

IN THE SENATE

SENATE BILL NO. 1412

BY STATE AFFAIRS COMMITTEE

AN ACT

1 RELATING TO WATER; AMENDING SECTION 42-201, IDAHO CODE, TO REVISE EXEMPTION  
2 PROVISIONS RELATING TO THE RELEASE AND DIVERSION OF WATER, TO PROVIDE  
3 FOR RELEASES AND DIVERSIONS FROM NATURAL WATERCOURSES, STORAGE RESER-  
4 VOIRS, CANALS AND DRAINS FOR DESIGNATED PURPOSES, AND TO PROVIDE THAT  
5 CERTAIN DIVERSIONS AND RELEASES OF WATER SHALL NOT BE ATTRIBUTED OR  
6 CHARGED TO THE SATISFACTION OF A WATER RIGHT AND SHALL, TO THE EXTENT  
7 PRACTICABLE, BE COORDINATED WITH THE WATER RIGHT OWNER; AMENDING SEC-  
8 TION 42-204, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT  
9 OF WATER RESOURCES SHALL DETERMINE THE IMPACT OF A REQUESTED WATER  
10 RIGHT UPON WATER AVAILABLE TO STORE IN RESERVOIRS IN THE SNAKE RIVER  
11 AND ITS TRIBUTARIES UPSTREAM FROM BROWNLEE RESERVOIR PRIOR TO GRANTING  
12 A VESTED WATER RIGHT FOR WATER OF THE SNAKE RIVER OR SURFACE OR GROUND  
13 WATER TRIBUTARY TO THE SNAKE RIVER OTHER THAN FOR DOMESTIC PURPOSES,  
14 TO PROVIDE THAT CERTAIN WATER RIGHTS SHALL NOT BE APPROVED UNLESS THE  
15 DIRECTOR FIRST APPROVES A MITIGATION PLAN, TO PROVIDE MITIGATION PLAN  
16 REQUIREMENTS, TO PROVIDE THAT CERTAIN BURDENS OF PROOF SHALL BE ON THE  
17 APPLICANT AND TO REVISE CODE REFERENCES; AND AMENDING SECTION 42-607,  
18 IDAHO CODE, TO PROVIDE THAT RELEASES OF WATER FROM SPECIFIED RESERVOIRS  
19 FOR FLOOD CONTROL PURPOSES PURSUANT TO DESIGNATED CRITERIA AND PROCE-  
20 DURES SHALL NOT BE ATTRIBUTED OR CHARGED TO THE SATISFACTION OF STORAGE  
21 WATER RIGHTS FOR THE RESERVOIRS UNLESS THE RELEASED WATER IS PUT TO BEN-  
22 EFICIAL USE PURSUANT TO THE WATER RIGHT.  
23

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

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

27 42-201. WATER RIGHTS ACQUIRED UNDER CHAPTER -- ILLEGAL DIVERSION AND  
28 APPLICATION OF WATER -- USES FOR WHICH WATER RIGHT NOT REQUIRED -- EXCLUSIVE  
29 AUTHORITY OF DEPARTMENT. (1) All rights to divert and use the waters of this  
30 state for beneficial purposes shall hereafter be acquired and confirmed un-  
31 der the provisions of this chapter and not otherwise. And after the passage  
32 of this title all the waters of this state shall be controlled and adminis-  
33 tered in the manner herein provided. Such appropriation shall be perfected  
34 only by means of the application, permit and license procedure as provided in  
35 this title; provided, however, that in the event an appropriation has been  
36 commenced by diversion and application to beneficial use prior to the effec-  
37 tive date of this act it may be perfected under such method of appropriation.

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

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

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

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

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

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

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

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

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

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

18 42-204. EXAMINATION -- PERMIT -- COMMENCEMENT OF WORK -- EXTENSIONS --  
19 APPEAL. On receipt of the application, which shall be of a form prescribed by  
20 the department of water resources, it shall be the duty of that department to  
21 make an endorsement thereon of the date of its receipt, and to examine said  
22 application and ascertain if it sets forth all the facts necessary to show  
23 the location, nature and amount of the proposed use. If upon such examina-  
24 tion the application is found defective, it shall be the duty of the depart-  
25 ment of water resources to return the same for correction or to correspond  
26 with the applicant to obtain the needed information or amendments. If the  
27 application is returned to the applicant or the department shall request ad-  
28 ditional information and the applicant fails to return the corrected appli-  
29 cation or to supply the needed information within thirty (30) days, the de-  
30 partment may void the record of said application and notify the applicant of  
31 such action. If the corrected application is returned or the information is  
32 supplied after thirty (30) days, such corrected application shall be treated  
33 in all respects as a new application, and the priority of the right initiated  
34 shall be determined by the date of receipt, in the office of the department,  
35 of the corrected application or additional information; provided, that upon  
36 request, and good cause appearing therefor, the director of the department  
37 of water resources may grant an extension of time within which to return the  
38 corrected application or supply needed information. All applications which  
39 shall comply with the provisions of this chapter and with the regulations of  
40 the department of water resources shall be numbered in such manner as will  
41 aid in their identification, and it shall be the duty of the department to ap-  
42 prove all applications, made in proper form, which contemplate the applica-  
43 tion of water to a beneficial use: provided, that the department may deny any  
44 such application, or may partially approve and grant a permit for a lesser  
45 quantity of water than applied for, or may grant a permit upon conditions as  
46 provided in the preceding section.

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

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

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

21 (b) If the director determines that the new water right would reduce wa-  
22 ter that could be physically stored or applied to existing beneficial  
23 uses to which storage water is applied, the water right shall not be ap-  
24 proved unless the director first approves a mitigation plan to provide  
25 water to storage equivalent in amount, location and for the same time  
26 that the requested water right reduces water that could be physically  
27 stored or applied to existing beneficial uses to which storage water is  
28 applied.

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

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

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

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

10 (34) The time for completion of works and application of the water to  
11 full beneficial use under any permit involving the construction of a reser-  
12 voir of more than ten thousand (10,000) acre feet capacity or for the appro-  
13 priation of water to be impounded in such reservoir of more than ten thousand  
14 (10,000) acre feet capacity, may be extended by the director of the depart-  
15 ment of water resources upon application to the director if the permittee  
16 establishes that the permittee has exercised reasonable diligence and that  
17 good cause exists for the requested extension.

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

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

37 (67) In all other situations not governed by these provisions the de-  
38 partment may grant one (1) extension of time, not exceeding five (5) years  
39 beyond the date originally set for completion of works and application of the  
40 water to full beneficial use, or beyond any grant of extension pursuant to  
41 the provisions of subsection (1) of this section, upon request for extension  
42 received on or before the date set for completion, provided good cause ap-  
43 pears therefor.

44 Any applicant feeling himself aggrieved by the decision of the depart-  
45 ment of water resources regarding his application may request a hearing be-  
46 fore the director in accordance with section 42-1701A(3), Idaho Code, for  
47 the purpose of contesting the decision and may seek judicial review pursuant  
48 to section 42-1701A(4), Idaho Code, of any final decision of the director  
49 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.