

TITLE 42
IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 15
MINIMUM STREAM FLOW

42-1501. LEGISLATIVE PURPOSE -- MINIMUM STREAM FLOW DECLARED BENEFICIAL USE. The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. The legislature further declares that minimum stream flow is a beneficial use of water of the streams of this state for the purpose of protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho. Minimum stream flows as established hereunder shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion. It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code.

[42-1501, added 1978, ch. 345, sec. 11, p. 891.]

42-1502. DEFINITIONS. Whenever used in this act, the terms:

(a) "Appropriate" or "appropriation" mean [means] the identification of a beneficial use and place of in-stream use of the waters of a stream. It shall not be construed to require any kind of physical structure or physical diversion from the stream;

(b) "Board" means the Idaho water resource board;

(c) "Department" means the Idaho department of water resources;

(d) "Director" means the director of the Idaho department of water resources;

(e) "Stream" means any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the state of Idaho;

(f) "Minimum stream flow" means the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest;

(g) "Unappropriated water" means water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act.

[42-1502, added 1978, ch. 345, sec. 11, p. 892.]

42-1503. APPLICATION TO APPROPRIATE -- PROCESS -- JUDICIAL REVIEW. Whenever the board desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the director. Such application shall be made upon forms to be furnished by the director and shall include:

- (a) The name of the stream and legal description of the point on the stream where the minimum stream flow is proposed to be appropriated and determined;
- (b) The minimum stream flow proposed;
- (c) The purpose for which the minimum stream flow appropriation is proposed to be made;
- (d) The period of time or season of the year during which said appropriation is proposed; and
- (e) Such other information as shall be required by the form furnished by the director.

Upon the receipt of an application filed under the provisions of this act, the director shall forward a copy thereof to the departments of fish and game, environmental quality, parks and recreation, and any other public entity likely to have an interest or knowledge in the matter. The director shall also prepare a notice describing the proposed appropriation of minimum stream flow and cause said notice to be published once each week in two (2) consecutive weekly issues of a newspaper published within the county where the appropriation of minimum stream flow is proposed, if there is such newspaper, otherwise in a newspaper of general circulation within the county. The director may also give other notice of the proposed appropriation in such manner and to such persons or organizations as he may determine. Such notice shall specify the time and place for a public hearing to be held concerning the proposed appropriation of minimum stream flow. Such hearing shall be held in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director shall have power to administer oaths and to require the attendance of such witnesses and the production of such books, records, and papers as he may desire at the hearing and for that purpose the director may apply to the district court for a subpoena for any witnesses or a subpoena duces tecum to compel the production of any books, records, or papers which shall be served and returned in the same manner as a subpoena in a civil case. In case of any disobedience or neglect to obey a subpoena or subpoena duces tecum it shall be the duty of the district court in any county of this state in which such disobedience, neglect, or refusal occurs, or any judge thereof, on application by the director, to compel obedience by proceedings for contempt as in the case of a subpoena issued by a regularly constituted court. Upon the conclusion of the hearings and completion of any investigation conducted by the director, he shall enter his findings in writing approving the application in whole, or in part, or upon conditions or rejecting said application. Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

- (a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;
- (b) is in the public, as opposed to private, interest;

(c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;

(d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and

(e) is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and bench marks.

A copy of the director's findings shall be mailed to the board and to each person or organization who gave testimony in support of or in opposition to the proposed appropriation. The board or any person testifying at a hearing who is aggrieved by a decision of the director shall have the right to have that decision reviewed by the courts pursuant to section 42-1701A(4), Idaho Code. Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved.

[42-1503, added 1978, ch. 345, sec. 11, p. 892; am. 1980, ch. 238, sec. 14, p. 544; am. 2001, ch. 103, sec. 80, p. 318.]

42-1504. REQUEST TO FILE APPLICATION. Any person, association, municipality, county, state or federal agency may, in writing, request that the board consider the appropriation of a minimum stream flow of the unappropriated waters of any stream. Said request shall be in writing and provide the same information required in the form provided for by section 42-1503, Idaho Code. The board shall consider said request within six (6) months after it is filed and may proceed to reject or accept the proposal. There shall be no right of review of any board decision rejecting a request under this section. If the board decides that the request has merit, the board shall proceed as provided in this act. The board may hold hearings in reaching its decision and shall notify the requesting party of its decision.

[42-1504, added 1978, ch. 345, sec. 11, p. 894.]

42-1505. PRIORITY DATE -- ADMINISTRATION. In his direction and control of the distribution of water from the streams of this state under the provisions of chapter 6, title 42, Idaho Code, the director shall consider any approved application for appropriation of minimum stream flow filed under the provisions of this act as a water right with priority date as of the date of receipt in the office of the director of a complete application. Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application.

[42-1505, added 1978, ch. 345, sec. 11, p. 894.]

42-1506. LEMHI RIVER -- 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 in the

designated reach shall be in the amount of thirty-five (35) cfs from January 1 through December 31, provided that fifteen (15) cfs of the appropriation shall be subordinated to all diversions, including high waters or flood waters, authorized under the Lemhi river basin decree (Lemhi County Case No. 4948). The designated reach begins at water diversion L-6 located on the Lemhi river in the southeast quarter (1/4) of section twenty-four (24), township twenty-one (21) north, range twenty-two (22) east of the Boise meridian, and ends at the confluence of the Lemhi river with the Salmon river near the southwest corner of section thirty-two (32), township twenty-two (22) north, range twenty-two (22) east of the Boise meridian, Lemhi county.

(2) 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 operation of the water supply bank within the Lemhi river basin consistent with the provisions of section 42-1765A, 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.

[42-1506, added 2001, ch. 373, sec. 1, p. 1309.]

42-1507. SNAKE RIVER WATER RIGHTS AGREEMENT MINIMUM STREAM FLOW WATER RIGHTS ESTABLISHED. (1) The legislature hereby establishes minimum stream flow water rights for the stream reaches identified by resolution of the Idaho water resource board, adopted February 8, 2005. The elements of the minimum stream flow water rights established by this section are as defined by the board's resolution and the attachments thereto. The board shall hold the minimum stream flow water rights in trust for the people of the state of Idaho, and the board shall file claims for the rights in the Snake river basin adjudication. These minimum stream flow water rights shall have a priority date as of April 1, 2005, and shall be subordinated to future domestic, commercial, municipal, and industrial water uses and such other future uses as described in the December 17, 2004, resolution of the Idaho water resource board providing approval of the Snake River Water Rights Agreement of 2004 ("Mediator's Term Sheet" dated April 20, 2004, and submitted on that date to the SRBA Court in SRBA Consolidated Subcase 03-10022 and SRBA Consolidated Subcase 67-13701, with all appendices to the document), as approved, ratified, and confirmed by the 108th Congress of the United States in the "Snake River Water Rights Act of 2004," Pub. L. No. 108-447 (H.R. 4818), 118 Stat. 3431 to 3441 (December 8, 2004).

(2) No fee shall be required in connection with the filing of claims in the Snake river basin adjudication for the minimum stream flow water rights established by this section.

(3) Any minimum stream flow water rights established by this section that are not capable of being maintained may be satisfied and maintained through operation of the water supply bank authorized by sections 42-1761 through 42-1765, Idaho Code, inclusive, and other available methods consistent with Idaho law.

(4) In the event the state decides to change any minimum stream flow water rights created by this section, it will provide notice of such change and consult with the Nez Perce tribe on a government-to-government basis as provided in the Snake River Water Rights Agreement of 2004. Provided however, nothing herein or in the Snake River Water Rights Agreement of 2004 shall be construed or interpreted to abridge, impair or limit the authority of the state of Idaho to create, modify or terminate any minimum stream flow water right established by this section.

(5) This section shall not become effective until the governor issues a proclamation certifying that all conditions for the effectiveness of the Snake River Water Rights Agreement of 2004 have been satisfied.

[42-1507, added 2005, ch. 150, sec. 1, p. 466.]