



UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

413 W. Idaho Street, Suite 101, Boise, Idaho 83702

(208) 331-7880

November 4, 2014

Paula Wilson
IDEQ State Office
Attorney General's Office
1410 N. Hilton Street
Boise, ID 83706

**Re: Docket No. 58-0102-1201 – Upper Snake River Tribes Foundation Comments
Regarding IDEQ Discussion #6: Suppression of Fish Consumption**

Dear Ms. Wilson:

The Upper Snake River Tribes (USRT) Foundation is 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 four tribes have common vested interests to protect rights reserved through the United States Constitution, federal treaties, federal unratified treaties (e.g. Fort Boise Treaty of 1864 and Bruneau Treaty of 1866), executive orders, inherent rights, and aboriginal title to the land, which has never been extinguished by USRT member tribes. USRT works to ensure the protection, enhancement, and preservation of the tribes' rights, resources, cultural properties, and practices and that they remain secured. These include but are not limited to hunting, fishing, gathering, and subsistence uses.

USRT would like to thank the Idaho Department of Environmental Quality (IDEQ) for the opportunity to comment on the Idaho Fish Consumption Rate and Human Health Water Quality Criteria – Discussion Topic #6: Suppression of Fish Consumption. Further, USRT appreciates the invitation IDEQ extended to two Idaho tribal members (Chad Colter (Shoshone-Bannock Tribes) and Joe Oatman (Nez Perce Tribe)) to present the tribal perspective of suppression at the October 2nd rulemaking session. No other group in Idaho has felt the profound effects of suppression more than have tribal members. It has not only impacted their sustenance needs but also their cultural and spiritual well-being.

IDEQ has the unique opportunity during this rulemaking process to evaluate how suppression, both through "contamination (i.e. polluted fish)" and "depletion (i.e. reduced fish numbers)," has affected fish consumption patterns in Idaho. However, to date, it appears that IDEQ is letting this opportunity slip away with very little thought or discussion. This is in no way meant to diminish the illustrative and powerful presentations given by Mr. Colter and Mr. Oatman, but to highlight the

fact that IDEQ placed the burden on the tribes to discuss suppression on October 2nd. Prior to the October 2nd rulemaking session, IDEQ has produced a discussion paper for all other policy discussions. Yet, no discussion paper was formulated and disseminated by IDEQ on the suppression of fish consumption. As the regulating entity, IDEQ needs to put forth the time and effort to present their interpretation of suppression and how it will be factored into revised water quality standards and a fish consumption rate. As IDEQ moves forward in their policy rulemaking/implementation method phase from December 2014 – March 2015, USRT implores the agency to take the time necessary to thoroughly evaluate and consider suppression and fully factor its impacts into revised water quality standards and commensurate fish consumption rate.

Suppression in Idaho due to contamination is of significant concern not only to the tribes, as elucidated at the October 2nd rulemaking session, but the general public, as well. Idaho's 2012 Integrated Report¹ finds that there are 13,237 river/stream miles in Idaho that are not meeting applicable water quality standards for one or more beneficial uses by one or more pollutants and thus included on the §303(d) list of impaired waters (Category 5 waters). An additional 31,287 miles in Idaho are not supporting one or more beneficial uses (Category 4 waters). Contamination in Idaho waters has caused both diminished fish numbers and bioaccumulation of toxics in living fish to the level where they are unsafe to eat. Whether real or perceived, contaminants in Idaho waters has a significant suppression effect on would be consumers.

Depletion of fish, the other major factor leading to suppression, is certainly attributable to contamination, but in Idaho is largely tied to dams and other diversion structures that impede or prevent fish migration and reproduction. Federal dams on the Columbia and Snake rivers in Oregon and Washington have caused considerable depletion or extirpation of anadromous species in Idaho. There are also dozens of major dams and several hundred smaller dams and diversion structures in Idaho that adversely affect or block fish migration and passage. Without question fish depletion in Idaho has caused the most harm to the tribes, most notably to their traditional lifeways and in their ability to consume fish at the level and frequency they did historically. It has been estimated that members of the Shoshone-Bannock Tribes ate as much as 800 pounds of fish per year, the equivalent of 1,000 grams of fish per day.² Historic fish consumption estimations for the Northern Paiute vary widely from as little as 143 pounds per year (178 grams/day)³ to 700 pound per year (871 grams/day)⁴.

¹ Idaho Department of Environmental Quality. 2014. Idaho's 2012 Integrated Report. Boise, ID: Idaho Department of Environmental Quality.

² Scholz, A., K. O'Laughlin, D. Geist, D. Peone, J. Uehara, L. Fields, T. Kleist, I. Zozaya, T. Peone, and K. Teesatuskie. 1985. *Compilation of Information on Salmon and Steelhead Total Run Size, Catch and Hydropower Related Losses in the Upper Columbia River Basin, above Grand Coulee Dam*. Fisheries Technical Report No. 2. Upper Columbia United Tribes Fisheries Center, Eastern Washington University, Department of Biology. Cheney, Washington 99004.

December Tooze, J., et. al. 2006. A new statistical method for estimating the usual intake of episodically consumed foods with application to their distribution. *Journal of the American Dietetic Association* 106:10, 2006, pp. 1575-1587.

³ United States Senate Committee on Indian Affairs (U.S. Senate). 2007. Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act Hearing. One Hundred First Congress, First Session. April 26, 2007.

⁴ Upper Snake River Tribes Foundation. 2012. Northwest Power and Conservation Council Presentation. Boise, Idaho. 8 August 2012.

Taken together, contamination and depletion in Idaho has led to the suppressed consumption of fish most distinctly for Indian tribes, but also for other subpopulations and the general public. This is a known and substantiated fact. Thus, for IDEQ to devise revised water quality standards based on a current fish consumption rate would not only be harmful to the health of all Idahoans, particularly high fish consumers, but set the state on a never-ending path of diminishing water quality standards and fish consumption rates.

The never-ending path, otherwise known as the “downward spiral,” is a concept articulated previously by the Environmental Protection Agency (EPA) and the National Environmental Justice Advisory Council. In *Fish Consumption and Environmental Justice* (2002)⁵, it is stated:

A suppression effect occurs when a fish consumption rate for a given subpopulation reflects a current level of consumption that is artificially diminished from an appropriate baseline level of consumption for that subpopulation . . . When agencies set environmental standards using a fish consumption rate based upon an artificially diminished consumption level, they may set in motion a downward spiral whereby the resulting water quality standards permit further contamination and/or depletion of the fish and aquatic resources.

More recently, EPA reiterated this position in their *Human Health Ambient Water Quality Criteria and Fish Consumption Rates Frequently Asked Questions* (2013)⁶. Under the goals of the human health ambient water quality criteria, EPA states:

It is also important to avoid any suppression effect that may occur when a fish consumption rate for a given subpopulation reflects an artificially diminished level of consumption from an appropriate baseline level of consumption for that subpopulation because of a perception that fish are contaminated with pollutants.

It is paramount that IDEQ does not take Idaho’s water quality standards and fish consumption rate on the downward spiral. Unfortunately, given the minimal emphasis IDEQ is placing on the suppression effect, it is difficult to ascertain how the agency will refrain from going down a path of accepting diminishing water quality standards and fish consumption rate. IDEQ’s engagement in a general population and recreational angler fish consumption survey will provide a statistical estimation of the contemporary level of fish consumption in Idaho. But, of what value is there in knowing what the general population and anglers are currently eating given the condition of Idaho waters? It has already been noted here that there are thousands of miles of impaired rivers and streams in Idaho. Further, the Idaho Department of Health and Welfare (IDHW) has imposed a statewide mercury advisory for bass (largemouth and smallmouth) in all lakes, rivers, reservoirs, and other water bodies in Idaho.⁷ Additionally, there are IDHW-imposed fish consumption advisories on 22 creeks, lakes, reservoirs, and rivers in northern and southern Idaho.⁸ The species of fish on the 22 water bodies are varied and include: bluegill, brown trout, bullhead, carp, catfish,

⁵ Environmental Protection Agency and the National Environmental Justice Advisory Council. 2002. http://www.epa.gov/environmentaljustice/resources/publications/nejac/fish-consump-report_1102.pdf

⁶ <http://water.epa.gov/scitech/swguidance/standards/criteria/health/methodology/upload/hhfaqs.pdf>

⁷ Idaho Department of Health and Welfare. ND. Eat Fish, Be Smart, Choose Wisely: A guide to safe fish consumption for fish caught in Idaho waters. <http://healthandwelfare.idaho.gov/Portals/0/Health/EnvironmentalHealth/FishGuide.pdf>

⁸ Ibid.

crappie, cutthroat trout, kokanee, Lahontan cutthroat trout, lake trout, perch, rainbow trout, redband trout, sucker, Utah sucker, walleye, whitefish, and yellow perch.

If it is IDEQ's strategy to take the results of the contemporary general population/angler survey and use that number to devise Idaho's revised water quality standards and fish consumption rate then the downward spiral has begun. While the Nez Perce Tribe and Shoshone-Bannock Tribes are also in the process of undertaking a contemporary fish consumption survey, they have employed a suite of measures to document the forces of suppression and identify their respective heritage fish consumption rates. This approach, while unique for Idaho tribes, is not unlike what has been done recently by the Lummi, Spokane, Suquamish, and Swinomish tribes. Tribes throughout the country have recognized, as must IDEQ, that contemporary fish consumption rates are not an appropriate baseline for determining water quality standards given the effects of contamination and depletion. For tribes, the baseline is the ability to harvest and consume fish at a level that fully and healthfully fulfills their rights reserved through the United States Constitution, federal treaties, federal unratified treaties, executive orders, inherent rights, and aboriginal title to the land.

As was so eloquently stated by Seattle University law professor Catherine O'Neill, when "we set risk-based standards based on assumptions about exposure measured in this bleak period, we aim for a future that is not improved. That is, we impose a limit on the health of our waters – and a ceiling on the safe consumption of fish from those waters – that reflects not a level of fish intake that is healthful or to which tribes are entitled, but a level that is simply equal to present, constrained practice."⁹ EPA's relevant guidance does not restrain agencies to making only present-oriented exposure assessments. Instead, it finds that exposure assessments may be past-, present-, or future-oriented. To realize the restorative goals of the Clean Water Act, "it makes sense that exposure analysis is oriented toward a future in which aquatic ecosystems are healthy and whole. And, given the tribal context, it is arguable that exposure analysis not only may but must be oriented toward a future in which the fish resource is robust and tribal members may exercise fully their right to take fish."¹⁰

The need for IDEQ to recognize the effects of suppression not only on tribes, but also the general public could not be clearer. To not do so means the continual diminishment of water quality, human health, and tribal rights in Idaho. Certainly that cannot be the outcome IDEQ wants from this process. If you have questions or remarks following review of these comments, please contact Scott Hauser, USRT Environmental Program Director, at (208) 331-7880 (office) or (208) 995-4872 (cell) and/or by email at scott.hauser@usrtrf.org.

Sincerely,



Scott Hauser
Environmental Program Director

⁹ O'Neill, Catherine A. 2013. Fishable Waters. American Indian Law Journal. Vol. I, Issue II.
<http://www.law.seattleu.edu/Documents/ailj/Spring%202013/O'Neill-Fishable%20Waters.pdf>

¹⁰ Ibid.