CONFEDERATED TRIBES OF
WARM SPRINGS
1855

Confederated Tribes of Warm Springs, Oregon
PO Box C
Warm Springs, OR 97761
Phone: 541-553-1161
Fax: 541-553-1924

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Via Electronic Submission (http://www.regulations.gov) and First Class Mail

Public Comments Processing
Attn: Docket No. FWS-R1-ES-0091
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS.: JAO/1N
Falls Church, VA 22041-3803

Re: COMMENT - Draft Environmental Impact Statement and Draft Deschutes Basin Multi-Species Habitat Conservation Plan, Docket No. FWS-R1-ES-2019-0091

Dear Madame or Sir:

On October 4, 2019, the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") published in the Federal Register notices of availability for the proposed Deschutes Basin Multi-Species Habitat Conservation Plan ("HCP") and associated Draft Environmental Impact Statement ("DEIS"). 84 Fed. Reg. 53,164 (USFWS notice); 84 Fed. Reg. 53,114 (NMFS notice). The Services are now seeking public comments on the DEIS and HCP.

I am the Chairman of the Twenty-Eighth Tribal Council of The Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS" or "Tribe"). I am an enrolled member of the Tribe, and my tribal heritage descends from the Tiah Band of the Icischkin-speaking Warm Springs People and the Wasco Band of the Kiksht-speaking Wasco People. I am writing on behalf of the Tribe and my people to provide comments on the DEIS and HCP.

I. Overview of the Tribe and its Interests in the Deschutes Basin.

The Tribe is a federally recognized, self-governing, sovereign Indian tribe. The Tribe consists of three Indian tribal groups: the Warm Springs, the Wasco and the Paiute. The Tribe is the legal successor in interest to the Indian signatories to the Treaty between the United States of America and the Tribes of Middle Oregon, which was executed on June 25, 1855, and ratified by Congress on March 8, 1859, 12 Stat. 963, ("1855 Treaty" or "Treaty"). Pursuant to the Treaty, the Tribe ceded approximately 10 million acres of land to the United States and reserved approximately 640,000 acres for exclusive use and occupation of the Tribe and its members as a permanent homeland ("Warm Springs Reservation").

The substantial majority of the Deschutes Basin lies within the lands used and occupied by the Tribe since time immemorial. In the 1855 Treaty, the Tribe's predecessors ceded much of those lands to the United States, including the lands upon which the present day cities of Bend, Redmond, Madras, Tumalo, Sisters, and Prineville now exist. The southern boundary of the Tribe's ceded lands is the 44th parallel, the northern boundary is the Columbia River, and the western boundary is the crest of the Cascade Mountain Range. The middle of the channel of the Deschutes River forms the eastern boundary of the Warm Springs Reservation, and one of the Deschutes River's major tributaries, the Metolius River, forms a significant portion of the southern boundary of the Reservation.

The 1855 Treaty recognizes the Tribe as a sovereign entity, possessing inherent rights to provide for the general welfare of its people, including the right to manage its natural resources for their benefit.[1] The Treaty expressly reserves rights to the Tribe for its members to go outside (or "off") the Warm Springs Reservation to all of the lands and waters that it had used prior to the treaty to hunt, fish, gather roots and berries, and to pasture livestock. Those rights have been defined and upheld by federal courts since the early 1900's, meaning that the Tribe has legally enforceable Treaty protected rights for the vast majority of the Deschutes Basin. The 1855 Treaty also protects rights in areas beyond the ceded lands if those areas were used by Tribal members from time to time at or before the time they entered the Treaty. The Tribe maintains rights to fish, hunt, gather and pasture livestock for many areas beyond the ceded land boundary, including that small portion of the Upper Deschutes Basin that is south of the 44th parallel.

In 1951, the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission ("FERC"), issued a license to Portland General Electric ("PGE") to construct the Pelton Project on the Deschutes River for the purpose of generating hydroelectric power. The Pelton Project is located at approximately river mile 100 near the City of Madras. In 1955, the Tribe and PGE entered into a written agreement pursuant to which the Tribe granted to PGE, in exchange for compensation, certain easements and rights necessary for the construction and operation of the Pelton and Round Butte Dams and their associated generation and transmission facilities and for the construction of the Pelton Reregulating Dam. The agreement also affirmed the right of the Tribe to construct, operate, and maintain generation facilities in the Pelton Reregulating Dam. In the early 1980s, the Tribe completed construction of a powerhouse at the Pelton Reregulating Dam and became a joint licensee of the Pelton Project.

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[1] The Tribe exercises its sovereignty to achieve the highest of all goals: "to preserve our traditional cultural ways that have existed for so many centuries in harmony with our homeland; and to provide for the well-being of our people for the many centuries that lie ahead." Declaration of Sovereignty, Confederated Tribes of the Warm Springs Reservation of Oregon, June 25, 1992.

In 1981, the Tribe and the United States entered into an agreement to work collaboratively in an effort to determine the scope and attributes of the Tribe's federally reserved Indian water right for lands within the Warm Springs Reservation. By 1987, the Tribe, the United States, and the State of Oregon each had formed teams to negotiate the scope and attributes of the Tribe's federally reserved Indian water right. The parties also chose to include various stakeholders in their discussions, including irrigation districts and municipalities within the Deschutes Basin. The negotiations were successful, resulting in the Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, effective November 17, 1997, and amended on November 19, 2001 ("WRSA"). In January 2003, the Oregon Circuit Court for Deschutes County incorporated the WRSA into the Deschutes River Decree. *See Final Judgment and Decree Incorporating Findings of Fact and Order of Determination and Incorporating Settlement Agreement*, Circuit Court of the State of Oregon, County of Deschutes, Case No. 99CV0380ST, Jan. 7, 2003.

The WRSA determines the scope and attributes of the Tribe's reserved Indian water right for lands within the Warm Springs Reservation, which includes instream flows for rivers and streams arising on the Warm Springs Reservation along with instream flows in the Deschutes and Metolius Rivers for the benefit of the aquatic ecosystem of the Reservation. The Tribe's reserved Indian water right also includes out-of-stream uses both on and off the Warm Springs Reservation. The priority date of the Tribe's reserved water right is earlier than any other water right in the Deschutes Basin. The use of the Tribe's reserved water right within the exterior boundary of the Warm Springs Reservation is administered by the Tribe in accordance with the WRSA.

The WRSA provides that the parties recognize and support the long-standing commitment of the Tribe to protect instream flows necessary to sustain the aquatic ecosystem for the benefit of fish and wildlife resources of the Warm Springs Reservation. The WRSA also recognizes the importance of tributary waters for the long-term protection of the Deschutes River fisheries beyond the Warm Springs Reservation boundaries. The parties affirmed their mutual goal of exercising their respective authority cooperatively in order to establish appropriate measures for the long-term protection of resident and anadromous fisheries of the Deschutes River and its tributaries.

In 1999, both the Tribe and PGE recognized that the FERC license for the Pelton Project would expire on December 31, 2001. The Tribe and PGE filed competing applications to continue the operation and maintenance of the Pelton Project. In April 2000, the Tribe and PGE entered into a Long-Term Global Settlement and Compensation Agreement, providing for their respective rights and obligations with respect to the Pelton Project ("Global Settlement Agreement"). The Global Settlement Agreement provided the Tribe with the opportunity to acquire an ownership interest in Pelton Project assets owned by PGE. The Tribe is now a one-third owner of the Pelton Project assets previously entirely owned by PGE. The Tribe remains the sole owner of the Reregulating Dam generation facilities.

In June 2001, the Tribe and PGE filed an amendment to combine their license applications and became co-applicants for a new license. In July 2004, the Tribe and PGE, along with twenty stakeholders entered into a written Settlement Agreement Concerning the Relicensing of the Pelton Round Butte Hydroelectric Project No. 2030. The Tribe and PGE filed the settlement agreement with FERC. On June 21, 2005, FERC issued an order approving the settlement and issuing a new fifty-year license to the Tribe and PGE ("2005 FERC License"). 111 FERC ¶ 61,450, *order on rehearing*, 117 FERC ¶ 61,112 (2006).

The 2005 FERC License requires the Tribe and PGE to implement a Fish Passage Plan that is intended to establish self-sustaining harvestable anadromous fish runs of Chinook salmon, steelhead, and sockeye salmon above the Pelton Project. The Fish Passage Plan contains a three-phase fish passage program that requires substantial capital improvements. The 2005 FERC License also requires the establishment of the Pelton Round Butte Fund for the purpose of funding enhancement projects for fish and wildlife resources and habitat throughout the Deschutes Basin. Since the issuance of the 2005 FERC license, the Tribe and PGE have spent, in accordance with their ownership interests, (either directly or through the Pelton Round Butte Fund) over $175 million on the Fish Passage Plan and other enhancement projects.

Several federally listed species are known to occur in the vicinity of the Pelton Project, including the Columbia River bull trout DPS and the Middle Columbia River steelhead ESU ("MCR steelhead"). As part of its issuance of the 2005 FERC License, FERC initiated consultation with the USFWS and NMFS pursuant to Section 7 of the Endangered Species Act of 1973 ("ESA"). USFWS and NMFS issued biological opinions concluding that issuance of the 2005 FERC License was not likely to jeopardize the continued existence of the bull trout and the MCR steelhead. Both USFWS and NMFS included incidental take statements with reasonable and prudent measures to minimize the incidental take of bull trout and MCR steelhead, along with terms and conditions to implement the measures.

II. History of the Development of the HCP and Related Issues.

The MCR steelhead have been listed as threatened since 1999. NMFS issued the Middle Columbia Steelhead ESA Recovery Plan, November 30, 2009, ("MCR Steelhead Recovery Plan" or "Plan") with the goal of removing the MCR steelhead from the threatened species list. The Plan recognizes that successful reintroduction of the MCR steelhead above the Pelton Project could contribute substantially to recovery of the MCR steelhead by reestablishing a population in Whychus Creek and the Crooked River drainage, both tributaries to the Deschutes River.

In January 2013, NMFS issued a final rule authorizing the continued release of MCR steelhead above the Pelton Project as part of the 2005 FERC License. *See* 78 Fed. Reg. 2893 (January 15, 2013). NMFS also designated, pursuant to Section 10(j) of the ESA, the MCR steelhead located

above the Pelton Project as a "nonessential experimental population" for a period of twelve years. *Id*. The express purpose of the designation was to:

> "temporarily lift certain ESA liability and consultation requirements to allow time for local landowners and municipalities to *develop well-informed conservation measures to support the reintroduction effort in the Upper Deschutes River basin*." *Id*. at 2894 (emphasis added).

The ultimate success of the Fish Passage Plan and reintroduction of MCR steelhead have a direct bearing on the value of the Tribe's ownership interest in the Pelton Project.[2] The success of the reintroduction program will also have a direct impact on the Tribe's ability to harvest steelhead, a traditional and Treaty-protected fishery.

The reintroduction of salmon and MCR steelhead above the Pelton Project precipitated the development of the HCP. The applicants ("Applicants") initiated the HCP process in 2008.[3] Because of its important sovereign interests and treaty-protected rights implicated by the HCP, the Tribe has participated in the HCP planning process from the beginning.[4]

By March 2013, the Applicants had identified fifteen species as under consideration for coverage by the Deschutes Basin HCP, including, the bull trout, the MCR steelhead, and the Oregon

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[2] The Tribe currently has approximately 5,316 members, most of whom reside on the Warm Springs Reservation. The Tribe has significant levels of unemployment, exceeding thirty percent (30%), and high rates of poverty. The Tribe is confronted with substantial social challenges associated with such unemployment and poverty, including, without limitation, diminished life expectancy, poor health indicators, crime, and drug use. The Tribe relies significantly on the revenue that it receives from the Pelton Project to fund governmental operations, which are essential for the self-governance of the Tribe and the general welfare of its members.

[3] The Applicants include Arnold Irrigation District ("AID"), Central Oregon Irrigation District ("COID"), Lone Pine Irrigation District ("LPID"), North Unit Irrigation District ("NUID"), Ochoco Irrigation District ("OID"), Swalley Irrigation District ("SID"), Three Sisters Irrigation District ("TSID"), Tumalo Irrigation District ("TID"), and the City of Prineville. The eight irrigation districts comprise the Deschutes Basin Board of Control ("DBBC").

[4] The Tribe is a governmental co-manager of the Deschutes Basin and possesses significant sovereign, cultural and treaty-reserved interests in the Basin. The Tribe has legally-protected treaty-reserved rights to take fish throughout, which include a right to have fish to take. *See generally United States. v. Washington,* 853 F.3d 946 (2017), *aff'd by equally divided court* 138 S.Ct 1832 (2018).

spotted frog. In August 2014, the USFWS issued a final rule determining threatened species status under the ESA for the Oregon spotted frog. *See* 79 Fed. Reg. 51658 (August 29, 2014). Congress also passed The Crooked River Collaborative Water Security and Jobs Act of 2014, Pub. L. No. 113-244, 128 Stat. 2864 ("Crooked River Act"), which is intended to address the allocation of water among the various needs, including, municipal, agriculture, and the aquatic ecosystem.

In the fall of 2015, COID, NUID, and TID proposed to modify the operations of Crane Prairie, Wickiup and Crescent Lake dams and reservoirs as an early conservation measure for the Oregon spotted frogs while the HCP was completed. In December 2015, the Center for Biological Diversity ("CBD") filed a lawsuit against the U.S. Bureau of Reclamation ("BOR") (15-cv-2358 (D. Or.)) challenging BOR's operation and maintenance of Crane Prairie Dam and Reservoir and Wickiup Dam and Reservoir as violating the ESA due to impacts on Oregon spotted frog populations in the Upper Deschutes Basin. In January 2016, WaterWatch of Oregon initiated a related action (16-cv-0035 (D.Or.)) seeking to enjoin BOR, COID, NUID, and TID to provide adequate river flows in the Upper Deschutes Basin to prevent harm to Oregon spotted frogs. The court consolidated actions into a single proceeding ("OSF Litigation").

The Tribe participated as an *amicus curiae* in the OSF Litigation expressing concern that increased Upper Deschutes River flows, ostensibly for the benefit of the Oregon spotted frog, may have negative impacts on other areas of the Deschutes Basin and their associated ecosystems and species, including the bull trout and MCR steelhead. (ECF 52, 15-cv-2358 (D. Or.)). The Tribe noted that a dramatic reallocation of the Upper Deschutes River hydrograph risked undoing much good work that had been done to restore instream flows in the Crooked River. *Id.* The Tribe urged the court not to consider the needs of the Oregon spotted frog in isolation and to balance the frog's needs with other federally protected species in the Deschutes Basin, including, principally, the MCR steelhead.

The parties settled the OSF Litigation and filed a stipulated settlement agreement with the court in October 2016. (ECF 72, 15-cv-2358 (D. Or.)). The settlement agreement obligated BOR and the irrigation district defendants to use their best efforts to assist USFWS to complete the required consultation and issue a biological opinion by July 31, 2017. *Id.* BOR and the irrigation district defendants further agreed to limit the duration of the incidental take statement to July 31, 2019. *Id.* BOR issued its biological assessment in December 2016, and USFW issued its biological opinion in September 2017.

III. The Services' Treaty and Trust Responsibilities Owed to the Tribe.

The Services owe certain treaty and trust responsibilities to the Tribe in connection with actions that the Services take under the ESA. The Services acknowledge those responsibilities. *See* Secretarial Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act, June 5, 1997; Secretarial Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, August 20, 2014. Pursuant to Secretarial Order 3206, the Services are to carry out their responsibilities under the ESA "in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the [Services], and that strives to ensure that Indian tribes do not bear a *disproportionate burden* for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation." (Emphasis added.)

IV. The Tribe's Comments on the DEIS and HCP.

The proposed federal action is the issuance of incidental take permits ("ITPs") that would authorize the take of certain covered species that could result from covered activities over the term of the ITPs. Similar to the fears that it expressed in the OSF Litigation, the Tribe is seriously concerned that the DEIS and HCP prioritize the needs of the Oregon spotted frog at the expense of other covered species, specifically the covered fish species--including Chinook salmon, the bull trout, and MCR steelhead--and other tribal trust resources. By failing to consider the Deschutes Basin from a holistic perspective, the DEIS and HCP run afoul of the 1855 Treaty, the federal-tribal trust relationship, the ESA, the National Environmental Policy Act ("NEPA"), and applicable secretarial orders and agency policies.

The bull trout, Chinook salmon, and MCR steelhead are tribal trust resources. *See* Secretarial Order 3206. The Services are duty-bound to advocate for the incorporation of measures into HCPs that will restore or enhance tribal trust resources; they must also advocate for HCP provisions that eliminate or minimize the diminishment of those resources and be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources. *Id.*

The DEIS devotes limited attention to the Tribe's trust resources affected by the HCP. There is no evidence that the Services advocated for HCP measures that would restore or enhance tribal trust resources, such as the MCR steelhead. Nor does the DEIS reveal that the Services made a meaningful attempt to minimize the diminishment of the Tribe's trust resources.

To the contrary, the DEIS finds adverse effects on fish harvested by the Tribe and on the successful reintroduction of salmon and MCR steelhead into habitats upstream of the Pelton Project. DEIS, pp. ES-23 – ES-24. How can those findings be consistent with the 1855 Treaty, the federal-tribal trust relationship, the ESA, NEPA, applicable regulations, secretarial orders and agency policies? In short, they cannot.[5]

The Services should work with the Applicants to modify the proposed action to better mitigate and minimize the effects on the covered fish species, to develop and evaluate alternatives not previously given serious consideration by the Services, and to supplement, improve or modify the Services' analyses. *See* 40 C.F.R. 1503.4. The Services and Applicants should develop an approach that better balances the needs of the Oregon spotted frog with the other covered species, including specifically salmon and the MCR steelhead, and the Tribe's trust resources, including its lands and waters.

A. Legal Framework of the HCP and DEIS

A conservation plan is a prerequisite to the issuance of an ITP. 16 U.S.C. § 1539(a)(2)(A). Such plans must identify the impact that will result from such taking, measures applicants will take to minimize and mitigate impacts, funding available to implement the planned mitigation measures, alternatives to the taking considered by applicants, the reasons the alternatives were not selected, and any other measures the Services require as being necessary or appropriate for purposes of the plan. *Id.* The Services may only issue an ITP they find, with respect to the permit application and related conservation plan, that:

1. the taking of protected species will be incidental;

2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

3. the applicant will ensure that adequate funding for the plan will be provided;

4. the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

[5] The DEIS conclusion that the proposed action would have an "adverse effect" on MCR steelhead is also at odds with NMFS stated-purpose in designating those fish as a nonessential experimental population in order to "allow time for local landowners and municipalities to develop well-informed conservation measures to support the reintroduction effort in the Upper Deschutes River basin." *See* 78 Fed. Reg. 2893, 2894 (January 15, 2013).

5. any measures required by the Secretary as being necessary or appropriate for purposes of the plan will be met, and he has received required assurances that the plan will be implemented.

16 U.S.C. § 1539(a)(2)(B). The potential severity of direct, indirect, and cumulative impacts on the species and habitat must be considered. 50 C.F.R. 222.307(c). Where the needs of protected species are in conflict, the provisions of the ESA apply equally and the measures taken to protect one species need to be considered in the adverse impacts analysis of the other species. *See, e.g., Miccosukee Tribe of Indians v. U.S.*, 566 F.3d 1257 (11th Cir. 2009) (in which the court assumed that the ESA applies equally to listed species and measures taken to protect one species must be considered in the adverse impacts analysis of the other species).

Issuance of an ITP is a federal action that requires evaluation under NEPA. The DEIS provides the NEPA-required analysis of the HCP and is intended to promote informed decision-making in light of the environmental impacts of the proposed federal action. In addition, under Section 7(a) of the ESA, 16 U.S.C. § 1536(2), the Services are required to ensure that the issuance of the ITP "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species."

In preparing an EIS, agencies must present complete and accurate information that is necessary to allow a well-informed and reasoned comparison of the alternatives and final decision. *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 812-813 (9th Cir. 2005). The quality and accuracy of the information relied upon is essential to the decision-making and public disclosure components of the EIS process. Environmental impact statements must contain "high quality information and accurate scientific analysis," as well as up front disclosures of shortcomings in the data or models relied upon. *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005). Agencies must ensure the scientific integrity of environmental impact statements.[6] 40 CFR 1502.24.

[6] An EIS analysis informs the ESA Section 7 consultation, and in fulfilling the Section 7 consultation requirements, the Services are required to use the best scientific and commercial data available. ESA Section 7(a)(2). "Where the information in [an EIS is] so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA." *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d at 811; 40 CFR 1500.1(b) and 1502.24.

B. The Tribe's Comments on the DEIS.

Following are the Tribe's specific comments on the DEIS, given the time allowed by the public comment period. The DEIS was published in the federal register on October 4, 2019 and provided a public comment period of 45 days. USFWS subsequently extended the public comment period by 15 days. The DEIS is two volumes and contains a total of 1,182 pages. The HCP is an additional 871 pages. Both documents are highly technical and require substantial analysis. A 60-day public comment period is not adequate or reasonable; it simply does not give the Tribe sufficient time to analyze both documents and consider their effects on its trust resources, lands, and waters. In light of the vital resources at stake, the Tribe objects to this restrictive comment period and makes the following comments without waiving additional issues that may be raised by the DEIS.

1. Executive Summary

Figure ES-1 purports to describe the land and waters covered by the HCP. Figure ES-1, however, contains a material omission; it fails to identify the Indian lands and waters that are ostensibly within the lands and waters covered by the HCP. The 1855 Treaty provides that the boundary of the Warm Springs Reservation extends to the middle of the channel of the Deschutes River. Figure ES-1 describes the covered lands and waters as including the entire Deschutes River below Wickiup Dam, including that portion of the river adjacent to the Warm Springs Reservation. The DEIS does not acknowledge that the covered lands and waters include the Tribe's lands and waters reserved by the 1855 Treaty. The DEIS also fails to state that the covered lands include Tribal trust lands outside the Warm Springs Reservation, which are located at Sherars Falls on the lower Deschutes River. Sherars Falls is a site of significant cultural importance to the Tribe and its members. Our people have fished there since time immemorial, and the area's significance is marked by the presence of petroglyphs created by our old people. Sherars Falls contains additional, substantial cultural resources and archeological sites. The Services failure to accurately describe the Tribe's lands and waters affected by the HCP have resulted in an incomplete analysis for purposes of NEPA.

2. Chapter 1 Purpose and Need

a. 1.6 NEPA Cooperating Agencies

Chapter 1.6 lists the cooperating agencies for the DEIS. The list includes the Tribe, and we appreciate the ongoing engagement by the Services during the NEPA process. We feel it is necessary, however, to point out that the Tribe cannot, as a matter of law, be a cooperating agency for purposes of NEPA. *See* 40 C.F.R. 1501.6 (cooperating agencies are other "Federal" agencies with jurisdiction over the subject matter of the federal action). The Tribe is sovereign, federally-recognized, Indian tribe; it is not a federal agency. We nonetheless appreciate the Services according us the functional equivalent of cooperating agency status.

b. 1.7 Tribal Consultation

Secretarial Order 3206 requires the Services to work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems. Both USFWS and NMFS have developed tribal consultation policies and handbooks. *See* U.S. Fish & Wildlife Service Tribal Consultation Handbook (updated October 2018); NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations (November 12, 2013). Those guiding documents require the Services to inform themselves about the Tribe's culture and political organization.

For purposes of the HCP, the Services should have adopted a consultation protocol that engaged the Tribal Council in a meaningful government-to-government consultation with its counterparts from the Services. That did not occur, however. The consultation was limited to staff-level consultation, which is appreciated by the Tribe. The omission of formal government-to-government consultation at the leadership level, however, is problematic given that the Warm Springs Reservation lies almost entirely with the Deschutes Basin and the covered lands and waters of the HCP include some of the Tribe's lands and waters located within and outside the Reservation.

3. Chapter 2 Proposed Action and Alternatives

NEPA requires an alternatives analysis, which is properly understood as the "heart of the environmental impact statement." 40 C.F.R. 1502.14. An environmental impact statement should present the impacts of the proposed action and the alternatives in comparative form, thereby "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

An environmental impact statement must "[r]igorously explore and objectively evaluate all reasonable alternatives," devoting "substantial treatment to each alternative" and including "reasonable alternatives not within the jurisdiction of the lead agency." *Id.* A range of reasonable alternatives must be considered. *See Westlands Water Dist. v. U.S. Dept of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). The selection and discussion of alternatives must foster informed decision-making and public participation. For that reason, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2010) (citing *Westlands Water Dist.*, 376 F.3d at 868).

The DEIS analyzes four alternatives. The first is a no action alternative, which assumes continuation of the actions covered in the current ESA Section 7 Biological Opinion for the Upper Deschutes River addressing the Oregon spotted frog, and which would result in the Applicants being subject to liability for "take" of protected species. DEIS, p. 2-2. The second alternative is the proposed action, which includes conservation measure WR-1 that adjusts the timing and volume of flow in the Deschutes River below Wickiup Dam. DEIS, Table 2-4. WR-1 focuses on regulating flows during spring months, increasing flows during fall and winter months, decreasing flows during summer months, and limiting ramp down rates at the end of the irrigation season. *Id*. The WR-1 fall and winter minimum flow schedule is:

- 1-5 years: 100 cfs
- 6-10 years: 200 cfs
- 11-20 years: 300 cfs
- 21-30 years: 400 cfs

The Services conclude the WR-1 will cause adverse environmental effects in the Crooked River, particularly during the 21-30 year time period, which the DEIS describes as "full implementation" when the minimum fall and winter flow in the upper Deschutes River is the greatest. The Services identify adverse effects relating to water quality, Columbia bull trout habitat, MCR steelhead habitat, spring Chinook habitat, and reintroduction of salmon and MCR steelhead above the Pelton Project. DEIS, pp. 3.3-18, 3.4-38, 3.4-40, 3.4-42, 3.8-7, and 3.8-8.

The Services conclude:

> "Beneficial storage season effects of the proposed action on the Crooked River compared to the no-action alternative would be outweighed by adverse irrigation season effects that would *impede reintroduction success and potentially result in reintroduction failure by reducing brood year success during critical early stages of reintroduction depending on annual water management practices*. Water supply modeling assumes early irrigation season diversions from the Crooked River would increase as water supply availability on the Deschutes River declines. The frequency of this outcome would depend on specific, annual water supply management decisions, and water supply availability that are not captured fully by modeling results. *Therefore, overall, the proposed action would have an adverse effect on spring Chinook salmon and steelhead trout reintroduction compared to the no-action alternative*." DEIS, p. 3.8-8 (emphasis added).

Despite that alarming conclusion, the Services limit their alternatives analyses to variations of the proposed action that accelerates the depletion of the Deschutes River water supply for NUID and concentrates risk on salmon and MCR steelhead reintroduction. DEIS, Table 2-5, Table 2-6. The Services fail to consider a range of reasonable alternatives, or any alternatives that would that lessen the impact and risk to the covered fish species in the Crooked River. The DEIS is, therefore, inadequate. *See Oregon Natural Desert Ass'n*, 625 F.3d at 1122.

The Services should supplement, improve, and modify the alternatives analyses to include one or more new alternatives that contain the following:

- Modification of WR-1: The Services should analyze lower fall and winter minimum flows in the Deschutes River at full implementation (years 21-30) coupled with additional habitat improvement measures to maintain similar beneficial effects for the Oregon spotted frog as currently exists in the proposed action. The Services should then utilize the additional Deschutes River water to bolster NUID's water supply to offset to its needs to use Crooked River water during the irrigation season, thereby making water available instream for the benefit of covered fish species.

- Modification of CR-1, CR-2, CR-3, and CR-4: The Services should analyze the Crooked River sub-basin instream flows in light of their trust obligations to the Tribe and the 1855 Treaty reserved rights to have harvestable populations of fish above the Pelton Project and to an amount of water at least equal to what is required by the ESA for the covered species in the DEIS. *See U.S. v. Washington*, 853 F.3d 946; *Baley v. United States*, 2019 WL 5995861 (Nov. 14, 2019). In conjunction with the modified WR-1 described above, the Services should analyze how to shape Crooked River in-stream flows in a manner consistent with their trust responsibility, the Tribe's treaty-reserved rights to fish and water, NUID's Crooked River irrigation water rights, and the Crooked River Act to better minimize and mitigate the impacts of incidental take of covered fish species to the maximum extent practicable.

- Modification of DR-2 and CR-4: The Services should analyze an alternative conservation funding strategy that better balances an allocation of resources among the covered areas and the covered species. It is not reasonable to allocate $8,000 annually to the Crooked River sub-basin in the context of the total capital investment associated with the HCP. The scope of the Services' analyses should include coordinating the HCP conservation funds with other sources of capital, such as the Pelton Fund, so as to maximize the efficiency of the HCP conservation funds. The Services should also consider whether some of the resources currently allocated to canal piping could be better deployed to other conservation measures throughout the covered areas and among the covered species.[7]

[7] The Tribe has substantial experience developing and implementing conservation programs to protect and enhance its treaty-reserved rights throughout its aboriginal lands. For example, its efforts in the John Day River basin have focused on voluntary private party restoration efforts resulting in significantly improved habitat for fish and wildlife. In the Deschutes Basin, the Tribe is a founding stakeholder of the Deschutes River Conservancy a collaborative decision making entity focused on restoring streamflow and improving water quality in the Deschutes Basin. The Tribe is willing to work with the Services and Applicants to

- Adaptive Management Measure: The Services should analyze a comprehensive adaptive management measure that allows for future adjustments to all conservation measures in the HCP so as to optimize the practicable minimization and mitigation of effects on all covered species across all covered lands during the permit term.

The Tribe urges the Services to supplement, improve, and modify the alternatives analyses. The Services should be more transparent about the competing biological needs of the multiple species covered by the HCP and the trade-offs inherent in proposed action, and engage stakeholders to identify solutions for balancing the needs of the entire Deschutes Basin. The Services should widen their focus to a system-wide level and not allow the OSF Litigation or risk of future litigation to unduly prioritize the needs of one covered species—the Oregon spotted frog—at the expense of other covered species. The DEIS should focus on mechanisms and ecological processes leading to desired outcomes, rather than setting precise criteria for the entirety of the ITP term. *See* Michael G. Thabault, The Role of Science in Balancing the Needs of Protected Species: An Historical Perspective, 131 Journal of Contemporary Water Research & Education 55 (2005).

4. Chapter 3 Affected Environment and Environmental Consequences

The Tribe provides comments below to DEIS Chapter 3, sections 3.1.1 Modeling, 3.2 Water Resources, 3.3 Water Quality, 3.4 Biological Resources, 3.8 Tribal Resources, 3.9 Socioeconomics and Environmental Justice, and 3.10 Cultural Resources. The Tribe also makes the following general comments. First, the DEIS does not specify the degree to which uncommitted mitigation measures were considered in the effects analysis, which is contrary to NEPA's requirement that an impacts analysis may rely only on mitigation measures that are funded and certain to occur. Second, the DEIS should better describe the potential effects of climate change on the study area resources and how climate change may create a changed condition for purposes of the HCP. Third, the DEIS should clarify how implementation of the Crooked River Act may affect the proposed conservation measures in the HCP.

a. 3.1.3 Modeling

The Services determine that the effects of the proposed action and Alternatives 3 and 4 on the natural and human environment are "primarily a result of changes in water management operations." DEIS, p. 3.1-2. Accurate scientific analysis is essential to implementing NEPA. 40 C.F.R. 1500.1(b). The Services are required to insure the scientific integrity of analyses in environmental impact statements. 40 C.F.R. 1502.24. For purposes of the development of a conservation plan and issuance of an ITP, the Services must consider the best available science.

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develop a conservation funding strategy that better meets the needs of all covered lands and species.

Habitat Conservation Planning and Incidental Take Permit Processing Handbook, U.S. Department of the Interior Fish and Wildlife Service and U.S. Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service, December 21, 2016 ("HCP Handbook"), p. 2-5.

The Services relied on RiverWare computer modeling to predict how those changes would affect water distribution, streamflow, reservoir storage and water supply, reservoir water surface elevation and flood storage capacity, and flood flows. *Id.* The RiverWare model, however, fails to reliably predict likely future conditions. The Services need to describe how decision-making protocols impact the model outputs in order to effectively analyze effects. The Tribe would like to assist the Services in making sure that the RiverWare Model incorporates as many relevant policies, agreements, and protocols as possible. For example, it is not clear whether DBBC patron diversions are modeled accurately, or at all. It is not clear how or if the Oregon Department of Environmental Quality's imperative to promulgate total maximum daily load standards for the Deschutes Basis is addressed in the model.

The RiverWare model also fails to take into account the interconnectedness of the Deschutes Basin. The model fails to adequately analyze how implementation of WR-1 in the proposed action and Alternatives 3 and 4 affects NUID's reliance on its Crooked River water supply. The model appears to model the Deschutes River and the Crooked River systems independently, thereby not analyzing how water management in the upper and middle Deschutes River will impact the Crooked River. The RiverWare model must be modified to analyze the interconnected effects of the HCP conservation measures—direct and indirect, near and remote.

b. 3.2 Water Resources

The DEIS fails to identify the Tribe as a water user in the Deschutes Basin. The Tribe's WRSA determines the scope and attributes of the Tribe's reserved Indian water right for lands within the Warm Springs Reservation, which includes instream flows for rivers and streams arising on the Reservation along with instream flows in the Deschutes and Metolius Rivers for the benefit of the aquatic ecosystem of the Reservation. The Tribe also possesses 1855 Treaty reserved rights to water in the streams and rivers of the Deschutes Basin outside the Reservation in an amount equal to at least what is required by the ESA for the covered species in the DEIS. *See Baley v. United States*, 2019 WL 5995861 (Nov. 14, 2019). The DEIS should acknowledge those legally enforceable rights of the Tribe in this chapter and analyze the HCP's proposed action and alternatives consistent with those rights.

c. 3.3 Water Quality

The DEIS water quality effects determination is incomplete. Because the covered lands include the lands and waters of the Warm Springs Reservation, the Services must analyze the water quality effects of the proposed action and all alternatives under the Tribe's adopted water quality

standards and the water quality provisions of the WRSA. The Services must also analyze water quality issues in light of their trust obligations to the Tribe and the 1855 Treaty reserved rights to have harvestable populations of fish throughout the Deschutes Basin. *See U.S. v. Washington*, 853 F.3d 946.

Because accurate scientific analysis is essential to implementing NEPA, 40 C.F.R. 1500.1(b), the Services should also incorporate the recently published, peer-reviewed *Water Quality Study for the Pelton Round Butte Project and the Lower Deschutes River: Monitoring & Modeling*, Joseph Eilers and Kellie Vache, MaxDepth Aquatics, Inc., Bend, Oregon (Jun. 2019) ("Water Quality Study") into the water quality analyses. The Water Quality Study showed that Crooked River temperatures are elevated and the river contains high levels of nitrogen from anthropogenic sources such as irrigation return flow. The Crooked River is a major source of nutrients in Lake Billy Chinook, which in turn affects water quality in the Lower Deschutes River. High concentrations of nutrients, for example, likely contribute to the flourishment of periphyton, which adversely affects fish habitat. The study points out options for treatment of return irrigation flow which would improve conditions in the Deschutes Basin, such as distribution of the return flow through constructed or existing wetlands. Those conservation measures are not meaningfully analyzed in the DEIS or HCP.

The water quality issues in the Deschutes Basin are well known. The causal link between irrigation return flows and water quality is not reasonably debatable. Yet, the DEIS does not sufficiently analyze how return flows are likely to impact the covered species and covered lands. The DEIS includes return flow as a covered activity, and acknowledges its impact on water quality, but does not appear to evaluate what measures might be practicable (or are intended) to mitigate or minimize these impacts. Without those analyses, the DEIS is not complete and will not support informed decision-making with regard to whether to issue an ITP.

d. 3.4 Biological Resources

Section 3.4 of the DEIS describes the affected environment for biological resources and effects on those resources resulting from the proposed action and its alternatives. DEIS, p. 3.4-1. An environmental impact statement is required to include a detailed statement on any adverse environmental effects which cannot be avoided in the event the proposed action is implemented. 42 U.S.C § 4332(2)(C)(ii).

An environmental impact statement must include a discussion of direct and indirect effects and their significance, the environmental effects of the proposed action and alternatives, and natural or depletable resource requirements. 40 C.F.R. 1502.16. Environmental impact statements must also discuss possible conflicts with approved tribal, state, and local plans and laws, and should "describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 C.F.R. 1502.16(c); 40 C.F.R. 1506.2(d). The objectives of the statute underlying the federal action for which the statement is prepared should be addressed in the analysis. *Oregon*

Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1109 (9th Cir. 2010). The conservation objectives underlying the ESA, therefore, must be considered in the DEIS.

i. 3.4.1 Methods

The Services set forth the adverse effects thresholds on pp. 3.4-3 and 3.4-4 of the DEIS. Those thresholds are incomplete because they fail to appropriately reconcile the proposed action and alternatives with other federal laws and plans, Tribal laws and plans, and state laws and plans, as required. In addition, they set an unreasonably high bar for an adverse effect finding, which is out of sync with the goals of the ESA.

The Services do not adequately reconcile the proposed action and its alternatives with the MCR Steelhead Recovery Plan. As far as the Tribe can discern, the Services do not even reference the Plan, which is a NMFS' foundational document for the recovery and restoration of the MCR steelhead so that they are self-sustaining and no longer need protection under the ESA.

The Plan identifies the Pelton Project as a limiting factor:

> *"Blocked migration to historically accessible habitat*. Historically, summer steelhead had free access to most of the Deschutes watershed, including the Crooked River, Metolius River, Deschutes River upstream to Big Falls, and Whychus Creek. Summer steelhead were historically present throughout much of the Crooked River basin, with the exception of the North Fork Crooked River above Upper and Lower Falls. Steelhead were still present in the Crooked River until the mid to late 1950s, and were occasionally caught by anglers. Now the Pelton-Round Butte Hydroelectric Project (Project), constructed at river mile (RM) 100 on the mainstem Deschutes River, creates the primary barrier to anadromous fish attempting to reach spawning and rearing areas in the upper basin. The project was completed in 1964 with upstream and downstream fish passage facilities. However, by 1966 it appeared that downstream passage through Lake Billy Chinook, the reservoir behind Round Butte Dam, could not be maintained because of poor guidance of out-migrating smolts. The last fish were passed in 1968. Currently, plans are underway to reinitiate fish passage facilities at the Pelton-Round Butte complex and reintroduce steelhead to the upper basin (details in Section 9.4.2 of the Oregon Steelhead Recovery Plan). The second large barrier to upstream fish migration into the Crooked River is Opal Springs Dam at RM 7. Agencies and stakeholders are working together to address fish passage issues (see Section 8.2.4 in the Oregon Steelhead Recovery Plan)." MCR Steelhead Recovery Plan, p. 6-20.

The Plan further provides that "the decline of the Middle Columbia River steelhead DPS is caused by widespread habitat degradation, impaired mainstem and tributary passage, hatchery

effects, and predation/ competition/ disease," and that "because of the steelhead's complex life cycle and the many changes that have taken place in its environment, the factors limiting its survival must be addressed in concert, and in an integrated way." *Id.* at 7-1. The Plan concludes that a coordinated, population-by-population and site-by-site approach to recovery is required, a component of which is the reintroduction program. *Id.* The Recovery Plan acknowledges that the viability of the Cascades Eastern Slope Tributaries Major Population Group will be bolstered if the reintroduction of steelhead in the Crooked River is successful. *Id.* at 7-17. The Services must analyze the HCP in the context of the MCR Steelhead Recovery Plan and reconcile any conflicts.[8]

The Services must also reconcile the HCP's proposed action and alternatives with the biological opinion issued by NMFS in connection with the issuance of the 2005 License for the Pelton Project. That biological opinion expressly provides that the reintroduction of MCR steelhead above the Pelton Project is expected to improve the viability of the Deschutes Basin population overall by increasing distribution and production of the species. Biological Opinion, Pelton Round Butte Hydroelectric Project, FERC Project No. 2030 (Feb. 1, 2005), p. 8-2. The Services should further analyze the proposed action and alternatives for consistency with the 2005 FERC License itself, which contains federally mandated requirements that are directly impacted by the proposed action and alternatives. Those license requirements include the Fish Passage Plan and conditions relating to Clean Water Act Section 401 certifications issued by the Oregon Department of Environmental Quality and the Tribe. The Services must evaluate the proposed action and its alternatives' effects on the Pelton Project licensees' ability to comply with the 2005 License.[9]

The Services should also analyze the HCP in the context of the MCR steelhead recovery plan issued by the State of Oregon, which has determined that MCR steelhead production in historical habitats is designated as a tributary management strategy of the highest priority. *See* Oregon Mid-Columbia Steelhead Recovery Plan, Oregon Dept. of Fish and Wildlife (Feb. 2010), pp. 1-47. Likewise, the Services must also reconcile the proposed action and alternatives with applicable Tribal laws and policies including the Tribe's Ordinance 74, Integrated Resources

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[8] Although the corresponding adverse effects threshold provides that an effect would be adverse if it conflicts "with goals set forth in an approved recovery plan for a federal listed plant or wildlife species to the extent that the goals could not be achieved," DEIS pp. 3.4-3, this is too narrowly drawn. The total failure of a recovery plan is not a predicate to a finding of an adverse effect.

[9] This failure is particularly problematic as the Pelton Project Fish Passage Plan (Article 17) and the Section 401 Certifications for the Project are imposed to enable ESA compliance obligations and federal Clean Water Act requirements—statutes that are directly relevant to the proposed action and alternatives.

Management Plan (IRMP), Tribal Water Code (Ordinance 80), and the Wild and Scenic River ordinance (Warm Springs Tribal Code Chapter 401). The Tribe is willing to assist the Services in the necessary evaluation of the alternatives' effects on those laws and plans.

The Services must further consider the fact that the MCR steelhead's status as a nonessential experimental population expires on January 15, 2025, well-before the expiration of the proposed 30-year term of the ITPs. 78 Fed Reg 2893 (2013). The stated purpose of that designation was to facilitate the very action under review in the DEIS—namely that Basin stakeholders would develop conservation measures to support the reintroduction program and aid in the recovery of the species. 78 Fed Reg at 2894.

Finally, the DEIS also erroneously asserts that the effects of the proposed action and alternatives would be adverse only if they result in permanent reductions in the quality and function of critical habitat; however, habitat degradation short of "permanent is viewed as adverse to protected species—in fact, any adverse modification of critical habitat runs contrary to the ESA. 16 USC 1536(a)(2). The Services must consider adverse effects consistent with appropriate thresholds.

ii. BIO-4 to BIO-12, BIO-14, and BIO-15 bull trout, MCR steelhead, spring Chinook, sockeye salmon, redband trout, summer/fall Chinook, kokanee salmon.

In analyzing the effects on the bull trout, MCR steelhead, spring Chinook, sockeye salmon, redband trout, summer/fall Chinook, kokanee salmon, the Services must redo their effects analyses and take into account the applicable legal standards as outlined above. The Services must include a detailed statement on any adverse environmental effects which cannot be avoided in the event the proposed action is implemented. 42 U.S.C § 4332(2)(C)(ii).

As part of this analysis, it bears emphasis that the reintroduction of salmon and MCR steelhead above the Pelton Project and into Whychus Creek and the more recent achievement of volitional passage of MCR steelhead, bull trout and salmon above Opal Springs Dam in the Crooked River are milestone regional commitments to the recovery strategy that should be considered as part of the species' baseline. As co-owners and joint licensees, the Tribe and PGE have invested significantly in a comprehensive array of conservation measures in connection with the reintroduction of anadromous fish about the Pelton Project. Those activities have included construction of a selective water withdrawal tower, habitat restoration and enhancement projects, riparian protection programs, conversions to piped delivery of irrigation water, and fish passage and culvert replacement projects, among others. Those actions not only support fish reintroduction above the Pelton Project by benefitting fish while they occupy the Crooked River, but also help create a habitat foothold in the Crooked River to aid the fish in further expansion into their historical range. The significance of the Crooked River is underscored by Congress' enactment of the Crooked River Act, which is intended, in part, to provide management options

for stakeholders to improve fish habitat, contributing to the generational investment in reintroduction of those fisheries.

Despite the backdrop of salmon, MCR steelhead and bull trout volitional passage into the Crooked River, stakeholder investments in the Deschutes Basin for the recovery of these species, and Congress' resource expectations for implementation of the Crooked River Act, there is no integrated analysis of relative benefits and trade-offs to the spotted frog and to the MCR steelhead at different winter release levels. The Services do not adequately describe how the proposed conservation measures are tailored to meet the needs of the Oregon spotted frog over other practicable alternatives. For example, the Services do not evaluate whether there are net benefits for the Oregon spotted frog if Wickiup Reservoir were managed for frog habitat rather than a primary reliance on WR-1. The HCP, instead, prioritizes winter release flows for the spotted frog without meaningful regard to potential impacts on salmon, bull trout and MCR steelhead flows in the Crooked River. The cumulative effect is less flexibility to shape flows to mimic the system's natural variability and overall to reduce instream flow and water quality in certain reaches. It is widely recognized that water quality conditions in the Crooked River do not meet all of the biological needs of the salmon, bull trout and MCR steelhead, and the HCP as proposed would impair those conditions further.

As noted, a primary concern of the Tribe is that the addition of conservation measures for the Oregon spotted frog in the HCP has inappropriately limited the conservation measures deemed practicable in the Crooked River. The practicability of fish flows in the Crooked River are premised on assumed increased Wickiup winter releases into the Deschutes River. WR-1 is a primary focus of the conservation measures in the HCP, and the potential for improved fish flows in the Crooked River are given inadequate attention without any corresponding analysis as to why the WR-1 is practicable in light of needed fish flows in the Crooked River.

Adherence to WR-1 has also eliminated consideration of other water management efforts that may result in water conservation beneficial to both species and that may provide effective adaptive management strategies. No adaptive management is proposed for the Crooked River or Whychus Creek even though the management of the covered fish species in these streams is highly complex and sensitive to changing flows in different water years and ongoing development in the Basin.

The lack of tools for adaptive management of the covered fish species also raises questions about implementation of the Wickiup Reservoir conservation measures themselves. While in later years WR-1 includes a reservation of authority in the USFWS to time the release and storage of water, based on consultation with NMFS, there is no guidance or management strategies regarding how that will be evaluated or exercised in a way to safeguard flows for salmon, bull trout, or MCR steelhead in multiple life stages.

The conservation measures proposed in the HCP and the alternatives considered in the DEIS result in beneficial effects to only one species covered in the HCP—the Oregon spotted frog. The same measures have also been identified as causing an adverse effect to the reintroduction program for other covered species, including MCR steelhead.

The competing needs of these ESA species is unnecessarily created by the apparent prioritization of winter release flows below Wickiup reservoir for the Oregon spotted frog, which directly increase NUID's reliance on its Crooked River water rights. Although the DEIS concludes that the proposed action would have an adverse effect on the MCR steelhead reintroduction, DEIS at 3.8-8, the Services do not adequately evaluate how this impacts recovery of the MCR steelhead species. It is incumbent on the Services to adequately evaluate how impacts to the reintroduction program impact recovery of the MCR steelhead species. The Services cannot, and should not, prioritize the conservation measures for the Oregon spotted frog and assume that adverse environmental effects caused by those conservation measures are unavoidable.

e. 3.8 Tribal Resources

The Services describe the "tribal resources" as "treaty-reserved, or otherwise federally protected, rights to tribal fishing, hunting and gathering practices, and pasturing of stock including access to areas associated with a tribe's treaty rights. These resources may include plants, animals, fish, or other materials used for commercial, subsistence, and ceremonial purposes. Tribal resources includes all natural resources, including water and harvestable fisheries, relevant to treaty and federally recognized tribes with ceded lands and usual and accustomed stations in the study area (Article 1, Treaty with the Tribes of Middle Oregon, 12 Stat. 963, 1859)." The Tribe generally accepts that description of its resources with a caveat. The Tribe's cultural resources should be included in this description. The Services should also analyze the Tribe's cultural resources separate from non-Tribal cultural resources.

i. 3.8.2 Affected Environment.

For the reasons set forth in Section IV.B.1 of this letter, the Services description of the affected environment is not accurate. The Services fail to describe that a portion of the HCP's covered lands are Indian lands and waters located within the Warm Springs Reservation. The Services must supplement, improve or modify their analyses to reflect that Indian lands and waters within the Warm Springs Reservation are within the study area. *See* 40 C.F.R. 1503.4.

ii. 3.8.4 Environmental Consequences.

(a) TR-1 Affect to Fish Populations Harvested by Tribes.

The Services conclude that "[o]verall, the effect on tribal fish resources would not be adverse because the primary species and populations harvested by tribal members are in the Lower Deschutes River." DEIS, p. 3.8-7. The Tribe considers that conclusion nonsensical. While it is accurate that tribal members currently focus their fishing activities in the Lower Deschutes River, that was not always so. The reason that tribal members do not concentrate their fishing activities above the Pelton Project is because the Project has largely extirpated harvestable populations of anadromous in those areas. The Services cannot, as a matter of law or of good conscience, assume no effect on the Tribe because it currently has no harvestable fish to take above the Project, especially in light of the recognized historical range of the species and massive investment on the part of the Tribe to restore these very populations.

The Fish Passage Plan set forth in the 2005 License for the Pelton Project contains objectives for self-sustaining, harvestable populations of salmon and MCR steelhead above the Project. The Fish Passage Plan is consistent with the MCR Recovery Plan and with the federal-tribal trust responsibility by re-establishing a traditional tribal fishery above the Pelton Project. The Services will not fulfill the United States' trust responsibilities to the Tribe by ignoring adverse effects to the Tribe's treaty-reserved right to have harvestable populations of salmon and MCR steelhead above the Pelton Project.

The Services must supplement, improve or modify their analyses to better assess the proposed action and alternatives on the Tribe's treaty-reserved rights to have fish to take above the Pelton Project. *See U.S. v. Washington*, 853 F.3d 946. The Services need to work with the Applicants, and the Tribe on a government-to-government basis, to modify the proposed action and alternatives to better mitigate and minimize the effects on the covered fish species. *See* 40 C.F.R. 1503.4.

(b) TR-2 Reintroduction of Salmon and MCR Steelhead into Habitats Upstream of the Pelton-Round Butte Complex.

The Services conclude:

> "Beneficial storage season effects of the proposed action on the Crooked River compared to the no-action alternative would be outweighed by adverse irrigation season effects that would impede reintroduction success and potentially result in reintroduction failure by reducing brood year success during critical early stages of reintroduction depending on annual water management practices. Water supply modeling assumes early irrigation season diversions from the Crooked River would increase as water supply availability on the Deschutes River declines. The frequency of this outcome would depend on specific, annual water supply management decisions, and water supply availability that are not captured fully by modeling results. Therefore, overall, *the proposed action would have an adverse effect on spring Chinook salmon and steelhead trout reintroduction compared to the no-action alternative*." DEIS, p. 3.8-8 (emphasis added).

The Services make similar conclusions with respect to Alternatives 3 and 4. *Id.* at 3.8-9 – 3.8-11. The Tribe concurs with that conclusion but believes that it is not complete.

First, it is not proper to characterize the reintroduction of salmon and MCR steelhead above the Pelton Project as solely a tribal resource. The reintroduction of those species are the subject of federal and state fisheries plans and are a requirement of the 2005 License for the FERC Project. The Services' conclusion that proposed action may result in the failure of the reintroduction of those fish species must be analyzed in a broader context and not just analyzed in terms of how it affects the Tribe.

Second, the Services' must evaluate the HCP's adverse impacts on salmon and MCR steelhead reintroduction and the corresponding effects on the Pelton Project 2005 License requirements, including the Fish Passage Plan. The Services failure to do so exposes the Tribe and PGE to license compliance liability and increased financial exposure associated with the Fish Passage Plan. The Services' incomplete analysis risks creating an implicit servitude on the Pelton Project to mitigate the adverse effects that the HCP will have salmon and MCR steelhead reintroduction. This will place a disproportionate conservation burden on the Tribe, contrary to Secretarial Order 3206.

(c) TR-4 Affect the Warm Springs Tribes' Off-Reservation Reserved Water Right

The Services analyses of the effect of the proposed action and alternatives on the Tribe's reserved water rights is incomplete. The Services wrongly assume that the Tribe's reserved water rights consist solely of its reserved water right for lands within the Warm Springs Reservation, the scope and attributes of which are settled and set forth in the WRSA. The Tribe, however, also possesses treaty-reserved water rights for instream flows to maintain fish habitat throughout the Deschutes Basin. *See U.S. v. Washington*, 853 F.3d 946; *Baley v. United States*, 2019 WL 5995861 (Nov. 14, 2019). The Services fail to recognize that treaty-reserved right or to analyze the HCP's effect on that right, particularly with respect to instream flows (including the effects on both quantity and quality) in the Crooked River.

The WRSA also guarantees to the Tribe instream flows in various reaches of the Deschutes and Metolius Rivers. The rights secured to the Tribe under WRSA, which are based on its 1855 Treaty, are briefly acknowledged in the DEIS as a tribal resource. The DEIS concludes, however, that "the proposed action would have no effect on the Tribes' ability to exercise their reserved off-reservation water right compared to no-action alternative." The Services base that conclusion on a determination that any changes in streamflow caused by the HCP, which have the potential to impact the Tribe's water right, are limited to the Lower Deschutes River and Lake Billy Chinook, where no adverse change is anticipated. The basis on which Services make that determination is not clear.

The Services' analysis does not appear to take into account the HCP's effect on water quality in the Crooked River and the consequent impact on water quality in Lake Billy Chinook and the Lower Deschutes River. The Tribe is concerned that the Services have not adequately considered the Tribe's rights and interests embodied in the WRSA, including its right to protect the aquatic ecosystem of the Reservation and to use its reserved water right for out-of-stream uses. To the contrary, the Services largely ignore the WRSA and assume that the portion of the Tribe's reserved water right that may be used out-of-stream, but is currently not used, will remain instream for the entirety of the 30-year permit period. The Tribe is concerned that this assumption will result in an implied servitude, or possible expropriation of, that portion of the Tribe's reserved right in violation of the U.S. Constitution, the 1855 Treaty, the WRSA and federal law.

f. 3.9 Socioeconomics and Environmental Justice

As explained in Section IV.B.4.e.ii(a) of this letter, the Services have inappropriately minimized the HCP's impact on the Tribe's treaty-reserved fishing rights by focusing on areas where its members currently fish. The Services fail to consider that the Tribe's members fish in those locations because that is where the fish are currently located after decades of habitat degradation and extirpation from certain areas of the Deschutes Basin. The Services must supplement and improve their SOC-3 and SOC-9 analyses to assess the cultural and economic value to the Tribe of reintroduction of salmon and MCR steelhead above the Pelton Project and the HCP's risk to the success of reintroduction.

The Services must supplement and improve their SOC-6 analyses to better account for the Tribe's joint ownership of the Pelton Project. Specifically, the Services should consider scenarios where the HCP may trigger additional passage, mitigation and enhancement requirements in the 2005 License and the costs associated with such requirements. Those costs will impact the value of the Tribe's ownership in the Pelton Project and the revenues that it receives to fund important governmental services for its members, which are among the most poverty stricken populations in the region. The Tribe has no way to offset those costs.

g. 3.10 Cultural Resources

Under NEPA, the EIS must include an analysis of the effects of a proposed action on both historic and cultural resources. See 42 USC 4331(b)(2) and (4); 40 CFR 1502.16(g); 40 CFR 1508.8(b). The National Historic Preservation Act (NHPA) further requires that the Services examine the impacts of federal undertakings on "historic properties" through a "Section 106" analysis. 54 USC 306108. This analysis should be coordinated with the NEPA process as early as possible. 36 CFR 800.8. Incidental Take Permits are among the "federal undertakings" subject to NHPA's Section 106, as is implementation of the HCP's conservation requirements for covered species. *See* 36 CFR 800.16(y); HCP Handbook, at 3-29 and Appendix A. When initiating a Section 106 process, agencies are required to engage in a government-to-government consultation with affected tribes that is sensitive to their concerns and needs, and this consultation should take place early in the planning process. *See* 36 CFR 800.3 and 800.2; *Quechan Tribe of Fort Yuma Indian Reservation v. US DOI*, 755 F.Supp.2d 1104, 1108-09 (US Dist. Ct. SD Cal., 2010).

Although the DEIS contains an analysis of the proposed action and alternatives on "cultural resources," *see* DEIS pp. 3.10, it appears that the Services have not yet initiated the Section 106 process. The term "cultural resources" is not defined in NEPA or its regulations, but the DEIS itself defines the term by reference to the NHPA ("Cultural resources specifically relate to archaeological resources as well as buildings, structures, and objects per 36 CFR 800."). DEIS pp. 3.10-1. Similarly, the DEIS' identification of what impacts would qualify as "adverse effects" are tailored to those which are within the purview of the NHPA. *See* DEIS 3.10-3

(limiting "adverse effects" to those impacts that would adversely affect an archaeological resource that includes human remains, that has been determined to be eligible for listing in the National Registry of Historic Places (NRHP), or that is potentially eligible for the listing in the NRHP).

The Services' review of cultural resources in the DEIS appears incomplete. In particular, the Tribe is concerned with the DEIS's conclusion that the HCP's effects on cultural resources will be limited to those in the Wickiup Reservoir. That conclusion is based on the Services' assessment that Wickiup is the location where the greatest changes in water level are expected. DEIS pp. 3.10-1 and n.1. The problems with this conclusion are multi-fold.

First, given the concerns expressed above relating to the accuracy of the RiverWare modeling, as well as the HCP's significant effects on flows throughout the Deschutes Basin, the Tribe lacks confidence that the Services are correct in their assessment that significant water level fluctuations will be concentrated in Wickiup. The Tribe, importantly, also disagrees with the Services apparent assessment that water level fluctuations must be greater than a foot to lead to impact cultural resources. The Tribe has observed that smaller changes in water level can impact archaeological sites, dislodging artifacts and remains out of the sediment, exposing them to the environmental factors and the potential for looting.

More fundamentally, however, the Tribe believes that Services have improperly limited review of potential effects to Wickiup Reservoir and the resources identified therein. Although the Tribe's cultural resources database does not currently contain information about sites in the vicinity of Wickiup Reservoir to supplement information contained in the Oregon SHPO database, the Deschutes River is well-known as an important traditional-use area for Tribal members and their ancestors (including fishing, hunting, and gathering). Formal studies to determine the cultural significance of the areas affected by the HCP have not yet been undertaken and are needed prior to the implementation of any HCP.

The cultural resources evaluated by the Services considered are far narrower than the NHPA's definition of historic property that may be eligible (or is listed) for inclusion in NRHP and narrower than what NEPA requires. As indicated by the NEPA regulations, which refer to cultural and historic resources separately, cultural and historic resources are distinct from each other rather than one and the same. *See* 40 CFR 1502.16(g). Historic properties are a subset of cultural resources, and "the term 'cultural resources' covers a wider range of resources than 'historic properties,' such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections." NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, Council on Environmental Quality, Executive Office of the President, and Advisory Council on Historic Preservation, Mar. 2013. The Services, therefore, may not restrict their analysis to those resources covered by NHPA, nor limit "adverse effects" to only those effects that would be proscribed by NHPA. Certainly, from the perspective of the Tribe the term "cultural resources" is more expansive than that offered in the DEIS and includes,

for example, air, water, traditionally-used plants, animals, and areas, and religious and ceremonial sites, regardless of whether such resources are eligible for listing in the NRHP.

Even under NHPA, "historic property" is defined broadly to include "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria." 36 C.F.R 800.l(1). As recognized in the NHPA, determination of eligible historic properties requires direct consultation with the Tribe, which has not yet occurred.

The Services must conduct a thorough Section 106 consultation to evaluate the HCP's true effects on the area's cultural resources. A thorough consultation will require appropriate scoping of potential resources and areas of potential effect and studies conducted in consultation with the Tribe. In addition, cultural monitoring, inadvertent discovery and mitigation measures will need to be in place for the affected areas in the event the HCP is implemented.

Because of the obvious deficiencies of the DEIS Cultural Resources section, the Tribe is concerned that it does not adequately inform the Services of the effects of the proposed action on cultural resources and that the actual impacts will be far greater than described. While the Tribe understands that the Services will conduct a formal Section 106 consultation, the Services should revise the Cultural Resources section of the DEIS to more accurately identify the area of potential effect and the cultural resources that could be affected. For DEIS purposes, the Services should not restrict their analysis to Wickiup Reservoir or those resources covered by NHPA and they should more accurately describe historic properties that may be NHPA eligible.

5. Chapter 4 Cumulative Impacts

The Services should supplement and improve their analyses of the potential impacts of the proposed action and alternative actions to better assess the cumulative effects of the HCP on the water quality of the Crooked River. In particular, the Services should expressly analyze the interrelationship between the HCP and the Pelton Project relating to water quality. The Services should include the Water Quality Study recently completed by PGE in their analyses.

C. The Tribe's Comments on the HCP.

The Tribe acknowledges the effort the Applicants have undertaken in connection with the preparation of the HCP. The Tribe appreciates the collaborative and inclusive process that Applicants adopted, in which they have consistently demonstrated a good faith and sincere respect for the Tribe's sovereignty, culture, and treaty-reserved rights. The Services, however, may only issue ITPs if they find, among other things, that the HCP will (a) ensure to the

maximum extent practicable, minimize and mitigate the impacts of such taking, and (b) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in wild. 16 U.S.C. § 1539(2)(B)(ii) and (iv). For the reasons set forth in this letter and expressly incorporated here, the HCP does not minimize and mitigate, to the maximum extent practicable, the impacts of any incidental take of the covered fish species, including salmon and the MCR steelhead. Further, the HCP may, in fact, appreciably reduce the likelihood of the survival and recovery of covered fish species.

The Tribe is seriously concerned that the HCP over-prioritizes the needs of the Oregon spotted frog at the expense of other covered species, specifically the covered fish species--including Chinook salmon, the bull trout, and MCR steelhead--and other tribal trust resources. The HCP's focus on the Oregon spotted frog is likely the result of the OSF litigation, and, in that sense, the Oregon spotted frog has regrettably hijacked the HCP and prevented the Applicants from considering the Deschutes Basin from a holistic perspective in the context of the Tribe's 1855 Treaty, the ESA, NEPA, and applicable secretarial orders and agency policies so that each of the covered species receive equal treatment.

The essential logic of the HCP conservation measures are that the needs of the Oregon spotted frog are the priority. The practicability of the conservation measures for the covered fish species assume that the Oregon spotted frog conservation measures are implemented. That assumption improperly elevates the Oregon spotted frog above the other covered species and limits the range of conservation measures available for the covered fish species. The HCP must be revised to better balance the conservation measures among the covered species in accordance with the ESA and in a manner that better analyzes the incidental take of the covered fish species on the survival and recovery of those species in the wild.

V. Conclusion

The Tribe appreciates the efforts of the Services and the Applicants. The HCP, however, is seriously out of balance, and the DEIS is incomplete. The Services and the Applicants should modify the proposed action to better mitigate and minimize the effects on the covered fish species and develop and evaluate alternatives not previously given serious consideration. *See* 40 C.F.R. 1503.4. The Services and Applicants must develop an approach that better balances the needs of the Oregon spotted frog with the other covered species, including specifically salmon and the MCR steelhead, and that minimizes the impact on the Tribe's trust resources, lands, and waters.

Thank you again for your continuing efforts on behalf of the Deschutes Basin, its fish and wildlife, and its stakeholders. We remain available for consultation and collaboration as you work through this process.

Very truly yours,

Raymond Tsumpti

RAYMOND TSUMPTI
Tribal Council Chairman
The Confederated Tribe of the Warm Springs
Reservation of Oregon

By: Michele Stacona

Michele Stacona, Secretary-Treasurer/CEO
(with authorization by Chairman Tsumpti)

Enclosure – List of References Cited

cc: Robyn Thorson, Regional Director, U.S. Fish and Wildlife Service
Barry Thom, Regional Administrator, NOAA Fisheries
Lorri Gray, Regional Director, U.S. Bureau of Reclamation
David Filippi, counsel for Applicants
Robert A. Brunoe, General Manager, Branch of Natural Resources,
Confederated Tribes of Warm Springs
James A. Manion, General Manager, Warm Springs Power and Water Enterprises

REFERENCES CITED[10]

1. *Treaty with the Tribes of Middle Oregon, 1855,* Jun. 25, 1855, 12 Stat. 963, ratified Mar. 8, 1859, at https://www.fws.gov/pacific/ea/tribal/treaties/Tribes_Mid_or.pdf.

2. *Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement,* Nov. 17, 1997, amended Nov. 19, 2001, at http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1074&context=nawrs.

3. Final Judgment and Decree Incorporating Findings of Fact and Order of Determination and Incorporating Settlement Agreement, Circuit Court of the State of Oregon, County of Deschutes, Case No. 99CV0380ST, Jan. 7, 2003.

4. Order Approving Settlement and Issuing New License, 111 FERC ¶ 61,450, *order on rehearing*, 117 FERC ¶ 61,112 (2006) (FERC Project No. 2030), at https://www.ferc.gov/whats-new/comm-meet/061505/H-5.pdf, *incorporating* the *Pelton Round Butte Project Settlement Agreement and all attachments, including (but not limited to):*
    a. *Pelton Round Butte Project Fish Passage Plan;*
    b. Water Control Board of the Confederated Tribes of the Warm Springs Reservation of Oregon Clean Water Act § 401 Certification for Portland General Electric and Confederated Tribes of Warm Springs' Pelton Round Butte Hydroelectric Project on the Deschutes River, Oregon (Jun. 2002);
    c. State of Oregon Department of Environmental Quality Clean Water Act § 401 Certification Conditions for the Pelton Round Butte Hydroelectric Project (FERC No. 2030), Deschutes River Basin, Jefferson County, Oregon; and
    d. Pelton Round Butte Project Water Quality Management and Monitoring Plan, CWA Section 401 Certification Pelton Round Butte Hydroelectric Project Exhibit A (Jul. 2004).

[10] The Tribe provides this list of cited references with the intention that the materials cited will be included in the administrative record. As the Services likely already possess copies of most of these documents, only web links are provided. In some cases, web links for the documents could not be located. The Tribe will provide hard copies or PDFs of any documents cited in its comment letter or in this reference list to the Services upon request.

5. Letter from USFWS Field Supervisor Nancy Gilbert to Magalie Roman Salas, Secretary, FERC, re: Biological Opinion for the Pelton Round Butte Hydroelectric Project, FERC No. 2030, Nov. 2, 2004 (attaching biological opinion).

6. Letter from NMFS Regional Administrator D. Robert Long to Magalie Roman Salas, Secretary, FERC, re: Biological Opinion for the Pelton Round Butte Hydroelectric Project, FERC No. 2030, Feb. 1, 2005 (attaching biological opinion).

7. *Middle Columbia River Steelhead Distinct Population Segment ESA Recovery Plan,* National Marine Fisheries Service, Northwest Region, Nov. 30, 2009, at https://www.salmonrecovery.gov/Files/RecoveryPlans/mid-c-plan.pdf.

8. The Crooked River Collaborative Water Security and Jobs Act of 2014, Pub. L. No. 113-244, 128 Stat. 2864, at https://www.govinfo.gov/content/pkg/PLAW-113publ244/pdf/PLAW-113publ244.pdf.

9. Memorandum in Response to Motion for Preliminary Injunction (Mar. 4, 2016); Declaration of Josh Newton in Support of Memorandum in Response to Motion for Preliminary Injunction (Mar. 4, 2016); Declaration of Robert A. Brunoe in Support of Memorandum in Response to Motion for Preliminary Injunction (Mar. 4, 2016); and Stipulated Settlement Agreement (Oct. 28, 2016) and Order Approving Settlement (Nov. 9, 2016), *Center for Biological Diversity et al., v. U.S. Bureau of Reclamation, et al.,* case no.: 6:15-cv-02358-JR (consolidated with 6:16-cv-00035-JR).

10. *Secretarial Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act, U.S. Dep't of Interior and U.S. Dep't of Commerce,* Jun. 5, 1997, at https://www.doi.gov/sites/doi.gov/files/elips/documents/3206_-american_indian_tribal_rights_federal-tribal_trust_responsibilities_and_the_endangered_species_act.pdf.

11. *Secretarial Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, U.S. Dep't of Interior, Aug. 20, 2014, at* https://www.doi.gov/sites/doi.gov/files/elips/documents/3335_-_reaffirmation_of_federal_trust_responsibility_to_federally_recognized_indian_tribes_and_individual_indian_beneficiaries.pdf.

12. *Tribal Consultation Handbook, U.S. Dep't Fish and Wildlife, Oct. 2018 at* https://www.fws.gov/TCG.pdf.

13. *NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations,* U.S. Dep't of Commerce, National Oceanic and Atmospheric Administration, Nov. 12, 2013, at https://www.legislative.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf.

14. The Role of Science in Balancing the Needs of Protected Species: An Historical Perspective, Michael G. Thabault, 131 Journal of Contemporary Water Research & Education 55 (2005), at https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1936-704X.2005.mp131001009.x.

15. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, U.S. Fish and Wildlife Service and National Marine Fisheries Service, Dec. 21, 2016, at https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf.

16. *Water Quality Study for the Pelton Round Butte Project and the Lower Deschutes River: Monitoring & Modeling,* Joseph Eilers and Kellie Vache, MaxDepth Aquatics, Inc., Bend, Or., Jun. 2019, link available at https://www.portlandgeneral.com/corporate-responsibility/environmental-stewardship/water-quality-habitat-protection/deschutes-river/deschutes-water-quality.

17. *Conservation and Recovery Plan for Oregon Steelhead Populations in the Middle Columbia River Steelhead Distinct Population Segment, Richard Carmichael (*Oregon Dep't of Fish and Wildlife) and *Barbara Taylor*, Feb. 2010, at https://www.dfw.state.or.us/fish/CRP/docs/mid_columbia_river/Oregon_Mid-C_Recovery_Plan_Feb2010.pdf.

18. *Integrated Resources Management Plan For the Forested Area and Rangelands* (Ordinance No. 74)*,* May 29, 2013 (IRMP 2012).

19. *Confederated Tribes of Warm Springs, Tribal Code Chapter 432, Water Quality Standards, Beneficial Uses, and Treatment Criteria* (Ordinance No. 80), at https://warmsprings-nsn.gov/government/tribal-code/?pid=1054.

20. *Confederated Tribes of Warm Springs, Tribal Code Chapter 401, Warm Springs Wild and Scenic Rivers Act, at* https://warmsprings-nsn.gov/bchapter/wild-scenic-rivers/.

21. *Deschutes Subbasin Plan*, Northwest Power and Conservation Council Columbia Rivers Fish and Wildlife Program, at https://www.nwcouncil.org/sites/default/files/EntirePlan_1.pdf.

22. *Confederated Tribes of Warm Springs, Tribal Code Chapter 475, Hydroelectric Licensing and Regulation Ordinance* (Ordinance 78), adopted Mar. 11, 1998, at https://warmsprings-nsn.gov/government/tribal-code/?pid=1062.

23. NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, Council on Environmental Quality, Executive Office of the President, and Advisory Council on Historic Preservation, Mar. 2013, at https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.DB HCP