

LAW OFFICES OF  
LAURENCE J. LUCAS, ESQ.

P.O. Box 1342  
Boise, ID 83701  
(208) 424-1466

October 3, 2000

Via Certified Mail, Return Receipt Requested

Guardian Limited Partnership #2  
P.O. Box 927  
Salmon, ID 83467

Guardian Limited Partnership #2  
Roger H. Ball  
5950 Marbrisa  
Idaho Falls, ID 83406

Parley A. Arave  
PO Box 1  
Lemhi ID 83465

**RE: Notice of Intent to Sue For Violations of the Endangered  
Species Act Regarding Hayden Creek Watershed**

Dear Sirs:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(2)(A), I am writing on behalf of my clients Idaho Watersheds Project and Committee for Idaho's High Desert (hereinafter "Plaintiffs"), to give you notice of Plaintiffs' intent to bring a civil action for violations of the ESA, 16 U.S.C. § 1531 et seq., as set forth below.

Plaintiffs are informed and believe that you and/or your agents, employees, servants, beneficiaries, licensees, permittees and/or other persons or entities acting under your authority, direction or control are engaged in water diversions out of Hayden Creek and/or East Fork Hayden Creek, tributary to the Lemhi River, in Lemhi County, Idaho; and are further diverting such water for transport and use upon federal, state and/or private lands within the Lemhi River watershed. According to the records of the Idaho Dept. of Water Resources, said diversions out are located within T17N R23E, Boise Meridian; and are associated with claimed water rights 74-01072, 74-01073, 74-01074, and possibly others, which are registered in your name(s).

Plaintiffs are further informed and believe that you and/or your agents, employees, servants, beneficiaries, licensees, permittees and/or other persons or entities acting

under your authority, direction or control are engaged livestock grazing, irrigation and/or other land management activities upon federal, state and/or private lands within the Lemhi River watershed, utilizing (in whole or in part) water obtained from the referenced diversions.

Your operation of the referenced diversions further includes, but is not limited to, entering upon federal and/or state lands and placing gravel, rock, dirt, wood, and/or other foreign materials into the said water source to undertake diversions; entry upon federal and/or state lands and undertaking repair and maintenance of the diversions and associated ditches; diverting water out of the water source at locations upon federal and/or state lands; transporting water by means of the diversions and associated ditches to other locations, including upon and across federal and/or state lands, for purposes of irrigation and/or watering of livestock; and permanent removal and loss of the water from EF Hayden Creek, Hayden Creek, and/or the Lemhi River.

The Lemhi River and these tributaries are actual inhabited or potential habitat of Bull Trout (*Salvelinus confluentus*), a species listed as threatened under the ESA. 63 Federal Register 31647 (6/10/98). They are also designated critical habitat under the ESA for spring/summer and fall Snake River Chinook Salmon, which are listed as threatened or endangered under the ESA, 58 Federal Register 68543 (12/28/93); and designated critical habitat for Snake River Basin Steelhead (*Oncorhynchus mykiss*), also listed as threatened under the ESA. 62 Federal Register 43937 (8/18/97); 65 Federal Register 7764 (2/16/00). Plaintiffs are informed and believe that these water sources are occupied by Bull Trout, Snake River Salmon and/or Steelhead during all or portions of the year.

As the National Marine Fisheries Service emphasized recently in its adoption of regulations under ESA § 4(d) concerning Snake River Salmon and Steelhead, adverse modification of habitat necessary for the spawning, rearing, feeding, sheltering, or other biological functions of the listed species may result in "take" of individuals of the species. Prohibited "take" under Section 9 of the ESA may thus result from livestock impacts upon riparian or aquatic habitat, and from the diversion of water and dewatering of streams which are habitat for these listed fish. See 65 Federal Register 42422 (7/10/00).

The erection, operation, maintenance and repair of diversion structures may also "take" the listed species by blocking fish passage, contributing sedimentation or other pollutants, removing shady cover, raising temperatures, and other effects. *Id.* Moreover, unless the diversions are equipped with adequate screening devices which are properly installed, operated, and maintained, "take" of the listed fish species may also occur through "entrainment" of fish in the diversions and/or ditches. *Id.*

Although the NMFS analyses were made with respect to the Snake River Salmon and Steelhead, they are generally if not fully applicable to Bull Trout as well, as

extensive scientific documentation and field study show, and as the listing rule demonstrates.

Plaintiffs are also informed and believe that one or more of the referenced diversions and associated ditches have caused, and will foreseeably continue to cause, "take" of individual Bull Trout, Salmon, and/or Steelhead through entrainment, dewatering, obstruction of fish passage, and/or other adverse habitat modifications; and further have caused and foreseeably will continue to cause adverse modification of habitat designated as critical to Snake River Salmon and/or Steelhead and to individuals of said species, all in violation of the "take" prohibition of ESA Section 9.

In addition, livestock grazing under your authority or management control has caused, and will foreseeably continue to cause, serious degradation of the aquatic and riparian habitat of Hayden Creek, EF Hayden Creek, and/or the Lemhi River (or other tributaries to it), causing adverse impacts upon the listed species and their essential biological functions, also in violation of the "take" prohibition of ESA Section 9.

Accordingly, Plaintiffs hereby notify you of their intent to sue you for violations of ESA Section 9, 16 U.S.C. § 1538, with respect to the violations described herein.

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), Plaintiffs may institute legal action after 60 days following the date of this notice for the foregoing violations of law, and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and reasonable expert and attorney fees pursuant to the ESA citizen suit provision.

Plaintiffs have prepared this notice based on good faith information and belief after reasonably diligent investigation. However, if any of the foregoing is factually erroneous or inaccurate, please notify me promptly to avoid unnecessary litigation.

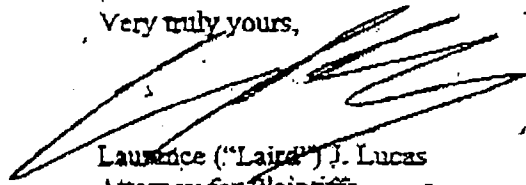
Moreover, the U.S. Supreme Court and other courts have noted that the purpose behind the 60-day notice requirement of the ESA and other statutes is to encourage settlement discussions among parties and avoid potential litigation. In that spirit, I encourage you to contact the Plaintiffs listed below, in order to seek an amicable resolution of this matter. The Plaintiffs' names, addresses and phone numbers are:

Jonathan Marvel  
Executive Director  
Idaho Watersheds Project  
P.O. Box 1602  
Hailey, ID 83333  
(208) 788-2290

Pam Marcum  
Chairperson  
Committee for Idaho's High Desert  
P. O. Box 2863  
Boise, ID 83701  
(208) 429-1679

Likewise, please feel free to contact me (or have your attorneys, if any, contact me), at the address and number on the letterhead above.

Very truly yours,



Laurence ("Laird") J. Lucas  
Attorney for Plaintiffs

Cc:  
Secretary Bruce Rabbitt  
U. S. Dept. of Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Jamie Clark  
Director, U.S. FWS  
1849 "C" Street, N.W.  
Mail Stop 3012  
Washington D.C. 20240

Hon. Norman Mineta  
Secretary of Commerce  
14<sup>th</sup> and Constitution Ave., N.W.  
Room 5516  
Washington DC 20230

Penelope Dalton  
Ass't Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway SSMC3  
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