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(ii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan’s terms shall be determined within that Federal Court proceeding.

(iii) The Secretary shall seek comment from the public on the Secretary’s pending determination whether implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS.

(iv) The Secretary shall publish notification in the FEDERAL REGISTER of any determination regarding a Tribal Plan and the basis for that determination.

(d) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the ESA relating to endangered species, including regulations in part 222 of this chapter II implementing such exceptions, also apply to the threatened Southern DPS of North American green sturgeon listed in §223.102(c)(1). Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Scientific Research and Monitoring Exception as described in paragraph (b)(1) of this section or Scientific Research and Monitoring Exemptions as described in paragraph (c)(1) of this section, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10(a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site https://apps.nmfs.noaa.gov, no later than November 29, 2010. The take prohibitions would take effect if the permit application is received by November 29, 2010, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

(e) Affirmative Defense. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS of North American green sturgeon listed in §223.102(c)(1), any person claiming that his or her take is authorized via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the take authorization is applicable and was in force, and that the person fully complied with the take authorization requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

(75 FR 30728, June 2, 2010)

§§ 223.211–223.300 [Reserved]

§ 223.301 Special rules—marine and anadromous fishes.

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

(1) The Middle Columbia River steelhead located in the geographic areas identified in paragraph (a)(4) of this section comprise a nonessential, experimental population (NEP).

(2) Take of this species that is allowed in the NEP area. (1) Taking of Middle Columbia River (MCR) steelhead that is otherwise prohibited by paragraph (a)(3) of this section and 50 CFR 223.203(a), provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreational fishing, recreation, agriculture, forestry, municipal usage, and other similar activities, which are carried out in accordance with Federal, state, and local laws and regulations as well as applicable tribal regulations.

(2) Take of this species that is allowed in the NEP area. (1) Taking of Middle Columbia River (MCR) steelhead that is otherwise prohibited by paragraph (a)(3) of this section and 50 CFR 223.203(a), provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreational fishing, recreation, agriculture, forestry, municipal usage, and other similar activities, which are carried out in accordance with Federal, state, and local laws and regulations as well as applicable tribal regulations.

(ii) Handling of MCR steelhead in the NEP area by NMFS, Oregon Department of Fish and Wildlife (ODFW) and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS) employees and authorized agents acting on their behalf for scientific purposes and by the Portland General Electric Company (PGE) and CTWS employees and authorized agents acting on their behalf for the purpose of
monitoring and evaluating the ongoing reintroduction under the Federal Energy Regulatory Commission (FERC) license for the Pelton Round Butte Hydroelectric Project (FERC No. 2030).

(iii) Taking of MCR steelhead incidental to any activities related to or associated with the operation and maintenance of Pelton Round Butte Hydroelectric Project’s (FERC Project No. 2030) Round Butte Dam by PGE or CTWS as administered under a license issued by FERC. Acceptable forms of taking of steelhead include, but are not limited to, mortality, stranding, injury, impingement at Round Butte Dam facilities, or delay in up- or down-stream passage associated with or caused by any of the following activities. Activities related to the operation and maintenance of Round Butte Dam include, but are not limited to:

(A) Hydroelectric generation;
(B) Maintenance of project facilities;
(C) Provision of upstream and downstream fish passage;
(D) Fish handling at fish separation and counting facilities;
(E) Fish conservation activities;
(F) Fish handling, tagging, and sampling in connection with FERC approved studies; and
(G) Approved resource protection, mitigation, and enhancement measures.

(iv) Handling MCR steelhead by Deschutes Valley Water District employees and agents acting on their behalf for the purpose of monitoring and evaluating the Opal Springs Hydroelectric Project (FERC No. 5891).

(v) Take incidental to any activities related to or associated with the operation and maintenance of the Opal Springs Hydroelectric Project (FERC Project No. 5891) as administered under a license issued by FERC and the Settlement Agreement Concerning License Amendment for Fish Passage, dated October 2011.

(vi) Take of MCR steelhead by any person with a valid permit issued by NMFS and a valid permit issued by ODFW for educational purposes, scientific purposes, and the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the ESA.

(3) Take of this species that is not allowed in the NEP area. (i) Except as expressly allowed in paragraph (a)(2) of this section, the taking of MCR steelhead is prohibited within the NEP geographic area, as provided in 50 CFR 223.203(a).

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

(4) Geographic extent of the nonessential experimental population of Middle Columbia River steelhead. (i) The geographic range of this experimental population is all accessible reaches upstream of Round Butte Dam on the Deschutes River, including tributaries Whychus Creek, Crooked River and Metolius River. More specifically, the geographic range includes all accessible reaches of the Deschutes River downstream to Round Butte Dam; the Whychus Creek subbasin; the Metolius River subbasin; and the Crooked River subbasin from Bowman Dam downstream (including the Ochoco and McKay Creek watersheds) to its point of confluence with the Deschutes River.

(ii) Round Butte Dam is the downstream terminus of this NEP. When MCR steelhead are below the Round Butte Dam, they will be outside the NEP area and thus considered part of the nonexperimental population.

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

(6) Time frame for NEP designation. This NEP designation will expire on January 15, 2025.

(b) [Reserved]

[78 FR 2907, Jan. 15, 2013]