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JAN 13 2014

Department of Water Resources
Eastern Region

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

NOTICE OF PROTEST

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JAN 06 2014

Department of Water Resources

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, and 42-222, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

1. Matter being protested Application for Permit 74-16008 in the name of Lynn Herbst
2. Name of protestant Idaho Water Resource Board
3. Protestant's Representative for service (If different than protestant)

4. Service mailing address PO BOX 83720 Boise, ID 83720-0098
5. Service telephone no. 208.287.4848 Email Address: helen.harrington@idwr.idaho.gov
6. Basis of protest (including statement of facts and law upon which the protest is based)
See Attachment

(additional pages may be attached to describe nature of the protest)
7. What would resolve your protest? Withdrawal of application

I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 6th day of January, 20 14.

Helen J. Harrington for the IWRB
Protestant

Protestant's Representative

NOTE:

A protestant is required to timely file a protest with the department together with a \$25.00 protest fee for each application being protested in order for the protestant to be considered a full party by the department. In addition, the department's Rule of Procedure, IDAPA 37.01.01203, requires a protestant to send a copy of a protest to the applicant.

INSTRUCTIONS

1. The matter being protested must be clearly identified. A typical matter is identified by the application number such as "Application for Permit No. _____ in the name of _____" or "Application for Transfer No. _____ in the name of _____."
 2. Show the name of the protestant. Only one (1) protestant may be shown per protest form. If this protest form is signed by more than one person, the hearing officer will consider the first signer as the official protestant and the representative for service of documents.
 3. If the protestant is represented by an attorney or other authorized representative, show the representative's name. The department then will serve documents on the representative and upon the protestant if specifically requested.
 4. Show the address where the department is to serve the documents. This should be the address of the authorized representative unless the protestant does not designate a representative.
 5. Show the telephone number of the authorized representative unless the protestant does not designate a service representative.
 6. Specifically describe the nature of the protest.
 7. Describe the relief being sought by the protestant.
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FOR DEPARTMENT USE ONLY

Received by CW Date 1-6-14 Time 2:35 PM
\$25.00 fee Receipted by CW # C098147 Date 1-6-14

ATTACHMENT A

Application for permit 74-16008 proposes the diversion of 3.71 cfs of water from springs, tributary to Agency Creek via an irrigation ditch. The Idaho Water Resource Board's (Board) review of the application indicates that there may not be a sufficient supply of water to fulfill the water right without adverse effect on the 35 cfs Lemhi River minimum stream flow right (74-14993). Permitting this application may not be in the local public interest because it is inconsistent with the State's efforts to support recovery of Endangered Species Act (ESA) listed fish species in the Lemhi River Basin through voluntary conservation measures that protect existing property rights. An additional water right of 3.71 cfs at the proposed diversion will increase the consumptive use in the Lemhi River Basin, thereby reducing flows to supply the Board's minimum stream flow 74-14993 at the L-6 diversion (See attached stream gage data). It is likely that the current spring flow would remain in Agency Creek and reach the Lemhi River to help meet the minimum stream flow at the L-6 diversion.

The Lemhi River is home to Chinook salmon, steelhead, and bull trout, all currently listed as Threatened under the ESA. The Idaho Department of Fish and Game (IDFG) and the Idaho Office of Species Conservation's (OSC) Upper Salmon Basin Watershed Program technical team have identified low flow conditions and disconnected tributaries as factors limiting fish production in the Lemhi River Basin. The Board has administered the Water Transaction Program since 2003. Over the past 8 years, the Board has committed over \$6 million dollars toward flow restoration projects in the Upper Salmon River Basin – most of that funding coming from Bonneville Power Administration (BPA) through the Columbia Basin Water Transactions Program (CBWTP) and the Idaho Fish Accords. Over \$3.7 million of these funds were used for flow restoration projects implemented on a voluntary basis by local landowners to meet the minimum stream flow in the Lemhi River.

Priority conservation measures implemented through voluntary agreements include actions to reconnect tributaries with the Lemhi River that were previously inaccessible for fish. These actions focus on improving flow, removing structural barriers and addressing stream and riparian habitat issues. Over the past several years, considerable progress has been made to provide the conditions necessary so that all life stages of ESA listed fish can access prioritized tributaries. In 2004, the State entered into an agreement with the United States and the Nez Perce Tribe to resolve federal instream flow claims filed by the United States on behalf of the Tribe. As part of the 2004 Snake River Water Rights Settlement, the parties agreed to implement a suite of measures to address fish habitat issues in the Salmon and Clearwater Basins. The Salmon/Clearwater Component of the Mediator's Term Sheet provides that the State will establish programs under Section 6 of the ESA funded in part by the State's share of a Habitat Trust Fund. An MOA between the Nez Perce Tribe, the USFWS and NOAA Fisheries establishes a collaborative process for recommending expenditures from the State Section 6 Habitat Fund. The MOA sets forth a Framework for the Implementation of Habitat Actions in the Lemhi River Basin Pursuant to Section II.A.I of the Term Sheet. The Framework guides the implementation actions in the Lemhi Basin. (See Attached Lemhi River Habitat Actions table.)

The goal of the Lemhi Conservation Effort is "to conserve, restore, and enhance sufficient aquatic and riparian habitat to sustain viable fish populations while protecting private property rights and preserving and enhancing the farming and ranching lifestyle and economy of the Lemhi River Basin." (See Attached Overview of the Lemhi River Basin Community Based Habitat Restoration Effort prepared by Clive J. Strong, Deputy Attorney General, Office of the Idaho Attorney General for the Idaho Water Resource Board August 29, 2013 Lemhi Basin tour.) Additional withdrawals of water from flow limited areas is

inconsistent with the efforts of the State and local community to craft site specific conservation solutions that support recovery of ESA-listed fish species, and avoid enforcement actions and litigation.

Table 1 – Lemhi River Habitat Actions
Attachment to Framework for the Implementation of Habitat Actions in the Lemhi River Basin Pursuant Section II.A.8 of the Term Sheet

Table 1. Lemhi River Habitat Actions.

Lemhi River Reach/Tributary	Objective	Potential Strategies	Potential Actions
Lemhi River Mouth Reach (Mouth to L6)	Provide fish passage	1) Maintain a minimum flow of 35 cfs at L6 throughout irrigation season by Year 10 of MOA. Maintain interim flow of 35/25 cfs at L6 for first 10 years of MOA: • Mar 15-Jun 30: 35 cfs not less than 80% of the time and 25 cfs not more than 20% of the time • Jul 1-Nov 1: minimum flow of 25 cfs maintained Adaptively manage to ensure passage objective is met (i.e., no undue delays or stress due to lack of flow) 2) Modify the stream channel to consolidate flows and increase water depth for passage 3) Evaluate pool development to create resting/staging areas for migrating fish by year 3 of MOA. 4) Protect riparian vegetation to provide thermal benefits for migrating fish. Evaluation to occur by year 5 of	• Transfer water from S14 on the Salmon River to L6 on the Lemhi River • Convert surface water to groundwater on Salmon River Golf Course and City Park • Lease water rights • Exchange surface water for groundwater/Kid's Creek and sprinklers • Donations of water rights on developed property • Complete an engineering/flow study by habitat specialists to identify specific requirements and appropriate actions • Engineer the design of appropriate structures and implement one project if study concludes feasible and effective by year 3 of MOA • Develop timeline and priority for implementation of each project. Projects designed to improve passage through the remaining critical reaches to be completed by year 15 of the MOA • Validate previous estimates of pool habitat to determine needs • Determine how pools can benefit migrating fish and evaluate risk of flooding • Implementation may occur prior to year 3 of MOA if deemed effective and feasible • Install fence to exclude livestock • Develop grazing rotations

Table 1 – Lemhi River Habitat Actions
Attachment to Framework for the Implementation of Habitat Actions in the Lemhi River Basin Pursuant Section II.A.8 of the Term Sheet

		MOA.	- Develop conservation easements in floodplains - Re-vegetate riparian areas
Lemhi River Lower Reach (L6 to Agency Creek)	Provide fish passage	1) Protect riparian vegetation to provide thermal benefits for migrating fish. Evaluation to occur by year 5 of MOA. 2) Evaluate pool development to create resting/staging areas for migrating fish.	- Install fence to exclude livestock - Develop grazing rotations - Develop conservation easements in floodplains - Re-vegetate riparian areas - Validate previous estimates of pool habitat to determine needs, - Determine how pools can benefit migrating fish, and if they potential increase flooding. - Implementation may occur prior to year 3 of MOA if deemed effective and feasible
Lemhi River Middle Reach (Agency Creek to Hayden Creek)	Improve rearing conditions for fish	1) Protect riparian areas to provide 80% bank stability. 2) Double the amount of pools that is estimated in the middle reach (from 7% to 14%) by year 20 of MOA 3) Improve the quality of pool habitat and evaluate its effectiveness by year 3 of MOA. Additional projects to	- Validate previous bank stability estimates by year 5 of the MOA to determine the location and protection needs. Implementation may occur within this evaluation period. - Install fence to exclude livestock - Develop grazing rotations - Develop conservation easements in floodplains - Re-vegetate riparian areas - Investigate effectiveness and feasibility by year 3 of the MOA. - Implement one demonstration pool development project during investigation period - Modify stream channel and install natural structure that create pools - Evaluate fish response - Install one demonstration pool development during the 3 year evaluation phase

Table 1 – Lemhi River Habitat Actions
Attachment to Framework for the Implementation of Habitat Actions in the Lemhi River Basin Pursuant Section II.A.8 of the Term Sheet

Lemhi River Upper Reach (Hayden Creek to Leadore)	Improve spawning and rearing conditions for fish	be implemented by year 20 of MOA if found effective and feasible. 4) Provide off channel habitat that supports fish spawning and rearing.	• Consultation for design and engineering of structures • Evaluate fish response • Survey Lemhi River floodplain and irrigation ditches to identify sites • Consultation for project design and engineering • If feasible, implement one project to create off channel habitat by year 5 of the MOA. • Evaluate other natural/historic channels and irrigation canals for implementation
	1) Preserve the flow regime at the McFarland Campground stream gage. 2) Develop an adaptive management process to develop measures that meet fish needs in the upper river	3) Protect riparian areas to provide 80% riparian stability.	• Work with water users to prevent the development of future water rights that further deplete mainstem flow. • Evaluate relationship between habitat/flow and fish survival • Potential projects: • Increase stream flow utilizing water banks rentals used to reconnect upstream tributaries • Executing dry year lease options, partial and full season leases • Agreements not to divert through a voluntary water market • Validate previous bank stability estimates by year 5 of the MOA to determine the location and protection needs. Implementation may occur within this evaluation period • Install fence to exclude livestock, • Develop grazing rotations • Develop conservation easements in floodplains • Re-vegetate riparian areas

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		4) Evaluate the effectiveness of increasing the amount of pools by year 3 of MOA. 5) Provide off channel habitat that supports fish spawning and rearing.	• Validate previous estimates of pool habitat to determine needs, • Determine how pools can benefit fish spawning and rearing • Implement based on evaluation results • Two potential projects identified for reconnection by year 10 of MOA: 1) Lemhi Little Springs Creek/Mill Creek confluence, and 2) Benedict Little Spring Creek • Evaluate other natural/historic channels and irrigation canals for implementation
Lemhi River – Basinwide	Reduce fish entrainment into irrigation ditches. Improve spawning and rearing conditions for fish	1) Install fish screens into irrigation canals below the point of diversion. 2) Construct fish barriers at the ditch return to prevent fish from entering the downstream end of canals. 1) Mimic high water events by providing pulses of flow during predetermined times 2) Develop off channel habitat, either by reconnecting natural side channels or modifying irrigation canals by year 20 of MOA.	• Inventory the Lemhi basin for fish entrainment by year 5 of MOA • Consultation, project design and engineering • Develop timeline for implementing projects • Inventory the Lemhi basin to determine where backdoor issues exist by year 5 of MOA • Consultation, project design and engineering • Develop timeline for implementing projects • Develop a water budget for the upper Lemhi basin by year 5 of MOA • Consultation to determine effectiveness for improving fish habitat. • If feasible, implementation to occur by year 10 of MOA or when high water opportunities occur • Survey Lemhi River floodplain and irrigation ditches to identify sites • Consultation for project design and engineering

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	Provide unimpaired fish passage	1) Remove structures that impair fish passage.	• Inventory the Lemhi basin for potential fish barriers • Consultation, feasibility, project design and engineering
Kenney Creek	Provide unimpaired fish passage	1) Provide additional flow	• Acquire water through permanent, seasonal, or dry year leases • Transfer points of diversions and consolidate irrigation ditches in the lower reaches of Kenney Creek to increase flow
		2) Remove/modify structures that prevent fish passage	• Modify existing irrigation structures to eliminate fish barriers
	Improve spawning and rearing conditions for fish	3) Reduce/eliminate entrainment	• Install fish screens to reduce entrainment at numerous unscreened irrigation diversions
		4) Protect riparian areas in the lower reaches of Kenney Creek	• Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
Pattee Creek	Provide unimpaired fish passage	1) Provide additional flow	• Consolidate irrigation ditches in Pattee Creek to increase flow, • Acquire water through permanent, seasonal, or dry year leases
		2) Remove/modify structures that prevent fish passage	• Modify existing irrigation structures to eliminate fish barriers
	Improve spawning and rearing conditions for fish	3) Reduce/eliminate entrainment	• Install fish screens to reduce entrainment at numerous unscreened irrigation diversions
		4) Protect riparian areas in Pattee Creek	• Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in

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				floodplains
Wimpy Creek	Provide unimpaired fish passage	1) Provide additional flow		Consolidate irrigation ditches in the lower reaches of Wimpy Creek, and improve water conveyance from point of diversion to point of use
	Improve spawning and rearing conditions for fish	2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment 4) Protect riparian areas in the lower reaches of Wimpy Creek		- Modify existing irrigation structures to eliminate fish barriers - Install fish screens to reduce entrainment at numerous unscreened irrigation diversions - Install fence to exclude livestock - Develop grazing rotations - Develop conservation easements in floodplains
Bohannon Creek	Provide unimpaired fish passage	1) Provide additional flow		- Consolidate irrigation ditches in the lower reaches of Bohannon Creek, and improve water conveyance from point of diversion to point of use - Acquire water through permanent, seasonal, or dry year leases
	Improve spawning and rearing conditions for fish	2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment 4) Protect riparian areas in the lower reaches of Bohannon Creek		- Modify existing irrigation structures to eliminate fish barriers - Install fish screens to reduce entrainment at numerous unscreened irrigation diversions - Install fence to exclude livestock, Develop grazing rotations - Develop conservation easements in floodplains
Geertson Creek	Provide unimpaired	1) Provide additional flow		Consolidate irrigation ditches in the lower

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	fish passage		• reaches of Geertson Creek, and improve water conveyance from point of diversion to point of use • Acquire water through permanent, seasonal, or dry year leases • Modify existing irrigation structures to eliminate fish barriers • Install fish screens to reduce entrainment at numerous unscreened irrigation diversions • Install fence to exclude livestock, Develop grazing rotations • Develop conservation easements in floodplains
	Improve spawning and rearing conditions for fish	2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment 4) Protect riparian areas in the lower reaches of Geertson Creek	
Agency Creek	Provide unimpaired fish passage	1) Provide additional flow 2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment 4) Protect riparian areas in the lower reaches of Agency Creek	• Siphon L31 and L32 irrigation water that intersects Agency Creek to eliminate Agency Creek flow from being directed down these irrigation ditches • Consolidate irrigation ditches in the lower reaches of Agency Creek to increase flow, Acquire water through permanent, seasonal, or dry year leases • Modify existing irrigation structures to eliminate fish barriers • Install fish screens to reduce entrainment at numerous unscreened irrigation diversions • Install fence to exclude livestock, Develop grazing rotations, Develop conservation easements in floodplains
	Improve spawning and rearing conditions for fish		

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Big Timber Creek	Provide unimpaired fish passage	1) Provide additional flow 2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment	• Siphon L63 irrigation water at the L63/Big Timber Creek intersect to eliminate Big Timber Creek water from being directed down the irrigation ditch • Modify and/or consolidate existing diversion structures in the lower reaches of Big Timber Creek to maintain more flow in the stream channel • Improve conveyance of water to point of use so that less water is withdrawn and flows are increased in Big Timber Creek • Replace the highway 28 culvert with an appropriate fish passage structure • Modify diversion structures and install fish screens.
Big Eightmile Creek	Provide unimpaired fish passage Improve spawning and rearing conditions for fish	1) Provide additional flow 2) Reduce/eliminate entrainment 3) Protect riparian areas in the lower reaches of Big Eightmile Creek	• Siphon L59 irrigation water at the L59/Big Eightmile Creek intersect to eliminate Big Eightmile stream flow from being directed down the irrigation ditch • Consolidate irrigation ditches in the lower reaches and improve conveyance of water from point of diversion to point of use • Acquire water through permanent, seasonal, or dry year leases • Modify diversion structures and install fish screens • Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
Little Eightmile Creek	Provide unimpaired fish passage	1) Provide additional flow	• Consolidate irrigation ditches in the lower reaches and improve conveyance of water from point of diversion to point of use,

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			2) Reduce/eliminate entrainment	• Acquire water through permanent, seasonal, or dry year leases • Modify diversion structures and install fish screens
Texas Creek *	Provide unimpaired fish passage	1) Reduce/eliminate entrainment		• Modify the existing structure at L63 to improve fish passage for migrating fish
	Improve spawning and rearing conditions for fish	2) Protect riparian vegetation in lower reaches		• Install fence to exclude livestock • Develop grazing rotations • Develop conservation easements in floodplains
Hawley Creek	Provide unimpaired fish passage	1) Provide additional flow		• Improve conveyance of water from point of diversion to point of use • Acquire water through permanent, seasonal, or dry year leases
		2) Remove/modify structures that prevent fish passage		• Replace culverts with appropriate fish passage structures
		3) Reduce/eliminate entrainment		• Replace diversion structure and install fish screen
	Improve spawning and rearing conditions for fish	4) Protect riparian areas in the degraded riparian zones throughout the tributary		• Install fence to exclude livestock • Develop grazing rotations • Develop conservation easements in floodplains
Eighteenmile Creek	Provide unimpaired fish passage	1) Provide additional flow		• Install a structure that prevents Eighteenmile Creek flow from being transported to Canyon Creek, and directs these flows down the historical channel so that a direct connection is made with the Lemhi River
				• Eliminate diversions and other ditch structures to provide flow and reduce entrainment

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	Improve spawning and rearing conditions for fish	2) Reduce/eliminate entrainment 3) Protect riparian areas throughout the tributary	• Acquire water through permanent, seasonal, or dry year leases • Replace diversion structure and install fish screen • Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
Canyon Creek	Provide unimpaired fish passage	1) Provide additional flow 2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment 4) Protect riparian areas in the lower reaches of Canyon Creek	• Improve the structure of the Whitefish ditch/Canyon Creek siphon so that it is 100% effective in separating irrigation water from Canyon Creek • Replace culverts that prevent or impair fish passage • Install fish screens in irrigation diversions to reduce fish entrainment • Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
Mill Creek	Provide unimpaired fish passage	1) Provide additional flow 2) Remove/modify structures that prevent fish passage 3) Reduce/eliminate entrainment	• Consolidate irrigation ditches in the lower reaches of Mill Creek (e.g. on Ferry Creek), and improve water conveyance from point of diversion to point of use • Modify existing irrigation structures to eliminate fish barriers • Install fish screens to reduce entrainment at several unscreened diversions in the lower

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	Improve spawning and rearing conditions for fish	4) Protect riparian areas in the lower reaches of Mill Creek	stream reaches
Big Springs Creek	Provide unimpaired fish passage	1) Reduce/eliminate entrainment	• Install fish barriers at the lower end of screened irrigation ditches to prevent fish entrainment
	Improve spawning and rearing conditions for fish	2) Improve substrate quality	• Prescribe high volume flows to maintain stream channel and remove silt and other fine sediments
		3) Protect riparian areas in the upper reaches of Big Springs Creek	• Install fence to exclude livestock • Develop grazing rotations, • Develop conservation easements in floodplains
Lemhi Little Springs Creek	Provide unimpaired fish passage	1) Provide additional flow	• Modify existing irrigation structures to increase flow
		2) Reduce/eliminate entrainment	• Install fish screens to reduce entrainment in unscreened irrigation diversions
	Improve spawning and rearing conditions for fish	3) Protect riparian areas in the lower reaches	• Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
Lee Creek	Provide unimpaired fish passage	1) Provide additional flow	• Modify existing irrigation structures to increase flow
		2) Reduce/eliminate entrainment	• Install fish screens to reduce entrainment in unscreened irrigation diversions

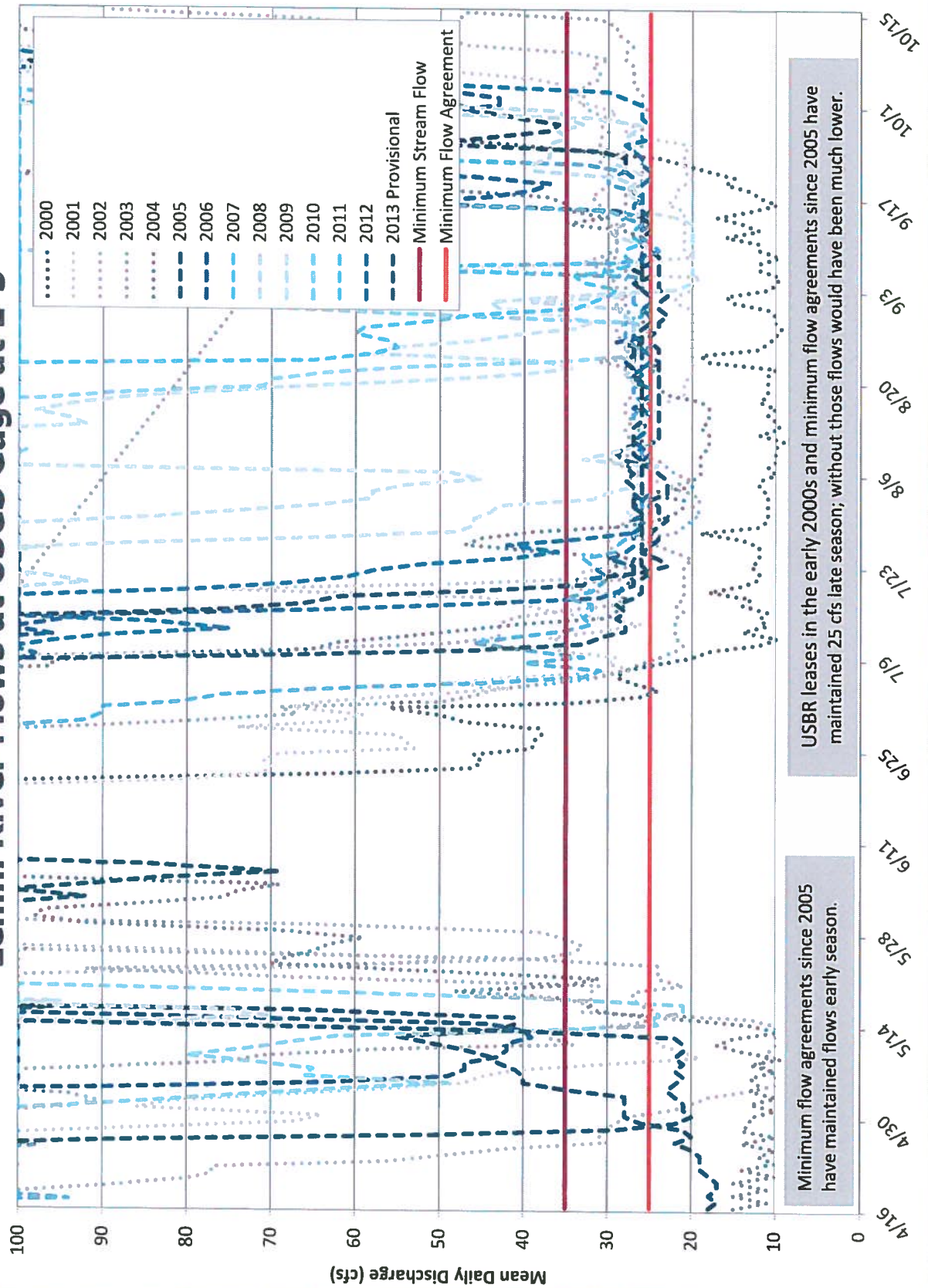
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Table 1 – Lemhi River Habitat Actions

	Improve spawning and rearing conditions for fish	3) Protect riparian areas	• Install fence to exclude livestock, • Develop grazing rotations, • Develop conservation easements in floodplains
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* The lower reach of Texas Creek is proposed for reconnection with the Lemhi River.

Lemhi River Flows at USGS Gage at L-5



OVERVIEW OF THE LEMHI RIVER BASIN COMMUNITY BASED HABITAT RESTORATION EFFORT¹

The Lemhi River Basin is located approximately 775 miles from the Pacific Ocean. Prior to the construction of a hydropower dam at the mouth of the river in 1909, the Lemhi River Basin was one of the most productive salmon and steelhead spawning areas in the Columbia River Basin. The enlargement of the hydropower dam in 1946 combined with the ongoing reduction of flow and at times dewatering of the Lemhi River by irrigation diversions nearly led to the extirpation of salmon and steelhead in the Lemhi River Basin. After removal of the hydropower dam in 1957, salmon and steelhead started to return to the Lemhi River; however, agricultural diversions continued to impede fish passage through the main stem during drought periods and to limit fish access to the tributary streams.

Fish conservation efforts in the Lemhi basin began in 1958 with the establishment of the Idaho Department of Fish and Game screen shop in Salmon and installation of the first fish screens in the basin. Federal funding supported these early efforts.

Salmon and steelhead are an important part of the cultural heritage of those residing in the Lemhi Basin. So when the Snake River salmon and steelhead runs experienced a perilous decline in the 1980s, a group of ranchers banded together and developed the irrigators' plan. They also sought assistance from the Northwest Power Planning Council (NPPC) in implementing habitat improvement measures in the basin. The NPPC had issued the *Strategy for Salmon* (NPPC 1992), which sought to facilitate watershed-level planning efforts between private landowners, government agencies, tribes, and other stakeholders to recover Columbia River Basin salmon and steelhead. The NPPC, with the financial support of the Bonneville Power Administration, established the Idaho Model Watershed Project as part of its recovery plan. (Now known as the Upper Salmon Basin Watershed Program). In 1995, the Model Project published the Model Watershed Plan, which identified a range of fish conservation actions for the Lemhi, Pahsimeroi, and East Fork Salmon River watersheds. The plan consisted of an assessment of fish habitat conditions within the basin and habitat goals, and prioritized a list of projects to achieve those goals. The central feature of the plan was development of local solutions tailored to fish habitat needs. Based on the plan, numerous conservation projects were implemented by local landowners and governmental agencies focusing on fish passage issues, fish screen improvements, protection of riparian habitat, and consolidation or modification of irrigation diversion works. These activities were possible because federal and state agencies partnered with landowners to craft local solutions rather than attempting to impose top down governmental solutions.

Local salmon and steelhead recovery efforts in the Lemhi Basin were threatened in the spring of 2000 when early spring irrigation diversions and drought led to the dewatering of a reach of the lower Lemhi River and the death of three salmon. NOAA Fisheries, which had previously elected not to participate in the Model Project, threatened

¹Prepared by Clive J. Strong, Deputy Attorney General, Office of the Idaho Attorney General for the Idaho Water Resource Board August 29, 2013 Lemhi Basin tour.

to initiate enforcement actions against irrigators because the dead salmon were listed as a threatened species under the Endangered Species Act (ESA). The irrigators were outraged that NOAA Fisheries would seek to prosecute given their efforts to develop and implement projects to restore flows in the main stem Lemhi River. Governor Kempthorne encouraged NOAA Fisheries to work with the local community rather than pursue an enforcement action. Ultimately, the state sponsored discussions led to a series of agreements that paved the way for continued fish habitat improvement measures in the Lemhi River Basin.

In June 2000, the Lemhi Irrigation District (LID), Water District #74 (WD74), the Model Watershed Project, the Idaho Department of Fish and Game (IDFG), and the Idaho Department of Water Resources entered into a Memorandum of Understanding (MOU), providing for two key commitments by Lemhi basin irrigators—(a) season-long maintenance of a minimum of 10 cfs in water flow below L-6 to aid downstream migration by juvenile fish; and (b) “fish flushes” of 35 cfs during the low flow months of June, July, and August to aid upstream migration of adult fish. NOAA Fisheries based upon the MOU elected to not pursue an enforcement action against the local landowners and agreed to participate in discussions toward development of a long-term conservation plan.

On July 18, 2001, the signatory parties to the 2000 MOU, the Idaho Office of Species Conservation (OSC), U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS) signed the Lemhi River Basin Conservation Agreement (LRBCA or “agreement”). The LRBCA was organized around three “implementation tiers,” and addressed additional reaches of the river important to fish. Tier 1 described actions undertaken to conserve resident and anadromous fish in the Lemhi basin up to the date of the agreement; Tier 2 identified specific fish conservation activities that would be undertaken under the agreement; and Tier 3 identified actions that would be addressed in a future “long-term agreement,” the purpose of which was to establish a process for voluntary compliance with the ESA. The LRBCA contained a plan to monitor the effectiveness of Tier II measures and to obtain information for use in developing the Tier III’s long-term plan. The LRBCA also provided that NOAA would not pursue enforcement actions under the ESA for lawful water diversions during the term of the agreement. The LRBCA, which was renewed for 2002 and 2003, was intended as bridge to the development of a long-term fish conservation plan for the Lemhi River Basin.

In the course of implementing the LRBCA, the USBWP Advisory Group and local irrigators recognized that changes in Idaho water law were needed to implement the L-6 diversion minimum flow commitments. Through their efforts and Representatives Lenore Barrett and JoAn Wood, House Bill No. 358 was enacted. This legislation authorized the Idaho Water Resource Board (IWRB) to appropriate a minimum stream flow water right of 35 CFS in the Lemhi River and to appoint a local rental committee to arrange for the rental of water to satisfy the minimum stream flow water right. Pursuant to the legislation, the committee has the authority to rent natural flow rights, under full season or partial season leases on a willing buyer and willing seller basis. This approach

avoided local conflict, disruption of state water law, and is the cornerstone for long-term conservation efforts in the Lemhi River Basin.

Concurrent with the LRBCA process, the Nez Perce Tribe, the United States, the State of Idaho, and local communities and water users in Idaho were engaged in negotiations in the Snake River Basin Adjudication to resolve federal reserved instream flow claims filed by the United States on behalf of the Nez Perce Tribe. In addition to on-reservation consumptive use claims, the United States and Tribe asserted a right to flows for the protection of anadromous and resident fish populations in the Salmon and Clearwater River Basins. After years of negotiation, the parties entered into the 2004 Snake River Water Rights Settlement. As part of the settlement, the parties agreed to implement a suite of measures to address fish habitat issues in the Salmon and Clearwater Basins that are patterned after the LRBCA.

The Salmon/Clearwater Component of the Mediator's Term Sheet consists of three parts: 1) the establishment of 205 state based minimum instream flow water rights; 2) implementation of a Salmon and Clearwater Habitat Management and Restoration Initiative; and 3) the creation of a Habitat Trust Fund. The Term Sheet among other things provides that the State will establish programs under Section 6 of the ESA to be funded in part by the State's share of the Habitat Trust Fund. In 2005, the State of Idaho, the Nez Perce Tribe, the U.S. Fish and Wildlife Service and NOAA Fisheries entered into a MOA establishing a collaborative process for recommending expenditures from the State Section 6 Habitat Trust Fund. The MOA sets forth a *Framework for the Implementation of Habitat Actions in the Lemhi River Basin Pursuant to Section II.A.I of the Term Sheet*. The *Framework* currently guides the implementation actions in the Lemhi River Basin.

Efforts to develop a Section 6 Cooperative Agreement for the Lemhi River Basin are stalled over the question of how much flow is required in the Lemhi River and tributary streams to avoid jeopardy and promote recovery of listed fish species. Rather than being deterred by this scientific debate, local interests, the State, the Tribes and governmental agencies continue to move forward and aggressively implement priority conservation measures. Since 1993, 544 habitat improvement projects have resulted in reopening 75 miles of priority streams for salmon migration, restoration of 352 miles of streamside habitat, enhancement of 494 miles of fish habitat, installation of 249 fish screen on irrigation diversions, and restoration of 61 cfs of water to salmon and steelhead streams.

The priority conservation measures implemented by collaborators have included actions to reconnect tributaries with the Lemhi River that were previously inaccessible for fish. These actions largely focused on improving flow, removing structural barriers, and addressing stream and riparian habitat issues as necessary. Over the past 5 years, considerable progress has been made to provide the conditions necessary so that all life stages of ESA listed fish can access prioritized tributaries. The following summary of tributary habitat projects demonstrates the win-win opportunities that can be achieved through locally developed conservation projects:

Kenney Creek – full reconnect

- Reconfigured diversion and water delivery system at no cost to landowner
- Landowner substantially expanded his ranch through a purchase of property by the State of Idaho that was then turned over to the landowner for continued use for irrigated agriculture
- A conservation easement ensures that ranch will not be subdivided
- Conservation easement established for minimum bypass flow for fish in Kenney Creek

Little Springs Creek – full reconnect

- Removed all irrigation diversions to establish natural stream flow and provide full access for fish
- Installed water delivery systems for multiple ranches that increased production and improved efficiency at no cost to landowner
- Irrigation water now diverted out of Lemhi River
- Landowner is provided financial compensation for diverting out of the Lemhi, including coverage for commercial power and maintenance costs
- Removed barriers and implemented habitat projects to improve tributary conditions for fish; installed fence to improve riparian areas and help landowner manage pastures and livestock

Canyon Creek-full reconnect

- Installed a new state of the art irrigation system at no cost to the landowner that efficiently supplies water to all irrigated acreage on the ranch (previously unable to effectively irrigate all acreage)
- Water previously captured by diversions now spilled to the Lemhi River for fish, and pumped back to its original place of use
- Landowner is provided financial compensation for diverting out of the Lemhi, including coverage for commercial power and maintenance costs
- Result is significant increase in production
- Removed barriers and implemented habitat projects to improve tributary conditions for fish; installed fence to improve riparian areas and help landowners manage pastures and livestock

Big Timber Creek – reconnect lower portion of Big Timber Creek

- Pre-project diesel pump involved significant cost to deliver water from the irrigation ditch to a pivot
- Water previously captured by diversions now spilled to the Lemhi River and pumped back to the place of use with an efficient pump station installed at no cost to the landowner
- Landowner is provided financial compensation for diverting out of the Lemhi, including coverage for commercial power and maintenance costs
- Result is significant increase in production

- Removed barriers and implemented habitat projects to improve tributary conditions for fish; installed fence to improve riparian areas and help landowners manage pastures and livestock

Bohannon Creek – full reconnect

- Installed an efficient irrigation system on Eagle Valley Ranch that consolidated 3 irrigation diversions into one and improved flow for fish
- Removed 1 (expired special use permit) post-FLPMA diversion located on federal land
- Without consolidation of this diversion, landowner faced significant curtailment under new FLPMA permit
- Installed fish screens on the entire watershed to reduce entrainment of ESA listed fish
- Removed barriers and implemented habitat projects to improve tributary conditions for fish; installed fence to improve riparian areas and help landowners manage pastures and livestock
- Fish Screening to reduce entrainment of ESA listed fish – no installation and maintenance costs to landowner

The goal of the Lemhi conservation effort is “to conserve, restore, and enhance sufficient aquatic and riparian habitat to sustain viable fish populations while protecting private property rights and preserving and enhancing the farming and ranching lifestyle and economy of the Lemhi River Basin.” In furtherance of this goal, collaborators in the Upper Salmon Basin have taken a pre-emptive approach to implementing projects to support recovery of ESA listed fish that has resulted in substantial benefits to both fish and landowners in the Lemhi River Basin.