



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

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Director

December 30, 2003

Vicki Nomura
US Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
7600 Sand Point Way NE, F/EN5
Seattle, WA 98115-0070

Re: Your Correspondence Dated October 30, 2003 and Case # NW030298,
L-32 Ditch Diversion crossing Agency Creek, tributary to Lemhi River

Dear Ms. Nomura,

I have reviewed your above referenced correspondence that poses a number of specific questions and seeks information regarding the L-32 irrigation ditch from the Lemhi River that intersects Agency Creek in Lemhi County, Idaho. I apologize for my late response to your inquiry. The delay is the result of a busy work schedule and my need to gather certain information relative to your questions.

Your letter indicates that the National Oceanic and Atmospheric Administration ("NOAA") is investigating the de-watering of Agency Creek as a potential "take" under the Endangered Species Act ("ESA"). The Idaho Department of Water Resources ("IDWR"), along with other state agencies and local water districts in the Lemhi Basin, is a signatory to the 2002-2003 Lemhi River Basin Conservation Agreement. Item IV of this agreement provides that NOAA will exercise enforcement discretion relative to prosecution of a potential "take" if certain measures under the agreement are implemented by non-federal parties. IDWR believes that the non-federal parties to the agreement have made a good faith effort to implement the measures under the agreement. Although IDWR believes that the matter that you are investigating is not an intentional "take" as defined by the agreement, we nonetheless wish to respond to your questions in furtherance of development of the future long-term conservation plan outlined in the agreement. I have listed your questions below in the same order presented in your correspondence, each followed with an explanation that represents IDWR's response.

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?"

The intersection of the L-32 Lemhi River ditch with Agency Creek (hereinafter referred to as the "L-32" junction) is a valid and lawful point of diversion for water right number 74-249 from Agency Creek (see enclosed water right summary). This right is appurtenant to the same place of use as water right number 74-404 (summary enclosed)

which is diverted from the Lemhi River via the L-32 ditch. The State of Idaho therefore does allow the diversion of up to 3.8 cfs of water from Agency Creek under water right 74-249 into the L-32 ditch. The right does not authorize the de-watering of Agency Creek and the right can only be delivered at L-32 when the priority date of the right is deliverable on Agency Creek. The diversion of water under right 74-249 to the L-32 ditch may be commingled with Lemhi River to the extent that there are other rights from the Lemhi River that can be delivered to that portion of the L-32 ditch that crosses Agency Creek. Based on personal communication with the local watermaster, Jerry Eastman, the owner of water right 74-249 has a re-diversion pump on the L-32 ditch downstream of the L-32 junction. Right 74-249 has a rather junior priority date (11/27/1919) and is among the first rights on the creek to be cut when regulation begins.

The Agency Creek watermaster provided personal communication to IDWR explaining how the Agency Creek and L-32 intersection is normally managed and what happened on the creek during 2003. That explanation is summarized as follows:

- a. The water users on Agency Creek and the L-32 ditch remove the berm at the L-32 junction after the end of each irrigation season. The berm is removed at this location so that the high flows in Agency Creek resulting from spring runoff can bypass the L-32 junction and prevent damage to the L-32 ditch and surrounding lands.
- b. A partial berm or rock dam is placed across the creek and along the west side of the ditch each spring, normally about mid-May. The partial berm bypasses flow downstream to Agency Creek and below the L-32 junction in a quantity that is roughly equivalent to flow in Agency Creek upstream of the L-32 junction. The rock berm across the creek is built up each year usually during the first half of July to reduce losses of Lemhi River water in the L-32 ditch to Agency Creek. The rock dam is generally quite porous and normally provides enough leakage to Agency Creek throughout the remaining irrigation season such that flow in Agency Creek below the L-32 junction is roughly equivalent to the flow in the creek above the L-32 junction.
- c. Sub-flow and ground water seepage typically recharges or adds to the flow of Agency Creek below the L-32 junction as a result of irrigation of lands above the L-32 ditch between early May and mid-July. This recharge effect normally continues until the late irrigation season (late September and October). On a normal year, leakage from the L-32 rock dam continues until water in the L-32 ditch is shut-off, which is usually in October. Water is usually turned into the L-32 ditch during the first half of May, but turn-on dates may vary between late April and mid-June depending on weather conditions and crop needs.
- d. Regulation of water rights and diversions on Agency Creek normally begins in late August or early September. There are four diversions upstream of the

L-32 junction that diverts most of the remaining flow in the creek at this time of the year.

- e. In 2003, the watermaster began monitoring diversions on June 30. Some diversions and water rights on Agency Creek upstream of the L-32 junction went off at about this time and after July 1 as a result of receding flow in the creek. The watermaster began physical regulation of water rights and diversions on August 17. Agency Creek had little or no flow in it above the L-32 junction crossing after August 17, 2003. Three diversions above the L-32 junction remained on after August 17 as a result of watermaster regulations.
- f. In 2003, water in the L-32 ditch was turned on May 18 as per communication with the Lemhi River watermaster, Rick Sager. Only some of the priority rights were deliverable at that time. All of the priority rights in the L-32 ditch were turned on June 12, and remained on until August 1, when the ditch was shut off for several days. The L-32 diversion was then turned on again on August 4, but turned off on August 8 and remained off until September 11 when some water was turned back to the ditch until it was shut off for the year on October 20. The early regulation or shut-off of the L-32, coupled with the regulation of Agency Creek in mid-August, resulted in little or no flow occurring in Agency Creek both above and below the L-32 junction during August and September. The entire lower end of Agency Creek below the L-32 junction had little flow due largely to drought conditions, the early turn-off of the L-32 ditch, and the earlier than normal regulation of Agency Creek. The rock dam crossing Agency Creek had very little or almost no effect on the severe low flow in the lower end of Agency Creek during the latter part of the 2003 irrigation season.

2. "Who built the berm blocking Agency Creek? Please provide the exact date the berm was built."

The findings of fact and conclusions of law for the Agency Creek decree (Margaret Mahaffey and Pioneer Band & Trust Co. vs. Fred B. Patee et. al., Civil Case No. 1566, Lemhi County District Court, August 15, 1925), indicate that the Gilmore and Pittsburgh Railroad Company constructed a ditch from the Lemhi River to Agency Creek in 1911 for irrigation of lands owned by certain water users referred to as the Pattee Brothers. This same document further shows that the Pattee Brothers constructed an extension of this ditch across Agency Creek in 1914 for irrigating lands owned by the Pattee Brothers exclusively with water from the Lemhi River. There is evidence that the Pattee Brothers at the time abandoned use of water from Agency Creek in favor of the water diverted from the Lemhi River and that certain other water users on Agency Creek upstream of the L-32 ditch used the Agency Creek water that had been abandoned by the Pattee Brothers.

The Lemhi River Adjudication maps on file with IDWR show that there is a headgate structure just north of the Agency Creek and the L-32 junction. The headgate serves a lateral ditch at that point but it is also noted on the map that the headgate can spill or return water to Agency Creek. The Agency Creek watermaster stated that this headgate structure was last capable of functioning as a spill structure for returning or bypassing water to Agency Creek in the early 1980's. However, he said the structure has been modified over the years such that it no longer functions as a spill structure.

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."

The Agency Creek watermaster, Jerry Eastman, reported to IDWR that all diversions on Agency Creek have some type of controlling structure or device for controlling flow. Structures range from berms or wing dams to lockable headgates. A number of the controlling structures are not lockable. The lack of lockable controlling devices is not an issue on a number of diversions because the flow of Agency Creek usually subsides and water cannot physically be diverted from the creek. This receding flow and resulting natural shut-off of diversions usually occurs before the watermaster regulates any water rights or diversions. The watermaster did explain that he monitors all diversions on a regular basis once the creek goes into regulation and that he makes certain that all junior priority diversions remain shut off during times of regulation. There are a total of about 21 diversions on Agency Creek as per the watermaster.

The watermaster advises that currently only seven of the 21 diversions on the creek have adequate measuring devices. The water district has adopted resolutions at recent annual meetings requiring installation of acceptable measuring devices. Some devices were installed within the last year as a result of the resolutions and the watermaster anticipates that there will be nearly full compliance next year.

4. "Did the watermaster in charge of Agency Creek record water withdrawal information? If so, please provide the withdrawal amounts."

The watermaster reported to IDWR withdrawal amounts in 2003 only during the period of time in which the creek was in regulation and for those diversions that diverted water during the period of regulation. The watermaster reports that the creek went into regulation on August 17, 2003 and remained in regulation until October 1, 2003. The table below summarizes water diverted at those regulated diversions, from August 17 through October 1.

| Ditch | Wateruser | Amount | Amount |
|--------|-----------------|-----------|-----------|
| | | 24 hr-cfs | acre-feet |
| A-1 | Gary Adams | 23.7 | 47.0 |
| A-3 | Ginger Meyers | 37.8 | 75.0 |
| A-4 | Ginger Meyers | 28.0 | 55.5 |
| A-12-B | William Loudy | 149.0 | 295.5 |
| A-13 | Glen Elzinga | 27.9 | 55.3 |
| A-14 | George Garrison | 83.4 | 165.4 |
| A-16 | George Garrison | 120.8 | 239.6 |
| A-17 | Cow Creek Ranch | 6.6 | 13.1 |
| Total | | 477.2 | 946.5 |

5. "Does Agency Creek have a 'Flood Flow' provision similar to the Lemhi River? If so, please explain that provision."

Yes. The Proposed Findings of Water Rights in the Lemhi River General Adjudication, Civil Case No. 4948, Seventh Judicial District Court of Idaho, Lemhi County, defines "high water" or "flood water" (definition n. in findings of water rights). These terms are also defined in Findings of Facts 7 and 14, and Conclusions of Law 3 and 6.

Note that Conclusion of Law number 3 determines that water rights on Agency Creek and certain other creeks tributary to the Lemhi River, are not considered junior in priority to the water rights from the Lemhi River for water distribution purposes.

6. "Did Agency Creek go into "regulation" in 2003? If so, please provide the dates it went in and out of regulation."

See IDWR response in part e. to question number 1 above and response to question number 4 above.

7. "According to recent electronic correspondence between NOAA Fisheries Enforcement and IDWR, a site visit was scheduled for October 9, 2003, by IDWR representative Bob Foster. Please provide any information learned from that visit."


Please see the attached memorandum dated October 10, 2003 from Bob Foster, IDWR, to Tim Luke, IDWR.

IDWR is aware that certain state and federal government agencies have discussed with Agency Creek and L-32 ditch users a proposed project to flume or siphon the creek over or under the L-32 ditch. Specifically, the Upper Salmon River Model Watershed Project has discussed this project with local users. It is IDWR's understanding that the project has not move forward because of some recent changes in land ownership and because the project may have been related to consolidation of several diversions on the creek. Should this siphon project move forward, the local users, NOAA and other federal, state and local government agencies should

consider the possibility that flows in the lower end of Agency Creek may actually decrease if the rock berm or dam is removed and properly sealed. This potential exists because of the leakage from the L-32 ditch to the creek associated with the rock dam that is placed across the creek and along the bank of the ditch each year. This normal leakage from the L-32 ditch did not occur late in the 2003 irrigation season due to the drought conditions and because the L-32 diversion was shut off much earlier than normal.

Please contact me directly at the phone number or address on this letterhead if you have further questions or need additional assistance concerning this matter.

Sincerely,



Tim Luke
Manager, Water Distribution Section

Enclosures: Summary of Water Rights 74-249 and 74-404
Proposed Findings of Water Rights, Lemhi River General Adjudication
IDWR Memorandum Dated October 10, 2003

Cc: Joe Giordano, NMFS Enforcement, Boise
Jerry Eastman, Watermaster, Water District 74-M
Bob Foster, IDWR, Salmon Field Office
Phil Rassier, Deputy Attorney, Idaho Attorney Generals Office
IDWR Eastern Region
IDWR Adjudication Bureau

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IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 74-249

1. General AC. IRR.=209.8.
THIS RT. IS ONLY SUPPLEMENTAL TO RT. 74-0404 FOR THE SAME LAND AND MAY ONLY BE USED WHEN THE WATER AVAILABLE FROM THE LEMHI RIVER USING RT. 74-0404 CANNOT BE FILLED DUE TO ITS RELATIVE PRIORITY WHEN CONSIDERED TOGETHER WITH OTHER RTS. DIVERTED FROM THE LEMHI RIVER, PROVIDED FURTHER THAT SAID RT. SHALL BE LIMITED TO THE USE OF ONE INCH OF WATER PER ACRE.
CHANGED FROM PROPOSED FINDING FILED WITH THE COURT PER COURT-AUTHORIZED STIPULATION.

Comments:Dates and Other Information:

Licensed Date:
Decreed Date: 12/30/1982
Water Supply Bank Enrollment Accepted:
Water Supply Bank Enrollment Removed:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Decree Defendant: Mary Adams, et al
Decree Plaintiff: State of Idaho
Civil Case Number: 4948
Judicial District: Seventh District
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report 74-404

WATER RIGHT NUMBER: 74-404

| | |
|-------------------|--|
| <u>Owner Type</u> | <u>Name and Address</u> |
| Current Owner | JEAN L STODDARD RT 1 SALMON, ID 83467 |
| Current Owner | JAMES F STODDARD RT 1 SALMON, ID 83467 |

Priority Date: 06/01/1914
Basis: Decreed
Status: Active

| | |
|---------------|------------------|
| <u>Source</u> | <u>Tributary</u> |
| LEMHI RIVER | SALMON RIVER |

| | | | |
|-----------------------|-------------------------|-----------------------|----------------------|
| <u>Beneficial Use</u> | <u>From</u> <u>To</u> | <u>Diversion Rate</u> | <u>Annual Volume</u> |
| IRRIGATION | 3/15 to 11/15 | 10.300 CFS | |
| | <u>Total Diversion:</u> | 10.300 CFS | |

Location of Point(s) of Diversion
LEMHI RIVER SE1/4NE1/4 Sec. 5, Twp 18N, Rge 24E, B.M.
LEMHI County

Place of Use
IRRIGATION

| Twp | Rge | Sec | NE | | | | NW | | | | SW | | | | SE | | | | Totals |
|-----|-----|-----|-----|------|------|-----|----|----|-----|-----|----|----|----|-----|------|------|-----|----|--------|
| | | | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE | |
| 19N | 24E | 17 | | | 23.0 | | | | | | | | | | 18.0 | 26.0 | 3.0 | | 70.0 |
| 19N | 24E | 20 | 7.0 | 37.0 | 36.0 | 8.0 | | | 2.0 | 5.0 | | | | 6.0 | 39.0 | | | | 140.0 |

Total Acres: 210

Conditions of Approval:

Remarks:

- General AC. IRR.=209.8.
DIV. L-32.

Comments:

Dates and Other Information:

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 74-404

Dates and Other Information:

Licensed Date:
Decreed Date: 12/30/1982
Water Supply Bank Enrollment Accepted:
Water Supply Bank Enrollment Removed:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Decree Defendant: Mary Adams, et al
Decree Plaintiff: State of Idaho
Civil Case Number: 4948
Judicial District: Seventh District
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False