



## FREQUENTLY ASKED QUESTIONS (FAQs) REGARDING LEMHI BASIN STREAMFLOW MAINTENANCE WATER RIGHT APPLICATIONS

**1. What is a Lemhi Basin streamflow maintenance water right?**

**Answer:** *A Lemhi Basin streamflow maintenance water right refers to an appropriation of “high flow” pursuant to Idaho Code § 42-251. Lemhi Basin streamflow maintenance water rights authorize diversion of “high flow” water onto lands with decreed irrigation water rights for the purpose of “holding water underground to augment the natural flow of the Lemhi River later in the irrigation season.”<sup>1</sup>*

**2. What is “high flow”?**

**Answer:** *“High flow” describes unappropriated “natural flow of ‘water over and above the amounts required to fulfill (1) existing quantified rights . . . and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.’”<sup>2</sup>*

**3. What is the purpose for the practice of diverting “high flow” in the Lemhi Basin?**

**Answer:** *In the absence of water storage reservoirs in the Lemhi Basin, irrigators have diverted high flow as a way of holding water underground in the Basin to augment flow in the Lemhi River and its tributaries during the irrigation season.<sup>3</sup>*

**4. What are the permissible uses of high flows appropriated under Idaho Code § 42-251?**

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<sup>1</sup> Idaho Code § 42-251(1)(i).

<sup>2</sup> The quoted language is from the *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, February 16, 1982, at 3 paragraph n. Idaho Code § 42-251(1)(b)(Herein after cited as *Finding of Facts*). The SRBA in approving inclusion of the Basin 74 high flow general provision in the SRBA Final Unified Decree likewise defined high flow as “natural flow of ‘water over and above the amounts 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.’” *Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051 et al., In Re SRBA Case No. 39576 at 9 (January 3, 2012) (Hereinafter cited as *Memorandum Decision*). The legislative findings in Idaho Code § 42-251(1)(b)-(d) and (i) reaffirm the definition of “high flow” from the two prior Decrees and find 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...” Idaho Code § 42-251(1)(i).

<sup>3</sup> The purpose of use for high flows was first described in *Findings of Facts 7* in the Lemhi Basin Decree. *Memorandum Decision* at 7.

**Answer:** *Lemhi Basin streamflow maintenance water rights allow diversion of “high flow” water onto the place of use of decreed irrigation water rights for the purpose of “holding water underground to augment the natural flow of the Lemhi River later in the irrigation season.”*<sup>4</sup>

**5. Who is entitled to seek an appropriation of high flow under Idaho Code § 42-251?**

**Answer:** *“Lemhi irrigators who hold irrigation water rights decreed in the SRBA, and claim authority to divert and use Lemhi Basin high flows for stream flow maintenance pursuant to the Basin 74 High Flow General Provision may file an application for permit with the department of water resources to convert such use into a protectable water right on or before July 1, 2024.”*<sup>5</sup>

**6. What is the Basin 74 General Provision?**

**Answer:** *The Lemhi Basin 74 General Provision refers to the provision decreed in the Snake River Basin Adjudication (SRBA) Final Unified Decree, which states:*

*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 provided:*

- (a) the waters so diverted are applied to beneficial use.*
- (b) existing decreed rights and future appropriations of water are first satisfied.*<sup>6</sup>

**7. Does the practice of diverting high flow allowed by the Basin 74 General Provision create a water right?**

**Answer:** *No. The SRBA Court held that the practice of diverting high flow did not create a water right. The Basin 74 General Provision allows an irrigator that owns an irrigation water right decreed in the SRBA to continue to use the high flow the irrigator historically diverted, but such use is junior to all existing and future water rights.*<sup>7</sup>

**8. What is the difference between use of water under the Basin 74 General Provision and a Lemhi Basin streamflow maintenance water right?**

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<sup>4</sup> Idaho Code § 42-251(1)(i).

<sup>5</sup> Idaho Code § 42-251(2).

<sup>6</sup> *Partial Decree Pursuant to I.R.C.P.54(b) for General Provisions in Basin 74*, In Re SRBA Case No. 39576 (April 3, 2012).

<sup>7</sup> *Memorandum Decision* at 9. “[T]he Special Master determined that the *Decree* recognized a lesser use, stating that it ‘describe[d] high flows as an ‘ancillary use’ of water – not a water right – tied to use on irrigated lands quantified in the *Lemhi Decree* (base rights).” *Memorandum Decision* at 8.

**Answer:** *A Lemhi Basin streamflow maintenance water right is a vested water right that entitles the owner of the right to receive water before water rights with later priority dates. Water diverted under the Basin 74 General Provision is an authorized use of unappropriated water, but is not a water right; therefore, water diverted under the Basin 74 General Provision is subject to diminishment by all existing and future water rights.*

- 9. Will I be able to continue to divert “high flow” under the Basin 74 General Provision if I do not file an application for a Lemhi Basin streamflow maintenance water right?**

**Answer:** *Yes. Your use of “high flow”, however, will be limited to the amount of “high flow” remaining after all existing water rights, including Lemhi Basin streamflow maintenance water rights, are satisfied.*

- 10. If I divert “high flow” under the Basin 74 General Provision, am I required to file an application for a Lemhi Basin streamflow maintenance water right?**

**Answer:** *No. You may continue to use “high flow” as allowed by the Basin 74 General Provision.*

- 11. If I obtain a Lemhi Basin streamflow maintenance water right, will I be able to divert “high flow” under the Basin 74 General Provision?**

**Answer:** *No. Idaho Code § 42-251(5) provides that all applications for Lemhi Basin streamflow maintenance water rights “...shall be subject to the terms and conditions of the Lemhi Basin Comprehensive Settlement Agreement Between the Idaho Water Resource Board, Idaho Department of Fish and Game, Idaho Office of Species Conservation and Various Lemhi Water Users...” (hereinafter Lemhi Comprehensive Agreement). The Lemhi Comprehensive Agreement provides that “[e]ach 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 to divert water under the Basin 74 High Flow General Provision”.<sup>8</sup>*

- 12. What is the maximum amount of water I can appropriate for Lemhi Basin streamflow maintenance?**

**Answer:** *Idaho Code § 42-251(3) states that “[t]he quantity of a stream flow maintenance water right shall be limited to the historic high flow use under the Basin 74 General Provision ancillary to irrigation water rights decreed in the SRBA, but not to exceed the ditch capacity of the decreed irrigation water rights on August 25, 2014.”*

- 13. Why is the ditch capacity defined as that existing on August 25, 2014?**

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<sup>8</sup> Lemhi Comprehensive Agreement Section III.6 at 11.

**Answer:** *The SRBA Court’s jurisdiction is limited to the determination of existing water rights. Since the Final Unified Decree was entered on August 25, 2014, the SRBA Court’s authority to include a general provision for use of “high flow” ancillary to a decreed irrigation water right is similarly limited to the period prior to entry of the Final Unified Decree. Thus, a Lemhi Basin streamflow maintenance water right cannot be greater than the ditch capacity at the time the SRBA Decree was entered.*

**14. What amount of “high flow” should I apply for if I don’t know the quantity of my historic use?**

**Answer:** *In absence of any evidence of historic beneficial use, an irrigator should file an application for the irrigator’s proportionate share of the ditch capacity as it existed on August 25, 2014. An applicant should then obtain actual beneficial use data during the permit development period to support the diversion rate on the application.*

**15. If I apply for a Lemhi Basin streamflow maintenance water right, will I be bound by the terms and conditions of the Lemhi Comprehensive Agreement?**

**Agreement:** *Yes, Idaho Code § 42-251(5) provides that all applications for Lemhi Basin streamflow maintenance water rights are subject to the terms and conditions of the Lemhi Comprehensive Agreement.*

**16. Will my fish screen flow agreement affect the quantity of water I can appropriate for Lemhi Basin streamflow maintenance?**

**Answer:** *The answer depends on the design of the fish screen and the optimum diverted flow allowed under your fish screen agreement.*

**17. Will I have to prove-up the quantity of water I apply for in my Lemhi Basin streamflow maintenance application?**

**Answer:** *Yes. An applicant for a Lemhi Basin streamflow maintenance water right must be able to prove the extent of actual beneficial use. The amount of the Lemhi Basin streamflow maintenance water right, however, cannot exceed the historic “high flow” use that occurred on or before August 25, 2014. <sup>9</sup> An applicant must prove the quantity applied for is based on historic “high flow” use to support the quantity of water permitted. IDWR will use the SRBA disallowed “high flow” recommendation records as evidence of historic “high flow” use to the extent possible.*

**18. What options does an applicant for a Lemhi Basin streamflow maintenance water have to prove the extent of beneficial use?**

**Answer:** *Options for proving beneficial use are: 1) flow measurements conducted showing the amount of flow diverted and beneficially used in excess of the decreed*

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<sup>9</sup> Idaho Code § 42-251(3).

irrigation water right(s) during the permit development period, but not in excess of use prior to August 25, 2014; 2) evidence showing the applicant diverted the full ditch capacity for “high flow” use prior to August 25, 2014; or 3) records showing how much “high flow” was diverted historically (i.e., historic measurements showing the total diversion when “high flow” was diverted prior to August 25, 2014).

After a permit is approved, a permit holder will have a five (5) year period<sup>10</sup> before submitting proof of beneficial use within which the permit holder may divert and use the permitted quantity for Lemhi Basin streamflow maintenance use. Once the permit holder submits proof of beneficial use, IDWR will evaluate all evidence of use, occurring both before and after permit approval. IDWR will base the license on the historic use prior to August 25, 2014, as provided for by Idaho Code § 42-251(4), even if the permit holder was unable to divert water for Lemhi Basin streamflow maintenance use after the permit was approved.

If the permit holder does divert and use water under the Lemhi Basin streamflow maintenance permit, IDWR will gather evidence quantifying the development period water use along with evidence that the same amount of water was historically used prior to August 25, 2014, to serve as the basis for the license. This examination and data collection effort may only be necessary if there is no SRBA recommendation record for your historic use. The license quantity cannot exceed the ditch capacity of the decreed irrigation water rights as it existed on August 25, 2014.<sup>11</sup>

**19. What happens if I am unable to prove my historic “high flow” diversion quantity because of insufficient natural flow during the permit development period?**

**Answer:** Idaho Code § 42-251(4) provides that “[t]he department **may** consider as part of its beneficial use examination for licensing of a permit under this section a permit holder’s past historic diversions of high flow under the Basin 74 General Provision.” (Emphasis added). Thus, you may offer proof of your historic diversions with your Lemhi Basin streamflow maintenance application filing to support the quantity you seek in your application. IDWR will determine the relevance and sufficiency of any evidence you offer regarding your past historic diversions. Alternatively, you can request an extension of time to submit proof of beneficial use.<sup>12</sup> If an extension of time to submit proof of beneficial use is granted, it will allow you to divert and beneficially use available water for your permitted Lemhi Basin streamflow maintenance use.

**20. May I file an application for a Lemhi Basin streamflow maintenance water right if I converted my delivery system to a closed sprinkler conveyance system?**

**Answer:** The answer depends on whether your conveyance system has sufficient capacity to deliver flow in excess of the quantity diverted under your decreed irrigation

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<sup>10</sup> Idaho Code § 42-204(3) provides for an extension of the permit development period, if the permit holder satisfies the statutory criteria.

<sup>11</sup> Idaho Code 42-251(3).

<sup>12</sup> Idaho Code § 42-204(3).

*water right(s) or the amount of “high flow” you apply to fallowed lands. Water applied to pasture or crop lands will first be considered water for irrigation use under the decreed irrigation water rights. Water applied to pasture or crop lands in quantities exceeding the decreed irrigation water rights will be considered Lemhi Basin streamflow maintenance use.*

**21. If I share a ditch with other Lemhi Basin streamflow maintenance applicants, what quantity of “high flow” may I apply for in my Lemhi Basin streamflow maintenance application?**

*Answer: The quantity you are entitled to apply for is limited to the amount of your historic beneficial use in excess of your decreed irrigation water right(s), but not to exceed the ditch capacity on August 25, 2014<sup>13</sup>. If you share the ditch with another irrigator that diverts “high flow”, then your Lemhi Basin streamflow maintenance water right application is limited to your proportionate share of the natural flow available after all existing water rights diverting from the ditch are satisfied.*

**22. If I share a ditch with other water users who have filed Lemhi Basin streamflow maintenance applications on the same ditch, can I seek a water right for the full ditch capacity?**

*Answer: Only if you have a legal right to use the entire capacity of the ditch as it existed on August 25, 2014, and you in fact made full beneficial use of the amount of water that can be conveyed through the ditch in excess of your decreed right.*

**23. Can users on a ditch file an application for Lemhi Basin streamflow maintenance jointly?**

*Answer: Yes. Irrigators sharing a ditch may file a joint application for a Lemhi Basin streamflow maintenance water right. The amount of the application will be limited to the total amount of historic beneficial use by all applicants on the place of use of the decreed irrigation water right(s), but not to exceed the ditch capacity on August 25, 2014. All applicants will be required to sign the application and each applicant will be listed as a co-owner on any subsequent permit and license.*

**24. Can irrigators diverting water through a common headgate file for a Lemhi Basin streamflow maintenance water right jointly?**

*Answer: Yes, provided the irrigators agree on elements and conditions for the Lemhi Basin streamflow maintenance application. Each irrigator will be listed as a co-owner of the Lemhi Basin streamflow maintenance water right.*

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<sup>13</sup> Idaho Code § 42-251(3).

**25. What are the benefits of having the Lemhi Irrigation District file a Lemhi Basin streamflow application on my behalf?**

*Answer: The Lemhi Comprehensive Agreement provides that the Lemhi Irrigation District ("District") may file Lemhi Basin streamflow maintenance applications on behalf of irrigators, except in the Big Timber, Big Eightmile, Lee, and Mill Creek Basins. The benefit of having the District file the Lemhi Basin streamflow maintenance applications on behalf of irrigators are: 1) reduced filing fees; 2) greater flexibility in sharing water available under the water right, 3) avoiding change of ownership issues; and 4) avoiding potentially conflicting applications.*

**26. How will my interest in a Lemhi Basin streamflow maintenance water right held by the Lemhi Irrigation District be reflected in the permit and license.**

*Answer: The Lemhi Irrigation District will hold legal title to the Lemhi Basin streamflow maintenance water right and water users will hold equitable title to the water right.*

**27. When do I need to file multiple applications versus a single application for Lemhi Basin streamflow maintenance water rights?**

*Answer: An irrigator needs to file a Lemhi Basin streamflow maintenance water right application for each water delivery system. An irrigator with decreed irrigation water rights that are diverted through multiple water delivery systems will need to file a Lemhi Basin streamflow maintenance application for each water delivery system.*

**28. May I file for a Lemhi Basin streamflow maintenance water application on wastewater?**

*Answer: No. Wastewater is not part of the natural flow of a stream. As the term implies, wastewater is only available when the irrigation water right that is the source of the wastewater right is being exercised.<sup>14</sup>*

**29. What happens if a new water right application is filed before I file a Lemhi Basin streamflow maintenance water right application?**

*Answer: Under the Idaho prior appropriation doctrine, the new water right application, if approved, would have priority over a Lemhi Basin streamflow maintenance application filed later. Applicants desiring to perfect a Lemhi Basin streamflow maintenance application should file their applications as soon as possible to avoid this situation.*

**30. When should I file my Lemhi Basin streamflow maintenance application?**

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<sup>14</sup> "High water' or 'Flood water' as used in the Findings of Fact, and Conclusions of Law, is intended to describe a **natural flow** of 'water over and above the amounts required to fulfill (1) existing quantified rights as shown in recommended decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho." (Emphasis added). *Memorandum Decision* at 6.

**Answer:** *As soon as possible to avoid the possibility that a new water right application is filed in the interim thereby obtaining priority over your Lemhi Basin streamflow maintenance water right. The application must be filed on or before the July 1, 2024, deadline in Idaho Code § 42-251(2).*

**31. What are the risks of not filing an application for a Lemhi Basin streamflow maintenance water right before the July 1, 2024, deadline?**

**Answer:** *If you do not file an application for a Lemhi Basin streamflow maintenance water right prior to July 1, 2024, you will not be able to establish a water right for your historic “high flow” use under Idaho Code § 42-251. You may still use “high flow” under the Basin 74 General Provision, but such use will be junior to all existing water rights, including Lemhi Basin streamflow maintenance water rights.*

**32. Will all water rights diverting from the Lemhi River and its tributaries above the ending point of the McFarland minimum stream flow water right be subject to the condition requiring the holder of the Lemhi Basin streamflow maintenance water to curtail for a three-day period while the McFarland stream flow water right is being exercised?**

**Answer:** *Yes. The Lemhi Comprehensive Agreement provides that: “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 while the McFarland Campground minimum stream flow water right is being exercised.”<sup>15</sup>*

**33. If I apply for a Lemhi Basin streamflow maintenance water right on a source below McFarland Campground will the right be subject to a condition requiring that it be turned off while the McFarland Campground minimum stream flow is being exercised?**

**Answer:** *No. The Lemhi Comprehensive Agreement only requires a condition on Lemhi Basin streamflow maintenance water rights diverting from sources in the Lemhi Basin above the McFarland Campground minimum stream flow water right ending point.<sup>16</sup>*

**34. May I continue to divert “high flow” under the Basin 74 General Provision until my Lemhi Basin streamflow maintenance water right permit is issued?**

**Answer:** *Yes. Such use will be junior, however, to all existing water rights.*

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<sup>15</sup> Lemhi Comprehensive Agreement Section III.5 at page 10-11.

<sup>16</sup> Lemhi Comprehensive Agreement Section III. 5 at 10-11.



**35. How will the watermaster distribute water in the event some, but not all, Lemhi Basin streamflow maintenance water right applications that divert from a common source have been issued?**

*Answer: IDWR intends to issue all Lemhi Basin streamflow maintenance permits diverting from the same source at the same time. In the event some, but not all, of the Lemhi Basin streamflow maintenance applications are protested, IDWR will hold a conference with the irrigators on the source to address how the permits will be administered pending resolution of the protest(s).*

**36. Does the Lemhi Comprehensive Agreement affect the Basin 74 Separate Streams General Provision?**

*Answer: No. All existing water rights diverting from the twenty-seven streams listed in the Separate Streams General Provision will continue to be administered separate from the Lemhi River. Lemhi Basin streamflow maintenance water rights issued on separate streams, however, will contain a condition requiring that they curtail for a three-day period when the McFarland Campground minimum stream flow water right is being exercised.*

**37. Will the Lemhi Comprehensive Agreement affect existing water rights?**

*Answer: No. The Lemhi Comprehensive Agreement only applies to the specific water right applications listed in the agreement and Lemhi Basin streamflow maintenance uses.*

**38. How will the amount of natural flow available for distribution to the Lemhi Basin streamflow maintenance water rights on a common source be determined?**

*Answer: All existing decreed, licensed, and permitted water rights with a priority date earlier than the Lemhi Basin streamflow maintenance water rights will be satisfied first, and then the remaining available natural flow will be distributed proportionately to the Lemhi Basin streamflow maintenance water rights.*

**39. How will Lemhi Basin streamflow maintenance permits and use of “high flow” water under the Basin 74 General Provision be administered?**

*Answer: When Lemhi Basin streamflow maintenance water rights are in priority, the available water supply will be distributed proportionately among Lemhi Basin streamflow maintenance water right holders diverting from the same water source<sup>17</sup>. If there is “high flow” available after all existing water rights, including Lemhi Basin streamflow maintenance water rights, are satisfied then the remaining “high flow” will be available to persons entitled to divert “high flow” under the Basin 74 General Provision.*

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<sup>17</sup> Idaho Code § 42-251(5)(b) and Lemhi Comprehensive Agreement Section III.2 at 10.

**40. How will I be assessed for water diverted under a Lemhi Basin streamflow maintenance water right?**

*Answer: Each water district will determine the assessment for Lemhi Basin streamflow maintenance water rights within the district. Most districts assess based upon the number of acres irrigated under a water right.*

**41. Who will administer the Lemhi Basin streamflow maintenance water rights?**

*Answer: The watermaster assigned to distribute water to the headgate of the water delivery system will be responsible for distribution of the Lemhi Basin streamflow maintenance water rights.*

**42. May I use my Lemhi Basin streamflow maintenance water right to irrigate new acres?**

*Answer: No. Lemhi Basin streamflow maintenance water rights may only be diverted to the place of use of the decreed irrigation water right(s) to which it is ancillary. Diversion and application of water under a Lemhi Basin streamflow maintenance use is as a way of holding water underground in the Lemhi Basin to augment flow in the Lemhi River and its tributaries during the irrigation season<sup>18</sup>. Irrigation is a different beneficial use than Lemhi Basin streamflow maintenance.*

**43. Is it possible to obtain a new water right in the Lemhi Basin?**

*Answer: Yes, provided there is sufficient unappropriated water for the proposed use. The application will be junior to all existing water rights, including Lemhi Basin streamflow maintenance water rights.*

**44. Is a Lemhi Basin streamflow maintenance water right transferable separate and apart from the base right?**

*Answer: No. The Lemhi Basin streamflow maintenance application is ancillary to and may only be used on the place of use of the irrigation water right decreed in the SRBA that is entitled to use "high flow" under the Basin 74 General Provision. The Lemhi Basin streamflow maintenance water right cannot be transferred to other places of use independent of the decreed irrigation water right to which it is ancillary.*

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<sup>18</sup> Idaho Code § 42-251(1)(i).