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Water Review

A Perspective on Western Water Issues Prepared by the Family Farm Alliance and Its Members

OREGON

Protecting Central Oregon's Agriculture, Economy and Environment

Overview

On May 18, 2011, the National Marine Fisheries Service (NMFS) Pacific Northwest Region released a proposed rule to designate reintroduced steelhead in Central Oregon's Deschutes River Basin as a nonessential, experimental population under section 10(j) of the Endangered Species Act (ESA). This designation, which is set to expire after approximately 12 years, will provide clear assurances to cities, counties, irrigation districts and others in Central Oregon that their lawful use of water supplies will not be at risk by the ESA. The proposed rule, when finalized later this year, is intended to protect Central Oregon's social and economic values and accelerate steelhead recovery efforts. Because this rule represents the first application of ESA section 10(j) in the United States by NMFS, it is an important topic of interest for this edition of the Family Farm "Water Review".

Round Butte Dam **Source: Portland General Electric**

The Deschutes River Basin

The Deschutes River is one of Central Oregon's signature rivers, and one of the most beloved waterways in the state. Originating at Lava Lake in the Cascade Mountains and flowing 250 miles north, the Deschutes River drops 4,589 feet along its way to its confluence with the Columbia River. Major Deschutes River tributaries include the Crooked and Metolius Rivers. The term "lower Deschutes" refers to the 100 miles of the river below the Pelton Round Butte Project (PRB) – co-owned by the Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation.

The Deschutes supports unique native fisheries of national significance, including Chinook salmon, steelhead, redband trout (rainbow trout) and bull trout. Reaches above and below PRB have been designated as federal Wild and Scenic Rivers, an Oregon State Scenic Waterway and are

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Deschutes River Steelhead *(Cont'd from P. 1)*

protected under the Wild and Scenic Rivers Act.

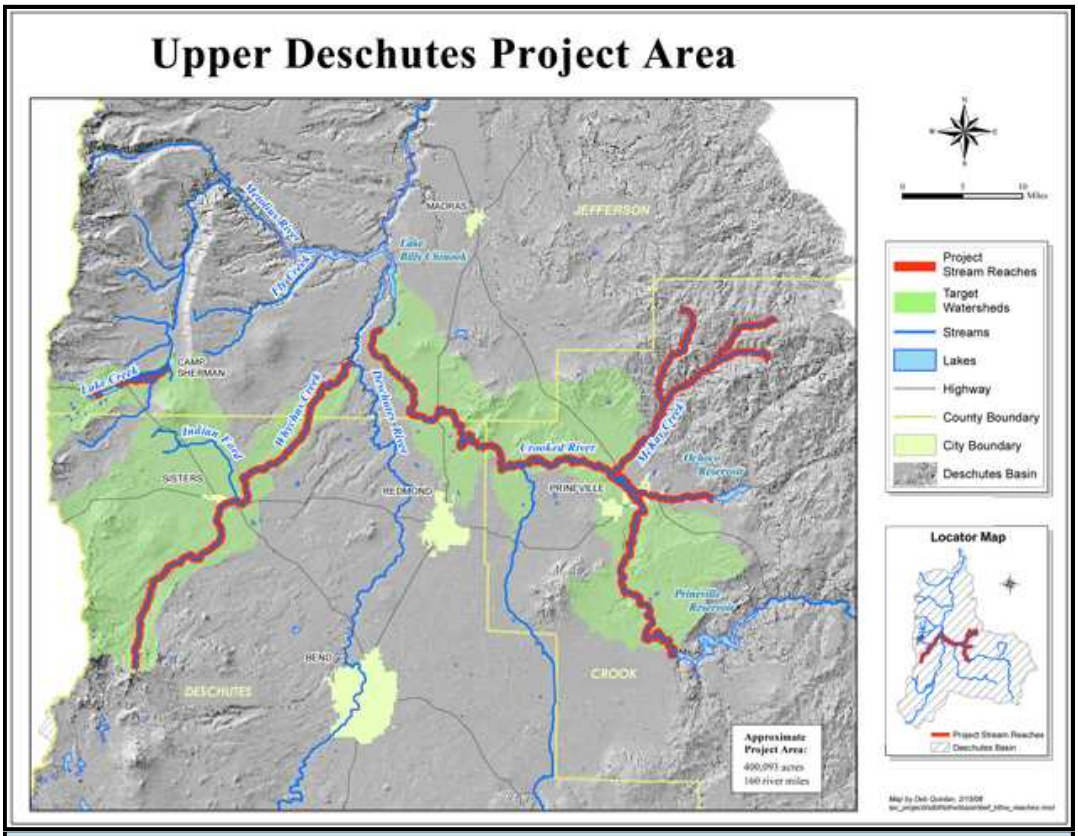
The river is more than an Oregon treasure. It sustains varied economies by generating electricity, irrigating agricultural land, providing a fish harvest for the Tribes and supporting recreation and tourism. The Deschutes draws white water rafters and fishermen from all over the region, while its reservoirs provide water skiing, shoreline camping and other recreation. (*Source: Portland General Electric*).

The Deschutes River is fed primarily by snowfall from the majestic Cascade Mountains. While these mountains block the rains from Central Oregon, they also accumulate a vast reservoir of snow. Warming spring temperatures melts the snow, swelling the river and filling U.S. Bureau of Reclamation reservoirs for irrigation of the productive but semi-arid lands throughout Central Oregon.

Irrigation Drives Development

Early homesteaders to this region ranched and practiced dry-land farming techniques, with wheat becoming the dominant commodity by the early 1900s. Despite being one of the most successful dry-farming areas in Central Oregon, local farmers began to experience a moisture shortage after 1925. Hit hard by the dry-spell, coupled with the arrival of the Great Depression, many dry-land farmers abandoned their farms and ranches. Those that remained realized that to exist, they needed a reliable source of water. This heralded the arrival of irrigation.

The Carey Act of August 18, 1894 initiated many early irrigation projects by authorizing the federal government to contract with the states for land reclamation. The water rights established under the Carey Act were inchoate or temporary until the land was



Upper Deschutes Project Area **Source: Oregon Watershed Enhancement Board**

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Deschutes River Steelhead *(Cont'd from P. 2)*

actually irrigated and producing crops. The State decided that as of June 30, 1950 sufficient time had passed to establish the rights as required by the Carey Act. It was not until 1958 that the courts finalized all the various claims and rights to the waters of the Deschutes River.

Adhering to the "doctrine of prior appropriation," water rights were assigned on a first-come, first-serve basis. But the upstream appropriator had to responsibly conserve its water supplies if there were to be any water for an appropriator at the end of the canal. That same philosophy still holds sway today.

As Central Oregon Irrigation District (COID) general manager Steve Johnson explains, "Clean water is a resource to share and respect." COID and other districts incorporate this philosophy into their management decisions.

Agricultural activity played an instrumental role in this region's heritage. For example, local farmers helped create the social and economic foundation of cities like Bend, Madras, Prineville, Redmond, Sisters and other communities throughout Central Oregon.

Today, the Deschutes Basin Board of Control is made up of the following 7 major irrigation districts in the region:

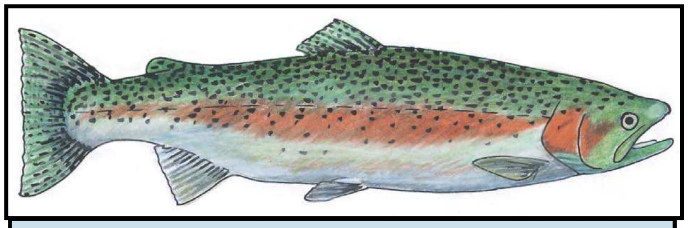
- Arnold Irrigation District, Bend
- Central Oregon Irrigation District, Redmond
- North Unit Irrigation District, Madras
- Ochoco Irrigation District, Prineville
- Swalley Irrigation District, Bend
- Three Sisters Irrigation District, Sisters
- Tumalo Irrigation District, Bend

These 7 districts, which collectively irrigate approximately 150,000 acres of productive land in Crook, Deschutes and Jefferson Counties, receive their water supplies from the Deschutes River and its tributaries. Because of their need to work together, the districts established an intergovernmental agreement called a "board of control" under Oregon law. This legal structure allows the districts to work together as one entity to implement water conservation projects, provide educational resources, share materials and equipment, and for other complementary purposes. Conservation is a unifying theme for the Deschutes Basin Board of Control.

"No new amounts of water are available - surface water in Central Oregon is a finite resource," said Johnson. "The only way additional water will become available to COID's subscribers is through conservation."

Steelhead Return to the Deschutes Basin

The Deschutes River is an important resource for fishery purposes. In 2005, Portland General Electric (PGE) and the Confederated Tribes of Warm Springs agreed to reintroduce hatchery steelhead into the Upper Deschutes Basin, as part of their effort to re-license the PRB. During the relicensing process, the hatchery stock selected for reintroduction was not listed under the ESA. A later court decision (*Alsea Valley Alliance v Evans*), however, led to this hatchery stock of Middle Columbia River steelhead being listed as "threatened" under the ESA. Since the listing, the Deschutes Basin Board of Control and its member districts, cities including Prineville, and other local conservation groups have collaborated with PGE, the Confederated Tribes, and NMFS to ensure a successful reintroduction and to secure local support.



Steelhead **Source: NOAA Fisheries**

Pursuant to the NMFS-approved reintroduction

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Deschutes River Steelhead *(Cont'd from P. 3)*

plan, steelhead have been released annually in the Upper Deschutes Basin, including into Whychus Creek since 2007 and into the Crooked River since 2008. Under the ESA, lawful actions such as the diversion of water by irrigation districts or municipalities that harm the reintroduced hatchery steelhead could lead to civil and criminal penalties, even if the harm was accidental or unintentional.

Deschutes River near Bend, Oregon **Source: USDA Forest Service**

Protecting Communities, Promoting Recovery

Congress added Section 10(j) of the ESA in 1982. The new designations was meant to be a constructive tool meant to protect the social and economic values of communities where reintroductions are planned, as well as to promote the reintroduction of listed species to accelerate their recovery. An increasingly utilized provision of the law, section 10(j) enables the U.S. Fish and Wildlife Service (FWS) and NMFS to work with local interests to reintroduce "experimental" populations of a listed species. An experimental population may be reintroduced into areas the species historically inhabited so long as the habitat is not already occupied by another population of the species. To ensure local interests do not unfairly bear the burden of a reintroduction, a nonessential, experimental population receives less protection than a listed population without such a designation.

Before making a 10(j) designation, NMFS must determine whether the population is essential to the continued existence of the species as a whole. An experimental population is essential if its "loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild." All other experimental populations are nonessential. If a nonessential experimental designation is made, then the incidental taking of a member of the population may occur without further authorization. For example, a successful designation would allow the unintentional "take" of reintroduced steelhead when the taking is incidental to a legal activity, such as recreation (e.g., fishing, boating, or swimming), forestry, agriculture, or hydroelectric power generation. By contrast, the unintentional take of a listed steelhead without a nonessential experimental designation is prohibited by law absent some other authorization. NMFS plans to use this same designation for salmon and steelhead on other river systems, including California's San Joaquin River. Additionally, FWS has utilized this provision of the ESA extensively. Recently, FWS proposed a 10

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Deschutes River Steelhead *(Cont'd from P. 4)*

(j) designation for a bull trout reintroduction in Oregon's Clackamas River, the stock for which would be taken from Central Oregon's Metolius River.

In the case of the steelhead in the Deschutes Basin, the experimental population is geographically separate from the non-experimental population because of the PRB. The dam complex is an absolute barrier, preventing members of the non-experimental population from intermingling with the experimental population. That is, all steelhead above the dam will be part of the experimental population, while all steelhead below the dam will not be part of the experimental population. Second, the designation of the experimental population is expected to promote the development of conservation measures that will support the reintroduction effort. For example, the proposed designation will build support for the reintroduction effort among local landowners and facilitate the development of conservation efforts that will carry forward even after the proposed designation has expired.

Tumalo Irrigation District is replacing over 6 miles of open canal sections with large diameter conduit . This latest phase of construction will save over 530 acre-feet of water once lost to seepage.

Why the Deschutes Basin?

The Deschutes Basin appears to be the perfect location for the NMFS to use Section 10(j). While Central Oregon's agricultural interests, businesses, and cities didn't ask for the reintroduction of listed steelhead into their community, they have worked to support it - even assisting PGE and the Oregon Department of Fish and Wildlife with the annual release of juvenile steelhead into nearby rivers and streams. River conditions are also good. The Deschutes and its tributaries provide excellent habitat for various fish and wildlife species. In fact, anglers and conservation groups tout this region's blue ribbon fishery for rainbow and redband trout.

These conditions are no accident. Since the 1960s, irrigation districts, cities, counties, local watershed councils and others have undertaken an array of voluntary measures to conserve water, return water instream for fish and wildlife purposes, and use irrigation water supplies to generate renewable carbon-free energy. For example, district-led conservation projects have reduced diversions by over 200,000 acre-feet annually, leading to higher instream flows in the Deschutes River and its tributaries. Recent projects by four districts alone have resulted in the piping or lining of 58 miles of canals, resulting in a return of 91.5 cubic feet per second of water instream. Because of these accomplishments, and the nature of the reintroduction,

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Deschutes River Steelhead *(Cont'd from P. 5)*

NMFS proposed this 10(j) designation, an action strongly supported by local water managers.

"For our district and the others in the basin, this proposed rule will allow us to continue work on conservation projects that local water users have a long history of promoting," said Mike Britton, general manager of North Unit Irrigation District. "With this designation, we can advance these projects, benefiting our patrons and the environment."

Unprecedented Conservation Work

Since 2005, more than 25 large-scale water conservation and restoration projects have been initiated in the Deschutes Basin to improve steelhead and other fisheries habitat, and more projects are in the pipeline. The Bureau of Reclamation (Reclamation) recently awarded several WaterSMART grants to cost-share three key projects in the Deschutes Basin. This commitment of funding reflects long-standing Reclamation support for considering any potential summer steelhead reintroduction into the upper Deschutes system as a nonessential experimental population.

"Reclamation feels it is possible to consider reintroduced summer steelhead into the upper Deschutes River Basin as a "nonessential experimental" population," former-Reclamation Lower Columbia Area Manager Ron Eggers wrote NMFS in June 2005. "This would be better accepted by the local community and would allow landowners, state, Tribes and Federal agencies the opportunities to work cooperatively."

A recent Reclamation grant award of $859,149 will help the Three Sisters Irrigation District replace 20,000 feet of open canal with polyethylene pipe, an improvement expected to result in 750 acre-feet of water savings annually. Water conserved through this project will be marketed through the Deschutes River Conservancy for a protected instream right, to support important habitat for bull trout, redband trout, summer steelhead and Chinook salmon. The District will also install a 950-kilowatt capacity turbine generator as part of the project, a renewable, carbon-free source of energy that the District expects to supply 3.1 million kilowatt-hours of electricity.

Construction of Ochoco Irrigation District McKay Creek Fish Passage Project—2009.

A $1 million WaterSMART grant combined with matching grants from the Oregon Watershed Enhancement Board, will assist the Tumalo Irrigation District to convert the second phase of 6.3 miles of canal to pipe on the Tumalo Feed Canal. This phase of the project is expected to save 536 acre-feet of water per year that is currently being lost to seepage. Conserved water will be dedicated to the State of Oregon for permanent instream flows to benefit endangered salmon, steelhead and bull trout.

Finally, the North Unit Irrigation District will use a $1 million WaterSMART grant to line approximately 5 miles of its main canal to address seepage losses. The project is expected to result in 7,880 acre-feet of water savings annually. Conserved water will be used to restore instream flows in the Crooked River. The District also estimates

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Deschutes River Steelhead *(Cont'd from P. 6)*

that approximately 1,220 megawatt-hours of electricity will be saved annually through pumping reductions.

All of these measures are designed to sustain agricultural productivity, reduce diversions and increase instream flows in the Deschutes River and its tributaries.

"We all look forward to continued involvement in our future and as part of that we actively support the conservation of all our natural resources," says COID's Johnson.

Congressional and Local Community Support

Support for the proposed rule extends far beyond the local irrigation districts. Oregon's Congressional delegation played a key role in supporting the designation. In a March 9, 2010 letter to the NOAA Administrator, Jane Lubchenco, all seven members of Oregon's delegation wrote in support of the effort to implement this 10(j) designation. The delegation's support is based on the premise that the proposed rule will serve as a model for successfully reintroducing listed species throughout the country while avoiding unnecessary controversies and unintended societal impacts. The letter states in part:

Rep. Greg Walden (R-Ore.) led the effort to urge the Obama Administration to use the 10(j) designation. During a breakfast meeting attended by Oregon's full congressional delegation last year, Walden encouraged his colleagues to join onto the March 2010 letter. All agreed – signatories included Reps. Walden, Earl Blumenauer, Peter DeFazio, Kurt Schrader, David Wu, and Senators Ron Wyden and Jeff Merkley.

"This Section 10(j) designation will ensure that locally-supported conservation projects will continue in the region as the steelhead species are reestablished in the Deschutes River and its tributaries for the first time in nearly 40 years," Rep. Walden said. "The decision, when finalized, will provide clear legal assurances to cities, counties, irrigation districts and others in central Oregon that their lawful use of water will not be at risk by the ESA. The decision will protect central Oregon communities and their economy, as well as accelerating steelhead recovery efforts."

The lawmakers' efforts were also strongly supported by the Central Oregon Cities Organization, which represents Bend, Culver, La Pine, Madras, Maupin, Metolius, Prineville, Redmond, and Sisters.

"As the Chair of the Central Oregon Cities Organization that represents the communities impacted by the reintroduction of steelhead in the Deschutes River, I am pleased that the Administration answered Rep. Walden's call to provide the 10 (j) designation," said Redmond Mayor George Endicott, chair of the Central Oregon Cities Organization. "The designation protects central Oregon's economy and promotes the reintroduction of steelhead while mitigating any adverse impacts on the species while the communities are able to study potential impacts and develop plans to mitigate those impacts."

"We're pleased the National Oceanic and Atmospheric Administration, National Marine Fisheries Service is working with our constituents to use the Endangered Species Act to support the reintroduction of a federally protected species, and is doing so in a manner that promotes the social and economic needs of the broader community."

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Deschutes River Steelhead *(Cont'd from P. 7)*

Significance of 10(j) Designation

The significance of the proposed designation extends well beyond the Deschutes Basin. As the first one proposed by NMFS, it could serve as a model for future designations and encourage the reintroduction of species under NMFS's jurisdiction elsewhere. But there are several unique elements to this proposed rule. Unlike others by FWS, the NMFS proposal includes a specific expiration date, set for 12 years after the first generation of adult steelhead are passed above the PRB complex (probably through a "trap and haul" program), and then into the nonessential experimental population area.

And NMFS has buttressed its intent with strong guiding language, as evidenced in its May 18, 2011 Federal Register notice.

"In weighing the benefits of developing strong 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," NMFS observed.

"We do not expect that continuing these (existing) agricultural, recreational, municipal and other activities by private landowners, within and near the Nonessential Experimental Population area will cause significant harm to Middle Columbia River steelhead," NMFS concluded.

Submitting Comments

NMFS will solicit comments and other relevant information from interested parties for 60 days. Comments will become part of the administrative record that NMFS must consider before it issues a final rule. To ensure that the final rule designates the reintroduced steelhead as a nonessential experimental population, interested parties should comment in support of the proposed rule.

Two documents are now available for public comment:

- A proposed rule designating Middle Columbia River steelhead as an experimental population; and;
- A draft environmental assessment for this proposed designation.

NOAA Fisheries will issue a final rule after reviewing comments. Comments must be received by July 18.

For more information see the Northwest Region website at: http://www.nwr.noaa.gov/ESA-Salmon-Regulations-Permits/Section-10-Permits/Deschutes.cfm

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