

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 50

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

1 RELATING TO HYDROPOWER; AMENDING SECTION 42-203B, IDAHO CODE, TO REVISE PRO-  
2 VISIONS RELATING TO THE AUTHORITY OF THE DIRECTOR OF THE IDAHO DEPART-  
3 MENT OF WATER RESOURCES TO LIMIT A PERMIT OR LICENSE FOR POWER PURPOSES  
4 TO A TERM, TO PROVIDE THAT THE TERM MAY BE IN CERTAIN FORMS, TO REVISE AN  
5 EXCEPTION TO APPLICABILITY, TO REVISE PROVISIONS RELATING TO THE CON-  
6 sideration of certain factors regarding the director's limitation of a  
7 permit or license to a term, to remove reference to a term of years, to  
8 provide that the term, once established, shall not be modified except in  
9 accordance with due process of law prior to expiring, to provide for the  
10 automatic extension of a term with annual renewals of the project's fed-  
11 eral energy regulatory commission (FERC) license, to provide that the  
12 director may review such water right licenses and issue certain orders  
13 prior to the issuance of a subsequent or new FERC license, to provide  
14 for the effective date of such orders, to provide for automatic exten-  
15 sion of terms where such order is not issued and for the continued effec-  
16 tiveness of original conditions, to provide for the director's review  
17 of terms not established by reference to a project's FERC license, to  
18 provide that the director may review such water right licenses and issue  
19 certain orders prior to expiration of the term, to provide for the ef-  
20 fective date of such orders, to provide for automatic extension of terms  
21 where such order is not issued and for the continued effectiveness of  
22 original conditions and to make a technical correction.  
23

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

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

27 42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED  
28 WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AU-  
29 THORITY TO LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and  
30 declares that it is in the public interest to specifically implement the  
31 state's power to regulate and limit the use of water for power purposes and to  
32 define the relationship between the state and the holder of a water right for  
33 power purposes to the extent such right exceeds an established minimum flow.  
34 The purposes of the trust established by subsections (2) and (3) of this sec-  
35 tion are to assure an adequate supply of water for all future beneficial uses  
36 and to clarify and protect the right of a user of water for power purposes  
37 subordinated by a permit issued after July 1, 1985, or by an agreement, to  
38 continue using the water pending approval of depletionary future beneficial  
39 uses.

40 (2) A water right for power purposes which is defined by agreement with  
41 the state as unsubordinated to the extent of a minimum flow established by  
42 state action shall remain unsubordinated as defined by the agreement. Any

1 portion of the water rights for power purposes in excess of the level so es-  
2 tablished shall be held in trust by the state of Idaho, by and through the  
3 governor, for the use and benefit of the user of the water for power purposes,  
4 and of the people of the state of Idaho; provided, however, that application  
5 of the provisions of this section to water rights for hydropower purposes on  
6 the Snake river or its tributaries downstream from Milner dam shall not place  
7 in trust any water from the Snake river or surface or ground water tributary  
8 to the Snake river upstream from Milner dam. For the purposes of the deter-  
9 mination and administration of rights to the use of the waters of the Snake  
10 river or its tributaries downstream from Milner dam, no portion of the waters  
11 of the Snake river or surface or ground water tributary to the Snake river up-  
12 stream from Milner dam shall be considered. The rights held in trust shall  
13 be subject to subordination to and depletion by future upstream beneficial  
14 users whose rights are acquired pursuant to state law, including compliance  
15 with the requirements of section 42-203C, Idaho Code.

16 (3) Water rights for power purposes not defined by agreement with the  
17 state shall not be subject to depletion below any applicable minimum stream  
18 flow established by state action. Water rights for power purposes in excess  
19 of such minimum stream flow shall be held in trust by the state of Idaho, by  
20 and through the governor, for the use and benefit of the users of water for  
21 power purposes and of the people of the state of Idaho. The rights held in  
22 trust shall be subject to subordination to and depletion by future consump-  
23 tive upstream beneficial users whose rights are acquired pursuant to state  
24 law, excluding compliance with the requirements of section 42-203C, Idaho  
25 Code.

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

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

41 (6) The director shall have the authority to subordinate the rights  
42 granted in a permit or license for power purposes to subsequent upstream  
43 beneficial depletionary uses. A subordinated water right for power use does  
44 not give rise to any claim against, or right to interfere with, the holder of  
45 subsequent upstream rights established pursuant to state law. The director  
46 shall also have the authority to limit a permit or license for power purposes  
47 to a specific term, which may be in the form of a fixed date or by reference to  
48 a federal energy regulatory commission (FERC) license or other authoriza-  
49 tion issued or contract executed, in connection with the power project.

1 Subsection (6) of this section shall not apply to licenses which have  
2 already been issued as of ~~the effective date of this act~~ July 1, 1985.

3 (7) The director, in the exercise of the authority to limit a permit or  
4 license for power purposes to a specific term, of years shall, designate the  
5 number of years through which the term of the license shall extend and for  
6 purposes of determining such date shall term, consider among other any of the  
7 following factors, among others:

8 (a) The term of any power purchase contract which is, or reasonably may  
9 become, applicable to, such permit or license;

10 (b) The policy of the Idaho public utilities commission (IPUC) regard-  
11 ing the term of power purchase contracts as administered by the IPUC un-  
12 der and pursuant to the authority of the public utility regulatory pol-  
13 icy act of 1978 (PURPA);

14 (c) The term of any federal energy regulatory commission (FERC) license  
15 granted, or which reasonably may be granted, with respect to any partic-  
16 ular permit or license for power purpose;

17 (d) Existing downstream water uses established pursuant to state law.  
18 The term of years shall be determined at the time of issuance of the per-  
19 mit, or as soon thereafter as practicable if adequate information is not then  
20 available. The term of years shall commence upon application of water to  
21 beneficial use. The term of years, once established, shall not thereafter be  
22 modified except in accordance with due process of law prior to expiring.

23 (8) If a term is established by the director by reference to the hy-  
24 dropower project's FERC license, the term shall automatically extend to run  
25 concurrently with any annual renewals of the project's FERC license. Prior  
26 to the issuance of a subsequent or new FERC license for the project, the di-  
27 rector may review the water right license and may issue an order canceling  
28 all or any part of the use, establishing a new term, or revising, adding or  
29 deleting conditions under which the water right may be exercised. The order  
30 shall take effect on the date the current term, as may be extended through an-  
31 ual renewals, expires. If the director does not issue such an order, the  
32 term shall automatically extend to a length equal to the project's subse-  
33 quent or new FERC license and any original conditions on the water right li-  
34 cence shall remain in effect.

35 (9) If a term is established by the director but the term is not estab-  
36 lished by reference to a hydropower project's FERC license, the director may  
37 review the water right license prior to the expiration of the term and may  
38 issue an order canceling all or any part of the use, establishing a new term  
39 of years, or revising, adding or deleting conditions under which the water  
40 right may be exercised. The order shall take effect on the date the current  
41 term expires. If the director does not issue such an order, the term shall  
42 automatically extend to a length equal to the original term and any original  
43 conditions on the water right license shall remain in effect.