

Idaho Legislature Title 42 Changes- Senate Bill 1074 - Testimony of Paul Poorman

1. Mr. Chairman, members of the Resources & Environment Committee: Before you is Senate Bill 1074. In general it would make the following changes to Title 42:
 - a. It would repeal section 1101 which ensures that property owners can utilize water from streams/creeks/rivers that flow through their property
 - b. It adds the extent of ditch embankments to the ditch Right of Way that the ditch owner is obligated to maintain, without defining embankments or stipulating limits on the extent of the embankments that naturally occur due to ditch size of slope of underlying land.
 - c. It gives the ditch owner the right to utilize the material removed from the ditch within the RoW or to take the material off of the underlying landowner's property.
 - d. It gives the ditch owner the right to occupy the RoW during any season of the year without notification or permission from the landowner, regardless of land conditions (snow, mud, etc.)
 - e. The proposal gives sole discretion on maintenance activities to the ditch owner, even though the RoW is a *Non-Exclusive* property right.
2. The proposed changes seem innocuous, but they could lead to even greater abuse of private property rights than what is already occurring.
 - a. Imagine that you own a parcel of land that has a creek running through it and a foot-wide ditch carrying at most, 3CFS, to a downstream water user. Then imagine that the water user finds it "reasonable"
 - i. to scrub vegetation from a 600' long by 200' wide swath.
 - ii. to remove culverts that provide access to 200 acres of your property.
 - iii. to come onto your property every day in the summer and numerous times in the winter when the ditch is covered in snow or deep in mud, far in excess of what is needed to maintain a 3CFS summertime water right (0.03CFS wintertime stockwater right).
 - iv. to remove fences across the ditch allowing cattle to roam freely throughout your property.
 - v. to rip up the surface layer of the ditch and allow 500,000 gallons a day to flood your land below his ditch.
 - b. Sounds preposterous, right? Well, this is precisely what happened to us on our property just north of Cambridge!
 - i. Water deliveries through our property have worked fine for well over a hundred years.
 - ii. A new owner of a downstream water right engaged in each of the activities above, and used Title 42 to justify his actions.
 - iii. Not only did we find these activities totally unreasonable, but so did the 3rd District Idaho Court in civil case CV44-19-0565.
3. The proposed changes, which appear to partially stem from this litigation, would give broader latitude for the ditch owner to:

- a. “remove from the ditch, canal, conduit, embankments, and irrigation structures the debris, soil, vegetation, and other material the ditch, canal, or conduit owner or operator reasonably deems necessary to properly access, inspect, operate, clean, maintain, and repair...”. *The proposed changes leave it to the “owner or operator” to define what he or she “reasonably deems necessary,” without regard for the private-property rights of the underlying land owner.*
 - b. “The owner or operator has the right and discretion to transport the material from the right-of-way, to utilize the material for reconstruction, repair, or maintenance of the ditch, canal, conduit, embankments, irrigation structures, and related roads and access areas, and to deposit and leave the material within the right-of-way, provided that the deposits occupy no greater width of land along the ditch, canal, conduit, and embankments than is reasonably necessary.” *Again, “reasonably necessary” gives broad latitude to the water user and, as we have seen, can vastly impinge on the rights of other private property owners..*
 - c. In short, the proposed changes amount to a major "taking of private property rights" from the land owner to the ditch owner.
4. I agree that irrigators need access to irrigation ditches, conduits, structures, etc to maintain infrastructure, but terms like “embankment” and “reasonably necessary” are open to interpretation and will likely lead to unreasonable impacts on the private property of underlying landowners.
- a. We respectfully request that you vote no on the proposed changes to Title 42, or at the very minimum, seek to include the following changes:
 - i. Section 1101, which protects the rights of landowners to utilize water from streams that flow through their property needs to be retained.
 - ii. The term "embankment" needs to be defined. It also needs to have a physical limit on how wide it can be so that differences in ditch flow, slope of underlying ground, and pad width can be accommodated.
 - iii. Vegetation can be removed from the ditch channel and pad, but removal of vegetation from embankment needs to have permission of underlying landowner. Removal of dirt, brush, vegetation, rocks, etc. from landowner's property should not be allowed.
 - iv. Define "reasonable" and "reasonably". What is reasonable for one person may be totally unacceptable for another.
 - v. Add language that keeps the ditch owner from using his/her ditch to block landowner's access to their own property.
 - vi. Add language that allows fences at property lines, as long as a gate is provided.
5. In an ideal world, neighbors work things out in situations like this of joint ownership. Landowners and water-right holders have done this in our drainage for decades. However, the proposed changes before you appear to have grown out of this recent litigation, and, while they sound “reasonable,” they could give a

water-right holder far more latitude to abuse the private property rights of the underlying landowner.

Summary:

- a. Recommend not adopting the proposed changes.
- b. If that's not possible, the following changes are requested:
 - i. Retain section 1101.
 - ii. Define embankment
 - iii. Define "reasonable" access
 - iv. No removal of material from landowner's property.
 - v. Prevent ditch owner from cutting off access to landowner's property by removing or preventing ditch crossings.
 - vi. Specifically allow fences that cross the ditches at property boundaries, as long as gates are provided.
- c. Doing so would better balance the rights of water users with those of underlying private-property owners.
- d. Not doing so will make private property owners vulnerable to unreasonable water users and expensive litigation. This, we have unfortunately learned from personal experience.