



# AGENDA

## IDAHO WATER RESOURCE BOARD

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**Special Board Meeting No. 2-22**  
**Thursday, February 24, 2022**  
**Executive Session 10:00 A.M. (MT)**  
**Open Meeting 11:00 A.M. (MT)**

**Brad Little**  
*Governor*

**Jeff Raybould**  
*Chairman*  
St. Anthony  
At Large

**Roger W. Chase**  
*Vice-Chairman*  
Pocatello  
District 4

**Jo Ann Cole-Hansen**  
*Secretary*  
Lewiston  
At Large

**Dale Van Stone**  
Hope  
District 1

**Albert Barker**  
Boise  
District 2

**Dean Stevenson**  
Paul  
District 3

**Peter Van Der Meulen**  
Hailey  
At Large

**Brian Olmstead**  
Twin Falls  
At Large

Water Center  
Conference Room 602 C & D / Online Zoom Meeting  
322 E. Front St.  
BOISE

**Board Members & the Public may participate via Zoom**

[Click here to join our Zoom Meeting](#)

Dial in Option: 1(253) 215-8782

Meeting ID: 864 7883 1027 Passcode: 693600

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1. Roll Call
2. Executive Session: Board will meet pursuant to Idaho Code § 74-206(1) subsection (f) to communicate with legal counsel regarding legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. Topics: Big & Little Wood Recharge Applications and Lemhi Basin Settlement. Closed to the public; no actions taken during executive session.
3. Lemhi Basin Settlement\*
4. Big & Little Wood Recharge Applications\*
5. Administrative Rules\*
6. Non-Action Items for Discussion
7. Next Meeting & Adjourn

\* Action Item: A vote regarding this item may be made this meeting. Identifying an item as an action item on the agenda does not require a vote to be taken on the item.

#### **Americans with Disabilities**

The meeting will be held telephonically. If you require special accommodations to attend, participate in, or understand the meeting, please make advance arrangements by contacting Department staff by email [jennifer.strange@idwr.idaho.gov](mailto:jennifer.strange@idwr.idaho.gov) or by phone at (208) 287-4800.

**BEFORE THE IDAHO WATER RESOURCE BOARD**

IN THE MATTER OF THE LEMHI RIVER BASIN

RESOLUTION FOR APPROVAL OF LEMHI  
BASIN COMPREHENSIVE SETTLEMENT  
AGREEMENT

1 WHEREAS, Lemhi irrigators historically diverted natural flow in the Lemhi River Basin in  
2 excess of their decreed rights for their shared benefit when natural flow exceeded the amount  
3 of water required to satisfy all existing water rights; and  
4

5 WHEREAS, the “high flow practice” serves to “hold or reservoir” the water in the soil to  
6 augment and to sustain stream flows in the Lemhi River Basin; and  
7

8 WHEREAS, the practice of diverting high flow was recognized in the 1982 Lemhi Basin  
9 Adjudication and reaffirmed in the Snake River Basin Adjudication; and  
10

11 WHEREAS, the Lemhi River and its tributaries are important habitat for the Snake  
12 River’s fall-run Chinook salmon, Snake River Basin’s steelhead, and Columbia River’s bull  
13 trout, as well as rainbow, redband, and westslope cutthroat trout; and  
14

15 WHEREAS, stream flows are essential to maintaining passage, spawning, and rearing  
16 habitat for anadromous and resident fisheries in the Lemhi River Basin; and  
17

18 WHEREAS, irrigation diversions in the Lemhi Basin contributed to the decline of  
19 anadromous fisheries in the Lemhi Basin; and  
20

21 WHEREAS, from the early 1990s Lemhi irrigators have been working collaboratively  
22 with other stakeholders to develop a unified plan to preserve and protect the anadromous  
23 fisheries while preserving and protecting the farming and ranching lifestyle of the basin;  
24 and  
25

26 WHEREAS, the stakeholders developed biological and business goals for the Lemhi River  
27 Basin that seek to conserve, restore, and enhance sufficient habitat to sustain viable fish  
28 populations in the Lemhi River Basin while protecting private property rights and preserving and  
29 enhancing the farming and ranching lifestyle and economy of the Lemhi River Basin; and  
30

31 WHEREAS, at the request of Lemhi irrigators, the 2001 Idaho Legislature enacted Section  
32 42-1506, Idaho Code, which authorized the Idaho Water Resource Board (“Board”) to  
33 appropriate a minimum stream flow in the lower reach of the Lemhi River to provide fish passage  
34 and protect Lemhi water users from Endangered Species Act (“ESA”) Enforcement actions; and  
35

36 WHEREAS, the Board has been working collaboratively with Lemhi irrigators and other  
Resolution No. \_\_\_\_\_

37 stakeholders to implement additional passage and habitat projects in the Lemhi Basin consistent  
38 with the Lemhi Basin biological and business goals; and  
39

40 WHEREAS, recent applications for permits to appropriate high flow were protested by  
41 Lemhi water users because of concerns about the impact of the appropriations on their existing  
42 high flow use, and by the Idaho Department of Fish and Game and the Board because of concerns  
43 regarding the impact of the appropriations on their efforts to improve fish passage and spawning  
44 and rearing habitat; and  
45

46 WHEREAS, at the request of Lemhi irrigators, the 2020 Idaho Legislature adopted Senate  
47 Concurrent Resolution No. 137, a copy of which is attached hereto as **Attachment A**; and  
48

49 WHEREAS, Senate Concurrent Resolution No. 137, directed the Board, with technical  
50 support from IDWR, to work expeditiously with local water users in the Lemhi River Basin to  
51 develop a comprehensive settlement that resolves current tensions and conflicts that are the  
52 result of competing water demands in the Lemhi River Basin and to report back to the First  
53 Regular Session of the Sixty-sixth Idaho Legislature on the implementation of the resolution; and  
54

55 WHEREAS, the Board retained mediators to facilitate discussions between Lemhi  
56 irrigators and other stakeholders; and  
57

58 WHEREAS, the Board reported back to the First Regular Session of the Sixty-sixth Idaho  
59 Legislature that the mediators conducted nine meetings and engaged in extensive shuttle  
60 diplomacy with the participating parties since June 2020; and  
61

62 WHEREAS, the Board reported that significant progress had been made in the Lemhi River  
63 Basin settlement discussions, including the development of a framework for resolving the  
64 tensions over the use of Lemhi high flows consistent with past practices, future needs, and Idaho  
65 law, and in the resolution of one major contested case in the basin, consistent with the  
66 framework; and  
67

68 WHEREAS, the First Regular Session of the Sixty-sixth Idaho Legislature adopted House  
69 Concurrent Resolution 21, a copy of which is attached hereto as **Attachment B**, which directed  
70 the Board to continue to work expeditiously with local water users to complete a comprehensive  
71 settlement that resolves current tensions and conflicts over the use of Lemhi Basin high flows  
72 that, to the best of the abilities of the participating parties and in the spirit of compromise and  
73 resolution, is consistent with past practices, future needs, and Idaho law; and  
74

75 WHEREAS, the parties met seven times during 2021 to convert the settlement framework,  
76 with the assistance of the mediators, into the Lemhi River Comprehensive Settlement Agreement  
77 Between the Idaho Water Resource Board, Idaho Department of Fish and Game, Idaho Office of  
78 Species Conservation, and Various Lemhi Basin Water Users ("Lemhi Comprehensive Settlement

Agreement”), a copy of which is attached hereto as **Attachment C**; and

WHEREAS, the Board conducted three public meetings to present the Lemhi Comprehensive Settlement Agreement; and

WHEREAS, the Board mailed a notice of the public meeting to all holders of irrigation water rights in the Lemhi Basin; and

WHEREAS, the Lemhi Comprehensive Settlement Agreement creates a comprehensive process for 1) resolving protests to pending applications for permits, 2) appropriating water rights to establish protectable water rights for the existing high flow practice; and 3) appropriating instream flow water rights on certain streams for fish passage, spawning and rearing; and

WHEREAS, participation in the Lemhi Comprehensive Settlement Agreement is voluntary; and

WHEREAS, the Lemhi Comprehensive Settlement Agreement has been signed by the Idaho Department of Fish and Game, the Office of Species Conservation, and various water users; and

WHEREAS, the Lemhi Comprehensive Settlement Agreement is consistent with Idaho law; and

WHEREAS, the Lemhi Comprehensive Settlement Agreement will not injure any existing water rights; and

WHEREAS, after reviewing the Lemhi Comprehensive Settlement Agreement, the Board finds it is a reasonable and equitable resolution of the competing interests in the use of high flows in the Lemhi River Basin and is consistent with Lemhi biological and business goals; and

WHEREAS, the Board finds that the Lemhi Comprehensive Settlement Agreement harmonizes the State of Idaho’s competing duties to protect existing water rights, to safeguard the provisions of the Forest Service Wild and Scenic Rivers Settlement, to allocate additional water rights, to conserve, restore, and enhance sufficient habitat to sustain viable fish populations, and to enhance the farming and ranching lifestyle and economy of the Lemhi River Basin.

NOW, THEREFORE BE IT RESOLVED that the Board approves the Lemhi Comprehensive Settlement Agreement and authorizes its chairman to execute.

NOW, BE IT FUTHER RESOLVED that the Board provide to the Second Regular Session of the Idaho Legislature a copy of the Lemhi Comprehensive Settlement Agreement and request

121 enactment of the proposed legislation upon approval of the Agreement by the named parties.

DATED this 24th day of February 2022.

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JEFF RAYBOULD, Chairman  
Idaho Water Resource Board

ATTEST \_\_\_\_\_  
JO ANN COLE-HANSEN, Secretary

# ATTACHMENT A

LEGISLATURE OF THE STATE OF IDAHO  
Sixty-fifth Legislature Second Regular Session - 2020

IN THE SENATE

SENATE CONCURRENT RESOLUTION NO. 137

BY STATE AFFAIRS COMMITTEE

## A CONCURRENT RESOLUTION

STATING FINDINGS OF THE LEGISLATURE AND DIRECTING THE IDAHO WATER RESOURCE BOARD TO WORK EXPEDITIOUSLY WITH LOCAL WATER USERS TO DEVELOP A COMPREHENSIVE SETTLEMENT THAT RESOLVES CURRENT TENSIONS AND CONFLICTS 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.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, Lemhi irrigators have diverted natural flow in the Lemhi River Basin in excess of their decreed rights for their shared benefit during the spring runoff in late May or June when flows exceed the amount of water required to satisfy all existing water rights for almost as long as there has been irrigation in the Lemhi River Basin; and

WHEREAS, the 1982 Lemhi Basin Decree memorialized the high-flow practice in a general provision that allowed irrigators whose rights were decreed in the Lemhi Adjudication to continue to divert "so called 'high waters' or 'flood waters' in addition to the quantified rights as described in the recommended decree of water rights"; and

WHEREAS, the 1982 Lemhi Basin Decree defined high water or flood water as the diversion of "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"; and

WHEREAS, Lemhi irrigators sought to decree the high-flow practice through the filing of claims in the Snake River Basin Adjudication (SRBA); and

WHEREAS, the Lemhi water users' claims were denied by the SRBA District Court as a result of objections to the claims by the United States, the Nez Perce Tribe, and conservation groups; and

WHEREAS, the SRBA District Court reaffirmed the Lemhi Basin Decree high-flow general provision through the inclusion of the Basin 74 General Provision in the SRBA Final Unified Decree; and

WHEREAS, since the early 1990s, Lemhi irrigators 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; and

WHEREAS, the National Marine Fisheries Services (NOAA Fisheries), in the spring of 2000, threatened to bring an enforcement action under the Endangered Species Act (ESA) against Lemhi irrigators for dewatering of the Lemhi River at the L-6 diversion; and

1 WHEREAS, the 2001 Idaho Legislature enacted Section 42-1506, Idaho  
2 Code, at the request of the Lemhi River Basin irrigators, which authorized  
3 the Idaho Water Resource Board to appropriate a minimum stream flow in the  
4 lower reach of the Lemhi River to provide fish passage and protect Lemhi wa-  
5 ter users from ESA enforcement actions; and

6 WHEREAS, the Lemhi minimum stream flow is sustained, in part, through  
7 the Lemhi water bank and voluntary agreements not to divert when the minimum  
8 stream flow is not being met; and

9 WHEREAS, the biological and business goals of the Lemhi irrigators  
10 are to conserve, restore, and enhance sufficient habitat to sustain viable  
11 fish populations in the Lemhi River Basin while protecting private property  
12 rights and preserving and enhancing the farming and ranching lifestyle and  
13 economy of the Lemhi River Basin; and

14 WHEREAS, in the absence of storage reservoirs in the Lemhi River Basin,  
15 the high-flow practice helps to achieve the Lemhi irrigators' stated biolog-  
16 ical and business goals by extending the water supply for irrigators and en-  
17 hancing the natural flow of the Lemhi River during the dry summer months; and

18 WHEREAS, consistent with the Lemhi irrigators' biological and business  
19 goals, 15 cubic feet per second (cfs) of the 35 cfs of the Lemhi minimum in-  
20 stream flow water right diversion rate is subordinated to high water or flood  
21 water authorized under the Lemhi Basin Decree; and

22 WHEREAS, a consequence of the SRBA District Court not decreeing the  
23 Lemhi irrigators' high-flow claims is that the high-flow practice does not  
24 have an established priority date and therefore is not protected from junior  
25 water rights diverting and diminishing the water supply available for future  
26 high-flow diversions; and

27 WHEREAS, without protection for the Lemhi high-flow practice,  
28 high-flow water supplies historically available to the irrigators could be  
29 reduced, maintenance of the Lemhi minimum stream flow could be compromised,  
30 and Lemhi water users could face an increased risk of ESA enforcement ac-  
31 tions; and

32 WHEREAS, the SRBA decreed the U.S. Forest Service federal reserved wa-  
33 ter rights 75-13316 and 77-11941 on the main stem Salmon River in the SRBA;  
34 and

35 WHEREAS, the quantity of the U.S. Forest Service's Salmon River re-  
36 served water rights would have precluded most future development in the  
37 Salmon River Basin, the Forest Service agreed to subordinate its water  
38 rights to up to "150 cfs (including not more than 5,000 acres of irriga-  
39 tion...) when the mean daily discharge at the Shoup gage is [less than] 1,280  
40 cfs" and "an additional diversion of 225 cfs (including up to an additional  
41 10,000 acres of irrigation...) when the mean daily discharge at the Shoup  
42 gage is [greater than or equal to] 1,280 cfs"; and

43 WHEREAS, since the decree of the Lemhi minimum stream flow water right  
44 and the Salmon River federal reserved water rights, certain irrigators in  
45 the Lemhi River Basin have or are in the process of perfecting water rights in  
46 the Lemhi River Basin; and

47 WHEREAS, the SRBA Final Unified Decree establishes that 27 tributaries  
48 to the Lemhi River "shall be administered separately from all other water  
49 rights in [the Lemhi] Basin ... in accordance with the prior appropriation  
50 doctrine as established by Idaho law"; and

1 WHEREAS, the SRBA District Court held the separate streams general pro-  
2 vision does not preclude the U.S. Forest Service from making a delivery call  
3 under its Salmon River federal reserved water rights; and

4 WHEREAS, new applications to appropriate water on tributary streams  
5 have led to numerous protests by downstream Lemhi water users, conservation  
6 groups, and state agencies; and

7 WHEREAS, the Idaho Department of Water Resources has recently condi-  
8 tioned certain protested water right permit applications in the Lemhi River  
9 Basin limiting the diversion of water authorized by the permits to times  
10 when stream flows at specified locations within the Lemhi River Basin exceed  
11 certain minimum flow rates, and these conditioned stream flow diversion  
12 limitations are separate and apart from the Lemhi minimum stream flow water  
13 right; and

14 WHEREAS, the State of Idaho must harmonize its competing duties to pro-  
15 tect existing water rights, to safeguard the provisions of the Forest Ser-  
16 vice settlement, to allocate additional water rights, to conserve, restore,  
17 and enhance sufficient habitat to sustain viable fish populations, and to  
18 enhance the farming and ranching lifestyle and the economy of the Lemhi River  
19 Basin; and

20 WHEREAS, the above described legal developments have created legal un-  
21 certainty for all water users in the Lemhi River Basin; and

22 WHEREAS, the Legislature finds it is in the public interest for affected  
23 stakeholders to work collaboratively to develop a comprehensive solution  
24 that achieves the Lemhi irrigators' biological and business goals of con-  
25 serving, restoring, and enhancing sufficient habitat to sustain viable  
26 fish populations in the Lemhi River Basin while protecting private property  
27 rights and preserving and enhancing the farming and ranching lifestyle and  
28 economy of the Lemhi River Basin; and

29 WHEREAS, Section 42-1734, Idaho Code, provides authority to the Idaho  
30 Water Resource Board to cooperate in water studies, planning, and research;  
31 and

32 WHEREAS, the Idaho Legislature established the Aquifer Planning and  
33 Management Fund to provide moneys for "monitoring, measurement and com-  
34 prehensive plan development as well as for personnel costs, operating  
35 expenditures and capital outlay associated with the statewide comprehensive  
36 aquifer planning and management effort."

37 NOW, THEREFORE, BE IT RESOLVED by the members of the Second Regular  
38 Session of the Sixty-fifth Idaho Legislature, the Senate and the House of  
39 Representatives concurring therein, that we direct the Idaho Water Resource  
40 Board, with technical support from the Idaho Department of Water Resources,  
41 to work expeditiously with local water users to develop a comprehensive  
42 settlement that resolves current tensions and conflict that are the result  
43 of competing water supply demands in the Lemhi River Basin and that the com-  
44 prehensive settlement, to the best of the abilities of the participating  
45 parties and in the spirit of compromise and resolution, is consistent with  
46 past practices, future needs, and Idaho law.

47 BE IT FURTHER RESOLVED that the Idaho Water Resource Board report to the  
48 First Regular Session of the Sixty-sixth Idaho Legislature on the implemen-  
49 tation of this resolution.

# ATTACHMENT B

LEGISLATURE OF THE STATE OF IDAHO  
Sixty-sixth Legislature First Regular Session - 2021

## IN THE HOUSE OF REPRESENTATIVES HOUSE CONCURRENT RESOLUTION NO. 21

BY WAYS AND MEANS COMMITTEE

### A CONCURRENT RESOLUTION

STATING FINDINGS OF THE LEGISLATURE AND DIRECTING THE IDAHO WATER RESOURCE BOARD TO CONTINUE TO WORK EXPEDITIOUSLY WITH LOCAL WATER USERS TO COMPLETE A COMPREHENSIVE SETTLEMENT THAT RESOLVES CURRENT TENSIONS AND CONFLICTS OVER THE USE OF LEMHI BASIN HIGH FLOWS THAT, 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.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, the Idaho State Legislature adopted Senate Concurrent Resolution 137 in 2020 during the Second Regular Session of the Sixty-fifth Legislature, directing 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 conflicts 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; and

WHEREAS, Senate Concurrent Resolution 137 further directed the Idaho Water Resource Board to report to the First Regular Session of the Sixty-sixth Idaho Legislature on implementation of the resolution; and

WHEREAS, the Idaho Water Resource Board, with technical support from the Idaho Department of Water Resources, retained two mediators to facilitate discussions with local water users, state agencies, state legislators, and other affected parties; and

WHEREAS, the mediators have conducted nine meetings and engaged in extensive shuttle diplomacy with the participating parties since June 2020; and

WHEREAS, significant progress has been made in the Lemhi River Basin settlement discussions, including the development of a framework for resolving the current tensions over the use of Lemhi high flows consistent with past practices, future needs, and Idaho law, and in the resolution of one major contested case in the basin, consistent with the framework; and

WHEREAS, the participating parties are supportive of continuing the current effort to develop a comprehensive settlement, consistent with the existing framework and the direction provided by Senate Concurrent Resolution 137.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Sixty-sixth Idaho Legislature, the House of Representatives and the Senate concurring therein, that we direct the Idaho Water Resource Board, with technical support from the Idaho Department of Water Resources, to continue to work expeditiously with local water users to complete a com-

1   prehensive settlement that resolves current tensions and conflicts over  
2   the use of Lemhi Basin high flows that, to the best of the abilities of the  
3   participating parties and in the spirit of compromise and resolution, is  
4   consistent with past practices, future needs, and Idaho law.

5       BE IT FURTHER RESOLVED that the Idaho Water Resource Board report to the  
6   Second Regular Session of the Sixty-sixth Idaho Legislature on the implemen-  
7   tation of this resolution, including any comprehensive settlement reached  
8   by the participating parties and any proposed legislation that is needed to  
9   implement any such settlement.

**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**

This 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 (“Agreement”) memorializes the undersigned 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.

**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 Creek Applications**
  - a. **Permit 74-16187** (Kurt Bird) is subject to the terms and conditions set forth in Stipulation Re Permit 74-16187, attached hereto as Attachment A.
  - b. **Application 74-16205** (Merritt D. Udy) will be subject to the following conditions:

1. Right may be exercised only when the flow in Big Timber Creek is 18 c.f.s or greater at the Big Timber Creek Gage, 13304050, located at Latitude 44°41'19.65", Longitude 113°22'13.46", Lemhi County (BT Gage). All flow at the BT Gage, including Idaho Water Resource Board (IWRB) Water Transaction Flows, counts toward satisfaction of the 18 c.f.s. bypass flow.
2. Season of Use: 3/15 to 7/31.
3. If applicable, include Permissible Place of Use (PPU) and other flexibility options to the extent consistent with condition 4 below.
4. No right to divert water available under Big Timber or Little Timber Creek Basin stream flow maintenance right or the Snake River Basin Adjudication 74 High Flow General Provision (Basin 74 High Flow General Provision) for use on 74-16205 Place of Use (POU).
5. Right will benefit from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 but may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 c.f.s.

**c. Merritt D. Udy Little Timber Creek Lemhi Basin stream flow maintenance application** will be subject to the following conditions:

1. Application will be based on the historic high flow use under the Basin 74 High Flow General Provision ancillary to irrigation water rights decreed in the Snake River Basin Adjudication ("Base Right(s)"), but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
2. Right will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
3. Season of Use: 3/15 to 11/15.
4. Right may be exercised only when the flow in Big Timber Creek is 18 c.f.s or greater from March 15<sup>th</sup> to July 31<sup>st</sup> and 10 c.f.s or greater from August 1<sup>st</sup> to November 15<sup>th</sup> at the BT Gage. All flow at the BT Gage, including IWRB Water Transaction Flows, counts toward satisfaction of the 18 c.f.s. bypass flow.
5. Right will be subject to the conditions described in Section III below.
6. Right, as well as the Big Timber and Little Timber Lemhi Basin stream flow maintenance water rights of Kurt Bird and Jerry Foster, shall have a priority date one day later than all other Big Timber and Little Timber stream flow maintenance

water rights.

7. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
8. Right will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Big Timber and Little Timber Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Right(s).
9. No right to divert water available under the Big Timber or Little Timber Basin stream flow maintenance right(s) 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. Right may be exercised only when the flow in Big Timber Creek is 18 c.f.s or greater at the BT Gage. All flow at the BT Gage, including IWRB Water Transaction Flows, counts toward satisfaction of the 18 c.f.s. bypass flow.
2. Season of Use: 3/15 to 7/31.
3. If applicable, include PPU and other flexibility options to the extent consistent with condition 4 below.
4. No right to divert water available under Big Timber Basin Lemhi stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16186 POU.
5. Right will benefit from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 but may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 c.f.s.

e. **Jerry Foster Big Timber Creek Lemhi Basin stream flow maintenance application** will be subject to the following conditions:

1. Application will be based on the historic high flow use under Basin 74 High Flow General Provision ancillary to Base Right(s), but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
2. Right will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
3. Season of Use: 3/15 to 11/15.
4. Right may be exercised only when the flow in Big Timber Creek is 18 c.f.s or greater from March 15<sup>th</sup> to July 31<sup>st</sup> and 10 c.f.s or greater from August 1<sup>st</sup> to November 15<sup>th</sup> at the BT Gage. All flow at the BT Gage, including IWRB Water

Transaction Flows, counts toward satisfaction of the 18 c.f.s. bypass flow.

5. Right will be subject to the conditions described in Section III. below.
6. Right, as well as the Big Timber and Little Timber Lemhi Basin stream flow maintenance water rights of Merritt D. Udy and Kurt Bird, shall have a priority date one day later than all other Big Timber and Little Timber stream flow maintenance water rights.
7. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
8. Right will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Big Timber and Little Timber Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Right(s).
9. No right to divert water under Big Timber or Little Timber Creek Lemhi Basin stream flow maintenance right(s) or Basin 74 High Flow General Provision for use on 74-16186 POU.

f. **Other Big Timber Creek 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 under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
3. Rights will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
4. Season of Use: 3/15 to 11/15.
5. Rights may be exercised only when the flow in Big Timber Creek is 18 c.f.s or greater from March 15<sup>th</sup> to July 31<sup>st</sup> and 10 c.f.s or greater from August 1<sup>st</sup> to November 15<sup>th</sup> at the BT Gage. All flow at the BT Gage, including IWRB Water Transaction Flows, counts toward satisfaction of the 18 c.f.s bypass flow.
6. Rights will be subject to conditions described in Section III below.
7. Rights will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
8. Right will be in full satisfaction of, and supersede, any existing or future claims of a right to divert water from Big Timber and Little Timber Creeks under the Basin 74 High Flow General Provision for use on the place of use of the Base Rights.

3. **Big Eightmile Creek Applications**

- a. **Application 74-16196** (Steven and Susan Johnson) will be subject to the following conditions:
1. Right may be exercised only when the flow in Big Eightmile Creek is 5 c.f.s 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 (Big Eightmile Lower Gage). All flow at the Lee Creek Gage, including IWRB Water Transaction Flows count toward satisfaction of the 5 c.f.s. bypass flow.
  2. Season of Use: 3/15 to 07/31.
  3. If applicable, include PPU and other flexibility options to the extent consistent with condition 4 below.
  4. No right to divert water available under Big Eightmile Creek Lemhi Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16196 POU.
  5. Right will benefit from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 but may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 c.f.s.
- b. **Steven and Susan Johnson Big Eightmile Lemhi Basin stream flow maintenance applications** will be subject to the following conditions:
1. Application will be based on the historic high flow use under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
  2. Right will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
  3. Season of Use: 3/15 to 11/15.
  4. Right may be exercised only when the flow in Big Eightmile Creek is 5 c.f.s or greater as measured at Big Eightmile Lower Gage. All flow at the Big Eightmile Lower Gage, including IWRB water transaction flows, counts toward satisfaction of the 5 c.f.s. bypass flow.
  5. Right will be subject to conditions described in Section III below.
  6. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.

7. Right, as well as the stream flow maintenance water right(s) of Kent and Lisa Bird, shall have a priority date one day later than all other Big Eightmile Creek Lemhi Basin stream flow maintenance rights.
  8. Right will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Big Eightmile Creek under the Basin 74 High Flow General Provision for use on the place of use of Base Right(s).
  9. No right to divert water under Big Eightmile Creek Lemhi Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16196 POU.
- c. **Application 74-16204** (Kent and Lisa Bird) will be subject to the following conditions:
1. Right may be exercised only when the flow in Big Eightmile Creek is 5 c.f.s or greater flow measured at the Big Eightmile Lower Gage but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014. All flow at the Big Eightmile Lower Gage, including IWRB Water Transaction Flows, counts toward satisfaction of the 5 c.f.s. bypass flow.
  2. Season of Use: 3/15 to 7/31.
  3. If applicable, include PPU and other flexibility options to the extent consistent with condition 4 below.
  4. No right to divert water available under Big Eightmile Creek Lemhi Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16204 POU.
  6. Right will benefit from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 but may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 c.f.s.
- d. **Kent and Lisa Bird Big Eightmile Lemhi Basin stream flow maintenance applications** will be subject to the following conditions:
1. Application will be based on the historic high flow use under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
  2. Right will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
  3. Season of Use: 3/15 to 11/15.
  4. Right may be exercised only when the flow in Big Eightmile Creek is 5 c.f.s or greater as measured at the Big Eightmile Lower Gage. All flow at the Big Eightmile Lower Gage,

including IWRB Water Transaction Flows, counts toward satisfaction of the 5 c.f.s. bypass flow.

5. Rights will be subject to the conditions described in Section III below.
6. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
7. Right, as well as the Big Eightmile Lemhi Basin stream flow maintenance water right(s) of Steven and Susan Johnson, shall have a priority date one day later than other Big Eightmile Creek Lemhi Basin stream flow maintenance water rights.
8. Right will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Big Eightmile Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Right(s).
9. No right to divert water under Big Eightmile Lemhi Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16204 POU.

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

1. Applications by other Big Eightmile water users will be based on the historic high flow use under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
2. Rights 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: 3/15 to 11/15.
4. Rights may be exercised only when the flow in Big Eightmile Creek is 5 c.f.s or greater as measured at Big Eightmile Lower Gage. All flow at the Big Eightmile Lower Gage, including IWRB Water Transaction Flows, counts toward satisfaction of the 5 c.f.s. bypass flow.
5. Rights will be subject to the conditions described in Section III below.
6. Rights will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
7. Rights will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Big Eightmile Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Rights.

4. **Mill Creek Applications**

- a. **Application 74-16194 (Steven and Susan Johnson)** will be subject to the following conditions:
  - 1. Application will be amended to remove 2.08 c.f.s. for Irrigation.
  - 2. Season of Use for recharge: 01/01 to 12/31.
  - 3. No right to divert water available under Mill Creek Lemhi Basin stream flow maintenance right or Basin 74 High Flow General Provision for use on 74-16194 POU.
  - 4. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
- b. **Application 74-16195 (Steven and Susan Johnson)** will be withdrawn.
- c. **Steven and Susan Johnson Mill Creek Lemhi Basin stream flow maintenance application** will be subject to the following conditions:
  - 1. Application will be based on the historic high flow use under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.
  - 2. Right will be limited to the place of use of the Base Right(s) and cannot be transferred to other places of use independent of the Base Right(s).
  - 3. Season of Use: 3/15 to 11/15.
  - 4. Right will be subject to the conditions described in Section III below.
  - 5. Right will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
  - 6. Right will have a priority date one day later than other Mill Creek Lemhi Basin stream flow maintenance water rights.
  - 7. Right will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Mill Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Right(s).
- d. **Other Mill Creek Lemhi Basin stream flow maintenance applications** will be subject to the following conditions:
  - 1. Applications by other Mill Creek water users will be based on the historic high flow use under Basin 74 High Flow General

Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.

2. Rights 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 Rights.
  3. Season of Use: 3/15 to 11/15.
  4. Rights will be subject to the conditions described in Section III below.
  5. Rights will not benefit from any of the subordination provisions described in Paragraph 10.b of water rights 75-13316 and 77-11941.
  6. Rights will be in full satisfaction of, and supersede, any existing or future claim of a right to divert water from Mill Creek under the Basin 74 High Flow General Provision for use on the place of use of the Base Right(s)
5. **Separate Streams Administration.** The above listed water rights that divert from streams listed in the Partial Decree Pursuant to I.R.C.P. 54(b) for General Provision in Basin 74 (“SRBA Basin 74 Separate Streams 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 the Lemhi Basin stream flow maintenance water rights as provided in Section III.
6. **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 Water Right 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 B that provides for the filing of Lemhi Basin stream flow maintenance water right 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 under Basin 74 High Flow General Provision ancillary to Base Right(s) but not to exceed the ditch capacity of the Base Right(s) on August 25, 2014.

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 Lemhi Basin stream flow maintenance water right held by the Lemhi Irrigation District shall establish a process for sharing water available under the Lemhi Basin stream flow maintenance water right.

3. **Owner of Lemhi Basin Stream Flow Maintenance Water Rights.** Lemhi Basin irrigators who hold irrigation water rights decreed in the SRBA, and who claim authority to divert and use Lemhi Basin high flows for streamflow maintenance pursuant to the Basin 74 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. 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 irrigators who hold irrigation water rights decreed in the SRBA.

4. **McFarland Campground Minimum Stream Flow Application.** Parties to this Agreement agree to support the legislation set forth in Attachment B authorizing the IWRB to appropriate a minimum stream flow at McFarland Campground located on the Lemhi River in the NWSE of Section 14, Township 17 North, Range 24 East, Boise Meridian in the amount of 420 c.f.s (“McFarland MSF”); 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 March 15<sup>th</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.

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 while the McFarland Campground minimum stream flow water right is being exercised.

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 to divert water under the Basin 74 High Flow General Provision.
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 applications provided for by this Agreement.
8. **Priority of Existing Rights.** The McFarland Campground MSF water right provided for in this Section shall be junior to all previously decreed, licensed, or permitted water rights. The McFarland Campground MSF shall also be junior to all water right applications with a priority date before the effective date of this Agreement.
9. **Agreement to Not Protest Applications.** Parties to this Agreement agree to not protest Lemhi Basin stream flow maintenance applications filed with IDWR pursuant to proposed section 42-251, Idaho Code provided the elements of the application are consistent with applicant's historic use under Basin 74 High Flow General Provision on the place of use of the base rights and the quantity claim does not exceed the ditch capacity of the base rights on August 25, 2014.
10. **Priority of McFarland Campground Minimum Stream Flow Water Right.** The McFarland Campground water right may not call against water rights with points of diversion from streams administered as separate streams pursuant to the Partial Decree pursuant to I.R.C.P. 54(b) of the Basin 74 High Flow General Provision approved by the SRBA District Court on January 2, 2006, except as to Lemhi Basin stream flow maintenance water rights appropriated pursuant to section 42-251, Idaho Code
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 Basin 74 High Flow General Provision, 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 to this Agreement agree to support the legislation set forth in Attachment B authorizing the IWRB to file applications for permit for minimum stream flow water rights ("MSF") on the

following creeks:

STREAM	QUANTITY	Period of Use	GAGE	CONDITIONS
Big Timber	18 c.f.s 10c.f.s	3/15 to 7/31 8/1 to 3/14	Big Timber Gage 13304050, located at Latitude 44°41'19.65", Longitude 113°22'13.46", Lemhi County.	IWRB Water Transaction flows count toward satisfaction of minimum flow. (Current amount is 7.2 c.f.s.)
Bohannon	13 c.f.s 8.5 c.f.s	3/15 to 7/31 8/1 to 3/14	Lower Bohannon Gage, 28 21N23E SENE	IWRB Water Transaction flows count toward satisfaction of minimum flow. (Current amount is 8.58 c.f.s.).
Canyon	16 c.f.s 4 c.f.s	3/15 to 7/31 8/1 to 3/14	Canyon Creek, 28 16N26E NWNE	IWRB Water Transaction flows count toward satisfaction of minimum flow. (Current amount is 4 c.f.s.)
Hayden	60 c.f.s 13 c.f.s	3/15 to 7/31 8/1 to 3/14	21 18N24E SWSW	

2. **Local Public Interest.** These MSF 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 MSF water rights provided for in this Section shall be junior to all previously decreed, licensed, or permitted water rights. The MSF shall also be junior to all water right applications with a priority date before the effective date of this Agreement and Lemhi Basin 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 obtaining access to lands for development of the pilot projects.
  - b. Any future water right applications for recharge shall be subject to the same conditions set forth in Section III, which apply to Lemhi Basin streamflow maintenance water rights set forth in this Agreement.
2. **Cloud Seeding and Surface Water Storage Feasibility Study.** The IWRB will commission a feasibility study to evaluate whether cloudseeding and surface water storage projects are potential long-term water management strategies in the Lemhi River Basin.

## VI. **Miscellaneous Provisions**

1. **Fish Screens.** The Parties to this Agreement holding irrigation water rights on Big Timber Creek agree to grant access to IDFG to install and maintain fish screens on their irrigation diversions at no cost to landowners. IDFG may install fish screens on other diversions in the Lemhi Basin as determined by mutual agreement of the landowners and the Department. Parties to this Agreement 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 water right applications by the IDFG for nonconsumptive fish propagation flows required for operation of fish screens.
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 to this Agreement agree to 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 IDFG, one (1) representative of the Office of Species Conservation, and one (1) representative of the IWRB. The Basin 74 water master or an IDWR employee shall serve as an ex officio member of the Steering Committee. Water user representatives shall be parties to this Agreement.
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, 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. **Parties:** In addition to the Parties listed below, other persons may become parties to this Agreement by signing the form in Attachment C acknowledging they accept and agree to be bound by all terms and conditions set forth in this Agreement.
2. **Additional Applications.** Applications 74-16188, 74-16190, 74-16185, 74-16191, 74-16192, 74-16193, and 74-16189 may be added to Section I of this Agreement under the same terms and conditions as the other applications listed in Section I provided the holders of the applications agree to be bound by all other terms and conditions of this Agreement.
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 any 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 a 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.
12. **Date of Agreement.** The date of this Agreement shall be the last date of the signatures below.
13. **Effective date.** This Agreement shall become effective after the Idaho Legislature enacts the legislation in Attachment B. In the event the Idaho Legislature fails to enact the legislation in Attachment A in substantially the same form as set forth therein, this Agreement shall be null, and void and the parties agree to meet and confer on an alternative settlement.

SIGNATURE PAGE

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CARL ELLSWORTH

DATED: \_\_\_\_\_

SIGNATURE PAGE

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LOWELL CERISE

DATED: \_\_\_\_\_

SIGNATURE PAGE

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CARL LUFKIN

DATED: \_\_\_\_\_

SIGNATURE PAGE

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KURT AND JANET BIRD

DATED: \_\_\_\_\_

SIGNATURE PAGE

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STEVEN AND SUSAN JOHNSON

DATED: \_\_\_\_\_

SIGNATURE PAGE

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KENT AND LISA BIRD

DATED: \_\_\_\_\_

SIGNATURE PAGE

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JERRY A. FOSTER

DATED: \_\_\_\_\_

SIGNATURE PAGE

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MERRIT D. UDY

DATED: \_\_\_\_\_

SIGNATURE PAGE

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LEMHI IRRIGATION DISTRICT

DATED: \_\_\_\_\_

SIGNATURE PAGE

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JEFF REYBOULD, CHAIRMAN  
IDAHO WATER RESOURCE BOARD

DATED: \_\_\_\_\_

SIGNATURE PAGE

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MICHAEL EDMONDSON, ADMINISTRATOR  
OFFICE OF SPECIES CONSERVATION

DATED: \_\_\_\_\_

SIGNATURE PAGE

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ED SCHRIEVER, DIRECTOR  
IDAHO DEPARTMENT OF FISH AND GAME

DATED: \_\_\_\_\_

## **ATTACHMENT A**

### **STIPULATION RE PERMIT 74-16187**

This Stipulation is entered into by Kurt W. Bird and Janet E. Bird (“Bird”), the Idaho Water Resource Board (“IWRB”), and the Idaho Department of Fish and Game (“IDFG”) (collectively, the “Parties”), to resolve litigation over Bird’s application for a permit to appropriate the public waters of the State of Idaho, identification number 74-16187 (“Application”), and protests to the Application (“Protests”) filed by IWRB and IDFG.

#### **RECITALS**

WHEREAS, the Application was filed with the Idaho Department of Water Resources (“IDWR”) on or about October 12, 2018, and the Protests were filed on or about January 17, 2019; and

WHEREAS, IDWR held an administrative hearing on the Application and the Protests on August 28 and August 29, 2019; and

WHEREAS, the hearing officer issued a preliminary order approving the Application with certain conditions on January 9, 2020, and an amended preliminary order approving the Application with certain conditions on February 6, 2020; and

WHEREAS, the Director of IDWR issued a final order approving the Application with certain conditions on May 21, 2020; and

WHEREAS, IWRB and IDFG filed a petition for judicial review of the final order on June 22, 2020; and

WHEREAS, the judicial review proceeding was stayed at the Parties’ request after briefs were submitted but before the hearing was held, while the Parties attempted to negotiate a settlement of the litigation; and

WHEREAS, the Parties have reached agreement regarding approval of the Application with certain conditions, dismissal of the judicial review proceeding, and certain related matters, and the Parties now desire to memorialize the terms of the agreement.

#### **AGREEMENT**

NOW, THEREFORE, the Parties stipulate and agree as follows:

I. The Application should be approved with the following elements and conditions:

Current Owner: Kurt W. Bird or Janet E. Bird  
Priority Date: October 12, 2018  
Source: Big Timber Creek tributary to Lemhi River  
Beneficial Use: Irrigation

Season of Use: March 15 – July 31

Diversion Rate: 6.40 cfs

Point of Diversion: NWNW, Section 20, T15N, R26E (Home Ditch)

Place of Use: 320 acres

SWSE, SESE, Section 8, T15N, R26E

SW1/4, Section 9, T15N, R26E

NENE, NWNE, Section 17, T15N, R26E

Conditions of Approval:

1. Subject to all prior rights.
2. Proof of Application of water to beneficial use shall be submitted on or before the date established by the Director.
3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of approval, this water right is within State Water Districts 170 and 74W.
4. Prior to the diversion and use of water under this right, the right holder shall install and maintain acceptable measurement devices at the authorized point(s) of diversion and in accordance with Department specifications or shall obtain an approved variance from the Department to employ an alternative method to determine and record the amount of water diverted.
5. Prior to diversion of water under this right, the right holder shall install and maintain a locking controlling works, subject to the approval of the Department, in manner that will provide suitable control of the diversion.
6. When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.
7. This right does not grant any right-of-way or easement across the land of another.
8. This right is only available when flow at the Big Timber Gage 13304050, located at Latitude 44°41'19.65", Longitude 113°22'13.46", Lemhi County (BT Gage) is at least 18 cfs. Any flows present as a result of the Idaho Water Resource Board's

water transactions program will be included (“counted”) in determining whether the 18 cfs flow requirement is satisfied.

9. The right holder shall cease diversion under this right if the flow of Big Timber Creek is less than 18 cfs at the BT Gage. Any flows present as a result of the Idaho Water Resource Board’s water transactions program will be included (“counted”) in determining whether the 18 cfs flow requirement is satisfied.
10. 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.
11. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
12. Rights 74-32, 74-34, 74-7165, 74-15926, 74-15927, 74-15928, 74-15929, 74-15930, 74-15931 and 74-16187 when combined shall not exceed a total diversion rate of 52.77 cfs.
13. This right fully satisfies any and all claims of right or authorization to divert “high flow” water, as that term is defined in the Basin 74 “General Provisions” decreed in the Snake River Basin Adjudication, for use within the place of use for this right. This limitation applies to all acres within the place of use for this right, including any acres that are also covered by other water rights.
14. Bird will allow IDFG to install and maintain fish screens on Bird’s diversions, including execution of an access agreement for such purposes, and will not protest IDFG applications for fish propagation water rights required for operation of the fish screens. Bird will cooperate with IDFG to consolidate Bird’s diversions where feasible.
15. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

- II. The Parties will jointly move the court presiding over the pending judicial review litigation for an order requesting that the case be remanded back to IDWR for consideration of the settlement set forth in this stipulation.
- III. If the court grants the joint motion to remand the case back to IDWR, the Parties will jointly move the Director of IDWR to:
  - a. Approve the Application with the elements and conditions set forth above in paragraph I;
  - b. Issue instructions to the watermasters for Water Districts 170 and 74W regarding administration of the elements and conditions of the Application.
- IV. After the Application has been approved and permit 74-16187 has been issued, Bird will file a transfer application with IDWR to remove from the place of use for permit 74-16187 the approximately 22.2 acres of lands covered by existing water rights. The IWRB and IDFG will not protest or oppose the transfer application.
- V. IWRB and IDFG will not oppose a future application by Bird to appropriate “high flow” water he currently diverts from Big Timber Creek under the SRBA High Flow General Provisions for Basin 74, provided that a copy of this stipulation is filed with the application, and that the application:
  - a. Proposes a purpose of use of “stream flow maintenance,” or a substantially similar purpose;
  - b. Proposes March 15 to November 15 as the season or period of use;
  - c. States that the proposed use of water is ancillary to existing uses authorized by water rights 74-32, 74-34, 74-1801, 74-7165, 74-15926, 74-15927, 74-15928, 74-15929, 74-15930, and 74-15931 (“Base Rights”);
  - d. States that the proposed use of the water is limited to the authorized places of use for the Base Rights;
  - e. Seeks a diversion rate no greater than that necessary to fill the current (July 2021) physical capacity of the diversion works and ditches that convey water to the authorized places of use for the Base Rights;

- f. States that the proposed use of water is in full satisfaction of, and supersedes, any existing or future claim by Bird of a right to divert “high flow” from Big 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 Rights;
- g. States that water may be diverted under the right only when the flow is 18 cfs or greater from March 15 to July 31, and 10 cfs or greater from August 1 to November 15 as measured at the BT Gage, and that any flows present as a result of the Idaho Water Resource Board’s water transactions program will be included (“counted”) in determining whether the 18 cfs and 10 cfs flow requirements are satisfied; and
- h. States that water may not be diverted under this right for three (3) consecutive days in each of two (2) years during every five (5) year period (“bypass flow”). The five-year period will be “rolling” to provide adequate habitat for salmon and steelhead cohorts. In the event bypass flows are provided in two consecutive years, then there will not be a requirement to not divert in the following 3 years. The Idaho Department of Fish and Game and Bird will jointly determine the years in which this condition applies and the dates in those years during which diversions will not be allowed and will provide this information to the Water District 74W watermaster in joint written instructions. Weekly runoff forecasts will be monitored and used to select the dates for the bypass flow, which shall be timed to occur, as near as possible, to the peak of high flow between May 21st to July 6th. Notwithstanding the foregoing, any natural runoff occurrence that meets or exceeds 420 cfs for three consecutive days as measured at the McFarland Gage shall be counted towards satisfaction of the two in five -year condition. This condition may be adjusted at the time of licensing to conform to: any analogous condition required by a comprehensive settlement of “high flow” issues in the Lemhi Basin, if one has been reached; or any modifications to this condition to which the Idaho Department of Fish and Game and Bird have agreed.

- i. States that water diverted under this right will not receive the benefit of Wild and Scenic subordination.
  - j. This right will be subordinated to other Big Timber stream flow maintenance water rights, except for those held by David Udy and Jerry Foster.
- VI. If Bird files an application consistent with the requirements set forth above in paragraph V, IWRB and IDFG may file protests for the sole and exclusive purpose of monitoring the proceedings and ensuring that any permit or license issued pursuant to such an application conforms to the requirements of paragraph V. IWRB and IDFG will not oppose an application that conforms to the requirements of paragraph V, or seek any conditions in addition to those required by paragraph V. IWRB and IDFG retain their rights to protest and oppose any future application(s) by Bird to appropriate water from Big Timber Creek that do not conform to the requirements set forth above in paragraph V.
- VII. Bird will not oppose an application by the IWRB under chapter 15, Title 42, of the Idaho Code to appropriate a minimum stream flow for Big Timber Creek, provided that a copy of this stipulation is filed with the application, and that the application:
  - a. Proposes a diversion rate of 18 cfs from March 15 to July 31, and 10 cfs from August 1 to March 14, as measured at the BT Gage.
  - b. Is either filed later in time than Bird's application for a streamflow maintenance water right, or is expressly subordinated to any future application by Bird for a stream flow maintenance water right that satisfies the requirements set forth above in paragraph V; and
  - c. States that any flows present as a result of the Idaho Water Resource Board's water transactions program will be included ("counted") in determining whether the 18 cfs and 10 cfs flow requirements are satisfied.
- VIII. If the IWRB files an application consistent with the requirements set forth above in paragraph VII, Bird may file a protest for the sole and exclusive purpose of monitoring the proceedings and ensuring that any permit or license issued pursuant to such an application conforms to the requirements of paragraph VII.

Bird will not oppose an application that conforms to the requirements of paragraph VII, or seek any conditions in addition to those required by paragraph VII. Bird retains his right to protest and oppose any future application(s) for minimum stream flows on Big Timber Creek that do not conform to the requirements set forth above in paragraph VII.

- IX. The Parties have entered into this stipulation to settle their disagreements regarding the Application and the Protests, and to resolve the pending litigation. This stipulation represents a compromise between the Parties regarding their disagreements over the issues and subjects addressed herein, and sets forth the entire agreement between the Parties related to these matters. Except as specifically provided in this stipulation, nothing in this stipulation waives the rights, positions, or arguments of the Parties as to any issue of fact or law. This stipulation may not be used or held against any of the Parties other than to show the terms of their agreement on the issues and subjects expressly addressed and resolved herein.
- X. The parties agree that the terms and provisions of this Stipulation 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.
- XI. The provisions of this Stipulation are not severable. If any provision of this Stipulation is found to be unlawful and of no effect and/or the Idaho Department of Water Resources fails to approve the stipulation, then the parties hereto shall resume negotiations to revise such unlawful provision.
- XII. This Stipulation shall be voidable by any party if the Idaho Department of Water Resources fails to approve the Stipulation as submitted.
- XIII. This Stipulation shall bind and inure to the benefit of the respective successors of the parties.
- XIV. This Stipulation may be executed in counterparts, each of which shall be an original, but all of which, taken together, shall constitute one and the same agreement.
- XV. Each of the undersigned represent that they are authority to execute this Stipulation.

XVI. This Stipulation shall become effective and binding on the Parties upon execution by all the signatories.



Jeff Reybould  
Chairman  
Idaho Water Resource Board

Dated: 1-21-22


\_\_\_\_\_  
Ed Schriever  
Director  
Idaho Department of Fish and Game

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

XVI. This Stipulation shall become effective and binding on the Parties upon execution by all the signatories.

\_\_\_\_\_  
Jeff Reybould  
Chairman  
Idaho Water Resource Board

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

  
\_\_\_\_\_  
Ed Schriever  
Director  
Idaho Department of Fish and Game

Dated: 1/24/2022

Kurt W. Bird

Kurt W. Bird

Dated: 1-13-2022

Janet E. Bird

Janet E. Bird

Dated: 1-13-2022

## **ATTACHMENT B**

### **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 \_\_\_\_\_, 2022, 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 designated streams. The participating parties jointly request the Idaho Legislature approve this legislation.

### **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 Basin Decree, many Lemhi Basin irrigators filed claims in the Snake River Basin Adjudication (SRBA) seeking water rights for their historic “high water or flood water” practice.

(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 Basin 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 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. The application shall be upon forms provided by the department. The department shall process the application as provided in section 42-203A, Idaho Code.

(3) Quantity of Right: The quantity of a stream flow maintenance water right shall be limited to the historic high flow use under the 74 High Flow General Provision ancillary to irrigation water rights decreed in the SRBA, or the ditch capacity of the Base Rights on August 25, 2014, whichever is less.

(4) 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 diversions of high flow under the Basin 74 General Provision.

(5) COMPREHENSIVE SETTLEMENT. All applications filed under this section shall be subject to the terms and conditions of the Lemhi Basin Comprehensive Settlement Agreement Between the Idaho Water Resources Board, Idaho Department of Fish and Game, Idaho Office of Species Conservation and Various Lemhi Water Users.

(6) NOTICE — HOW GIVEN — REQUIREMENTS. To ensure all persons claiming authority to divert or withdraw and use water 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 within IDWR Administrative Basin 74 who currently own an irrigation water right decreed in the Snake River Basin Adjudication 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 c.f.s at McFarland Campground located on the Lemhi River in the NWSE of Section 14, Township 17 North, Range 24 East, Boise Meridian. 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 March 15<sup>th</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) This right may not call against water rights with points of diversion from streams administered as separate streams pursuant to the Partial Decree pursuant to I.R.C.P. 54(b) of the Basin 74 High Flow General Provision approved by the SRBA District Court on January 2, 2006, except as to Lemhi Basin stream flow maintenance water rights appropriated pursuant to section 42-251, Idaho Code.

(3) 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

(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.

## 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, Bohannon, Canyon, and Hayden creeks in accordance with the provisions of this section.

(a) The minimum stream flow for Big Timber Creek shall be 18 c.f.s from March 15 to July 31 and 10 c.f.s 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 c.f.s from March 15 to July 31 and 8.5 c.f.s 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 c.f.s from March 15 to July 31 and 4 c.f.s 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 c.f.s from March 15 to July 31 and 13 c.f.s 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 voluntary agreements between the IWRB and Basin 74 water users in accordance with Idaho law.

(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 water right applications with a priority date before the effective date of this section and all Lemhi Basin streamflow maintenance water rights perfected pursuant to 42-251, Idaho Code.

(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 water right applications with a priority date before the effective date of this section and on Lemhi Basin streamflow maintenance water rights filed pursuant to 42-251, Idaho Code on Big Timber, Bohannon, Canyon and Hayden Creeks.

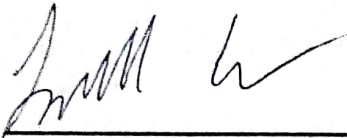
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CARL ELLSWORTH

DATED: 7/14/22

SIGNATURE PAGE

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LOWELL CERISE

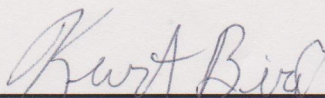
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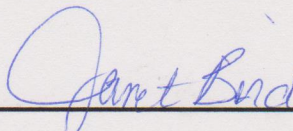
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CARL LUFKIN

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DATED: 2-14-22

  
KURT AND JANET BIRD



DATED: 2-14-22

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STEVEN AND SUSAN JOHNSON

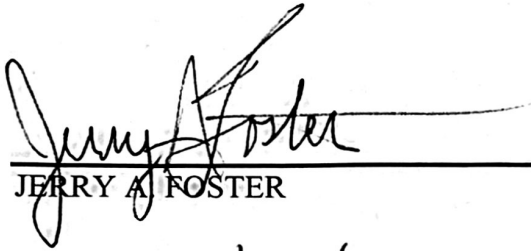
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Kent Bird and Lisa Bird  
KENT AND LISA BIRD

DATED: 2-12-22

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JERRY A. FOSTER

DATED: 2/14/22

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Merritt D. Udy  
MERRIT D. UDY

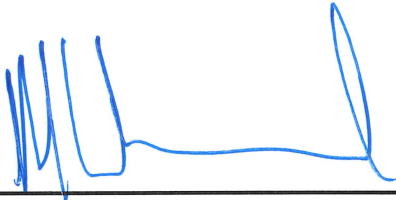
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Carl Ellsworth Chairman  
LEMHI IRRIGATION DISTRICT

DATED: 2/14/22

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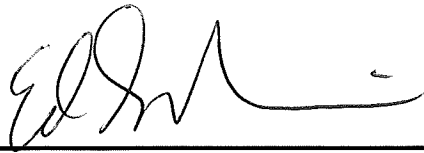


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MICHAEL EDMONDSON, ADMINISTRATOR  
OFFICE OF SPECIES CONSERVATION

DATED: FEB 23 2022

SIGNATURE PAGE



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ED SCHRIEVER, DIRECTOR  
IDAHO DEPARTMENT OF FISH AND GAME

DATED: 2/16/2022



State of Idaho  
DIVISION OF FINANCIAL MANAGEMENT  
Executive Office of the Governor

BRAD LITTLE  
Governor

ALEX J. ADAMS  
Administrator

February 9, 2022

**MEMORANDUM**

TO: Executive Branch Agency/Department Heads  
Rules Review Officers

FROM: Alex J. Adams

Handwritten signature of Alex J. Adams in cursive.

SUBJECT: **Preparing Administrative Fee Rules for Post-Sine Die**

Once more, in order to ensure the continuity of administrative rules following the adjournment of the 2022 Legislative session, this memo outlines the fee rule reauthorization process that agencies will need to complete prior to **February 28, 2022**. While each agency must take these steps now, these temporary fee rules are conditional and will only become effective at *sine die* if the pending fee rules submitted to the 2022 Legislative session are not otherwise approved or rejected in part by concurrence of the Legislature.

1. Agencies must submit a completed Notice of Adoption of Temporary Rule form to DFM by February 28<sup>th</sup>.
  - A template Notice is enclosed for fee rules.
  - Rules should be adopted as submitted to the 2022 Legislature.
    - a. Fee Rules expire upon *sine die* if not approved by the legislature.
    - b. Non-Fee Rules are likely to become final and effective unless specifically rejected by concurrent resolution of both the House and Senate.
  - No ARRF will be required.
  - Please submit completed Notices to [adminrules@dfm.idaho.gov](mailto:adminrules@dfm.idaho.gov).
2. If rulemaking authority is vested in a board or commission – not agency staff – the board or commission must convene to properly authorize the Notice. This is required by law. Please work closely with your attorney to ensure the Notice is properly authorized.
  - The meeting must be scheduled in a timeframe to submit a completed Notice to DFM prior to the February 28th deadline.
  - The motion should be made as follows:

“Pursuant to Section 67-5226, Idaho Code, the Governor has found that temporary adoption of this rule is appropriate to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens.

These rules implement the duly enacted laws of the state of Idaho, provide citizens with the detailed rules and standards for complying with those laws, and assist in the orderly execution and enforcement of those laws.

The expiration of these rules without due consideration and processes would undermine the public health, safety and welfare of the citizens of Idaho and deprive them of the benefit intended by these rules.

The Governor has also found that the fee(s) or charge(s) being imposed or increased is/are justified and necessary to avoid immediate danger to the agency/department/board/commission's budget, to the state budget, to necessary state functions and services, and to avoid immediate danger of a potential violation of Idaho's constitutional requirement that it balance its budget.

Therefore, we are adopting this temporary rule to be effective upon *sine die* of the 2022 session of the Idaho Legislature. This action is conditional and will only become effective if the rules are not otherwise approved or rejected in part by the Legislature.”

3. DFM will publish the fee notices of temporary rulemaking shortly after *sine die* with the rules having an effective date as of *sine die*.
4. For these temporary rules only, agencies do not have to accept written comments pursuant to Idaho Code § 67-5222(a) as its requirement and deadline applies to “publication of the notice of *proposed* rulemaking in the bulletin” (emphasis added). The fee rules were acted upon in open public meetings/hearings that allowed public comment throughout the 2021 rulemaking process.
5. Each agency must keep all records of this rulemaking process for at least two (2) years pursuant to Idaho Code § 67-5225. Please ensure the record is thorough and complete.

**BEFORE THE IDAHO WATER RESOURCE BOARD**

IN THE MATTER OF PREPARING TEMPORARY  
FEE RULES IN THE EVENT CURRENT  
PENDING ADMINISTRATIVE FEE RULES ARE  
NOT IN EFFECT ON OR BEFORE JULY 1, 2022

RESOLUTION TO CONDITIONALLY ADOPT  
THE IDAHO WATER RESOURCE BOARD'S  
CURRENT PENDING ADMINISTRATIVE FEE  
RULES AS TEMPORARY RULES

1 WHEREAS, the Idaho Water Resource Board ("IWRB") is the executive branch entity with  
2 exclusive or joint statutory oversight and authority over 12 chapters of Administrative Rules in  
3 IDAPA 37, including: IDAPA 37.01.01 Rules of Procedure of the IDWR; IDAPA 37.02.01  
4 Comprehensive State Water Plan Rules; IDAPA 37.02.03 Water Supply Bank Rules; IDAPA  
5 37.02.04 Shoshone Bannock Tribal Water Supply Bank Rules; IDAPA 37.03.03 Rules and Minimum  
6 Standards for the Construction and Use of Injection Wells; IDAPA 37.03.04 Drilling for  
7 Geothermal Resources Rules; IDAPA 37.03.05 Mine Tailings Impoundment Structures Rules;  
8 IDAPA 37.03.06 Safety of Dams Rules; IDAPA 37.03.07 Stream Channel Alteration Rules; IDAPA  
9 37.03.09 Well Construction Standards Rules; and IDAPA 37.03.10 Well Driller Licensing Rules; and  
10

11 WHEREAS, omnibus Pending Fee Rule Docket No. 37-0000-2100F (Fee Rule) is currently  
12 before the 2022 Legislature awaiting its review, and the rule will only become final and effective  
13 upon adoption of a concurrent resolution by the House and Senate; and  
14

15 WHEREAS, zero-base regulation Pending Fee Rule Docket No. 37-0101-2101 (Fee Rule),  
16 Rules of Procedure of the Idaho Department of Water Resources ("IDWR") and the IWRB, is  
17 currently before the 2022 Legislature awaiting its review, and the rule will only become final and  
18 effective upon adoption of a concurrent resolution by the House and Senate; and  
19

20 WHEREAS, zero-based regulation Pending Fee Rule Docket No. 37-0307-2101 (Fee Rule),  
21 Stream Channel Alteration Rules, is currently before the 2022 Legislature awaiting its review, and  
22 the rule will only become final and effective upon adoption of a concurrent resolution by the  
23 House and Senate; and  
24

25 WHEREAS, pursuant to Section 67-5292, Idaho Code, every pending rule of the IWRB and  
26 the IDWR will automatically expire on July 1, 2022, unless the rule is extended by the Legislature,  
27 which typically occurs with the legislative passage of a "going home bill"; and  
28

29 WHEREAS, the Legislature has not passed a going home bill or concurrently adopted any  
30 pending fee rules in the last three legislative sessions, and in 2021 failed to *sine die* before July 1,  
31 2021; and  
32

WHEREAS, the Legislature’s failure to concurrently adopt pending fee rules, pass a “going home bill,” or adjourn the 2022 Legislative Session before July 1, 2022, could result in the expiration of pending fee rules on or before July 1, 2022; and

WHEREAS, as a precautionary measure to ensure the continuity of administrative rules following the adjournment of the 2022 Legislative session, the Division of Financial Management acting on behalf of the Governor of Idaho has directed all agencies to adopt all pending fee rules currently before the Legislature as temporary rules; and

WHEREAS, pursuant to Section 67-5226, Idaho Code, the Governor has found temporary adoption of the IWRB’s rules is appropriate to protect the public health, safety, and welfare of the citizens of Idaho and confer a benefit on its citizens; and

WHEREAS, the IWRB’s rules implement the duly enacted laws of the state of Idaho, provide citizens with the detailed rules and standards for complying with those laws, and assist in the orderly execution and enforcement of those laws; and

WHEREAS, the expiration of the IWRB’s rules without due consideration and processes would undermine the public health, safety, and welfare of the citizens of Idaho and deprive them of the benefit intended by these rules; and

WHEREAS, the Governor has also found that the fee(s) or charge(s) imposed or increased are justified and necessary to avoid immediate danger to the budget of the Idaho Department of Water Resources, to the state budget, to necessary state functions and services, and to avoid immediate danger of a potential violation of Idaho’s constitutional requirement that it balance its budget;

NOW, THEREFORE BE IT RESOLVED that the IWRB adopts and authorizes the notice and publication of the following omnibus and zero-based regulation pending fee rules as temporary rules to be effective upon *sine die* of the 2022 session of the Idaho Legislature or on July 1, 2022, whichever comes first. This approval and adoption are conditional and will only become effective if the rules previously adopted by the IWRB as pending rules currently before the Idaho Legislature are not otherwise effective after *sine die* pursuant to Idaho Code sections 67-5291 and 67-5292.

- Docket No. 37-0000-2100F (Fee Rule), Omnibus Fee Rulemaking
- Docket No. 37-0101-2101 (Fee Rule), IDAPA 37.01.01, *Rules of Procedure for the Idaho Department of Water Resources*
- Docket No. 37-0307-2101 (Fee Rule), IDAPA 37.03.07, *Stream Channel Alteration Rules*

DATED this 24<sup>th</sup> day of February 2022.

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JEFF RAYBOULD, Chairman  
Idaho Water Resource Board

ATTEST 

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JO ANN COLE-HANSEN, Secretary  
Idaho Water Resource Board

## RECOMMENDATION MEMO

**DATE:** February 7, 2022

**TO:** Idaho Water Resource Board

**THRU:** Gary Spackman, Director, and Mat Weaver, Deputy Director

**FROM:** Mary Condon, Remington Buyer, Phill Hummer

**RE:** ZBR Rulemaking analysis of Water Supply Bank Rules, IDAPA 37.02.03 and Staff Recommendations

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In January 2020, the Governor passed Executive Order 2020-10 (“Order”), requiring agencies to review all of their administrative rules. In adherence to the Order, the IWRB must review its Water Supply Bank Rules (“WSB Rules”) to determine if they should be repealed, replaced, or replaced through negotiated rulemaking. This memorandum summarizes rulemaking recommendations from the staff responsible for operating the Water Supply Bank Program. Ultimately, staff recommends that the IWRB engage in negotiated rulemaking to re-promulgate the existing WSB Rules.

### Analysis of the Rules

In adherence with the Governor’s Order, in reviewing the WSB Rules, staff must analyze and determine (1) “Whether the benefits the WSB Rules are intended to achieve are being realized, (2) whether those benefits justify the costs of the WSB Rule, and (3) whether there are less-restrictive alternatives to accomplish the same benefits.” Order at 2. This memo addresses each review criteria individually.

#### 1. Is the Rule Achieving its Intended Benefits

Idaho Code § 42-1762 requires the IWRB to adopt rules that govern the operation of the Water Supply Bank (“WSB”). The purposes of the WSB, as defined by Idaho Code §§ 42-1761-1766, are to (1) encourage the highest beneficial use of water, (2) provide a source of adequate water supplies to benefit new and supplemental water uses, and (3) provide a source of funding for improving water user facilities and efficiencies. Benefits of the current WSB Rules include establishing review criteria for the purchase, sale, lease, or rental of water rights through the WSB, establishing processes to allocate surplus funds generated from WSB transactions, and establishing minimum criteria for appointing local committees to operate local WSB rental pools.

Staff has determined that negotiated rulemaking could, at a minimum, improve the rule by simplifying and streamlining the criteria under leases and rentals and giving them similar processes. Currently, the two processes have different structures within the rules, which adds unnecessary complexity.

Idaho Code, § 42-1761 identifies three primary purposes for the WSB as outlined above. The WSB is a widely used market in Idaho to temporarily change the location and purpose of a water right and its intended water use with some limitations. Wide use of the WSB is evidenced by the number of processed rental and lease transactions reported in the IWRB’s [2019 WSB Annual Report](#) (“2019 Report”). For the period 2015-2019, 112 rentals and 339 leases were processed

per year on average according to the 2019 Report. Because water users from basins across the state regularly use the WSB year in and year out, staff concludes the current WSB program and rules fulfill the first two statutory purposes of the WSB.

However, the third purpose of the WSB is to “provide a source of funding for improving water user facilities and efficiencies.” Under the current WSB fee structure<sup>1</sup>, fee revenue is insufficient to meet this purpose. In the 2019 Report, the IWRB reported that the cost to implement the WSB Program exceeded fee revenue every year from 2013 to 2019. The negative operating balance in that time ranged from approximately \$58K to \$135K, with an average negative operating balance of about \$94K.

Due to the program’s ongoing negative operating balances, the IWRB is required to subsidize the program with general funds and therefore generates no additional funds for “improving water facilities and efficiencies.” As a result, the third statutory purpose of the WSB is unrealized, and the current rule may not be achieving one of its intended benefits. Negotiated rulemaking could result in amended water right lease application filing fees or rental fees that increase WSB revenue sufficient for the IWRB to fund improvements to water facilities and efficiencies, thus realizing all of the WSB statutorily defined purposes.

## **2. Costs of the Rules**

The costs associated with the current WSB Rules are attributed to three types of activities governed by the rules (1) leasing a water right to the Bank (Rule 25), (2) renting a water right from the Bank (Rule 30), and (3) Rental Pool Committees (Rule 40).

The first activity type, leasing a water right, or acquiring a water right by the IWRB, does not impose more costs than normally encountered with state water transactions for evaluating the validity and providing a defense from forfeiture. The fee is adequate for the costs associated with application review and processing and comparable to the fees associated with the filing of similar water rights applications under Idaho Codes §§ 42-201 and 222. Further, under the current rule, the IWRB returns 90% of the rental fee annually to the water right owner. However, there are currently no WSB processing costs to the lessor for changes in ownership or water right transfers even though these activities require administrative action by the WSB. A rulemaking would allow the IWRB to reconsider filing fees associated with processing WSB rentals and leases to reflect changes due to notices of change in ownership or transfers.

The second activity type, renting water rights from the WSB, does result in annual costs. The IWRB adopted the current rental costs via resolution and for the period 2018 to 2022, the rental cost is \$20 per acre-foot. Beginning in 2023, from 2023 to 2030, the IWRB will raise the cost to \$23 per acre-foot. Rule 30 of the WSB Rules established that the IWRB collects 10% of the rental amount as an administrative fee for operating the WSB while paying the remaining 90% to the water right owner. The IWRB does not currently collect application fees associated with submitting a rental application or amending an application or approved agreement, nor does it charge late fees for late annual payments, even though these activities result in administrative review and action by WSB staff. Current rental fees are well below average when compared to private consulting firms who handle water transactions and to IDWR transfer application processing fees involving changes in nature of use, changes in points of diversion, and new appropriations for beneficial uses. The amount of time required by IDWR staff to review an

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<sup>1</sup> Water Right lease application filing fees are set forth in Rule 25 of the WSB Rules. Water Right rental rates are established by resolution of the IWRB, with 90% of revenue accruing to the water right owner and 10% accruing to the IWRB to offset WSB program operation costs as set forth in Rule 30. *Id.*

application for rental, actively manage rental transactions, calculate and submit payments to water right owners, and amend rental agreements to reflect permanent changes to water rights made through other water right processes greatly exceeds the 10% of WSB rental amounts collected by the IWRB. This rulemaking would allow the IWRB to reconsider its WSB rental fees.

The last activity type, the appointment of local rental pool committees, describes criteria for forming rental pool committees and reporting schedules, and it establishes minimum requirements for lease and rental considerations for rental pool committees. The costs of the rules appear to be equal to their benefit for local committees, but the rulemaking would allow the IWRB to simplify language and correct statutory references.

### **3. Alternatives to the Rules**

The WSB Rules are adopted under Idaho Code § 42-1762 and provide interpretation of the application of Idaho Codes §§ 42-1761-1766. The WSB is specific to water marketing in Idaho, and similar programs are only recently emerging in other states and countries within the last decade. Further, other states use Idaho's current statutes and rules as references and guidelines when creating their water markets and adopting laws and promulgating rules to govern those markets.

There is an opportunity to improve the clarity of the WSB Rules by simplifying the language, reducing redundancy with WSB related statutes, and fully describing WSB procedures. Additionally, a review of the current fee structure might result in changes to the WSB program that would allow it to generate revenue that exceeds operating costs which the IWRB could use to fund water projects for the benefit of Idaho as envisioned in Idaho Code, § 42-1761.

### **4. Recommendation for the Rules**

Based on our analysis, staff recommends repealing the WSB Rules and replacing them through the zero-based regulation negotiated rulemaking process. According to the negotiated rule process, IDWR staff will seek comment from the public on whether the IWRB can implement any non-regulatory measures in place of or in support of the Water Supply Bank rules. The rulemaking team will propose some minor rule changes and clarifications, as well as the proposal of revised program-related fees.

# Recommendation Memo

## State of Idaho

### Department of Water Resources

322 E Front Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700

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**Date:** January 18, 2022

**To:** Idaho Water Resource Board

**Thru:** Gary Spackman, Director, and Mat Weaver, Deputy Director

**From:** Tim Luke, Water Compliance Bureau Chief *TL*

**Subject:** Memorandum re: IDWR's Drilling for Geothermal Resources Rules, IDAPA 37.03.04 with Retrospective Analysis and Recommendation.

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## Executive Order 2020-01

Executive Order No. 2020-01 (the "EO") requires the Idaho Department of Water Resources ("IDWR") and the Idaho Water Resource Board ("IWRB") (collectively "Agencies") to review all rule chapters under the Agencies' purview by 2026. The review must be a critical and comprehensive review. EO at 2.

Pursuant to the schedule already determined by the Division of Financial Management ("DFM") and the Agencies, IDWR's Drilling for Geothermal Resources Rules ("Geothermal Rules"; IDAPA 37.03.04) must be analyzed in the second year of the review process.

Therefore, the EO requires the Agencies to review the Geothermal Rules to determine whether they should be repealed altogether or re-promulgated. If the Agencies desire to re-promulgate the Geothermal Rules, the Agencies must retrospectively analyze the rules and determine whether the rules need to be re-promulgated, and, if so, to recommend an approach. *Id* at 3.

This Recommendation Memorandum ("Memo") provides analysis and recommendations for the Director and Board.

## Retrospective Analysis

### 1. What are the benefits of the current rule?

The Geothermal Rules provide minimum standards and best management practices that protect against overdevelopment of a limited but renewable energy resource. The rules help IDWR manage a unique resource for the maximum benefit to the state while minimizing risk and cost to the citizens of Idaho. Additional benefits of the current rule include:

- Clarification of permit requirements and processing procedures.
- Establishes minimum construction methods for exploration, production, and injection wells to protect both geothermal and groundwater resources, public health, neighboring property owners, and the public. For example, several sub-rules on well casing requirements are designed to protect usable groundwater from contamination.

- Provides minimum standards for abandonment of geothermal wells to prevent contamination of usable groundwater, prevent damage to geothermal reservoirs, and protect life, health, environment, and property.
- Establishes minimum record requirements that benefit public understanding and occurrence of geothermal resources in Idaho, but also provide confidentiality of certain records within one year of receipt.

## 2. Do the benefits of the rule justify the costs of the rule?

The current Geothermal Rules do not impose more costs than what is normally encountered with drilling geothermal resource wells in other states or areas of the country. The Geothermal Rules specify some minimal construction practices that are normally implemented or engineered to industry standards to minimize risk or liability to the geothermal resource, groundwater resources, environment, life, and public health and safety. Geothermal resource developers typically implement drilling and well construction plans that are more stringent than required by rule.

Due to the nature and depth of the geothermal resource in Idaho, much of the cost to develop the resource is a result of the specialized equipment necessary to drill and construct wells, land acquisition costs, lease payments, royalties, and other factors not within the purview of the rule. Only four to five geothermal wells have been drilled and developed in Idaho over the past ten to 12 years, at costs of over \$4 million per well. High costs, risks and limited benefits tend to limit private business interest and investment in geothermal resource exploration, development, and production. Protecting the geothermal and ground water resources to benefit the citizens of Idaho justifies the relatively minor cost attributed to minimum standards imposed by rule.

## 3. Are there less restrictive alternatives to accomplish the benefits of the rule?

The current Geothermal Rules add clarification to the Geothermal Act Chapter 40, Title 42, Idaho Code), authorize flexibility in the application of statutes, and imposes certain minimum well construction standards that are normally designed and implemented to existing industry standards to protect resources, the environment, and public health.

IDWR will propose removing certain sub-rules that are unnecessary or obsolete, including sub-rules that reiterate current statutes.

## 4. Recommendation

IDWR staff recommends the Geothermal Rules be repealed and replaced through the negotiated rulemaking process. Pursuant to the negotiated rule process, IDWR staff will seek comment on whether any non-regulatory measures can be implemented in lieu of the Geothermal Rules. IDWR will propose some minor rule changes or updates for purposes of clarification and consistency with current statutes.