

March 20, 2003

The Honorable Laird Noh
Idaho State Senate
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Noh:

This letter is in response to your March 4, 2003, inquiry regarding House Bill No. 284 (“HB 284”). In that inquiry you ask the following question:

QUESTION PRESENTED

May the legislature modify the application of the local public interest as expressed in HB 284 without those modifications first being changed in the State Water Plan, under procedures spelled out for such modification by the legislature?

CONCLUSION

Upon reviewing the provisions of article XV, § 7 of the Idaho Constitution and the statutes establishing the Idaho Water Resource Board in accordance with article XV, § 7, we conclude that the legislature may amend the statutory definition of the “local public interest” without the Idaho Water Resource Board first amending Public Interest Policy 1B of the *State Water Plan*. We further conclude that the change in the definition of the “local public interest” proposed under HB 284 is not inconsistent with current Policy 1B of the *State Water Plan*, which provides: “It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.”

ANALYSIS

The Idaho Water Resource Board (“IWRB”) initially adopted *The State Water Plan—Part Two* on December 29, 1976. The IWRB adopted the *State Water Plan* pursuant to its then existing constitutional and statutory authorities. Art. XV, § 7, Idaho Const. (1965 Sess. Laws 22), and Idaho Code § 42-1734 (1974 Sess. Laws 533). Article XV, section 7 of the Idaho Constitution was amended in 1984 to read as it now appears:

SECTION 7. STATE WATER RESOURCE AGENCY. There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to construct and operate

water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Art. XV, § 7, Idaho Const. (amended text as proposed by S.J.R. No. 117, 1984 Sess. Laws 689, and ratified at the Nov. 6, 1984 general election).

As the state water resource agency referred to in art. XV, § 7 of the Idaho Constitution, the IWRB is authorized to “formulate and implement a state water plan for the optimum development of water resources in the public interest.” Following its amendment in 1984, article XV, § 7, now provides that “[t]he Legislature . . . shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change . . . shall be submitted to the Legislature . . . and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.”¹

In formulating the 1976 *State Water Plan—Part Two*, the IWRB adopted 37 policies as the basis for future water resource development, conservation and preservation in the state. Policy No. 1 entitled “Public Interest” provided as follows:

Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses, both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the

application shall consider the public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board.

The Idaho State Water Plan—Part Two, Idaho Water Resource Board, Dec. 29, 1976, page 91.

In 1978, the legislature implemented a modified version of the public interest provision proposed by Policy 1 of the *State Water Plan*. Rather than making a water right application subject to the public interest as determined under the State Water Plan, the legislature chose to define the public interest by statute. The legislature amended Idaho Code § 42-203 to require that the “local public interest” be considered for each new application to appropriate water, “where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.” 1978 Sess. Laws 767. The statutory definition of the “local public interest” has remained unchanged since 1978 and is now codified as I.C. § 42-203A(5)(e). In 1981, the legislature amended Idaho Code § 42-222 to make the local public interest criterion applicable to water right transfer applications. 1981 Sess. Laws 253.

The current version of the *State Water Plan*, adopted by the IWRB in December 1996 contains the following “public interest” policy identified as Policy 1B:

It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.

The IWRB’s Comment following Policy 1B states:

The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including ground waters, and the waters of all natural springs and lakes within the boundaries of the state, to be public waters [Idaho Code § 42-101]. Water allocation and management decisions must consider the public interest as established by state law. The State Water Plan is an expression of the public interest.

Idaho State Water Plan, Idaho Water Resource Board, Dec. 1996, p. 5. The IWRB adopted Policy 1B pursuant to its authority under art. XV, § 7, Idaho Const., and the provisions of Idaho Code § 42-1734A(1), which provides in pertinent part as follows:

The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest.

Pursuant to the provisions of art. XV, § 7, Idaho Const., the legislature approved Policy 1B of the *State Water Plan*, as adopted by the IWRB, through the enactment of law. 1997 Sess. Laws 67. The IWRB has not made any subsequent change to the public interest policy of the *State Water Plan* since 1996.

The question now presented is whether the legislature may modify the definition of the “local public interest” in the manner expressed in HB 284 without those changes first being made in the *State Water Plan*, under the procedures spelled out for such modification by the legislature.

HB 284 would change the statutory definition of the “local public interest” from “the affairs of the people in the area directly affected by the proposed use,” now existing under Idaho Code § 42-203A(5)(e), to “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” This revised definition of the “local public interest” would appear as an added definition in Idaho Code § 42-202B to be applied wherever the defined term is used within title 42, Idaho Code. In addition, HB 284 would add language at several locations in title 42, Idaho Code, prohibiting the approval of a proposed water project that would “adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.”

The change in the definition of the “local public interest” as proposed under HB 284 is not inconsistent with Policy 1B of the current *State Water Plan*. Policy 1B reads: “It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.” There is no provision in either art. XV, § 7, Idaho Const., or in the statutes establishing and governing the IWRB, that would require the IWRB to first amend the *State Water Plan* before the legislature modifies the existing statutory definition of the “local public interest.” Idaho Constitution, art. II, § 1, and art. III, § 1, place in the legislature the power to make law. Mead v. Arnell, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990). Nothing in art. XV, § 7 of the Idaho Constitution suggests an intent to limit the legislature’s authority to make law with respect to matters that may be addressed in the *State Water Plan*.

Sincerely,

PHILLIP J. RASSIER
Deputy Attorney General
Natural Resources Division

¹ The 1984 amendment to art. XV, § 7, Idaho Const., was in response to the decision of the Idaho Supreme Court in Idaho Power Company v. State, 104 Idaho 570, 661 P.2d 736 (1983), declaring

unconstitutional the provisions of Idaho Code § 42-1736 because the statute purported to authorize the legislature to perform functions constitutionally assigned to the Idaho Water Resource Board. The court further held that to the extent art. XV, § 7, authorizes the legislature to take action upon the *State Water Plan* it must do so by enactment of law and not by means of a concurrent resolution.