

IN THE SENATE

SENATE JOINT MEMORIAL NO. 106

BY STATE AFFAIRS COMMITTEE

A JOINT MEMORIAL

1  
2 TO THE PRESIDENT OF THE UNITED STATES, THE PRESIDENT OF THE SENATE AND THE  
3 SPEAKER OF THE HOUSE OF REPRESENTATIVES OF CONGRESS, TO THE CONGRES-  
4 SIONAL DELEGATION REPRESENTING THE STATE OF IDAHO IN THE CONGRESS OF THE  
5 UNITED STATES, TO THE SECRETARY OF AGRICULTURE, AND TO THE SECRETARY OF  
6 THE INTERIOR.

7 We, your Memorialists, the Senate and the House of Representatives of  
8 the State of Idaho assembled in the First Regular Session of the Sixty-fifth  
9 Idaho Legislature, do hereby respectfully represent that:

10 WHEREAS, approximately 63% of land in the State of Idaho is public land  
11 controlled by the United States, primarily by the Bureau of Land Management  
12 and the Forest Service, which makes the right to cross federal land for de-  
13 livery of water rights to Idaho water users extremely important; and

14 WHEREAS, the law of the United States, since the 1866 Mining Act, has  
15 recognized that a water user in the arid West has the right to divert water  
16 from the rivers and streams across federal land for use on private property  
17 for, among other purposes, mining and agriculture. When the water user has a  
18 water right appropriated under state law, the law provides that a water user  
19 needs no approval from the federal government for the diversion and benefi-  
20 cial use of the water on the user's private property; and

21 WHEREAS, the United States Congress passed the Federal Land Policy and  
22 Management Act (FLPMA), as amended, in 1976, which explicitly recognizes and  
23 protects easements and rights existing on federal lands and recognizes under  
24 previous laws, such as the 1866 Mining Act, to deliver water appropriated un-  
25 der state law across federal land to private property; and

26 WHEREAS, Congress passed an amendment to FLPMA in 1986 known as the  
27 Colorado Ditch Bill Act, which explicitly directs the Secretary of Agricul-  
28 ture to issue a permanent easement for a water system involving reservoirs,  
29 canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other  
30 facilities and systems, for the impoundment, storage, transportation, and  
31 distribution of water traversing federal lands within the National Forest  
32 System when: (1) the water system is used for agricultural irrigation or  
33 livestock purposes; (2) the system that existed in 1976 has remained in  
34 operation; (3) any enlargement of the system after 1976 requires separate  
35 authorization; (4) the user has a valid state water right; and (5) the use in-  
36 volves some private land. The water users were to supply the Forest Service  
37 with evidence of the location of easements; and

38 WHEREAS, the state of Idaho has had a comprehensive method for recog-  
39 nizing the appropriation of waters of the state for beneficial use under the  
40 priority doctrine since before statehood; and

41 WHEREAS, the State of Idaho recognized in 1984 the need to adjudicate  
42 the water rights of this state and the Legislature directed the Department  
43 of Water Resources to initiate the Snake River Basin Adjudication (SRBA), as

1 provided by Idaho law, to facilitate the effective management of the waters  
2 of the Snake River Basin and to engage in a comprehensive adjudication of all  
3 surface and ground water use in the basin; and

4 WHEREAS, the United States was a party to the SRBA, is bound by the de-  
5 crees of the SRBA court, and must recognize the water rights of the Idaho wa-  
6 ter users as decreed by the SRBA court; and

7 WHEREAS, the SRBA issued more than 167,000 water rights and issued its  
8 final unified decree in 2014, in which the SRBA court decreed water rights  
9 with priority rights dating back, in some instances, to the 1860s; and

10 WHEREAS, Congress further directed that applications under the Col-  
11 orado Ditch Bill Act by easement holders be submitted by the end of 1996 to  
12 assist the Secretary of Agriculture in issuing permanent easements; and

13 WHEREAS, the Secretary of Agriculture has not issued or recognized many  
14 of these permanent easements, even though the water rights have been decreed  
15 by the SRBA court and the applications have been submitted as required by  
16 Congress more than 20 years ago; and

17 WHEREAS, certain interest groups are arguing that the secretary must  
18 take actions harmful to the pre-FLPMA easement holders because the secretary  
19 has not issued the mandated easements; and

20 WHEREAS, the vast majority of surface water rights in this state were  
21 decreed with priority dates that preceded the enactment of FLPMA in 1976, and  
22 those water uses are entitled to the right to cross federal lands to deliver  
23 their state water rights; and

24 WHEREAS, there are many Idaho water users, such as the members of the  
25 Salmon Headwaters Conservation Association, that properly complied with the  
26 easement requirements specified by the Colorado Ditch Bill Act to have their  
27 permanent easement recognized by the United States, but are now required to  
28 further expend resources on legal and administrative processes to defend and  
29 protect their valid existing Idaho water rights and associated rights-of-  
30 way across federal land.

31 NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Ses-  
32 sion of the Sixty-fifth Idaho Legislature, the Senate and the House of Rep-  
33 resentatives concurring therein, that we urge the President of the United  
34 States and Congress to take such action as necessary to require the Secretary  
35 of the Interior and the Secretary of Agriculture to recognize valid ease-  
36 ments existing pursuant to the 1866 Mining Act on lands under their respec-  
37 tive administrations without requiring citizens of the United States to sue  
38 the government in order to enjoy the benefits of such validly existing ease-  
39 ment rights.

40 BE IT FURTHER RESOLVED that the President and Congress take such action  
41 as necessary to require the Secretary of Agriculture to recognize valid  
42 easements existing prior to FLPMA on lands within the National Forest System  
43 without requiring citizens of the United States to sue the government in  
44 order to enjoy the benefits of such validly existing rights.

45 BE IT FURTHER RESOLVED that in recognition that the Secretary of Agri-  
46 culture has not acted on applications submitted more than 20 years ago, the  
47 President and Congress are urged to take such action as necessary to ex-  
48 tend the deadline for filing applications under FLPMA for an additional two  
49 years.

1 BE IT FURTHER RESOLVED that the President and Congress are urged to take  
2 such action as necessary to require the Secretary of Agriculture to refrain  
3 from interfering with the use of any decreed water right by attempting under  
4 any federal law to attach conditions on any 1866 Mining Act or FLPMA ease-  
5 ments crossing federal lands, especially in a manner that restricts or con-  
6 ditions in any way the use of water on private land as authorized by state  
7 law.

8 BE IT FURTHER RESOLVED that the Secretary of the Senate be, and she is  
9 hereby authorized and directed to forward a copy of this Memorial to the  
10 President of the United States, the President of the Senate and the Speaker  
11 of the House of Representatives of Congress, to the congressional delegation  
12 representing the State of Idaho in the Congress of the United States, to the  
13 Secretary of Agriculture, and to the Secretary of the Interior.