

IN THE SENATE

SENATE CONCURRENT RESOLUTION NO. 137

BY STATE AFFAIRS COMMITTEE

A CONCURRENT RESOLUTION

1
2 STATING FINDINGS OF THE LEGISLATURE AND DIRECTING THE IDAHO WATER RESOURCE
3 BOARD TO WORK EXPEDITIOUSLY WITH LOCAL WATER USERS TO DEVELOP A COMPRE-
4 HENSIVE SETTLEMENT THAT RESOLVES CURRENT TENSIONS AND CONFLICTS THAT
5 ARE THE RESULT OF COMPETING WATER SUPPLY DEMANDS IN THE LEMHI RIVER
6 BASIN AND THAT THE COMPREHENSIVE SETTLEMENT, TO THE BEST OF THE ABILI-
7 TIES OF THE PARTICIPATING PARTIES AND IN THE SPIRIT OF COMPROMISE AND
8 RESOLUTION, IS CONSISTENT WITH PAST PRACTICES, FUTURE NEEDS, AND IDAHO
9 LAW.

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

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

16 WHEREAS, the 1982 Lemhi Basin Decree memorialized the high-flow prac-
17 tice in a general provision that allowed irrigators whose rights were de-
18 creed in the Lemhi Adjudication to continue to divert "so called 'high wa-
19 ters' or 'flood waters' in addition to the quantified rights as described in
20 the recommended decree of water rights"; and

21 WHEREAS, the 1982 Lemhi Basin Decree defined high water or flood water
22 as the diversion of "natural flow of water over and above the amount required
23 to fulfill (1) existing quantified rights as shown in the decree of water
24 rights and (2) any future rights that may be established pursuant to statu-
25 tory procedures of the State of Idaho"; and

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

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

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

35 WHEREAS, since the early 1990s, Lemhi irrigators have led an effort to
36 protect and enhance salmon runs in the Lemhi River Basin, including but not
37 limited to providing passage flows for salmon, screening diversion works,
38 and implementing habitat improvement projects; and

39 WHEREAS, the National Marine Fisheries Services (NOAA Fisheries), in
40 the spring of 2000, threatened to bring an enforcement action under the En-
41 dangered Species Act (ESA) against Lemhi irrigators for dewatering of the
42 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.