

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 10, 2011.

**Carol Rushin,**

*Acting Regional Administrator, Region 8.*

[FR Doc. 2011–12213 Filed 5–17–11; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 223

[Docket No. 110427267–1267–01]

RIN 0648–BB04

#### Endangered and Threatened Species: Designation of a Nonessential Experimental Population for Middle Columbia River Steelhead Above the Pelton Round Butte Hydroelectric Project in the Deschutes River Basin, Oregon

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; notice of availability.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), propose to designate the Middle Columbia River (MCR) steelhead (*Oncorhynchus mykiss*), recently reintroduced into the upper Deschutes River basin in central Oregon, as a nonessential experimental population (NEP) under the Endangered Species Act (ESA). This NEP designation would expire 12 years after the first generation of adults return to the NEP area. A draft environmental assessment (EA) has been prepared on this proposed action and is available for comment (see **ADDRESSES** and **INSTRUCTIONS** section below).

**DATES:** To allow us adequate time to consider your comments on this proposed rule, they must be received no later than July 18, 2011. If you would like to request a public hearing, we must receive your request in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section, by July 5, 2011. Comments on the EA must be received by July 18, 2011.

**ADDRESSES:** You may submit comments on the proposed rule by any of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Submit written comments to Assistant Regional Administrator, Hydropower Division, Northwest Region, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

- *Fax:* (503) 231–2318.

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.) voluntarily

submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. We will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

You may access a copy of the draft EA by one of the following:

- Visit NMFS’ Northwest Region Web site at <http://www.nwr.noaa.gov>.

- Call 503.736.4741 and request to have a CD or hard copy mailed to you.

- Obtain a CD or hard copy by visiting NMFS’ Portland office at 1201 NE Lloyd Blvd, Suite 1100, Portland, OR 97232.

You may submit comments on the draft EA by one of the following methods:

- *E-mail:* [expopEA.nwr@noaa.gov](mailto:expopEA.nwr@noaa.gov).

- *Mail:* Submit written comments to Hydropower Division, FERC and Water Diversions Branch, NMFS, 1201 NE Lloyd Blvd., Portland, OR 97232.

Please see the draft EA for additional information regarding commenting on that document.

**FOR FURTHER INFORMATION CONTACT:** Scott Carlon, NMFS, 1201 NE Lloyd Blvd., Portland, OR 97232 (503–231–2379), or Marta Nammack, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301–713–1401).

#### SUPPLEMENTARY INFORMATION:

##### Context

On March 25, 1999, NMFS listed the Middle Columbia River (MCR) steelhead distinct population segment (DPS) as threatened under the Endangered Species Act (ESA) (16 U.S.C. 1531–1544) (64 FR 14517). The MCR steelhead DPS range covers approximately 35,000 square miles (90,650 sq km) of the Columbia plateau of eastern Oregon and eastern Washington. The Deschutes River in central Oregon is one of six major river basins supporting steelhead in this DPS. Since 1968, the Pelton Round Butte Hydroelectric Project (Pelton Round Butte) on the Deschutes River has blocked steelhead from accessing nearly 200 miles (322 km) of historical spawning and rearing habitat.

In this rulemaking, we are proposing to designate as an experimental population the MCR steelhead currently being reintroduced to the upper Deschutes River basin. This reintroduction is a requirement of the new hydropower license for the Pelton Round Butte Hydroelectric Project in

Oregon, and thus will continue regardless of whether we designate the steelhead population in the upper Deschutes River basin as experimental. The licensees, Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon, are conducting the reintroduction program in cooperation with the State of Oregon, NMFS, the U.S. Forest Service, the U.S. Fish and Wildlife Service, U.S. Bureau of Land Management, Jefferson and Deschutes Counties, Oregon, and 10 other stakeholder groups. This reintroduction is one of many recovery actions being implemented by NMFS, Federal and state agencies, and other partners throughout the threatened species' historical range. While passage and reintroduction are occurring under the authority of the Federal Power Act, we would be designating the reintroduced steelhead as a NEP, and providing special protective measures for the NEP, under the authority of the ESA. The purpose of this proposed designation is to temporarily lift certain ESA liability and consultation requirements to allow time to develop conservation measures to support the reintroduction effort in the Upper Deschutes River basin. The conservation measures would benefit from information gained during the early stages of the reintroduction effort to focus the conservation measures on the areas needing support.

The specific stock chosen to initiate steelhead reintroduction is from the Round Butte Hatchery. After the new license was issued in June 2005 and reintroduction planning was largely completed, we included the Round Butte Hatchery steelhead stock as part of the threatened group of steelhead (71 FR 834; January 5, 2007).

We are proposing to have the NEP designation set by this action expire after three successive generations of steelhead have been passed over Round Butte Dam. Specifically, the NEP designation would expire 12 years after the first generation of adults return to the NEP area. Some local landowners and one municipality are working to develop a Habitat Conservation Plan (HCP) for certain activities that may impact steelhead reintroduced above Round Butte Dam. This HCP is likely to be completed sooner than the proposed expiration date for the NEP designation. However, the HCP covers only a subset of the activities and area impacted by the reintroduction. Thus, other local entities may consider developing conservation measures to address potential ESA liability. We expect that the fixed-duration NEP designation will incentivize local landowners and

municipalities to develop such conservation measures in a timely manner, since full ESA protections will once again apply to the steelhead after the experimental population designation expires. In addition, we expect that information developed during the NEP designation period will help inform conservation measures, either as they are being developed or through adaptive management mechanisms.

The proposed NEP would occur in portions of Deschutes, Jefferson, and Crook Counties, Oregon. The geographic boundaries of the NEP would extend upstream from Round Butte Dam on the Deschutes River to Big Falls (river mile 132, or kilometer 212) and all accessible reaches of its tributary, Whychus Creek; on the Crooked River from its confluence with the Deschutes River upstream to Bowman Dam (river mile 70, or rkm 113) and all accessible tributaries between these points; and on the Metolius River from its confluence with the Deschutes River upstream to all accessible areas. While this area is part of its historical range, it is outside the current range of the Middle Columbia River steelhead DPS. The DPS boundary is located at the Reregulating Dam, the furthest downstream dam of the Pelton Round Butte Hydroelectric Project, on the Deschutes River downstream of the NEP area.

Section 10(j) of the Endangered Species Act (16 U.S.C.S. 1539(j)) allows the Secretary of Commerce (Secretary) to authorize the release of an experimental population of an endangered or threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species. The Secretary may designate an experimental population when, and at such times as, the population is wholly separate geographically from nonexperimental populations. In this action, NMFS proposes to designate an experimental population that is geographically separate from the non-experimental ESA-listed MCR steelhead population, due to the dams that block access for the species to the area where the species is being reintroduced. The MCR steelhead will only be considered experimental when they are above the Round Butte Dam. The proposed designation will further the conservation of the species because it will build support for the reintroduction effort among local landowners, incentivize those landowners and municipalities to complete conservation measures within the set time-period, and ensure that the conservation

measures are informed by information gathered during the NEP designation, i.e., the first three generations of returning adults. We will provide notice in the **Federal Register** when the NEP designation is set to expire.

#### Public Comment Procedures

We would like the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, tribal and government agencies, the scientific community, environmental groups, industry, local landowners, and all other interested parties to provide comments on the proposed rule and EA. We request that you keep your comments relevant to the proposed experimental population designation, bearing in mind that the reintroduction is required by the Pelton Round Butte hydropower license. Your comments should be as specific as possible, provide suggested changes, explain the basis for them, and include supporting information where appropriate.

Prior to issuing a final rule, we will consider the comments and supporting materials we receive. The final rule may differ from the proposed rule based on this information and other considerations.

We are interested in all public comments, and have specific questions we are interested in hearing public comments on:

(1) Use of a specific expiration date: We chose to state up front that the designation would expire at a certain time to encourage completion of conservation measures rather than leaving their development more open ended. Other experimental population designations indicate that the designation may be removed for certain reasons, but do not include a specific expiration date in the designation. Please comment on the use of an expiration date.

(2) Twelve-year time frame: We propose that the NEP designation expire 12 years after the first generation of adults return to the NEP area, in part because useful information will be gained during that timeframe because this 12-year period should allow three generations of the reintroduced steelhead to return. Three generations allows for consideration of variability between generations, including the year-to-year variability in environmental conditions, so is expected to provide useful information for developing and tailoring conservation measures. After this time, we will know where adults are spawning and young are rearing, and

whether there are certain needs of the steelhead in specific areas that can be addressed through conservation measures. If the HCP or other conservation measures are completed prior to the 12-year expiration, information from the NEP designation could nevertheless be used to inform those measures through adaptive management mechanisms.

As indicated, the time limit is also designed to incentivize completion of conservation measures—both in the HCP and otherwise. For the HCP, however, a 12-year limit could reduce the incentive to complete the HCP on its current projected timeframe, which is less than 12 years. Yet, if we used a shorter time-frame, the quality of information from the NEP would be significantly diminished.

Please comment on the use of 12 years as a fixed time period for the NEP designation.

(3) The extent to which the experimental population would be affected by current or future Federal, state, or private actions within or adjacent to the experimental population area.

(4) Current programs within the experimental population area that protect fish or aquatic habitats.

(5) Any necessary management restrictions, protective measures, or other management measures that we have not considered.

## Background

The Deschutes River basin above the Pelton Round Butte Hydroelectric Project was once home to native runs of summer steelhead, Chinook salmon, sockeye salmon, and Pacific lamprey. Before hydroelectric and irrigation development, steelhead used the Deschutes River up to Big Falls, Whychus Creek (a Deschutes River tributary above the Pelton Round Butte Hydroelectric Project), and the Crooked River watershed. Within the Crooked River watershed, steelhead were documented in McKay, Ochoco, Horseheaven, Newsome, Drake, Twelvemile, and Beaver Creeks, and the North Fork Crooked River (Nehlsen, 1995). The completion of Ochoco Dam east of Prineville in 1920 blocked steelhead access into most of the Ochoco Creek watershed, and the completion of Bowman Dam on the Crooked River in 1961 stopped fish passage into the upper Crooked River watershed. On the Deschutes River, the Pelton and Reregulating Dams were completed in 1958. Even though these dams had fish passage, steelhead numbers in the upper Deschutes River basin, though still significant, had

declined by that time (Nehlsen, 1995). Available information suggests peak annual escapements in the 1950s were at least 1,600 adult summer steelhead and 800–900 (Montgomery, 1955) adult spring Chinook salmon (with perhaps twice this number harvested downstream). After completion of Round Butte Dam (the most upstream dam) in 1964, fish passage decreased dramatically, and, by 1968, was abandoned in favor of a hatchery program to mitigate for lost passage and habitat. The runs could not be sustained primarily because deceptive surface currents confused smolts attempting to migrate seaward through Lake Billy Chinook, the project's upper-most reservoir. Most of the smolts failed to find their way from the head of the reservoir downstream to a fish collector installed at Round Butte Dam (Korn *et al.*, 1967). As a result of this decline, and following a comprehensive study of west coast steelhead, we subsequently listed the MCR as a DPS (64 FR 14517, March 25, 1999).

There has long been an interest in reestablishing anadromous fish runs in the upper Deschutes River subbasin. This interest strengthened in recent years as technological innovations advanced and hydrodynamic modeling suggested that surface currents could be altered to favor the downstream passage of smolts. The relicensing of the Pelton Round Butte Project provided the opportunity to implement these innovations in order to attempt to reestablish anadromous fish runs upstream.

The Federal Energy Regulatory Commission issued a new license for the Pelton Round Butte Project (project number P–2030) on June 21, 2005, to Portland General Electric Company (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSRO), who are joint licensees (Licensees). The license requires fish passage over the Pelton Round Butte Project and incorporates the terms of a Settlement Agreement entered into by the Licensees and 20 other parties. The license establishes a Fish Committee, which is made up of the Licensees, NMFS, Oregon Department of Fish and Wildlife (ODFW), the US Fish and Wildlife Service (FWS), and other agencies and entities. Details regarding the responsibilities of the Licensees with respect to fish passage and reintroduction are in the Fish Passage Plan, included as Exhibit D to the Settlement Agreement. These responsibilities include fish passage improvements at the Pelton Round Butte Project, a wide variety of test and

verification studies, and longer term monitoring efforts. The license includes a schedule for meeting those obligations.

Because the Pelton Round Butte Hydroelectric Project does not provide volitional passage, the central element of the Fish Passage Plan is a Selective Water Withdrawal structure now in place and operating at Round Butte Dam to improve water quality in the lower Deschutes River, create currents in the reservoir that should help guide smolts to an associated fish screening and collection facility, and provide downstream passage for juveniles. It is currently envisioned that returning adult steelhead in the experimental population will be collected below the Reregulating Dam and transported for release above Round Butte Dam. This new facility will protect fish in Lake Billy Chinook from being entrained into turbines, and is the centerpiece of a multi-faceted effort to reestablish runs of steelhead that have been absent from the upper basin for more than 42 years. Recognizing the fish reintroduction opportunity, the Oregon Fish and Wildlife Commission adopted Oregon Administrative Rules in December 2003 that direct ODFW to restore anadromous fish, including MCR summer steelhead, into portions of their historical range upstream from the Pelton Round Butte Project. Specific areas targeted for reintroduction include the Deschutes River from Round Butte Dam upstream to Big Falls, Whychus Creek, and the Crooked River and tributaries upstream to Bowman and Ochoco Dams. The Metolius River was not targeted for steelhead reintroduction as it is believed that this subbasin is better suited to resident steelhead (i.e., rainbow trout or redband trout).

Individuals that are used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 222.301) prior to removal. In this case, the donor steelhead are from a captive bred population, which is propagated to mitigate for lost fisheries due to failed fish passage after the Pelton Round Butte Project was originally constructed. The hatchery fish being used for the reintroduction are excess stock. In addition, it is possible that some wild adult stock could also be released into the NEP area before the designation expires.

## Statutory and Regulatory Framework

Congress made significant changes to the ESA in 1982, including the addition

of section 10(j), which provides for the designation of reintroduced populations of listed species as “experimental populations.” Previously, we had authority to reintroduce populations into unoccupied portions of a listed species’ historical range. However, local citizens often opposed these reintroductions because they were concerned about potential liability for harming these animals, and the placement of restrictions and prohibitions on Federal and private activities. Under section 10(j) of the ESA, the Secretary can authorize the release of an “experimental” population outside the species’ current range, but within its historical range, where: (1) The experimental population is geographically separate from the non-experimental population; and (2) the designation will further the conservation of the listed species. The determination of whether experimental populations are “essential” or “nonessential” to the continued existence of the species must be based on the best scientific and commercial data available.

The ESA provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the consultation requirements of section 7. Section 9 of the ESA prohibits the take of an endangered species. The term “take” is defined by the ESA as “to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct.” 15 U.S.C. 1532(19). Section 7 of the ESA provides procedures for Federal interagency cooperation and consultation to conserve federally listed species, ensure the survival and help in recovery of these species, and to protect designated critical habitat necessary for the listed species’ survival. It also mandates that all Federal agencies determine how to use their existing authorities to further the purposes of the ESA to aid in recovering listed species. It also states that Federal agencies will, in consultation with NMFS, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of designated critical habitat. Section 7 of the ESA does not apply to activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

For the purposes of section 7 of the ESA, section 10(j) requires that we treat NEPs as a species proposed to be listed, unless they are located within a National Wildlife Refuge or National Park, in which case they are treated as

threatened, and section 7 consultation requirements apply. When NEPs are located outside a National Wildlife Refuge or National Park, only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEP designations provide additional flexibility in developing conservation and management measures, because they allow NMFS to work with the action agency early to develop conservation measures, instead of analyzing an already well-developed proposed action provided by the agency in the framework of a section 7(a)(2) consultation. Additionally, for populations of listed species that are designated as nonessential, section 7(a)(4) of the ESA only requires that other agencies confer (rather than consult) with NMFS on actions that are likely to jeopardize the continued existence of a species proposed to be listed. These conferences are advisory in nature, and their findings do not restrict agencies from carrying out, funding, or authorizing activities.

Section 10(j) of the ESA (16 U.S.C. 1539(j)) also provides the Secretary of Commerce with authority to designate populations of listed species as experimental, and includes criteria for the designation. Experimental population designations must be done through a rulemaking that identifies the population, and state whether the population is essential or nonessential to the continued existence of the species. For purposes of section 9 of the ESA, a population designated as experimental is treated as threatened regardless of the species’ designation elsewhere in its range. Through section 4(d) of the ESA, a threatened designation allows the Services greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the ESA allows us to adopt regulations necessary to provide for the conservation of a threatened species. MCR steelhead are currently included in NMFS’ 4(d) rule that imposes section 9 take liability for threatened anadromous fish, at 50 CFR 203. Through this rulemaking, we propose to use our authority under section 4(d) to create a different set of protective regulations, specific to the experimental steelhead population above Round Butte Dam. In effect, we would be modifying the current 4(d) rule as it applies to MCR steelhead. For this nonessential experimental population only, we would allow take if the take is incidental to a lawful activity, such as agricultural activities.

The FWS has regulations for experimental population designation, 50

CFR 17 subpart H, that provide definitions, considerations in finding that the designation would further the conservation of the species, and information to be included in the designation. These regulations state that, in making the determination that the designation would further the conservation of the species, the Secretary must consider the effect of taking the eggs or young from another population, the likelihood that the experimental population will become established, the effect the designation would have on the species’ overall recovery, and the extent to which the experimental population would be affected by activities in the area. A regulation designating the experimental population must include: A clear means to identify the experimental population; a finding based on the best available science indicating whether the population is essential to the continued existence of the species; management restrictions, protective measures, or other management concerns; and a periodic review of the success of the release and its effect on the conservation and recovery of the species. The FWS regulations also state that any experimental population shall be treated as threatened for purposes of establishing protective regulations under ESA section 4(d), and the protective regulations for the experimental population will contain applicable prohibitions and exceptions for that population.

While we do not have regulations regarding designation of experimental populations, many of the considerations in FWS’ regulation are generally applicable to this designation. Where applicable, we will include the same considerations in our decision regarding designation, and provide that rationale in the preamble. These considerations are in addition to the statutory requirements that are also explained in the preamble.

#### Biological Information

“Steelhead” is the name commonly applied to the anadromous (migratory) form of the biological species *O. mykiss*. The common names of the non-anadromous, or resident, form are rainbow trout and redband trout. The species *O. mykiss* exhibits perhaps the most complex suite of life history traits of any species of Pacific salmonid. These fish can be anadromous or freshwater residents, and under some circumstances yield offspring of the opposite form. Steelhead can spawn more than once, whereas all other *Oncorhynchus* except cutthroat trout (*O. clarki*) spawn once and then die.

When we originally listed the MCR steelhead as threatened on March 25, 1999 (64 FR 14517), it was classified as an evolutionarily significant unit (ESU) of salmonids that included both the anadromous and resident forms, but not hatchery fish. Since then, we revised our species determinations for West Coast steelhead under the ESA, delineating anadromous, steelhead-only distinct population segments (DPS). We listed the MCR steelhead DPS as threatened on January 5, 2006 (71 FR 834). Rainbow trout and redband trout are not listed under the ESA, and are under the jurisdiction of the states unless they are listed, when they come under the jurisdiction of the FWS. We published a final Critical Habitat designation for MCR steelhead on September 2, 2005, with an effective date of January 2, 2006 (70 FR 52630).

As noted previously, the MCR steelhead DPS extends over an area of about 35,000 square miles (90,650 square km) in the Columbia plateau of eastern Washington and eastern Oregon. The DPS includes all naturally spawned populations of steelhead in drainages upstream of the Wind River, Washington, and the Hood River, Oregon (exclusive), up to, and including, the Yakima River, Washington, excluding steelhead from the Snake River Basin (64 FR 14517, March 24, 1999; 71 FR 834, January 5, 2006). Major drainages that support steelhead in this DPS are the Deschutes, John Day, Umatilla, Walla Walla, Yakima, and Klickitat river systems. Most of the region is privately owned (64 percent), with the remaining area under Federal (23 percent), tribal (10 percent), and state (3 percent) ownership. Most of the landscape consists of rangeland and timberland, with significant concentrations of dryland agriculture in parts of the range. Irrigated agriculture and urban development are generally concentrated in valley bottoms. Human populations in these regions are growing.

Steelhead produced in seven artificial propagation programs are considered part of the DPS, and were given a listing status of threatened in 2006 (71 FR 834, January 5, 2006). These programs are the Touchet River Endemic Summer Steelhead Program, the Yakima River Kelt Reconditioning Program (in Satus Creek, Toppenish Creek, Naches River, and Upper Yakima River), and the Umatilla River and Deschutes River steelhead hatchery programs.

Within the range of West Coast steelhead, spawning migrations occur throughout the year, with seasonal peaks of activity. The runs are usually named for the season in which the peak

occurs. Most steelhead can be categorized as one of two run types, based on their sexual maturity when they re-enter freshwater and how far they go to spawn. In the Pacific Northwest, summer steelhead enter freshwater between May and October, and require several months to mature before spawning; winter steelhead enter freshwater between November and April with well-developed gonads and spawn shortly thereafter. Summer steelhead usually spawn farther upstream than winter steelhead (Withler, 1966; Roelofs, 1983; Behnke, 1992).

The steelhead that occur in the Deschutes Basin are summer run. Spawning occurs from late winter through spring, and juveniles typically rear in freshwater for 2 years (may range 1–4 years) before migrating to the Pacific Ocean. About half of the adults return after 1 year in the ocean and the other half returns after 2 years.

Throughout much of its historical range, the decline of steelhead has been attributed to habitat degradation and fragmentation, the blockage of migratory corridors, poor water quality, angler harvest, entrainment (the incidental withdrawal of fish and other aquatic organisms in water diverted out-of-stream for various purposes) into diversion channels and dams, and introduced nonnative species. Specific land and water management activities that may negatively impact steelhead populations and habitat, if not implemented in accordance with best management practices, include the operation of dams and other diversion structures, forest management practices, livestock grazing, agriculture, agricultural diversions, road construction and maintenance, mining, and urban and rural development.

#### *Factors Affecting Listing Middle Columbia River Steelhead as Threatened*

Section 4(a)(1) of the ESA and NMFS implementing regulations (50 CFR part 424) establish procedures for listing species as threatened or endangered. According to this direction, the Secretary must determine if a species is endangered or threatened based on any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence (Busby *et al.*, 1996; NMFS, 1999).

In our initial determination to list the MCR steelhead species, we found that all five section 4(a)(1) factors had played a role in the decline of the West Coast salmon and steelhead ESUs. These factors may or may not still be limiting recovery in the future when we reevaluate the status of the species to determine whether the protections of the ESA are no longer warranted and the species may be delisted. Findings leading to the listing of West Coast salmon and steelhead, including MCR steelhead, include:

(1) *The present or threatened destruction, modification, or curtailment of its habitat or range:* Salmon and steelhead have experienced declines in abundance over the past several decades as a result of loss, damage, or change to their natural environment. Water diversions, forestry, agriculture, mining, and urbanization have eliminated, degraded, simplified, and fragmented habitat. Hydroelectric development on the mainstem Columbia River modified natural flow regimes and impaired fish passage. Tributary obstructions also restrict or block salmon and steelhead access to historical habitats.

(2) *Overutilization of the steelhead and salmon for commercial, recreational, scientific, or educational purposes:* Overfishing in the early days of European settlement led to the depletion of many salmonid stocks before extensive modifications and degradation of natural habitats, and exploitation rates following the degradation of many aquatic and riparian ecosystems were higher than many populations could sustain. Today, steelhead harvest continues on the Columbia River, tributaries, and Pacific Ocean; however, fishery impacts have declined significantly because of changes in fishery management.

(3) *Disease or predation:* Introductions of non-native species and habitat modifications have resulted in increased predator populations in numerous rivers. Predators on adult and juvenile steelhead include seabirds, such as Caspian terns, walleye and California sea lions.

(4) *Inadequacy of existing regulatory mechanisms:* Various Federal, state, county, and tribal regulatory mechanisms are in place to reduce habitat loss and degradation caused by human use and development. Many of these mechanisms have been improved over the years to slow the habitat degradation and destruction. Protective efforts directed toward addressing the many factors that adversely impact MCR steelhead and habitat—water quality and quantity, safe migration, riparian vegetation, food, predation dynamics and complex stream channels, and floodplain connectivity—will aid in improving these factors.

(5) *Other natural or human-made factors affecting its continued existence:* Variability in ocean and freshwater conditions can have profound impacts on the productivity of salmonid populations and, at different times, have exacerbated or mitigated the problems associated with degraded and altered riverine and estuarine habitats.

*Relationship of the Proposed Experimental Population to Recovery Efforts*

The 2009 Middle Columbia River Steelhead Recovery Plan has the overarching aim of removing the steelhead DPS from the threatened and endangered species list. The suite of strategies and actions proposed in the Plan will protect and improve ecosystem functions and restore normative ecological processes to levels that support recovery of MCR steelhead populations. The strategies and actions were developed by planning teams comprised of natural resource specialists for the Fifteenmile, Deschutes, John Day, Umatilla, and Walla Walla watersheds. The actions reflect direction identified in regional and local plans, recent modeling and research findings, and local expert input provided by the planning team members. Together, these strategies and actions call for maintaining high quality habitats and their productive capacity, improving ecosystem processes and habitats that are impaired but are currently important to productive capacity, and restoring habitat through passive and active measures.

Recovery criteria specific to the Deschutes include eight kinds of tributary habitat conservation measures that could mitigate for adverse impacts. We organized the habitat actions and associated information for each population by the conservation measures, or habitat strategies:

- (1) Protect and conserve natural ecological functions that support the viability of populations and their primary life history strategies throughout their life cycle;
- (2) Restore passage and connectivity to habitats blocked or impaired by artificial barriers and maintain properly functioning passage and connectivity;
- (3) Maintain and restore floodplain connectivity and function;
- (4) Restore degraded and maintain properly functioning channel structure and complexity;
- (5) Restore riparian condition and large woody debris recruitment and maintain properly functioning conditions;
- (6) Restore natural hydrograph to provide sufficient flow during critical periods;
- (7) Improve degraded water quality and maintain unimpaired water quality; and
- (8) Restore degraded and maintain properly functioning upland processes to minimize unnatural rates of erosion and runoff.

The recovery scenario described in the MCR steelhead recovery plan

(NMFS, 2009) states that the Deschutes Eastside and Westside populations should reach a viable status. The Westside population existed historically in Whychus Creek and the upper Deschutes River below Big Falls. The Eastside population, as determined by the Interior Columbia Technical Recovery Team, did not extend above Pelton Round Butte historically. The Plan recognizes that successful reintroduction of MCR steelhead and their natural production above the Pelton Round Butte Project could contribute substantially to recovery in two ways, by: (1) restoring production from the Whychus Creek drainage, part of the historical Westside Deschutes population that currently is limited to major tributaries below the Pelton Round Butte Project; and (2) reestablishing production in the Crooked River drainage, identified by the Interior Columbia Technical Recovery Team as a separate extirpated historical population. If successful, these reintroductions and restoration of natural production could contribute substantially to population status and therefore to the viability of the MCR steelhead DPS.

The MCR steelhead recovery plan also includes an ambitious restoration and protection program for currently accessible habitats in tributaries below the Pelton Round Butte Project. As a result, it is possible that the Westside Deschutes population could reach minimum viability levels without access to habitat above the Pelton Round Butte Project if there is an increase in actions aimed at further improving natural production from accessible habitats below the project. Furthermore, the Mid-Columbia Recovery Plan recognizes that a future delisting decision for the DPS should consider not only the specific biological criteria incorporated into the current plan, but also the general principles underlying those criteria, advances in risk assessment, management actions in place to address threats, and considerations for the status of all of the components in the DPS. Therefore, while the reintroduction program furthers recovery, it is one of many measures to assist achieving this goal.

**Does the proposed designation further the conservation of the species?**

Under ESA section 10(j), the Secretary may designate listed species as experimental if doing so furthers the conservation of the species. The proposed designation of MCR steelhead is expected to promote development of conservation measures well-tailored to supporting reintroduction because we

will have 12 years, or three steelhead generations, of data to use as the foundation for conservation measures. Three generations should account for the variable environmental conditions (both ocean and freshwater) the NEP will experience and give a solid basis for knowing what kinds of conservation measures will provide strong support for the reintroduction effort. For example, once we know the main spawning areas after collecting this information from three generations of spawning adults, we can craft conservation measures to protect those areas. Conservation measures that are completed before the expiration date likely would include an adaptive management component that would allow us to modify these measures based on this information. In addition, the expiration date adds another conservation aspect to the designation by encouraging development and completion of the conservation measures before expiration of the NEP designation (although with respect to the HCP it may create a disincentive for completing the HCP on its current trajectory, which is less than 12 years).

We weighed these benefits against any potential harm caused by this designation. There is potential harm associated with the reduced section 9 protections during the time period of the designation. However, we do not expect changes to current conditions to significantly increase harm to steelhead during the NEP period. In weighing the benefits of developing sound conservation measures in a time certain versus the potential for roughly the same amount of loss as there is now, the benefits of developing and implementing the conservation measures outweigh the loss of some individual fish. Therefore, on balance, the designation of the population as experimental would further the conservation of the species.

**Is the proposed experimental population essential or nonessential?**

Under ESA section 10(j)(2)(B), the Secretary must “identify the [proposed] population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.” 15 U.S.C. 1539(j)(2)(B). First, we considered the importance of the experimental population to recovery of MCR steelhead generally. While the reintroduction effort is a significant recovery effort, it is not the only one and not the key to whether recovery can be achieved for this steelhead DPS. Successful implementation of

restoration efforts across all major population groups in the DPS could reduce risks and improve viability even absent reintroduction above Pelton Round Butte Dam.

Another factor we considered is that the steelhead used for this reintroduction effort will be surplus hatchery stock. The hatchery program exists to mitigate for lost MCR steelhead upstream habitat, but the steelhead used in the reintroduction program are excess hatchery fish and are beyond what is needed for the mitigation. Furthermore, MCR steelhead have a very wide range in the Columbia Plateau, and are found in numerous rivers. The potential loss of some of the excess hatchery fish being used for the reintroduction effort will not appreciably reduce the likelihood of survival and recovery for this DPS. Therefore, this experimental population will be designated as nonessential because there are sufficient numbers of other fish from this population throughout a wide geographic range, and these fish are excess hatchery stock that are not needed for other purposes.

#### Location of Proposed NEP

ESA section 10(j) requires that the experimental population be designated only when, and at such times, as it is geographically separate from nonexperimental populations of the same species. On a very basic level, the NEP geographic area includes all waters that could support steelhead above Round Butte Dam. The NEP area covered by this action would include portions of the Deschutes River basin above Round Butte Dam, which is the most upstream development of the three-dam Pelton Round Butte Hydroelectric Project. Specifically, the NEP area includes the Deschutes River from Big Falls (river mile 132 or river kilometer 212) downstream to Round Butte Dam; the Whychus Creek subbasin; the Metolius River subbasin; and the Crooked River subbasin from Bowman Dam downstream (including the Ochoco and McKay Creek watersheds) to its point of confluence with the Deschutes River.

Accordingly, Round Butte Dam serves as the line of demarcation between the experimental population and the rest of the steelhead population. This geographic boundary is clearly defined by the presence of Round Butte Dam, with all steelhead above the dam being part of the experimental population and all steelhead below the dam not part of the experimental population. This approach to providing a clear geographic separation recognizes that anadromous fish migrate and mingle during the migration. The steelhead will

be experimental when, and at such times as, they are above Round Butte Dam, and not experimental when they are downstream of the dam.

The nearest steelhead population to the NEP area is found in the Deschutes River below Round Butte Dam. The geographic boundary of the current steelhead DPS does not include the area above Round Butte Dam. Other steelhead populations near the NEP area include fish in the following tributaries of the lower Columbia River: The Lewis River, entering the lower Columbia at river mile (RM) 84 (river km 135), the Willamette River at RM 101 (river km 163), and the Hood River at RM 165 (river km 366). Because anadromous populations of steelhead migrate to the Pacific Ocean and return to their natal streams to spawn, experimental population fish will commingle with nonexperimental population fish in the lower Deschutes and Columbia Rivers, and individuals from the experimental population may stray into any of the lower Columbia River tributaries or into Deschutes River tributaries below the Pelton Round Butte Project and spawn. Steelhead found outside of the NEP boundary but known to be part of the hatchery stock used for the reintroduction will also be considered nonexperimental.

The Round Butte Dam provides an absolute boundary to nonexperimental population fish returning to spawn. All juvenile steelhead smolts leaving the NEP boundary are collected at Round Butte Dam and each fish is given the same unique mark so that when they return to the Pelton fish trap as adults, trap operators can readily distinguish between experimental population and nonexperimental population fish. Only adult steelhead from the experimental population will be released above Round Butte Dam; therefore, the NEP is geographically separate from other steelhead populations because of the Pelton Round Butte Project.

Lastly, the steelhead reintroduction plan calls for using wild spawners from lower Deschutes River tributaries at some point in the reintroduction effort. Use of non-hatchery fish in the reintroduction will largely depend on the availability of wild spawners and the successful performance of the fish passage program at the Pelton Round Butte Project. We will consider any non-hatchery steelhead used for reintroduction above Round Butte Dam to be part of the experimental population once released into the NEP area.

In summary, the section 10(j) requirement that the experimental designation be limited to such times as

the population is geographically separate is met here because the NEP area is outside the range of the currently existing DPS, and is clearly defined by Round Butte Dam, which is impassable to steelhead. It includes all streams above Round Butte Dam capable of supporting steelhead. All steelhead above the dam are in the experimental population, and all steelhead below the dam are not part of the experimental population.

#### Time Frame for NEP Designation

We are proposing an expiration date for the NEP designation because we want to provide an incentive for private land owners and local government entities to complete conservation measures in a certain time frame, while providing time to gather useful information on the reintroduction effort. This information will be used in the development of the conservation measures so they will be able to support the reintroduction program.

We are proposing a time frame of 12 years from the time when the first NEP adults return to the NEP area. This time is not definite now because we do not yet know exactly when the first adult steelhead will be passed above the dams to the NEP area. Adult passage will depend on meeting criteria established in the steelhead and spring Chinook Reintroduction Plan (ODFW and CTWSRO, 2008). On average, one generation of steelhead is about 4 years (2 years freshwater rearing, 1 year in the ocean, and roughly 9–11 months for adult migration, holding, and spawning), so three generations will be 12 years. We recognize that variations in freshwater rearing and ocean growth will occur (i.e., longer freshwater rearing and ocean growth time).

The proposed timeframe reflects our view that it will be useful to have information on three generations of steelhead to understand how well the reintroduction program is working and how best to craft conservation measures to support the program. As we discussed in the section on whether the designation will further the conservation of the species, the time frame of three generations allows an adequate amount of data to be collected on the reintroduction program, and time for this information to be used as the basis of conservation measures tailored toward supporting this reintroduction. This amount of information will allow all parties, private and governmental, to work together to develop conservation measures that are specifically focused on addressing needs of steelhead in the Upper Deschutes River basin. For conservation measures completed before



expiration of the designation, such as potentially the HCP currently being developed, an adaptive management component could address the need to potentially modify the measures based on this information. This component will maximize the benefit of the conservation measures and strengthen the reintroduction program, and will result in a strong program for this recovery measure.

Without an expiration date, development and completion of conservation measures may continue for a longer time. In general, twelve years is a reasonable amount of time to complete development of conservation measures because there is still a lot of information needed, and the issues are complex and involve many parties. That said, the HCP could be completed before the NEP designation expires. We would like to strongly encourage development and implementation of conservation measures that will support the reintroduction, and this expiration date is meant to provide that encouragement while also ensuring that the measures are based on good information.

#### **Management Considerations and Protective Measures**

The aquatic resources in the NEP area are managed by the U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation, the State of Oregon, municipalities, and private landowners. Multiple-use management of these waters would continue under the NEP designation. We do not expect that continuing these agricultural, recreational, municipal, and other activities by private landowners within and near the NEP area will cause significant harm to MCR steelhead; the reintroduction effort has begun and the juvenile survival rates suggest that the activities in the area are not a limiting factor. The main factors we relied on in considering appropriate management measures are: (1) A significant number of upstream irrigators are developing or already implementing certain conservation measures; (2) Federal agencies have already consulted under section 7 of the ESA and are implementing actions that do not cause jeopardy and minimize incidental take; (3) fish used for the reintroduction will be excess hatchery fish, and loss of some of them will not harm survival and recovery of the steelhead; and (4) enough steelhead are already surviving to provide information necessary for the initial stages of the reintroduction program. These factors all lead to the conclusion that, for a 12-year period, the reintroduction effort can continue successfully while allowing some take

of the steelhead in the experimental population because enough fish will survive to support reintroduction. Therefore, for the time period of the designation, incidental take, as provided in the next paragraph, will not harm the recovery program.

*Incidental Take:* Although MCR steelhead are already covered by a NMFS 4(d) rule at 50 CFR 203, this action would modify that protection if it is implemented. In this proposed rule, under the authority of ESA section 4(d), incidental take of steelhead within the experimental population area would be allowed, provided that the take is unintentional, not due to negligent conduct, or is consistent with State fishing regulations that have been coordinated with NMFS. As recreational fishing for species other than steelhead is popular within the NEP area, we expect some incidental take of steelhead from this activity but, as long as it is incidental to the recreational fishery, and in compliance with ODFW fishing regulations and Tribal regulations on land managed by the Confederated Tribes of the Warm Springs Reservation of Oregon, such take will not be a violation of the ESA.

#### **Monitoring and Evaluation**

As a requirement under its Federal license to operate the Pelton Round Butte Project, the Licensees will monitor over the 50-year term of the license. Some of this monitoring relates directly to the MCR steelhead reintroduction program. The licensees will collect data to gauge long-term progress of the reintroduction program and to provide information for decision-making and adaptive management for directing the reintroduction program. Fish passage, fish biology, aquatic habitat, and hatchery operations will be the primary focus of the monitoring (PGE and CTWSRO, 2004; ODFW and CTWSRO, 2008).

Fish passage monitoring will focus on addressing a variety of issues important to successful reintroduction. These issues consist of measuring fish passage efficiency, including smolt reservoir passage, collection efficiency at the fish collection facility, smolt injury and mortality rates, adult collection, and adult reservoir passage to spawning areas. Passive integrated transponder tags and radio tags will be used to evaluate and monitor fish passage effectiveness. Biological evaluation and monitoring will concentrate on adult escapement and spawning success, competition with resident species, predation, disease transfer, smolt production, harvest, and sustainability of natural runs. Habitat monitoring will

focus on long-term trends in the productive capacity of the reintroduction area (e.g., habitat availability, habitat effectiveness, riparian condition) and natural production (the number, size, productivity, and life history diversity) of steelhead in the NEP area above Round Butte Dam.

Monitoring at the fish hatchery will focus on multiple issues important to the quality of fish collected and produced for use in the reintroduction program. ODFW will be primarily responsible for monitoring hatchery operations. This will consist mainly of broodstock selection; disease history and treatment; pre-release performance such as survival, growth, and fish health by life stage; the numerical production advantage provided by the hatchery program relative to natural production; and success of the hatchery program in meeting conservation program objectives.

While this monitoring is being conducted for purposes of making the reintroduction effort successful, we will use the information to also determine if the experimental population designation is causing any harm to MCR steelhead and their habitat, and then, based on this and other available information, determine if the designation needs to be removed before the expiration date. There is no need for additional monitoring because this effort will provide all the information necessary.

#### **Findings**

Based on the best available scientific information, the designation of MCR steelhead above the Pelton Round Butte Project as a NEP will further the conservation of the species because it will encourage private landowners and all levels of government to work together to develop conservation measures, which in turn will support recovery efforts. The geographic area is well-defined as all parts of the three rivers capable of supporting steelhead above the Pelton Round Butte dams. This population is nonessential because it is made up of excess hatchery stock that are not necessary for the survival and recovery of the species, and because there are sufficient MCR steelhead populations elsewhere such that this NEP is not essential to the DPS. The expiration date for the designation is appropriate because it will encourage completion of conservation measures based on site-specific scientific information, within the time frame provided in the rule.



### Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the Information Quality Act (Section 515 of Pub. L. 106–554). The Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet this criteria.

### Classification

#### *Regulatory Planning and Review (E.O. 12866)*

In accordance with the criteria in E.O. 12866, OMB has determined this proposed rule is not a significant rulemaking action.

If enacted, this proposed rule would not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are the U.S. Forest Service, Bureau of Land Management, and Bureau of Reclamation. Because of the substantial regulatory relief provided by the NEP designation, we believe the reestablishment of steelhead in the areas described would not conflict with existing human activities or hinder public utilization of the area.

This proposed rule also would not materially affect entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients. Because there are no expected impacts or restrictions to existing human uses as a result of this proposed rule, no entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients are expected to occur.

#### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility

analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The Chief Counsel for Regulation certifies that this proposed rule would not have a significant economic effect on a substantial number of small entities.

If this proposal is adopted, the small businesses in the upper Deschutes River basin that could be affected include those involved in agriculture, ranching, fishing, recreation and tourism, because their activities have the potential to affect steelhead and their habitat. The proposed rule would likely be beneficial to the small entities listed here, however, and there will likely be no adverse economic impact on these entities, because the rule would relieve a restriction on these small businesses by removing potential ESA liability for them during the time frame of the NEP designation.

Section 7(a)(4) requires Federal agencies to confer (rather than consult) with us on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities. The proposed rule would relieve a restriction on Federal actions by removing the ESA section 7(a)(2) consultation requirement for Federal action agencies. The designation of steelhead as an experimental population within the upper Deschutes River basin would likely not affect the use of Federal lands because there would be no requirement to consult under ESA section 7(a)(2) to make a jeopardy or adverse modification determination.

This proposed rule will relieve an ESA regulatory restriction and will not impose any new or additional economic or regulatory restrictions upon States, non-Federal entities, or members of the public due to the presence of steelhead. Therefore, this rulemaking will have no significant economic impact on a substantial number of small entities because it is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities, and may have a

beneficial effect on small entities. For these reasons, an initial regulatory flexibility analysis is not required, and none has been prepared.

#### *Takings (E.O. 12630)*

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed rule: (1) Would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

#### *Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

#### *National Environmental Policy Act*

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it available for public inspection (see **ADDRESSES** section). All appropriate NEPA documents will be finalized before this rule is finalized.

#### *Government-to-Government Relationship With Tribes*

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of

power and responsibilities between the Federal Government and Indian tribes), we must consult with those governments, or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

About 28 percent of the acreage included in the NEP area is owned and managed by the CTWSRO. We have invited (letter dated September 21, 2010, from William Stelle, Regional Administrator, NMFS, to Stanley Smith, Chairman, CTWSRO) the CTWSRO to discuss the proposed rule at its convenience should it choose to have a government-to-government consultation. To date, NMFS has not received a request for formal government to government consultation. Additionally, the CTWSRO is involved in the reintroduction as one of the licensees and as a member of the fish committee that is involved in the reintroduction program.

*Energy Supply, Distribution, or Use (E.O. 13211)*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

This proposed rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**References Cited**

A complete list of all references cited in this proposed rule is available upon request from National Marine Fisheries Service office (see **FOR FURTHER INFORMATION CONTACT**).

**List of Subjects in 50 CFR Part 223**

Endangered and threatened species, Exports, Imports.

Dated: May 11, 2011.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, we propose to amend part 223, subpart B of chapter 1, title 50 of the Code of Federal Regulations, as set forth below.

**PART 223—[AMENDED]**

1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

**223.211–223.300 [Reserved]**

2. Add reserved §§ 223.211 through 223.300.

3. Add part 223.301 to read as follows:

**§ 223.301 Special rules—marine and anadromous fishes.**

(a) Middle Columbia River steelhead (*Oncorhynchus mykiss*).

(1) The Middle Columbia River steelhead populations identified in paragraph (a)(4) of this section are nonessential, experimental populations.

(2) *Take of this species that is allowed in the nonessential, experimental population area.* (i) Taking of Middle Columbia River steelhead that is otherwise prohibited by paragraph (a)(3) of this section and 50 CFR 223.203(a) is allowed within the nonessential, experimental population geographic area, provided that the taking is unintentional, not due to negligent conduct, and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreation, agriculture, forestry, municipal usage, and other, similar activities, which are carried out in accordance with Federal, State, and local laws and regulations.

(ii) Any person with a valid permit issued by NMFS and a valid permit issued by the Oregon Department of Fish and Wildlife may take steelhead in the nonessential, experimental population area for educational purposes, scientific purposes, and the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the ESA.

(3) *Take of this species that is not allowed in the nonessential, experimental population area.* (i) Except as expressly allowed in paragraph (a)(2) of this section, the taking of Middle Columbia River steelhead is prohibited

within the nonessential, experimental population geographic area, as provided in 50 CFR 223.203(a).

(ii) No person shall possess, sell, deliver, carry, transport, ship, import, or export, by any means whatsoever, Middle Columbia River steelhead taken in violation of this paragraph (a)(3)(ii) and 50 CFR 223.203(a).

(4) All reintroduction sites are within the probable historical range of Middle Columbia River steelhead and are as follows:

(i) *Middle Columbia River Steelhead.* Upper Deschutes River basin upstream of Round Butte Dam, including tributaries Whychus Creek, Crooked River and Metolius River. More specifically, the Deschutes River from Big Falls (river mile 132) downstream to Round Butte Dam; the Whychus Creek subbasin; the Metolius River subbasin; and the Crooked River subbasin from Bowman Dam downstream (including the Ochoco and McKay Creek watersheds) to its point of confluence with the Deschutes River.

(ii) Round Butte Dam is the downstream terminus of this nonessential experimental population. The powerhouse intakes are fully screened, so except for rare spill events due to high flows, neither adult nor juvenile fish can volitionally leave the nonessential experimental population area, effectively isolating them from the nonexperimental population below the Pelton Round Butte Hydroelectric Project. All juvenile steelhead emigrating from the nonessential experimental population area are collected at Round Butte Dam and given a unique mark before being transported to the lower Deschutes River for release. Once released below the Round Butte Dam, these fish will be outside the nonessential experimental population area and thus considered part of the nonexperimental population. Only returning adult steelhead that originated from the nonessential experimental population area (identified by a unique mark) will be released in the nonessential experimental population area.

(5) *Review and evaluation of effectiveness of nonessential experimental population designation.* As a requirement under its Federal license to operate the Pelton Round Butte Hydroelectric Project, Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon will conduct monitoring over the 50-year term of the license. This monitoring will include collecting information on the reintroduction program that NMFS will use in evaluating the effectiveness of the

nonessential experimental population designation.

(6) *Time frame for NEP designation.* After three successive generations of adult steelhead have passed upstream above Round Butte Dam, this nonessential, experimental population

designation will no longer be in effect. The time frame for three generations (12 years) will begin the first year adult fish from the experimental population are released above Round Butte Dam. This release will occur according to the

criteria provided in the steelhead and spring Chinook Reintroduction Plan (ODFW and CTWSRO, 2008).

(b) [Reserved]

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