUDY RELATING TO FIRE PROTECTION ON IDAHO'S FOREST LANDS AND TO UNDERTAKE AND COMPLETE A STUDY RELATING TO FIRE PROTECTION FOR STATE-OWNED RANGE LANDS AND TO CONSIDER A STUDY RELATING TO ALTERNATIVE METHODS OF FUNDING OF THE ADMINISTRATIVE COST OF STATE TIMBER SALES.

Mr. Trombley testified before the committee that this proposed legislation was needed because for the past several years the moneys available to fully fund their fire program have been diminishing to the point where they have not been able to fully pay their contractual obligations to the United States Forest Service for protecting state and private lands within the boundaries of the national forests. He said, under current federal policy, interest must be charged on unpaid bills and additionally, it may be necessary to pay them offset.

ACTION: Representative Little moved and Representative Haagenson seconded to send SCR 109 to the floor with a "NO PASS" recommendation.

NOTION CARRIED. Representative Little will sponsor.

The meeting was recessed at 1:15 P. M. and will continue upon adjournment of the House.

Chairman Chatburn called the meeting to order at 3:35 P. M.

All Members present, except:

ABSENT: Rep. Winchester

TESTIMONY: Mr. Greg Panter, Idaho Power Company
Mr. Gray Andrist, Motorized Recreation
Mr. Ken Morris, Department of Fish and Game

110: RELATING TO JURISDICTION OVER THE WATER RIGHTS OF AN ELECTRIC PUBLIC UTILITY BY THE IDAHO PUBLIC UTILITIES COMMISSION AND TO CONTRACTS BETWEEN AN ELECTRIC PUBLIC UTILITY AND THE STATE OF IDAHO RELATING TO SUCH WATER RIGHTS

Mr. Panter testified that this bill gives the water users more security and is designed to clear up the water rights that are in

MINUTES
RESOURCES AND CONSERVATION COMMITTEE
April 8, 1981

Page 2

jeopardy as a result of the Supreme Court's decision on November 19, 1982.

Rep. Bateman asked Mr. Panter what happens to future water rights.

Mr. Panter replied that, at this point in time, they have one action going on today which is the action of the state trying to seek subordination of the water rights at Swan Falls. That issue will be dealt with at the federal level.

MOTION: Rep. Bateman moved and Rep. Sutton seconded that S 1130 go to the floor with a "DO PASS" recommendation.

MOTION CARRIED. Chairman Chathurn will sponsor the bill.

S 1190: RELATING TO FISH AND GAME COMMISSION AUTHORITY TO PROVIDE THAT THE COMMISSION MAY ENTER INTO COOPERATIVE AGREEMENTS WITH LAND-HOLDERS TO CLOSE CERTAIN LANDS TO THE USE OF MOTORIZED VEHICLES.

Mr. Norrie told the committee that the Fish and Game Department, through their years of study and research, have found that one of the problems facing wildlife results from road building. He said what this bill does is give the Fish and Game Commission the authority to enter into cooperative agreement with public and private landowners for one purpose and that is to protect wildlife habitat.

Rep. Little stated that under existing Idaho law, road closure is specifically defined and wondered if this bill would be in conflict.

Mr. Norrie said the commission and the other agencies would not be doing anything that is in violation-which is one thing that would be brought out in the public hearings.

Rep. Judd asked if the commission is the sole determination in closing a road. (At a public hearing).

Mr. Norrie answered it is a combined determination of the commission, the agencies and the landowners involved.

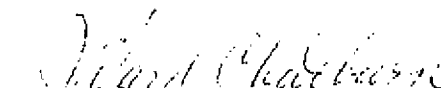
Mr. Andrist spoke in opposition to S 1190 because this bill appears to usurp the responsibilities of the counties for road closures and road obstructions.

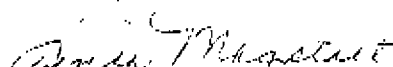
MOTION: Rep. Haagenon moved and Rep. Mitchell seconded to send S 1190 to the floor with a "DO PASS" recommendation.

MOTION: Rep. Tucker moved and Rep. Brackett seconded that S 1190 be held in committee so that further study of the legislation could be made.

MOTION CARRIED.

The meeting adjourned at 6:30 P. M.


J. WARD CHATHURN, CHAIRMAN


Linda Hagstadt, Secretary

MINUTES

RESOURCES AND CONSERVATION COMMITTEE

April 8, 1983 (A)

TIME: 1:00 P. M.

PLACE: Room 412 - Statehouse

PRESENT: All members present, except:

EXCUSED: Representatives Stoicheff, Bateman, Orma, Findlay, Edwards and Tucker.

GUESTS: Mr. Sherl Chapman, Idaho Water Users Association, Inc.
Mr. Kenneth Dunn, Department of Water Resources

Chairman Chatburn called the meeting to order at 1:00 P. M.

RS 9463: RELATING TO WATER RIGHTS FOR ELECTRICAL POWER PURPOSES; AMENDING SECTION 42-205, IDAHO CODE, TO PROVIDE THAT ALL WATER RIGHTS FOR HYDROPOWER PURPOSES ARE SUBORDINATED TO SUBSEQUENT DEPLETIONS IN STREAM FLOWS FOR OTHER BENEFICIAL PURPOSES, AND TO PROVIDE A MORATORIUM ON THE APPROVAL OF PERMITS TO APPROPRIATE WATERS FROM A CERTAIN PORTION OF THE SNAKE RIVER UNTIL APRIL 10, 1984; PROVIDING SEVERABILITY; AND DECLARING AN EMERGENCY.

Mr. Chapman told the committee the Idaho Water Users had been working on this issue the last two months. This proposed legislation would put a moratorium of one year, which would give the Water Resources time for planning the water rights of the Snake River. None of this can be done unless there is subordination legislation. Mr. Chapman asked that the committee favorably consider this legislation so that it would not be delayed for one year or two years. The moratorium puts everything on hold until April 10, 1984. This will enable coordination in planning with the Water Resources to come up with some good plans for the Swan Falls Dam area of the Snake River and our water resources development in Idaho.

Rep. Wood asked if this legislation is adopted and the court finds that in the taking of water rights that we must compensate, would this go back and apply to all of the people protected in S 1180?

Mr. Chapman replied that it would not. He said that issue was discussed in detail. S 1180 takes care of actions under the PUC and also provides for contracts between the Governor of the state and Idaho Power Company to protect existing water users. The subordination and possible compensation is for future uses of water - water that has not yet been diverted.

Mr. Dunn testified that this bill will address any opportunity the state has to manage its water in the future; and in particular, provide for a one-year moratorium on the issuance of permits to appropriate water on the Snake River. It is intended to give the Water Resource Board an opportunity to come up with a management plan for the Snake system.

Rep. Oliason asked if the moratorium date of April, 1984 could be extended.

Mr. Dunn answered that it could be changed.

MINUTES
RESOURCES AND CONSERVATION COMMITTEE
April 8, 1984

Page 2

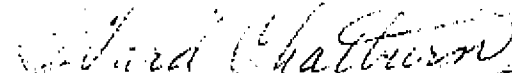
Chairman Chatburn asked Mr. Dunn's opinion if the passage of the subordination measure would, in any way, affect S 1180.

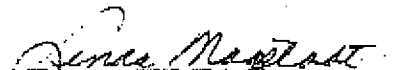
Mr. Dunn replied that in his opinion, it would not have an effect. That is legislation specifically addressed to existing water users. It protects them by a contract the state will enter into with the Power Company and the agreement will be that they will be allowed to remain in production. The Power Company will, in effect, be abandoning that portion of their right to allow that to occur. As a condition of that, the state will be relieving the Power Company of any action that they might have experienced before the PUC.

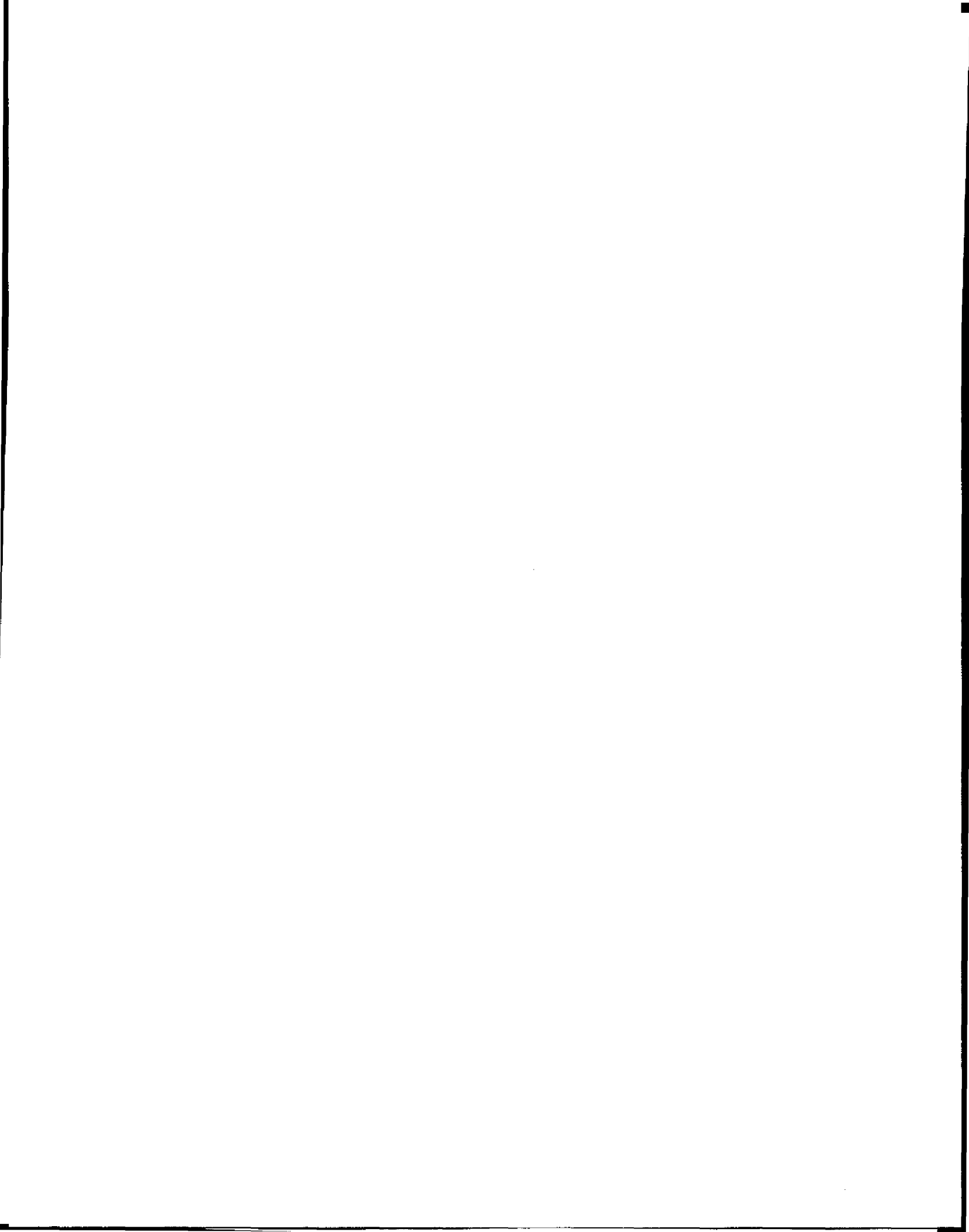
MOTION: Rep. Wood moved and Rep. Reynolds seconded that we request the Ways and Means committee introduce RS 9463.

MOTION CARRIED. Representatives Haagenson and Judd wished to be recorded as voting "NAY."

The meeting adjourned at 1:24 P. M.


J. VARD CHATBURN, CHAIRMAN


Linda Magstadt, Secretary



**LEGAL DESCRIPTIONS FOR NOTICES OF
NOTICES OF CHANGE IN WATER RIGHT OWNERSHIP**

Water Right Nos.:

02-2001A, 02-2001B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-10135, 36-2013, 36-2018, 36-2026, 37-20709, 37-20710, 02-4000, 02-4001, 02-2032

Water Right No.	Point(s) of Diversion	Place of Use	Comments
02-2001A	T7S, R13E, S2, SWSW, Lot 8, Twin Falls County; T7S, R13E, S2, SESW, Lot 7, Gooding County	T7S, R13E, S2, SESW, Lot 7, Gooding County	Lower Salmon Falls Dam and Power Plant
02-2001B	T7S, R13E, S2, SWSW, Lot 8, Twin Falls County; T7S, R13E, S2, SESW, Lot 7, Gooding County	T7S, R13E, S2, SESW, Lot 7, Gooding County	Lower Salmon Falls Dam and Power Plant
02-2032	T2S, R1E, S18, SESWSE, Lot 10, Owyhee County; T2S, R1E, S18, NWSESE, Lot 11, Ada County	T2S, R1E, S18, SESE, Lot 11, Ada County	Swan Falls Dam and Power Plant
02-2036	T9S, R18E, S31, NESW, Lot 8, Twin Falls County; T9S, R18E, S31, NWSW, Lot 9, Jerome County	T9S, R17E, S36, NESE, Lot 15, Jerome County	Shoshone Falls Dam and Power Plant
02-2056	T10S, R18E, S4, NENW, Lot 3, Twin Falls County	T10S, R18E, S4, NENW, Lot 3, Twin Falls County	Twin Falls Dam and Power Plant
02-2057	T8S, R13 E, S2, NWNE, Lot 1, Gooding County; T8S, R13 E, S2, NWNE, Lot 2, Twin Falls County	T8S, R13E, S2, NWNW, Lot 4, Twin Falls County; T8S, R13E, S3, NENE, Lot 1, Twin Falls County; T8S, R13E, S3, NWNW, Lot 3, Twin Falls	Upper Salmon Falls Dam and Power Plants

		County	
02-2059	T7S, R13E, S2, SWSW, Lot 8, Twin Falls County; T7S, R13E, S2, SESW, Lot 7, Gooding County	T7S, R13E, S2, SESW, Lot 7, Gooding County	Lower Salmon Falls Dam and Power Plant
02-2060	T7S, R13E, S2, SWSW, Lot 8, Twin Falls County; T7S, R13E, S2, SESW, Lot 7, Gooding County	T7S, R13E, S2, SESW, Lot 7, Gooding County	Lower Salmon Falls Dam and Power Plant
02-2064	T6S, R12E, S7, SWNESE, Lot 5, Gooding County; T6S, R12E, S7, SWNESE, Lot 10, Elmore County	T6S, R12E, S7, Lot 5, Gooding County	Bliss Dam and Power Plant
02-2065	T6S, R12E, S7, SWNESE, Lot 5, Gooding County; T6S, R12E, S7, SWNESE, Lot 10, Elmore County	T6S, R12E, S7, NESE, Lot 5, Gooding County	Bliss Dam and Power Plant
02-4000	T2S, R1E, S18, SESWSE, Lot 10, Owyhee County; T2S, R1E, S18, NWSESE, Lot 11, Ada County	T2S, R1E, S18, SESE, Lot 11, Ada County	Swan Falls Dam and Power Plant
02-4001	T2S, R1E, S18, SESWSE, Lot 10, Owyhee County; T2S, R1E, S18, NWSESE, Lot 11, Ada County	T2S, R1E, S18, SESE, Lot 11, Ada County	Swan Falls Dam and Power Plant
02-10135	T6S, R12E, S7, NESE, Lot 5, Gooding County; T6S, R12E, S7, NESE, Lot 10, Elmore County	T6S, R12E, S7, NESE, Lot 5, Gooding County	Bliss Dam and Power Plant
36-2013	T8S, R14E, S8, SWSE, NWSE, Gooding County	T8S, R14E, S8, NESW, Lot 3, Gooding County	Thousand Springs Power Plant

36-2018	T9S, R14E, S2, NESWSE, Lot 7, Gooding County; T9S, R14E, S2, NESWSE, Lot 7, Gooding County;	T9S, R14E, S2, SWSE, Lot 7, Gooding County	Clear Lake Power Plant
36-2026	T8S, R14E, S17, SEWSE, Gooding County	T8S, R14E, S8, NESW, Lot 3, Gooding County	Thousand Springs Power Plant
37-20709	T6S, R13E, S25, SWSW, Gooding County	T6S, R13E, S35, NENW, Gooding County	Upper Malad Gorge Power Plant
37-20710	T6S, R13E, S35, NENW, Gooding County	T6S, R13E, S27, SWSW, Gooding County	Lower Malad Gorge Power plant