

June 16, 2000 - Predecisional ESA document - not for release

Northwest Region
7600 Sand Point Way, N.E.
Bin C15700, Bldg.1
Seattle, Washington 98115-0070

Dear Lemhi River Basin Water Diverters:

The purpose of this letter is to alert you to potential conflicts between water diversions in the Lemhi River and salmon, steelhead, and bull trout listed under the Endangered Species Act (ESA), and to enlist your immediate help in resolving those issues. Lower than usual early season water flow in the Lemhi watershed and anticipated low flows later in the season have prompted discussions among water users and Federal, state, and local government representatives. More background follows on these discussions, the relationship between ESA and Lemhi water users, and available processes with which to find resolution. The National Marine Fisheries Service (NMFS) believes this information is important to your interests, which is why it has been sent to you by certified mail. Please help disseminate this information as widely as possible throughout the Lemhi Valley by sharing it with others you think may be interested.

As we proceed it may be helpful to point out that the NMFS goal for implementing the ESA in the Lemhi Basin includes providing stability to water withdrawals and diversions while restoring a healthy environment for listed fish. The most desirable way to accomplish both parts of the goal depends on the full participation of you and others in the Lemhi community. Some of what follows includes information on how the community can jointly respond to the need for improved water resource management.

The Endangered Species Act

Both the NMFS and U.S. Fish and Wildlife Service (USFWS) are responsible for administering the ESA in the Lemhi River basin. There are three species of fish in the Lemhi River listed as threatened under the ESA - Snake River spring/summer chinook, Snake River steelhead, and Columbia River bull trout. You can get more information about the listings for steelhead and chinook salmon at the NMFS web site, www.nwr.noaa.gov. Information about

Post-It® Fax Note	7671	Date	6-19-00	# of pages	6
To	SKIP/Ron	From	Bob Foster		
Co./Dept.	IDWR	Co.	Salmon		
Phone #		Phone #			
Fax #		Fax #			

June 16, 2000 - Predecisional ESA document - not for release

bull trout and the ESA can be found at the USEWS web site, www.fws.gov.

Fish listed under the ESA receive a basic level of protection through section 9 which prohibits anyone from "taking" listed species. "Take" is broadly defined to include harm to the fish or their habitat.

The section 9 prohibition against "take" of listed fish, including "take" by harming its habitat, may be violated in the Lemhi Basin by operation of a water diversion with no or inadequate fish screens, by placement of diversion structures in the stream that create fish passage barriers, or by withdrawing or diverting water resulting in insufficient stream flows. The ESA provides for civil penalties of up to \$25,000 and criminal penalties of up to \$100,000 and a year in jail for illegal take of a listed species. The take prohibition also can be enforced by the Federal government, or by any third party in a so-called "citizen lawsuit" once those who bring the action first provide 60 days' notice.

Not all "take" can be avoided and not all take jeopardizes the listed species. The ESA specifies processes that can provide legal protection from enforcement actions. It is possible for states, local governments, or individuals to avoid the prohibition against "take" by developing an approved Habitat Conservation Plan (HCP) under the ESA. An HCP for water diversions in the Lemhi Basin, for example, might establish an acceptable level of "take" of fish while also allowing water diversions and withdrawals to continue, with agreed-on conditions. These conditions would have to ensure that over time water diversion structures and withdrawals will not jeopardize the continued existence of the fish. To be approved, the sponsor of an HCP must show that there is adequate funding and authority to implement the conditions in the plan. The Services have completed a number of HCPs in the Northwest with forest land owners.

What Does This Mean for the Lemhi Valley?

The need for ESA protections stirred controversy in the Lemhi Valley this spring when dead and dying fish were documented in a dewatered reach of the Lemhi River and along recently constructed push-up berms. The NMFS notified Governor Kempthorne of the "take" issue concerns and participated in a series of meetings

June 16, 2000 - Predecisional EIS document - not for release

and conference calls with the Idaho Department of Water Resources (IDWR), Idaho Department of Fish and Game (IDFG), Water District 74 representatives, and other members of the Lemhi Model Watershed Group. There is not yet agreement among the parties for adequately reducing "take." As required by the ESA, NMFS must use the best available scientific data to both set biologically-based flow levels and the design of diversions that will allow fish passage.

Providing for the survival of ESA listed fish will require a change in practices. Biologically-based instream flows needed to protect ESA listed fish may affect summer irrigation under current practices. Changes in the construction and maintenance of diversion berms and dams to ensure fish passage also require special efforts and careful design. On the other hand, if water users take fish by blocking passage with diversions or by causing inadequate flows, they are vulnerable to the prohibition against take.

Agricultural Economy and Fish

This uncertainty regarding water use and take of listed species is unsatisfactory to all of us. The NMFS also recognizes the practical reality that, unless the members of the community cooperate with each other and participate jointly in water management, administration of the ESA will be extraordinarily difficult and contentious as we work to restore adequate flows for fish in the streams of the Lemhi Valley.

An HCP provides the vehicle for a solution. If pursued, an HCP will take time - perhaps three years - to develop, including substantial public input and review. Although during that time, diverters would not have the protection against section 9 provided by a completed HCP, the Model watershed, state, NMFS are therefore discussing a Memorandum of Agreement (MOA) that would describe activities and actions to protect fish while the HCP is being negotiated and also reduce ESA risks for diverters during negotiations. A well-founded MOA would substantially reduce the risk of enforcement actions against diverters who were participating in the MOA's water management program.

There is an urgent need to reach a solution for the short term, through an MOA or other means. Available information on snowpack, flows, and the presence of adult salmon in the Lemhi

June 16, 2000 - Predecisional ESA document - not for release

River indicates the lower Lemhi River may be dewatered under current water management by early July, at a time when adult chinook salmon must pass through the lower Lemhi River to reach the spawning grounds. The NMFS has been working with the Model Watershed, a handful of irrigators, and state and Federal agency staff involved with the Lemhi River to understand the water management and its effects on ESA listed salmon and steelhead, in an effort to find a solution for this irrigation season. The very short timeframe demands that we continue to work with this small working group of local representatives. We urge you to coordinate with your irrigation district representatives, the Model Watershed, and state agencies, to give this local working group the ability to craft and implement a solution for this year that adequately minimizes take of listed salmon and steelhead.

We believe that a long-term water management plan for the Lemhi Valley is ultimately the best way to protect all our interests. The alternative will bring substantial controversy and possible litigation. We want to be as responsive as possible to inquiries, so please direct these to the Model watershed office (756-6322). We support a negotiated solution, and urge you to do so as well. We hope this information has been useful.

Sincerely,

William Stelle, Jr.
Regional Administrator

cc: Water District 74
Idaho State
Lemhi County

June 16, 2000 - Predecisional ESA document - not for release

bcc: F/NWO - K. Cunningham
F/PR3 - Chief Endangered Species
BFO - File Copy
GCNW - M. Rowland

arthaud;troyer:6/16/00

Addresses for ccs:

Rick Sager
Water District 74
P.O. Box 744
Salmon, ID 83467

Idaho State

Lemhi County Clerk
206 Courthouse Dr.
Salmon, ID 83467

Additional NMFS Suggestions for Irrigators at their June 16, 2000 Meeting

NMFS would like to help clarify a few needs that irrigators may be able to use to improve any alternative proposals.

In considering the state's proposal of a 10 or 20 cfs minimum and NMFS proposal of 60/40/20/20 (60 in mainstem below Hayden, 40 in mid mainstem reach, 20 in upper mainstem reach, and 20 in Hayden Creek), it is important to realize that these proposals may really be not very different. That is, the state is focusing on the reach just below L6 for the 10-20 cfs minimum - but it is possible that this site specific requirement is actually equivalent to providing 60 or more above L6, 40 or more in the mid mainstem, etc. Getting fish past diversions is of course is critical.

Some further points to consider:

- 1) Delivering water to senior rights keeps some flow in many upstream areas, as does groundwater recharge. It's important to think about the amount of flow that is practically available in and below key spawning and holding areas when you provide a flow level in the L6 3-mile reach. If flows up and downstream are actually greater than those below the L6 diversion, be sure to describe those amounts and include them.
- 2) Fish-flushes may be more of an adverse affect to the riverine ecosystem rather than a real solution to minimize "take." Instead, strive to find flows that will always pass fish at the L6 ladder and critical reach below.
- 3) Keep in mind that any flow level should be related to passing critical riffles and diversion structures along the entire mainstem and in Hayden Creek.
- 4) Keeping screens and bypasses operational throughout the season is an obvious need and critically important.
- 5) Committing now to develop a Habitat Conservation Plan for the long-term will show good faith. Attempt to move this conflict away from the appearance of an annual "take" situation to an activity that will have minimal impacts and is permitted by the federal ESA.
- 6) Provide real assurance that proposed measures will be adhered to. Provide conflict resolution or "safety nets" to deal with those reluctant to move in the identified direction, so these can be separated from bona fide mistakes or errors in prediction that can't be helped.