

ATTACHMENT B

STATEMENT OF PURPOSE

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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 15th to July 6th 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, Bohannan, Canyon, and Hayden creeks in accordance with the provisions of this section.

(a) The minimum stream flow for Big Timber Creek shall be 18 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.