

MINUTES  
**SENATE RESOURCES & ENVIRONMENT COMMITTEE**

**DATE:** Monday, February 15, 2021

**TIME:** 1:30 P.M.

**PLACE:** Room WW55

**MEMBERS PRESENT:** Chairman Vick, Vice Chairman Johnson, Senators Bair, Heider, Patrick, Guthrie, Siddoway (Burtenshaw), Stennett, and Rabe

**ABSENT/ EXCUSED:** None

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman Vick** called the meeting of the Senate Resources and Environment Committee (Committee) to order at 1:30 p.m.

**GUBERNATORIAL APPOINTMENT:** **Chairman Vick** said the first order of business was the consideration of the appointment of Tammy Overacker to the Outfitters and Guides Licensing Board.

**MOTION:** **Senator Stennett** moved to send the Gubernatorial Appointment of Tammy Overacker to the Outfitters and Guides Licensing Board to the floor with recommendation that she be confirmed by the Senate. **Senator Heider** seconded the motion. The motion carried by **voice vote**. Senator Thayne will be the floor sponsor.

**RS 28105** **Removes Defunct Idaho OnePlan Conservation Planner From Statute and Standardizes References to Districts and Commission.** **Chairman Vick** said as a favor to the Senate Agriculture Committee, he agreed to have this RS printed and with the understanding that this legislation would be returned to that Committee for the hearing. **Colby Cameron**, Bureau Chief for Regulatory and Legislative Affairs, Division of Financial Management, represented the Senate Agriculture Committee for this RS.

**MOTION:** **Vice Chairman Johnson** moved to send **RS 28105** to print. **Senator Bair** seconded the motion. The motion carried by **voice vote**.

**RS 28097** **Converts Lava Hot Springs Foundation to a Continuously Appropriated Account.** **Colby Cameron** said **RS 28097** deals with the Lava Hot Springs Foundation. Currently, the foundation has to request its dedicated funds to be appropriated each year by the Legislature. **Senator Stennett** said she read on the fiscal note that it would save about \$1,000 in travel expenses each year, and this year the foundation was able to present their budget via Zoom. **Mr. Cameron** said appearing on Zoom was correct and he is assuming that procedure will continue in the future.

**MOTION:** **Senator Bair** moved to send **RS 28097** to print. **Senator Siddoway** seconded the motion. The motion carried by **voice vote**.

**Chairman Vick** announced that **S 1074** would be heard next, instead of **S 1072**, due to a scheduling conflict.

**S 1074** **Relating to Irrigation, Right-of-Way.** **Paul Arrington**, Executive Director, Idaho Water Users Association (IWUA), presented **S 1074**. **Mr. Arrington** said this legislation seeks to repeal Idaho Code § 42-1101, and amend some of the language and provisions in Idaho Code § 42-1102 and 42-1204 to clarify the nature and scope of ditch rights in Idaho.

Idaho Code § 42-1101 was enacted when Idaho was a territory to recognize the "riparian rights" doctrine under which riparian land ownership is sufficient to establish a water right to an adjoining stream. However, Idaho courts long ago rejected this doctrine; prior appropriation is the law that governs the State. **Mr. Arrington** said the Idaho Constitution states that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied.

**Mr. Arrington** said there has been an increase in litigation involving the rights, duties, and responsibilities of ditch owners. Idaho law provides ditch owners the ability to cross a neighbor's property to get water to the ditch owner's property. That ditch easement includes the ability to operate, maintain, and access the ditch. It also includes the ability to remove debris from the ditch. The addition of embankments is necessary for access when maintaining a ditch.

**Mr. Arrington** stated that this bill confirms the right to remove spoils from the ditch, as well as the right to leave those spoils on the bank or to use them for maintenance needs. This is consistent with historical practice. Finally, this legislation confirms the right to access the right-a-way year-round.

**DISCUSSION:** **Senator Stennett** inquired if this legislation seeks to avoid any conflicting interpretation and litigation. **Mr. Arrington** said that was correct. **Senator Stennett** then asked if any other part of the private property, beyond the easement, if permission would be needed from the landowner. **Mr. Arrington** replied it would be needed. He said the easements are specific to the ditches and the amount of space needed to maintain them.

**TESTIMONY:** **Paul Poorman**, from Cambridge, Idaho, representing himself, testified in opposition to **S 1074**. (Attachment 1). He recommended to not adopt the proposed changes, but if that is not possible, he suggested six changes: 1.) Retain section 1101; 2.) Define embankment; 3.) Define "reasonable" access; 4.) Prohibit the removal of material from the landowner's property; 5.) Prevent the ditch owner from cutting off access to the landowner's property by removing or preventing ditch crossings; and 6.) Specifically allow fences that cross the ditches at property boundaries, as long as gates are provided.

**DISCUSSION:** **Senator Stennett** said she had previously inquired of the Attorney General what is considered "reasonable" access. The Attorney General determined that it would be up to the ditch owner to make an initial determination of necessity, but the question should then be reviewed by a court. **Senator Stennett** asked Mr. Poorman if he thought the landowner would have any say. **Mr. Poorman** replied it looks like they are recommending a dead zone. **Senator Stennett** then asked Mr. Poorman, as a landowner, if he would be able to be part of that process. **Mr. Poorman** indicated that his proposal would be to scale it down or go to a binding arbitration.

**Senator Stennett's** next concern was regarding the term "embankment". She said it was determined that it is an artificial barrier, which means any structure constructed to impede or obstruct the flow of water, and asked Mr. Poorman if that was a sufficient definition. **Mr. Poorman** suggested that there needs to be a certain distance based on the amount of flow that is in the ditch. **Senator Stennett** stated she had one last question, regarding the right to occupy the right-of-way during any season of the year. **Mr. Poorman** said because in the winter there is snow, and in the spring there is mud, that proposal is problematic.

**Senator Patrick** wanted to know who would be responsible if property was flooded due to poor ditch maintenance. **Mr. Poorman** replied that ditch owners need to maintain their ditches, but it needs to be done in conjunction with the landowners, as well as with local experts.

**Gayle Buhrer-Poorman** from Cambridge, Idaho, representing herself, testified in opposition to **S 1074**. (Attachment 2). She stated this legislation constitutes a "taking" of private land and needs amendments to better protect rights of landowners. The proposed amendments do not distinctly define an embankment nor does it distinctly apply these regulations to all canals and ditches throughout the state of Idaho. **Ms. Buhrer-Poorman** said small ditches need to be maintained and treated much differently than large canals and the poor maintenance is what is causing much of the problems regarding their property.

**Chairman Vick** asked Ms. Buhrer-Poorman if a court previously ruled on their litigation. **Ms. Buhrer-Poorman** replied that a court had and its decision very much favored them as far as the amount of right-of-way that this ditch owner could have. The ruling also defined the ditch owner's access because the ditch owner was coming in at all times of the day and night, using the Poormans' driveway instead of the right-of-way access to the ditch.

**Mr. Arrington** closed the discussion by saying **S 1074** applies to the Poormans' ditch just as much as it applies to large water facilities. What this legislation does is codify water managers' practices and work for over a century in Idaho. The Code currently allows for the removal of vegetation from the right-of-way, and nothing in this amendment adds to or takes away from that ability. The Code currently obligates ditch owners to maintain embankments and nothing in this amendment changes that. **Mr. Arrington** said this amendment does not resolve every issue that can arise relating to a ditch. Most of the problems addressed by the Poormans today are not resolved through this legislation. Disputes will continue with landowners and ditch owners and will have to be settled in court. These easements are subject to a rule of reasonableness.

**Senator Stennett** asked if the amendment could be more clear. **Mr. Arrington** said IWUA have not been able to articulate language that adequately works for the small ditches and still works for the big facilities that carry a lot of water. **Mr. Arrington** expressed the importance of local agreements and urged landowners to document them so there is a written document to confirm what the rights and duties are specific to a given ditch.

**Senator Rabe** wanted to know more about not extending notices to owners or occupants of the land. **Mr. Arrington** said that notices may work for small ditches, but they don't work for large facilities. If there is an emergency, large facilities cannot wait 10 days to give notice to landowners. **Senator Rabe** then inquired if notice requirements could be implemented for smaller waterways and not for larger ones. **Mr. Arrington** said that change could create as much litigation as it was trying to solve.

**Vice Chairman Johnson** asked why the term "absolutely necessary" was changed to "reasonably necessary." **Mr. Arrington** said the courts have held the ditch owners to the rule of reasonableness and by changing the term, the Code will be aligned with the case law.

**Senator Guthrie** said that when talking about the topic of reasonableness, a small ditch with a 200-foot easement, would not be reasonable. In terms of mining, taking rocks, taking firewood, and mining the dirt, that is totally inappropriate, and he hopes there is some kind of protection in the bill.

**MOTION:**

**Senator Guthrie** moved to send **S 1074** to the floor with a **do pass** recommendation. **Senator Patrick** seconded the motion. The motion carried by **voice vote**. Senator Bair will be the floor sponsor.

**S 1072** **Relating to Irrigation Districts, Vacancies.** **Senator Anthon** said this legislation is an amendment that aligns two provisions of code, Idaho Code § 43-209 and Idaho Code § 43-201(3), and allows the filling of a vacant seat to take place in the same way as filling an elected seat. **Senator Siddoway** inquired if this would allow board members to determine how few people are on their board. **Senator Anthon** responded by saying no, this bill just determines who would qualify for geographical divisions to represent them as a seated member on the board.

**MOTION:** **Senator Siddoway** moved to send **S 1072** to the floor with a **do pass** recommendation. **Senator Heider** seconded the motion. The motion carried by **voice vote**. Senator Anthon will be the floor sponsor.

**S 1073** **Relating to Real Property, Adverse Possession.** **Senator Anthon** presented **S 1073** and said it would clarify that the statutory protection of water delivery facilities from claims of "adverse possession" extend to properties owned by water delivery entities. **Senator Anthon** said adverse possession is a legal theory allowing someone who doesn't actually have a title to land to gain one by acting like they own it. **Senator Anthon** said this legislation says that if an irrigation district owns the ditch, they don't have an easement.

**DISCUSSION:** **Senator Stennett** asked if someone taking over property and not paying taxes, qualifies as "squatting." **Senator Anthon** replied that it was, as one of the key elements of adverse possession is the payment of taxes.

**MOTION:** **Vice Chairman Johnson** moved to send **S 1073** to the floor with a **do pass** recommendation. **Senator Stennett** seconded the motion. The motion carried by **voice vote**. Senator Anthon will be the floor sponsor.

**SCR 104** **Relating to the Ririe Reservoir.** **Senator Bair** presented **SCR 104** and said dams have multiple purposes: flood control: irrigation: and recreation, such as fishing and boating. With each dam that is built for flood control, there is a flood rule curve. **Senator Bair** said federal flood rule curves dictate how a dam is operated, and neither the Bureau of Reclamation (Bureau) nor the dam operator has to deviate from those curves. There has to be multiple studies done to make changes and presently, the second phase of studies is being done.

**Senator Bair** said this legislation encourages the Idaho Water Resource Board (IWRB) to help fund the last phase of the studies required to motivate the Bureau toward changing and updating the flood rule curve.

**DISCUSSION:** **Senator Guthrie** stated that **SCR 104** is good legislation but inquired if the Bureau is obligated to yield to the findings of the report. **Senator Bair** deferred the question to Brian Patton, Executive Officer, Idaho Department of Water Resources and Idaho Water Resource Board.

**Mr. Patton** clarified that the water stored in Ririe is used by almost every canal company and irrigation district in Eastern Idaho upstream of American Falls Reservoir. Some years ago, those water users, canal companies, and irrigation districts met with the Bureau and the U.S. Corps of Engineers (Corps) and started this process when Congress passed the Wynne Act, (the water infrastructure investments for the nation in 2016 that gave the authorization to start these studies). It created a window to look at these flood rule curves and to try to operate reservoirs more optimally to achieve multiple purposes.

**Mr. Patton** stated the operation at Ririe Dam is very heavily weighted toward flood control, to the expense of filling the reservoir. Those water users started the process and spent several hundred thousand dollars in phase one of the investigation. That basically gave the green light to go to phase two of the investigation. **Mr. Patton** said this resolution would throw the state's weight behind this process as well as encourage the IWRB to get involved and start working directly with the Corps and the Bureau to move the process forward.

**Mr. Patton** said the Corps is not bound by the results of the study, but if the study shows that the reservoir can be operated for more optimum or multiple purposes without impacting flood protection, then the Corps and the Bureau will be more likely to move in that direction.

**MOTION:**

**Senator Siddoway** moved to send **SCR 104** to the floor with a **do pass** recommendation. **Senator Guthrie** seconded the motion. The motion carried by **voice vote**. Senator Bair will be the floor sponsor.

**ADJOURNED:**

There being no further business at this time, **Chairman Vick** adjourned the meeting at 2:47 p.m.

---

Senator Vick  
Chair

---

Juanita Budell  
Secretary