

IN THE SENATE

SENATE BILL NO. 1412

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO WATER; AMENDING SECTION 42-201, IDAHO CODE, TO REVISE EXEMPTION PROVISIONS RELATING TO THE RELEASE AND DIVERSION OF WATER, TO PROVIDE FOR RELEASES AND DIVERSIONS FROM NATURAL WATERCOURSES, STORAGE RESERVOIRS, CANALS AND DRAINS FOR DESIGNATED PURPOSES, AND TO PROVIDE THAT CERTAIN DIVERSIONS AND RELEASES OF WATER SHALL NOT BE ATTRIBUTED OR CHARGED TO THE SATISFACTION OF A WATER RIGHT AND SHALL, TO THE EXTENT PRACTICABLE, BE COORDINATED WITH THE WATER RIGHT OWNER; AMENDING SECTION 42-204, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL DETERMINE THE IMPACT OF A REQUESTED WATER RIGHT UPON WATER AVAILABLE TO STORE IN RESERVOIRS IN THE SNAKE RIVER AND ITS TRIBUTARIES UPSTREAM FROM BROWNLEE RESERVOIR PRIOR TO GRANTING A VESTED WATER RIGHT FOR WATER OF THE SNAKE RIVER OR SURFACE OR GROUND WATER TRIBUTARY TO THE SNAKE RIVER OTHER THAN FOR DOMESTIC PURPOSES, TO PROVIDE THAT CERTAIN WATER RIGHTS SHALL NOT BE APPROVED UNLESS THE DIRECTOR FIRST APPROVES A MITIGATION PLAN, TO PROVIDE MITIGATION PLAN REQUIREMENTS, TO PROVIDE THAT CERTAIN BURDENS OF PROOF SHALL BE ON THE APPLICANT AND TO REVISE CODE REFERENCES; AND AMENDING SECTION 42-607, IDAHO CODE, TO PROVIDE THAT RELEASES OF WATER FROM SPECIFIED RESERVOIRS FOR FLOOD CONTROL PURPOSES PURSUANT TO DESIGNATED CRITERIA AND PROCEDURES SHALL NOT BE ATTRIBUTED OR CHARGED TO THE SATISFACTION OF STORAGE WATER RIGHTS FOR THE RESERVOIRS UNLESS THE RELEASED WATER IS PUT TO BENEFICIAL USE PURSUANT TO THE WATER RIGHT.

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

SECTION 1. That Section 42-201, Idaho Code, be, and the same is hereby amended to read as follows:

42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL DIVERSION AND APPLICATION OF WATER -- USES FOR WHICH WATER RIGHT NOT REQUIRED -- EXCLUSIVE AUTHORITY OF DEPARTMENT. (1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

(3) Notwithstanding the provisions of subsection (2) of this section, water may be released or diverted from a natural watercourse and used at any time, with or without a water right:

(a) From a natural watercourse, a storage reservoir, canal or drain to extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire. Diversions and releases of water pursuant to this subsection (3) (a) shall not be attributed or charged to the satisfaction of a water right and shall, to the extent practicable, be coordinated with the water right owner to prevent injury to the owner's beneficial use of the water right.

(b) From a natural watercourse fFor forest practices as defined in section 38-1303(1), Idaho Code, and forest dust abatement. Such forest practices and forest dust abatement use is limited to two-tenths (0.2) acre-feet per day from a single watercourse.

(4) For purposes of subsection (3) (b) of this section, no person shall divert water from a canal or other irrigation facility while the water is lawfully diverted, captured, conveyed, used or otherwise physically controlled by the appropriator.

(5) If water is to be diverted from a natural watercourse within a water district, or from a natural watercourse from which an irrigation delivery entity diverts water, a person diverting water pursuant to subsection (3) (b) of this section shall give notice to the watermaster of the intent to divert water for the purposes set forth in said subsection. In the event that the water to be diverted pursuant to subsection (3) (b) of this section is not within a water district, but an irrigation delivery entity diverts water from the same natural watercourse, the required notices shall be given to said irrigation delivery entity. For uses authorized in subsection (3) (a) of this section, notice shall not be required but may be provided when it is reasonable to do so.

(6) A water right holder, who determines that a use set forth in subsection (3) of this section is causing a water right to which the holder is entitled to be deprived of water to which it may be otherwise entitled, may petition the director of the department of water resources to order cessation of or modification of the use to prevent injury to a water right. Upon such a petition, the director shall cause an investigation to be made and may hold hearings or gather information in some other manner. In the event that the director finds that an injury is occurring to a water right, he may require the use to cease or be modified to ensure that no injury to other water rights occurs. A water right holder feeling aggrieved by a decision or action of the director shall be entitled to contest the action of the director pursuant to section 42-1701A(3), Idaho Code.

(7) This title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

(8) Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

SECTION 2. That Section 42-204, Idaho Code, be, and the same is hereby amended to read as follows:

42-204. EXAMINATION -- PERMIT -- COMMENCEMENT OF WORK -- EXTENSIONS -- APPEAL. On receipt of the application, which shall be of a form prescribed by the department of water resources, it shall be the duty of that department to make an endorsement thereon of the date of its receipt, and to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. If upon such examination the application is found defective, it shall be the duty of the department of water resources to return the same for correction or to correspond with the applicant to obtain the needed information or amendments. If the application is returned to the applicant or the department shall request additional information and the applicant fails to return the corrected application or to supply the needed information within thirty (30) days, the department may void the record of said application and notify the applicant of such action. If the corrected application is returned or the information is supplied after thirty (30) days, such corrected application shall be treated in all respects as a new application, and the priority of the right initiated shall be determined by the date of receipt, in the office of the department, of the corrected application or additional information; provided, that upon request, and good cause appearing therefor, the director of the department of water resources may grant an extension of time within which to return the corrected application or supply needed information. All applications which shall comply with the provisions of this chapter and with the regulations of the department of water resources shall be numbered in such manner as will aid in their identification, and it shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to a beneficial use: provided, that the department may deny any such application, or may partially approve and grant a permit for a lesser quantity of water than applied for, or may grant a permit upon conditions as provided in the preceding section.

The department of water resources shall issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be authorized, on receipt thereof, to proceed with

the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and perfect the proposed appropriation. The department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made. Sixty (60) days before the date set for the completion of the appropriation of water under any permit, the department shall forward a notice to the applicant by certified mail at his address of record of the date for such completion, which said notice shall advise the applicant of the necessity of submitting an affidavit of completion or a request for an extension of time on or before said date; Provided that:

(1) (a) Prior to granting a vested water right for water of the Snake River or surface or ground water tributary to the Snake River, other than for domestic purposes as defined in section 42-111, Idaho Code, the director shall determine the impact of the requested water right upon water available to store in reservoirs in the Snake River and its tributaries upstream from Brownlee Reservoir.

(b) If the director determines that the new water right would reduce water that could be physically stored or applied to existing beneficial uses to which storage water is applied, the water right shall not be approved unless the director first approves a mitigation plan to provide water to storage equivalent in amount, location and for the same time that the requested water right reduces water that could be physically stored or applied to existing beneficial uses to which storage water is applied.

(c) The burdens of proof under the provisions of this subsection shall be on the applicant.

(2) In cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right-of-way or other matter within the jurisdiction of the United States, by state, county, city or other local government permitting or administrative action or process related to the applicant's land or water development, or by litigation of any nature which might bring his title to said water in question, the department of water resources upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit, or in any subsequent grant of extension pursuant to subsection (23), (34), (45) or (67) of this section, for each and every action required.

(23) The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of more than twenty-five thousand (25,000) acre feet in one (1) irrigation season for a project of no less than five thousand (5,000) acres, may upon application to the director of the department of water resources supported by a showing that additional time is needed on account of the time required for organiz-

ing, financing and constructing works of such large size, be extended by the director of the department of water resources for up to twelve (12) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section: Provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said diversion, including expenditures for the purchase of rights-of-way and property in connection therewith, at least one hundred thousand dollars (\$100,000).

(34) The time for completion of works and application of the water to full beneficial use under any permit involving the construction of a reservoir of more than ten thousand (10,000) acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than ten thousand (10,000) acre feet capacity, may be extended by the director of the department of water resources upon application to the director if the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension.

(45) The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land may be extended by the director of the department of water resources upon application by the permittee for an additional period up to ten (10) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section, provided the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension.

(56) In connection with permits held by the United States, or the Idaho water resource board, whether acquired as the original applicant, by assignment or otherwise, the director of the department of water resources may extend the time for completion of the works and application of the water to full beneficial use for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction of such works.

(67) In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

Any applicant feeling himself aggrieved by the decision of the department of water resources regarding his application may request a hearing before the director in accordance with section 42-1701A(3), Idaho Code, for the purpose of contesting the decision and may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of any final decision of the director following the hearing.

1 Every holder of a permit which shall be issued under the terms and condi-
 2 tions of an application filed hereafter appropriating twenty-five (25) cu-
 3 bic feet or less per second must, within one (1) year from the date upon which
 4 said permit issues from the office of the department of water resources, com-
 5 mence the excavation or construction of the works by which he intends to di-
 6 vert the water, and must prosecute the work diligently and uninterruptedly
 7 to completion, unless temporarily interrupted through no fault of the holder
 8 of such permit by circumstances, over which he has no control.

9 The holder of any permit who shall fail to comply with the provisions of
 10 this section within the time or times specified shall be deemed to have aban-
 11 doned all rights under his permit.

12 SECTION 3. That Section 42-607, Idaho Code, be, and the same is hereby
 13 amended to read as follows:

14 42-607. DISTRIBUTION OF WATER. (1) It shall be the duty of said wa-
 15 termaster to distribute the waters of the public stream, streams or water
 16 supply, comprising a water district, among the several ditches taking water
 17 therefrom according to the prior rights of each respectively, in whole or
 18 in part, and to shut and fasten, or cause to be shut or fastened, under the
 19 direction of the department of water resources, the headgates of the ditches
 20 or other facilities for diversion of water from such stream, streams or water
 21 supply, when in times of scarcity of water it is necessary so to do in order to
 22 supply the prior rights of others in such stream or water supply; provided,
 23 that any person or corporation claiming the right to the use of the waters
 24 of the stream or water supply comprising a water district, but not owning or
 25 having the use of an adjudicated or decreed right therein, or right therein
 26 evidenced by permit or license issued by the department of water resources,
 27 shall, for the purposes of distribution during the scarcity of water, be held
 28 to have a right subsequent to any adjudicated, decreed, permit, or licensed
 29 right in such stream or water supply, and the watermaster shall close all
 30 headgates of ditches or other diversions having no adjudicated, decreed,
 31 permit or licensed right if necessary to supply adjudicated, decreed, permit
 32 or licensed right in such stream or water supply. So long as a duly elected
 33 watermaster is charged with the administration of the waters within a water
 34 district, no water user within such district can adversely possess the right
 35 of any other water user.

36 (2) Releases of water from Arrowrock Reservoir, Anderson Ranch Reser-
 37 voir and Lucky Peak Reservoir on the Boise River for flood control purposes
 38 pursuant to the criteria and procedures established by the "Memorandum of
 39 Agreement Between the Department of the Army and the Department of the In-
 40 terior for Flood Control Operation of the Boise River Reservoirs," dated
 41 November 20, 1953, as amended by the "Water Control Manual for Boise River
 42 Reservoirs," and as may be hereafter amended pursuant to article 7 of the
 43 November 20, 1953, agreement, shall not be attributed or charged to the sat-
 44 isfaction of storage water rights for those reservoirs unless the released
 45 water is put to beneficial use pursuant to the water right.