



State of Idaho

DEPARTMENT OF WATER RESOURCES

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Director

May 11, 2020

DREW HERBST
PO BOX 78
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LYNN HERBST
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SALMON ID 83467

RE: Rediversions of L31-A Return Flows at the Agency Ck21/L31 Crossover Diversion

Drew and Lynn:

In July 2017, I made a site visit to the L-31 crossover diversion from Agency Creek, along with the Lemhi River watermaster, Rick Sager. The purpose of the visit was to ensure the correct administration of recently awarded Water Right Permit 74-16008 and associated Lemhi River water rights, and to confirm that new headgates and measuring devices were sufficient for watermaster control.

Water right nos. 74-740, 74-741, 74-742, and 74-7147 (Lemhi rights) diverting from the Lemhi River, and right 74-16008 from springs arising in the L-31 ditch, all have points of rediversion at Agency Creek-21 (AC-21), where the L-31 ditch crosses the creek, and at Agency Creek-22 (AC-22), which is west of Highway 28. Right no 74-250 from Agency Creek has a single point of diversion at AC-21. These rights are presently owned by Lynn Herbst, and used by Drew Herbst. Both AC-21 and AC-22 have adequate headgates and measuring devices.

At the time of my 2017 visit, transfer 80150 was being processed by the Department of Water Resources (Department) to modify the place of use of the Lemhi rights to match Permit 74-16008. Transfer 80150 was approved in November 2017, and water right license 74-16008 was issued in February 2020. Conditions of use contained on 74-16008 limit use of this right to times when the appurtenant Lemhi River rights are no longer available. 74-16008 may supply only a portion of the unavailable diversion rate under the Lemhi River rights.

Flows delivered at AC-21 under the above rights are conveyed down the L-31 ditch to a pump station that irrigates a total of about 180 acres under the Lemhi rights and 15 acres under right 74-250 (which overlap 15 acres of another Lemhi River right, no. 74-739). The remaining 6 acres under the Lemhi rights are flood irrigated from AC-22. The L-31 pump station also delivers water to an additional 17 acres south of Tendroy Road under right 74-739. Right 74-739 has a decreed point of diversion at L-31A. Approximately 12 acres are flood irrigated under 74-739 from the L-31A ditch. Irrigation return flows and unused flows in L-31A flow into the L-31 ditch at locations above the AC-21 crossover diversion.

During 2017, Lynn Herbst requested that the Lemhi River watermaster deliver the return flows in the L-31 ditch, to the AC-21 rediversion. Mr. Sager has refused delivery of credited flows, on the grounds that right no. 74-739 does not include an authorized point of diversion at the L-31 ditch or a point of rediversion at AC-21. Herbst asserts that he is allowed to convey unused water diverted under 74-739 at L-31A, to the L-31 ditch, and call for rediversion of that water at AC-21 to compensate for water pumped at the L-31 pump station to acres under 74-739.

Idaho Code 42-105(1) states:

“The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.”

The Department agrees that I.C. 42-105(1) applies to the Herbst request, subject to certain conditions. Because of overlapping rights, associated diversions from Agency Creek, and combined diversion limits that must be administered at AC-21 and AC-22, comprehensive watermaster instructions should be issued for administration of rights 74-739, 74-740, 74-741, 74-742, 74-7147, 74-250 and 74-16008. AC-21 and AC-22 should be under the primary control of the watermaster of WD74, Lemhi River. The area is also within the jurisdiction of the watermaster of WD74M, Agency Creek. These instructions shall apply to the current watermasters of these two districts, and the current owner or operator of the above water rights. The instructions are subject to modification if future water rights or transfers are approved, or for other good cause at the Department’s discretion.

By copy of this letter, the Department directs the water user and the watermasters of Water District 74 and Water District 74M to administer water rights 74-739, 74-740, 74-741, 74-742, 74-7147, 74-250 and 74-16008, and to take other actions as required, pursuant to the attached instructions.

These instructions are effective immediately and shall remain in effect until modified by the Department.

If there are questions regarding implementation of these instructions, please contact me at 208-742-0655.



Cindy Yenter
Watermaster, Water District 170
IDWR Salmon Field Office

cc: Rick Sager, Watermaster WD74
Jerry Eastman, Watermaster WD74M
Rob Harris, Idaho Falls
James Cefalo, IDWR Idaho Falls
Rob Whitney, IDWR Boise

Attachment: Delivery Instructions for L-21, AC-21 and AC-22 and Schedule of Deliveries

Delivery Instructions for Lemhi-31, Agency Creek-21 and Agency Creek-22 Diversions
May 11, 2020

1. Headgates and measuring devices shall be installed and maintained by the water user at all times at the AC-21 and AC-22 diversions. The AC-21 and AC-22 diversions shall be under the control of the watermaster of WD74, Lemhi River.
2. Combined diversions at AC-21 and AC-22 under right nos. 74-740, 74-741, 74-742, 74-7147 and 74-16008 shall not exceed 5.35 cfs. If the Lemhi River priority cut is 1961 or later, diversion under 74-16008 may begin and combined diversions may not exceed 5.35 cfs. If the Lemhi priority cut reaches 1908, combined diversions shall not exceed 3.98 cfs. If all Lemhi rights are curtailed at L-31, deliveries under 74-16008 shall not exceed 3.72 cfs. *See attached schedule of deliveries*
3. In addition to the above deliveries, 0.30 cfs pursuant to right no. 74-250 (priority 1909) may be delivered at AC-21. 74-250 may not be delivered at AC-22. As necessary, the watermaster of WD74M shall curtail junior rights diverting upstream on Agency Creek to satisfy 74-250 in priority. Spring flows arising in L-31 are tributary to Agency Creek and should be used to satisfy 74-250 before they are delivered under 74-16008.
4. In addition to the above deliveries, up to 0.40 cfs may be delivered at AC-21 to compensate for deliveries to acres under 74-739 from the L-31 pump station, provided an equivalent amount of flow is returning to L-31 either directly from the L-31A ditch or as irrigation return flow. The water user shall install and maintain a measuring device in a location approved by the watermaster of WD74 for purposes of quantifying return flow. The water user shall provide an access road to the device.
5. If return flows as specified in #4 are not entering L-31, or flows are less than 0.40 cfs, the WD74 watermaster shall reduce the total diversion at AC-21 and the water user shall cease or proportionately reduce irrigation from the L-31 pump station on acres under 74-739.
6. Uncontrolled and unmeasured diversions from the L-31 ditch to a field situated between the L-31 ditch and Hwy 28 (aka the "sub" field) shall cease.
7. The diversion from Agency Creek just below the Lemhi Back Road within SWSE Section 20, 19N 24E (aka school house diversion) is not associated with a valid water right and shall be closed and secured by the watermaster of WD74M, unless an approved water right is obtained which includes this diversion as an authorized point of diversion. A lockable headgate shall be installed by the water user and locked by the watermaster, or the head of the ditch shall be sealed with dirt fill.
8. The stock water pipeline from the L-31 ditch shall be closed by the WD74 watermaster when the Lemhi River is placed into priority regulation and shall remain closed during the irrigation season until priority regulation is lifted.

Schedule of Deliveries of Affected Rights at AC-21 and AC-22

Summary of Affected Water Rights

Right	priority	source	Point of Diversion	rate (cfs)	rate limits (cfs)		acres	acre limits		comments
74-739	4/1/1873	Lemhi R	L-31A	1.33			44.3	44.3		
75-250	10/1/1909	Agency Ck	AC-21	0.30			15.5			
74-742	6/1/1871	Lemhi R	L-31	0.38	4.77	5.35	12.5	166.7	186.2	74-16008 shall provide only 2/3 replacement rate when Lemhi rights are not available see tables below
74-740	4/1/1961	Lemhi R	L-31	0.20			7.0			
74-741	1/8/1908	Lemhi R	L-31	4.30			143.1			
74-7147	11/6/1981	Lemhi R	L-31	0.88			44.1			
74-16008	6/26/2015	Springs	In L-31 ditch	3.72						

Maximum Replacement under 74-16008

right	priority	rate	16008 replace rate 67%
74-742	6/1/1871	0.38	0.25
74-741	1/8/1908	4.3	2.88
74-740	4/1/1961	0.2	0.13
74-7147	11/6/1981	0.88	0.59

Combined re-diversion limit at AC-21 and AC-22

	Total	74-16008
Priority Cut	Delivered	Delivered
All decreed rights on (no diversion under permit)	5.35 cfs	0 cfs
74-7147 (1981) curtailed	5.35 cfs	0.59 cfs
74-740 (1961) curtailed	5.35 cfs	0.72 cfs
74-741 (1908) curtailed	3.98 cfs	3.6 cfs
74-742 (1871) curtailed (permit only)	3.72 cfs	3.72 cfs