



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
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MEMORANDUM FOR: The Record
Tribal 4(d) Rule implementation
Imnaha River spring chinook – 2002

FROM: D. Robert Lohn 
Regional Administrator

SUBJECT: Endangered Species Act (ESA) Section 7 and Magnuson-Stevens Act Essential Fish Habitat Consultation: Management of spring chinook salmon in the Imnaha River subbasin in 2002 under a Nez Perce Tribal Resource Management Plan

NMFS Tracking Number: F/NWR/2002/00883 (assoc. with NWR/4d/14/2002/001)

Action Agencies: National Marine Fisheries Service, Northwest Region

Consultation Conducted By: National Marine Fisheries Service, Northwest Region
Sustainable Fisheries Division

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SECTION 7 CONSULTATION - BIOLOGICAL OPINION

Background, Description of the Proposed Action, Affected Evolutionary Significant Units (ESUs) and Action Area

The National Marine Fisheries Service (NMFS) published a 4(d) rule adopting regulations necessary and advisable to conserve threatened species (July 10, 2000, 65 FR 42422). A separate rule published July 10, 2000 (65 FR 42481; “tribal 4(d) Rule”) creates a mechanism by which application of Endangered Species Act (ESA) section 9 take prohibitions may be limited for Tribal Resource Management Plans (TRMPs) where the Secretary of Commerce (Secretary) has determined that implementing the TRMP will not appreciably reduce the likelihood of survival and recovery of the listed species.

The Tribal Plan specifies the management of recreational, ceremonial, and subsistence fisheries in 2002 in the Imnaha River subbasin in the State of Oregon that potentially affect Snake River spring/summer chinook salmon and Snake River steelhead listed as threatened under the ESA. NMFS has determined that the harvest activities described in the Tribal Plan meet the criteria of

the Tribal 4(d) Rule and will act to conserve the affected listed species. NMFS' review of the proposed activities is set out in the document entitled "Tribal Resource Management Plan 4(d) Rule Evaluation and Recommended Determination – Tribal Resource Management Plan for Snake River Spring/Summer Chinook in the Imnaha River Subbasin" (Evaluation/Recommended Determination document). The TRMP proposes actions that assure that spawning escapements, hatchery brood stock requirements and supplemental adult releases will be achieved in accordance with cooperative agreements. The TRMP proposes fisheries that limit the harvest rate on protected natural-origin chinook salmon to 5.7% in a year of large returns. This harvest rate is estimated to allow a projected escapement of over 2,500 adult naturally produced spring chinook after the fisheries. The 5.7% impact represents the total for both tribal and non-tribal fisheries which are proposed to take place in the subbasin, consistent with the artificial propagation management plan and the terms of the TRMP. The TRMP also addresses the management strategies used by the Tribe and State to ensure attainment of natural spawning escapement objectives and operation of an experimental artificial propagation program which is subject to ESA section 10 (a)(1)(A) permit number 1128, which was issued on September 20, 2000. The Nez Perce Tribe will, in association with the State of Oregon, closely monitor fisheries occurring in the Imnaha River subbasin in 2002 as well as collecting biological data such as run size and run composition, and will report on the results of that monitoring.

The following ESUs may be affected by the proposed action:

- Snake River spring/summer chinook salmon
- Snake River Basin steelhead

Two other salmon ESUs listed under the ESA occur in the Snake River Basin: Snake River sockeye salmon (listed as endangered), and Snake River fall chinook salmon (listed as threatened). No fish of either ESU are expected to be present in the Imnaha River during the proposed fisheries.

The action area for these harvest activities includes the Imnaha River from its confluence with the Snake River to 60 feet downstream of the Gumboot Creek weir, a distance of approximately 48 miles, all in the state of Oregon. The specific area in which each of the proposed fisheries would take place is detailed in the TRMP and summarized in the Evaluation/Recommended Determination document.

Affected ESUs' Current Status and Environmental Baseline

The Evaluation/Recommended Determination document contains information currently available about the status of each affected ESU. Recent research consultations for Columbia Basin ESUs describe the best available ESU status and environmental baselines for these ESUs (NMFS 2002). In addition, the NMFS 2001 Federal Columbia River Power System (FCRPS; NMFS 2001) consultation contains information about the status of a number of ESUs, including those considered here. Based on the modeling data and other information in the FCRPS consultation, as well as the Evaluation/Recommended Determination document's ESU sections, these ESUs

appear to be recently stable but remain at low abundance levels. It is clear that average population abundances in both ESUs are substantially less than historical levels. The current low average abundances of the species and the range of different activities currently affecting the species underscore the critical need for continued rigorous monitoring and evaluation of population parameters and the effects of various activities on those populations.

The biological requirements for both of the affected ESUs are currently not being met under the environmental baselines. Their status is such that there must be significant improvements in the environmental conditions of the ESUs' respective baselines. Previous NMFS listing decisions and consultations, notably the 2002 biological opinions on the issuance and funding of section 10(a)(1)(A) permits (NMFS 2002) and permit modifications for take for scientific research and enhancement purposes and the 2000 FCRPS opinion (NMFS 2000), provide detailed discussions of the environmental baselines. Current scientific information suggests that a multitude of factors, past and present, human and natural, have contributed to the decline of these ESUs. For example there is evidence to suggest that previous and current destruction and modification of freshwater habitats contribute to the decline of these populations.

Effects of the Proposed Action

In its biological opinions, NMFS analyzes the effects of the action as defined in 50 CFR 402.02. NMFS considers the estimated level of injury or mortality attributable to the collective effects of the action and any cumulative effects. NMFS also evaluates whether the action directly or indirectly is likely to destroy or adversely modify the listed species' designated critical habitat.

As discussed in the Evaluation/Recommended Determination document and in the TRMP, the TRMP describes actions that assure that spawning escapements, hatchery brood stock requirements and supplemental adult releases would be achieved in accordance with the annual operating plan. The TRMP proposes fisheries that limit the harvest rate on protected natural-origin chinook salmon to 5.7% in a year of large returns. Natural fish on the spawning grounds are still expected to approximate the preliminary delisting abundance targets, and population growth rate would remain high even with the fisheries implemented. This harvest management strategy, particularly recreational fisheries that target hatchery chinook, is expected to contribute to the survival and recovery of Imnaha River subbasin chinook salmon by managing the proportion of natural and hatchery fish on the spawning grounds. As described in the Evaluation/Recommended Determination document, harvest decisions for the Imnaha River subbasin are tailored to biological and other considerations unique to the subbasin. Under the harvest strategy specified for 2002, naturally produced chinook salmon escapement to the spawning grounds is expected to approximate preliminary delisting targets, population growth will remain high (the replacement rate is expected to still exceed 2:1), total escapement (naturally produced and experimental hatchery fish) is expected to still exceed the highest escapement goals, chinook salmon will still be well distributed throughout the Imnaha River subbasin, and thus implementation of the TRMP will not appreciably reduce the likelihood of survival and recovery of listed spring/summer chinook salmon. For all these reasons, the proposed harvest

activities are not expected to reduce the ESUs populations, their reproductive capacity or the distribution of populations in the affected ESUs.

The Nez Perce Tribe's TRMP stipulates adequate measures to reduce risks to listed fish. These include setting escapement objectives by which the fisheries will be managed, and incorporating management of the fisheries with inseason run size and run composition information obtained from a variety of sources, such as dam counts and fishery catch surveys. These stipulations will act to further limit impacts on listed fish and are comparable to terms and conditions found in section 10 permits.

Critical habitat has been designated for each of the affected ESUs – the critical habitat designation for Snake River Basin steelhead has been vacated, but designations for the Snake River spring/summer chinook salmon ESU remains in effect. In the Evaluation/Recommended Determination document, NMFS assesses the impacts on habitat for each ESU. The harvest activities will cause little, if any, habitat alteration. Specific activities that might alter habitat are associated with riparian traffic and wading activity in extremely localized areas; however, these areas are already used for other similar purposes include hunting, hiking and camping, and non-consumptive observation of wildlife and scenery. Therefore, NMFS concludes that activities described in the TRMP will not directly or indirectly destroy or adversely modify any of the affected ESUs' critical habitat.

Cumulative effects are those effects defined in 50 CFR 402. Future Federal actions will be subject to the ESA section 7 consultation requirements, and are therefore not considered here. Non-Federal actions that require authorization under other sections of the ESA, and not included here, will be considered in separate section 7 consultations.

Conclusion

Based on the foregoing analysis, including the evaluation of the harvest activities in the Evaluation/Determination Document, NMFS concludes that the proposed federal action is not likely to jeopardize the continued existence of the Snake River spring/summer chinook salmon or Snake River Basin steelhead ESUs, or result in the destruction or adverse modification of designated critical habitat for those ESUs, where designated. This conclusion is based on the relatively large returns of chinook salmon expected for the Imnaha River in 2002, the management of the fisheries to allow all natural and experimental hatchery broodstock goals to be achieved, the expectation that the population growth rate will remain positive, and the management of the fisheries such that spatial distribution of the returning adults through the subbasin will not be changed. Adequate measures will be used to minimize the effects of any take.

In addition, NMFS' July 2000 tribal 4(d) rule is designed to encourage activities and programs that will conserve listed species. If programs are consistent with the rule's limits, ESA take prohibitions will not apply to those programs. As discussed in the NMFS

Evaluation/Recommended Determination document, the fishery management program developed by the Nez Perce Tribe in association with ODFW for calendar year 2002 is consistent with the tribal 4(d) Rule, and will provide sufficient conservation of and benefits for the listed species.

Incidental Take Statement

The ESA take prohibitions will not apply to these Programs. Therefore, any federal action associated with the fishery harvest activities described in the TRMP and the Evaluation/Recommended Determination document also will not be subject to take prohibitions. No incidental take statement has been prepared.

Reinitiation of Consultation

Reinitiation requirements are the re-evaluation and modification requirements set out in Part III of the Evaluation/Recommended Determination document, and in the determination letter to the Nez Perce Tribe, all of which are incorporated herein.

References

References for this consultation are those used by NMFS in the Evaluation/Recommended Determination Document (Part IV), and the following:

NMFS (National Marine Fisheries Service). 2000. Endangered species act – section 7 consultation biological opinion – reinitiation of consultation on operation of the Federal Columbia River Power System (FCRPS), including the juvenile fish transportation program, and 19 Bureau of Reclamation projects in the Columbia Basin. December 21, 2000.

NMFS. 2002. ESA section 7 and MSA EFH consultation on issuance and funding of 27 section 10(a)(1)(A) permits, permit modifications, and permit amendments for takes of endangered and threatened Snake River salmon and steelhead for scientific research and enhancement purposes. February 19, 2002.

MAGNUSON-STEVENS ACT ESSENTIAL FISH HABITAT CONSULTATION

A. Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-267), established procedures designed to identify, conserve, and enhance Essential Fish Habitat (EFH) for those species regulated under a Federal fisheries management plan. Pursuant to the MSA:

- Federal agencies must consult with NMFS on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH (§305(b)(2));
- NMFS must provide conservation recommendations for any Federal or State action that would adversely affect EFH (§305(b)(4)(A));
- Federal agencies must provide a detailed response in writing to NMFS within 30 days after receiving EFH conservation recommendations. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS EFH conservation recommendations, the Federal agency must explain its reasons for not following the recommendations (§305(b)(4)(B)).

EFH means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity (MSA §3). For the purpose of interpreting this definition of EFH: Waters include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; substrate includes sediment, hard bottom, structures underlying the waters, and associated biological communities; necessary means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle (50 CFR 600.10). Adverse effect means any impact which reduces quality and/or quantity of EFH, and may include direct (*e.g.*, contamination or physical disruption), indirect (*e.g.*, loss of prey or reduction in species fecundity), site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions (50 CFR 600.810).

EFH consultation with NMFS is required regarding any Federal agency action that may adversely affect EFH, including actions that occur outside EFH, such as certain upstream and upslope activities.

The objectives of this EFH consultation are to determine whether the proposed action would adversely affect designated EFH and to recommend conservation measures to avoid, minimize, or otherwise offset potential adverse effects to EFH.

B. Identification of Essential Fish Habitat

Pursuant to the MSA, the Pacific Fisheries Management Council (PFMC) has designated EFH for three species of federally-managed Pacific salmon: chinook (*O. tshawytscha*); and coho (*O. kisutch*); and Puget Sound pink salmon (*O. gorbuscha*)(PFMC 1999). Freshwater EFH for Pacific salmon includes all those streams, lakes, ponds, wetlands, and other water bodies currently, or historically accessible to salmon in Washington, Oregon, Idaho, and California, except areas upstream of certain impassable man-made barriers (as identified by the PFMC 1999), and longstanding, naturally-impassable barriers (*i.e.*, natural waterfalls in existence for several hundred years). Detailed descriptions and identifications of EFH for salmon are found in

Appendix A to Amendment 14 to the Pacific Coast Salmon Plan (PFMC 1999). Assessment of potential adverse effects to these species' EFH from the proposed action is based, in part, on this information.

C. Proposed Action and Action Area

For this EFH consultation, the proposed actions and action area are detailed in the TRMP and summarized in the Evaluation/Recommended Determination document. The action area for these harvest activities includes the Imnaha River from its confluence with the Snake River to 60 feet downstream of the Gumboot Creek weir, a distance of approximately 48 miles, all in the state of Oregon. The action is the issuance of a determination that management of fisheries and artificial propagation activities in the Imnaha River subbasin in 2002, implemented by the Nez Perce Tribe in cooperation with the Oregon Department of Fish and Wildlife, addresses criteria of the tribal 4(d) rule and will not appreciably reduce the likelihood of survival and recovery of listed Snake River spring/summer chinook salmon and Snake River Basin steelhead.

The proposed action area includes river reaches accessible to chinook salmon and is part of the EFH for chinook salmon. Assessment of the impacts on these species' EFH from the above proposed action is based on this information.

D. Effects of the Proposed Action

As described in the Biological Opinion, the proposed action may result in adverse effects to EFH. These adverse effects are limited to localized (site-specific) and temporary physical disruption of the migration corridor for some adults returning to the Imnaha River subbasin.

E. Conclusion

NMFS concludes that the proposed action would adversely affect designated EFH for chinook salmon.

F. EFH Conservation Recommendation

Pursuant to Section 305(b)(4)(A) of the MSA, NMFS is required to provide EFH conservation recommendations to Federal agencies regarding actions which may adversely affect EFH. NMFS understands that the conservation measures described in the TRMP that will be implemented by the Nez Perce Tribe are applicable to designated salmon EFH and address the adverse effects. Therefore, NMFS recommends that those same Conservation Measures and Terms and Conditions be adopted as the EFH Conservation Recommendations for this consultation.

G. Statutory Response Requirement

Pursuant to the MSA (§305(b)(4)(B)) and 50 CFR 600.920(j), Federal agencies are required to provide a detailed written response to NMFS' EFH conservation recommendations within 30

days of receipt of these recommendations. The response must include a description of measures proposed to avoid, mitigate, or offset the adverse impacts of the activity on EFH. In the case of a response that is inconsistent with the EFH conservation recommendations, the response must explain the reasons for not following the recommendations, including the scientific justification for any disagreements over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects.

H. Consultation Renewal

The NMFS must reinitiate EFH consultation if the proposed actions are substantially revised in a way that may adversely affect EFH, or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations (50 CFR Section 600.920(k)).