

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 749

BY WAYS AND MEANS COMMITTEE

AN ACT

1 RELATING TO THE LEMHI BASIN; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE
2 ADDITION OF A NEW SECTION 42-251, IDAHO CODE, TO PROVIDE FOR LEGISLATIVE
3 FINDINGS, TO PROVIDE FOR STREAM FLOW MAINTENANCE APPLICATIONS, TO PRO-
4 VIDE FOR QUANTITY OF RIGHT, TO PROVIDE FOR PROOF OF BENEFICIAL USE, TO
5 PROVIDE FOR COMPREHENSIVE SETTLEMENT, AND TO PROVIDE FOR NOTICE; AMEND-
6 ING CHAPTER 15, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION
7 42-1506A, IDAHO CODE, TO PROVIDE FOR A CERTAIN MINIMUM STREAM FLOW WATER
8 RIGHT; AMENDING CHAPTER 15, TITLE 42, IDAHO CODE, BY THE ADDITION OF A
9 NEW SECTION 42-1506B, IDAHO CODE, TO PROVIDE FOR CERTAIN MINIMUM STREAM
10 FLOW APPROPRIATIONS; AND DECLARING AN EMERGENCY AND PROVIDING AN EFFEC-
11 TIVE DATE.
12

13 Be It Enacted by the Legislature of the State of Idaho:

14 SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is
15 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
16 ignated as Section 42-251, Idaho Code, and to read as follows:

17 42-251. APPROPRIATION OF UNAPPROPRIATED FLOWS FOR LEMHI BASIN STREAM
18 FLOW MAINTENANCE -- LEGISLATIVE FINDINGS OF FACT CONCERNING HISTORIC USE OF
19 HIGH FLOWS IN THE LEMHI RIVER BASIN AND NEED FOR PROTECTION AND EFFECTIVE
20 MANAGEMENT OF SUCH USE. (1) Legislative Findings.

21 (a) In the absence of storage reservoirs in the Lemhi Basin, the diver-
22 sion of "high water or flood water" onto irrigated land in the spring
23 developed as a way of holding water underground within the basin, which
24 would later contribute to the flows in the Lemhi River and its tribu-
25 taries.

26 (b) The 1982 Lemhi Basin Decree recognized the practice of diverting
27 "high water or flood water" onto irrigated lands. It defined "high wa-
28 ter or flood water" as "natural flow of water over and above the amount
29 required to fulfill (1) existing quantified rights as shown in the de-
30 cree of water rights and (2) any future rights that may be established
31 pursuant to statutory procedures of the state of Idaho." Proposed Find-
32 ings of Water Rights, In the Matter of the General Determination of
33 the Rights to the Use of the Surface Waters and Tributaries from What-
34 ever Source of the Lemhi River Drainage Basin, Civil No. 4948, Feb.
35 16, 1982, at 3, paragraph n. The Lemhi Decree included a conclusion
36 of law stating the practice "of diverting so called 'high waters or
37 flood waters' in addition to the quantified rights as described in the
38 recommended decree of water rights (and future rights that may be estab-
39 lished pursuant to statutory procedures) [is] allowed provided: (a)
40 the waters so diverted are applied to beneficial use. (b) the existing
41 quantified rights (including future appropriations of water) are first
42 satisfied."

1 (c) Based on the conclusions of law in the Lemhi Basin Decree, many
2 Lemhi Basin irrigators filed claims in the Snake River Basin Adjudica-
3 tion (SRBA) seeking water rights for their historic "high water or flood
4 water" practice.

5 (d) On January 3, 2012, the SRBA Court affirmed the Special Master's Re-
6 port and Recommendation finding that "Idaho case law precludes the high
7 flow claimants from seeking to establish high flow water rights in the
8 SRBA as a matter of law." Memorandum Decision and Order on Challenge at
9 11, Subcase Nos. 74-15051, In re SRBA Case No. 39576. Although the SRBA
10 Court disallowed the high flow claims, it reaffirmed the Lemhi Basin De-
11 cree conclusion of law regarding "high water or flood water" use through
12 its Partial Decree pursuant to I.R.C.P. 54(b) of the Basin 74 High Flow
13 General Provision (Basin 74 General Provision). Basin 74 General Pro-
14 vision provides: "The following general provision shall govern the use
15 of 'High Flow' surface water for irrigation use within the Lemhi Basin:
16 The practice of diverting high flows in the Lemhi Basin, in addition to
17 diverting decreed and future water rights that may be established pur-
18 suant to statutory procedures of the State of Idaho, is allowed provided
19 (a) the waters so diverted are applied to beneficial use. (b) existing
20 decreed rights and future appropriations of water are first satisfied."

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

26 (f) The long-term goal of the Lemhi irrigators is to conserve, restore,
27 and enhance sufficient habitat to sustain viable fish populations in
28 the Lemhi River Basin while protecting private property rights and pre-
29 serving and enhancing the farming and ranching lifestyle and economy of
30 the Lemhi River Basin.

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

37 (h) Use of high flows under the Basin 74 General Provision is not a pro-
38 tected property interest under Idaho law. Because the SRBA Court disal-
39 lowed all "high water or flood water" claims, a conflict developed be-
40 tween irrigators who rely on the use of high flows under the Basin 74
41 General Provision and persons desiring to appropriate high flow for new
42 uses.

43 (i) The legislature finds (1) that the use of Lemhi River Basin high
44 flow for holding water underground to augment the natural flow of the
45 Lemhi River later in the irrigation season is a beneficial use of wa-
46 ter; and (2) that it is in the public interest to protect through the
47 appropriation process the entitlements to divert and use high flows un-
48 der the Basin 74 General Provision for efficient administration of such
49 uses and to aid in the proper planning for future development of the wa-
50 ter resources of the Lemhi River Basin.

1 (j) The Lemhi Basin stream flow maintenance applications provided for
2 in this section are based upon the historic practice recognized by the
3 Basin 74 High Flow General Provision, and therefore, are not intended to
4 nor shall be construed as establishing a precedent for issuance of any
5 future water rights in the State of Idaho.

6 (2) Stream Flow Maintenance Applications. Lemhi irrigators who hold
7 irrigation water rights decreed in the SRBA, and claim authority to divert
8 and use Lemhi Basin high flows for stream flow maintenance pursuant to the
9 Basin 74 General Provision may file an application for permit with the de-
10 partment of water resources to convert such use into a protectable water
11 right on or before July 1, 2024. The application shall be upon forms provided
12 by the department. The department shall process the application as provided
13 in section 42-203A, Idaho Code.

14 (3) Quantity of Right. The quantity of a stream flow maintenance water
15 right shall be limited to the historic high flow use under the Basin 74 Gen-
16 eral Provision ancillary to irrigation water rights decreed in the SRBA, but
17 not to exceed the ditch capacity of the decreed irrigation water rights on
18 August 25, 2014.

19 (4) Proof of Beneficial Use. The department may consider as part of its
20 beneficial use examination for licensing of a permit under this section a
21 permit holder's past historic diversions of high flow under the Basin 74 Gen-
22 eral Provision.

23 (5) Comprehensive Settlement. All applications filed under this sec-
24 tion shall be subject to the terms and conditions of the Lemhi Basin Compre-
25 hensive Settlement Agreement Between the Idaho Water Resource Board, Idaho
26 Department of Fish and Game, Idaho Office of Species Conservation and Var-
27 ious Lemhi Water Users, including but not limited to the following condi-
28 tions:

29 (a) Regardless of their priority dates, stream flow maintenance wa-
30 ter rights shall include a condition requiring them to cease diversion
31 while the McFarland Campground minimum stream flow water right estab-
32 lished pursuant to section 42-1506A, Idaho Code, is being exercised.

33 (b) Regardless of priority date, the water supply legally available to
34 stream flow maintenance water rights created under this section that
35 divert from a common source shall be distributed proportionately among
36 the stream flow maintenance water rights diverting from the common
37 source, except as otherwise provided for in the Lemhi Basin Comprehen-
38 sive Settlement Agreement Between the Idaho Water Resource Board, Idaho
39 Department of Fish and Game, Idaho Office of Species Conservation and
40 Various Lemhi Water Users. For purposes of this section each tributary
41 administered as a separate source pursuant to the SRBA Basin 74 Separate
42 Streams General Provision is a common source. The mainstem Lemhi River
43 and all tributaries in Basin 74 not listed in the SRBA Basin 74 Separate
44 Streams General Provision are a common source.

45 (6) Notice - How Given - Requirements. To ensure all persons claiming
46 authority to divert or withdraw and use water under the Basin 74 General Pro-
47 vision are notified of the provisions of this section, the department of wa-
48 ter resources is directed to give notice of the provisions of this section as
49 follows:

1 (a) By regular mail upon all persons within Idaho department of water
2 resources Administrative Basin 74 who currently own an irrigation water
3 right decreed in the SRBA a notice in writing of the existence of this
4 section;

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

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

12 (d) By providing sufficient number of copies of the notice and decla-
13 ration to the Lemhi County treasurer for enclosure with each mailing of
14 one (1) or more statements of taxes due issued in 2023; and

15 (e) By such other means the director of the department in his discretion
16 determines will carry out the purposes of this section.

17 SECTION 2. That Chapter 15, Title 42, Idaho Code, be, and the same is
18 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
19 ignated as Section 42-1506A, Idaho Code, and to read as follows:

20 42-1506A. LEMHI RIVER -- MCFARLAND CAMPGROUND MINIMUM STREAM FLOW AP-
21 PROPRIATION. (1) The water resource board is hereby authorized and directed
22 to appropriate and hold in trust for the people of the state of Idaho a mini-
23 mum stream flow water right in a designated reach of the Lemhi River in accor-
24 dance with the provisions of this section. The minimum stream flow appropri-
25 ation shall be in the amount of 420 c.f.s. at McFarland Campground located on
26 the Lemhi River in the NWSE of Section 14, Township 17 North, Range 24 East,
27 Boise Meridian. The elements of this water right shall include the follow-
28 ing:

29 (a) This water right may be exercised only two (2) years out of every
30 five (5) years. The five (5) year period shall be a rolling period.

31 (b) The exercise of the right shall be limited to a duration of three
32 (3) days, during the March 15 to July 6 period of use. The three (3) day
33 period shall be timed to occur as near as possible to the peak of Lemhi
34 runoff.

35 (2) This right may not call against water rights with points of diver-
36 sion from streams administered as separate streams pursuant to the Partial
37 Decree pursuant to I.R.C.P. 54(b) of the Basin 74 High Flow General Provision
38 approved by the SRBA District Court on January 2, 2006, except as to Lemhi
39 Basin stream flow maintenance water rights appropriated pursuant to section
40 42-251, Idaho Code.

41 (3) The water resource board shall appropriate the minimum stream flow
42 water right authorized under this section in accordance with the provisions
43 of section 42-1503, Idaho Code. In acting upon the application for permit,
44 the director of the department of water resources need not determine that
45 the appropriation is capable of being maintained based upon records of ex-
46 isting stream flows because it is anticipated that the water right will be
47 maintained through conditions on water rights acquired pursuant to section
48 42-251, Idaho Code.

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

7 SECTION 3. That Chapter 15, Title 42, Idaho Code, be, and the same is
8 hereby amended by the addition thereto of a NEW SECTION, to be known and des-
9 ignated as Section 42-1506B, Idaho Code, and to read as follows:

10 42-1506B. BIG TIMBER, BOHANNAN, CANYON, AND HAYDEN -- MINIMUM STREAM
11 FLOW APPROPRIATIONS. (1) The water resource board is hereby authorized and
12 directed to appropriate and hold in trust for the people of the state of Idaho
13 minimum stream flow water rights for Big Timber, Bohannan, Canyon, and Hay-
14 den Creeks in accordance with the provisions of this section.

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

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

27 (c) The minimum stream flow for Canyon Creek shall be 16 c.f.s. from
28 March 15 to July 31 and 4 c.f.s. from August 1 to March 14 from the
29 headwaters of Canyon Creek in Government Lot 5, Section 18, Township 17
30 North, Range 27 East, Boise Meridian to its confluence with the Lemhi
31 River in the northwest quarter of Section 28, Township 16 North, Range
32 26 East, Boise Meridian.

33 (d) The minimum stream flow for Hayden Creek shall be 60 c.f.s. from
34 March 15 to July 31 and 13 c.f.s. from August 1 to March 14 from the head-
35 waters of Hayden Creek in Section 14, Township 16 North, Range 22 East,
36 Boise Meridian to its confluence with the Lemhi River in the southwest
37 quarter, Section 21, Township 18 North, Range 24 East, Boise Meridian.

38 (2) In acting upon the applications for permit, the director of the de-
39 partment of water resources need not determine that the appropriation is ca-
40 pable of being maintained based upon records of existing stream flows be-
41 cause it is anticipated the water rights will be maintained through volun-
42 tary agreements between the Idaho water resource board and Basin 74 water
43 users in accordance with Idaho law.

44 (3) The minimum stream flows provided for in this section shall be ju-
45 nior to all previously decreed, licensed, or permitted water rights. The
46 minimum stream flows shall also be junior to all water right applications
47 with a priority date before the effective date of this section and all Lemhi
48 Basin stream flow maintenance water rights perfected pursuant to section
49 42-251, Idaho Code.

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

7 (5) These minimum stream flow applications for permit are in satis-
8 faction of the local public interest requirement of section 42-203A(5) (e),
9 Idaho Code, as it pertains to processing of water right applications with a
10 priority date before the effective date of this section and on Lemhi Basin
11 stream flow maintenance water rights filed pursuant to section 42-251, Idaho
12 Code, on Big Timber, Bohannon, Canyon, and Hayden Creeks.

13 SECTION 4. An emergency existing therefor, which emergency is hereby
14 declared to exist, this act shall be in full force and effect on and after
15 July 1, 2022.