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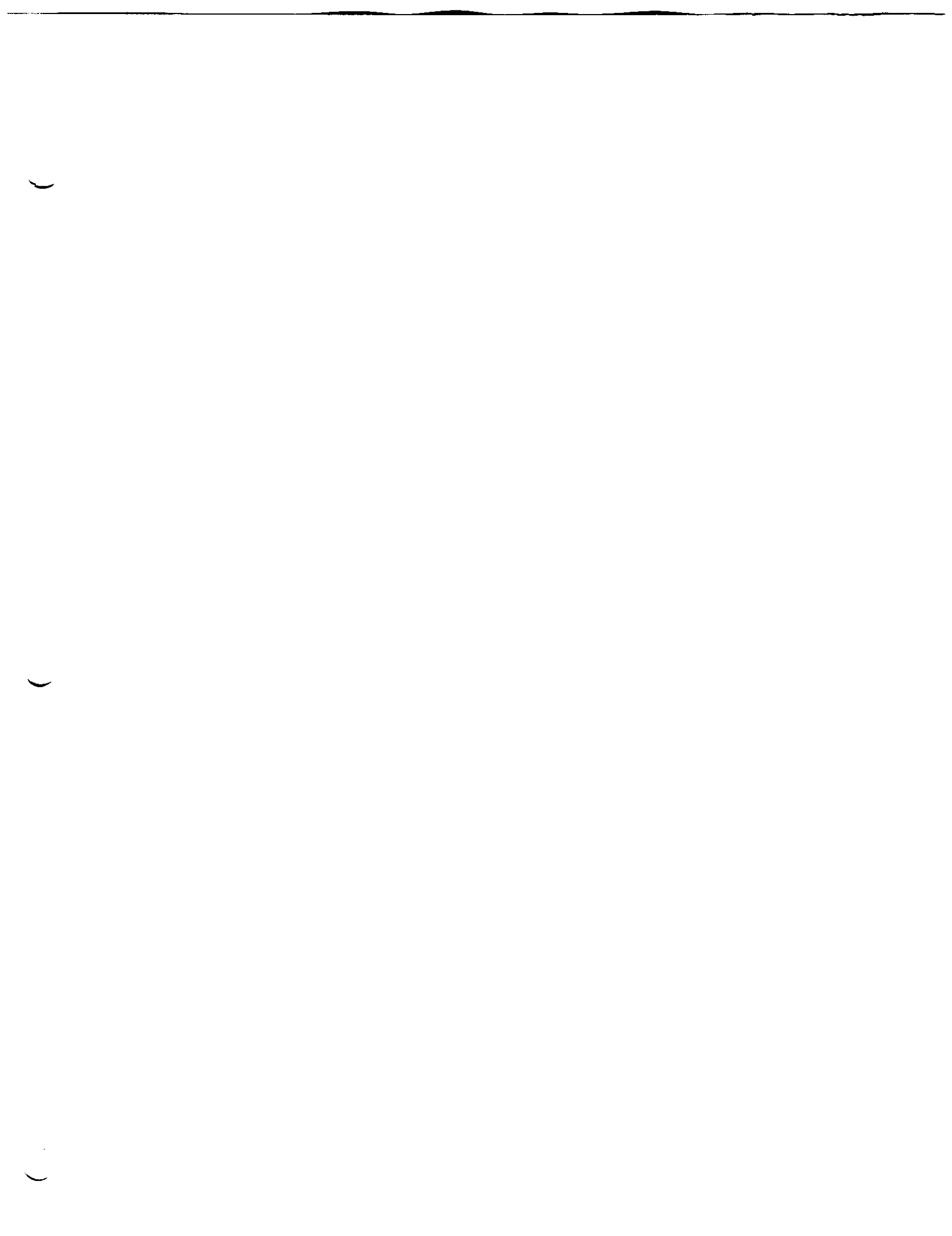
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ADMINISTERING WATER RIGHTS:
THE PERMIT SYSTEM

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WESTERN WATER LAW IN TRANSITION

A short course sponsored by the
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I. INTRODUCTION.

A. "Irrigable land without water is fit only for a grave". Elwood Mead, Wyoming Territorial Engineer. The permit system of water rights was developed first in Wyoming under the direction of Elwood Mead. The permit system has evolved since territorial days into a complex regulatory scheme that is utilized by almost every state west of the hundredth meridian. Each state has given its unique stamp to the permit system, but the elements of the system that have made it so attractive, centralized repository of information and administration and adjudication by non judicial officials, have ensured the system's continued vitality. This paper will use the Wyoming water right system as an example, and discuss the methods for obtaining, utilizing and transferring water rights. The paper then will look at changes that are occurring around the west and the impact that they are having on water rights administration.

B. References sources

1. General references on water law

- a. I, II W. Hutchins, Water Rights Laws in the Nineteen Western States (1971)
- b. S R. Clark (Ed.) Waters and Water Rights, Sec. 400-432 (1972)
- c. C. Kinney, Law of Irrigation and Water Rights (2nd Ed. 1912)
- d. S. Wiel, Water Rights in the Western States (3rd Ed. 1911)
- e. R. Dewsnap and D. Jensen, A Summary Digest of State Water Laws (1973)
- f. Robert G. Dunbar, Forging New Rights in Western Waters (1983) (This book contains a history of the development of western water law)

2. Articles on specific topics will be included in the body of the paper.

II. WYOMING'S ADMINISTRATIVE SYSTEM--STATE ENGINEER AND BOARD OF CONTROL.

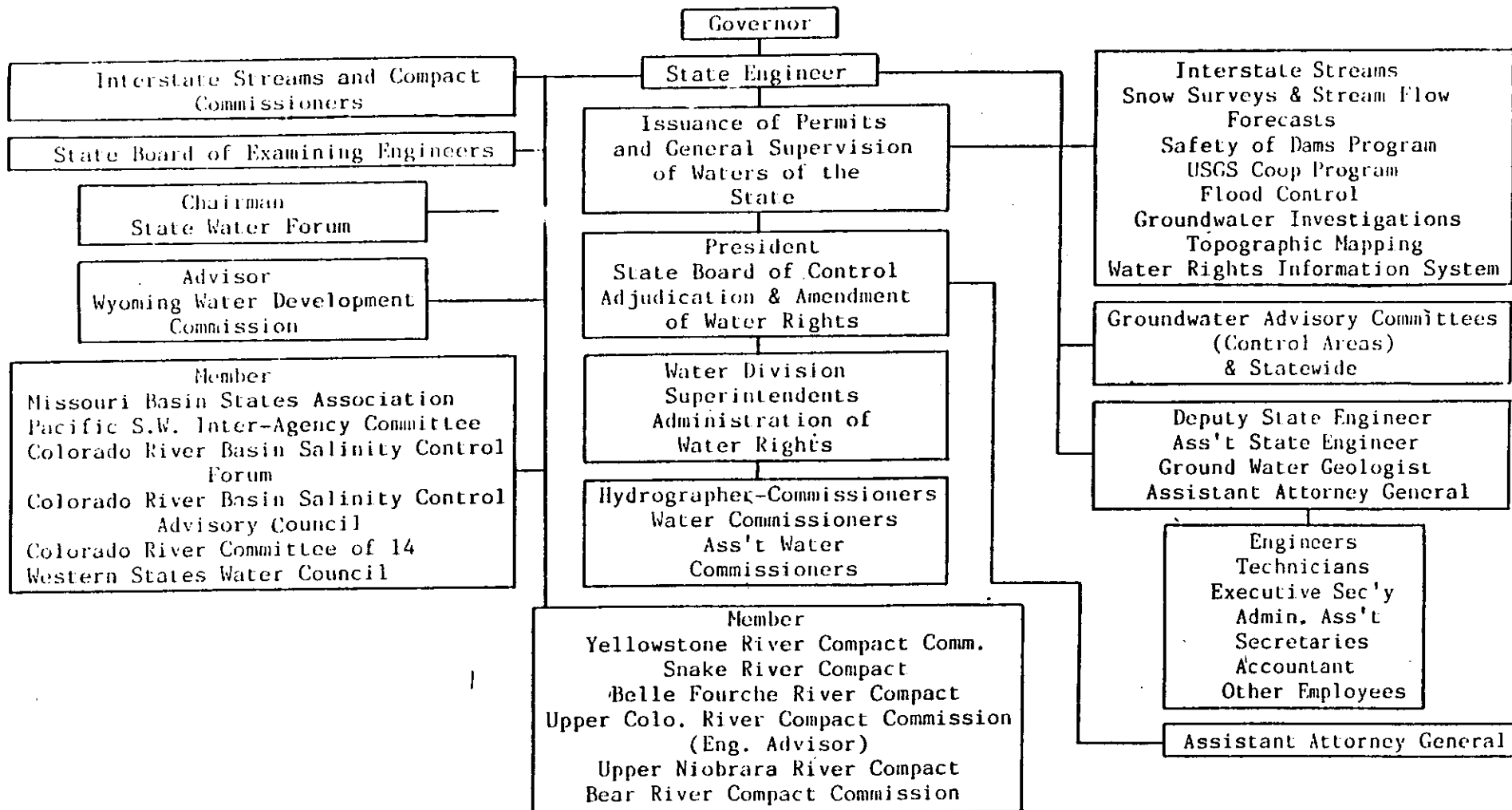
A. The Wyoming Constitution established the basic administrative framework for Wyoming's water law. Article 8, Section 1, Wyoming Constitution, declares that "the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state." Article 8, Section 3 declares that priority of appropriation for beneficial uses shall give the better right.

B. State Engineer, created by Wyoming Constitution Article 8, Section 5.

1. Appointed by Governor for six-year term(s), is currently required to be a registered (Licensed) professional engineer and land surveyor.

2. Primarily responsible for general supervision of waters of the state, issuance of permits, regulation and administration of water rights, interstate streams and compact commissions. (See organization chart for State Engineer's Office in appendix).

FUNCTIONAL CHART -- STATE ENGINEER'S OFFICE



3. Is also President of the Board of Control.

C. Board of Control, created by Wyoming Constitution Article 8, Section 2.

1. Composed of the State Engineer and the Superintendents of the four water divisions.

2. Primarily responsible for the adjudication of water rights and for the approval of any changes in adjudicated rights. (Including changes in point of diversion, lands to be irrigated, and use.) Also the Board has primary jurisdiction to hear abandonment actions.

III. HOW TO GET A WATER RIGHT - THE PERMIT SYSTEM.

A. A permit, when issued, is a right to the use of the State's water in accordance with the terms of the permit, i.e., specified use, place of use, rate of diversion, and priority date, etc.

B. A permit is required for both surface and groundwater, it provides necessary information to administer the water right. No water right is acquired unless a permit is issued, and construction of any diversion works or use of water without a permit is a misdemeanor. W.S. 41-4-501.

C. Surface Water rights

1. Application is made to State Engineer for a permit on specified forms.
2. Application is dated (priority date) at time of submittal although it may be returned for corrections if found defective.
3. The permit will provide specific time requirements for the commencement and completion of the project, and application of water to beneficial use. If specified notices are not timely filed with the State Engineer, the permit may expire. W.S. 41-4-506. Notices must be filed for the following events:

- a. date of commencement of construction,
 - b. date of completion of construction,
 - c. date of application of water to beneficial use
4. Prior to permit expiration, appropriate notices will be served to the applicant by certified mail. Extensions of time may be granted by the State Engineer for good cause upon applicant's request. Denius v. T.R. Tweleve, Inc., 589 P.2d 374 (Wyo. 1979).
5. The State Engineer's rejection of a permit may be appealed by the applicant to the Board of Control. W.S. 41-4-517. A decision of the Board of Control may be appealed to the District Court. Basis of the rejection of a permit may be:
- a. No unappropriated water
 - b. Proposed use conflicts with existing rights

- c. Proposed use threatens to prove detrimental to the public interest
W.S. 41-4-502

D. Groundwater Rights

1. Wyoming's permit system of appropriation extends to the use of groundwater under a separate set of groundwater laws which were first enacted in 1947. W.S. 41-3-901 et. seq.
2. Underground water currently subject to permit requirements includes virtually any water which may be extracted from the ground, including, by special example: hot water or geothermal steam and, by definition, springs yielding less than 25 gpm which are used for domestic or stock purposes. W.S. 41-3-901(a)(ii); 41-3-902.
3. A permit must be secured from State Engineer prior to commencing construction of a well or related activities.

4. If the proposed development is outside of a designated critical area (control area) and upon review of the application and supporting material regarding means of conveyance, design and construction of well, source aquifer, potential conflicts, and similar data, a permit will be issued as a matter of course, if the issuance is in the public's "water interest". W.S. 41-3-931.

5. A control area may be designated by the Board of Control for the following reasons:

a. Use of groundwater is approaching a use equal to the current recharge rate.

b. Groundwater levels declining or have declined excessively.

c. Conflicts between users are occurring or foreseeable.

d. Waste of water occurring or may occur.

- e. Other conditions exist or may arise that require protection of the public interest. W.S. 41-3-912.
6. The State Engineer has broad powers to take corrective actions in a control area. He may stop further development, limit withdrawals, institute well spacing. W.S. 41-3-915.
7. If the application is for water within the boundaries of a control area, the following procedures are followed:
- a. Application is submitted and reviewed by the State Engineer.
 - b. Application is considered by the Control Area Advisory Board.
 - c. Application is advertised in the local newspaper.
 - d. If no protests are filed, recommendation of Control Area Advisory Board is submitted to the State Engineer.

e. If a protest is filed, a public hearing before the Control Area Advisory Board and the State Engineer is held and recommendations made to State Engineer. State Engineer grants the permit (probably with limiting conditions) or denies.

f. Anyone feeling aggrieved by this decision has recourse to the Board of Control and ultimately the courts.

8. Permits may be issued with conditions the State Engineer finds to be in the public interest. Permits will also specify time requirements for the completion of the project.

9. Permits, once issued, can be cancelled if the appropriation is in violation of any permit conditions including the time requirements.

10. Changes to permits (prior to adjudication) may be requested by petition to the State Engineer.

11. Special items or conditions of a ground-water permit:

a. Granting a permit does not guarantee the right to have the water level or artesian pressure in the well maintained at any specific level. W.S. 41-3-933.

b. A flowing artesian well shall be constructed and equipped to allow the flow to be shut off when not in use.

c. A single schedule of priorities shall be developed for regulation in the case where several underground aquifers are interconnected so as to act as a single water source or where the underground waters and surface streams are interconnected in a manner such that they relate as a single source of supply. W.S. 41-3-916.

d. The groundwater statutes provide ordinary stock and domestic uses are

to have preference over other uses regardless of priority. Domestic use, for these purposes, has been defined as household use and the watering of lawns and gardens not to exceed 1 acre and the yield is less than 25 gpm. W.S. 41-3-907.

E. Adjudication of a Water Right

1. In the years immediately after statehood all streams were adjudicated to provide basic data on water use and establish priorities.
2. The Board of Control is solely responsible for adjudications.
3. Upon completion of a project the permittee requests the adjudication of water use and/or files a notice of beneficial use.
 - a. For surface water rights; proof of appropriation and beneficial use includes field verification of facilities, location of use and

similar information, usually completed by Water Division Superintendents or other field representatives.

- b. For groundwater rights, proofs are taken by Groundwater Staff of the State Engineer's Office.
4. All proofs are advertised in a newspaper in general circulation, and open for public review and objection.
5. Hearings will be held for contested proofs prior to submittal to the Board of Control.
6. Proof is forwarded to the Board of Control for action. Board of Control must be satisfied that the appropriation has been perfected in accordance with the permit and will then issue a Certificate of Appropriation.
7. These adjudicated rights are then listed in a tabulation of adjudicated water rights for the appropriate Water

Divisions, and recorded in the County Court House.

IV. LOSS OF THE WATER RIGHT - ABANDONMENT, FORFEITURE.

- A. Wyoming Law provides that an appropriator who fails to use water for the purposes for which it was appropriated for any five successive years is considered to have abandoned the right and shall forfeit all water rights and privileges thereto. W.S. 41-3-401.
- B. The Wyoming Supreme Court recently held that in order to have standing to petition for abandonment, the petitioner must demonstrate that his water right has been injured or abridged. Platte County Grazing Association v. State Board of Control, 675 P.2d 1279 (Wyo. 1984); Cremer v. State Board of Control, 675 P.2d 250 (Wyo. 1984). In response to these decisions the 1985 Wyoming Legislature amended W.S. 41-3-401 to grant standing to "any person who has a valid adjudicated water right or is a holder of a valid permit from the same source of supply which is equal to or junior in date of priority to the right for which abandonment is sought. See, Note, Standing

Under the Wyoming Forfeiture Statute, Platte County Grazing Association v. State Board of Control, 675 P.2d 1279 (Wyo. 1984), 16 Land and Water L. Rev. 485 (1984).

C. The statute vests exclusive jurisdiction in the Board of Control to hear abandonment actions.

D. Defenses.

1. Lack of intent to abandon is not a defense. Ward v. Yoder, 355 P.2d 371 (Wyo. 1960). The statute provides that abandonment can be declared where the appropriator "intentionally or unintentionally" fails to use the water. W.S. 41-3-401.

2. Diligence in attempting to put the water to beneficial use is not a defense Wheatland Irrigation District v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983). (Work to repair dam could not prevent declaration of abandonment where petition was filed prior to application of water to beneficial use).

3. The only affirmative defense is the unavailability of water which must be established as matter of defense by the person seeking to protect his right. Yentzer v. Hemmingway, 440 P.2d 7 (Wyo. 1968).

V. CHANGES IN WATER RIGHTS IN WYOMING.

A. Change in point of diversion.

1. W.S. 41-3-114 allows a petition for change in point of diversion to be filed with the State Engineer (unadjudicated rights) or the Board of Control (adjudicated rights).
2. The guiding principle is that the change of use may not injuriously affect other appropriators.
3. The statute was amended in the 1985 Legislature to clarify that the State Engineer may grant a change in point of diversion of a permit where water has not been applied to beneficial use. The State Engineer may only grant the change

if it is within the vicinity of the original point of diversion; does not alter the original project concept; and it is from the same source of supply described in the original permit. The change was made to clarify the State Engineer's powers following the decision in Green River Development Company v. FMC et al., 660 P.2d 339 (Wyo. 1983).

4. The 1985 Legislature also created a new statute, W.S. 41-3-329, that allows the State Engineer or the Board of Control to grant a change in point of diversion of a reservoir.

B. Change in place of use or manner of use.

1. In the early days of statehood, the right to make a change in use or change in place of use was considered part of the vested property right of an appropriator, provided there was no injury to other water users. Johnson v. Little Horse Creek Irrigation Company, 79 P. 22 (Wyo. 1904).

2. In 1909 the Legislature enacted a "no change" statute that appeared to prohibit a change in use. See, Trelease and Lee, Priority and Progress - Case Studies in the Transfer of Water Rights, 1 Land and Water L. Rev. 1 (1966).

3. In 1973 the Legislature enacted W.S. 41-3-104 which effectively established the right to make a change of use provided certain procedural and substantive requirements were met. See, Comment, Changing Manner and Place of Use of Water Rights in Wyoming, 10 Land and Water L. Rev. 455 (1975).

4. Procedure under W.S. 41-3-104 to change use or place of use.
 - a. The owner of a water right files a petition with the Board of Control, whether or not the water right is adjudicated.

 - b. The Board conducts a public hearing and may grant the change in use provided that the quantity of water

transferred by the granting of the petition shall not exceed the amount of water historically diverted under existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

c. The Board of Control is also entitled to consider such factors as the economic loss to the community and the state if the use from which the right is transferred is discontinued; the extent to which such economic loss will be offset by the new use; whether other sources of water are available to the new use.

5. The Wyoming Supreme Court reviewed changes of use granted by the Board of Control in Basin Electric Cooperative v. State Board of Control, 587 P.2d 557 (Wyo. 1978), and In the Matter of the

Petition for Change of Use and for Change of Place of Use for the Ekxtrom No. 1 Well, 649 P.2d 657 (Wyo. 1982). The Basin Electric decision is critically analyzed in G. Gould, Conversion of Agricultural Water Rights to Industrial Use, 27 Rocky Mt. Min. L. Inst. 1719 (1982).

6. The Board of Control has within the last five years considered two petitions proposing significant changes of use along the North Platte River. In both cases the petitioner sought to transfer water from irrigated farm land in the upstream portions of the main stem of the river, to municipal and industrial use at Casper and the Dave Johnson Power Plant near Glenrock. After extensive hearings in both cases, the Board of Control denied the petitions. The Board was concerned in both cases about the absence of long term data on historic consumptive use, and the lack of ability to calculate a transportation loss that would adequately protect the downstream water users, and the difficulty with measuring

water through a 225 mile river system involving five major reservoirs. Neither decision was appealed to the Wyoming Supreme Court. In the Matter of the Petition of the County of Natrona, Town of Mills, et al., Docket No. 1-80-4-4; In the Matter of the Petition of Pacific Power & Light, Docket No. 1-80-4-5.

DEVELOPMENTS IN THE WESTERN STATES

NOTE: Rather than examine developments on a state by state basis the author has tried to group developments into some common topics. The outline is abbreviated in those areas that will be covered in depth by other speakers.

VI. SPECULATIVE WATER FILINGS - WHAT TO DO WHEN THE ENERGY BOOM GOES BUST?

A. Problem.

1. The Boom - In the 1960s and early 1970s energy companies embarked on ambitious plans for water development in Wyoming and Montana. During that time period fifty to seventy-five filings for major water projects, either substantial direct diversions or large storage reservoirs were made with the Wyoming State Engineer. These filings were in anticipation of development of coal gasification projects, thermal power plants, oil shale projects and coal slurry pipelines.

2. The Bust - Although Wyoming's coal production increased from 7 million tons in 1974 to 112 million tons in 1984, the decline in oil prices, the failure of coal slurry pipelines, the demise of the oil shale industry, and the drop in demand for electricity caused almost all of the major water projects to be shelved. However, the energy companies have been generally reluctant to abandon the filings that they have made and the priority dates that these filings represent.

B. Example - Proposed reservoir development in the Powder River Basin.

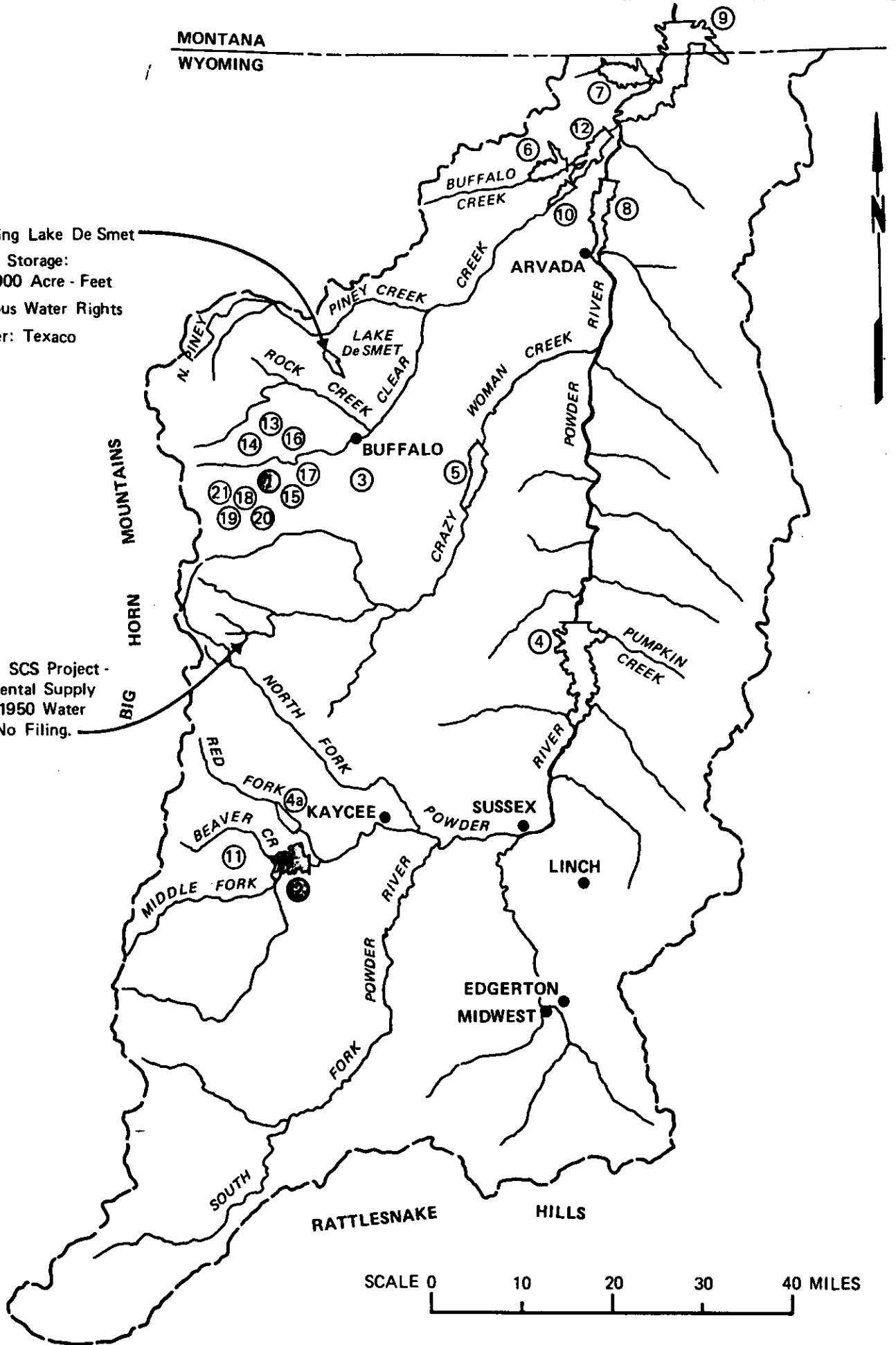
1. The Powder River drainage is adjacent to the Powder River coal fields. There are 21 filings for reservoirs in the Powder River drainage. (See attached map.) Nineteen of these filings (including enlargements) were filed after 1970. These filings propose storage and use of water that is four to five times in excess of Wyoming's compact allocation of the Yellowstone River Compact.

C. Wyoming's response - Rather than undertake a whole sale cancellation of these filings, the State Engineer has enacted rules that will allow him to begin a systematic process of evaluating these applications. The State Engineer will then determine which applications will receive a permit and which will be cancelled. The State Engineer proposed legislation to the 1985 Legislature which would have established fixed time periods (10 years) for development of a permit. Under present law the State Engineer is allowed to

MONTANA
WYOMING

Existing Lake De Smet
Total Storage:
235,000 Acre - Feet
Various Water Rights
Owner: Texaco

Potential SCS Project -
Supplemental Supply
to Pre - 1950 Water
Rights. No Filing.



WATER STORAGE RIGHTS

POTENTIAL RESERVOIR	PERMIT OR FILING NUMBER	APPROPRIATOR	TOTAL STORAGE (Acre-ft.)	WATER SOURCE	PRIORITY DATE (S)
● LITTLE SOUR DOUGH	7623 R	TOWN OF BUFFALO	1,600	CLEAR CREEK DRAINAGE BASIN	10/18/83
● MIDDLE FORK POWDER RIVER	7548 R 7549 R	POWDER RIVER RESERVOIR CORP.	41,100 8,500 <u>49,600</u>	MIDDLE FORK POWDER RIVER	3/07/40 12/29/70
POST - YELLOWSTONE RIVER COMPACT					
③ ENLARGEMENT OF NEGRO CREEK	7621 R	TOWN OF BUFFALO	13,900	CLEAR CREEK DRAINAGE BASIN	9/19/56
④ PUMPKIN	18 4/334 20 5/330	UNIVERSAL DEVELOPMENT CORP.	207,000 72,000 <u>279,000</u>	POWDER RIVER	2/13/62 7/24/70
④a RED FORK	TRANSFER	EXXON	30,900	RED FORK POWDER RIVER	—
⑤ CRAZY WOMAN RESERVOIR	7315 R	SUNEDCO COAL COMPANY	64,300	CRAZY WOMAN CREEK	7/05/67
⑥ TEX ELLIS	21 3/138	CADIZ CORP.	46,500	BUFFALO CREEK & CLEAR CREEK	8/21/72
⑦ FENCE CREEK RESERVOIR	21 2/281	UTAH INTERNATIONAL INC.	106,700	FENCE CREEK & POWDER RIVER	11/20/73
⑧ GIBBS	21 2/340 21 2/390	MR. & MRS R.M. GIBBS	44,800 9,500 <u>54,300</u>	POWDER RIVER	6/07/74 10/15/74
⑨ MOORHEAD	21 4/384	INTAKE WATER CO.	564,400	POWDER RIVER	9/27/74
⑩ B.C.L. RESERVOIR	22 3/154	CADIZ CORP.	19,100	CLEAR CREEK	3/16/76
⑪ MORGAREIDGE No. 7	7968 R	R.G. MORGAREIDGE	1,200	MIDDLE FORK POWDER R. BASIN	5/12/78
⑫ LOWER CLEAR CREEK	24 2/42	CADIZ CORP.	231,200	CLEAR CREEK	3/24/81
⑬ SOUTH ROCK CREEK	24 4/116	LOVE LAND & CATTLE COMPANY	13,300	CLEAR CREEK DRAINAGE BASIN	8/12/81
⑭ TRIANGLE PARK	24 3/116	LOVE LAND & CATTLE COMPANY	3,000	CLEAR CREEK DRAINAGE BASIN	8/12/81
⑮ LITTLE SOUR DOUGH	24 2/206	CADIZ CORP.	1,600	CLEAR CR. BASIN	2/18/82
⑯ CAMP COMFORT	24 5/243	CADIZ CORP.	11,600	CLEAR CR. BASIN	5/10/82
⑰ CANYON	24 4/332	TOWN OF BUFFALO	5,000	CLEAR CR. BASIN	12/8/82
⑱ SOUTH CLEAR CREEK	24 5/332	TOWN OF BUFFALO	5,000	CLEAR CR. BASIN	12/8/82
⑲ LYNX PARK	24 6/332	TOWN OF BUFFALO	10,700	CLEAR CR. BASIN	12/8/82
⑳ TIE TACK	24 1/333	TOWN OF BUFFALO	10,000	CLEAR CR. BASIN	12/8/82
㉑ SOURDOUGH CREEK	24 2/333	TOWN OF BUFFALO	4,500	CLEAR CR. BASIN	12/8/82

WYOMING WATER DEVELOPMENT COMMISSION
POWDER RIVER LEVEL I RECONNAISSANCE STUDY

POTENTIAL RESERVOIRS

extend indefinitely development under a permit. The Legislation failed to pass.

D. The State of Montana*, because of its enormous water supply in the Yellowstone River drainage has been faced with similar problems. A great many filings were made in the 1970s for coal gasification projects and coal slurry pipelines.

1. Montana has attacked the problem of speculative water filings by recently enacting legislation which requires an appropriator to show that he has a bonafide intent to appropriate water for beneficial use. See H.B. 396 (1985) in the Appendix.

2. In order to examine speculative intent the Montana Department of Natural Resources and Conservation has sent interrogatories to the applicants requesting detailed information on each project.

*The Author is indebted to Donald MacIntyre, Chief Legal Counsel, Montana Department of Natural Resources and Conservation for the information on Montanas legislation.

VII. INTERSTATE TRANSFERS AND WATER MARKETING.

A. Interstate transfers of water will be discussed in detail by Professor Tarlock during the Tuesday morning session. See generally, D. Grant, The Future of Interstate Allocations of Water, 30 Rocky Mt. Min. L. Inst. 977 (1983).

B. A number of states have revised their laws dealing with interstate transfers in response to the Supreme Court decision in Sporhase v. Nebraska, 459 U.S. 941 (1982).

1. Kansas - 1984 Kan. Sess. Laws Chapter 380, permitting interstate transportation of surface and groundwaters, requiring compliance with elaborate hearing procedures if more than 1,000 acre feet is to be moved more than 10 miles from the point of diversion.

2. Nebraska - Neb. Rev. Stat. Section 46-613.01 as amended by L.B. 1060 (1984) establishing factors that the Department of Water Resources must consider prior to approving groundwater exports.

3. Wyoming - W.S. 41-3-115 was amended in 1983 to provide factors that the Legislature must consider in approving an out of state diversion over 1,000 feet per year. See Comment, Sporhase v. Nebraska ex. rel. Douglas; State Control of Water Under the Constraints of the Commerce Clause, 18 Land and Water L. Rev. 513 (1983).

4. Colorado - C.R.S. 37-81-101.

5. New Mexico - The New Mexico legislature has enacted changes to its water rights transfer statutes as a result of the decisions in El Paso v. New Mexico.

C. The State of Montana recently enacted significant changes in its water policy to maximize Montana's interest in the interstate allocation of water and provide for a water leasing program. H.B. 680 (1985).

1. Only the Department of Natural Resources Conservation (DNRC) is allowed to appropriate water for transport outside of the major river basins in the state.

In addition, only the Department may appropriate water in excess of 4,000 acre feet per year or 5.5 cfs. This water then may be leased to any person under provisions of the act. The term of the lease may not exceed 50 years and the Department may not lease more than a total of 50,000 acre feet.

2. H.B. 680 establishes extensive criteria that must be considered prior to approving any out of state transfer of water.
3. The Act amends Section 85-2-316, MCA dealing with the reservation of water, listing the river basins where the Department may make water reservations. The reservation of water is limited to the state or political subdivision or the United States. Water reserved for withdrawal and transport for use outside the state must meet strictly defined public interest criteria.
4. The Act repeals Section 85-2-104, MCA which was the ban on the use of water for coal slurry.

VIII. DEALING WITH DIMINISHING WATER SUPPLIES AND INCREASED COMPETITION.

A. Abandonment, forfeiture, cancellation.

1. In only a few western states does abandonment and forfeiture appear to be a frequently used remedy. Wyoming, Colorado and Idaho are the states where it is most commonly used. See, J. Novak, Abandonment and Forfeiture: How to Hold a Water Right as Development Takes Place, 28 Rocky Mt. Min. L. Rev. 1249 (1982); 5 R. Clark (Ed.), Waters and Water Rights, Sec. 413 (1972).
2. Colorado--Beaver Park Water, Inc. v. City of Victor, 649 P.2d 300 (Colo. 1982). (Colo. law requires showing of intent to abandon. Here intent not proven despite 20 years of non-uee).
3. Idaho--Crowe v. Carlson, 690 P.2d 916 (Id. 1984) (Idaho has statutory forfeiture after 5 years of non-use and common law abandonment, requiring a showing of intent to abandon.); Jenkins

v. State, Department of Resources, 103 Idaho 384, 647 P.2d 1256 (1982) (Abandonment of a water right is properly considered by the Department in a proceeding that changes the point of diversion.)

4. Montana--Seventy Nine Ranch, Inc v. Pitsch, 666 P.2d 215 (1983) (Forty years of non use with strong evidence of intent to abandon water right which raised rebuttal of presumption of abandonment.)

5. Abandonment of riparian rights--The Washington Supreme Court recently decided two cases dealing with forfeiture of unused riparian rights. The Court held that 1932 was the cutoff date for the exercise of unused riparian rights and that forfeiture of riparian rights for nonuse did not effect an unconstitutional taking. In the Matter of Dead Man Creek Drainage Basin, 694 P.2d 1071 (Wash. 1985); In the Matter of Chumstick Creek Drainage Basin, 694 P.2d 1065 (Wash. 1985).

6. Nebraska--Appropriations may be canceled for three consecutive years of nonuse but the statute provides for exceptions including adequate precipitation, insufficient stream flow, participation in federal agricultural control programs. Neb. Rev. Stat. Sections 46-226.01-226.04.

B. Prescriptive rights.

1. A number of states allow water rights to be acquired by prescription, provided the legal requirements are satisfied.
2. Montana--Grimsley v. Estate of Spencer 670 P.2d 85 (Mont. 1983).
3. Idaho--Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984).
4. Wyoming--It has long been considered that prescriptive rights to water could not be acquired in Wyoming. Campbell v. Wyoming Development co., 55 Wyo. 347, 100 P.2d 124 (1940). The Wyoming Supreme Court has under consideration a case that may

clarify the law on this issue. Lewis v. State Board of Control.

C. Change of use or place of use.

1. See generally 5 R. Clark (Ed) Water and Water Rights Section 412 (1972). Change of use and places of use are allowed in all states, with the major limitation being that the rights of other appropriators, both junior and senior are not injured. Most states limit the change to the amount of water historically diverted and historically consumptively used. See G. Gould, Conversion of Agricultural Water Rights to Industrial Use, 27 Rocky Mt. Min. L. Inst. 1719 (1982).
2. The procedure appears to be most commonly used in Idaho, Colorado and Wyoming. (For Wyoming law see page 17).
3. Washington--Schuh v. State Department of Ecology, 667 P.2d 64 (Wash. 1983) (Transfer denied where it would enlarge the quantity of the groundwater used and

the appropriation would prejudice junior appropriators.)

4. Utah--Crafts v. Hansen, 667 P.2d 1068 (Utah 1983). (Summary judgement not appropriate where court faced with opposing opinions on whether change would impair vested rights).
5. Nebraska allows the transfer of water from one tract to another but the purpose of the use cannot change and the water must be used in the same river basin. N.R.S. Section 46-294.

D. Waste and conservation.

1. See generally G. Pring and K. Tomb, License to Waste: Legal Barriers to Conservation of Efficient Use of Water in the West, 25 Rocky Mtn. Min. L. Inst. 25-1 (1979). The general consensus is that the appropriation system has historically provided few incentives for water users to conserve water, but with increasing demands upon the resource, greater attention is being paid in all states to

methods that can increase the efficiency of water use and promote conservation.

2. The State of California has been in the forefront of encouraging conservation.

a. In 1979 California enacted a statute that provides that an appropriator does not forfeit water unused because of water conservation efforts. (Cal Water Code Section 1011 (1980)).

b. In 1983 the California Legislature passed a law stating that conservation and efficient use of water shall be actively pursued. The law requires the urban water supplier to adopt an urban water management plan which must evaluate such techniques as waste water reclamation; exchanges of water and transfers; incentives including retrofit programs; and changes of pricing, rate structure and regulation. (Chapter 1009, Statutes from 1983).

c. The State Water Resources Control Board recently issued a decision requiring the Imperial Irrigation District in Southern California to develop a water conservation plan and to conserve water being wasted within the district. The Board concluded that the failure of the district to implement water conservation measures is unreasonable and constitutes a misuse of water under the California Constitution and statutory provisions. See, Vol. 17 No.2, Water Law Newsletter 7 (1984).

3. Innovative water saving techniques are being evaluated in other states. For example, in Wyoming a municipality (with financial assistance from the State) is paying for lining of an irrigation district's ditches and laterals. The municipality will then be entitled to appropriate the 7,000 acre feet per year that will be saved annually. Casper-Alcova Irr. Dist. Rehab. Project. H.B. 335 (1985).

E. Water quality and the appropriations system.

1. The interrelationship between state and federal water quality laws and the appropriation system is an immense topic that will be addressed by other speakers. Many of the major battles in the coming decades will be fought over the impact of water quality laws on rights to appropriate and consumptively use water. See generally, C. Woodruff & D. Harrison, Accommodations of the Appropriations Doctrine and Federal Goals Under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899, 22 Rocky Mt. Min. L. Inst. 941 (1976).

a. California has been recently struggling with the water quality issues as they relate to use of water in the Sacramento-San Joaquin Delta. A decision last year in the San Francisco Superior Court addressed some of the major issues. See, Vol. 17, No. 2, Water Law Newsletter 5 (1984).

b. An interesting example of the interplay between water quality issues and interstate compacts is developing in Wyoming. The State of Montana has expressed concerns about Wyoming's plans for development in the Powder River, because of the potential for diminished water quality in Montana. Montana fears that development of high quality water in Wyoming may diminish the already marginal quality of water that is being used by Montana irrigators. Montana is urging Wyoming to develop a basinwide management plan that takes into account the water quality effects of development in Wyoming. Wyoming has responded that the water that she will be developing is well within her compact allocations and that the Yellowstone River Compact does not address questions of water quality. Both state legislatures recently enacted resolutions calling for committees from the states to meet to discuss this issue and

others. Wyo. Enrolled Joint Res.
No. 4 (1985).

IX. PUBLIC RIGHTS TO USE WATER FOR RECREATIONAL
PURPOSES AND THE PUBLIC TRUST DOCTRINE.

A. Public rights to use water for recreational
purposes.

1. Many states have recognized a right of
the public to use streams and lakes for
recreational purposes. These cases have
tried to balance the rights of the
private landowners with the rights of the
public to use waterways for recreation.

a. Day v. Armstrong, 362 P.2d 137 (Wyo.
1961).

b. South Idaho F. & G Association v.
Picabo Livestock Company, 96 Idaho
360, 528 P.2d 1295 (1975).

c. People v. Mack, 97 Cal. Rptr. 448,
Cal. App. 3d 1040 (1971).

d. J.J.N.P. Company v. Utah Division of Wildlife Resources, 655 P.2d 1133 (Utah 1982). (Public has recreational rights in waters of lake even if surrounded by private property).

B. The public trust doctrine

1. The public trust doctrine has its origins in land law relating to protection of the public interest in commerce, navigation and fisheries. See Dunning, Public Trust Doctrine and Western Water Law: Discord or Harmony 30 Rocky Mountain Mineral Law? 30 Rocky Mt. Min. Law Inst. 17-1 (1984); California v. Superior Court, 29 Cal. 3rd. 210, 625 P.2d 39, 172 Cal. Rptr. 696 (1981); California v. Superior Court, 29 Cal. 3rd. 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981). (Public trust applied to submerged land).
2. The public trust doctrine was extended to the administration of water rights in the landmark opinion in National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3rd. 419, 658 P.2d. 701,

189 Cal. Rptr. 346, cert. denied, 104 S. Ct. 13 (1983). (Mono Lake case).

- a. The Mono Lake decision has been applied in California to broaden the liability of landowners to recreational users of canal navigable waters. See Pacific Gas and Electric Company v. Superior Court, 145 Cal. App. 3rd. 253 (1983).
3. The Idaho Supreme Court has applied the Mono Lake reasoning to hold that the public trust doctrine applies to the state granting a lease to a yacht club for construction and use of docking facilities on a navigable lake. Kootenai Environmental Alliance, Inc v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Id. 1983).
4. The Montana Supreme Court has also applied the public trust doctrine in two recent cases. The Court has held that any surface waters that are capable of recreational use may be so used by the

public without regard to stream bed ownership or navigability for nonrecreational purposes. Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984); Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984).

- a. The Montana Legislature in the 1985 session passed House Bill 265, which attempts to clarify the law relating to recreational use of state waters. The law establishes a basic right to use all surface waters that are capable of recreational use by the public without regard to the ownership of land underlying the waters. The law sets forth some specific activities such as big game hunting, overnight camping, other activities that are not primarily water related pleasure activities that the public does not have a right to make recreational use of without the permission of the landowner. The law establishes that the public has a right to portage

around barriers but preserves the right of the landowner to create barriers across streams for purposes of land or water management. The law sets up a procedure for establishing portage routes, and it contains restrictions on the liability of the landowner.

X. HYDROPOWER RIGHTS AND SUBORDINATION TO UPSTREAM DEVELOPMENT.

A. Idaho's Swan Falls case.

1. In Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983) the Idaho Supreme Court held that the water rights for the Swan Falls power plant were not subordinated to future upstream depletion on the Snake River and tributaries. See, L. Wolfe, Hydropower: FERC Licensing and Emerging State-Federal Water Rights Conflicts, 29 Rocky Mt. Min. L. Inst. 851, 875 (1983). The decision has created quite a controversy in Idaho and resulted in an agreement between the Governor and Idaho Power Company on

October 25, 1984. The agreement defined portions of the power companies' water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and defined rights in excess of the minimum stream flow as being held in trust. The agreement was ratified by the legislature during the 1985 session. H.B. 186 (1985).

2. The 1985 Idaho Legislature also enacted Senate Bill 1008 which allows permits to be issued for water which is or may be available because of a subordination of a water right for power. The bill requires the director to make a public interest determination which includes examination of such factors as:

- a. Direct and indirect effects on the state and local economy;
- b. Economic impact on electrical rates;
- c. Promotion of the family farming traditions;

d. Promotion of full economic and multiple use development of water resources in Idaho. (See S.B. 1008 in appendix).

1 **STATEMENT OF INTENT**2 **HOUSE BILL 396**3 **House Natural Resources Committee**

4

5 A statement of intent is desirable for this bill
6 because it authorizes the board of natural resources and
7 conservation to make rules on the new material enacted in
8 the bill. The rules would implement section 1 of the bill,
9 which establishes criteria for the department of natural
10 resources and conservation to reject an application for a
11 beneficial water use permit that is not in good faith or
12 does not show a bona fide intent to appropriate water.

13 The intent is to adopt those rules necessary to
14 implement the criteria listed in section 1. Because the
15 criteria are specific, the rulemaking authority would be
16 limited to adopting rules:

17 (1) defining a proposed place of use;

18 (2) prescribing the contents of a detailed project
19 plan and of a general project plan;

20 (3) defining reasonable time lines, not to exceed 10
21 years, for completion of projects; and

22 (4) prescribing the detailed information to implement
23 criteria relative to applications for water use above that
24 amount of water which will be used solely by the applicant.

1 HOUSE BILL NO. 396

2 INTRODUCED BY SPAETH, RAMIREZ, HOLLIDAY, HANSON, BOYLAN

3 BY REQUEST OF THE DEPARTMENT

4 OF NATURAL RESOURCES AND CONSERVATION

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE
7 DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S AUTHORITY
8 TO DETERMINE THAT AN APPLICATION FOR A BENEFICIAL WATER USE
9 PERMIT IS NOT IN GOOD FAITH OR DOES NOT SHOW A BONA FIDE
10 INTENT TO APPROPRIATE WATER FOR A BENEFICIAL USE; AMENDING
11 SECTION 85-2-310, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE
12 DATE AND AN APPLICABILITY DATE."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 Section 1. Section 85-2-310, MCA, is amended to read:

16 "85-2-310. Action on application. (1) The department
17 shall grant, deny, or condition an application for a permit
18 in whole or in part within 120 days after the last date of
19 publication of the notice of application if no objections
20 have been received and within 180 days if a hearing is held
21 or objections have been received. However, in either case
22 the time may be extended upon agreement of the applicant,
23 or, in those cases where an environmental impact statement
24 must be prepared or in other extraordinary cases, not more
25 than 60 days upon order of the department. If the

1 department orders the time extended, it shall serve a notice
2 of the extension and the reasons therefor by certified mail
3 upon the applicant and each person who has filed an
4 objection as provided by 85-2-308.

5 (2) However, an application may not be approved in a
6 modified form or upon terms, conditions, or limitations
7 specified by the department or denied, unless the applicant
8 is first granted an opportunity to be heard. If no objection
9 is filed against the application but the department is of
10 the opinion that the application should be approved in a
11 modified form or upon terms, conditions, or limitations
12 specified by it or that the application should be denied,
13 the department shall prepare a statement of its opinion and
14 the reasons therefor. The department shall serve a statement
15 of its opinion by certified mail upon the applicant,
16 together with a notice that the applicant may obtain a
17 hearing by filing a request therefor within 30 days after
18 the notice is mailed. The notice shall further state that
19 the application will be modified in a specified manner or
20 denied, unless a hearing is requested.

21 (3) The department may cease action upon an
22 application for a permit and return it to the applicant when
23 it finds that the application is not in good faith or does
24 not show a bona fide intent to appropriate water for a
25 beneficial use. An application returned for any of these

1 reasons shall be accompanied by a statement of the reasons
 2 for which it was returned, and there shall be no right to a
 3 priority date based upon the filing of the application.
 4 Returning an application pursuant to this subsection shall
 5 be deemed a final decision of the department.

6 (4) For all applications filed after July 1, 1973, the
 7 department shall find that an application is not in good
 8 faith or does not show a bona fide intent to appropriate
 9 water for a beneficial use if:

10 (a) an application is not corrected and completed as
 11 required by 85-2-302;

12 (b) the appropriate filing fee is not paid;

13 (c) the application does not document:

14 (i) a beneficial use of water;

15 (ii) the proposed place of use of all water applied
 16 for;

17 (iii) for an appropriation of 4,000 acre-feet a year or
 18 more and 5.5 cubic feet per second or more, a detailed
 19 project plan including, but not limited to, a reasonable
 20 time line for the completion of the project and the actual
 21 application of the water to a beneficial use, which may not
 22 exceed 10 years from the date of application, detailing when
 23 and how much water will be put to a beneficial use;

24 (iv) for appropriations not covered in subsection
 25 (4)(c)(iii), a general project plan stating when and how

1 much water will be put to a beneficial use; and

2 (v) if the water applied for is to be appropriated
 3 above that which will be used solely by the applicant or if
 4 it will be marketed by the applicant to other users,
 5 information detailing:

6 (A) each person who will use the water and the amount
 7 of water each person will use;

8 (B) the proposed place of use of all water by each
 9 person;

10 (C) the nature of the relationship between the
 11 applicant and each person using the water; and

12 (D) each firm contractual agreement for the specified
 13 amount of water for each person using the water; or

14 (d) the appropriate environmental impact statement
 15 fee, if any, is not paid as required by 85-2-124."

16 NEW SECTION. Section 2. Extension of authority. Any
 17 existing authority of the department of natural resources
 18 and conservation to make rules on the subject of the
 19 provisions of this act is extended to the provisions of this
 20 act.

21 NEW SECTION. Section 3. Applicability. This act
 22 applies retroactively, within the meaning of 1-2-109, to all
 23 applications filed after July 1, 1973.

24 NEW SECTION. Section 4. Severability. If a part of
 25 this act is invalid, all valid parts that are severable from

1 the invalid part remain in effect. If a part of this act is
2 invalid in one or more of its applications, the part remains
3 in effect in all valid applications that are severable from
4 the invalid applications.

5 NEW SECTION. Section 5. Effective date. This act is
6 effective on passage and approval.

-End-

)

)

)

1 STATEMENT OF INTENT

2 HOUSE BILL 265

3 House Judiciary Committee

4
5 A statement of intent is required for House Bill 265
6 because section 2(5) directs the fish and game commission to
7 adopt rules governing recreational use of surface waters.

8 In its implementation of this bill, the long-range goal
9 of the commission must be to preserve, protect, and enhance
10 the surface waters of this state while facilitating the
11 public's exercise of its recreational rights on surface
12 waters. The commission shall strive to permit broad exercise
13 of public rights, while protecting the water resource and
14 its ecosystem. In adopting the procedural rules required by
15 section 2, the commission shall emphasize that in close
16 cases the decision must be to protect the environment by
17 restricting or continuing to restrict recreational use,
18 since it is easier to prevent environmental degradation than
19 it is to repair it.

20 In developing the rules implementing House Bill 265,
21 the commission shall make every effort to make the process
22 uncomplicated and clear. As provided in subsection (5)(b),
23 the commission must issue written findings and an order
24 whenever a request is made for restrictions on recreational
25 use of a surface water or for the lifting of previously

1 imposed limitations on recreational use of a surface water.
2 The commission may adopt rules providing for summary
3 dismissal of requests when a substantially similar request
4 has been received and acted upon within a brief time prior
5 to the second or subsequent requests if, during the time
6 period since the first request, it is unlikely that there
7 has been a change in the situation upon which the commission
8 based its earlier decision.

9 In developing the rules establishing criteria for
10 determination upon a request made under subsections (5)(a)
11 or (5)(b), the commission shall require that each of the
12 following factors that is relevant to the decision must be
13 considered in the determination:

- 14 (a) whether public use is damaging the banks and land
15 adjacent to the water body;
- 16 (b) whether public use is damaging the property of
17 landowners underlying or adjacent to the water body;
- 18 (c) whether public use is adversely affecting wildlife
19 or birds;
- 20 (d) whether public use is disrupting or altering
21 natural areas or biotic communities;
- 22 (e) whether public use is causing degradation of the
23 water quality of the water body; and
- 24 (f) any other factors relevant to the preservation of
25 the water body in its natural state.



1 In making its decision after a request has been made
2 for restrictions of recreational use, the commission may
3 impose any reasonable limitation on the recreational use of
4 surface waters including complete prohibition of a
5 particular type of recreation, prohibition of a particular
6 type of recreation in certain specified areas, such as
7 within a specified distance of a residence or other
8 structure, or in an appropriate case, prohibition of all
9 recreation. THE COMMISSION SHALL PROHIBIT ALL RECREATION ON
10 PRIVATE IMPOUNDMENTS THAT HAVE BEEN LICENSED FOR A PRIVATE
11 USE.

12 THE COMMISSION SHALL PROTECT THE SAFETY OF THE PUBLIC
13 BY PROHIBITING HUNTING WITHIN A SPECIFIED DISTANCE OF
14 OCCUPIED DWELLINGS.

HOUSE BILL NO. 265
INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections 2 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, or-a-natural-object IN-OR-OVER-A-WATER-BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water or-a-natural-object within-the-ordinary-high-water-mark-of-a-stream.

(2) "Class I waters" means surface waters, OTHER THAN

LAKES, that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

~~(c) flow through public lands, while within the boundaries of such lands;~~

~~(d)~~(C) are or have been capable of supporting THE FOLLOWING commercial activity ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

~~(e)~~(D) are or have been capable of supporting commercial activity within the meaning of the federal navigability test FOR STATE STREAMBED OWNERSHIP.

(3) "Class II waters" means all surface waters that are not class I waters, EXCEPT LAKES.

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(4)~~(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.



1 ~~5~~6 "Diverted away from a natural water body" means
2 a diversion of surface water through a manmade water
3 conveyance system, including but not limited to:
4 (a) an irrigation or drainage canal or ditch;
5 (b) an industrial, municipal, or domestic water
6 system;
7 (c) a flood control channel; or
8 (d) a hydropower inlet and discharge facility.
9 (7) "LAKE" MEANS A BODY OF WATER WHERE THE SURFACE
10 WATER IS RETAINED BY EITHER NATURAL OR ARTIFICIAL MEANS AND
11 THE NATURAL FLOW OF WATER IS SUBSTANTIALLY IMPEDED.
12 (8) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A
13 HUMAN DWELLING AT LEAST ONCE A YEAR.
14 ~~6~~79 "Ordinary high-water mark" means the line
15 that water impresses on land by covering it for sufficient
16 periods to cause physical characteristics that distinguish
17 the area below the line from the area above it.
18 Characteristics of the area below the line include, when
19 appropriate, but are not limited to diminished DEPRIVATION
20 OF THE SOIL OF SUBSTANTIALLY ALL terrestrial vegetation or
21 ~~lack~~ AND DESTRUCTION OF ITS agricultural crop VEGETATIVE
22 value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT
23 CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER
24 MARKS.
25 ~~7~~810 (a) "Recreational use" means with respect to

1 ~~class-I SURFACE~~ waters: fishing, hunting, swimming ~~(EXCEPT~~
2 ~~WITHIN 100-YARDS-OF-ANY-OCCUPIED-DWELLING)~~, ~~HIKING~~, floating
3 in small craft or other flotation devices, boating in
4 motorized craft unless otherwise prohibited or regulated by
5 law, or craft propelled by oar or paddle, ~~OTHER~~
6 ~~WATER-RELATED--PLEASURE--ACTIVITIES~~, OTHER WATER-RELATED
7 PLEASURE ACTIVITIES, and related unavoidable or incidental
8 uses, ~~within-the-ordinary-high-water-mark-of-the-waters.~~
9 ~~(b)--Recreational-use-means-with-respect-to--class--if~~
10 ~~waters--all--of--the--uses--set--forth-in-subsection-(7)(a),~~
11 ~~except-that-it-does-not-include,--without-permission--of--the~~
12 ~~landowner:~~
13 ~~(i)--overnight-camping;~~
14 ~~(ii)--big-game-hunting-or-upland-bird-hunting;~~
15 ~~(iii)--operation---of---all-terrain--vehicles--or--other~~
16 ~~motorized-vehicles-not-primarily-designed-for-operation-upon~~
17 ~~the-water;~~
18 ~~(iv)--the-placement-or--creation--of--any--permanent--or~~
19 ~~semipermanent--object-such-as-a-permanent-duck-blind-or-boat~~
20 ~~moorage;--or~~
21 ~~(v)--other---activities---which---are---not---primarily~~
22 ~~water-related-pleasure-activities;~~
23 ~~(8)(9)--"Supervisors"--means-the-board-of-supervisors-of~~
24 ~~a-soil-conservation-district;--the--directors--of--a--grazing~~
25 ~~district;--or-the-board-of-county-commissioners-if-a-request~~

1 pursuant to ~~{section 3(3)(b)}~~ is not within the boundaries
 2 of a conservation district or if the request is refused by
 3 the board of supervisors of a soil conservation district or
 4 the directors of a grazing district.

5 (11) "SUPERVISORS" MEANS THE BOARD OF SUPERVISORS OF A
 6 SOIL CONSERVATION DISTRICT, THE DIRECTORS OF A GRAZING
 7 DISTRICT, OR THE BOARD OF COUNTY COMMISSIONERS IF A REQUEST
 8 PURSUANT TO [SECTION 3(3)(B)] IS NOT WITHIN THE BOUNDARIES
 9 OF A CONSERVATION DISTRICT OR IF THE REQUEST IS REFUSED BY
 10 THE BOARD OF SUPERVISORS OF A SOIL CONSERVATION DISTRICT OR
 11 THE DIRECTORS OF A GRAZING DISTRICT.

12 ~~{10}~~ (12) "SURFACE WATER" MEANS, FOR THE PURPOSE OF
 13 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A
 14 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE
 15 ORDINARY-HIGH-WATER-MARK, ITS BED, AND ITS BANKS UP TO THE
 16 ORDINARY HIGH-WATER MARK.

17 NEW SECTION. Section 2. Recreational use permitted --
 18 limitations -- exceptions. (1) Except as provided in
 19 ~~subsection {3}~~ SUBSECTIONS (2) THROUGH (4) (5), all class-
 20 SURFACE waters that are capable of recreational use as
 21 ~~defined in {section 1(7)(a)}~~ including the beds underlying
 22 them and the banks up to the ordinary-high-water-mark, may
 23 be so used by the public without regard to the ownership of
 24 the land underlying the waters.

25 ~~{2}~~ Except as provided in subsection {3}, all class-

1 waters that are capable of recreational use as defined in
 2 ~~{section 1(7)(b)}~~ including the beds underlying them and
 3 the banks up to the ordinary-high-water-mark, may be so used
 4 by the public without regard to the ownership of the land
 5 underlying them except that recreational use does not
 6 include those activities excluded in ~~{section 1(7)(b)}~~:

7 ~~{3}~~ (2) The right of the public to make recreational
 8 use of surface waters does not include the right to make
 9 recreational use of waters, WITHOUT PERMISSION OF THE
 10 LANDOWNER:

11 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER
 12 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON
 13 THE WATER;

14 (b) THE RECREATIONAL USE OF SURFACE WATERS in a stock
 15 pond or other PRIVATE impoundment fed by an intermittently
 16 flowing natural watercourse; or

17 ~~{3}~~ (c) THE RECREATIONAL USE OF WATERS while diverted
 18 away from a natural water body for beneficial use pursuant
 19 to Title 85, chapter 2, part 2 or 3; OR

20 (d) BIG GAME HUNTING; EXCEPT BY LONG BOW OR SHOTGUN
 21 WHEN SPECIFICALLY AUTHORIZED BY THE COMMISSION;

22 ~~{3}~~ THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
 23 OF CLASS-11 WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
 24 THE LANDOWNER;

25 ~~{A}~~ (e) OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED

1 ~~DWELLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING,~~
2 ~~WHICHEVER IS LESS;~~
3 ~~(B)(P) THE PLACEMENT OR CREATION OF ANY PERMANENT OR~~
4 ~~SEMI-PERMANENT OBJECT, SUCH AS A PERMANENT DUCK-BLIND OR BOAT~~
5 ~~MOORAGE, OR~~
6 ~~(C)(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY~~
7 ~~WATER-RELATED PLEASURE ACTIVITIES, AS DEFINED IN SECTION~~
8 ~~1(10); OR~~
9 ~~(H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY~~
10 ~~PURPOSE WHEN WATER IS NOT FLOWING THEREIN.~~
11 ~~(I) THE PUBLIC HAS NO RIGHT TO MAKE RECREATIONAL USE~~
12 ~~OF CLASS II WATERS WITHOUT THE PERMISSION OF THE LANDOWNER.~~
13 (E) OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED
14 DWELLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING,
15 WHICHEVER IS LESS;
16 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT DUCK
17 BLIND, BOAT MOORAGE, OR ANY SEASONAL OR OTHER OBJECTS WITHIN
18 SIGHT OF OR WITHIN 500 YARDS OF AN OCCUPIED DWELLING,
19 WHICHEVER IS LESS; OR
20 (G) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY
21 PURPOSE WHEN WATER IS NOT FLOWING THEREIN.
22 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
23 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
24 THE LANDOWNER:
25 (A) BIG GAME HUNTING;

1 (B) OVERNIGHT CAMPING;
2 (C) THE PLACEMENT OR CREATION OF ANY SEASONAL OBJECT;
3 OR
4 (D) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
5 WATER-RELATED PLEASURE ACTIVITIES AS DEFINED IN SECTION
6 1(10)].
7 (4) The right of the public to make recreational use
8 of surface waters does not grant any easement or right to
9 the public to enter onto or cross private property in order
10 to use such waters for recreational purposes.
11 (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO
12 R7-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,
13 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING
14 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES
15 MUST INCLUDE THE FOLLOWING:
16 (A) THE ESTABLISHMENT OF PROCEDURES BY WHICH ANY
17 PERSON MAY REQUEST AN ORDER FROM THE COMMISSION:
18 (I) LIMITING, RESTRICTING, OR PROHIBITING THE TYPE,
19 INCIDENCE, OR EXTENT OF RECREATIONAL USE OF A SURFACE WATER;
20 OR
21 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR
22 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED
23 BY THE COMMISSION; AND
24 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN
25 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT

1 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A); AND
 2 (C) A PROCEDURE FOR THE IDENTIFICATION OF STREAMS
 3 WITHIN CLASS II WATERS WHICH ARE NOT CAPABLE OF RECREATIONAL
 4 USE OR ARE CAPABLE OF LIMITED RECREATIONAL USE, AND A
 5 PROCEDURE TO RESTRICT THE RECREATIONAL USE TO THE ACTUAL
 6 CAPACITY OF THE WATER.

7 (5)(6) The provisions of this section do not affect
 8 any rights of the public with respect to state-owned lands
 9 that are school trust lands or any rights of lessees of such
 10 lands under lease on {the effective date of this act}.

11 NEW SECTION. Section 3. Right to portage --
 12 establishment of portage route. (1) A member of the public
 13 making recreational use of surface waters may, above the
 14 ordinary high-water mark, portage around barriers in the
 15 least intrusive manner possible, avoiding damage to the
 16 landowner's land and violation of his rights.

17 (2) A landowner may create barriers across streams for
 18 purposes of land or water management or to establish land
 19 ownership as otherwise provided by law; if a landowner
 20 erects a barrier STRUCTURE pursuant to a design approved by
 21 the department and the barrier is designed not to and
 22 STRUCTURE does not interfere with the public's use of the
 23 surface waters; the public may not go above the ordinary
 24 high-water mark to portage around the barrier STRUCTURE;

25 (3) (a) A portage route around or over a barrier may

1 be established to avoid damage to the landowner's land and
 2 violation of his rights as well as to provide a reasonable
 3 and safe route for the recreational user of the surface
 4 waters;

5 (b) A portage route may be established when either a
 6 landowner or a member of the recreating public submits a
 7 request to the supervisors that such a route be established;

8 (c) Within 45 days of the receipt of a request, the
 9 supervisors shall, in consultation with the landowner and a
 10 representative of the department, examine and investigate
 11 the barrier and the adjoining land to determine a reasonable
 12 and safe portage route;

13 (d) Within 45 days of the examination of the site, the
 14 supervisors shall make a written finding of the most
 15 appropriate portage route;

16 (e) The cost of establishing the portage route around
 17 artificial barriers must be borne by the involved landowner,
 18 except for the construction of notification signs of such
 19 route, which is the responsibility of the department; The
 20 cost of establishing a portage route around natural barriers
 21 must be borne by the department;

22 (f) Once the route is established, the department has
 23 the exclusive responsibility thereafter to maintain the
 24 portage route at reasonable times agreeable to the
 25 landowner; The department shall post notices on the stream

1 of--the--existence--of--the--portage--route--and--the--public's
 2 obligation--to--use--it--as--the--exclusive--means--around--a
 3 barrier:

4 (g)--if--either--the--landowner--or--recreationist--disagrees
 5 with--the--route--described--in--subsection--(3)(e),--he--may
 6 petition--the--district--court--to--name--a--three--member
 7 arbitration--panel.--The--panel--must--consist--of--an--affected
 8 landowner,--a--member--of--an--affected--recreational--group,--and--a
 9 member--selected--by--the--two--other--members--of--the--arbitration
 10 panel.--The--arbitration--panel--may--accept,--reject,--or--modify
 11 the--supervisor's--finding--under--subsection--(3)(d):

12 (h)--The--determination--of--the--arbitration--panel--is
 13 binding--upon--the--landowner--and--upon--all--parties--that--use--the
 14 water--for--which--the--portage--is--provided.--Costs--of--the
 15 arbitration--panel,--computed--as--for--jurors'--fees--under
 16 3-15-201,--shall--be--borne--by--the--contesting--party--or--parties;
 17 all--other--parties--shall--bear--their--own--costs:

18 (i)--The--determination--of--the--arbitration--panel--may--be
 19 appealed--within--30--days--to--the--district--court: A LANDOWNER
 20 MAY CREATE BARRIERS ACROSS STREAMS FOR PURPOSES OF LAND OR
 21 WATER MANAGEMENT OR TO ESTABLISH LAND OWNERSHIP AS OTHERWISE
 22 PROVIDED BY LAW. IF A LANDOWNER ERECTS A STRUCTURE PURSUANT
 23 TO A DESIGN APPROVED BY THE DEPARTMENT AND THE STRUCTURE
 24 WHICH DOES NOT INTERFERE WITH THE PUBLIC'S USE OF THE
 25 SURFACE WATERS, THE PUBLIC MAY NOT GO ABOVE THE ORDINARY

1 HIGH-WATER MARK TO PORTAGE AROUND THE STRUCTURE.

2 (3) (A) A PORTAGE ROUTE AROUND OR OVER A BARRIER MAY
 3 BE ESTABLISHED TO AVOID DAMAGE TO THE LANDOWNER'S LAND AND
 4 VIOLATION OF HIS RIGHTS AS WELL AS TO PROVIDE A REASONABLE
 5 AND SAFE ROUTE FOR THE RECREATIONAL USER OF THE SURFACE
 6 WATERS.

7 (B) A PORTAGE ROUTE MAY BE ESTABLISHED WHEN EITHER A
 8 LANDOWNER OR A MEMBER OF THE RECREATING PUBLIC SUBMITS A
 9 REQUEST TO THE SUPERVISORS THAT SUCH A ROUTE BE ESTABLISHED.

10 (C) WITHIN 45 DAYS OF THE RECEIPT OF A REQUEST, THE
 11 SUPERVISORS SHALL, IN CONSULTATION WITH THE LANDOWNER AND A
 12 REPRESENTATIVE OF THE DEPARTMENT, EXAMINE AND INVESTIGATE
 13 THE BARRIER AND THE ADJOINING LAND TO DETERMINE A REASONABLE
 14 AND SAFE PORTAGE ROUTE.

15 (D) WITHIN 45 DAYS OF THE EXAMINATION OF THE SITE, THE
 16 SUPERVISORS SHALL MAKE A WRITTEN FINDING OF THE MOST
 17 APPROPRIATE PORTAGE ROUTE.

18 (E) THE COST OF ESTABLISHING THE PORTAGE ROUTE AROUND
 19 ARTIFICIAL BARRIERS MUST BE BORNE BY THE INVOLVED LANDOWNER,
 20 EXCEPT FOR THE CONSTRUCTION OF NOTIFICATION SIGNS OF SUCH
 21 ROUTE, WHICH IS THE RESPONSIBILITY OF THE DEPARTMENT. THE
 22 COST OF ESTABLISHING A PORTAGE ROUTE AROUND NATURAL
 23 ARTIFICIAL BARRIERS NOT OWNED BY THE LANDOWNER ON WHOSE LAND
 24 THE PORTAGE ROUTE WILL BE PLACED MUST BE BORNE BY THE
 25 DEPARTMENT.

1 (F) ONCE THE ROUTE IS ESTABLISHED, THE DEPARTMENT HAS
 2 THE EXCLUSIVE RESPONSIBILITY THEREAFTER TO MAINTAIN THE
 3 PORTAGE ROUTE AT REASONABLE TIMES AGREEABLE TO THE
 4 LANDOWNER. THE DEPARTMENT SHALL POST NOTICES ON THE STREAM
 5 OF THE EXISTENCE OF THE PORTAGE ROUTE AND THE PUBLIC'S
 6 OBLIGATION TO USE IT AS THE EXCLUSIVE MEANS AROUND A
 7 BARRIER.

8 (G) IF EITHER THE LANDOWNER OR RECREATIONIST DISAGREES
 9 WITH THE ROUTE DESCRIBED IN SUBSECTION (3)(E), HE MAY
 10 PETITION THE DISTRICT COURT TO NAME A THREE-MEMBER
 11 ARBITRATION PANEL. THE PANEL MUST CONSIST OF AN AFFECTED
 12 LANDOWNER, A MEMBER OF AN AFFECTED RECREATIONAL GROUP, AND A
 13 MEMBER SELECTED BY THE TWO OTHER MEMBERS OF THE ARBITRATION
 14 PANEL. THE ARBITRATION PANEL MAY ACCEPT, REJECT, OR MODIFY
 15 THE SUPERVISORS' FINDING UNDER SUBSECTION (3)(D).

16 (H) THE DETERMINATION OF THE ARBITRATION PANEL IS
 17 BINDING UPON THE LANDOWNER AND UPON ALL PARTIES THAT USE THE
 18 WATER FOR WHICH THE PORTAGE IS PROVIDED. COSTS OF THE
 19 ARBITRATION PANEL, COMPUTED AS FOR JURORS' FEES UNDER
 20 3-15-201, SHALL BE BORNE BY THE CONTESTING PARTY OR PARTIES;
 21 ALL OTHER PARTIES SHALL BEAR THEIR OWN COSTS.

22 (I) THE DETERMINATION OF THE ARBITRATION PANEL MAY BE
 23 APPEALED WITHIN 30 DAYS TO THE DISTRICT COURT. PORTAGE
 24 ROUTES AROUND EXISTING BARRIERS MAY ONLY BE ACQUIRED BY:

25 (A) -- LANDOWNER PERMISSION;

1 (B) -- PURCHASE; OR
 2 (C) -- EMINENT DOMAIN, AS PROVIDED IN ARTICLE II, SECTION
 3 297 OF THE MONTANA CONSTITUTION;
 4 (3) -- IF A LANDOWNER PLACES AN ARTIFICIAL BARRIER ACROSS
 5 A WATER BODY AFTER THE EFFECTIVE DATE OF THIS ACT, HE MUST
 6 PROVIDE PORTAGE;

7 (J) Once a portage route is established, the
 8 public shall use the portage route as the exclusive means to
 9 portage around or over the barrier.

10 (4) NOTHING CONTAINED IN [THIS ACT] ADDRESSES THE
 11 ISSUE OF NATURAL BARRIERS OR PORTAGE AROUND SAID BARRIERS,
 12 AND NOTHING CONTAINED IN [THIS ACT] MAKES SUCH PORTAGE
 13 LAWFUL OR UNLAWFUL.

14 NEW SECTION. Section 4. Restriction on liability of
 15 landowner and supervisor AND SUPERVISOR. (1) A person who
 16 makes recreational use of surface waters flowing over or
 17 through land in the possession or under the control of
 18 another, pursuant to [section 2], or land while portaging
 19 around or over barriers or while portaging or using portage
 20 routes, pursuant to [section 3], does not have the status of
 21 invitee or licensee and is owed no duty by a landowner, HIS
 22 AGENT, OR HIS TENANT other than that provided in subsection
 23 (2).

24 (2) A landowner, HIS AGENT, or tenant is liable to a
 25 person making recreational use of waters or land described

1 in subsection (1) only for an act or omission that
2 constitutes willful or wanton misconduct.

3 ~~(3) No supervisor who participates in a decision
4 regarding the placement of a portage route is liable to any
5 person who while making recreational use of the surface
6 waters is injured while using IS INJURED OR WHOSE PROPERTY
7 IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route
8 except for an act or omission that constitutes willful and
9 wanton misconduct.~~

10 (3) NO SUPERVISOR OR ANY MEMBER OF THE ARBITRATION
11 PANEL WHO PARTICIPATES IN A DECISION REGARDING THE
12 PLACEMENT OF A PORTAGE ROUTE IS LIABLE TO ANY PERSON WHO IS
13 INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR
14 USE OF THE PORTAGE ROUTE EXCEPT FOR AN ACT OR OMISSION THAT
15 CONSTITUTES WILLFUL AND WANTON MISCONDUCT.

16 NEW SECTION. Section 5. Prescriptive easement not
17 acquired by recreational use of surface waters. (1) A
18 prescriptive easement is a right to use the property of
19 another that is acquired by open, exclusive, notorious,
20 hostile, adverse, continuous, and uninterrupted use for a
21 period of 5 years.

22 (2) A prescriptive easement cannot be acquired
23 through:

- 24 (A) recreational use of surface waters, including:
- 25 (1) the streambeds underlying them; and

1 (II) the banks up to the ordinary high-water mark; or
2 of
3 (III) ANY portage routes over and around barriers; OR
4 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO
5 REACH SURFACE WATERS.

6 Section 6. Section 70-19-405, MCA, is amended to read:
7 "70-19-405. Title by prescription. Occupancy Except as
8 provided in [section 5], occupancy for the period prescribed
9 by this chapter as sufficient to bar an action for the
10 recovery of the property confers a title thereto,
11 denominated a title by prescription, which is sufficient
12 against all."

13 NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE
14 PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED
15 BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE
16 SURFACE WATERS, THE BEDS, AND THE BANKS OF ANY NAVIGABLE OR
17 NONNAVIGABLE WATERS OR THE PORTAGE ROUTES WITHIN THIS STATE.

18 NEW SECTION. SECTION 8. LAKES. NOTHING CONTAINED IN
19 [THIS ACT] ADDRESSES THE RECREATIONAL USE OF SURFACE WATERS
20 OF LAKES.

21 NEW SECTION. Section 9. Severability. If a part of
22 this act is invalid, all valid parts that are severable from
23 the invalid part remain in effect. If a part of this act is
24 invalid in one or more of its applications, the part remains
25 in effect in all valid applications that are severable from

1 the invalid applications.

2 NEW SECTION. Section 10. Applicability. Sections 5
3 and 6 apply only to a prescriptive easement that has not
4 been perfected prior to [the effective date of this act].

5 NEW SECTION. Section 11. Effective date. This act is
6 effective on passage and approval.

-End-

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature

First Regular Session - 1985

IN THE SENATE

S BILL NO. 1008

BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, TO REDESIGNATE THE SECTION, TO MAKE CERTAIN ORGANIZATIONAL CHANGES AND TO PROVIDE FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE DATE OF THIS ACT; PROVIDING THAT THE PROVISIONS OF THIS ACT SHALL NOT AFFECT ANY INTERSTATE COMPACT; AND PROVIDING SEVERABILITY.

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

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

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

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

(3) The director of the department shall cause a copy of the notice of

1 application to be sent by ordinary mail to any person who requests in writing
2 to receive any class of notices of application and who pays an annual mailing
3 fee as established by departmental regulation.

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

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

42 (6) Any person or corporation who has formally appeared at the hearing,
43 feeling aggrieved by the judgment of the director of the department of water
44 resources, may seek judicial review thereof in accordance with section
45 42-1701A(4), Idaho Code.

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

49 42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER
50 RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO

1 LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that
2 it is in the public interest to specifically implement the state's power to
3 regulate and limit the use of water for power purposes and to define the rela-
4 tionship between the state and the holder of a water right for power purposes
5 to the extent such right exceeds an established minimum flow. The purposes of
6 the trust established by subsections (2) and (3) of this section are to assure
7 an adequate supply of water for all future beneficial uses and to clarify and
8 protect the right of a user of water for power purposes to continue using the
9 water pending approval of depletionary future beneficial uses.

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

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

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

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

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

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

51 SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is

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

3 42-203C. HYDROPOWER WATER RIGHT -- CRITERIA FOR REALLOCATION -- WEIGHT --
4 BURDEN OF PROOF. (1) If an applicant intends to appropriate water which is or
5 may be available for appropriation by reason of a subordination condition
6 applicable to a water right for power purposes, then the director shall con-
7 sider, prior to approving the application, the criteria established in section
8 42-203A, Idaho Code, and whether the proposed use would significantly reduce,
9 individually or cumulatively with other uses, the amount of water available to
10 the holder of a water right used for power production and, if so, whether the
11 proposed reduction is in the public interest.

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

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

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

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

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

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

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

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

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

34 42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. (1) The department
35 shall review all permits issued prior to the effective date of this section,
36 except to the extent a permit has been put to beneficial use prior to July 1,
37 1985, to determine whether they comply with the provisions of chapter 2, title
38 42, Idaho Code. If the department finds that the proposed use does not satisfy
39 the criteria of chapter 2, title 42, Idaho Code, then the department shall
40 either cancel the permit or impose the conditions required to bring the permit
41 into compliance with chapter 2, title 42, Idaho Code. If the department finds
42 that the permit satisfies the criteria established in chapter 2, title 42,
43 Idaho Code, then the department shall enter an order continuing the permit.

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

48 SECTION 5. This act shall not be construed as modifying, amending, or

1 repealing any interstate compact.

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

