

MINUTES
HOUSE RESOURCES & CONSERVATION COMMITTEE

- DATE:** Monday, February 19, 2018
- TIME:** 1:30 P.M.
- PLACE:** Room EW40
- MEMBERS:** Chairman Gibbs, Vice Chairman Gestrin, Representatives Moyle, Raybould, Shepherd, Wood, Boyle, Vander Woude, Miller, Burtenshaw, Mendive, Youngblood, Kauffman, Giddings, Blanksma, Erpelding, Rubel
- ABSENT/
EXCUSED:** None
- GUESTS:** Lynn Tominaga, Idaho Ground Water Association; Gary Spackman, Idaho Department of Water Resources; Norman Semanko, Parsons Behle and Latimer; Andy Brunelle, U.S. Forest Service; Russ Hendricks, Idaho Farm Bureau
- Chairman Gibbs** called the meeting to order at 1:30pm.
- MOTION:** **Rep. Kauffman** made a motion to approve the minutes of the February 9, 2018 meeting. **Motion carried by voice vote.**
- Chairman Gibbs** welcomed the new committee Page, **Caleb Pirc**, and asked him to introduce himself.
- H 550:** **Norman Semanko**, Twin Lakes Improvement Association, stated this bill would establish a removal and replacement process for appointed flood control district commissioners. The current statute addresses the flood control district commissioner appointments by the Director of the Idaho Department of Water Resources, but does not provide a mechanism for removal or replacement with due cause. Mr. Semanko stated there were concerns with some broad terms and vague language in the bill, so he is requesting this bill be sent to General Orders with the following committee amendments: "The director may remove a commissioner for neglect of duty, misconduct or malfeasance or inability to perform the duties of a commissioner, or if the commissioner is no longer a resident of the division from which appointed. The director may appoint a successor for the unexpired term."
- MOTION:** **Rep. Kauffman** made a motion to send **H 550** to General Orders with committee amendments attached. **Motion carried by voice vote.** **Rep. Gibbs** will sponsor the bill on the floor.
- Chairman Gibbs** requested the record reflect there were no questions from the committee and nobody came forward to testify.
- H 603:** **Rep. Boyle**, District 9, stated this bill codifies the landmark stockwater rights case of *Joyce Livestock Company v. United States* holding that an agency of the federal government cannot obtain stockwater rights under Idaho law unless it actually owns livestock and puts the water to beneficial use. Prior to the Joyce Livestock decision, thousands of stockwater rights were decreed to or permitted in the name of federal agencies. Rep. Boyle stated within 90 days of this bill becoming law, the Director of the Idaho Department of Water Resources will be required to issue show cause orders to the federal agencies. Due process is provided to the agencies to prove they have put their stockwater rights to beneficial use in the last five years.

In response to a question regarding why this bill is necessary in addition to the Joyce Livestock decision, **Rep. Boyle** explained this bill is to clear up a gray area still remaining because the federal agencies have not yet forfeited or relinquished their water rights. Although ranchers are putting the water to beneficial use with their livestock, they are still unclear if they can file for their water rights because the federal agencies still hold those water rights.

In response to a question regarding why this bill states the Director of the Department of Water Resources will make the determination when the Joyce Livestock decision made the determination federal agencies cannot hold water rights, **Rep. Boyle** explained although the Joyce Livestock decision was clear that federal agencies cannot put water to beneficial use if they don't own livestock, a forfeiture process needed to be established for the Director to work with the federal agencies.

In response to concerns regarding the federal agencies forfeiting the water rights and the possibility of ranchers losing the priority date as a result of that forfeiture, **Rep. Boyle** explained ranchers have documentation showing the ranches they own today can be traced back to the early 1900's, and in some cases even earlier, which demonstrates when their livestock first started drinking the water, establishing their senior water rights date. In addition, the Taylor Grazing Act of 1934 required ranchers to prove their livestock were out on the range putting water to beneficial use five years prior to the Act, so 1929 has been established for many ranchers as a senior water rights date.

Gary Spackman, Director, Idaho Department of Water Resources, stated he is **in opposition** to this bill. He stated although he is speaking against this bill, it doesn't mean he is unfavorable to proposals to address the Joyce Livestock decision to place water rights into the hands of the cattlemen who put the water to beneficial use on federal lands. His concern is with the process defined in **Section 42.503**. The first issue is with the requirement that within 90 days following the enactment of this bill, he will be required to compile a list of all stockwater rights held by federal agencies and submit that list to the agencies. His staff estimated this list will contain approximately 10,000 - 20,000 stockwater rights that have been decreed to the federal government in the Snake River Basin Adjudication and will be a very large task. The second issue is where it directs him to issue "an order" to the federal government with that list of 10,000 - 20,000 water rights. Mr. Spackman stated **Rep. Boyle** noted in her presentation he would issue orders (plural), but the bill states he shall issue one order to the federal government. The third concern is with the wording that states the order issued to the federal government shall contain the factual and legal basis for the order. His concern is these rights have been decreed to the federal agencies, so the action would be a forfeiture of property rights with the standard of proof being clear and convincing evidence. Mr. Spackman stated the responsible party required to show burden of proof in this instance would be his office, or the Attorney General's Office rather than the federal government. Furthermore, he does not believe the evidence he has is clear and convincing to meet that legal hurdle. Mr. Spackman stated he does not believe this bill actually grants him the authority to determine which decreed water rights must be forfeited, and suggested it be rewritten to grant him that authority. With that authority, he could establish test cases where ranchers, who are familiar with certain parcels of federal lands where livestock use the water, could sign an affidavit stating they have not observed any federal government-owned livestock on the land using the water. With that evidence, Mr. Spackman believes he would then have factual, clear and convincing evidence to issue the orders to the federal government.

In response to questions if the action to transfer the water rights could be done en masse, **Mr. Spackman** stated each rancher will need to file individually and that process was established with the legislation passed last year.

In response to questions regarding forfeited water rights and retaining priority dates, **Mr. Spackman** stated if water rights are forfeited, then those rights are lost and ownership returns to the state of Idaho to be reappropriated. But, he stated most of the stockwater rights are small enough they qualify as a deferrable water right even though the Snake River Basin Adjudication is finished. He stated the court recognized in the final decree some of the water rights were deferrable and could be claimed at a later date with whatever priority date is claimed.

In response to questions regarding whether or not he agrees with the Joyce Livestock decision, **Mr. Spackman** stated he believes in due process and agrees with the Joyce Livestock decision. He explained when an earlier court decreed the water rights to the federal government, and then a later court decision established a stricter standard, the stricter standard does not negate the fact the water rights were already decreed by a court. He further explained if the federal government cannot establish they are using the water for beneficial use over the last five years, then the established process will be followed to make a determination if the water rights are forfeited.

In response to a question of what due process looks like, **Mr. Spackman** stated there's three elements to due process; a notice, an issue in the show cause order identifying there is some prima facie evidence of non use, and then an opportunity for a hearing.

In response to a question regarding keeping the bill as written or sending it back to the sponsor for amendments, **Mr. Spackman** stated he opposed this bill because he doesn't believe it establishes a legitimate process for determining forfeiture.

MOTION:

Rep. Raybould made a motion to **HOLD H 603** in committee for time certain at the discretion of the Chair. He also spoke to the motion and suggested **Mr. Spackman** and **Rep. Boyle** meet to correct the language and bring that back to the Chairman to determine how to proceed.

In response to a question regarding how he would change the language to alleviate his concerns, **Mr. Spackman** stated he thought this bill would grant him the authority to conduct contested cases to determine if water rights were actually forfeited. He reiterated the need to establish test cases to take through the administrative and judicial process in order to determine if the proof is adequate, rather than have the federal government's decreed water rights all move through the process at the same time.

Russ Hendricks, representing Idaho Farm Bureau, stated they are **in support** of this bill. He stated this bill shifts the burden of proof from the stockmen to the federal government to show they are putting the water to beneficial use and supports legislation that puts the water rights back into the hands of the stockmen.

Norman Semanko, Attorney, Parsons Bailey and Latimer, stated he is not representing anyone today. Mr. Semanko stated he represented many individuals during the Snake River Basin Adjudication process and was able to reach settlements in 2000, where individuals were able to obtain water rights in their own names. Mr. Semanko stated with the Joyce Livestock decision, it became clear the basis for the water rights decreed to the federal government was fiction. He continued, beneficial use is an ongoing requirement to hold those water rights, it isn't proving it one time and then you're done.

Mr. Semanko also pointed out an inconsistency on actions taken based on the Joyce Livestock decision, specifically the Department sent out show cause notices in the North Idaho Adjudication, without any additional information or evidence as stated by the Director in his testimony was necessary before issuing show cause orders to the federal government.

Rep. Raybould reiterated his concerns stated earlier, then asked **Mr. Semanko** if he felt there was a problem with the language in this bill that would cause cattlemen to end up with junior water rights once the federal government forfeited, or transferred, their water rights. Mr. Semanko responded there was nothing in this bill that impacts a cattleman's right to file their own claim, retaining their priority dates. He stated this bill is about the federal government forfeiting their decreed water rights if they cannot show they own livestock and are putting water to beneficial use.

**MOTION
WITHDRAWN:**

Rep. Raybould withdrew his motion to **HOLD H 603** in committee for time certain at the discretion of the Chair.

Bill Meyers, Attorney, Holland and Hart, stated earlier in his career, he held the position of Solicitor with the Department of Interior and stated if he were still in that position and received show cause orders from the Director of the Idaho Department of Water Resources as a result of this bill, he would ask his agency directors if they had been grazing livestock on the allotments where they hold water rights under Idaho's water law. He believes the answer would be no, since the agencies don't own livestock. His advice would be not to fight the show cause order because the agencies aren't putting water to beneficial use as clearly outlined in the Joyce Livestock decision, which should result in a forfeiture of their water rights back to the state of Idaho.

Chairman Gibbs called upon **Rep. Boyle** to conclude her presentation of **H 603**. Rep. Boyle stated she was not aware the Department was in opposition to this bill until moments before this meeting started. As a result of previous meetings with **Mr. Spackman**, she believed they had addressed his concerns in the bill before the committee. She stated the fact is the federal government does not own livestock so therefore cannot put water to beneficial use. Furthermore, it would not be right for any more cattlemen to spend more money and fight this battle in court when the Joyce Livestock decision is clear.

MOTION:

Rep. Moyle made a motion to send **H 603** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote.** **Rep. Boyle** will sponsor the bill on the floor.

ADJOURN:

There being no further business to come before the committee, the meeting was adjourned at 2:57pm.

Representative Gibbs
Chair

Tracey McDonnell
Secretary