

DOCUMENTS CITED IN DIRECTOR'S OCTOBER 20, 2008
FINAL ORDER LICENSING MILNER HYDRO RIGHT

INCLUDED IN AGENCY RECORD (WR FILE 01-7011)

- CD • 1976 Idaho State Water Plan at 116 (Policy 32)
- CD • 1982 Idaho State Water Plan at 42 (Policy 32)
 - "A Resolution" at 1, *In the Matter of Policy 32 of the State Water Plan* (Idaho Water Resource Board, Mar. 1, 1985)
- CD • 1986 Idaho State Water Plan at 20 (Policy 1B); at 35 (Policy 5A)
- CD • 1992 Idaho State Water Plan at 28 (Policy 5A)
- CD • 1996 Idaho State Water Plan at 6 (Policy 1F); at 7 (Policy 1J); at 14 (Policy 4D); at 17 (Policy 5B); at 19 (Policy 5H)
 - "Statement of Purpose" for 1985 Senate Bill 1008
 - "Statement of Legislative Intent" for 1985 Senate Bill 1008, JOURNAL OF THE STATE SENATE, ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO, 1985 at 58
 - Minutes, Senate Resources and Environment Committee, January 18, 1985, p. 9 (testimony of Pat Kole and Ken Dunn)

MINUTES
RESOURCES AND ENVIRONMENT COMMITTEE

MARCH 4, 1985

Room 433, 1:30 P.M.

PRESENT Chairman Noh, Senators Beitelspacher, Budge, Carlson, Crapo, Horsch, Little, Peavey, Ringert and Sverdsten. Senator Chapman was excused and Senator Kiebert was absent.

The meeting was called to order by Chairman Noh.

Wayne Haas Mr. Haas, Department of Water Resources, explained Policy 32 of the State Water Plan, section by section, pointing out the various changes and the reasoning behind them. (See resolution attached)

In Policy 32A, Water Held in Trust by the State, Senator Ringert asked what "deemed appropriated" meant. Pat Costello, Governor's office, believed it referred to the state recognizing Idaho Power had a valid water right up to 8400 cfs. Other parties could still pursue legal arguments that Idaho Power does not have a valid water right.

In response to Senator Ringert's question, Mr. Kole, Attorney General's office, said the wording in effect would give the state a shield through the trust system to deny water permits that the state does not feel are valid--to get around a problem of appropriating unappropriated water. Senator Ringert wanted to know if this was to get around other parties using as an argument the abandonment and forfeiture, etc. and Mr. Kole said no.

Senator Crapo questioned Mr. Haas if Policy 32B would include thermal cooling and he said yes. He also asked if there was a policy decision being made here to restrict the amount to less than in the past. Mr. Haas explained in looking at the needs for the near future, it is felt the 150 cfs is adequate and the Board could look at the amount five years down the road if conditions change. Mr. Haas could see nothing in the policy to discourage development at INEL.

Senator Crapo had further questions regarding surface storage with regard to rebuilding the Teton Dam. As he understood the policy, that dam would not be subject to the policy if it was to be rebuilt. Mr. Kole said their understanding in looking at an "approved project," is that it is approved if the state permit is cancelled or not. Mr. Nelson was in agreement.

Senator Ringert expressed concern about protecting the water at the source of diversion, mentioning the fish hatcheries along the Snake. Mr. Haas believes the water right is protected but the user may have to "chase the water." The language does not represent a policy change.

Senator Crapo commented he wasn't sure why the state should get involved in acquiring water for storage. Mr. Haas said by having this cushion it would make it easier for the state to manage the minimum flow and give the state some flexibility in management.

Sherl
Chapman

Mr. Chapman, from the Water Users, said they did have some concerns over the modifications of the Water Plan Policy but they are minor compared to the problems there would be if the agreement fails. He believes the Board has been fair and that the Water Users can work with the Board to solve any problems. He urged the committee to pass the legislation.

MOTION

Senator Budge moved and Senator Peavey seconded the bill go out with a "do pass" recommendation. Motion carried.

HB 142

RELATING TO THE DISTRIBUTION OF FUNDS COLLECTED BY THE STATE DEPARTMENT OF FISH AND GAME; TO INCREASE THE MONEYS DISTRIBUTED TO THE PREDATORY ANIMALS ACCOUNT FROM TWELVE THOUSAND DOLLARS TO FIFTY THOUSAND DOLLARS.

The proposed legislation would change the amount of the distribution of funds collected by the Department of Fish and Game allotted to the predatory animals account from \$12,000 to \$50,000.

There was no discussion on the bill.

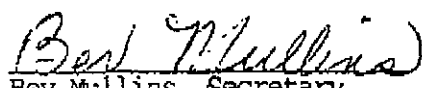
MOTION

Senator Peavey moved and Senator Little seconded the bill go out with a "do pass" recommendation.

The time for the meeting having run out, the committee was adjourned.



Laird Noh, Chairman



Bev Mullins, Secretary

For Monday - Res.

BEFORE THE IDAHO WATER RESOURCE BOARD

IN THE MATTER OF)
POLICY 32 OF THE)
STATE WATER PLAN)
_____)

A RESOLUTION

WHEREAS, pursuant to Chapter 17, Title 42, Idaho Code, the Idaho Water Resource Board (Board) has the power and duty to adopt a comprehensive State Water Plan; and,

WHEREAS, portions of the Snake River Water Rights Agreement (Agreement) entered into by the Governor, the Attorney General, and the Idaho Power Company on October 25, 1984 are not in accord with the State Water Plan; and,

WHEREAS, the Board has conducted 12 formal hearings in affected areas of the state on proposed changes to Policy 32 of the State Water Plan;

NOW, THEREFORE, BE IT RESOLVED that, the Idaho Water Resource Board under its authority to establish water policy amends Policy 32 of the State Water Plan to read as follows:

Policy 32 - Snake River Basin

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station, 3900 cfs from April 1 to October 31 and 5600 cfs from November 1 to March 31 measured at the Murphy gaging station, and 4750 cfs measured at the Weiser gaging station. A minimum average daily flow of 5,000 cfs at Johnson's Bar shall be maintained and an average daily flow of 13,000 cfs shall be maintained at Lime Point (river mile 172) a minimum of 95 percent of the time. Lower flows may be permitted at Lime Point only during the months of July, August, and September.

Waters not held in trust by the State in accordance with Policy 32A shall be allocated according to the criteria established by Idaho Code 42-203A.

The minimum flows established for the Snake River at the Murphy and Weiser gaging stations are management constraints; they further insure that minimum flow levels of Snake River water will be available for hydropower, fish, wildlife, and recreational purposes. The establishment of a zero minimum flow at the Milner gaging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake River Plain aquifer which provides this water must therefore be managed as an integral part of the river system.

The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex. By adopting these flows, the Idaho Water Resource Board recognizes the importance of minimum flows to downstream uses and makes their maintenance a matter of state water policy. Article 43 of the power license provides that:

"The project shall be operated in the interest of navigation to maintain 13,000 cfs flow in the Snake River at Lime Point (river mile 172) a minimum of 95 percent of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 cfs will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed to by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 cfs at Johnson's Bar"

Snake River flows above the hydropower right at any Idaho Power facility are considered unappropriated and therefore are not held in trust by the state. This distinction is further addressed in Policy 32A.

Policy 32A - Water Held in Trust by the State

It is the policy of Idaho that water held in trust by the state pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C.

The agreement between the state of Idaho and Idaho Power Company dated October 25, 1984 provides that Idaho Power's

claimed water right of 8400 cfs at the Swan Falls dam may be reduced to 3900 cfs. The claimed water right of 8400 cfs is deemed appropriated and the amount above the minimum flow established in Policy 32 up to the 8400 cfs is held in trust by the state. The agreement further provides that Idaho Power's claimed water rights at facilities upstream from Swan Falls shall be considered satisfied when the company receives the minimum flow specified in Policy 32 at the Murphy gaging station. The 8400 cfs claim of the power company has not historically been available during summer months.

The 8400 cfs claimed right is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate water was beneficially used prior to October 1, 1984 even if such uses would violate the minimum flows established in Policy 32. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law plus criteria the Legislature is requested by the agreement to establish as Idaho Code 42-203C. These additional criteria supplement Policy 1 of the Water Plan which urges that conformance with the State Water Plan be considered evidence of the public interest. The Idaho Water Resource Board recognizes that the specific criteria for defining public interest established by Idaho Code 42-203C are to be used in addition to the criteria set forth in Policy 1 for the reallocation of of hydropower rights.

Policy 32B - Domestic, Commercial, Municipal and Industrial (DCMI)

It is the policy of Idaho that 150 cfs of water for consumptive purposes held in trust by the state pursuant to Policy 32A be reallocated to meet future DCMI uses in accordance with state law.

While most DCMI uses are nonconsumptive or only partially consumptive, future growth in Idaho's population and commercial and industrial expansion will require an assured supply of water.

A continuous flow of 150 cfs provides approximately 108,600 acre-feet of water per year. This volume of water is assigned to consumptive uses within the basin for domestic, commercial, municipal, and other industrial purposes. Industrial purposes include processing, manufacturing, research and development, and cooling.

Adequate records should be kept and reviewed so that this reallocation can be modified as necessary. Increases in the

DCMI allocation, if necessary, will reduce the amount of water available for agricultural uses. The allocation will be reviewed as part of every Water Plan update.

Policy 32C - Agriculture

It is the policy of Idaho that appropriated water held in trust by the state pursuant to Policy 32A, less the amount of water necessary to provide for present and future DCMI uses as set forth in Policy 32B, shall be available for reallocation to meet new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D.

The policy allows for new and supplemental agricultural development through the reallocation of water held in trust by the state. The 1982 State Water Plan allocated water for a minimum level of new irrigation development of 850,000 acres plus supplemental water for 225,000 acres by the year 2020 over that which existed in 1975. This policy rescinds the 1982 allocations since there are no acres specified in that the type, location, and amount of use is unknown as is the effect of the evaluation called for in Policy 32A.

During the 8 year period from 1975 to 1983, about 140,000 acres of new development occurred within the basin. While the amount of new acreage varied significantly from year to year, the average was approximately 17,500 acres. Data are not available to estimate the number of acres that received supplemental water during this period. Idaho Code Section 42-203C limits the rate of new development in the basin above Murphy gaging station to 80,000 acres in any four year period. Therefore, the maximum development to the year 2020 above Murphy gaging station assuming no water supply constraint is 700,000 acres. Criteria placed on the reallocation of hydropower rights, limits on the rate of new development, plus the requirement that approval of new storage projects that divert water between November 1 and April 1 from the Snake River between Milner Dam and Murphy gaging station must mitigate the impact of diversions on hydropower generation (Policy 32I), will undoubtedly limit development to less than 700,000 acres.

Policy 32D - Hydropower

It is the policy of Idaho that hydropower use be recognized as a beneficial use of water, and that depletion of flows below the minimum average daily flows set forth in Policy 32 is not in the public interest.

The 1982 State Water Plan allocated 170,000 acre-feet for consumptive use in cooling thermal power plants. By establishing a minimum daily flow of 3300 cfs at Murphy and 4750 cfs at Weiser, stabilized flows were guaranteed for hydropower generation. The minimum daily flows for hydropower generation are now increased as stated in Policy 32. In addition, this policy specifically recognizes hydropower generation as a beneficial use of water and acknowledges the public interest in maintaining the minimum river flow at key points. Any water depletion for thermal power generation would now come from the block of water allocated to DCMI uses.

Policy 32E - Navigation

It is the policy of Idaho that water sufficient for commercial and recreational navigation is provided by the minimum flows established for the Snake River.

Commercial navigation enroute to Lewiston via the Columbia River and Lower Snake River can be accommodated with the flows leaving Idaho in the Snake River at Lewiston. Above Lewiston, commercial and recreational navigation should be accommodated within the protected flows on the Snake River and tributary streams.

Policy 32F - Aquaculture

It is the policy of Idaho that water necessary to process aquaculture products be included as a component of DCMI as provided in Policy 32B. The minimum flows established for the Murphy gaging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

Policy 32G - Fish, Wildlife, and Recreation

It is the policy of Idaho that the minimum flows established under Policy 32 are sufficient and necessary to meet the minimum requirements for aquatic life, fish, and wildlife, and to provide water for recreation in the Snake River below Milner Dam. Streamflow depletion below the minimum flows is not in the public interest.

The policy reiterates the view that the minimum flows established in Policy 32 will protect fish, wildlife, aquatic life and recreation within the Snake River Basin at acceptable levels and that this is in the public interest. State law provides for the Water Resource Board to apply for a water right for unappropriated water for minimum flows necessary "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." The minimum stream flow legislation, where appropriate, can be used on the Snake River and tributary streams to enhance these values. Tributary streams in the Snake River Basin which the Board has identified as key river segments needing protection are identified in Policy 7.

Policy 32H - Water Quality and Pollution Control

It is the policy of Idaho that the use of water to provide pollution dilution is not a beneficial use of water.

Existing state and federal water quality programs should be sufficient to protect the current high water quality associated with streams within the basin. Any allocation of water for minimum streamflow is directed towards meeting fish, wildlife, and recreational needs, not to the dilution of pollution.

Policy 32I - New Surface Storage

It is the policy of Idaho that applications for large surface storage projects upstream from the Murphy gage be approved when it is determined that those projects are needed to meet new uses after consideration of then existing public interest criteria. Approval of new storage projects that would divert water from the mainstem of the Snake River between Milner and the Murphy Gaging station during the period November 1 to March 31 should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

This policy addresses the approval of new surface storage in the basin but does not apply to already approved projects. A study of all existing social, legal and economic constraints on allocation and use of water in existing storage facilities will be made to determine whether new storage projects are needed. An attempt will be made to modify those constraints that are found to prevent reasonably full use of existing storage. Such study shall not delay applications for new storage projects. In addition, permits for these new projects may be issued during the study period, if they are found to be in the public interest. Public interest as used within this policy does not include the provisions of § 42-203 (c) Idaho Code.

"Large surface storage projects" are those which have the potential for significantly impacting existing uses. Projects for which approval is required under § 42-1737, Idaho Code, would be such projects. Smaller projects could also have significant impacts, but stock water ponds, and waste water re-pumping ponds would not be included, for example.

New storage projects that would divert water from the Snake River between the Milner and Murphy gaging stations during the November 1 to April 1 period are subject to the requirement that the impact such depletions have on hydropower generation is mitigated. Mitigated is defined as causing to become less harsh or hostile, and is used here rather than compensate which connotes equivalence. Methodology will be developed by the Water Resource Board for use in calculating impacts on hydropower generation.

Policy 32J - Stored Water For Management Purposes

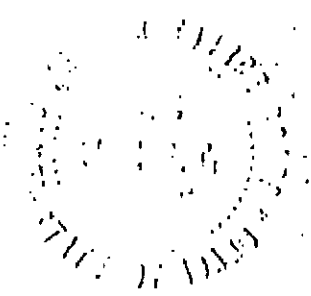
It is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River.

The Department of Water Resources is expected to allocate the unappropriated waters and the power rights held in trust by the state in such a manner as to assure minimum flows at designated key points on the Snake River. The impacts of groundwater use within the basin on the timing of aquifer discharge to the river is such that at some time stored surface water may be necessary to maintain the designated minimum flows.

At this time there is unallocated reservoir storage within the basin which could be acquired by the state. These waters would provide flexibility for management decisions and provide assurance that the established minimum flows can be maintained.

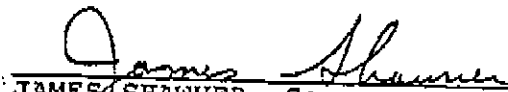
The state should act to acquire sufficient reservoir storage for this purpose. In the future no unallocated stored water will be available and it may be impossible to acquire sufficient water to satisfy river demands. Until such time as these waters are needed for management purposes, they shall be credited to the Water Supply Bank and funds obtained from their lease or sale shall accrue to the Water Management Account.

PASSED AND APPROVED this 1st of March, 1985.



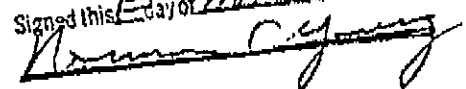

GENE M. GRAY, Chairman

ATTEST:



JAMES SHAWVER, Secretary

The foregoing is a true and certified copy of
the document on file at the Department of
Water Resources.

Signed this 1st day of March, 1985


APPENDIX C

58

SENATE JOURNAL

February 6

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

S 1095 BY TRANSPORTATION COMMITTEE

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

S 1096 BY TRANSPORTATION COMMITTEE

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

S 1097 BY TRANSPORTATION COMMITTEE

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

S 1098 BY TRANSPORTATION COMMITTEE

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

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

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

Second Reading of Bills

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

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

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

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

S 1086, by Education Committee, was read the second time at length and filed for third reading.

Third Reading of Bills

On request by Senator Ricks, granted by unanimous consent, S 1008, S 1007, S 1006, and S 1005 were placed at the head of the calendar.

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

Roll call resulted as follows:

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

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

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

Total - 42.

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

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

STATEMENT OF LEGISLATIVE INTENT S 1008

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

I. INTRODUCTORY STATEMENT.

Beginning in approximately 1977, a significant controversy arose between Idaho Power Company and certain other water users in the State of Idaho over the extent of Idaho Power Company's water rights at the Swan Falls Dam. Ultimately litigation was instituted against numerous water users by Idaho Power Company to clarify the status of the disputed water rights. Both the Governor and the Attorney General of the State of Idaho became extensively involved in attempts to resolve this dispute. In 1983 and 1984, in two separate legislative sessions, the Idaho Legislature also grappled with the controversy unsuccessfully. At issue was whether the water rights of Idaho Power Company should be subordinated to future appropriators to encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho.

Ultimately, in October, 1984, an Agreement was reached between the Governor of the State of Idaho, the Attorney General of the State of Idaho and Idaho Power Company which resolved the controversy. The agreement required legislative action and was made contingent upon passage by the Idaho State Legislature of certain legislation which was

referenced in the agreement. This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement.

II. STATEMENT OF PURPOSE.

This legislation is intended to resolve conflicts over whether an existing water right for power is subordinated. The legislation resolves these conflicts by defining the nature of such water rights. It is also intended to assure that water is available for development in Idaho and to provide a basis for reallocation of water for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.

The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights. Finally, the legislation is an assertion by the Legislature of the State of Idaho of its authority to limit and regulate the use of water for power purposes.

III. SECTION BY SECTION ANALYSIS.

A. SECTION 1. (AMENDING SECTION 42-203 OF THE IDAHO CODE.)

Section 1 amends Section 42-203 of the Idaho Code by renumbering the section to be Section 42-203A and adding new notice requirements for applications to divert in excess of ten (10) c.f.s. or one thousand (1,000) acre feet of water. Notice of such applications must be published statewide, once per week for two consecutive weeks. Section 1 also provides a mechanism by which persons interested in being notified of any proposed diversions may request in writing to be notified by the Department of Water Resources. Such requests may specify any class of notices of application. Persons making such requests must pay annual mailing fees to be established by the Department of Water Resources.

B. SECTION 2. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 2 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203B, Idaho Code. This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses. It also represents a legislative protection of the rights of a user of water for power purposes (1) against depletion to the extent of a minimum flow established by State action; and (2) to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to State law. The water right for power purposes shall not be subject to depletion up to the amount of the minimum flow as

defined by any applicable contract with the State. As applied to the Swan Falls Agreement, the existing minimum stream flow at the Murphy U.S.G.S. gauging station is recommended for change to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. The Agreement recognizes Idaho Power Company's rights as unsubordinated up to the amount of those flows. While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change. Valid subordination conditions governing any existing hydropower rights are not modified or removed by this legislation.

To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. The term "state action" refers only to action by the Idaho Department of Water Resources in compliance with all applicable law, and/or the establishment of minimum stream flows in the State Water Plan by the Idaho Water Resource Board, both of which actions are subject to ratification, modification or rejection by the Idaho State Legislature. To the extent of the established minimum flows and any right recognized by contract, such water rights for power purposes remain unsubordinated to all uses. The amount of water or water rights held in the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. No person to whom trust waters are reallocated shall be required to pay compensation to any party, other than appropriate administrative fees established by the director for processing of the reallocation.

The governor is given specific authority to enter into agreements with power users to define applicable minimum stream flows in accord with the terms of this section. These contracts must be ratified by the Idaho State Legislature.

Thus, existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the State. Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. In addition, if the holder of

such a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section.

The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

C. SECTION 3. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

1. Section 3 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203C, Idaho Code. This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2:

First, the proposed use must be evaluated under the criteria presently existing in Section 42-203A, including local public interest. (Senate Bill 1008 does not adversely affect the use of existing local public interest criteria. Review of these factors is separate from the new factors added by the bill in Section 42-203C.)

Second, if the proposed use meets these criteria, there must be a determination of whether the proposed use would "significantly reduce" the amount of water available to the power user whose rights are

owned by the trust. If a significant reduction is not found, then the application should be granted.

Third, if a significant reduction is found, then the proposed use must be evaluated in terms of the criteria stated in Subsection 42-203C(2). The finding of a significant reduction does not infer that any portion of the trust waters should not be developed. Such a finding simply results in the necessity of evaluating the proposed use according to the terms of the criteria stated in Subsection 42-203C(2). These criteria focus on the benefits of the proposed use to the state and local economy, the impact on electric utility rates, the promotion of the family farming tradition, and the promotion of full economic and multiple use development of Idaho's water resources. The fifth criteria sets a cap on agricultural development above the Murphy Gauge.

Subsection 42-203C(2) (b) clarifies that the burden of proof in establishing that any of these criteria would prevent granting of the application is upon the protestant. This subsection was included to implement the specific legislative intent that the administrative burdens of meeting the new criteria would not block future development.

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

The criteria identified in Subsection 42-203C(2) are intended solely to guide the director of the Idaho Department of Water Resources in determining whether a proposed use has greater net benefits to the State than the existing hydropower use. The criteria identify those factors to be considered in making this determination. Proposed uses for domestic, commercial, municipal or industrial purposes and the like are not intended to receive less weight in the evaluation process simply because they are not mentioned specifically in the criteria. Nor is it intended that these uses be subject to the family farming standard contained in Subsection 42-203C(2) (ii), or the agricultural cap contained in Subsection 42-203C(2) (v). In such circumstances only the criteria relevant to the proposed use and its impact on hydropower would be pertinent.

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change

the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.

D. SECTION 4. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 4 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203D, Idaho Code. This section provides that the Idaho Department of Water Resources shall review all water permits issued by it prior to the effective date of this act; provided, however, that permits having been put to beneficial use prior to July 1, 1985 are exempt. These permits are to be reviewed to assure that they comply with the requirements of this act. The director is authorized to either cancel the permits or subject them to new conditions.

E. SECTION 5.

Section 5 clarifies that this act does not modify, amend or repeal any existing interstate compact.

F. SECTION 6.

Section 6 declares the provisions of this act to be severable in the event that any portion thereof is declared to be invalid or unenforceable.

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

Roll call resulted as follows:

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

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

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

Total - 42.

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

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

Roll call resulted as follows:

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

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

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

Total - 42.

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

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

Roll call resulted as follows:

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

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

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

Total - 42.

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

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

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

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

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

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

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

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

**RECESS
AFTERNOON SESSION**

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

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

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

Senator Peavey was recorded present at this order of business.

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

MINUTES

RESOURCES AND ENVIRONMENT COMMITTEE

JANUARY 18, 1985

RM 433, 1:30 p.m.

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

SB 1008 WATER RIGHTS FOR HYDROPOWER PURPOSES

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

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

This legislation will provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water rights permits or other action on permits or permit applications when necessary. It would also give the Director the authority to promulgate rules and regulations. This authority is necessary in order for the Department to carry out new State Water Plan and statutory mandates contemplated by the Swan Falls agreement. These include public interest review, imposition of mitigation conditions on certain new uses, water marketing, and general adjudication of the Snake River. He pointed out the only addition to this bill was the "so-called moritorium authority." Since the Swan Fall's lawsuit the Director has been imposing a moritorium and this law would merely confirm the authority. It would also give him authority to promulgate rules and regulations.

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

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

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

Senator
Noh

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

Pat
Costello

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

Senator
Noh

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

Senator
Crapo

Asked if the rate schedules had been broken down.

Pat Costello

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

Senator
Ringert

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

Pat Kole

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

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

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

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

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

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

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

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

Jan. 18, 1985

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

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

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

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

Tom Nelson

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

Senator Ringert

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

Tom Nelson

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

Senator Noh

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

Pat Costello

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

Senator Noh

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

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

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

Mr. High
PUC

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

Senator Noh

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

Mr. High

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

Senator Crapo

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

Mr. High

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

Mr. Swisher
PUC

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

Ward Conley
PUC

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

Senator
Beitelspacher

Go to page 3, of SB 1008, between 5 and 6, we have the Governor to enter an agreement defining that portion of a water right being unsubordinated and then on 6, you have the Director having the authority to subordinate rights. As I recall, the Director works for the Water Board which the Constitution and the Supreme Court case we touched on the last few years set up as another entity, so to speak. Do we have a conflict there? Is there another constitutional body in a sense that is outside of the reach of the Governor that has the authority to subordinate water and another constitutional entity that has the authority

Pat Costello

The authority granted under paragraph 5 is to enter into contracts which are not self executing. All this does is really authorize the Governor to go out and negotiate contracts to bring to the Legislature for ratification. None of them take affect unless they are ratified by law and because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water Board, particularly given the passage of the contract.

Senator Noh

Along those same lines, would you care to outline briefly, just exactly what are the limits and extent of the Governor's power to grant water rights through the trust agreement? This trust agreement has sometimes been interpreted as granting the Governor an inordinate amount of authority in determining who gets water and who doesn't.

Pat Costello

Yes, as I was glancing through the Attorney General's testimony I was a little troubled by a statement here that the Governor would be empowered under this to approve of waters to be allocated under the trust. That is not really what is contemplated here at all. This is strictly a passive trust over which the Governor will not exert any active discretions. It is modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The Governor is named as trustee just because you need an individual to be sued in the event of some scrabble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands if they are granted in accordance with state law. So, it simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the water as long as the trusts last. It is a passive trust.

Senator Noh

Mr. Kole and Mr. Nelson, do you concur with that interpretation?

Pat Kole

Yes. In looking at page 3 I think that is slightly inaccurate. The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the re-allocation determination. Basically, that last paragraph of the Attorney General's testimony, should read the "Director" will be

impovered and not the "Governor" to release water.

Tom Nelson Yes, I think it is clear on page 3 the Senator referred to lines 16 through 19, the rights have to be acquired pursuant to state law and unless you change it, the Governor plays no part in that process.

Pat Kole On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.

Senator Crapo My question is primarily one of procedure here in committee. Surely everyone knows the answer but me because I am a freshman. But it seems to me we need to leave a very good track of legislative history on this legislation. As I study it it needs clarification in my mind and I am sure there will be alot more testimony and evidence presented. Is it already set up by some mechanism that the testimony which is recorded here today and the prepared testimony presented here today to become part of a prepared record that is maintained so that in the future there can be reference made to it to ensure the intent of the legislation is followed?

Senator Noh Senator Crapo, my understanding is we have no financial provisions or procedures in precedent to do that. I personally have in mind ensuring that there is more than one copy of the tapes and they are placed in the records of the Department of Water Resources and the Law Library to create as good a record as we can.

Senator Ringert There is a problem even with the tapes because that is merely a record of the committee proceedings and does not necessarily reflect the intent of the other 30 senators on the floor. It is a very nebulous job in Idaho to determine what is the intent.

Senator Crapo I am aware of that. As an attorney I do alot of searching through legislative history where its available to figure out what the laws mean. It definitely in my opinion would be beneficial to have as much preserved as possible. For example, the written statement by Attorney General Jones and perhaps encourage those who appear before the committee in the future to be sure that their understanding of the bill is at least represented in the legislative history as something considered and that we make an avenue available for that to be done.

Senator Budge I think the nature of the legislation itself justifies very accurate records to be available.

Senator Horsch In the House by majority vote, we spread upon the pages of the Journal a letter of intent. You can make that as long as you want.

Senator Noh That is correct.

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

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

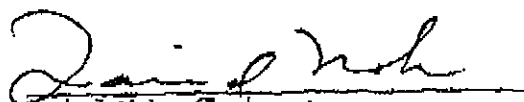
Senator Beitelspacher Is it all up to the Director whether I received compensation or not and is there anything in here that sets up criteria by which he shall determine how much I shall be compensated or is that promulgated by rule and regulation?

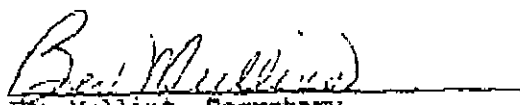
Tom Nelson The compensation issue would follow the subordination issue initially. If you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement that constitutional provision. So if he has no guidance, it is my guess that hen's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

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

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

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


Laird Noh, Chairman


Bev Mullins, Secretary

Prepared Testimony of Jim Jones,

Idaho Attorney General

on
Senate Bills 1006 and 1008

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

SB 1006

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

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

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

director of the department intends to exercise his legislative duties.

SB 1008

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

Proposed section 42-203 addresses two problems. First, the section provides a method for resolving conflicts over whether an existing hydropower water right is subordinated and, if so, on what basis the water may 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~~ ^{Directed By committee Sec. per Ad Koll, A' off} 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.

RECOMMENDED ADJUDICATION COST SHARING
For Snake River Above Lewiston

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

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

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

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

CAUTIONS:

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

fmstat/dgprop
1.16.85

NUMBERS OF IDAHO WATER RIGHTS

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

NOTES:

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

Division of Financial Management
8.29.84
fmstat/DGH2ORTS

MAXIMUM ENTITLEMENT OF WATER RIGHTS

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

Notes:

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

Division of Financial Management
1.17.85
fmstat/dgmax