

The SHOSHONE-BANNOCK TRIBES

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Attorney General's Office
1410 N. Hilton Street
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Re: Docket No. 58-0102-1201 – Shoshone-Bannock Tribes Formal Comments Regarding Fish Consumption Rates in Idaho Water Quality Criteria for Human Health Negotiated Rulemaking Meeting: Final Draft Rule

The Shoshone-Bannock Tribes (Tribes), a federally recognized Idaho tribe located in Southeast Idaho on the Fort Hall Reservation, have reserved off-reservation Treaty rights and approved Treatment as State (TAS) status under the Clean Water Act (CWA). The Tribes hereby submit formal comments on the final draft rule for a Fish Consumption Rate (FCR) in Idaho. As an Idaho tribe we have a vested interest in protecting our Treaty reserved rights and the following comments are intended to convey our unique perspective on the proposed Idaho Department of Environmental Quality (IDEQ) final draft rule for determining appropriate fish consumption rates for Idaho waters and generally comment on our position on the rulemaking process. This letter is not intended to resolve any outstanding issues that are likely to arise from the approval of Tribal water quality standards in shared Reservation boundary waters or waters received on the Reservation regulated by Idaho's standards.

Article IV of the Fort Bridger Treaty of July 3, 1868 (15 Stat., 673) secured our subsistence lifestyle and traditional cultural practices by reserving off-reservation rights. The value of cold clean water is unmeasurable; it is necessary for life and the center of our subsistence lifestyle. Because of these rights and interests, the Tribes have a direct interest in Idaho's rulemaking on a FCR and ultimately water quality standards. Our intention is to ensure that our membership has the opportunity to exercise those reserved rights in a meaningful way on robust populations that are free of toxins. Our expectation is that IDEQ will propose a FCR that recognizes the importance of our reserved Treaty rights and subsistence lifestyle by reducing the exposure risk to our high end fish consumers to the level of the General Population; utilizes deterministic methods for criteria calculations, includes all anadromous and market fish species (fish group 2) to adequately reflect consumption patterns which may also be subject bioaccumulation of toxins and provides for protective Water Quality Criteria (WQC); appropriately utilizes the Idaho Tribes' FCR data as submitted without IDEQ manipulation; no backsliding to allow WQC to

become less protective as we move forward; recognizes suppression as a real variable by including depletion and pollution in your baseline assessment; values Tribal heritage rates by recognizing them as an obtainable goal; and, will be protective of downstream waters. IDEQ submission of a FCR that does not meet these expectations will fail to protect Idaho waters and our Tribal members, who are the highest consumers of fish in the state. This final draft rule as it stands today will not meet our intensions or expectations for the membership to continue exercising treaty reserved rights or to utilize one of our first foods regularly without the risk of acute or chronic exposure to toxins.

The final draft rule includes a statement that Indian Tribes would only be considered for Basin Advisory groups for areas within their designated reservation boundaries. The Tribes exercise reserved off reservation rights and fully expect to be considered for any proposed advisory groups for each basin we have an interest in; particularly those outside of our designated reservation in Fort Hall.

The Fort Hall Reservation, located in Southeast Idaho, is the permanent homeland of the Shoshone and Bannock Tribes. The Tribes have experienced first-hand, the degradation of water quality in the Snake and Columbia river basins and in multiple watersheds that border our reservation or are received by the reservation from outside of our boundaries. The Tribes are in the process of drafting and approving water quality standards that will be more stringent than the criteria found in this final draft rule, thereby increasing the likelihood that we will find our respective entities unnecessarily in an adversarial relationship. The Tribes continue to request that IDEQ implement protective downstream water quality standards for each of the watersheds that may have an impact on reservation waters; particularly the mainstem Snake River, Blackfoot River, Portneuf River and Bannock Creek watersheds.

Due to the compromised nature of Idaho's waters, the Tribes were concerned by the decision from IDEQ to change course on their policy decision to prevent 'back-sliding' for each of the WQC, in spite of their overtures that this would be in place for the final rule. The Tribes cannot support a final draft FCR that will allow for WQC to become less protective, which will further suppress fish populations by allowing for additional pollution and contributing to the downward spiral of water quality, and ultimately the health of our membership,.

The Fort Hall Reservation is surrounded by CWA 303 (d) listed stream segments on the Portneuf, Blackfoot, and Snake rivers. According to Idaho's 2012 Integrated Report to the Environmental Protection Agency, 27.9% of the IDEQ sampled stream miles were classified as in poor condition, not fully supporting cold water aquatic life, with the lowest proportion of stream lengths classified as good found in the Pocatello Region. The purpose of the Clean Water Act is to restore degraded waters, not to allow for the back slide of WQC. It is the responsibility of IDEQ to administer their delegated authority by instituting mechanisms to improve our shared water resources and not contribute to the downward spiral of Idaho's water quality by utilizing the current degraded stream conditions, which do not fully support cold water aquatic life, as the baseline for FCR and implementation of WQC.

In 2015, Idaho's Department of Health and Welfare Fish Consumption Advisory Program identified a total of 22 human health advisories for fish consumption, 16 of these advisories are

located south of Brownlee Reservoir. Along with its less than prestigious listing on the CWA 303(d) list, the Portneuf River, which begins and ends on the Fort Hall Reservation, is constant reminder to our Tribal membership of the real health risks that come with the consumption of fish from our own reservation. It leaves the Reservation entering private lands, ceded lands of the Tribes, until it returns in its impaired state complete with signage advising us of the human health risk from fish consumption at the Fort Hall Bottoms where it enters the heavily regulated and impaired Snake River at the American Falls Reservoir.

The Tribes strongly object to the policy choices made by IDEQ to guide the development of this draft rule. In spite of our comments, presentation on suppression, submission of a comprehensive Idaho Tribes' fish consumption survey, and attendance at various meetings on this issue. IDEQ has ignored our comments on critical policy choices. Waffling on their policy choices to not allow for the backslide of WQC, which is now the case for several toxins, and risk assessment methodologies, opting for the unapproved and never used before for determining human health WQC probabilistic risk assessment methods. IDEQ's choice to set a less protective, acceptable cancer risk level and hazard quotient for tribes by subcategorizes tribes from the general population and utilizing the mean consumption rate at cancer risk level of 10^{-6} amounts to an unacceptable health risk to Tribal members. We are citizens of Idaho and must to be protected at the same level as Idaho's general population, anything less is counter to the concept of environmental justice, which was developed with the idea of preventing exactly this type of disparate impact on a protected class. The Tribes are obligated to protect our most vulnerable members, our young children and our elders, from precisely this type of irrational rule making that will expose them to serious constituents of concern and carcinogens.

The Snake River has set new records over the past few years for low flows. IDEQ's final draft rule should take into considerations the impacts climate change will have upon water quality and quantity as it relates to supporting native aquatic life. Based upon peer reviewed research, there is a very high likelihood that increasing air temperatures and water diversions will result in high instream temperatures in Idaho and the Pacific Northwest (Walters et al. 2013; Isaak et al. 2010; Isaak et al. 2011; Bartholow 2005; Petersen and Kitchell 2001). In fact, it has been estimated that Idaho's annual temperatures have increased about 1°F (Gillis et al. 2011) and the warming climate will increase instream, lake, and reservoir temperatures and decrease dissolved oxygen levels (Raymondi et al. 2013). Both of these effects will have major consequences for aquatic life, especially cold water biota the Tribes has made subsistence upon since time immemorial.

Numerous scientific studies and biological opinions have been completed regarding the relationship between low flows, sedimentation, nutrient loads, increased stream temperatures and the biological and chemical oxygen demands toxins present. Higher peak flows, alterations of flooding events, and more frequent and severe extreme events (e.g., wildfire, insect/pathogen outbreak, drought-related die off) will all likely increase sediment yield and nutrient loads to rivers and streams (Boehleter et al. 2015). Increased temperatures and earlier snowpack melt, will also likely result in lower summer streamflows which in turn will pose significant barrier to upstream migration and limit available habitat of fisheries. Lower summer stream flows and increased temperatures may also facilitate the concentrate of pollution levels and increase the risks of certain diseases, such as avian botulism (Rocke and Samuel 1999). Climate change poses a significant and serious risk to the subsistence and cultural use of freshwater ecosystems

by the Tribes. A definition for “climate change” also needs to be provided in the rule and evaluated by IDEQ.

The NOAA Fisheries concluded in their May 7, 2014 supplement to the biological opinion for the Idaho Water Quality Standards for Toxic Substances that the action as proposed is likely to jeopardize the continued existence of Snake River spring/summer/fall Chinook salmon, sockeye salmon, steelhead, and result in the destruction or adverse modification of designated critical habitat for spring/summer Chinook salmon. They also concluded that the action is also likely to jeopardize the continued existence of Southern Resident Killer Whales. Although, the 2004 biological opinion for the permitting of effluent discharge from the Potlatch facility in Lewiston, Idaho provided a no jeopardy opinion, it did define the how toxins emitted from effluent discharge into receiving waters during low increased biological and chemical oxygen demands affecting some juvenile salmon and steelhead enough to require an incidental take statement for these ESA listed species.

Based upon this information it is critically important that the IDEQ set standards that make progress towards mitigating the effects of climate change and other activities that suppress aquatic life. Development of more stringent water quality standards for point and non-point sources as it relates to fish consumption would contribute significantly towards ensuring Idaho’s freshwater ecosystems are resilient to climate change. No longer can we ignore the effects of climate change and pollution derived from non-point sources. To achieve this we suggest that the final draft rule provide new and innovative direction for water allocation, protection of water quality, and regulations/incentives to reduce both point and non-point source pollution to improve ecosystem function, reduce anthropogenic stresses, and restore habitat. In fact, it would be neglectful to adopt any policy or rulemaking for water resources without considering the potential and interrelated effects of climate change and both point and non-point pollution sources. This is especially important as pollution levels of nitrates are increasing in Idaho waters and significant threat to both human and aquatic life.

At a minimum, which we believe is a compromise, rates for fish consumption should provide protection for Tribal consumers at the 95% percentile (427.1 g/day) for Group 2 species and contribute towards enhancing healthy populations of fish and other forms of aquatic life in the State of Idaho. The long term goal should be to provide for a robust harvest with consumption rates set at Tribal heritage rates. Tribal heritage fishing efforts are well documented in Idaho and several methodologies and rates have been provided to IDEQ during this rulemaking process.

We want the IDEQ to know that the health and wellbeing of all Tribal members is important to the Tribes, and we cannot support any rule making that puts our Tribal members at risk for making subsistence upon natural food sources. The IDEQ also needs to recognize that anadromous fish utilize streams that flow through several states and it is critically important that the proposed rulemaking provide adequate protection of downstream waters as well.

In addition to being at risks through fish consumption, the Tribes has become increasingly concerned with drinking of untreated water obtained from streams and streams. Many of our Tribal members continue to utilize streams and springs for drinking and ceremonial uses. In fact, surface water may be ingested by members of our Tribes after recovering form arduous

ceremonial events that require abstinence of food and water for four days during the hottest times of the year. As such, ingestions of polluted waters after these types of ceremonies could potentially have life threatening consequences. Many of our members also continue to drink directly from streams while exercising off-reservation treaty rights.

Although there is an argument that more stringent rules result in additional financial costs to industry, less regulation results in additional externality costs to society and reduces ecosystem services derived from natural sources of water. Further loss of ecosystem services may be irreversible and a major concern among the Tribes. Proposed rulemaking that does not consider the loss of ecosystem services to the Tribes further marginalizes our society and culture. The widespread ecocide that has occurred over the past century has had a devastating impact upon our traditional lifeways and customs. It is now time that the dominant society begins to listen more closely to Indigenous people who have developed sophisticated knowledge to promote ecosystem sustainability.

As a member of the Upper Snake River Tribes (USRT) Foundation, a tribal consortium composed of four Indian tribes of the Upper Snake River region in Idaho, Nevada, and Oregon: the Burns Paiute Tribe, Fort McDermitt Paiute-Shoshone Tribe, Shoshone-Bannock Tribes of the Fort Hall Reservation, and Shoshone-Paiute Tribes of the Duck Valley Reservation, the Tribes were supported in our efforts to complete a review by USRT, who is also preparing comments on IDEQ's final draft rule to formulate ambient water quality standards for the protection of human health. To the extent USRT's comments do not conflict with anything herein they are incorporated by reference and should be accepted by IDEQ as an expanded and detailed version of the Tribes comments.

For technical questions on this submission, please contact Chad Colter, Fish and Wildlife Director at ccolter@sbtribes.com or (208) 239-4551. For policy level questions, and to establish a consultation meeting here in Fort Hall with Tribal leadership please contact Claude Broncho, Fish and Wildlife Policy Representative at cbroncho@sbtribes.com or (208) 239-4563. Thank you for your consideration of this submittal and we look forward to continuing a dialogue on this important issue.

Sincerely,


Blaine Edmo, Chairman
Fort Hall Business Council, Shoshone-Bannock Tribes

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