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Transmittal Cover

To: John Folsom
Upper Salmon Basin Model Watershed Project
Fax: 208 756-6376

From: Clive J. Strong
Deputy Attorney General
Natural Resources Division

Document Description: Two Letters from Laird Lucas concerning
Notice of Intent to Sue regarding Hayden
Creek Diversions and Lemhi River Diversions.
I have already faxed copies to Murray
Feldman, Bruce Smith and R.J. Smith.

Total Number of Pages (Including This Page): 14

Sender: Pat Boehm

Date: May 18, 2001

*Please advise of any deficiency in this transmission. Call
Pat Boehm at (208) 334-4124*

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Post-It* Fax Note	7671	Date	5-18-01	# of pages	9
To	SK.P	From	Bob F.		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #		Fax #			

**LAW OFFICES OF
LAURENCE J. LUCAS, ESQ.**

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

May 16, 2001

Guardian Limited Partnership #2
Roger H. Bell
General Partner/Registered Agent
5950 Marbrisa
Idaho Falls, ID 83406

Roger H. Bell
Bell Enterprises, Inc.
2235 East 25th St.
Suite 220
Idaho Falls, ID 83404

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

Lambi Ranches LLC
Derek C. Boice
2235 25th #220
Idaho Falls, ID 83404

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

Dear Sirs:

I am writing on behalf of Western Watersheds Project and Committee for Idaho's High Desert to raise our serious concerns about the effects of your water diversions on Hayden Creek upon several fish species listed under the Endangered Species Act (ESA); and to provide you notice of my clients' intention to sue under the ESA, if necessary to prevent further "take" of the fish due to your water diversions and their impacts.

This notice letter is required under the ESA before a citizen suit may be initiated, in order to give the parties time to negotiate a possible resolution that avoids the need for litigation. We are sending this notice letter in that spirit, and wish to emphasize that we will only resort to litigation if a consensual and effective solution to the problem of diversions on Hayden Creek is not forthcoming.

We set forth in some detail below our understanding of the current situation on Hayden Creek, and how your diversion "takes" listed fish species in violation of the ESA, so that you may understand clearly the reasons for our concerns. If any of the facts below are not accurate, you should so advise us promptly to avoid unnecessary court proceedings.

Basis for Claimed Violations of ESA

We understand that you divert approximately 26.19 cfs from Hayden Creek, tributary to the Lemhi River at approximately T17N R23E S 22 (Boise Meridian).

Hayden Creek is designated critical habitat under the ESA for spring/summer and fall Snake River chinook salmon, which are listed as threatened under the ESA, 58 Federal Register 68543 (12/28/93). It is also designated critical habitat for Snake River Basin steelhead (*Oncorhynchus mykiss*), another species listed as threatened under the ESA, 62 Federal Register 43937 (8/18/97); 65 Federal Register 7764 (2/16/00). In addition, Hayden Creek has populations of bull trout (*Salvelinus confluentus*), yet a third species listed as threatened under the ESA, 63 Federal Register 31647 (6/10/98). Through their respective listing decisions and promulgation of regulations under ESA § 4(d), the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) have prohibited the "take" of these threatened species under ESA § 9.

As NMFS emphasized recently in its adoption of regulations under ESA § 4(d) concerning salmon and steelhead, the diversion of water and dewatering of streams which are habitat for these fish may constitute a prohibited "take" under Section 9 of the ESA, 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 "extrainment" 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 fully applicable to Bull Trout as well, as extensive scientific documentation and field study show. In listing the bull trout as "threatened" under the ESA, USFWS addressed in detail the adverse effects which dams and diversions have had upon bull trout; and USFWS (like NMFS) has adopted regulations prohibiting the "take" of bull trout under ESA Sections 4(d) and 9. See 63 Federal Register 31647 (6/10/98) (now codified at 50 C.F.R. § 17.44(w)).

Your diversions from Hayden Creek cause or contribute to the complete or substantial dewatering of the creek for significant portions of the year, particularly during spring and summer months; and further contribute to dewatering of the Lemhi River. As a result, your diversions have caused, and will foreseeably continue to cause, the killing, harming, harassing, capturing, and other forms of "take" of listed Bull Trout, Salmon and/or

Steelhead, and the adverse modification of their critical habitat, all in violation of the above-listed regulations and Sections 4 and 9 of the ESA, 16 U.S.C. §§ 1533 & 1538.

We understand that last August, NMFS and the Idaho Department of Fish and Game found several dead bull trout in Ditch 11 as the result of dewatering from your diversions. Further, problems caused by dewatering are expected to be particularly acute this year, because of low precipitation conditions, and we are concerned that your continued diversions will cause further harm to bull trout and other species. We understand that some consensual efforts are underway to improve flows and diversion structures on Hayden Creek. While we are encouraged by the signs of progress, we are also concerned that the efforts currently underway will not be adequate to ensure adequate flows to protect the listed fish and to avoid further "take" in violation of the ESA.

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), my clients may institute legal action after 60 days following the date of this notice against you, for continuing to operate diversions and diverting water from Hayden Creek, thereby causing "take" of salmon, steelhead and/or bull trout in violation of the ESA. If litigation is filed, my clients will seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and reasonable expert and attorney fees.

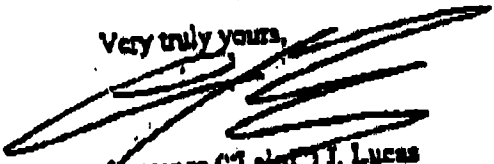
We are hopeful that the current efforts will result in maintaining adequate stream flows and habitat for Snake River chinook salmon, steelhead, and bull trout, and will render unnecessary any ESA litigation. If it appears, however, that dewatering problems will again recur this year or in the future, or your diversions otherwise may pose a reasonable certainty of imminent harm to the listed species, then the Plaintiffs will initiate litigation and seek appropriate relief to prevent "take" from occurring.

In order to pursue amicable resolution or to discuss this notice letter further, I encourage you to contact my clients listed below, or myself at the number on the letterhead above. My clients' names, addresses and phone numbers are:

Jonathan Marvel
Executive Director
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333
(208) 788-2290

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

Very truly yours,


Lawrence (Laird) J. Lucas
Attorney for Plaintiffs

Cc:

**Secretary, U. S. Dept. of Interior
1849 C Street, N.W.
Washington, D.C. 20240**

**Acting Director
U.S. Fish and Wildlife Service
1849 "C" Street, N.W.
Mail Stop 3012
Washington D.C. 20240**

**Secretary
U.S. Dept. of Commerce.
14th and Constitution Ave., N.W.
Room 5516
Washington DC 20230**

**Ass't Administrator for Fisheries
National Marine Fisheries Service
NOAA Fisheries Headquarters
1315 East-West Highway SSMC1
Silver Spring, MD 20910**

**LAW OFFICES OF
LAURENCE J. LUCAS, ESQ.**

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

May 16, 2001

Reba Thomas
Officer
Lemhi Irrigation District
Rt 1 Box 112
Salmon, ID 83467

All Water Users Listed
on Attachment "A" hereto

**RE: Notice of Intent to Sue For Violations of the Endangered
Species Act Regarding Lemhi River Diversions**

Dear Ms. Thomas and All Water Users Listed on Attachment "A":

I am writing on behalf of Western Watersheds Project and Committee for Idaho's High Desert to raise our serious concerns about the effects of water diversions from the Lemhi River upon several fish species listed under the Endangered Species Act (ESA); and to provide you notice of my clients' intention to sue under the ESA, if necessary to prevent further "take" of the fish due to your water diversions and their impacts.

This notice letter is required under the ESA before a citizen suit may be initiated, in order to give the parties time to negotiate a possible resolution that avoids the need for litigation. We are sending this notice letter in that spirit, and wish to emphasize that we will only resort to litigation if a consensual and effective solution to the problem of diversions on the Lemhi River is not forthcoming.

We set forth in some detail below our understanding of the current situation on the Lemhi River, and how diversions may "take" listed fish species in violation of the ESA, so that you may understand clearly the reasons for our concerns. If any of the facts below are not accurate, you should so advise us promptly to avoid unnecessary court proceedings.

Basis for Claimed Violations of ESA

We understand that the Lemhi Irrigation District supervises and provides for the diversion and delivery of water to water users listed on Attachment "A," from the L-6 and L-7 diversions on the lower Lemhi River, located at approximately T12 R 23E S30 (Beise Meridian).

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The Lemhi River is designated critical habitat under the ESA for spring/summer and fall Snake River chinook salmon, which are listed as threatened under the ESA. 58 Federal Register 68543 (12/28/93). It is also designated critical habitat for Snake River Basin steelhead (*Oncorhynchus mykiss*), another species listed as threatened under the ESA. 62 Federal Register 43937 (8/18/97); 65 Federal Register 7764 (2/16/00). In addition, the Lemhi River has populations of bull trout (*Salvelinus confluentus*), yet a third species listed as threatened under the ESA. 63 Federal Register 31647 (6/10/98). Through their respective listing decisions and promulgation of regulations under ESA § 4(d), the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) have prohibited the "take" of these threatened species under ESA § 9.

Although the Lemhi River is important occupied and potential habitat for the threatened salmon, steelhead and bull trout, it is well documented in numerous agency reports, studies, and other data, that diversions dewater the Lemhi River at critical locations, including the L-6 and L-7 diversions. Moreover, the problems caused by dewatering are expected to be particularly acute this year, because of low precipitation conditions.

As NMFS emphasized recently in its adoption of regulations under ESA § 4(d) concerning salmon and steelhead, the diversion of water and dewatering of streams which are habitat for these fish may constitute a prohibited "take" under Section 9 of the ESA. 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 "entrapment" 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 fully applicable to Bull Trout as well, as extensive scientific documentation and field study show. In listing the bull trout as "threatened" under the ESA, USFWS addressed in detail the adverse effects which dams and diversions have had upon bull trout; and USFWS (like NMFS) has adopted regulations prohibiting the "take" of bull trout under ESA Sections 4(d) and 9. See 63 Federal Register 31647 (6/10/98) (now codified at 50 C.F.R. § 17.44(w)).

Your diversions of water from the Lemhi River, including at the L-6 and L-7 diversion sites, cause or contribute to the complete or substantial dewatering of the river for significant portions of the year, particularly during spring and summer months. As a result, your diversions have caused, and will foreseeably continue to cause, the killing, harming, harassing, capturing, and other forms of "take" of listed Bull Trout, Salmon and/or Steelhead, and the adverse modification of their critical habitat, all in violation of the above-listed regulations and Sections 4 and 9 of the ESA, 16 U.S.C. §§ 1533 & 1538.

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), my clients may institute legal action after 60 days following the date of this notice against all parties

listed above and in Attachment "A" hereto, for continuing to operate the L-6 and L-7 diversions and diverting water from the Lemhi River, thereby causing "take" of salmon, steelhead and/or bull trout in violation of the ESA. If litigation is filed, my clients will 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.

We understand, however, that some consensual efforts are underway to improve flows and habitat for fish in the Lemhi River, including at the L-6 and L-7 diversions. These include water bank legislation passed by the Idaho Legislature this year, and what we understand may soon be a Conservation Agreement among the Lemhi Irrigation District and various federal and state agencies.

The conservation community in general, however, and my clients in particular, have been excluded from the negotiations over these efforts. While we are encouraged by the signs of progress, we are also concerned that the efforts currently underway will not be adequate to ensure adequate flows to protect the listed fish and to avoid further "take" in violation of the ESA. In particular, our understanding from the scientific literature is that minimum flows of 20 to 30 cubic feet per second - which we believe will be the amount called for under the proposed Conservation Agreement - will be inadequate to meet the needs of the listed fish.

In short, we are hopeful that the current efforts will result in maintaining adequate stream flows and habitat for Snake River chinook salmon, steelhead, and bull trout, and will render unnecessary any ESA litigation. If it appears, however, that dewatering problems will again recur this year or in the future, or your diversions otherwise may pose a reasonable certainty of imminent harm to the listed species, then the Plaintiffs will initiate litigation and seek appropriate relief to prevent "take" from occurring.

In order to pursue amicable resolution or to discuss this notice letter further, I encourage you to contact my clients listed below, or myself at the number on the letterhead above. My clients' names, addresses and phone numbers are:

Jonathan Marvel
Executive Director
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333
(208) 788-2290

Pam Marsum
Chairperson
Committee for Idaho's High Desert
P. O. Box 2863
Boise, ID 83701
(208) 439-1679

Very truly yours,



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

Cc:

**Secretary, U. S. Dept. of Interior
1849 C Street, N.W.
Washington, D.C. 20240**

**Acting Director
U.S. Fish and Wildlife Service
1849 "C" Street, N.W.
Mail Stop 3012
Washington D.C. 20240**

**Secretary
U.S. Dept. of Commerce
14th and Constitution Ave., N.W.
Room 5516
Washington DC 20230**

**Asst Administrator for Fisheries
National Marine Fisheries Service
NOAA Fisheries Headquarters
1315 East-West Highway BSMC3
Silver Spring, MD 20910**

Water Users listed on Attachment "A"