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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Boise Project Board of Control, on its own behalf and on behalf of and for the following entities: New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA:

Case No. 39576

)
) Subcase No. 63-3618
)
)
) **SECOND AFFIDAVIT OF PAUL L.**
) **ARRINGTON IN SUPPORT OF**
) **REPLY TO MOTIONS FOR**
) **SUMMARY JUDGMENT**
)
)

STATE OF IDAHO)

) ss

County of Ada)

I, PAUL L. ARRINGTON, being duly sworn upon oath, deposes and states as follows:

1. I am an attorney representing the Boise Project Board of Control, New York Irrigation District, Wilder Irrigation District, Boise-Kuna Irrigation District, and Big Bend Irrigation District (hereinafter collectively referred to as "BPBOC"). I am over the age of eighteen (18) and have personal knowledge of the facts stated herein.

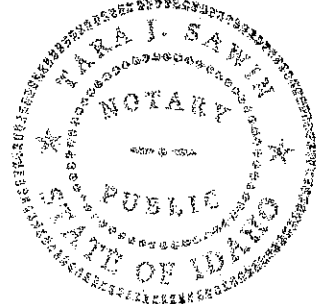
2. Attached as Exhibit C, is a true and correct copy of an excerpt from *The State Water Plan – Part Two*, dated December 29, 1976.
3. Attached as Exhibit D, is a true and correct copy of an excerpt from the minutes of the Legislative Council meeting held on April 20, 1977.
4. Attached as Exhibit E, is a true and correct copy of Senate Bill No. 1087, from the first regular session of the Fifty-first Legislature (1991).
5. Attached as Exhibit F, is a true and correct copy of Senate Bill No. 1328, from the second regular session of the Fifty-first Legislature (1992).
6. Attached as Exhibit G, is a true and correct copy of House Bill No. 72, from the first regular session of the Fifty-third Legislature (1995).

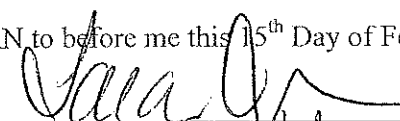
FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 15th Day of February, 2008.


Paul L. Arrington

SUBSCRIBED AND SWORN to before me this 15th Day of February, 2008.




Notary public for: Paul L. Arrington
Residing at: Meridian, Id
Commission expires: 8/17/13

CERTIFICATE OF SERVICE

I certify that on February 15, 2008, I served a true and correct copy of the foregoing **SECOND AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF REPLY TO MOTIONS FOR SUMMARY JUDGMENT** via first class mail, postage paid, and addressed as follows:

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
P.O. Box 44447
Boise, ID 83711-4447

Scott L. Campbell
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Chtd.
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Boise, ID 83701-0829

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S. Bryce Farris
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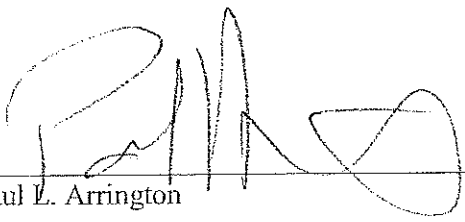
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Environment and Natural Resources Div.
550 W. Fort St., MSC 033
Boise, ID 83724

IDWR
Document Depository
P.O. Box 83720
Boise, ID 83720-0098



Paul L. Arrington

EXHIBIT C

State of Idaho

The State Water Plan — Part Two



Adopted by the

Idaho Water Resource Board

on December 29, 1976

**Policy 5
Flood Prone Area
Identification**

The sellers of parcels of land within flood prone areas as identified by the Department of Water Resources should be required to notify the buyer in writing that such lands are within such flood prone areas. Written notification, with an acknowledgement by the buyer, should be recorded with the title to the lands. Legislation implementing this policy should also provide that the buyer may recover damages from the seller if the seller fails to so notify the buyer.

Prospective buyers should be made aware of identified flood prone areas. The pressures to develop areas subject to periodic flooding will continue to increase as population increases, available lands diminish and second homes become more prevalent. Buyers should realize that flood prone areas require special construction provisions to avoid flood losses. Public investment in flood fight and flood damage reduction projects is increasing at such a rapid rate that all nonstructural steps also should be taken to reduce potential damages. This can be accomplished only if purchasers and sellers fully realize the damage potential and provide for potential flooding. The Department of Water Resources would utilize existing flood plain studies in establishing uniform and consistent flood prone area boundaries. Federal guidelines and regulations contained in the Flood Disaster Protection Act of 1973 may be modified in the future and lose much of their effectiveness in preventing future flood damages. Idaho should evaluate all flood control rules and regulations in considering this policy.

**Policy 6
Instream Flows**

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of Water Resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow.

Instream flows are essential to many uses of the state's water resources, including hydropower production, fish and wildlife propagation, recreation and navigation. Many of the uses have direct effects on the economy while others represent elements of Idaho's valued environment. Presently no procedure exists for establishing a right to an instream flow from the unappropriated waters of the state. The Idaho Supreme Court, in the Malad Canyon Case of the State of Idaho, Department of Parks vs. State of Idaho Department of Water Administration, indicated that a procedure could be adopted by the legislature. In order to protect present economic and environmental uses, such a procedure is an integral portion of the State Water Plan.

Methodolgy to determine instream flows for fish, wildlife and recreation has not been available until recent years and even now some streams are difficult to evaluate due to physical characteristics and resident species. In Idaho, instream flows should be evaluated to achieve a stream maintenance flows (SRMF). SRMF's are defined as a range of flows within which all aquatic life and related recreational activity are maintained and protected. The Idaho Water Resource Board believes this policy will further protect existing water rights because water would be maintained in the rivers and streams rather than allowing appropriations to dry up a water supply.

The basic provisions of instream flow legislation should include:

1. The name of the stream and legal description of the point on, or reach of the stream where the instream flow is proposed to be appropriated and determined;
2. The instream flow proposed in cfs;
3. The purposes for which the instream flow appropriation is proposed to be made;
4. The period of time or season of the year during which said appropriation is proposed;
5. Will not interfere with any vested water right, permit, or water right application with a priority of right date earlier than the date of receipt in the office of the director, Department of Water Resources, of a complete application for appropriation of instream flow filed under the provisions of this act;
6. Is in the public, as proposed to private, interest;
7. The extent to which flows are necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, power generation, or water quality of the stream;
8. The extent to which flows are capable of being maintained as evidenced by records or streamflows and water levels, and the existing or future establishment of necessary gaging stations and bench marks;
9. Identify the Idaho Water Resource Board as the only applicant for instream flows.

EXHIBIT D

April - 23

Legislative Council
Senate Caucus Room - State Capitol
Boise, Idaho
April 20, 1977

MINUTES

The meeting was called to order at 9:35 a.m., by the chairman, Senator Batt. Members present in addition to the chairman were Senators Chase, Mitchell, Murphy, Risch, and Swenson and Representatives Larsen, Chatburn, Hammond, Little, Reid and Sessions. Other legislators present for all or part of the meeting included Senators Budge and Manley, and Representatives Fitz and Hedlund. Staff present were Schlechte, Bennion, Neville and Willis. Others present included Legislative Auditor, Clyde Koontz; Legislative Fiscal Officer, John Andreason; Richard Barrett, State Personnel Director; Richard Hutchison, Deputy Personnel Director; Chester Graham, Deputy State Auditor; Stephen Allred, Director of the Water Resources Department; Warren Reynolds, Water Resources Department; and Members of the Water Resource Board George Yost, Donald Kramer, M. Reed Hansen, and Joseph Nettleton.

On motion of Representative Reid, seconded by Senator Chase, the minutes of the previous meeting regarding Western Conference Committee appointments were corrected to show Representative Braun appointed to the Committee on Agriculture rather than Representative Hosack, and Representatives Davidson and Reid appointed to the Committee on Government Reform and Fiscal Affairs, and were approved as corrected.

Legislative Administrative Matters

The director of the Council submitted a policy statement regarding staff classifications of persons eligible for compensation for overtime work. The statement is attached to these minutes as Appendix A.

On motion of Senator Chase, seconded by Representative Hammond, the policy statement was adopted as the policy of the Legislative Council.

Legislative Auditor Clyde Koontz reported on salary adjustments made in the office of the Legislative Auditor. Discussion followed concerning the apparent ability of agencies to adjust position descriptions to provide the level of pay they desire, regardless of the Hay plan. At least one employee of the Legislative Auditor's office had been hired by another state agency at a higher rate of pay than could be provided in the schedule of the auditors office.

April - 28

Joe River. He stated that the Board did not effectively represent the people in certain areas of the state. He urged the necessity for legislative review inasmuch as members of the Legislature do represent all areas and are responsive to the people. He also stated his opinion that talk of questioning the constitutionality of H.B. 14 was not wise because the Legislature could certainly amend the law in any way relating to the duties of the Board.

Mr. Yost responded that the Board had welcomed legislative input and had conducted extensive open hearings on the plan. He agreed that it would be impossible to develop a plan with support from all the people. In controversial areas, such as the St. Joe, this had been most difficult. The treatment of the plan for the St. Joe had been to leave it largely to the local citizenry to determine. He reviewed the language of the constitution creating the Board and charging it with implementation of the plan. He felt that this language was a charge to the Board to implement a plan, and did not necessarily allow for legislative review.

Representative Little expressed his opinion that talk of minimum stream flow was viewed by irrigators as a threat to their water needs. Mr. Yost explained that minimum flows were considered in the plan only for otherwise unappropriated waters. The direction of the plan had been to require that minimum stream flow filings could only be made by the Water Resource Board in order to maintain coordination and control of such filings. The right to water at Murphy, listed in the plan, was a right already held by Idaho Power and was not really at issue in the matter of minimum stream flows.

Mr. Kramer, member of the Board, suggested that the discussion of particulars from the plan may not be the most important matter for the Council and Board at this time. The question is where do we go from here in achieving adoption of some water management for the state of Idaho.

Representative Chatburn moved, seconded by Senator Swenson, that the Council appoint a committee to work with the Water Resources Board to review the state water plan and to prepare a report for the next session of the Idaho Legislature.

In discussion of the motion, Senator Budge stated his feeling that the Legislature and the Legislative Council would be wise to leave the water plan alone for the time being. He opposed adoption of the motion, and urged that the action of the Legislature should be not to act at this time. He suggested that the Board had held numerous hearings, but had failed to listen to the people at the hearings. He referred specifically to the sequence of events regarding the counties he represents, and their sentiments on the Bear River Compact, and stated that the Board had not been responsive to the wishes of the people effected by their recommendations.

Senator Swenson suggested that a committee could function to

EXHIBIT E

IN THE SENATE

SENATE BILL NO. 1087

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

RELATING TO THE TRANSFER OF WATER RIGHTS TO INSTREAM USE; AMENDING SECTION 42-1501, IDAHO CODE, TO DECLARE THAT INSTREAM USE OF WATER IS IN THE PUBLIC INTEREST AND IS A BENEFICIAL USE IF APPROVED AS PROVIDED IN THIS ACT; AMENDING SECTION 42-1502, IDAHO CODE, TO DEFINE "INSTREAM USE," "PERSON," "PARTY" AND "PROTEST," TO PROVIDE PROPER NOMENCLATURE AND TO MAKE LANGUAGE CHANGES TO CLARIFY THE DIFFERENCE BETWEEN INSTREAM USE AND MINIMUM STREAM FLOW; AMENDING SECTION 42-1503, IDAHO CODE, TO USE THE DEFINITIONS OF "PERSON" AND "PARTY"; AMENDING SECTION 42-1504, IDAHO CODE, TO USE THE DEFINITION OF "PERSON"; AND AMENDING CHAPTER 15, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1506, IDAHO CODE, TO PROVIDE FOR THE WATER RESOURCE BOARD TO ACCEPT AND HOLD WATER RIGHTS AND APPLY TO THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FOR A CHANGE TO INSTREAM USE, TO PROVIDE FOR NOTICE, HEARING, DECISION AND APPEAL, TO PROVIDE FOR THE RIGHT AS CHANGED TO BE DELIVERED IN ACCORDANCE WITH CHAPTER 6, TITLE 42, IDAHO CODE, AND TO PROVIDE THAT POWERS OF CONDEMNATION DO NOT APPLY TO OBTAINING RIGHTS FOR INSTREAM USE.

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

SECTION 1. That Section 42-1501, Idaho Code, be, and the same is hereby amended to read as follows:

42-1501. LEGISLATIVE PURPOSE -- MINIMUM STREAM FLOW AND INSTREAM USE DECLARED BENEFICIAL USE. The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state and the change of existing water rights to instream use for such purposes when made pursuant to this act chapter is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow ~~is a~~ and instream use are beneficial uses of water of the streams of this state for the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code. It is also necessary that authority be granted to accept, hold and change the use of existing rights to instream use to preserve, restore and

1 enhance stream values.

2 SECTION 2. That Section 42-1502, Idaho Code, be, and the same is hereby
3 amended to read as follows:

4 42-1502. DEFINITIONS. Whenever used in this act chapter, the terms:

5 (a) "Appropriate" or "appropriation" means the identification of a bene-
6 ficial use and place of in-stream use of the waters of within a stream. It
7 shall not be construed to require any kind of physical structure or physical
8 diversion from the stream;

9 (b) "Board" means the Idaho water resource board;

10 (c) "Department" means the Idaho department of water resources;

11 (d) "Director" means the director of the Idaho department of water
12 resources;

13 (e) "Stream" means any lake, spring, creek, stream, river or other natu-
14 ral body of standing or moving water which is subject to appropriation under
15 the laws of the state of Idaho;

16 (f) "Minimum stream flow" means the minimum flow of water in cubic feet
17 per second of time or minimum lake level in feet above mean sea level required
18 to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic
19 beauty, navigation, transportation, or water quality of a stream in the public
20 interest;

21 (g) "Unappropriated water" means water which is not subject to diversion
22 and use under any prior existing water right established by diversion and
23 application to a beneficial use or by application, permit or license on file
24 or issued by the director under the provisions of chapter 2, title 42, Idaho
25 Code, with a priority of water right date earlier than an application for
26 appropriation of minimum stream flow filed under the provisions of this act
27 chapter.

28 (h) "Instream use" means use within a stream of water available under an
29 existing water right, originally established for out-of-stream use, for pro-
30 tecting fish and wildlife habitat, aquatic life, recreation, aesthetic beauty,
31 navigation, transportation, or water quality of a stream in the public inter-
32 est.

33 (i) "Person" means an individual, group of individuals, association,
34 partnership, company, corporation, municipality, county, taxing district,
35 state or federal agency, or an agent or employee thereof.

36 (j) "Party" means any person fully participating in a hearing before the
37 director or board.

38 (k) "Protest" means a written notice filed with the department within the
39 time allowed in the public notice alleging that property or other interests
40 will be injured by approval of the application.

41 SECTION 3. That Section 42-1503, Idaho Code, be, and the same is hereby
42 amended to read as follows:

43 42-1503. APPLICATION TO APPROPRIATE -- PROCESS -- JUDICIAL REVIEW. When-
44 ever the board desires to appropriate a minimum stream flow of the unappropri-
45 ated waters of any stream, it shall submit an application to the director.
46 Such application shall be made upon forms to be furnished by the director and
47 shall include:

48 (a) The name of the stream and legal description of the point on the
49 stream where the minimum stream flow is proposed to be appropriated and deter-

1 (b) The minimum stream flow proposed;

2 (c) The purpose for which the minimum stream flow appropriation is pro-
3 posed to be made;

4 (d) The period of time or season of the year during which said appropri-
5 ation is proposed; and

6 (e) Such other information as shall be required by the form furnished by
7 the director.

8 Upon the receipt of an application filed under the provisions of this act
9 chapter, the director shall forward a copy thereof to the departments of fish
10 and game, health and welfare, parks and recreation, and any other public
11 entity likely to have an interest or knowledge in the matter. The director
12 shall also prepare a notice describing the proposed appropriation of minimum
13 stream flow and cause said notice to be published once each week in two (2)
14 consecutive weekly issues of a newspaper published within the county where the
15 appropriation of minimum stream flow is proposed, if there is such newspaper,
16 otherwise in a newspaper of general circulation within the county. The direc-
17 tor may also give other notice of the proposed appropriation in such manner
18 and to such persons or organizations as he may determine. Such notice shall
19 specify the time and place for a public hearing to be held concerning the pro-
20 posed appropriation of minimum stream flow. Such hearing shall be held in
21 accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The
22 director shall have power to administer oaths and to require the attendance of
23 such witnesses and the production of such books, records, and papers as he may
24 desire at the hearing and for that purpose the director may apply to the dis-
25 trict court for a subpoena for any witnesses or a subpoena duces tecum to com-
26 pel the production of any books, records, or papers which shall be served and
27 returned in the same manner as a subpoena in a civil case. In case of any dis-
28 obedience or neglect to obey a subpoena or subpoena duces tecum it shall be
29 the duty of the district court in any county of this state in which such dis-
30 obedience, neglect, or refusal occurs, or any judge thereof, on application by
31 the director, to compel obedience by proceedings for contempt as in the case
32 of a subpoena issued by a regularly constituted court. Upon the conclusion of
33 the hearings and completion of any investigation conducted by the director, he
34 shall enter his findings in writing approving the application in whole, or in
35 part, or upon conditions or rejecting said application. Approval of any such
36 application must be based upon a finding that such appropriation of minimum
37 stream flow:

38 (a) will not interfere with any vested water right, permit, or water
39 right application with priority of right date earlier than the date of receipt
40 in the office of the director of a complete application for appropriation of
41 minimum stream flow filed under the provisions of this act chapter;

42 (b) is in the public, as opposed to private, interest;

43 (c) is necessary for the preservation of fish and wildlife habitat,
44 aquatic life, recreation, aesthetic beauty, navigation, transportation, or
45 water quality of the stream;

46 (d) is the minimum flow or lake level and not the ideal or most desirable
47 flow or lake level; and

48 (e) is capable of being maintained as evidenced by records of stream
49 flows and water levels and the existing or future establishment of necessary
50 gauging stations and bench marks.

51 A copy of the director's findings shall be mailed to the board and to each
52 person or organization who gave testimony in support of or in opposition to
53 the proposed appropriation. ~~The board or any person~~ Any party testifying at a
54 hearing who is aggrieved by a decision of the director shall have the right to

1 have that decision reviewed by the courts pursuant to section 42-1701A(4),
 2 Idaho Code. Approved applications shall be submitted to each legislature by
 3 the fifth legislative day of each regular session, and: (i) shall not become
 4 finally effective until affirmatively acted upon by concurrent resolution of
 5 the Idaho legislature; or (ii) except that if the legislature fails to act
 6 prior to the end of the regular session to which the application was submit-
 7 ted, the application shall be considered approved.

8 SECTION 4. That Section 42-1504, Idaho Code, be, and the same is hereby
 9 amended to read as follows:

10 42-1504. REQUEST TO FILE APPLICATION. Any person, ~~association, municipa-~~
 11 ~~lity, county, state or federal agency~~ may, in writing, request that the board
 12 consider the appropriation of a minimum stream flow of the unappropriated
 13 waters of any stream. Said request shall be in writing and provide the same
 14 information required in the form provided for by section 42-1503, Idaho Code.
 15 The board shall consider said request within six (6) months after it is filed
 16 and may proceed to reject or accept the proposal. There shall be no right of
 17 review of any board decision rejecting a request under this section. If the
 18 board decides that the request has merit, the board shall proceed as provided
 19 in this act chapter. The board may hold hearings in reaching its decision and
 20 shall notify the requesting party of its decision.

21 SECTION 5. That Chapter 15, Title 42, Idaho Code, be, and the same is
 22 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
 23 ignated as Section 42-1506, Idaho Code, and to read as follows:

24 42-1506. TRANSFERRING RIGHTS TO INSTREAM USE -- PROCEDURE -- JUDICIAL
 25 REVIEW -- CONDEMNATION PROCEEDINGS NOT APPLICABLE. (a) Any person owning or
 26 holding a right to use water whether represented by license issued by the
 27 department, by unadjudicated claims to water rights by reason of diversion and
 28 application to beneficial use as recorded with the department under provisions
 29 of this title, or by decree of the court, may offer to assign, grant, bequest,
 30 or devise all or part of the water right permanently or for a specified period
 31 of time to the board for instream use. Such offer shall be in writing and
 32 shall describe the right or part thereof offered along with proof of ownership
 33 and validity of the right. The board may adopt rules and develop forms as
 34 needed to facilitate the making and consideration of such offers.

35 (b) The board shall review the offer at a regular or special meeting and
 36 notify the holder of the right whether the board will accept the offer and
 37 make application to the director to change the right to instream use. The
 38 board is designated as the only entity authorized to apply for and receive
 39 approval to change an existing water right and to hold such right following
 40 approval for instream use. Such right shall not be subject to forfeiture for
 41 nonuse under section 42-222(2), Idaho Code, nor shall it be declared aban-
 42 doned, after approval by the director, because the water to satisfy the right
 43 is not diverted from the stream.

44 (c) Whenever the board desires to change an existing water right to an
 45 instream use, it shall submit an application to the director on such forms as
 46 the director may require, along with such other information as the director
 47 may require to fully describe the right to be changed, the instream use or
 48 uses to which it is sought to be changed, and the reach of stream through
 49 which the instream use is sought to be maintained. Upon receipt of an applica-
 50 tion filed by the board for change of an existing right to an instream use,

1 the director shall give notice of the application as provided in section
2 42-203A, Idaho Code.

3 (d) Any person may, within the time allowed in the notice of application
4 for change to instream use, file a written notice with the director protesting
5 the approval of the application or otherwise indicating an interest in the
6 matter and may request that a hearing be set. The protest or notice of inter-
7 est shall include the name and address of the person and shall clearly set
8 forth the reasons for the protest or other interest in the matter. If the
9 director determines that a hearing should be held concerning the application
10 for change, such hearing shall be conducted as provided in section 42-1701A,
11 Idaho Code, provided, however, that the director shall provide for a hearing
12 on any protest received within the time allowed.

13 (e) After review of the application, and upon conclusion of hearings and
14 completion of any investigation conducted by the department, the director
15 shall enter his findings, in writing, approving the application in whole or in
16 part, or upon conditions, or rejecting said application. Approval of an appli-
17 cation to change an existing right to an instream use must be based upon find-
18 ings that such change complies with or can be conditioned to comply with the
19 following criteria:

20 (1) The change to instream use shall not injure or interfere with the use
21 of any existing water right.

22 (2) The change to instream use shall not constitute an enlargement in use
23 of the right.

24 (3) The change to instream use is in the public, as opposed to private,
25 interest.

26 (4) The instream use of the water is necessary, and the change to
27 instream use will be effective for the preservation, restoration or
28 enhancement of fish and wildlife habitat, aquatic life, recreation, aes-
29 thetic beauty, navigation, transportation, or water quality of the stream.

30 (5) The water right as changed to the instream use can be administered to
31 provide the benefits sought by the change.

32 A change to instream use can be approved that provides a flow less than
33 the minimum flow defined in section 42-1502(f), Idaho Code. If a right has
34 been assigned to the board for instream use for a temporary period of time,
35 the director's approval shall be conditioned to return, at the end of the time
36 period for which the right was assigned to the board, the authorized place of
37 use, nature of use, period of use, point of diversion and other elements
38 describing the right to that existing prior to the change to instream use.

39 (f) Any party appearing at a hearing held to consider the application for
40 change who is aggrieved by the director's decision shall have the right to
41 have the decision reviewed pursuant to section 42-1701A(4), Idaho Code. The
42 provisions of section 42-108, Idaho Code, concerning legislative review are
43 applicable to applications approved under this section.

44 (g) In administration of the distribution of water from streams of this
45 state under the provisions of chapter 6, title 42, Idaho Code, the director
46 shall consider any right approved under this section for instream use as hav-
47 ing a date of priority as it was recorded for the right prior to change unless
48 the director has, as a condition of approval, changed the priority of the
49 right to a later-in-time date.

50 (h) Nothing in this section is intended or shall be construed to allow
51 condemnation by the board, director, department, or any other person or entity
52 of any water right, or easement or right-of-way for the purposes of providing
53 water for instream use.

EXHIBIT F

IN THE SENATE

SENATE BILL NO. 1328

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

1 RELATING TO INSTREAM WATER USES; AMENDING CHAPTER 15, TITLE 42, IDAHO CODE, BY
2 THE ADDITION OF A NEW SECTION 42-1506, IDAHO CODE, AUTHORIZING THE WATER
3 RESOURCE BOARD TO ACQUIRE WATER RIGHTS BY GIFT, GRANT OR BEQUEST AND TO
4 OBTAIN A CHANGE IN NATURE OF USE OF THE ACQUIRED WATER RIGHTS TO INSTREAM
5 FLOW PURPOSES, PROVIDING THE PROCEDURE TO BE USED BY THE DEPARTMENT OF
6 WATER RESOURCES IN PROCESSING A CHANGE IN NATURE OF USE APPLICATION BY THE
7 BOARD, PROVIDING FOR JUDICIAL AND LEGISLATIVE REVIEW, PROVIDING FOR ADMIN-
8 STRATION OF APPROVED INSTREAM FLOW USES; AND AMENDING CHAPTER 30, TITLE
9 63, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 63-30221, IDAHO CODE, TO
10 AUTHORIZE DEDUCTIONS FROM TAXABLE INCOME OF THE FAIR MARKET VALUE OF WATER
11 RIGHTS THE TAXPAYER DONATES FOR INSTREAM PURPOSES.
12

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

14 SECTION 1. That Chapter 15, Title 42, Idaho Code, be, and the same is
15 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
16 ignated as Section 42-1506, Idaho Code, and to read as follows:

17 42-1506. CHANGE OF DIVERSIONARY RIGHTS TO INSTREAM FLOW PURPOSES -- PRO-
18 CEDURE -- JUDICIAL AND LEGISLATIVE REVIEW -- ADMINISTRATION. (a) The water
19 resource board is authorized to acquire or accept permanent or temporary
20 assignments of diversionary water rights, including storage rights, by pur-
21 chase on a willing seller basis or by gift, grant or bequest from any person
22 or entity owning such rights. The board shall accept those gifts, grants, or
23 bequests of water rights which the board determines to have a reasonable like-
24 lihood, if changed to instream flow uses, of preserving, restoring, or
25 enhancing fish and wildlife habitat, aquatic life, biological diversity, rec-
26 reation, aesthetic beauty, navigation, transportation, or water quality in any
27 natural stream, spring, or lake. The provisions of this section neither pro-
28 vide new authority nor diminish any existing authority for the condemnation of
29 water rights, easements, or rights-of-way for the purpose of providing water
30 for instream use or to provide access for the public to any stream or lake.

31 (b) The board shall file an application, pursuant to section 42-222(1),
32 Idaho Code, to change the nature, place, and/or time of use of any water right
33 acquired under this section to instream flow purposes in a defined stream
34 reach. The application shall describe the right to be changed, the instream
35 use or uses to which the right is sought to be changed, and the reach of the
36 stream through which the instream use is sought to be maintained.

37 (c) Any person may file with the department of water resources a notice
38 of protest to the application for change in accordance with the provisions of
39 section 42-222(1), Idaho Code. Alternatively, any person may file a notice of
40 comment to the application for change within the same time as that specified
41 in section 42-222(1), Idaho Code, for protests and may request that a hearing
42 be set to consider the application. Any person timely filing a notice of com-
43 ment shall be entitled to be a full party to any hearing on an equal basis

1 with any person filing a protest. Any notice of protest or notice of comment
2 shall include the name and address of the person making the protest or comment
3 and shall clearly set forth the reasons for the protest or other interest in
4 the matter. The department shall hold a hearing, as provided in section
5 42-1701A, Idaho Code, on any application for which a timely protest is filed
6 and not resolved. With respect to any application for which the department
7 does not receive a notice of protest or notice of comment, the department
8 still may hold a hearing on such application provided that such hearing is
9 completed within sixty (60) days after the close of the period allowed for
10 protests on the application.

11 (d) After reviewing the application to change an existing right to an
12 instream use, and upon concluding hearings and any investigation conducted by
13 the department, the director shall enter his findings, in writing, approving
14 the application in whole or in part or upon conditions, or rejecting the
15 application. The flow rate resulting from an approved change to instream use
16 can be greater or less than the minimum flow defined in section 42-1502(f),
17 Idaho Code. Approval of such an application must be based upon findings that
18 the change complies with or can be conditioned to comply with the following
19 criteria:

20 (1) The change to instream use shall not injure any existing water right.

21 (2) The change to instream use shall not constitute an enlargement in use
22 of the original right.

23 (3) The change to instream use is in the public interest.

24 (4) The instream use of the water is beneficial and will be effective for
25 the preservation, restoration or enhancement of fish and wildlife habitat,
26 aquatic life, biological diversity, recreation, aesthetic beauty, naviga-
27 tion, transportation, or water quality of a stream, spring or lake.

28 (5) The water right as changed to the instream use can be administered in
29 the priority system.

30 (e) The provisions of section 42-108, Idaho Code, requiring the consent
31 of certain corporations or irrigation districts, and that require legislative
32 approval of changes to rights of greater than fifty (50) cubic feet per second
33 or five thousand (5,000) acre-feet, are applicable to applications approved
34 under this section. The director shall interpret the provisions of section
35 42-108, Idaho Code, to mean that the appropriate corporation or irrigation
36 district may withhold consent only for good cause related to actual injury,
37 and that it shall not withhold consent unreasonably.

38 (f) If the board accepts an assignment of a right for a temporary period
39 of time, the director shall condition the approval of any change in use to
40 expire at the end of the time period for which the board accepted the right.
41 Upon such expiration, the status of the right shall revert to that existing
42 prior to the approved change to instream use. Subject to any conditions that
43 may have been placed on the sale or donation, the board may reconvey or other-
44 wise dispose of any purchased or donated right, or any part thereof, not
45 approved for use for instream flow purposes.

46 (g) Any party appearing at a hearing held to consider the application for
47 change who is aggrieved by the director's decision shall have the right to
48 have the decision reviewed pursuant to section 42-1701A(4), Idaho Code.

49 (h) For purposes of distribution and protection under chapter 6, title
50 42, Idaho Code, an instream water use approved under this section shall retain
51 the original priority date of the right. Notwithstanding the provisions of
52 section 42-605A, Idaho Code, the board annually shall reimburse a water dis-
53 trict created under section 42-604, Idaho Code, the dollar amount that the
54 right would be assessed under the district budget had such right continued to

1 be used as authorized prior to the change. The board shall be entitled to
2 vote, and shall exercise such vote, at the annual water district meeting to
3 the same extent as it would were it using the right as authorized prior to the
4 change.

5 SECTION 2. That Chapter 30, Title 63, Idaho Code, be, and the same is
6 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
7 ignated as Section 63-3022I, Idaho Code, and to read as follows:

8 63-3022I. DEDUCTIONS FOR DONATIONS OF WATER RIGHTS FOR INSTREAM FLOW PUR-
9 POSES. A taxpayer may deduct from taxable income, as defined in section
10 63-3022, Idaho Code, the fair market value of any water right the taxpayer
11 donates to the Idaho water resource board which is included in any approved
12 application for a change to instream flow purposes pursuant to section
13 42-1506, Idaho Code. The deduction may be taken in the tax year in which the
14 director of the department of water resources approves such application.

EXHIBIT G

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 72

BY MR. SPEAKER

Requested by: Idaho Department of Water Resources

AN ACT

RELATING TO INSTREAM WATER USES; AMENDING CHAPTER 15, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1506, IDAHO CODE, AUTHORIZING THE WATER RESOURCE BOARD TO ACQUIRE WATER RIGHTS BY GIFT, GRANT OR BEQUEST AND TO OBTAIN A CHANGE IN NATURE OF USE OF THE ACQUIRED WATER RIGHTS TO INSTREAM FLOW PURPOSES, PROVIDING THE PROCEDURE TO BE USED BY THE DEPARTMENT OF WATER RESOURCES IN PROCESSING A CHANGE IN NATURE OF USE APPLICATION BY THE BOARD, PROVIDING FOR JUDICIAL AND LEGISLATIVE REVIEW AND PROVIDING FOR ADMINISTRATION OF APPROVED INSTREAM FLOW USES.

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

SECTION 1. That Chapter 15, 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 42-1506, Idaho Code, and to read as follows:

42-1506. CHANGE OF DIVERSIONARY RIGHTS TO INSTREAM FLOW PURPOSES -- PROCEDURE -- JUDICIAL AND LEGISLATIVE REVIEW -- ADMINISTRATION. (a) The water resource board is authorized, in its discretion, to accept permanent or temporary assignments of diversionary natural flow water rights by gift, grant, or bequest from any person or entity owning such rights. The board shall accept only those water rights that the board determines may be changed to instream flow uses to preserve, restore or enhance fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation or water quality. Instream uses are deemed a beneficial use of water when approved under this section. A water right shall not be subject to loss by forfeiture or abandonment when used for an instream purpose approved under the provisions of this section. This section neither provides new authority nor diminishes any existing authority for the condemnation of water rights, easements or rights-of-way for the purpose of providing water for instream use or to provide access for the public to any stream. This section does not alter any right or authority to establish water rights for instream purposes provided by any other statute.

(b) The board shall file an application, pursuant to section 42-222(1), Idaho Code, to change the nature and place of use of any water right acquired under this section to instream flow purposes in a defined stream reach. The application shall describe the right to be changed, the instream use or uses to which the right is sought to be changed, and the reach or reaches of stream through which the instream use is sought to be maintained.

(c) Any person may file with the department of water resources a notice of protest to the application for change in accordance with the provisions of section 42-222(1), Idaho Code. Alternatively, any person may file a notice of comment to the application for change within the same time as specified for protests and may request that a hearing be set to consider the application. Any notice of protest or notice of comment shall include the name and address of the person making the protest or comment and shall clearly set forth the

reasons for the protest or other interest in the matter. The department shall hold a hearing, as provided in section 42-1701A, Idaho Code, on any application for which a timely protest is filed and not resolved. The department may hold a hearing on an application for which the department did not receive a protest.

(d) After review of the application, and upon conclusion of hearings and completion of any investigation conducted by the department, the director shall enter his findings, in writing, approving the application in whole or in part, or upon conditions, or rejecting the application. Approval of an application to change an existing right to an instream use must be based upon findings that the change complies with or can be conditioned to comply with the following criteria:

(1) The change to instream use shall not injure any existing water right, including rights having a priority date later in time than the right sought to be changed, and may be limited to the portion of the original water right consumptively used, as defined in section 42-1401A(2), Idaho Code, or otherwise conditioned or limited to prevent injury to other water rights.

(2) The change to instream use shall not constitute an enlargement in use of the original right.

(3) The change to instream use is in the public, as opposed to private, interest.

(4) The instream use of the water is beneficial and will be effective for the preservation, restoration or enhancement of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation or water quality in the defined stream reach or reaches.

(5) The water right as changed to the instream use can be administered to provide the benefits sought by the change.

The provisions of section 42-108, Idaho Code, that require the consent of a water distribution entity, and that require legislative approval of changes to rights of greater than fifty (50) cfs or five thousand (5,000) acre-feet are applicable to applications considered under this section. The flow rate resulting from an approved change to instream use can be greater or less than the minimum flow defined in section 42-1502(f), Idaho Code. If the board accepts an assignment of a right for a temporary period of time, the director shall condition the approval of any change in use to expire at the end of the time period for which the board accepted the right. Upon expiration of the temporary assignment, the status of the right shall revert to that existing prior to the approved change to instream use.

(e) Any party appearing at a hearing held to consider the application for change who is aggrieved by the director's decision shall have the right to have the decision reviewed pursuant to section 42-1701A(4), Idaho Code.

(f) For purposes of distribution under chapter 6, title 42, Idaho Code, and for purposes of consideration of new applications to appropriate water under chapter 2, title 42, Idaho Code, an instream water use approved under this section shall retain the original priority date of the right unless the director has conditioned approval of the change upon use of a later priority date. Notwithstanding the provisions of section 42-605A(2), Idaho Code, the board shall reimburse a water district created under section 42-604, Idaho Code, the dollar amount assessed by the water district up to a maximum of the dollar amount that the right would be assessed under the district budget if used as authorized prior to the change. The right shall not be voted at the annual water district meeting. The board may provide as a condition of accepting a right for conversion to instream use that the person or entity offering the right pay the district assessment.