

**LEMHI RIVER BASIN COMPREHENSIVE SETTLEMENT AGREEMENT  
BETWEEN THE IDAHO WATER RESOURCE BOARD, IDAHO DEPARTMENT  
OF FISH AND GAME, IDAHO OFFICE OF SPECIES CONSERVATION  
AND VARIOUS LEMHI BASIN WATER USERS**

**SIGNATORIES (“Parties”)**

Lemhi Irrigation District  
Kurt Bird  
David Udy  
Steven Johnson  
Carl Ellsworth  
Carl Lufkin  
Lowell Cerise  
RJ Smith

Idaho Water Resource Board  
Idaho Department of Fish and Game  
Office of Species Conservation

Other Water Users Who Agree to be Bound by this Settlement Agreement as provide Section XI.1 below.

**INTRODUCTION**

This Settlement Agreement (“Agreement”) memorializes the Parties’ comprehensive settlement of the Lemhi high flow issues as directed by Idaho Senate Concurrent Resolution 137, 2020 Idaho Sess. Laws at 1028-30 (“SCR 137”), and Idaho House Concurrent Resolution 21, 2021 Idaho Sess. Laws at 1169.

**SETTLEMENT AGREEMENT**

**I. Goals of the Parties**

1. The recognized biological and business goals of the Parties are to “conserve, restore, and enhance sufficient habitat to sustain viable fish populations within the Lemhi River Basin while protecting private property rights and preserving and enhancing the farming and ranching lifestyle and economy of the Lemhi River Basin.” SCR 137.
2. The undersigned state agencies desire to work with Lemhi water users to protect existing private water rights and to promote economic development in the Lemhi River Basin.
3. The undersigned Lemhi water users desire to work with the undersigned state agencies to implement flow, passage, and screening projects to enhance listed salmon, bull trout and steelhead in accordance with this Agreement.
4. The Parties recognize and agree that all actions in this Agreement will be done in conformance with Idaho water law.

II. **Resolution of State and Private Protests to Pending Water Right Applications.**

1. **Withdrawal of Protests to Pending Applications.** To promote economic development in the Lemhi River Basin the undersigned state agencies and private water users agree to withdraw their protests to the following water right applications of parties to this Settlement Agreement (“Agreement”) subject to the following terms and conditions.
2. **Big Timber Applications**
  - a. **Permit 74-16187** (Kurt Bird) will be subject to the terms and conditions set forth in the Stipulation between the parties to the contested case dated \_\_\_\_\_:
  - b. **Application 74-16205** (David Udy) will be subject to the following conditions:
    1. 18 cfs bypass flow. Water Transaction Flows counts toward satisfaction of bypass flow.
    2. Season of Use: 3/15 to 7/31.
    3. If applicable, include Permissible Place of Use (PPU) and other flexibility options.
    4. No right to divert water under Little Timber Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16205 Place of Use (POU).
    5. This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.
  - c. **David Udy stream flow maintenance application** will be subject to the following conditions:
    1. Application will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
    2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
    3. Season of use will be 3/15 to 7/31.
    4. Right may be exercised only when the flow in Big Timber is 18 cfs or greater at the Big Timber Gage 13304050, located at Latitude 44°41’19.65”, Longitude 113°22’13.46”, Lemhi County . Water Transaction Flows counts toward satisfaction of bypass flow.
    5. Right will be subject to the conditions described in Section III

- below.
6. Right will have a priority date one day later than all other Big Timber and Little Timber high flow applications other than Kurt Bird and Jerry Foster.
  7. Right will not receive benefit of Wild and Scenic subordination.
  8. Right will be in full satisfaction of, and supersede, any existing or future claim by Udy of a right to divert “high flow” from Big Timber and Little Timber Creek under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Right.
  9. No right to divert water available under Little Timber Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16205 POU.
- d. **Application 74-16186** (Jerry Foster) will be subject to the following conditions:
1. 18 cfs bypass flow. Water Transaction Flows counts toward satisfaction of bypass flow.
  2. Season of Use: 3/15 to 7/31.
  3. If applicable, include PPU and other flexibility options.
  4. No right to divert water under Big Timber Basin stream flow maintenance right or Basin 74 High Flow General Provision for used on 74-16186 POU.
  5. Right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.
- e. **Jerry Foster stream flow maintenance application** will be subject to the following conditions:
1. Application will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  2. Right will be limited to the place of use of the Base Rights and cannot be transferred to other places of use independent of the Base Right.
  3. Season of use will be 3/15 to 7/31.
  4. Right may be exercised only when the flow in Big Timber is 18 cfs or greater at the Big Timber Gage 13304050, located at Latitude 44°41’19.65”, Longitude 113°22’13.46”, Lemhi County. Water Transaction Flows counts toward satisfaction of bypass flow.
  5. Right will be subject to the conditions described in Section III. below.

6. Right will have a priority date one day later than all other Big Timber and Little Timber high flow applications other than David Udy and Kurt Bird.
  7. Right will not receive benefit of Wild and Scenic subordination
  8. Right will be in full satisfaction of, and supersede, any existing or future claim by Foster of a right to divert “high flow” from Big Timber and Little Timber Creek under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Right.
  9. No right to divert water under Big Timber Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16186 POU.
- f. **Other Big Timber Stream Flow Maintenance Applications** will be subject to the following conditions:
1. Applications for other water users will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  3. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
  4. Season of use will be 3/15 to 7/31.
  5. Rights may be exercised only when the flow in Big Timber is 18 cfs or greater at the Big Timber Gage 13304050, located at Latitude 44°41’19.65”, Longitude 113°22’13.46”, Lemhi County. Water Transaction Flows counts toward satisfaction of bypass flow.
  6. Rights will be subject to conditions described in Section III below.
  7. Rights will not receive benefit of Wild and Scenic subordination.
  8. Right will be in full satisfaction of, and supersede, any existing or future claims of a right to divert “high flow” from Big Timber and Little Timber Creeks under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Rights.
- f. Applicants agrees to allow Idaho Fish and Game to install and maintain fish screens on all Big Timber Creek diversions.
- g. Applicants will not protest Idaho Fish and Game applications for fish propagation flows required for operation of the fish screens.
- h. Applicants will cooperate with Idaho Fish and Game to consolidate diversion were feasible.

- i. Parties will not oppose IWRB application for a minimum streamflow water right on Big Timber of 18 cfs from March 15<sup>th</sup> to July 31<sup>st</sup> and 10 cfs from August 1<sup>st</sup> to March 14<sup>th</sup>.
- j. The application will be junior to all applications pending with the Idaho Department of Water Resources. IWRB Water Transaction Flows will count toward satisfaction of the minimum flow.

9. **Big Eightmile Applications**

- a. **Application 74-16196** (Steven Johnson) will be subject to the following conditions:
  - 1. 5 cfs bypass flow measured at Big Eightmile Lower gage at Lee Creek Road in the NE1/4NE1/4, Section 28, T16N, R25E, B.M., Lemhi County. Water Transaction Flows count toward satisfaction of bypass flow.
  - 2. Season of Use: 3/15 to 07/31.
  - 3. If applicable, include PPU and other flexibility options.
  - 4. No right to divert water under Big Eightmile Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16196 POU.
  - 5. Right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.
- b. **Steven Johnson Big Eightmile stream flow maintenance applications** will be subject to the following conditions:
  - 1. Application will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  - 2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
  - 3. Season of use will be 3/15 to 7/31.
  - 4. Right may be exercised only when the flow in Big Eightmile is 5 cfs or greater measured at Big Eightmile Lower gage at Lee Creek Road in the NE1/4NE1/4, Section 28, T16N, R25E, B.M., Lemhi County. Any water transaction flows count toward satisfaction of bypass flow.
  - 5. Right will be subject to conditions described in Section III below.
  - 6. Right will not receive benefit of Wild and Scenic subordination.

7. Right will have a priority date one day later than Big Eightmile stream flow maintenance applications other than Kent Bird.
  8. Right will be in full satisfaction of, and supersede, any existing or future claim by Johnson of a right to divert “high flow” from Big Eightmile under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of Base Right(s).
  9. No right to divert water under Big Eightmile Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16196 POU.
- c. **Application 74-16204** (Kent Bird) will be subject to the following conditions:
1. 5 cfs bypass flow measured at Big Eightmile Lower gage at Lee Creek Road in the NE1/4NE1/4, Section 28, T16N, R25E, B.M., Lemhi County. Water Transaction Flows count toward satisfaction of bypass flow.
  2. Season of Use: 3/15 to 7/31.
  3. If applicable, include PPU and other flexibility options.
  4. No right to divert water under Big Eightmile Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16204 POU.
  6. Right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.
- d. **Kent Bird Big Eightmile stream flow maintenance applications** will be subject to the following conditions:
1. Application will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
  3. Season of use will be 3/15 to 07/31.
  4. Right may be exercised only when the flow in Big Eightmile is 5 cfs or greater measured at Big Eightmile Lower gage at Lee Creek Road in the NE1/4NE1/4, Section 28, T16N, R25E, B.M., Lemhi County. Water Transaction Flows count toward satisfaction of bypass flow.
  5. Rights will be subject to the conditions described in Section III below.

6. Rights will not receive benefit of Wild and Scenic subordination.
7. Rights will have a priority date one day later than Big Eightmile stream flow maintenance applications other than Steven Johnson.
8. Right will be in full satisfaction of, and supersede, any existing or future claim by Bird of a right to divert “high flow” from Big Eightmile under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Right(s).
9. No right to divert water under Big Eightmile Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16204 POU.

**e. Other Big Eightmile Lemhi Basin Stream Flow Maintenance Applications** will be subject to the following conditions:

1. Applications for other water users will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
3. Season of use will be 3/15 to 7/31.
4. Rights may be exercised only when the flow in Big Eightmile is 5 cfs or greater measured at Big Eightmile Lower gage at Lee Creek Road in the NE1/4NE1/4, Section 28, T16N, R25E, B.M., Lemhi County. Water Transaction Flows count toward satisfaction of bypass flow.
5. Rights will be subject to the conditions described in Section III below.
6. Rights will not receive benefit of Wild and Scenic subordination.
7. Rights will be in full satisfaction of, and supersede, any existing or future claim of a right to divert “high flow” from Big Eightmile under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Rights.

**4. Mill Creek Applications**

**a. Application 74-16194 (Steven Johnson) will be subject to the following conditions:**

1. Season of Use for Irrigation: 3/15 to 7/31.
2. If applicable, include PPU and other flexibility options.

3. No right to divert water under Mill Creek Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16194 POU.
  4. Irrigation portion of right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.
  5. The recharge portion of the right does not benefit from the Wild and Scenic River subordination.
- b. **Application 74-16195** will be withdrawn at request of applicant.
- c. **Steven Johnson Mill Creek stream flow maintenance application** will be subject to the following conditions:
1. Application will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
  3. Season of use will be 3/15 to 7/31.
  4. Right will be subject to the conditions described in Section III below.
  5. Right will not receive benefit of Wild and Scenic subordination.
  6. Right will have a priority date one day later than other Mill Creek stream flow maintenance applications.
  7. Right will be in full satisfaction of, and supersede, any existing or future claim of a right by Steven Johnson to divert “high flow” from Mill Creek under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Right.
- d. **Other Mill Creek stream flow maintenance applications** will be subject to the following conditions:
1. Applications for other water users will be based on the historic high flow use ancillary to existing uses authorized by decreed irrigation water rights with priority dates on or before March 15, 1966 (“Base Right”).
  2. Right will be limited to the place of use of the Base Right and cannot be transferred to other places of use independent of the Base Right.
  3. Season of use will be 3/15 to 7/31.

4. Rights will be subject to the conditions described in Section III below.
  5. Rights will not receive benefit of Wild and Scenic subordination.
  6. Rights will be in full satisfaction of, and supersede, any existing or future claim of a right to divert “high flow” from Mill Creek under the Basin 74 High Flow General Provision decreed in the Snake River Basin Adjudication for use on the place of use of the Base Rights.
5. **Nonconsumptive fish propagation flow applications.** Parties will not protest nonconsumptive fish propagation flow water right applications 74-16224, 74-16225, 74-16227 and Transfer No. 83870.
6. **Separate Streams Administration.** The above listed water rights that divert from streams listed in the SRBA Basin 74 Separate Stream General Provision “shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho Law, except as required by the Wild and Scenic Rivers Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees dated September 1, 2003 and as required by conditions included in stream flow maintenance water rights acquired pursuant to this Agreement.
7. **IDWR Authority Not Affected.** Nothing herein is intended to nor shall affect IDWR’s authority with respect to its review and approval of the pending applications listed above. In the event IDWR fails to approve the applications as set forth above the Parties shall meet and determine whether such disapproval requires renegotiation, modification, or termination of the Agreement.

### III. **Lemhi Basin Stream Flow Maintenance Applications**

1. **Lemhi Basin Stream Flow Maintenance Applications.** To protect private property rights and to preserve the historic farming and ranching lifestyle and the economy of the Lemhi River Basin, the Parties agree to support legislation set forth in Attachment A that provides for the filing of Lemhi Basin stream flow maintenance applications. The applications will be ancillary to and may only be used on the place of use of base rights entitled to divert high flow under the Basin 74 High Flow General Provision. The diversion rate is limited to the historic use of high flow.
2. **Distribution of Lemhi Basin Stream Flow Maintenance Water Rights.**
  - a. When Lemhi Basin stream flow maintenance water rights are in priority, the water supply legally available to such rights shall be distributed proportionately among water users diverting from a common source, except as otherwise provided in Section III.2.b.

below.

- b. Water users whose lands are within the Lemhi Irrigation District and who are authorized to divert and use water under a stream flow maintenance water right held by the Lemhi Irrigation District shall establish a process for sharing water available under the stream flow maintenance water right.
  - c. Lemhi Basin stream flow maintenance water rights diverting from streams listed in the SRBA Basin 74 Separate Stream General Provision “shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho Law, except as required by the *Wild and Scenic Rivers Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees* dated September 1, 2003.”
3. **Owner of Lemhi Basin Stream Flow Maintenance Water Rights.** Irrigation water right holders entitled to divert water under the SRBA High Flow General Provision may either file an application in their own name or have the Lemhi Irrigation District file applications on their behalf; provided, however, all Lemhi Basin stream flow maintenance applications on Big Timber, Eightmile, Lee and Mill Creeks shall be filed only in the name of the water users whose lands are authorized to be irrigated with water rights decreed in the Lemhi Adjudication, Civil Case No. 4948 (1982). While applications filed by the Lemhi Irrigation District will show the Lemhi Irrigation District in the Name and Address section of the water right, the right shall include a condition stating that as a matter of Idaho constitutional and statutory law title to the use of the water under the right is held by those water users whose lands are authorized to be irrigated with water rights decreed in the Lemhi Adjudication, Civil Case No. 4948 (1982).
  4. **McFarland Campground Minimum Stream Flow Application.** The parties agree to support legislation set forth in Attachment A authorizing the Idaho Water Resource Board to appropriate a minimum stream flow at McFarland Campground.
  5. **McFarland Campground Minimum Stream Flow Condition.** As a condition of obtaining a stream flow maintenance water right, an applicant for a stream flow maintenance water right agrees to inclusion of a condition on the applicant’s stream flow maintenance water right requiring the applicant to cease diversions under the right when the McFarland Campground minimum stream flow water right is in priority.
  6. **Waiver of Use of High Flow Under General Provision.** Each Lemhi Basin stream flow maintenance water right shall contain a condition stating that the right is in full satisfaction of all rights of the holder under SRBA Basin 74 High Flow General Provision to the use of high flow on the place of use of the Base Right.

7. **Satisfaction of Local Public Interest.** The McFarland Campground minimum stream flow is in satisfaction of the local public interest requirement of Idaho Code 42-203A(5)(e) as it pertains to processing of Lemhi Basin stream flow maintenance water rights provided for by this Agreement.
8. **Priority of Existing Rights.** The McFarland Campground minimum stream flow water right provided for in this Section shall be junior to all previously decreed, licensed, or permitted water rights and all water right applications on file with the Idaho Department of Water Resources with a priority earlier than the McFarland Campground priority date.
9. **Agreement to Not Protest Applications.** Parties agree to not protest a stream flow maintenance application filed with the Idaho Water Resource Department pursuant to this Agreement provided the elements of the application are consistent with the historic use of high flow on the place of use of the base right under the Basin 74 High Flow General Provision.
10. **Good Faith.** Parties agree to cooperate in good faith in the filing and perfection of stream flow maintenance water rights.
11. **Stream Flow Maintenance Applications Do Not Create a Precedent.** The Lemhi Basin stream flow maintenance applications provided for in this Agreement are based upon the historic practice recognized by the Seventh Judicial District of the State of Idaho in the Lemhi Adjudication, Civil Case No. 4948 (1982), and therefore, are not intended to nor shall be construed as establishing a precedent for issuance of any future water rights in the State of Idaho.

IV. **Additional Minimum Stream Flow Applications.**

1. **Minimum Stream Flow Legislation.** The Parties agree to support the legislation set forth in Attachment A authorizing the IWRB to file applications for permit for minimum stream flow water rights on the following creeks:

STREAM	QUANTITY	Period of Use	GAGE	CONDITIONS
Big Timber	18 cfs 10cfs	3/15 to 7/31 8/1 to 3/14	Big Timber Gage located at Highway 28 Bridge in the SWNW of Sec. 28, T16N,	Water Transaction flows count toward satisfaction of minimum flow. (Current amount is 7.2 c.f.s.)

			R26E.	
Bohannon	13 cfs 8.5 cfs	3/15 to 7/31 8/1 to 3/14	Lower Bohannon Gage, 28 21N23E SENE	Water Transaction flows count toward satisfaction of minimum flow. (Current amount is 8.58 c.f.s.).
Canyon	16 cfs 4 cfs	3/15 to 7/31 8/1 to 3/14	Canyon Creek, 28 16N26E NWNE	Water Transaction flows count toward satisfaction of minimum flow. (Current amount 4 c.f.s.)
Hayden	60 cfs 13 cfs	3/15 to 7/31 8/1 to 3/14	21 18N24E SWSW	

2. **Local Public Interest.** These minimum stream flow water right applications for permit are in satisfaction of the local public interest requirement of Idaho Code 42-203A(5)(e) as it pertains to processing of existing and future water right applications on Big Timber, Bohannon, Canyon and Hayden Creeks.
3. **Priority of Existing Rights.** The minimum stream flow water rights provided for in this Section shall be junior to all previously decreed, licensed, or permitted water rights. The minimum stream flows shall also be junior to all pending water right applications and stream flow maintenance rights acquired pursuant to this Agreement.

V. **Lemhi Basin Water Supply Program**

1. **Recharge.** To enhance the farming and ranching lifestyle and economy of the Lemhi River Basin, the IWRB will commission a managed recharge feasibility study to evaluate the costs and benefits of managed recharge as a long-term water management tool in the Lemhi River Basin and determine if a program can be carried out. The study will assess the volume of water available for recharge and the potential areas within the Lemhi Basin suitable

for managed recharge and it will develop preliminary cost estimates for implementing managed recharge.

- a. As part of the managed recharge feasibility study, the IWRB will identify two pilot recharge projects. The Parties agree to not protest recharge water right applications for the pilot projects and to cooperate in obtain access to lands for development of the pilot projects.
  - b. Recharge applications for permit shall be subject to the same conditions applied to the streamflow maintenance water rights set forth in this Agreement.
2. **Cloud Seeding and Water Storage Feasibility Study.** The IWRB will commission a feasibility study to evaluate whether cloudseeding and water storage projects are potential long-term water management strategies in the Lemhi River Basin.

#### VI. **Miscellaneous Provisions**

1. **Fish Screens.** The Parties agree to install and maintain fish screens at no cost to landowners on Big Timber Creek diversions and on other diversions in the Lemhi Basin as determined by mutual agreement of the landowner and the Idaho Department of Fish and Game. Landowners agree to grant access to Idaho Fish and Game to install and maintain fish screens. Fish screens will be installed with available federal and ratepayer funding. Landowners agree to cooperate with IDFG to consolidate their diversions where possible.
2. **Fish Propagation Water Right Applications.** The Parties to this Agreement agree to not protest fish propagation flows required for operation of fish screens because these are nonconsumptive flows that are returned immediately downstream of the fish screen.
3. **Notice of Water Transactions.** The IWRB will establish and maintain a list of persons and entities interested in receiving notifications of IWRB meetings or its committees in which water transaction projects will be proposed or discussed. Persons or entities interested in receiving such notifications must provide their names and email addresses to IWRB staff. IWRB staff will send to each person or entity on the list an email with a copy of the final agenda and a link to the IWRB briefing book for each IWRB or committee meeting, as soon as practicable after the agenda is finalized. This paragraph does not restrict or expand any rights that interested persons or entities have under Idaho law to submit comments, testimony, or exhibits to the IWRB or one of its committees regarding a water transaction project or proposal; and the failure to receive an email or a copy of a meeting agenda shall not be a basis for challenging any decision or action of the IWRB or one of its committees regarding a water transaction project or proposal.

**VII. Steering and Technical Committees.**

1. **Steering Committee.** The Parties will establish a Steering Committee to oversee implementation of the Agreement. The Steering Committee shall consist of two (2) representatives of the Lemhi Irrigation District, two (2) representatives of the Upper Lemhi Basin Water Users, one (1) representative of the Idaho Department of Fish and Game, one (1) representative of the Office of Species Conservation, and one (1) representative of the Idaho Water Resource Board. The Basin 74 water master or an IDWR employee shall serve as an ex officio member of the Steering Committee.
2. The Steering Committee shall operate on a consensus basis.

**VIII. Administration**

1. **Distribution of Water Rights.** Distribution of water rights by water district watermasters shall be under supervision of the Director of IDWR consistent with Idaho Code Title 42 Chapter 6. In accordance with the provisions of this Agreement, local water district watermasters are expected to distribute water in accordance with the seasons of use established by water rights within local water districts, including water rights and applications for permit identified in this Agreement.
2. **Funding for Water Districts.** The water users of local water districts shall be responsible for adopting sufficient budgets to allow watermasters to distribute water rights during all periods when water rights within the water district are entitled to divert and when water is being diverted pursuant to the Basin 74 High Flow General Provision in the SRBA Unified General Decree, including water rights and applications for permit identified in this Agreement . The Director of IDWR may give specific direction to watermasters regarding the delivery of water during high flow periods or other times of the year as necessary in accordance with Idaho Code §§ 42-602 and 42-607.
3. **Computerized Accounting System.** IDWR will work with the water districts to develop and maintain a computerized accounting system for the Lemhi Basin. IDWR will provide the technical and programming resources to develop computerized accounting resources. The Parties agree the watermasters will use the computerized accounting system for priority administration of water rights.
4. **Water Master Instructions.** The Parties will jointly request the Director of the Idaho Department of Water Resources to issue such water master instructions as necessary for the implementation of this Agreement.

**XI. General Conditions**

1. **Additional Parties:** In addition to the Parties listed below, other persons

may become parties to this Agreement by signing the form in Attachment B acknowledging they will be bound by all terms and conditions set forth herein.

2. **Binding on Successors.** This Agreement shall be recorded in the official real property records of Lemhi County, Idaho, shall run with the properties described in the stream flow maintenance water rights authorized by this Agreement and shall be binding upon and inure to the benefit of the owners thereof.
3. **Amendment.** This Agreement may be amended only by an instrument in writing.
4. **No Waiver.** The failure to enforce or perform any provision set forth in this Agreement shall not be deemed a waiver of any such right.
5. **Entire Agreement.** Except to the extent otherwise provided herein, this Agreement constitutes the entire agreement between the Parties. No other agreements have been made modifying, adding to, or changing the terms hereof. This Agreement may not be abrogated, modified, rescinded, or amended in whole or in part without the consent of all signatories to the Agreement, in writing and executed by each of them. No purported modifications or amendments, including, without limitation, any oral agreement, course of conduct or absence of a response to a unilateral communication, shall be binding on either Party.
6. **Governing Law.** This Agreement shall be governed by the laws of State of Idaho.
7. **Interpretation.** The Parties agree that the terms and provisions of this Agreement embody their mutual intent and that such terms and conditions are not to be construed more liberally in favor of, or more strictly against, any Party.
8. **Authority of Parties.** Each of the Parties represent to the other that the person or persons executing this Agreement on behalf of such Party has the full right, power, and authority to enter and execute this Agreement on such Party's behalf and that no consent from any other person or entity is necessary as a condition precedent to the legal effect of this Agreement.
9. **Good Faith and Fair Dealing; Reasonableness.** The Parties agree to act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) wherever the Agreement requires the consent, approval, or similar action by a Party, such consent, approval, or similar action shall be in writing and not be unreasonably withheld, conditioned, delayed or denied, and (ii) wherever this Agreement gives a Party a right to determine, require, specify, or take similar

action with respect to matters, such determination, requirement, specification, or similar action shall be reasonable.

10. **Cooperation.** The Parties agree to reasonably cooperate with each other in the implementation and performance of this Agreement. Such duty to cooperate shall not require either Party to act in a manner inconsistent with its rights under this Agreement.
11. **Counterparts.** This Agreement may be executed in counterparts, which when taken together shall constitute one and the same Agreement.

DRAFT

SIGNATURES

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Lemhi Irrigation District

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Kurt Bird

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Steven Johnson

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Carl Ellsworth

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Carl Lufkin

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Lowell Cerise

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RJ Smith

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David Udy

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Idaho Water Resource Board

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Idaho Department of Fish and Game

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Office of Species Conservation

**Date of last signature:**

**ATTACHMENT A**

STATEMENT OF PURPOSE

RS \_\_\_\_\_

In 2020, the Idaho Legislature adopted Senate Concurrent Resolution 137 (SCR 137). SCR 137 directed “the Idaho Water Resource Board, with technical support from the Idaho Department of Water Resources, to work expeditiously with local water users to develop a comprehensive settlement that resolves current tensions and conflict that are the result of competing water supply demands in the Lemhi River Basin and that the comprehensive settlement, to the best of the abilities of the participating parties and in the spirit of compromise and resolution, is consistent with past practices, future needs, and Idaho law. SCR 137 further directed the Idaho Water Resource Board to report to the First Regular Session of the Sixty-sixth Idaho Legislature on the implementation of this resolution.

In 2020, the Idaho Water Resource Board retained two mediators to facilitate discussions with the affected interests. On \_\_\_\_\_, 2021, the affected water users and state agencies entered into the Lemhi Basin Comprehensive Settlement Agreement. As part of the Settlement Agreement, the participating parties agreed to seek enactment of this proposed legislation to provide for the filing of Lemhi Basin stream flow maintenance applications and minimum stream flow applications on selected tributary streams. Thus, the participating parties jointly request the Idaho Legislature approve this legislation. **ADD DETAILS WHEN FINAL SETTLEMENT REACHED**

**FISCAL NOTE**

The Idaho Water Resource Board will incur costs for the filing of the minimum stream flow water rights. Applicants for Lemhi Basin stream flow maintenance water rights will pay applications fees that will reimburse the Department of Water Resources for costs of advertising and processing the applications.

**Contact:**

Representative \_\_\_\_\_

SECTION 1

42-251 APPROPRIATION OF UNAPPROPRIATED FLOWS FOR LEMHI BASIN  
STREAM FLOW MAINTENANCE – LEGISLATIVE FINDINGS OF FACT  
CONCERNING HISTORIC USE OF HIGH FLOWS IN THE LEMHI RIVER BASIN  
AND NEED FOR PROTECTION AND EFFECTIVE MANAGEMENT OF SUCH USE.

(1) LEGISLATIVE FINDINGS: (a) In the absence of storage reservoirs in the Lemhi Basin, the diversion of “high water or flood water” onto irrigated land in the spring developed as a way of holding water underground within the basin, which would later contribute to the flows in the Lemhi River and its tributaries.

(b) The 1982 Lemhi Basin Decree recognized the practice of diverting “high water or flood water” onto irrigated lands. It defined “high water or flood water” as “natural flow of water over and above the amount required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.” *Proposed Findings of Water Rights, In the Matter of the General Determination of the Rights to the Use of the Surface Waters and Tributaries from Whatever Source of the Lemhi River Drainage Basin, Civil No. 4948, Feb. 16, 1982*, at 3, paragraph n. The Lemhi Decree included a conclusion of law stating the practice “of diverting so called ‘high waters or flood waters’ in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) [is] allowed provided: (a) the waters so diverted are applied to beneficial use. (b) the existing quantified rights (including future appropriations of water) are first satisfied.”

(c) Based on the conclusions of law in the Lemhi Decree, many Lemhi Basin irrigators filed claims in the Snake River Basin Adjudication (SRBA) seeking water rights for their historical “high water or flood water” uses.

(d) On January 3, 2012, the SRBA Court affirmed the *Special Master’s Report and Recommendation* finding that “Idaho case law precludes the high flow claimants from seeking to establish high flow water rights in the SRBA as a matter of law.” *Memorandum Decision and Order on Challenge* at 11, Subcase Nos. 74-15051, In re SRBA Case No. 39576. Although the SRBA Court disallowed the high flow claims, it reaffirmed the Lemhi Decree conclusion of law regarding “high water or flood water” use through its Partial Decree pursuant to I.R.C.P. 54(b) of the Basin 74 High Flow General Provision (Basin 74 General Provision). Basin 74 General Provision provides: “The following general provision shall govern the use of ‘High Flow’ surface water for irrigation use within the Lemhi Basin: The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provide (a) the waters so diverted are applied to beneficial use. (b) existing decreed rights and future appropriations of water are first satisfied.”

(e) Since the early 1990s Lemhi irrigators, with the assistance of state agencies, have led an effort to protect and enhance salmon runs in the Lemhi River Basin, including but not limited to providing passage flows for salmon, screening diversion works and implementing habitat improvement projects.

(f) The long-term goal of the Lemhi irrigators is to conserve, restore, and enhance sufficient habitat to sustain viable fish populations in the Lemhi River Basin while protecting private property rights and preserving and enhancing the farming and ranching lifestyle and

economy of the Lemhi River Basin.

(g) In 2001, the Idaho Legislature enacted Idaho Code § 42-1506 at the request of the Lemhi Basin irrigators. This statute authorized the Idaho Water Resource Board to appropriate a minimum stream flow in the lower reach of the Lemhi River for the purpose of providing fish passage and for protection of Lemhi water users from enforcement actions under the Endangered Species Act.

(h) Use of high flows under the Basin 74 General Provision is not a protected property interest under Idaho law. Because of the SRBA Court's disallowal of the "high water or flood water" claims a conflict has developed between irrigators who rely on the use of high flows under the Basin 74 High Flow General Provision and persons desiring to appropriate high flow for new uses.

(h) The legislature finds 1) that the use of Lemhi River Basin high flow for holding water underground to augment the natural flow of the Lemhi River during the summer is a beneficial use of water; and 2) that it is in the public interest to protect through the appropriation process the entitlements to divert and use high flows under the Lemhi Basin 74 High Flow General Provision for efficient administration of such uses and to aid in the proper planning for future development of the water resources of the Lemhi River Basin.

(2) STREAM FLOW MAINTENANCE APPLICATIONS. Lemhi irrigators who hold decreed irrigation water rights with a priority date prior to March 15, 1966, and claim authority to divert and use Lemhi Basin high flows for stream flow maintenance pursuant to Basin 74 General Provision may file an application for permit with the department of water resources to convert such use into a protectable water right not to exceed the extent of actual historic beneficial use on or before July 1, 2024. The application shall be upon forms provided by the department and the department shall process the application as provided in section 42-203A, Idaho Code.

(3) PROOF OF BENEFICIAL USE. The department may consider as part of its beneficial use examination for licensing of an application under this section an applicant's past historic use of high flows pursuant to the Basin 74 General Provision.

(4) COMPREHENSIVE SETTLEMENT. All applications filed under this section shall be subject to the terms and conditions of the Lemhi Basin Comprehensive Settlement dated \_\_\_\_\_.

(5) NOTICE — HOW GIVEN — REQUIREMENTS. To ensure all persons claiming authority to divert or withdraw and use waters of the under the Basin 74 General Provision are notified of the provisions of this section, the department of water resources is directed to give notice of the provisions of this section as follows:

(a) by regular mail upon all persons who currently own an irrigation water right decreed in the Lemhi Decree a notice in writing of the existence of this section;

(b) by publishing a notice in writing in a prominent and conspicuous place in at least one (1) newspaper of general circulation in Lemhi County, for at least one day a month for three (3) consecutive months;

(c) by posting a written notice, with the cooperation of the Lemhi County commission, in a prominent and conspicuous location in the Lemhi County courthouse;

(d) by providing sufficient number of copies of the notice and declaration to the Lemhi County treasurer for enclosure with each mailing of one (1) or more statements of taxes due issued in 2023; and

(e) by such other means the director of the department in his discretion determines

will carry out the purposes of this section.

## SECTION 2

42-1506A. LEMHI RIVER — MCFARLAND CAMPGROUND MINIMUM STREAM FLOW APPROPRIATION. (1) The water resource board is hereby authorized and directed to appropriate and hold in trust for the people of the state of Idaho a minimum stream flow water right in a designated reach of the Lemhi River in accordance with the provisions of this section. The minimum stream flow appropriation shall be in the amount of 420 cfs from May 21<sup>st</sup> to July 6<sup>th</sup> at McFarland Campground located on the Lemhi River in the NWSE of Section 14, Township 17 North, Range 24 East, Boise Meridian; provided, however, this right may not call against water rights with points of diversion from streams administered as separate streams pursuant to the SRBA Basin 74 General Provision approved by the SRBA District Court on January 2, 2006, except as to stream flow maintenance water rights appropriated pursuant to section 42-251, Idaho Code. The elements of this water right shall include the following:

- A) This water right may be exercised only two years out of every five years. The five-year period shall be a rolling period.
- B) The exercise of the right shall be limited to a duration of three days, during the May 21<sup>st</sup> to July 6<sup>th</sup> period of use. The three-day period shall be timed to occur as near as possible to the peak of Lemhi runoff.

(2) The water resource board shall appropriate the minimum stream flow water right authorized under this section in accordance with the provisions of section [42-1503](#), Idaho Code. In acting upon the application for permit, the director of the department of water resources need not determine that the appropriation is capable of being maintained based upon records of existing stream flows because it is anticipated that the water right will be maintained through conditions on water rights acquired pursuant to 42-251, Idaho Code and operation of the water supply bank within the Lemhi river basin consistent with the provisions of section [42-1765A](#), Idaho Code.

(3) Upon the board's filing of an application for permit to appropriate water as directed by this section, the director of the department of water resources is authorized and directed, on an interim basis pending final action on the application for permit, to distribute water under the filing in accordance with the doctrine of prior appropriation using a priority date as of the filing of the application for permit.

(4) Nothing herein shall be construed to preclude a water right holder with established water rights on streams designated as separate streams by SRBA General Provision 74 from leasing such rights through the water supply bank to maintain the Lemhi minimum stream flow water right authorized by this section.

## SECTION 3.

42-1506B. BIG TIMBER, BOHANNAN, CANYON, AND HAYDEN — MINIMUM STREAM FLOW APPROPRIATIONS. (1) The water resource board is hereby authorized and directed to appropriate and hold in trust for the people of the state of Idaho minimum stream flow water rights for Big Timber, Bohannan, Canyon, and Hayden creeks in accordance with the provisions of this section.

(a) The minimum stream flow for Big Timber Creek shall be 18 cfs from March 15 to July 31 and 10 cfs from August 1 to March 14 from the headwaters of Big Timber Creek in Section 30, Township 14 North, Range 25 East, Boise Meridian to its confluence with the Lemhi River in the southeast quarter of Section 20, Township 16 North, Range 26 East, Boise Meridian.

(b) The minimum stream flow appropriation for Bohannon Creek shall be 13 cfs from March 15 to July 31 and 8.5 cfs from August 1 to March 14 from the headwaters of Bohannon Creek in the northwest quarter of Section 19, Township 22 North, Range 24 East, Boise Meridian to its confluence with the Lemhi River in the northwest quarter of Section 33, Township 21 North, Range 23 East, Boise Meridian.

(c) The minimum stream flow for Canyon Creek shall be 16 cfs from March 15 to July 31 and 4 cfs from August 1 to March 14 from the headwaters of Canyon Creek in Government Lot 5, Section 18, Township 17 North, Range 27 East, Boise Meridian to its confluence with the Lemhi River in the northwest quarter of Section 28, Township 16 North, Range 26 East, Boise Meridian.

(d) The minimum stream flow for Hayden Creek shall be 60 cfs from March 15 to July 31 and 13 cfs from August 1 to March 14 from the headwaters of Hayden Creek in Section 14, Township 16 North, Range 22 East, Boise Meridian to its confluence with the Lemhi River in the southwest quarter, Section 21, Township 18 North, Range 24 East, Boise Meridian.

(2) In acting upon the applications for permit, the director of the department of water resources need not determine that the appropriation is capable of being maintained based upon records of existing stream flows because it is anticipated the water rights will be maintained through operation of the water supply bank within the Lemhi river basin consistent with the provisions of section [42-1765A](#), Idaho Code.

(3) The minimum stream flows provided for in this Section shall be junior to all previously decreed, licensed, or permitted water rights. The minimum stream flows shall also be junior to all pending water right applications and to the Lemhi Basin stream flow maintenance water right applications set forth in Appendix A to the Lemhi Basin Comprehensive Settlement Agreement.

(4) Upon the board's filing of applications for permit to appropriate water as directed by this section, the director of the department of water resources is authorized and directed, on an interim basis pending final action on the applications for permit, to distribute water under the filings in accordance with the doctrine of prior appropriation using a priority date as of the filing of the application for permit.

(5) These minimum stream flow applications for permit are in satisfaction of the local public interest requirement of Idaho Code 42-203A(5)(e) as it pertains to processing of existing and future water right applications on Big Timber, Bohannon, Canyon and Hayden Creeks.

**ATTACHMENT B**

**CONSENT TO BE BOUND BY INDIVIDUALS**

I \_\_\_\_\_ am the owner of Lemhi Irrigation Water Right(s) no. \_\_\_\_\_, and I have reviewed the ***Lemhi Basin Comprehensive Settlement Agreement between the Idaho Water Resources Board, Idaho Department of Fish and Game, Idaho Office of Species Conservation*** (“Agreement”) dated \_\_\_\_\_, and that I desire to become a party to the Agreement and by signing this form agree to be bound by all terms and conditions of the Agreement.

\_\_\_\_\_ Dated: \_\_\_\_\_

\_\_\_\_\_  
Print Name

**CONSENT TO BE BOUND BY ORGANIZATIONS**

I \_\_\_\_\_ am the agent/officer of \_\_\_\_\_ the owner of Lemhi Irrigation Water Right(s) no. \_\_\_\_\_. I represent that the owner has reviewed the ***Lemhi Basin Comprehensive Settlement Agreement between the Idaho Water Resources Board, Idaho Department of Fish and Game, Idaho Office of Species Conservation*** (“Agreement”) dated \_\_\_\_\_, and granted me the the full right power, and authority to sign this form binding the owner to all terms and conditions of the Agreement on its behalf and that no consent from any other person or entity is necessary as a condition precedent to the legal effect of this consent to be bound by the Agreement.

\_\_\_\_\_ Dated: \_\_\_\_\_

\_\_\_\_\_  
Officer/Agent

\_\_\_\_\_  
Print Name and Title