

May 21, 2001

Mr. Robert Austin
Deputy Director for Fish and Wildlife
Bonneville Power Administration
P. O. Box 3621
Portland, OR 97208-3621

Re: High Priority Project Proposals No. 23010 and No. 23011

Dear Mr. Austin:

This letter is provided in response to your letter dated May 8, 2001, to Mr. D. Robert Lohn of the Northwest Power Planning Council concerning project proposal no. 23010 – Restoration of Anadromous Fish Access to Hawley Creek; and project proposal no. 23011 – Reconnect Little Morgan Creek to the Mainstem Pahsimeroi River. Both of these projects were proposed for funding as “high priority” projects related to the Reasonable and Prudent Alternative in the National Marine Fisheries Service (“NMFS”) 2000 Biological Opinion for the Federal Columbia River Power System.

Your letter to Mr. Lohn requested clarification regarding how restored or improved flows resulting from these projects would be protected. As you may know, Idaho has well established law providing for the operation of a state-wide water bank. Recent legislation passed by the Idaho Legislature and signed into law by Governor Kempthorne provides specific parameters for operation of the water bank in the Lemhi River Basin. Idaho does not have a similar statutory framework for protecting so-called “conserved water” such as would be provided to restore or improve flows under project proposals nos. 23010 and 23011. However, that does not mean that instream flows resulting from “conserved water” can not be legally protected.

Last year, prior to passage of the legislation establishing the minimum stream flow and operation of the water bank in the Lemhi River Basin, a legally enforceable agreement was executed whereby a minimum flow was maintained in the lower reach of the Lemhi River. The agreement was executed by the Lemhi Irrigation District, the Upper Salmon Basin Watershed Project (formerly, the Model Watershed Project), Water District 74, the Idaho Department of Water Resources, and the Idaho Department of Fish and Game. The agreement allowed for maintaining the minimum flow by providing “conserved water” which without the agreement could have been diverted by the Lemhi Irrigation District or other members of Water District 74. Because of this agreement between holders of valid water rights, the Idaho Department of Water

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Resources committed to instructing the watermaster for Water District 74 to shepherd the "conserved water" past diversions and into the lower reach of the Lemhi River.

In the case of the Hawley Creek Project, implementing an agreement similar to the agreement executed last year for the Lemhi River Basin, but incorporating specific provisions applicable to this project, would protect the "conserved water" from being diverted. The agreement would be legally enforceable and would extend for an appropriate term consistent with the financial investment for the project, or until a suitable statutory framework could be enacted to replace the agreement. Under the agreement, "conserved water" that is physically provided when the water right for the Hawley Creek Project is in priority would be protected from diversion downstream on Hawley Creek, subject to a proportionate reduction for stream bed losses. To the extent the "conserved water" can be physically delivered into the Lemhi River, diversion of the water from the Lemhi would be similarly prevented. To ensure that the "conserved water" is protected, with proportionate reductions for conveyance through losing stream reaches, if any, measuring devices will need to be installed on Hawley Creek and additional measuring devices will be necessary on the Lemhi River. Alternatively, the watermaster for Water District 74 or his deputy will need to make manual stream flow measurements regularly to determine how much "conserved water" that is not subject to diversion exists at various locations.

To the extent the Hawley Creek Project includes ceasing to irrigate acreage authorized to be irrigated under a water right, a part of the water right associated with acreage that would no longer be irrigated can be deposited into the water bank. This part of the water right can be subsequently leased towards satisfying the downstream minimum stream flow of 35 cfs which was provided for by the recent legislation for the Lemhi River Basin. Under the lease, the quantity of water attributable to the consumptive use that resulted from the prior irrigation can be shepherded downstream past diversions from the Lemhi River to satisfy the minimum stream flow.

Another issue raised by NMFS staff concerning the Hawley Creek Project was the possible existence of a diversion on the Lemhi River that would block fish access to Hawley Creek. Last week, a representative of the Department of Water Resources conducted a field inspection of Hawley Creek and the Lemhi River and confirmed that the diversion NMFS was concerned about was not located such that fish access to Hawley Creek would be blocked.

In the case of the Morgan Creek Project, an enforceable agreement for an appropriate term consistent with the financial investment for the project would also be used to protect "conserved water" from subsequent diversion as described in the previous paragraphs. Water District 73, which includes Morgan Creek and the Pahsimeroi River, could represent holders of water rights who would otherwise be entitled to divert the "conserved water." There is a relatively small number of water right holders on the Pahsimeroi River downstream of Morgan Creek, which would make feasible the execution of an alternative agreement with all of the downstream water right holders individually. To ensure that the "conserved water" is protected, with proportionate reductions for conveyance through losing stream reaches, if any, measuring

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devices would need to be installed on Morgan Creek and on the Pahsimeroi River. Alternatively, the watermaster for Water District 73 or his deputy would need to make manual stream flow measurements regularly to determine how much "conserved water" that is not subject to diversions exists at various locations.

To the extent the Morgan Creek Project includes ceasing to irrigate acreage authorized under a water right, a part of the water right associated with acreage that would no longer be irrigated can also be deposited into the water bank. This part of the water right could be subsequently leased towards satisfying the existing downstream minimum stream flow water right on the Pahsimeroi River of 74 cfs, which has a priority date of 1980. Under the lease, the quantity of water attributable to the consumptive use that resulted from the prior irrigation can be shepherded downstream past diversions from either Morgan Creek or the Pahsimeroi River to satisfy the minimum stream flow.

For both the Hawley Creek and Morgan Creek Projects, once the deliverable "conserved water" or water leased from the water bank has reached the Salmon River, it will no longer be protected by the watermasters for Water Districts 73 or 74. However, the accounting of water deliveries and use that is performed annually by the Department of Water Resources can demonstrate that any water that reaches the Salmon River from the Pahsimeroi and Lemhi Rivers will also reach Lower Granite Dam. Any evaporative or other incidental losses will be minimal and considered insignificant, based on our current knowledge.

If you have any further questions or concerns regarding how restored or improved flows will be protected, please contact the either of the individuals below.

Sincerely,

Concur,

Karl J. Dreher
Director

Clive Strong
Chief, Natural Resources Division
Office of the Attorney General

c: Brian Brown – National Marine Fisheries Service
John Palensky – National Marine Fisheries Service
Dr. Brian Allee – Columbia Basin Fish and Wildlife Authority

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