

STATE OF COLORADO)
) ss.
County of Denver)

MICHAEL A. GHELETA, being first duly sworn upon oath, deposes and states as follows:

1. I am one of the attorneys representing Plaintiff Idaho Power Company in the above-entitled action, and submit the following affidavit based upon my personal knowledge and best belief.
2. Attached hereto as Exhibit A is a true and correct copy of Excerpted Pages of the 1996 State Water Plan (Dec. 1996).
3. Attached hereto as Exhibit B is a true and correct copy of the Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008 (Jan. 18, 1985).
4. Attached hereto as Exhibit C is a true and correct copy of House Bill 266, 48th Leg., 1st Reg. Sess. (Idaho 1985).
5. Attached hereto as Exhibit D is a true and correct copy of Senate Bill 1260, 53d Leg., 1st Reg. Sess. (Idaho 1995).
6. Attached hereto as Exhibit E is a true and correct copy of Senate Bills 1564 and 1565, 52d Leg., 2d Reg. Sess. (Idaho 1994).
7. Attached hereto as Exhibit F is a true and correct copy of the Minutes of the House Resources and Conservation Committee (Mar. 21, 1994).
8. Attached hereto as Exhibit G is a true and correct copy of the Minutes of the House Resources and Conservation Committee (Mar. 23, 1994).
9. Attached hereto as Exhibit H is a true and correct copy of Excerpted Pages of the Senate Journal (Mar. 17, 1994) and House Journal (Mar. 28, 1994).

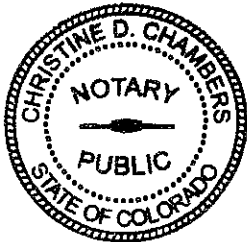
(remainder of page intentionally left blank)

Dated this 21st day of November, 2008.

Michael A. Gheleta

Michael A. Gheleta, Esq.

SUBSCRIBED AND SWORN to before me this 21st day of November 2008.



My Commission Expires April 3, 2011

Christine Chambers

Notary Public for Colorado

Residing at: 4101 7th St #2200, DENVER CO 80202

Commission Expires: 4.3.11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November 2008, I caused to be served a true and correct copy of the foregoing **THIRD AFFIDAVIT OF MICHAEL A. GHELETA IN SUPPORT OF IDAHO POWER COMPANY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON RECHARGE SUBORDINATION** by the method indicated below, and addressed to each of the following:

Steven L. Olsen - steven.olsen@ag.idaho.gov
Karl T. Klein
Michael C. Orr - michael.orr@ag.idaho.gov
Shasta Kilminster-Hadley
- shasta.k-hadley@ag.idaho.gov
Office of Attorney General
700 W. Jefferson, Room 210
Boise, ID 83711-4449
Served via E-mail and U.S. Mail, Postage Prepaid

Randall C. Budge
Candice M. McHugh
Thomas J. Budge
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, ID 83204-139
cmm@racinelaw.net
Served via E-mail and U.S. Mail, Postage Prepaid

United States Department of Justice
Environment & Nat'l Resources Division
550 W Fort Street, MSC 033
Boise, ID 83724
Served via U.S. Mail, Postage Prepaid

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449
Served via U.S. Mail, Postage Prepaid

Josephine Beeman
Beeman & Associates, P.C.
409 W. Jefferson Street
Boise, ID 83702
jo.beeman@beemanlaw.com
Served via E-mail and U.S. Mail, Postage Prepaid

Jerry R. Rigby
Rigby Andrus & Moeller Chtd
P.O. Box 250
Rexburg, ID 83440
Fax: (208) 356-0768
Served via Fax and U.S. Mail, Postage Prepaid

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098
Served via U.S. Mail, Postage Prepaid

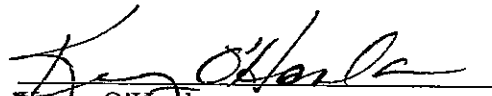

Kerry O'Hanlon

EXHIBIT A

IDAHO STATE WATER PLAN



ADOPTED BY

**THE
IDAHO
WATER RESOURCE
BOARD**

DECEMBER 1996

Water Use Group

A goal of the State Water Plan is to secure greater productivity, in both monetary and nonmonetary terms, from existing water supplies. Water Use policies are concerned with improvement in practices, procedures, and laws relating to existing water use.

1A - STATE SOVEREIGNTY

It is the policy of Idaho that the state has sovereignty over decisions affecting the development and use of its water resources, and that the state opposes any attempt by the federal government, its management agencies, any other state, or any other entity to usurp the state's role in these areas.

Comment: The Idaho Water Resource Board is responsible for the formulation of state water policy through the State Water Plan. The state's position on existing and proposed federal policies and actions should be coordinated by the Water Board to ensure the state retains its traditional right to control the water resources of the state.

1B - PUBLIC INTEREST

It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.

Comment: The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including ground waters, and the waters of all natural springs and lakes within the boundaries of the state, to be public waters [Idaho Code 42-101]. Water allocation and management decisions must consider the public interest as established by state law. The State Water Plan is an expression of the public interest.

1C - BENEFICIAL USE OF WATER

It is the policy of Idaho that beneficial uses include certain nonconsumptive water uses.

Comment: This policy is affirmed by Idaho Code 42-1501 and is reflected in the policies adopted by the Idaho Water Resource Board that "beneficial use" includes, but is not limited to, water required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetics, navigation, water quality, and managed ground water recharge as well as the traditional uses for agriculture, manufacturing, mining, hydropower, and human consumption.

1D - TRANSFERABILITY OF USE

It is the policy of Idaho that changes in the nature of use of a water right be allowed, including changes to nonconsumptive uses, provided other water rights are not injured.

Comment: The demand for water increases every year while the volume of unappropriated water within the state continually decreases. The purpose of allowing transferability of water rights is to provide flexibility in water allocation to meet changing conditions. Idaho Code 42-108 and 42-222 provide for changes in place of diversion, place of use, period of use, and nature of use. Provision is made to protect other water users, the agricultural base of an area, and the local public interest. Priority dates are retained if other water right holders are not injured.

In some instances, it is in the public interest to allow changes from traditional uses to instream flow purposes. In highly developed areas, the potential to protect or restore fish and wildlife, water quality, aesthetic, or recreation resources may depend upon the transferability of water rights. To make such transfers substantive, the priority date of the original water right should be retained if other water rights are not injured. Chapter 15, Title 42, Idaho Code needs to be expanded to enable the Idaho Water Resource Board to apply for a change in the nature of use when a water right is acquired that is best used for minimum or instream flow purposes.

EXHIBIT B

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 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 the Committee Dec. per Pat Koll, AG office} will be empowered to 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.

EXHIBIT C

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 266

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

1 RELATING TO THE RECHARGE OF GROUND WATER BASINS; AMENDING SECTION 42-4201A,
2 IDAHO CODE, TO AUTHORIZE IRRIGATION DISTRICTS TO APPROPRIATE THE UNAPPRO-
3 PRIATED WATERS OF THE STATE TO RECHARGE GROUND WATER BASINS WITHIN THE
4 DISTRICT UPON CONDITIONS; AMENDING SECTION 43-304, IDAHO CODE, TO AUTHOR-
5 IZE IRRIGATION DISTRICTS TO ACQUIRE LAND AND WATER RIGHTS NECESSARY FOR
6 GROUND WATER RECHARGE PROJECTS; AMENDING SECTION 43-328, IDAHO CODE, TO
7 PROVIDE A PROCEDURE TO PETITION AN IRRIGATION DISTRICT FOR GROUND WATER
8 RECHARGE IMPROVEMENTS; AMENDING CHAPTER 3, TITLE 43, IDAHO CODE, BY THE
9 ADDITION OF A NEW SECTION 43-343, IDAHO CODE, PROVIDING AUTHORITY TO IRRI-
10 GATION DISTRICTS TO CONSTRUCT AND OPERATE GROUND WATER RECHARGE PROJECTS.
11

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

13 SECTION 1. That Section 42-4201A, Idaho Code, be, and the same is hereby
14 amended to read as follows:

15 42-4201A. RECHARGE OF GROUNDWATER GROUND WATER BASINS -- DIRECTOR'S
16 AUTHORITY TO ISSUE PERMIT -- LIMITATIONS. (1) The welfare of the people of the
17 state of Idaho is dependent upon the conservation, development, augmentation
18 and optimum use of the water resources of this state. The legislature deems it
19 essential therefore that every effort be made to foster and encourage water
20 projects designed to promote these objectives. The legislature hereby acknowl-
21 edges that proposed projects to recharge water basins in the state by means of
22 the storage of unappropriated waters of the public waters of the state in
23 underground aquifers represents a unique and innovative endeavor to further
24 water conservation and increase the water available for beneficial use.
25 (2) In view of the public betterment to be achieved by the completion of
26 aquifer recharge projects, the legislature hereby declares that the appropri-
27 ation and underground storage of water by an aquifer recharge district herein-
28 after created and operated pursuant to the provisions of chapter 42, title 42,
29 Idaho Code, for purposes of groundwater ground water recharge or by an irri-
30 gation district organized and operated pursuant to title 43, Idaho Code, shall
31 constitute a beneficial use and hereby authorizes the department of water
32 resources to issue to the aquifer recharge district, or the irrigation dis-
33 trict, a permit, pursuant to section 42-203, Idaho Code, for the appropriation
34 and underground storage of the unappropriated waters of the state. The depart-
35 ment of water resources is further authorized to issue to an aquifer recharge
36 district, or an irrigation district, a license confirming the right to appro-
37 priate such waters for the beneficial use herein established upon compliance
38 by the district with the requirements specified in chapter 2, title 42, Idaho
39 Code. The rights acquired by an aquifer recharge district, or an irrigation
40 district, pursuant to any permit and license obtained as herein authorized
41 shall be secondary to all prior perfected water rights, including those held
42 by any privately-owned electrical generating company to appropriate waters in
43 the reaches downstream from a recharge district project diversion for purposes

1 of hydroelectric power generation.

2 (3) The director of the department of water resources may regulate the
3 amount of water which the an aquifer recharge district, or an irrigation dis-
4 trict, may appropriate divert for recharge purposes and may reduce such
5 amount, even though there is sufficient water to supply the entire amount
6 originally authorized by permit or license. To facilitate necessary financing
7 of an aquifer recharge project, the director may fix a term of years in the
8 permit or license during which the amount of water authorized to be diverted
9 shall not be reduced by the director under the provisions of this subsection.

10 (4) To insure that other water rights are not injured by the operations
11 of the an aquifer recharge district project, the director of the department of
12 water resources shall have the authority to approve, disapprove, or require
13 alterations in the methods employed by the a district to achieve groundwater
14 ground water recharge. In the event that the district director determines
15 that the district's methods of operation are adversely affecting existing
16 water rights or are creating conditions adverse to the beneficial use of water
17 under existing water rights, the director shall order the cessation of oper-
18 ations until such alterations as may be ordered by the director have been
19 accomplished or such adverse effects otherwise have been corrected.

20 SECTION 2. That Section 43-304, Idaho Code, be, and the same is hereby
21 amended to read as follows:

22 43-304. GENERAL POWERS OF BOARD -- BY-LAWS -- RIGHT OF ENTRY -- ACQUISITION OF PROPERTY. Said board shall have the power to manage and conduct the
23 business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be
24 required and prescribe their duties, to establish equitable by-laws, rules and
25 regulations for the distribution and use of water among the owners of such
26 land, as may be necessary and just to secure the just and proper distribution
27 of the same, which said by-laws, among other things, shall establish a fiscal
28 year, and in case the by-laws do not provide for the establishment of a fiscal
29 year, the fiscal year shall commence the first day of November and end the
30 thirty-first day of October of each and every year. Said by-laws, rules and
31 regulations must be printed in convenient form for distribution throughout the
32 district.

33 The board and its agents and employees shall have the right to enter upon
34 any land and to make surveys, and may locate the necessary irrigation works
35 and the line of any canal or canals, and the necessary branches for the same
36 on any lands which may be deemed best for such location.

37 Said board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights, and other property
38 necessary for the construction, use and supply, maintenance, repair and
39 improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the
40 storage of needful waters, lands and water rights for ground water recharge
41 projects initiated pursuant to chapter 42, title 42, Idaho Code, and all
42 necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment. Said board may
43 also construct the necessary dams, reservoirs, ground water recharge
44 facilities and works for the collection of water for said district, and do any
45 and every lawful act necessary to be done that sufficient water may be fur-
46
47
48
49
50

1 nished to each landowner in said district for irrigation purposes. The use of
2 all water required for the irrigation of the lands of any district formed
3 under the provisions of this title, together with the rights of way for canals
4 and ditches, sites for reservoirs, ground water recharge projects and all
5 other property required in fully carrying out the provisions of this title, is
6 hereby declared to be a public use, subject to the regulation and control of
7 the state, in the manner prescribed by law.

8 The board of directors of an irrigation district organized under the laws
9 of the state of Idaho may enter into contracts for a water supply to be deliv-
10 ered to the canals and works of the district, and do any and every lawful act
11 necessary to be done that sufficient water may be furnished to the lands in
12 the district for irrigation purposes.

13 SECTION 3. That Section 43-328, Idaho Code, be, and the same is hereby
14 amended to read as follows:

15 43-328. PETITION TO CONSTRUCT IMPROVEMENTS FOR IRRIGATION — ASSENT OF
16 PETITIONERS TO ASSESSMENT OF COST OF IMPROVEMENT. The holders of title, or
17 evidence of title, representing a majority of the acreage of any body of land
18 within any irrigation district, may file with the board of directors of the
19 district a petition in writing, praying for the construction of any improve-
20 ment necessary or expedient for the efficient irrigation of the lands, includ-
21 ing facilities for the recharge of ground water basins. The petition shall in
22 a general way describe the proposed improvement and shall describe the tracts,
23 or body of land, owned by the petitioners, and shall contain a description of
24 the exterior boundaries of the land for which the proposed improvement is to
25 be constructed, and describing therein any lands that are to be excepted from
26 the benefit or use of the proposed improvement. The petition shall also con-
27 tain an agreement on the part of the petitioners that the cost of construction
28 of the improvement shall constitute a lien upon the lands within the exterior
29 boundaries of the land described in the petition, except the lands that are
30 therein excepted from the benefit or use of the proposed improvement, and that
31 the lands shall be assessed for and pay the cost of the improvement. The peti-
32 tion shall be deemed to give assent of the petitioners to construction of the
33 improvement and shall authorize the assessment of the cost of such improvement
34 upon and against the lands described in the petition and not specifically
35 therein excepted. The petition shall be acknowledged in the same manner that
36 conveyances of land are required to be acknowledged.

37 SECTION 4. That Chapter 3, Title 43, Idaho Code, be, and the same is
38 hereby amended by the addition thereto of a NEW SECTION, to be known and
39 designated as Section 43-343, Idaho Code, and to read as follows:

40 43-343. AUTHORITY TO CONSTRUCT AND OPERATE GROUND WATER RECHARGE PROJECT.
41 Any irrigation district heretofore or hereafter organized under the laws of
42 this state, having received and affirmatively acted upon a petition to con-
43 struct a ground water recharge improvement project in the manner provided by
44 sections 43-328, 43-329 and 43-330, Idaho Code, is authorized by section
45 42-4201A, Idaho Code, to file an application with the department of water
46 resources to appropriate the unappropriated waters of the state for the pur-
47 pose of recharging ground water basins within the district to aid in the effi-
48 cient irrigation of district lands. Upon approval of the application for

1 permit by the director of the department of water resources, the district
2 shall proceed in the manner provided by the irrigation district laws of the
3 state to construct and operate the recharge project. The construction and
4 operation of the project shall be subject to such additional conditions and
5 limitations as shall be imposed by the director of the department of water
6 resources pursuant to sections 42-203 and 42-4201A, Idaho Code.

EXHIBIT D

IDAHO BILL TEXT

LEGISLATURE OF THE STATE OF IDAHO

Fifty-third Legislature

First Regular Session - 1995

IN THE SENATE

SENATE BILL NO. 1260

BY FINANCE COMMITTEE

VERSION: Enacted

March 17, 1995
Committee on Finance

AN ACT

APPROPRIATING GENERAL FUND MONEYS FOR DEPOSIT IN THE WATER MANAGEMENT FUND;
EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO CERTAIN EXPENDITURES;
EXPRESSING LEGISLATIVE INTENT WITH RESPECT TO UNSPENT BALANCES; EXPRESSING
LEGISLATIVE INTENT WITH REGARD TO WATER PURCHASES; AND DECLARING AN
EMERGENCY.

TEXT:

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

SECTION 1. There is hereby appropriated from the General Fund, to be transferred to the Water Management Fund, the sum of one million dollars (\$1,000,000) to be used by the Idaho Water Resources Board for purchasing water for the purpose of providing an artificial recharge of the Snake River Plain Aquifer.

SECTION 2. Of the amount appropriated to the Water Management Fund in Section 1 of this act, an amount not to exceed fifty-five thousand dollars (\$55,000) shall be provided by the Idaho Water Resources Board for a grant to update the study on the Soda Springs Dam site on the Bear River.

SECTION 3. Any unspent and unencumbered balances of the amount appropriated in this act remaining on June 30, 1995, shall be transferred back to the General Fund by the State Controller.

SECTION 4. Water purchases in this act would be made final after

agricultural needs are established. Existing uses of water that contribute to aquifer recharge are to be supported and encouraged.

SECTION 5. 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.

1995 ID S.B. 1260 (SN)

END OF DOCUMENT

EXHIBIT E

IN THE SENATE

SENATE BILL NO. 1564

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO GROUND WATER RECHARGE PROJECTS; AMENDING SECTION 42-234, IDAHO CODE, TO RECOGNIZE THAT GROUND WATER RECHARGE PROJECTS ENHANCE THE FULL REALIZATION OF IDAHO WATER RESOURCES, TO PROVIDE THE EFFECT OF RIGHTS ACQUIRED PURSUANT TO PERMIT OR LICENSE, TO RECOGNIZE THAT INCIDENTAL GROUND WATER RECHARGE BENEFITS ARE OBTAINED FROM THE DIVERSION AND USE OF WATER FOR VARIOUS BENEFICIAL PURPOSES, BUT THAT SUCH INCIDENTAL RECHARGE MAY NOT BE USED AS THE BASIS FOR CLAIM OF A SEPARATE OR EXPANDED WATER RIGHT AND TO PROVIDE WHAT IS IN THE PUBLIC INTEREST.

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

SECTION 1. That Section 42-234, Idaho Code, be, and the same is hereby amended to read as follows:

42-234. GROUND WATER RECHARGE PROJECTS ~~IN ST. ANTHONY AND REXBURG, IDAHO~~ -- AUTHORITY OF DEPARTMENT TO GRANT PERMIT. (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the ~~pitet~~ projects to recharge ground water basins in the vicinity of ~~St. Anthony and Rexburg~~, Idaho, has enhanced may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use. ~~in view of the demonstrated feasibility of the project and in recognition of the benefits to be derived from its continuation and expansion, the legislature deems it in the public interest that this project be continued and expansions of this project be encouraged.~~

(2) The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge ~~in the vicinity of St. Anthony and Rexburg, Idaho~~ shall constitute a beneficial use and hereby authorizes the department of water resources to issue ~~to the authorities responsible for the implementation and expansion of this recharge project~~ a permit for the appropriation and underground storage of unappropriated waters in the an area of recharge. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code. Any right so granted shall be subject to depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator.

(3) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental

1 recharge of aquifers which occurs as a result of water diversion and use that
2 does not exceed the vested water right of water right holders is in the public
3 interest. The values of such incidental recharge shall be considered in the
4 management of the state's water resources.

IN THE SENATE

SENATE BILL NO. 1565

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO RECHARGE OF GROUND WATER BASINS; AMENDING SECTION 42-4201A, IDAHO CODE, TO PROVIDE FOR ENCOURAGEMENT FOR PERSONS AND ENTITIES TO USE WATER IN A WAY THAT WILL AUGMENT GROUND WATER BASIN RECHARGE, TO PROVIDE THAT THE LEGISLATURE DECLARES THAT THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER BY ANY PERSON, AQUIFER RECHARGE DISTRICT, IRRIGATION DISTRICT OR CANAL COMPANY IS A BENEFICIAL USE, TO PROVIDE THE EFFECT OF CERTAIN WATER RIGHTS FOR POWER PURPOSES AND TO PROVIDE THAT THE DIRECTOR MAY REGULATE THE AMOUNT OF WATER WHICH MAY BE DIVERTED FOR RECHARGE PURPOSES.

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

SECTION 1. That Section 42-4201A, Idaho Code, be, and the same is hereby amended to read as follows:

42-4201A. RECHARGE OF GROUND WATER BASINS -- DIRECTOR'S AUTHORITY TO ISSUE PERMIT ---LIMITATIONS. (1) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects designed to promote these objectives and water use that will augment ground water basin recharge. The legislature hereby acknowledges that certain water uses and proposed projects to recharge water basins in the state by means of the storage of unappropriated waters of the public waters of the state in underground aquifers represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use.

(2) In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an-aquifer-recharge-district-herein-after-created-and-operated-pursuant-to-the-provisions-of-chapter-42,-title-42,-Idaho-Code, any person, aquifer recharge district, irrigation district or canal company for purposes of ground water recharge or-by-an-irrigation-district-organized-and-operated-pursuant-to-title-42,-Idaho-Code, shall constitute a beneficial use and hereby authorizes the department of water resources to issue to-the-aquifer-recharge-district,-or-the-irrigation-district, a permit, pursuant to section 42-203, Idaho Code, for the appropriation and underground storage of the unappropriated waters of the state. The department of water resources is further authorized to issue to-an-aquifer-recharge-district,-or-an-irrigation-district, a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance by the-district with the requirements specified in chapter 2, title 42, Idaho Code. The rights acquired by-an-aquifer-recharge-district,-or-an-irrigation-district, pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those held by-any-private-ly-owned-electrical-generating-company-to-appropriate-waters--in

1 the--reaches--downstream--from--a--recharge--project--diversion--for--purposes--of
 2 hydroelectric-power-generation water rights for power purposes that may other-
 3 wise be subordinated by contract entered into by the governor and Idaho power
 4 company on October 25, 1984, and ratified by the legislature pursuant to sec-
 5 tion 42-203B, Idaho Code.

6 (3) The director of the department of water resources may regulate the
 7 amount of water which an-aquifer-recharge-district,-or-an-irrigation-district,
 8 may divert be diverted for recharge purposes and may reduce such amount, even
 9 though there is sufficient water to supply the entire amount originally autho-
 10 rized by permit or license. To facilitate necessary financing of an aquifer
 11 recharge project, the director may fix a term of years in the permit or
 12 license during which the amount of water authorized to be diverted shall not
 13 be reduced by the director under the provisions of this subsection.

14 (4) To insure that other water rights are not injured by the operations
 15 of an aquifer recharge project, the director of the department of water
 16 resources shall have the authority to approve, disapprove, or require altera-
 17 tions in the methods employed by-a-district to achieve ground water recharge.
 18 In the event that the director determines that the district's methods of oper-
 19 ation are adversely affecting existing water rights or are creating conditions
 20 adverse to the beneficial use of water under existing water rights, the direc-
 21 tor shall order the cessation of operations until such alterations as may be
 22 ordered by the director have been accomplished or such adverse effects other-
 23 wise have been corrected.

EXHIBIT F

HOUSE RESOURCES AND CONSERVATION COMMITTEE

DATE: MARCH 21, 1994

TIME: 1:30 P.M.

PLACE: ROOM 412

PRESENT: All members of this committee except for:

ABSENT/
EXCUSED: Rep. Newcomb

GUESTS: Bruce Palmer, Lynn Tominaga, Don Campbell

MINUTES: The meeting was called to order at 4:40 p.m.

MOTION: Rep. Cuddy made the motion the accept the minutes as printed. Rep. Johnson seconded the motion and it carried.

SB 1504 Senator Frasure explained to the committee that this bill came about because of the winter feeding situation in southeastern Idaho during the winter of 1992-93. He told the committee that this legislation would assure that \$.75 out of the \$1.50 collected in the winter feeding program be used exclusively for feeding.

MOTION: Rep. Loosli made the motion to send SB 1504 to the floor with a do pass recommendation. Rep. Mader seconded the motion and it was carried. Rep. Johnson will carry the bill.

SB 1563 Rep. Barraclough introduced this bill to the committee saying that recharge is not the final answer for everyone, but it is better than doing nothing. He also felt would allow time to look at the Supreme Court ruling and what the options are. He further explained that SB 1563 would provide that the fee for aquifer recharge would be waived. Questions and discussion followed. Don Campbell, Executive director of the Idaho Aquaculture Association, speaking in favor of the bill, told the committee that an aggressive but managed recharge program could benefit Idahoans. Lynn Tominaga, from the Idaho Water Users Association, spoke in favor of this bill.

MOTION: Rep Jones made the motion to send SB 1563 to the floor with a do pass recommendation. Rep. Field seconded the motion and it carried. Rep. Barraclough and Rep. Bell will carry this bill.

SB 1574 Rep. Barraclough explained this legislation that would allow individuals, districts, and canal companies the ability to conduct artificial recharge and gain a water right for that water.

MOTION: Rep. Stoicheff made the motion to send SB 1574 to the floor with a do pass recommendation. Rep. Bell seconded the motion. Discussion followed. A vote was taken on the motion and it was carried. Rep. Barraclough and Rep. Bell will carry this bill.

House Resources and Conservation MINUTES

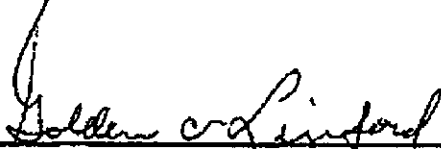
Page 2

Monday, March 21, 1994

SCR 140 Rep. Barracrough introduced this legislation also. This concurrent resolution states legislative intent and enables some time to really think out judgements that are best for everyone.

MOTION: Rep. Johnson made the motion to send SCR 140 to the floor with a do pass recommendation. Rep. Wood seconded the motion and it was carried. Barracrough and Rep. Bell will carry this bill also.

The meeting was adjourned at 5:20 p.m.



Golden C. Linford, Chairman



Susan Hansen, Secretary

EXHIBIT G

HOUSE RESOURCES AND CONSERVATION COMMITTEE

DATE: MARCH 23, 1994

TIME: 1:30 P.M.

PLACE: ROOM 412

PRESENT: All members of this committee

GUESTS: Sheri Chapman, Blaine Larsen, Norm Young, Don Campbell

MINUTES: The meeting was called to order at 1:37 p.m.

MOTION: Rep. Johnson made the motion to approve the minutes as written. Rep. Loosli seconded the motion and it was carried.

HB 968 Stan Boyd, explained that this legislation authorizes F&G to participate in the development and implementation of a wolf management plan for the State of Idaho. It would allow for F&G to dip into their non-game management fund if the money from the Federal Government is not enough. Questions and discussion followed.

MOTION: Rep. Stoicheff made the motion to send HB 968 to the floor with a do pass recommendation. Rep. Johnson seconded the motion and it was carried. Rep. Wood will carry this bill.

Rep. Linford set the committee at ease and reviewed pending water issues with them.

HCR 67 Rep. Newcomb, a sponsor of this bill, told the committee that this bill has to do with the transfer of water rights from federal set-aside lands and that these transfers are not in the local public interest.

MOTION: Rep. Johnson made the motion to send HCR 67 to the floor with a do pass recommendation. Rep. Field seconded the motion.

Blaine Larsen, a farmer from eastern Idaho, speaking against the bill, told the committee that these types of transfers cannot hurt anyone.

A vote was held on the motion to send HCR 67 to the floor with a do pass recommendation and it was carried. Rep. Antone and Rep. Newcomb will carry this bill.

SB 1421 Rep. Cuddy explained this bill to the committee as legislation that limits F&G Commissioner to two consecutive terms. He said that this would allow for a rotation of people and should help F&G with their public relations.

MOTION: Rep. Wood made the motion to send SB 1421 to the floor with a do pass recommendation. Rep. Cuddy seconded the motion. Rep. Bell voted no. Rep. Cuddy will carry this bill.

House Resources and Conservation MINUTES

Page 2

March 23, 1994

SB 1561 &
1562a

Sherl Chapman, from the Idaho Water Users Association, introduced these two bills as having to do with measuring and reporting water diversions, also, with allowing the use of utility billing records for helping to measure these diversions. Discussion followed on measuring devices, their cost, quality and if the type of measuring device could be legislated. There was discussion that this applies to pumpers who are not reporting consumption now and that the report required would be an annual one. Mr. Chapman pointed out that the pumper could enter into an agreement with the director to have his utility bills released instead of purchasing measuring devices for his pumps. There was discussion also on the need to keep these two pieces of legislation together, that these both are integral parts of the whole package of water bills. Mr. Chapman, told the committee that he does not think there will ever be too much data and he could not see the end of the need for data. Norm Young, from the Department of Water Resources said that the department may use the data to check for compliance because people are calling for management. Mr. Young noted that the administrative impact would be able to be handled because SB 1562 only requires that the devices be put into place when the director requests it. Don Campbell, Executive Director of the Idaho Aquaculture Association, spoke in favor of these two bills, and gave information on how the data collected could be used for the benefit of the farmers.

MOTION:

Rep. Stoicheff made the motion to send SB 1561 to the floor with a do pass recommendation. Rep. Loosli seconded the motion and it was carried. Rep. Loosli and Rep. Johnson will carry this bill. Rep. Steele voted no.

MOTION:

Rep. Loosli made the motion to send SB 1562a to the floor with a do pass recommendation. Rep. Mader seconded the motion and it was carried. Rep. Steele voted no. This bill will be carried by Rep. Loosli.

SB 1575

Rep. Barracrough introduced this bill as having to do with recharging the aquifer. He said that this legislation would protect the status and theory of how water rights are set down and does include an emergency clause. Don Campbell, spoke in favor of this bill saying that incidental recharge needs to be identified as a benefit and needs to be codified. Sherl Chapman, spoke to the letter of legislative intent that was drafted by the DWR telling the committee that it helps clarify the language in the bill.

MOTION:

Rep. Field made the motion to send SB 1575, with the letter of legislative intent attached, to the floor with a do pass recommendation. Rep. Wood seconded the motion and it was carried. Rep. Barracrough and Rep. Bell will carry this bill.

The meeting was adjourned at 4:35 p.m.


Golden C. Linford, Chairman


Susan Hansen, Secretary

EXHIBIT H

JOURNAL
of the
STATE SENATE



SECOND REGULAR SESSION
of the
FIFTY-SECOND LEGISLATURE
of the
STATE OF IDAHO
1994

IDAHO LEGISLATIVE SERVICES OFFICE
RESEARCH & LEGISLATION
STATE CAPITOL LOWER LEVEL EAST END
BOISE ID 83720

AMENDMENTS TO THE BILL

On page 8, delete lines 32 through 50, inclusive and on page 9, delete lines 1 through 7, inclusive, and renumber subsequent sections of the bill accordingly.

CORRECTION TO TITLE

On page 1, in line 14, following "MULTIPLIER;" delete the remainder of the line, delete all of line 15; and in line 16, delete "MINIMUM SALARY SCHEDULE;"

The Committee also has H 609, S 1498, H 600, H 867, H 690, and HJR 17 under consideration, reports progress, and begs leave to sit again.

HARTUNG, Chairman

On motion by Senator Hartung, seconded by Senator Davis, the report was adopted by voice vote.

Senate amendments to S 1427, H 663, as amended in the Senate, S 1472, H 696, and S 1560 were referred to the Judiciary and Rules Committee for printing.

S 1427, as amended, S 1472, as amended, and S 1560, as amended, were referred to the Judiciary and Rules Committee for engrossing.

H 663, as amended in the Senate, as amended in the Senate, and H 696, as amended in the Senate, were filed for first reading.

On request by Senator McRoberts, granted by unanimous consent, the Senate returned to the Thirteenth Order of Business.

Third Reading of Bills

S 1575, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration. Senators Cameron and Peavey arose as cosponsors of the bill and opened the debate. The question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Bilyeu, Bunderson, Cameron, Chamberlain, Childers, Darrington, Davis, Frasure, Furness, Dennis Hansen, John Hansen, Hartung, Haun, Hawkins, Ingram, Ipsen, Kerrick, Lloyd, Madsen, McLaughlin, McRoberts, Noh, Parry, Peavey, Reed, Reents, Richardson, Ricks, Schroeder, Sorensen, Sweeney, Thorne, Tucker, Twiggs, Wetherell. Total - 35.

Whereupon the President declared S 1575 passed, title was approved, and the bill ordered transmitted to the House.

On request by Senator Noh, granted by unanimous consent, the following Statement of Legislative Intent relative to S 1575 was adopted by the Senate and ordered spread upon the pages of the Journal:

LEGISLATIVE INTENT OF S 1575

The legislature recognizes the importance of carefully allocating the limited, finite water resources of the state to optimize out-of-stream private and public uses and instream public uses. By enactment of S 1575, the legislature intends to strike an appropriate balance by allowing continued diversion of water to sustain ground water supplies necessary for the prosperity and well-being of the public provided that such diversions do not injure other rights, and provided it is recognized that conservation programs to limit and reduce diversions are also necessary to achieve optimum use of the resource in the public interest.

The addition of subsection 3 to section 42-214, Idaho Code, recognizes the value to the public associated with the recharge to ground water aquifers which often accrues incidentally as water is used under valid rights for other purposes. Incidental recharge is to be encouraged in water management policies and programs where doing so promotes the use of water resources in the public interest and does not result in injury to other water rights, including rights established under state law for minimum instream flows.

The addition of subsection 3 is not intended to recognize incidental recharge as a beneficial use for which a water right can be claimed or decreed or for which a permit to appropriate water can be issued. Incidental recharge shall not be a basis for either establishing a water right or maintaining a water right for a diversion rate or diversion volume greater than that required for the beneficial use or uses authorized by the water right.

S 1568 was read the third time at length, section by section, and placed before the Senate for final consideration. Senator Sweeney arose as sponsor of the bill and opened the debate. The question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Bilyeu, Bunderson, Cameron, Chamberlain, Childers, Darrington, Davis, Frasure, Furness, Dennis Hansen, John Hansen, Hartung, Haun, Hawkins, Ingram, Ipsen, Kerrick, Lloyd, Madsen, McLaughlin, McRoberts, Noh, Parry, Peavey, Reed, Reents, Richardson, Ricks, Schroeder, Sorensen, Sweeney, Thorne, Tucker, Twiggs, Wetherell. Total - 35.

Whereupon the President declared S 1568 passed, title was approved, and the bill ordered transmitted to the House.

S 1421 was read the third time at length, section by section, and placed before the Senate for final consideration. Senator McLaughlin arose as sponsor of the bill and opened the debate. The question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Bilyeu, Bunderson, Childers, Frasure, Furness, Dennis Hansen, John Hansen, Hartung, Hawkins, Ingram, Kerrick, Lloyd, Madsen, McLaughlin, McRoberts, Noh, Peavey, Reents, Richardson, Schroeder, Sorensen, Sweeney, Twiggs, Wetherell. Total - 24.

JOURNAL
of the
**HOUSE OF
REPRESENTATIVES**



SECOND REGULAR SESSION
of the
FIFTY-SECOND LEGISLATURE
of the
STATE OF IDAHO
1994

S 1562, as amended, was read the third time at length, section by section, and placed before the House for final consideration.

At this time, the Speaker recognized Mr. Loosli to open debate.

The question being, "Shall S 1562, as amended, pass?"

Roll call resulted as follows:

AYES -- Ahrens, Antone, Barracough, Bell, Berain, Bivens, Black(23), Deal, Field, Gould, Hansen, Hofman, Jenkins, Johnson(27), Jones(22), Keeton, Kellogg, Kempton, King, Linford, Loosli, Lucas, Mader, Mahoney, Miller, Newcomb, Pomeroy, Reynolds, Robison, Stennett, Stevens, Stoicheff, Stone, Stubbs, Tiltman, White, Mr. Speaker, Total -- 37.

NAYS -- Alexander, Barrett, Black(15), Black(34), Christiansen, Crow, Cuddy, Danielson, Flandro, Geddes, Gurnsey, Hawkey, Horvath, Johnson(35), Jones(9), Judd, Larsen, Loertscher, McKee, Mortensen, Nafziger, Sall, Schaefer, Steele, Sutton, Taylor, Tippets, Vandenberg, Wilde, Wood, Wright, Total -- 31.

Absent and excused -- Crane, Lance. Total -- 2.
Total -- 70.

Whereupon the Speaker declared S 1562, as amended, passed the House. Title was approved and the bill ordered returned to the Senate.

S 1575 was read the third time at length, section by section, and placed before the House for final consideration.

At this time, the Speaker recognized Mr. Barracough and Mrs. Bell to open debate.

The question being, "Shall S 1575 pass?"

Roll call resulted as follows:

AYES -- Ahrens, Alexander, Antone, Barracough, Barrett, Bell, Berain, Bivens, Black(15), Black(34), Black(23), Christiansen, Crow, Cuddy, Danielson, Deal, Field, Flandro, Geddes, Gould, Gurnsey, Hansen, Hawkey, Hofman, Horvath, Jenkins, Johnson(35), Johnson(27), Jones(9), Jones(22), Judd, Keeton, Kellogg, Kempton, King, Larsen, Linford, Loertscher, Loosli, Lucas, Mader, Mahoney, McKee, Miller, Mortensen, Nafziger, Newcomb, Pomeroy, Reynolds, Robison, Sall, Schaefer, Steele, Stennett, Stevens, Stoicheff, Stone, Stubbs, Sutton, Taylor, Tiltman, Tippets, Vandenberg, White, Wilde, Wood, Wright, Mr. Speaker, Total -- 68.

NAYS -- None.

Absent and excused -- Crane, Lance. Total -- 2.
Total -- 70.

Whereupon the Speaker declared S 1575 passed the House. Title was approved and the bill ordered returned to the Senate.

Mrs. Bell asked unanimous consent that the following Statement of Legislative Intent be printed in the Journal and adopted as the intent of the House of Representatives. There being no objection, it was so ordered.

STATEMENT OF LEGISLATIVE INTENT S 1575

The legislature recognizes the importance of carefully allocating the limited, finite water resources of the state to optimize out-of-stream private and public uses and instream public uses. By enactment of S 1575, the legislature intends to strike an appropriate balance by ~~allowing continued diversion of water to sustain ground water supplies necessary for the prosperity and well-being of the public provided that such diversions do not injure other rights~~ and provided it is recognized that conservation programs to limit and reduce diversions are also necessary to achieve optimum use of the resource in the public interest.

The addition of subsection 3 to section 42-234, Idaho Code, recognizes the value to the public associated with the recharge to ground water aquifers which often accrues incidentally as water is used under valid rights for other purposes. Incidental recharge is to be encouraged in water management policies and programs where doing so promotes the use of water resources in the public interest and does not result in injury to other water rights, including rights established under state law for minimum instream flows.

The addition of subsection 3 is not intended to recognize incidental recharge as a beneficial use for which a water right can be claimed or decreed or for which a permit to appropriate water can be issued. Incidental recharge shall not be a basis for either establishing a water right or maintaining a water right for a diversion rate or diversion volume greater than that required for the beneficial use or uses authorized by the water right.

S 1337 was read the third time at length, section by section, and placed before the House for final consideration.

At this time, the Speaker recognized Mr. Stoicheff to open debate.

The question being, "Shall S 1337 pass?"

Roll call resulted as follows:

AYES -- Ahrens, Alexander, Antone, Barracough, Barrett, Bell, Berain, Bivens, Black(15), Black(34), Black(23), Christiansen, Crow, Cuddy, Danielson, Deal, Field, Flandro, Geddes, Gould, Gurnsey, Hansen, Hawkey, Hofman, Horvath, Jenkins, Johnson(35), Johnson(27), Jones(9), Jones(22), Judd, Keeton, Kellogg, Kempton, King, Larsen, Linford, Loertscher, Loosli, Lucas, Mader, Mahoney, McKee, Miller, Mortensen, Nafziger, Newcomb, Pomeroy, Reynolds, Robison, Sall, Schaefer, Steele, Stennett, Stevens, Stoicheff, Stone, Stubbs, Sutton, Taylor, Tiltman, Tippets, Vandenberg, White, Wilde, Wood, Wright, Mr. Speaker, Total -- 68.

NAYS -- None.

Absent and excused -- Crane, Lance. Total -- 2.
Total -- 70.

Whereupon the Speaker declared S 1337 passed the House. Title was approved and the bill ordered returned to the Senate.