



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Office for Law Enforcement
7600 Sand Point Way NE, F/EN5
Seattle, WA 98115-0070

RECEIVED

NOV - 6 2003

Department of Water Resources

October 30, 2003

Tim Luke
Idaho Department of Water Resources
1301 N Orchard
Boise, ID 83706

RE: Case # NW030298

Dear Mr. Luke:

NOAA's National Marine Fisheries Service (NOAA Fisheries) Enforcement is requesting assistance and information from Idaho Department of Water Resources (IDWR) concerning the irrigation diversion ditch L-32 that crosses Agency Creek, a tributary to the Lemhi River. As defined in the Endangered Species Act of 1973, NOAA Fisheries Enforcement has been designated to enforce the prohibitions of the Endangered Species Act protecting listed Snake River spring/summer chinook salmon and steelhead that are known to occur in this area.

In August, 2003, a NOAA Enforcement Agent documented, and is investigating, the de-watering of Agency Creek as a potential "Take" of Endangered Species Act protected chinook salmon and steelhead. Below please find my request for information from your agency:

- (1) Does the State of Idaho permit the co-mingling of Lemhi river L-32 diverted water and all of Agency Creek; thus de-watering Agency Creek below the junction?
- (2) Who built the berm blocking Agency Creek? Please provide the exact date the berm was built.
- (3) Are there water measuring devices and head gates on all the diversions from Agency Creek? If not, please provide a list of names and outstanding requirements.
- (4) Did the water master in charge of Agency Creek record water withdrawal information? If so, please provide the withdrawal amounts?
- (5) Does Agency Creek have a "Flood Flow" provision similar to the Lemhi River? If so, please explain that provision.
- (6) Did Agency Creek go into "regulation" in 2003. If so, please provide the dates it went in and out of regulation?
- (7) According to a recent electronic correspondence between NOAA Fisheries Enforcement and IDWR, a site visit was scheduled for October 9, 2003, by Idaho Department of Water Resources Representative Bob Foster. Please provide any information learned from that visit.

We look forward to working together with you and request any fees subject to this request be waived. Please address your correspondence concerning this matter to the Special Agent



investigating this incident listed below. Thank you for your time and prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Vicki Nomura". The signature is fluid and cursive, written over the printed name.

Vicki Nomura,
Special Agent in Charge

Correspondence Information

Special Agent Giordano
10215 West Emerald, Suite 180
Boise, Idaho 83704
(208)321-2956

cc:
SA Giordano

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF THE GENERAL)
DETERMINATION OF THE RIGHTS)
TO THE USE OF THE SURFACE WATERS)
AND TRIBUTARIES FROM WHATEVER)
SOURCE OF THE LEMHI RIVER)
DRAINAGE BASIN.)

CIVIL NO. 4948
PROPOSED FINDING OF
WATER RIGHTS

The above-entitled cause was initiated under provisions of Section 42-1406, Idaho Code, by the submission of a petition from eight (8) water users in the Lemhi River Basin, requesting that the Department of Water Administration (changed to Department of Water Resources in 1974) obtain authority from the Court to prepare a proposed finding of water rights in the Lemhi River Basin. The petitioners specifically requested that the study reflect the present practice and use of water within the Lemhi River Basin.

Pursuant to Section 42-1407, Idaho Code, R. Keith Higginson, Director of the Department of Water Resources petitioned the Court on April 30, 1970, for an order of authorization for the commencement of an adjudication of water rights in the Lemhi River Drainage.

An order was signed on August 13, 1970, by District Judge Arnold T. Beebe, authorizing the Department to commence an investigation and determination of the various rights to the use of the water of the Lemhi River and its surface tributaries including ground water which may be either tributary to the Lemhi River or its surface tributaries within the Lemhi River Drainage Basin, such waters lying or being used within Lemhi County.

An order of joinder signed on June 17, 1971, made approximately 457 land owners and possible water users parties to the adjudication. An additional 351 water users were joined by an order signed November 1, 1971. Approximately 1,900 claims of water rights were submitted to the Department.

Based upon all existing court decrees adjudicating water rights within the Lemhi River Drainage Basin, the claims submitted, the files and records of the Department and the Court, the examination and studies of the Lemhi River Drainage Basin and the various ditches and other diversions of water therein and the lands irrigated or other uses of water, the Department of Water Resources, in July 1974, filed a proposed finding of water rights with the Court. Objections to the proposed finding were resolved either by stipulation or hearing before the Court. The Court then adopted the following findings of fact, conclusions of law and decree of water rights, in which the

- a. "Director" means the Director of the Department of Water Resources.
- b. "Department" means the Idaho Department of Water Resources.
- c. "Ident. No." is the abbreviated form of "Identification Number". An identification number is assigned to each water right for purposes of identification. The first two (2) numerals i.e., "74" indicates the basin number as reflected in Department files, "Name and address" are self-explanatory and indicate the owner of the right at the time the "Notice of Claim to a Water right" was submitted to the Department.
- d. "Priority" indicates the priority date of the water right and is generally the date when the water was first applied to a beneficial use.
- e. "purpose" is self-explanatory except for "Fish Return" as shown on numerous Idaho Department of Fish and Game rights. Fingering fish are prevented from entering irrigation ditches by means of a screen across the irrigation ditch and a by-pass pipe for the fish to return through to the river. Hence, the term "Fish Return". This is a non-consumptive use.
9. "Period of use" indicates the period of time during each year when a particular right may be used each year.
- h. "Acre-foot" is a volume of water sufficient to cover one acre of land one foot deep with water and is equal to 43,560 cubic feet.
- i. "Maximum rate of diversion, c.f.s." indicates the rate of diversion from a water source in cubic feet per second. The term "miner's inch" formerly used in hydraulic mining and irrigation is also a measure of a rate of flow. The miner's inch in Idaho is defined as the quantity of water which will flow through an orifice one inch square under a four inch head. One cubic foot per second is equal to fifty miner's inches in Idaho, or 0.02 c.f.s. equals one miner's inch.
- j. "Place of use and lands irrigated" indicate the number of irrigated acres and legal description of the places of use within each 40-acre subdivision.
- k. Under the general heading "Basis of Right":
 - "Beneficial Use" indicates the right was based upon a Constitutional right or so called "use right", initiated and maintained by actual diversion and application to beneficial use.
 - "License" indicates the right has been initiated through application to the Department with appropriate statutory proof submitted in the past with subsequent examination and issuance of a license by the Department.
 - "Decree" indicates that the right has been adjudicated in a court of law prior to this general determination of water rights.
- l. "Domestic purposes" is defined as water for household use or livestock and water used for all other purposes including irrigation of up to one-half (1/2) acre of land in connection with said household where total use is not in excess of 13,000 gallons per day. Idaho Code.

- m. "H.E.S." as used in this report describes a place of use of a water right and means Homestead Entry Survey. There is a number following the H.E.S. designation that refers to the particular homestead entry in question, i.e., H.E.S. No. 236.
- n. "High water" or "Flood water" as used in the Findings of Fact, Conclusions of Law, and Decree describes a natural flow of "water over and above the amounts required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho."

FINDINGS OF FACT

1. The Lemhi River Drainage lies entirely within Lemhi County, State of Idaho, with its mouth at its confluence with the Salmon River near Salmon, Idaho, and with its source comprised of tributaries rising in the surrounding mountains and hills. There are periods during each year when the amount of water flowing in the Lemhi River and its tributaries is insufficient to meet and satisfy the various demands by claimants of appropriate rights. These periods of scarcity normally occur prior to the spring runoff and during the latter part of the summer.
2. There exist numerous separate decrees on the tributaries of the Lemhi River adjudicating the various priorities to the use of the water on those tributaries. Diversion and beneficial use of water on these decreed tributary streams has in the past, been without regard for uses or rights claimed on the Lemhi River proper, and users on the Lemhi River proper have made no demand on these tributary streams for water to fill prior rights on the main stem.
3. Beneficial use rights from surface water sources are those rights which were commenced by diversion and application of water for a beneficial use prior to May 20, 1971. Beneficial use rights from underground water sources are those which were commenced by diversion and application of the water to a beneficial use prior to March 25, 1963. All other rights to the use of water must have been initiated by an application filed with the Department of Water Resources. The only exception to this is for domestic wells where total use does not exceed 13,000 gallons per day pursuant to Section 42-227, Idaho Code.
4. The consumptive use of water for irrigation purposes was found to be 1.45 acre feet per acre per growing season based upon the following facts: Consumptive use or evapotranspiration of water from the land and crops is a total of 1.8 AF/acre per growing season of which precipitation normally furnishes 0.35 acre feet per acre, giving a net consumptive irrigation requirement of 1.45 AF/acre to be applied from some water source.
A change in the nature of use of the water right from irrigation to a more consumptive use or a change in location of use that causes waters diverted but not consumed to be returned to the Lemhi River or tributaries at a different location can reduce water available to other right holders.
5. The normal irrigation season is found to be from March 15 to November 15 of each year. However, there appear to be periods before March 15 and later than November 15 in some years in which water diverted for agricultural purposes has been applied to a beneficial use.
6. The use of water under previously decreed rights in the Lemhi River Basin was found, in many cases, to be different from the use as described in the original decrees. Changes in places of use, changes in point of diversion, apparent errors in the original decrees, abandonment or forfeiture of use, and the updating and improvement of irrigation systems through the years are some of the reasons for rights based on decrees differing from the original decrees.

7. The Lemhi River Basin presently has almost non-existent storage facilities in which to preserve water for use later in the irrigation season when the flow in surface water sources diminishes. Diversions of high waters or flood waters for irrigation purposes within the basin have been practiced in an effort to hold or store water underground within the basin, which later contributes to the flow of the streams and river, and has the effect of augmenting or supplementing this flow during the latter portion of the irrigation season. While the amount of such high water available varies from year to year, an effort has been made to divert all of such water, whenever and in whatever amounts it is available, and to apply it on the irrigated lands. The practice has been to distribute and use this water in an informal manner. There is some potential for development of water storage projects within the basin; however, general interest in such development will probably only occur as the economic feasibility thereof increases.
8. The amount of water required for stockwatering purposes is found to be 12 gallons of water per day per head for cows, calves, and horses and 2 gallons per day per head for sheep. For domestic or household use, the requirement is 1,000 gallons of water per day per household.
9. The United States has submitted claims of water right based on the "Reserved Rights" principle which are enumerated in Exhibit "I" and has also claimed unspecified minimum stream flows in various creeks, streams and water sources enumerated in Exhibit "J" of the United States of America Notice of Claim to a Water Right submission together with various other exhibits. The water rights of the United States are subject to adjudication in this proceeding under the provisions of 43 USC 666.
10. The State of Idaho, Department of Fish and Game has claimed minimum stream flows at the mouth of the Lemhi River, at the mouth of Hayden Creek and on the Lemhi River below the mouth of Big Springs Creek on three claims to a water right identified as 74-1768, 74-1769 and 74-1770, which claims are not based upon a diversion and application of water to beneficial use.
11. This decree of water rights includes rights in the name of U.S. Department of Interior initiated by application, permit and license pursuant to Idaho Code 42-501, et seq. The basis for these rights in this decree is listed as "D Permits"; however, each of these "D Permits" is a licensed right under Idaho Code 42-501.
12. Regulation of the diversion and use of water from the Lemhi River and its tributaries requires that each user who diverts water must install and maintain a suitable headgate and measuring device for the use of the watermaster.
13. Among the various water rights in the numerous licenses issued by the Department of Water Resources and the court decrees which adjudicated water rights within the Lemhi River Drainage are several which describe rights which are unclaimed by the present land owner. For the most part, these include uses which no longer exist because of forfeiture or abandonment of the right. These unclaimed "rights" are listed in the decree.
14. Water has been diverted and applied to a beneficial use as described in the following decree of water rights. In addition, the water users in the Lemhi River Basin have historically diverted the so called "high water or flood water" generally during the months of May and June.

CONCLUSIONS OF LAW

1. The United States holds rights to the use of water on reserved forest lands within the Lemhi River Drainage Basin with priorities based upon the dates when the various forest reserves were established, to the extent such water has been diverted and applied to a beneficial use prior to the date of this action or to the extent that future potential uses have been reasonably identified in its claims. The United States holds no rights either expressly or impliedly to the maintenance of continuous, uninterrupted flows of water and minimum stream levels for the various creeks, streams, and water sources enumerated on Exhibit "J", of the United States of

America Notice of Claim to a Water Right nor any rights to the present or future use of water of Lemhi River or its tributaries not specifically claimed and identified as to quantity and place of use except as set forth in these findings of fact, conclusions of law and decree of water rights.

2. The State of Idaho, Department of Fish and Game claims of water rights to maintain minimum stream flows at the mouth of the Lemhi River, at the mouth of Hayden Creek, and on the Lemhi River below the mouth of Big Springs Creek identified as Claim Nos. 74-1768, 74-1769 and 74-1770, are not based upon a diversion and application of the water to a beneficial use and are therefore invalid.

3. An adjudication of water rights should recognize the past history of use of water in the area. Since there exist numerous and separate decrees on tributaries to the Lemhi River and on other sources of water in the Lemhi River Basin, and since the water users on these stream systems have distributed their waters under direction of watermaster independently and without regard for prior claimed uses on the Lemhi River proper, the water users on those tributaries or water sources have advised any prior right to demand water from the tributary streams to fill rights claimed on the Lemhi River proper. For the purposes of water distribution in the Lemhi River Basin, water rights on the following water sources are not considered junior to the water rights from Lemhi River:

1. Agency Creek and tributaries
2. Alder Creek and tributaries
3. Basin Creek (incl. McNutt & Schwartz) and tributaries
4. Bohannon Creek and tributaries
5. Bull Creek and tributaries
6. Canyon Creek (Junction Creek) and tributaries
7. Eightmile Creek (Big) and tributaries
8. Eightmile Creek (Little) and tributaries
9. Geertson Creek and tributaries
10. Hawley Creek and tributaries
11. Haynes Creek and tributaries
12. Jake Canyon Creek and tributaries
13. Kirtley Creek and tributaries
14. Lee Creek and tributaries
15. Mill Creek and tributaries
16. Pattee Creek and tributaries
17. Peterson Creek and tributaries
18. Pratt Creek and tributaries
19. Sandy Creek and tributaries
20. Sawmill Creek (Little) and tributaries
21. Texas Creek and tributaries
22. Timber Creek (Big and Little) and tributaries
23. Walter Creek and tributaries
24. Warm Springs Creek (near Pratt Creek) and tributaries
25. Wimpey Creek and tributaries
26. Withington Creek and tributaries
27. Xearian Creek and tributaries
28. Zeph and Swartz Creek and tributaries

Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper. Future appropriations of water on any other water source or stream in the Lemhi River Basin, however, are considered to be tributary to the Lemhi River proper for the purposes of distribution.

Water sources or creeks not included in the listing above are tributary to the Lemhi River for the purposes of distribution if in fact water from the water source or creek would reach the Lemhi River.

4. Water users whose rights are described in this decree are required to install and maintain headgates and measuring devices at their points of diversion for use by a watermaster.
5. This recommended decree includes all of the existing rights to the waters of the Lemhi River and its tributaries and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted water from the Lemhi River or its tributaries or who owns lands to which previously established rights were appurtenant and who, upon being joined in this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code, subject to the provisions of 42-1405, Idaho Code.
6. The normal irrigation season in the Lemhi Basin is from March 15 to November 15 of each year. The practice of diverting water during the pre-irrigation and post-irrigation season as well as diverting the so called "high waters or flood waters" in addition to the quantified rights as described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) is allowed provided:
 - (a) the waters so diverted are applied to a beneficial use.
 - (b) the existing quantified rights (including future appropriations of water) are first satisfied. (Note that Conclusion of Law #3 provides an exception to this condition of "high water" or "flood water" diversion.)
7. Distribution by the watermaster of water from the public water supply for irrigation purposes shall be on the basis of the rates of diversion herein specified and shall not be limited in any manner by any provisions herein regarding consumptive use.

The consumptive use of water for irrigation purposes in the Lemhi River Basin has been determined to be 1.45 acre feet per acre. The Director of the Department of Water Resources will be guided by this determination in authorizing changes requested pursuant to 42-222, Idaho Code.
8. The watermaster(s) is authorized to allow diversion of water for agricultural uses before March 15 and after November 15 provided the conditions in paragraph six (6) in these Conclusions of Law are satisfied.
9. Water has been diverted and applied to a beneficial use as described in the following recommended decree of water rights.