



State of Idaho

DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

October 27, 2020

Kevin Lakey
Watermaster, Water District 37
107 W 1st St
Shoshone, ID 83352

Re: Out-of-Priority Diversions in Water District 37

Dear Kevin,

As you know, staff from the Idaho Department of Water Resources (“IDWR”) investigated a de-watering event on the East Fork Big Wood River (“EFBWR”) that occurred on September 7 and 8, 2020. The event was attributed in part to an EFBWR diversion called the Peters Ditch, also known as Canal No. 17-C1 or the Mitchell diversion (referred to herein as the Mitchell diversion). A copy of IDWR’s investigative report, dated October 15, 2020, was sent to you via email on October 16, 2020.

In the course of its investigation, IDWR learned that the Water District 37 (“WD37”) assistant watermaster allowed the owner of the Mitchell diversion, Robert Mitchell (“Mitchell”), to divert water from the EFBWR after Mitchell’s EFBWR water rights were curtailed. Specifically, Mitchell’s EFBWR’s irrigation water rights, bearing a priority date of June 3, 1884, were curtailed by the WD37 watermaster on July 13, 2020 as a result of the watermaster’s determination of water right priority cuts on the Big Wood River above Magic Reservoir. Despite this priority cut, WD37 allowed Mitchell to divert water this year, out-of-priority, from the EFBWR about every ten days after July 13, and extending to September 7, to fill several ponds on Mitchell’s property. Mitchell has no water rights authorizing diversion of water from the EFBWR for the ponds.

Upon discussions between IDWR staff, you and your assistant watermaster, Ryan Fuchs, IDWR understands that there is a long-standing practice in WD37 whereby the holders of water rights from the Big Wood River and tributaries are allowed to periodically divert water for stock watering purposes after their diversions are shut off due to water right priority cuts. You stated these out-of-priority diversions are limited to the irrigation season only and based on requests from the owners of curtailed priority rights. IDWR understands from you that this out-of-priority diversion practice for stock water use was regularly implemented by WD37 prior to your tenure as watermaster in 2004 and that you have continued the practice ever since. You explained that the owner of the Mitchell diversion requested periodic, short-term deliveries of water to maintain water levels for his ponds and fish this year after his irrigation priority rights were curtailed. You stated that the request was viewed by WD37 staff similar to an out-of-priority stock water delivery request.

In addition to authorizing the out-of-priority delivery to the Mitchell diversion, IDWR learned that the owner was allowed to control his own headgate and deliver water to himself out-of-priority under no

valid water rights, with no measurement or monitoring from WD37 staff. Consequently, IDWR lacked sufficient evidence regarding the amount of water diverted on September 7 and 8 when the EFBWR was de-watered. Moreover, review of past WD37 delivery records show instances in which WD37 has delivered more water to the Mitchell diversion than is authorized by Mitchell's water rights.

IDWR finds that there is no legal authority for WD37 to deliver water out-of-priority at the Mitchell diversion, nor is there any authority for WD37 to deliver water out-of-priority to other diversions in the district for stock water purposes. Further, IDWR finds there is no legal authority for WD37 to deliver more water to the Mitchell diversion than is authorized by Mitchell's water rights. Based on findings from its' recent investigation, IDWR directs you to immediately implement the following actions:

1. WD37 shall only deliver water to the Mitchell diversion in accordance with valid water rights held by Mitchell. Specifically, Mitchell is limited to diverting a combined rate of diversion of 0.98 cubic feet per second for irrigation under three separate water rights, all bearing a priority date of June 3, 1884. No water shall be diverted by Mitchell, or delivered to the Mitchell diversion, after you have curtailed water rights bearing a priority date of June 3, 1884.
2. Delivery and regulation of water to the Mitchell diversion, including control of the diversion headgate, shall be limited to the watermaster or assistant watermaster. The watermaster shall lock the headgate with his own lock and key once the priority rights are curtailed.
3. WD37 shall cease and desist any further practice of allowing out-of-priority diversions of water for livestock purposes during the irrigation season. All watermaster deliveries must be made in accordance with valid recorded water rights at each diversion. Control and regulation of diversions or headgates must be limited to the WD37 watermaster and appointed assistant watermasters.

IDWR is aware that you deliver water out-of-priority to about seven water rights in WD37 that include a condition stating that the use shall be non-consumptive. You may continue to deliver water out-of-priority to these rights subject to further review and guidance from IDWR.

Please contact me directly if you have any questions or need further clarification regarding this matter. I appreciate your ongoing cooperation, transparency and verity with IDWR and the public on this and all other WD37 matters of interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Luke".

Tim Luke
Water Compliance Bureau Chief

Copy: Corey Skinner, IDWR Southern Region Manager