

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

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

June 7, 2001

Ms. Sarah McNary  
Manager, Fish and Wildlife  
Bonneville Power Administration  
P. O. Box 3621  
Portland, OR 97208-3621

VIA FACSIMILE TO (503) 230-4563 AND FIRST CLASS MAIL

Re: Additional Clarification for High Priority Project Proposal No. 23011

Dear Ms. McNary:

This letter is provided to document and further clarify the water right administration process that would be implemented in association with project proposal no. 23011 – Reconnect Little Morgan Creek to the Mainstem Pahsimeroi River. The proposed project will consolidate the points of diversion for the lower three diversions on Little Morgan Creek and provide an enclosed system to deliver water so as to reduce the quantity of water diverted under the water rights involved by minimizing conveyance losses.

There could be as many as 9 water rights totaling 16.2 cfs involved in this project as follows:

<u>Water Right Number</u>	<u>Priority Date</u>	<u>Quantity</u>	<u>Owner</u>
73-0134	06/01/1883	2.13 cfs	Scott Whitworth
73-0135	06/01/1883	1.07	Scott Whitworth
73-0136	06/01/1885	6.0	Duane Moen
73-0139B	04/01/1897	1.6	Scott Whitworth
73-0129	03/01/1900	2.0	Hatch & Sons
73-0130	03/01/1900	1.6	Hatch & Sons
73-0131	03/01/1900	0.4	Hatch & Sons
73-0132	03/01/1900	1.4	Hatch & Sons
73-2140	03/14/1949	1.6	Hatch & Sons

Although water rights from Little Morgan Creek are administered together with water rights from the Pahsimeroi River, water rights with priorities earlier than about 1900 are not normally curtailed to maintain diversions under more senior water rights. During an extremely

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dry year, such as 1994, the watermaster records for Little Morgan Creek show that by mid-summer, water rights having priorities later than 1885 are curtailed.

When the water rights diverted at the structure proposed to consolidate the diversions, that is when the flows in Little Morgan Creek and the Pahsimeroi River are sufficient to supply other water rights from Little Morgan Creek and the Pahsimeroi River having more senior priorities, if any, then under project proposal no. 23011 "conserved water" would be available. The "conserved water" would not be subject to diversion by holders of senior priority water rights because those water rights would already be filled. When any of the water rights listed on the previous page are not in priority, senior priority water rights would be diverting the available water and there may be less "conserved water" for restoring stream flows, depending on which of the water rights remained in priority.

In any event, shepherding the "conserved water" past downstream water rights from the Pahsimeroi River that would otherwise be entitled to divert the "conserved water" will require that legally enforceable agreements be executed with those water right holders. There are no holders of water rights from Little Morgan Creek below the three owners listed on the previous page. Subject to those agreements, the watermaster or his deputy will shepherd or ensure passage of the "conserved water" past the diversions of water right holders on the Pahsimeroi River that otherwise could have diverted the water. This will require the installation of additional measuring devices and/or manual stream flow measurements by the watermaster or his deputy to both determine the quantity of "conserved water" at various locations, after proportionate reductions for conveyance through losing stream reaches, and to document that the appropriate amount of "conserved water" passes downstream diversions.

If you or your staff have any further questions or concerns regarding how restored or improved flows will be protected, please contact me at (208) 327-7910.

Sincerely,

Karl J. Dreher  
Director

c: Karen Hunt – Bonneville Power Authority (via facsimile to 503-230-4018)  
Brian Brown – National Marine Fisheries Service  
John Palensky – National Marine Fisheries Service  
Dr. Brian Allee – Columbia Basin Fish and Wildlife Authority