

LEMHI RIVER BASIN COMPREHENSIVE SETTLEMENT AGREEMENT FREQUENTLY ASKED QUESTIONS

1. Will the Settlement Agreement affect existing water rights?

No. The Settlement Agreement only deals with perfection of existing water right applications and new water right applications for use of high flow. Since the priority date of new water right applications will be later in time than all existing water rights, the new water rights will not alter or affect the exercise of existing water rights in the Lemhi River Basin.

2. What is high flow?

High flow is unappropriated natural flow over and above the amounts required to fill (1) existing water rights and (2) future rights that may be established pursuant to Idaho state law.

3. Is the historic practice of diverting high flow a water right?

No. The Snake River Basin Adjudication (SRBA) District Court held the historic practice of diverting high flow did not create a protectable water right. The Court, however, allowed the practice to continue through a high flow general provision. Because the historic use is not a water right, it does not have a priority date, and the use is junior to all existing and future water rights.

4. What is the high flow general provision?

The SRBA Final Unified Decreed includes the following provision governing the use of high flow within the Lemhi River 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 provided:

- (a) the waters so diverted are applied to beneficial use, and
- (b) existing decreed rights and future appropriations of water are first satisfied.”

5. Who is allowed to divert high flow?

Persons who own irrigation water rights decreed in the SRBA and who historically diverted natural flow may continue the practice of diverting high flow provided the water is put to beneficial use and all existing water rights are being satisfied.

6. Will the Settlement Agreement alter regulation of water rights on tributary streams that are regulated separately from the Lemhi River?

No. Section II.6 expressly reaffirms that water rights diverted from streams listed as separate streams in the 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 as established by Idaho law.”

7. Does the Settlement Agreement subject water rights diverting from tributaries regulated as separate streams to regulation for delivery of water to the Salmon River Wild and Scenic federal reserved water rights?

No. Combined administration is an existing requirement that predates the Settlement Agreement. The SRBA Court determined the Basin 74 Separate Streams General Provision is only binding on water rights within the Lemhi River Basin. Since the Wild and Scenic water rights are located outside the Lemhi River Basin the separate streams provision does not apply to those water rights.

8. What is a “Lemhi Basin Stream Flow Maintenance Water Right”?

The term “Lemhi stream flow maintenance water right” refers to a perfected water right for the historic use of high flow ancillary to decreed Lemhi River Basin irrigation water rights (“base rights”). The proposed stream flow maintenance legislation will allow irrigators in the Lemhi River Basin to perfect a water right for their historic high flow practice – something they have not been able to do in the past.

9. How much water can be appropriate for purposes of stream flow maintenance?

Applications for stream flow maintenance water rights are limited to the amount of actual historic beneficial use not to exceed the existing ditch capacity on August 25, 2014.

10. What is a bypass flow?

A bypass flow refers to a specific amount of flow that must be in a stream at a designated point before water may be diverted under a water right containing a bypass flow condition.

11. Will a bypass flow affect existing water rights?

No. Only water rights containing a bypass flow condition, as voluntarily agreed to by individual water users, are subject to the condition. No other water rights will be subject to the condition.

12. What are the benefits of becoming a party to the Settlement Agreement?

Water users who become parties to the Settlement Agreement will have the opportunity to convert their historic high flow practice to a protectable water right. Certain water users who have pending applications for water rights will be able to resolve protests to those water right applications. The IWRB and the Idaho Department of Fish and Game will be able to protect fish habitat. Residents of the Lemhi River Basin will be able to address water supply needs through water supply projects and improved water rights administration.

13. Are water users required to participate in the settlement?

No, participation in the settlement is voluntary.

14. Will existing water rights of water user who do not participate in the Settlement Agreement be altered or affected by the settlement?

No. Existing water rights will not be affected because they have priority dates earlier than all rights that will be recognized under the Settlement Agreement.

- 15. Will the Settlement Agreement affect the ability to divert high flow under the Lemhi Basin High Flow General Provision?**
No. Irrigators who are not parties to the Settlement Agreement will be able to continue their historic practice of diverting high flow subject to the terms of the Basin 74 High Flow General Provision. Those who do participate in the Settlement Agreement will gain the benefit of a permanent water right for their high flow practice.
- 16. What is the purpose of the McFarland Campground minimum stream flow water right?**
The purpose of the McFarland Campground minimum stream flow water right is to remove fine sediment from runs and riffles, move gravels and cobbles to clean them of fine sediment, and scour pools and channel banks to improve stream habitat for fish and their prey.
- 17. Will the McFarland Campground minimum stream flow affect existing water rights?**
No. As stated in Section III.8 of the Settlement Agreement, the McFarland Campground water right will be “junior to all previously decreed, licensed, or permitted water rights” and “junior to all water right applications with a priority date before the effective date of this Agreement.”
- 18. Will individuals not participating in the Settlement Agreement be required to curtail their diversions to provide water to satisfy the McFarland Campground minimum stream flow?**
No, only parties to the Settlement Agreement who seek a stream flow maintenance water right will be subject to a condition requiring the holder of the right to curtail for three consecutive days twice in every rolling five-year period.
- 19. How frequently is 420 cubic feet per second (“cfs”) available at the McFarland Campground gage?**
For water years 2008 to 2017, Lemhi River flows at McFarland Campground sustained a three consecutive day period of 420 cfs in 2 of the 10 years. These events occurred in water years 2009 and 2011. It is anticipated the voluntary agreement of water users who perfect a stream flow maintenance water right to curtail for 3 consecutive days twice in every rolling five-year period will provide sufficient flow to satisfy the McFarland Campground minimum stream flow water right.
- 20. Will the McFarland Campground minimum stream flow water right be able to call against water rights diverting from tributary streams?**
No. As stated in the McFarland Campground minimum stream flow legislation “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.” Only new stream flow maintenance applications will be subject to a condition requiring the applicant to

agree to not divert twice during a five-year rolling period for three-consecutive days during the March 15th to July 6th period of use.

21. How will the McFarland Campground minimum stream flow be administered?

The IWRB will determine when to exercise the McFarland Campground minimum streamflow with input from Steering and Technical Implementation Committees.

22. What happens if there is insufficient flow to meet the 420 cfs minimum flow at McFarland Campground?

All years the IWRB exercises the McFarland Campground minimum flow count toward the satisfaction of the stream flow maintenance bypass condition regardless of whether the 420 cfs minimum flow is achieved. Additionally, any year in which the flow past McFarland Campground naturally exceeds 420 cfs counts toward the satisfaction of the stream flow maintenance condition, with no need for curtailment in such year.

23. Will the proposed minimum stream flows on Big Timber, Bohannon, Canyon and Hayden Creeks affect existing water rights?

No. Section IV.3 of the Settlement Agreement expressly states that the minimum stream flow water rights will be junior to all existing water rights.

24. What is the scientific basis for the minimum stream flows and bypass flows?

The Physical Habitat Simulation (PHABSIM) model is an analytical method for instream flow characterization. <https://pubs.usgs.gov/sir/2006/5230/section4.html> PHABSIM studies were conducted on Big Timber, Big Eightmile, Bohannon, Canyon and Hayden Creek. The results of these studies are the basis for the minimum stream flows and the bypass flows.

<https://www.usbr.gov/pn/fcrps/habitat/projects/uppersalmon/index.html>

25. How was the Settlement Agreement negotiated?

Lemhi Water Users requested the Idaho Legislature to direct the IWRB, “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 . . .” SCR 137 (2020). Over approximately two years, the Board facilitated meeting between representatives of local water users and state agencies, which resulted in the Settlement Agreement.

26. What is the IWRB’s Water Transaction Program?

The Idaho Water Transaction Program is a voluntary, market-based program that improves flows to tributary streams and rivers in the Upper Salmon Basin for Chinook salmon, steelhead, and bull trout, fish species listed under the Endangered Species Act. Private transactions between water users and conservations groups are not part of the Idaho Water Transaction Program.

27. Does the Settlement Agreement include Idaho Water Transaction Program projects?

No. The Settlement Agreement does not include any Idaho Water Transaction projects.

28. How will notice be given of future water transactions?

Section VI.3 of the Settlement Agreement provides that the IWRB “will establish and maintain a list of persons and entities interested in receiving notification of IWRB meetings or committees in which water transaction projects will be proposed or discussed.” This will allow water users and others to comment on such projects.

29. Do water transaction flows count toward the satisfaction of existing and proposed minimum stream flows and bypass flows?

Yes, IWRB water transaction flows count toward satisfaction of minimum stream flow water rights and bypass flow conditions.

30. How does the Settlement Agreement affect future development in the Lemhi River Basin?

The Settlement Agreement will provide information necessary to identify the water currently available for future development. The water supply program will help to identify opportunities for enhancing the water supply.

31. Who must approve the Settlement Agreement for it to become effective?

The Settlement Agreement will become effective upon approval of legislation required by the Settlement Agreement and will be binding on the parties to the Settlement Agreement.

32. Does the Settlement Agreement limit a water user’s right to protest water right applications in the future?

No, the Settlement Agreement only limits the rights of parties to the Agreement to protest water rights addressed in the Agreement.