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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 130716626-4522-02]

RIN 0648-BD51

Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Upper Columbia River Spring-run Chinook Salmon in the Okanogan River Subbasin, Washington, and Protective Regulations

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

ACTION: Final rule and notice of availability of a final environmental assessment.

SUMMARY: We, the National Marine Fisheries Service (NMFS), designate and authorize the release of a nonessential experimental population of Upper Columbia River (UCR) spring-run Chinook salmon (Oncorhynchus tshawytscha) under section 10(j) of the Endangered Species Act (ESA) in the Okanogan River subbasin, and establish a limited set of take prohibitions for the nonessential experimental population under section 4(d) of the ESA. Successful reintroduction of a population within the species' historic range would contribute to its viability and further its conservation. The issuance of limited protective regulations will provide for the conservation of the species while providing assurances to people in the Okanogan River subbasin. The geographic boundary for the NEP is the main stem and all tributaries of the Okanogan River between the Canada-United States border and to the confluence of the Okanogan River with the Columbia River, Washington (hereafter "Okanogan River NEP Area"). We have prepared a Final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) on the

proposed action under the National Environmental Policy Act (NEPA) (see ADDRESSES: section below).

DATES: The final rule is effective [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: The Final Environmental Assessment and other reference materials regarding this final rule can be obtained via the Internet at http://www.westcoast.fisheries.noaa.gov or by submitting a request to the Branch Chief, Protected Resources Division, West Coast Region, NMFS, 1201 NE Lloyd Blvd., Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Scott Rumsey, NMFS, 1201 NE Lloyd Blvd., Portland, OR 97232 (503-872-2791) or Dwayne Meadows, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301-427-8403).

SUPPLEMENTARY INFORMATION:

Background

The UCR spring-run Chinook Salmon evolutionarily significant unit (ESU) is listed as an endangered species under the ESA (16 USC 1531 et seq.). We first designated the UCR spring-run Chinook Salmon ESU as endangered on March 24, 1999 (64 FR 14308), reaffirmed this status on June 28, 2005 (70 FR 37160), and maintained its endangered status after the ESU's 5-year review (76 FR 50448, August 15, 2011). Section 9 of the ESA prohibits the "take" of UCR spring-run Chinook salmon unless otherwise authorized.

The listed ESU currently includes all naturally spawned populations of spring-run Chinook salmon in accessible reaches of Columbia River tributaries between Rock Island and Chief Joseph Dams, excluding the Okanogan River. The Okanogan River is a major tributary of the upper Columbia River, entering the Columbia River between Wells and Chief Joseph Dams.

The majority of the Okanogan River subbasin is in Canada (74 percent) with the remainder in Washington State (26 percent). Listed UCR spring-run Chinook salmon from this ESU currently spawn in three river subbasins in eastern Washington: the Methow, Entiat, and Wenatchee. A fourth population historically inhabited the Okanogan River subbasin, but was extirpated in the 1930s because of overfishing, hydropower development, and habitat degradation (NMFS, 2007). The listed UCR Spring-run Chinook Salmon ESU also includes six artificial propagation programs: the Twisp River, Chewuch River, Methow Composite, Winthrop National Fish Hatchery, Chiwawa River, and White River spring Chinook salmon hatchery programs.

On November 22, 2010, we received a letter from the Confederated Tribes of the Colville Reservation (CTCR)), a federally recognized Native American tribe, requesting that we authorize the release of an experimental population of spring-run Chinook salmon in the Okanogan River subbasin under section 10(j) of the ESA. The CTCR also initiated discussions on this topic with the United States Fish and Wildlife Service (USFWS), the Bonneville Power Administration, the Army Corps of Engineers, the Bureau of Reclamation, the Washington Department of Fish and Wildlife, and the Okanagan Nations Alliance of Canada. The CTCR's request included a large amount of information on the biology of UCR spring-run Chinook salmon, the possible management implications of releasing an experimental population in the Okanogan River subbasin, and the expected benefits to the recovery of the listed UCR Spring-run Chinook Salmon ESU. On October 24, 2013 we published a proposed rule to designate a nonessential experimental population of spring-run Chinook salmon in the Okanogan River subbasin (78 FR 63439).

Under section 10(j) of the ESA, the Secretary of Commerce (Secretary) may authorize the release of an "experimental" population of a listed species outside its current range when the

release of the experimental population will further the conservation of the listed species. The population is experimental under section 10(j) at times when it is wholly separate geographically from nonexperimental populations. In order to authorize the release of an experimental population, section 10(j) also requires that the Secretary determine, using the best available information, whether the experimental population is "essential" or "nonessential" to the continued existence of the listed species. Section 10(j) allows that an experimental population deemed "nonessential" is treated as a species proposed for listing during interagency consultations under section 7 of the Act, requiring federal agencies to confer (rather than consult) with NMFS on actions that are likely to adversely affect the experimental population (except when the population occurs in an area within the National Wildlife Refuge System or the National Park System, where the ESA requires the population be treated as a threatened species). With respect to the ESA's take prohibitions, section 10(j) treats experimental populations as threatened species, authorizing NMFS to issue regulations governing the application of the ESA's prohibition against take of listed species.

This action involves the designation of a NEP of UCR spring-run Chinook salmon in the Okanogan River subbasin. The release of this NEP of UCR spring-run Chinook salmon in the Okanogan River NEP Area would further the conservation of UCR spring-run Chinook salmon by potentially establishing a fourth population in the species' historic range, contributing to the viability of the ESU. Fish used for the reintroduction would come from the Methow Composite hatchery program located at Winthrop National Fish Hatchery. The Methow River population of these fish is included in the UCR Spring-run Chinook Salmon ESU and has the best chance to survive and adapt to conditions in the Okanogan River subbasin because they most closely resemble the genetic and life-history characteristics of the UCR spring-run Chinook salmon

population that historically inhabited the Okanogan River subbasin (Jones et al., 2011). Fish from the NEP are expected to remain geographically separate from the UCR Spring-run Chinook Salmon ESU during the life stages in which they remain in, or return to, the Okanogan River; the experimental designation will not apply at any time when members of the NEP are downstream of the confluence of the Okanogan River with the Columbia River. This experimental population release is being implemented as recommended in the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan (NMFS, 2007), while at the same time ensuring that the reintroduction does not impose undue regulatory restrictions on landowners and third parties.

The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR spring-run Chinook salmon in this defined Okanogan River NEP Area are considered part of the NEP, irrespective of their origin. Conversely, when UCR spring-run Chinook salmon are located outside this defined Okanogan River NEP Area, they are not considered part of the NEP.

In this action, we are designating an experimental population that is geographically separate from the nonexperimental ESA-listed UCR population, as spring-run Chinook salmon are currently extirpated in the Okanogan River subbasin. This designation is expected to reduce the species' overall extinction risk from natural and anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Upper Columbia River. These expected improvements in the overall viability of UCR spring-run Chinook salmon, in addition to other actions being implemented throughout the Columbia River migration corridor, will contribute to the species near-term viability and recovery, either minimally if an Okanogan

population does not establish itself, or significantly if it does. The NEP will be geographically separated from the larger ESU of UCR spring-run Chinook salmon while in the Okanogan River subbasin, but will intermingle with other Chinook salmon populations as they travel downstream of the NEP area, while in the ocean, and on part of their upstream spawning migration. The "experimental" population designation is geographically based and does not travel with the fish outside the Okanogan River NEP Area.

This final rule establishes legal authority under section 10(j) of the ESA for an experimental population of UCR spring-run Chinook salmon in the Okanogan River basin. The rule also provides protective regulations under section 4(d) deemed necessary and advisable to conserve the experimental population. We, in close coordination with tribal, state and federal comanagers, are committed to completing review of the Hatchery Genetic Management Plans associated with the broodstock-collection, fish-transfer, and fish-release activities required to support this reintroduction effort.

To assist in the development of the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan (hereinafter called the recovery plan), we assembled the Interior Columbia Technical Recovery Team (ICTRT) to identify population structure and recovery goals. The recovery plan subsequently adopted the ICTRT recovery goals as delisting criteria for the UCR spring-run Chinook Salmon ESU.

The ICTRT recommended specific abundance and productivity goals for each population in the UCR Spring-run Chinook Salmon ESU. The team also identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The ICTRT (2008) considered all three extant natural populations (Methow, Entiat, and Wenatchee) to be at high risk of extinction based on their current abundance and

productivity levels. The ICTRT also recommended spatial structure and diversity metrics for these populations (ICTRT, 2007). Spatial structure refers to the geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (e.g., a single landslide) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas containing the expression of diverse life-history characteristics. Diversity is the phenotypic (morphology, behavior, and life-history traits) and genotypic (DNA) characteristics within and between populations. Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. It is the combination of phenotypic and genotypic diversity expressed in a natural setting that provides populations with the ability to utilize the full range of habitat and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment. The mixing of hatchery fish (or excessive numbers of out-of-basin stocks) with naturally produced fish on spawning grounds can decrease genetic diversity within a population (NMFS, 2007). The ICTRT (2008) also determined that all three extant populations of this ESU are at high risk of extinction based on their current lack of spatial structure and diversity.

The recovery plan identifies re-establishment of a population in the Okanogan River subbasin as a recovery action (NMFS, 2007). More specifically, the recovery plan explains that re-establishment of a spring-run Chinook salmon population in the Okanogan River subbasin

would aid recovery of this ESU by increasing abundance, productivity, spatial structure, and diversity, thereby reducing the risk of extinction to the ESU as a whole. The recovery plan establishes a framework for accomplishing restoration goals for the Okanogan River subbasin including restoring connectivity throughout their historic range where feasible and practical. Short- and long-term actions will protect riparian habitat along spawning and rearing streams and establish, restore, and protect stream flows suitable for spawning, rearing, and migration. In addition, water quality will be protected and restored where feasible and practical. In the mainstem Columbia River, implementation of the Federal Columbia River Power System (FCRPS) ESA section 7 Biological Opinion (NMFS, 2008a; NMFS, 2010) provides a number of new actions and continuation of existing programs that will likely continue to increase passage survival through the Columbia River mainstem passage corridor.

Statutory and Regulatory Framework

The ESA provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 (16 U.S.C. 1538) and the consultation requirements of section 7 (16 U.S.C. 1536). Section 9 of the ESA prohibits the take of an endangered species. The term "take" is defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct" (16 U.S.C. 1532(19)). Section 7 of the ESA provides procedures for federal interagency cooperation and consultation to conserve federally listed species, ensure their survival, help in recovery of these species, and protect designated critical habitat necessary for the survival of the listed species. It also mandates that all federal agencies determine how to use their existing authorities to further the purposes of the ESA to aid in recovering listed species. In addition, ESA section 7 requires that federal agencies will, in consultation with NMFS, ensure that any action they authorize,

fund, or carry out is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of designated critical habitat. Section 7 of the ESA does not apply to activities undertaken on private land unless they are authorized, funded, or carried out by a federal agency.

As noted above, for the purposes of section 7 of the ESA, section 10(j) requires that we treat NEPs as a species proposed to be listed, unless they are located within a National Wildlife Refuge or National Park, in which case they are treated as threatened, and section 7 consultation requirements apply. When NEPs are located outside a National Wildlife Refuge or National Park, only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEP designations provide additional flexibility in developing conservation and management measures by allowing us to work with the action agency early to develop conservation measures, instead of analyzing an already well-developed proposed action provided by the agency under the framework of a section 7(a)(2) consultation. Additionally, for populations of listed species that are designated as nonessential, section 7(a)(4) of the ESA only requires that federal agencies confer (rather than consult) with us on actions that are likely to jeopardize the continued existence of a species proposed to be listed. These conferences are advisory in nature, and their findings do not restrict agencies from carrying out, funding, or authorizing activities.

For endangered species, section 9 of the ESA automatically prohibits take. For threatened species, the ESA does not automatically extend the Section 9 take prohibitions, but instead authorizes the agency to adopt regulations it deems necessary and advisable for species conservation, including prohibiting take under section 4(d). Where we designate an experimental population of an endangered species, the automatic take prohibition no longer

applies; however, because the experimental population is treated as a separate threatened species, we can issue protective 4(d) regulations for that population as we deem necessary and advisable for the conservation of the population. Such regulations may include take prohibitions.

The USFWS has regulations for experimental population designation, 50 CFR 17.80 through 17.84, that provide definitions, considerations in finding that the designation would further the conservation of the species and information to be included in the designation. These regulations state that, in making the determination that the designation would further the conservation of the species, the Secretary must consider the effect of taking the eggs or young from another population, the likelihood that the experimental population will become established, the effect the designation would have on the species' overall recovery, and the extent to which the experimental population would be affected by activities in the area. Under the USFWS regulations, a regulation designating the experimental population must include: a clear means to identify the experimental population; a finding based on the best available science indicating whether the population is essential to the continued existence of the species; management restrictions, protective measures, or other management concerns; and a periodic review of the success of the release and its effect on the conservation and recovery of the species. The USFWS regulations also state that any experimental population shall be treated as threatened for purposes of establishing protective regulations under ESA section 4(d), and the protective regulations for the experimental population will contain applicable prohibitions and exceptions for that population.

The USFWS implementing regulations contain the following specific provisions:

The USFWS regulations define an essential experimental population as one "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild"

(50 CFR 17.80(b)). All other experimental populations are classified as nonessential (50 CFR 17.81(f)). This definition was directly derived from the legislative history to the ESA amendments that created section 10(j).

In determining whether the experimental population will further the conservation of the species, the USFWS regulations require the agency to consider: (1) any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere, (2) the likelihood that any such experimental population will become established and survive in the foreseeable future, (3) the relative effects that establishment of an experimental population will have on the recovery of the species, and (4) the extent to which the introduced population may be affected by existing or anticipated federal or state actions or private activities within or adjacent to the experimental population area (50 CFR 17.81(b)).

USFWS regulations at 50 CFR 17.81(c) also describe four components that will be provided in any regulations promulgated with regard to an experimental population under section 10(j). The components are: (1) appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s), (2) a finding of whether the experimental population is, or is not, essential to the continued existence of the species in the wild, (3) management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations, and (4) a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

We have not promulgated regulations implementing section 10(j) of the ESA, and have authorized only two experimental populations to date (78 FR 2893, January 15, 2013; 78 FR 79622, December 31, 2013). The USFWS has authorized many experimental populations. While USFWS' regulations do not apply to NMFS' 10(j) authorizations, they can help inform our authorization process and we use them to do so. We considered the factors identified in the USFWS regulations in the course of making the statutorily mandated determinations found in ESA section 10(j). To summarize, the statute requires that we determine: (1) whether the release will further the conservation of the species, and (2) whether the population is essential or nonessential. In addition, because section 10(j) provides that the population will only be experimental when and at such times as it is wholly separate geographically from nonexperimental populations of the same species, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the regulations require that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (See, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP NO. 97-835, AT 15 (1982)).

Biological Information and Current Status

UCR spring-run Chinook salmon are anadromous fish that migrate as adults from the ocean in the spring to spawn in freshwater streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or "redds" excavated by females. Depending on temperatures, eggs incubate for several weeks to months before hatching as "alevins" (a larval life stage dependent on food stored in a yolk sac). Following yolk sac absorption, alevins

emerge from the gravel as young juveniles called "fry" and begin actively feeding. UCR spring-run Chinook salmon juveniles spend a year in freshwater areas before migrating to the ocean. The physiological and behavioral changes required for the transition to salt water result in a distinct "smolt" stage. On their journey juveniles migrate downstream through a riverine and estuarine corridor between their natal lake or stream and the ocean.

After two to three years in the ocean, adult UCR spring-run Chinook salmon begin returning from the ocean in the early spring, with the run into the Columbia River peaking in mid-May (NMFS, 2007). Spring-run Chinook salmon enter the upper Columbia River tributaries from April through July. After migration, they hold in these tributaries until spawning occurs in the late summer, peaking in mid-to-late August.

On March 18, 2010, we announced the initiation of 5-year status reviews for 16 ESUs of Pacific salmon including the UCR Spring-run Chinook Salmon ESU (75 FR 13082). As part of this review, our Northwest Fisheries Science Center compiled and issued a report on the newest scientific information on the viability of this ESU. The report states,

> "The Upper Columbia Spring-run Chinook salmon ESU is not currently meeting the viability criteria (adapted from the ICTRT) in the Upper Columbia Recovery Plan. Increases in natural origin abundance relative to the extremely low spawning levels observed in the mid-1990s are encouraging; however, average productivity levels remain extremely low. Large-scale directed supplementation programs are underway in two of the three extant populations in the ESU. These programs are intended to mitigate short-term demographic risks while actions to improve natural productivity and capacity are implemented. While these programs may provide short-term demographic benefits, there

are significant uncertainties regarding the long-term risks of relying on high levels of hatchery influence to maintain natural populations" (Ford et al. 2011)."

All extant populations are still considered to be at high risk of extinction based on the abundance/productivity and spatial structure/diversity metrics. When the risk levels for these attributes are integrated, the overall risk of extinction for this ESU is high (Ford et al., 2011).

Analysis of the Statutory Requirements

1. Will authorizing release of a UCR spring-run Chinook salmon experimental population in the Okanogan River subbasin further the conservation of the species?

The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provide pursuant to this [Act] are no longer necessary." The factors we considered in determining if release of an experimental population in the Okanogan River NEP Area would "further the conservation" of UCR spring-run Chinook salmon included the potential impacts to the ESU posed by the release, the likelihood that the experimental population would become established and self-sustaining, and the extent to which a self-sustaining experimental population would reduce the threats to the ESU's viability. The USFWS regulations suggest considering whether the experimental population would be affected by other state- or federally-approved actions in the area. This last factor may not be subject to precise evaluation, but, where possible, we took into account all factors such as other approved actions that affect whether a population could become established and self-sustaining.

The Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan contains specific management strategies for recovering UCR spring-run Chinook salmon that include securing existing populations and reintroducing spring-run Chinook salmon into historically

occupied habitats in the Okanogan River subbasin. The plan concludes, and we continue to agree, that establishing an experimental population of UCR spring-run Chinook salmon in the Okanogan River subbasin is expected to reduce the species' overall extinction risk from natural and anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Upper Columbia River. These expected improvements in the overall viability of UCR spring-run Chinook salmon, in addition to other actions being implemented throughout the Columbia River migration corridor, will contribute to the species near-term viability and recovery.

To ensure the best chance for a successful reintroduction, we first determined the most appropriate source of broodstock within the UCR Spring-run Chinook Salmon ESU and the availability of that source. Reintroduction efforts have the best chance for success when the donor population has life history characteristics and genetic diversity compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced (Araki et al., 2008). Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction, and therefore only spring-run Chinook salmon populations found in the Upper Columbia River subbasin were considered for establishing the experimental population in the Okanogan River NEP Area.

The listed UCR Spring-run Chinook Salmon ESU includes six artificial propagation programs: the Twisp River, Chewuch River, Methow Composite, Winthrop National Fish Hatchery, Chiwawa River, and White River. We evaluated the fish propagated by each of these programs for their potential to support a re-introduced population in the Okanogan River subbasin. We concluded that fish produced from the Methow Composite stock of UCR spring-run Chinook salmon at Winthrop National Fish Hatchery are likely the most similar to the

extirpated Okanogan spring-run Chinook salmon and represent the best initial source of individuals to establish an experimental population of UCR spring-run Chinook salmon in the Okanogan River. Because the Methow Composite stock of UCR spring-run Chinook salmon are from the neighboring Methow River subbasin and have evolved in an environment similar to that of the Okanogan River subbasin, they are likely to be more genetically similar to the extirpated Okanogan spring-run Chinook salmon population than spring-run Chinook salmon populations from the more distant Entiat and Wenatchee River subbasins. For the past several years, enough adult salmon from the Methow Composite hatchery program have returned to the Methow subbasin to provide enough excess eggs and sperm to begin raising fish for reintroduction into the Okanogan River NEP Area.

We also considered the suitability of available habitat in the Okanogan River subbasin to support the experimental population in the foreseeable future. The Columbia basin as a whole is estimated to have supported pre-development spring-run Chinook salmon returns as large as 588,000 fish (Chapman, 1986). Historically, the UCR Spring-run Chinook Salmon ESU component of the Columbia basin is estimated to have comprised up to 68,900 fish (Mullan, 1987; UCSRB, 2007). It is estimated that before the 1930s, the Okanogan population of the UCR Spring-run Chinook Salmon ESU contained at least 500 spring-run Chinook salmon (NMFS, 2007).

While the historical population of spring-run Chinook salmon in the Okanogan River subbasin has been extirpated, the potential remains to reestablish a population in this area. Over the past century, overfishing, hydropower development, and local habitat degradation have severely impacted ecosystem features and processes in the Okanogan and other subbasins, creating a fragmented mixture of altered or barren fish and wildlife habitats and eradicating UCR

spring-run Chinook salmon from the Okanogan River subbasin. Disruptions in the hydrologic system have resulted in widespread loss of migratory corridors and access to productive habitat (CTCR, 2007). Low base stream flow and warm summer water temperatures have limited salmonid production both currently and historically. Stream flow and fish passage within the Okanogan River subbasin are affected by a series of dams and water diversions. However, the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan estimates that the Okanogan River subbasin continues to have the capacity for at least 500 spring-run Chinook salmon (NMFS, 2007).

The recovery plan establishes a framework for accomplishing restoration goals for the Okanogan River subbasin including restoring connectivity throughout their historic range where feasible and practical. Short- and long-term actions will protect riparian habitat along spawning and rearing streams and establish, restore, and protect stream flows suitable for spawning, rearing, and migration. In addition, water quality will be protected and restored where feasible and practical. In the mainstem Columbia River, implementation of the FCRPS ESA section 7 Biological Opinion (NMFS, 2008a; NMFS, 2010) provides a number of new actions and continuation of existing programs that will likely continue to increase passage survival through the Columbia River mainstem passage corridor. The implementation of these actions continues to improve habitat conditions in the Okanogan River NEP Area to support reestablishing a potential fourth independent population of UCR spring-run Chinook salmon. Salmon Creek and Omak Creek offer the best habitat conditions for spawning and rearing in the subbasin, and major efforts by the CTCR are underway to restore tributary habitat for spring-run Chinook salmon in both the United States and Canadian portions of the Okanogan River subbasin.

In addition to actions taken under the recovery plan, there are many federal and state laws and regulations that will also help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat. Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) requires permits from the United States Army Corps of Engineers (Corps) before dredge or fill material can be discharged into waters of the United States. The dredge and fill permit program provides avoidance, minimization, and mitigation for the potential adverse effects of dredge and fill activities within the nation's waterways (40 CFR 100–149). Section 404(b) of the CWA requires that section 404 permits be granted only in the absence of practicable alternatives to the proposed project, which would have a less adverse impact on the aquatic ecosystem. CWA section 401 provides protection of water quality by requiring dischargers to navigable waters to comply with applicable water quality standards. In addition, construction and operational storm water runoff is subject to restrictions under CWA section 402 and state water quality laws. Also the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 et seq.), requires that Essential Fish Habitat (EFH) be identified and federal action agencies consult with NMFS on any activity which they fund, permit, or carry out that may adversely affect EFH. Freshwater EFH for spring-run Chinook salmon in the Upper Columbia River subbasin includes the Okanogan River NEP Area. For each of these authorities, we do not assume complete implementation and compliance for all actions potentially affecting the experimental population or the listed ESU. However, we expect compliance and assume, at a minimum, that these authorities provide a regulatory regime that tends to encourage actions consistent with that regime.

The habitat improvement actions called for in the recovery plan, the protective measures in this final rule, and compliance with existing federal, state and local laws, statutes, and

regulations, are expected to contribute to the survival of the experimental population in the Okanogan River subbasin into the foreseeable future. Although any reintroduction effort is likely to require supplementation with hatchery-origin fish for several years, we conclude there is the potential for a population of spring-run Chinook salmon to become established. Furthermore, we conclude that such a self-sustaining population of genetically compatible individuals is likely to further the conservation of the species as discussed above.

2. Is the experimental population separate geographically from the nonexperimental populations of the same species?

Section 10(j) of the ESA requires that we identify the population by regulation to provide notice of which populations are experimental. The statute also provides that the population is only considered experimental "when, and at such times as, [it] is wholly separate geographically from the nonexperimental populations of the same species." In this case, the analysis and information that identifies the population also demonstrates when and where it will be wholly geographically separate from other UCR spring-run Chinook salmon. Under this rule, the experimental population is defined as the UCR spring-run Chinook salmon population released in the Okanogan River subbasin, and their subsequent progeny, when geographically located within the Okanogan River NEP Area. When the juvenile experimental UCR spring-run Chinook salmon leave the mouth of the Okanogan River and pass into the Columbia River mainstem and proceed to the Pacific Ocean, they are no longer geographically separated from the other extant, listed UCR spring-run Chinook salmon populations, and the "experimental" designation does not apply, unless and until they return as adults to spawn in the Okanogan River NEP Area.

The Okanogan River NEP Area provides the requisite level of geographic separation because UCR spring-run Chinook salmon are currently extirpated from this area, and straying of other UCR spring-run Chinook populations into this area is extremely low (Colville Business Council, 2010). The UCR Spring-run Chinook Salmon ESU does not include the Okanogan River, and the status of the ESU does not rely on the Okanogan River subbasin for recovery. If any extant UCR spring-run Chinook salmon stray into the Okanogan River subbasin, they would acquire experimental status while within that area, and therefore no longer be covered by the "endangered" listing, nor by the full range of section 9 prohibitions. The "experimental" designation is geographically based and does not travel with the fish outside the Okanogan River subbasin.

Hatchery-origin fish used for the reintroduction will be marked, for example, with specific fin clips and/or coded-wire tags to evaluate the stray rate and allow for broodstock collection of returning NEP adults. It may be possible to mark NEP juvenile fish released into the Okanogan River NEP Area in an alternative manner (other than coded-wire tags) that would distinguish them from other Chief Joseph Hatchery-raised Chinook salmon, and we will consider this during the Chief Joseph Hatchery annual review. During the Chief Joseph Hatchery annual review process, information on fish interactions and stray rates, productivity rates of hatchery-origin and natural-origin populations, and harvest effects are analyzed and evaluated for consistency with best management practices for artificial production as developed by the Hatchery Scientific Review Group (HSRG) and other science groups in the Pacific Northwest. Any such clips or tags would not, however, be for the purpose of identifying the NEP since, as discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful, and fish begin reproducing naturally, their

offspring would not be distinguishable from fish from other natural-origin UCR spring-run Chinook salmon populations. Outside of the experimental population area, e.g., in the Columbia River below the mouth of the Okanogan River or in the ocean, any such unmarked fish (juveniles and adults alike) will not be considered members of experimental population. They will be considered part of the ESU currently listed as endangered. Likewise, any fish that were marked before release in the NEP Okanogan River Area will not be considered part of the experimental population once they leave the Okanogan River NEP Area; rather, they will be considered part of the ESU currently listed as endangered.

3. Is the experimental population essential to the continued existence of the species?

The ESA requires the Secretary, in authorizing the release of an experimental population, to determine whether the population would be "essential to the continued existence" of the ESU. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further definition to the term when it described an essential experimental population as one whose loss "would be likely to appreciably reduce the likelihood of the survival of the species in the wild" (see, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 97-835, at 15 (1982)). The USFWS incorporated this concept into its regulatory definition of an essential population.

Based on the best available information as required by ESA section 10(j)(2)(B), we conclude that the proposed experimental population will not be one "whose loss would be likely to appreciably reduce the likelihood of survival" of the UCR Chinook Spring-run Salmon ESU for the reasons described below.

The recovery plan states that recovery of spring-run Chinook salmon in the Okanogan subbasin is not a requirement for delisting. Based on the recovery plan's recovery criteria and

proposed management strategies, the UCR Spring-run Chinook Salmon ESU could recover to the point where listing under the ESA is no longer necessary solely with contributions from the three extant populations. Specifically, if the Wenatchee and Methow populations could achieve a 12-year geometric mean abundance of 2,000 natural-origin fish, and if the Entiat population reaches a 12-year geometric mean abundance of 500 natural-origin fish, the UCR Spring-run Chinook Salmon ESU would meet the recovery criteria for abundance. This would require a minimum productivity of between 1.2 and 1.4 recruits per spawner for the 12-year time period (NMFS, 2007). The extant populations would also need to meet specific criteria, identified in the recovery plan, which would result in a moderate or lower risk for spatial structure and diversity. The Upper Columbia Salmon and Steelhead Recovery Plan identifies several harvest, hatchery management, hydropower and habitat related actions that could be taken to improve viability of the three extant UCR spring-run Chinook salmon populations.

The recovery plan estimates recovery of the UCR Spring-run Chinook Salmon ESU would take 10 to 30 years without the addition of the Okanogan population. Based on the best available current evidence and information, we conclude that recovery of the UCR Spring-run Chinook Salmon ESU would still be likely under the above-discussed conditions.

NOAA's 2011 5-year status review concluded that, despite an increase in abundance and a decrease in productivity of the UCR Spring-run Chinook Salmon ESU, information considered in the review did not change the biological extinction risk category since the previous 2005 status review. Neither status review considered the potential for UCR spring-run Chinook salmon in the Okanogan River subbasin to alter this risk, because UCR spring-run Chinook salmon were extirpated from the Okanogan River subbasin in the 1930s and no UCR spring-run Chinook salmon currently exist in the Okanogan River subbasin.

In summary, even without the establishment of a fourth (Okanogan) population, the UCR Spring-run Chinook Salmon ESU could possibly be delisted if all threats were addressed and all three populations recovered. Because we conclude that a population of UCR spring-run Chinook salmon in the Okanogan River NEP Area is not essential for conservation of the ESU, we conclude that the proper designation is as an NEP. Under Section 10(j)(2)(C)(ii) of the ESA we cannot designate critical habitat for a NEP.

Location of the NEP

ESA section 10(j) requires that the experimental population be designated "only when, and at such times, as it is geographically separate from nonexperimental populations of the same species." The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR spring-run Chinook salmon in this defined Okanogan River NEP Area are considered part of the NEP, irrespective of their origin. Conversely, when UCR spring-run Chinook salmon are located outside this defined Okanogan River NEP Area, they are not considered part of the NEP.

Additional Management Restrictions, Protective Measures, and Other Special Management Considerations

As indicated above, section 10(j) requires that experimental populations are treated as threatened species, except for certain portions of section 7. Congress intended that this provision would authorize us to issue regulations we deemed necessary and advisable to provide for the conservation of the experimental population, just as it does, under section 4(d), for any threatened species (JOINT EXPLANATORY STATEMENT, supra, at 15). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and

flexibility to the Secretary in managing experimental populations so as to reduce opposition to release of listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we are exercising the authority to issue protective regulations under section 4(d) for the proposed NEP to identify take prohibitions necessary to provide for the conservation of the species and otherwise provide assurances to people in the Okanogan River NEP Area.

The ESA defines "take" to mean: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Concurrent with the ESA section 10(j) authorization, we adopt protective regulations under ESA section 4(d) for the experimental population that prohibit take of UCR spring-run Chinook salmon that are part of the experimental population except in the following circumstances in the Okanogan River NEP Area:

1. Any activity taken pursuant to a valid permit issued by us under §223.203(b)(1) and §223.203(b)(7) for scientific research activities.
2. Aid, disposal, or salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3).
3. Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan that complies with the requirements of §223.203(b)(5).
4. Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan that complies with the requirements of §223.204.

5. Any harvest-related activity consistent with state harvest regulations and an approved Fishery Management Evaluation Plan that complies with the requirements of §223.203(b)(4).
6. Any take that is incidental[1] to an otherwise lawful activity. Otherwise lawful activities include, but are not limited to, agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations.

Outside the Okanogan River NEP Area, UCR spring-run Chinook salmon are not considered to be part of the NEP (even if they originated there), and the take prohibitions applicable for endangered UCR spring-run Chinook salmon will apply.

Summary of Comments and Responses

The proposed rule and draft EA established a public comment period from October 24 until December 9, 2013 (78 FR 63439, October 24, 2013). In addition to welcoming comments in general, we also requested comments on seven specific questions regarding: (1) whether the Methow Composite stock of UCR spring-run Chinook salmon is the best fish to use in establishing an experimental population and the scientific basis for the comment; (2) the proposed geographical boundary of the experimental population; (3) the extent to which the experimental population would be affected by current or future federal, state, tribal, or private actions within or adjacent to the experimental population area; (4) any necessary management restrictions, protective measures, or other management measures that we may not have considered; (5) the likelihood that the experimental population would become established in the Okanogan River NEP Area; (6) whether the proposed experimental population is essential or

[1] Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. 50 CFR 402.02

nonessential; and (7) whether the proposed designation furthers the conservation of the species and whether we have used the best available science in making this determination. We also contacted other Federal agencies and tribes and invited them to comment on the proposed rule. On November 5, 2013, we also held a public meeting within the geographic area affected by the proposed rule.

We received comments from a total of 8 individuals or organizations on the proposed rule and draft EA representing the opinions of various natural resource agencies, county officials, non-governmental organizations, and private entities. Six of the commenters expressed support for the proposal. One of the commenters in support of the proposal also suggested a few specific technical edits and clarifications be made to the draft EA, which we incorporated. The remaining two commenters provided comments expressing concerns about the proposal. Below we summarize our responses to all of the substantive issues raised regarding the proposed rule and draft EA.

Comments and Responses

Comment 1: One commenter noted disappointment in the short comment period, and felt that there was inadequate coordination with elected officials in developing the proposed introduction of endangered UCR spring-run Chinook salmon into the Okanogan River and tributaries.

Response: We provided a 45-day comment period starting on October 24, 2013, and ending on December 9, 2013. We did not receive requests from commenters for a review period extension.

We believe that there was adequate coordination with elected officials and the public in the development of the proposed NEP. The reintroduction of spring-run Chinook salmon into

the Okanogan River subbasin was included as a recommended action in the 2007 Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan. The Recovery Plan was developed in close collaboration with the Upper Columbia Salmon Recovery Board with extensive involvement of elected officials, state and tribal co-managers, and other stakeholders throughout the region. In 2011, we published an Advance Notice of Proposed Rulemaking in the Federal Register (76 FR 42658; July 16, 2011) notifying the public of our intention to develop a proposal for reintroduction, and describing opportunities for public engagement. Additional opportunities for input and engagement were highlighted in the proposed rule (78 FR 63439; October 24, 2013). We met with the Okanogan County Commissioners on December 5, 2011, and on November 5, 2013. On those same dates we also convened public meetings in Omak, Washington on the proposed reintroduction. These meetings were noticed in advance in local newspapers.

Comment 2: One commenter contended that there is a lack of credible historical evidence that the Okanogan Basin ever supported a viable population of spring-run Chinook salmon.

Response: We believe there is credible evidence that the Okanogan River subbasin historically supported a viable population of spring-run Chinook salmon (see section 3.2.1.1 of the EA for more detailed discussion). UCR spring-run Chinook salmon historically occurred in at least four systems in the Okanogan River subbasin: (1) Salmon Creek (Craig and Suomela, 1941), (2) tributaries upstream of Lake Osoyoos (Gartrell, 1936; Chapman et al., 1995; NPCC, 2004a), (3) Omak Creek (Fulton, 1968), and (4) the Similkameen River (Fulton, 1968).

Comment 3: One commenter expressed concern that there is inadequate habitat to support the reintroduction of UCR spring-run Chinook salmon.

Response: In the EA we evaluated whether the current water conditions would allow for a reintroduction program to succeed, and which areas of the Okanogan River subbasin currently have potential for year round rearing of UCR spring-run Chinook salmon (Section 3.5.4). We concluded that there is adequate tributary habitat to support UCR spring-run Chinook salmon in the United States portion of the Okanogan River subbasin.

Comment 4: One commenter expressed concern that the reintroduction of spring-run Chinook salmon will negatively impact other ESA listed and non-listed species.

Response: The reintroduction will not negatively impact other populations of UCR spring run Chinook salmon. The reintroduction effort will effectively reduce releases of Methow Composite hatchery smolts in the Methow subbasin by 200,000 out of a program goal of 600,000 smolts, and release them into the Okanogan River subbasin instead. Consequently the number of naturally spawning hatchery fish in the Methow subbasin is expected to be greatly reduced, by approximately one third, providing a large benefit to the endangered wild UCR spring-run Chinook salmon in the Methow subbasin. Apart from this benefit, life-history strategies for UCR spring-run Chinook salmon will not be affected by this action. The reintroduction effort into the Okanogan River subbasin is not expected to alter fisheries management outside of the action area and not expected to result in an increase in harvest impacts for UCR spring-run Chinook salmon or other listed species.

The proposed reintroduction is unlikely to negatively affect UCR summer/fall-run Chinook salmon populations. Spring-run Chinook salmon typically spawn prior to, and in different habitat than, summer/fall-run Chinook salmon habitat. Competition for spawning sites or redd superimposition is typically rare and in this case is not expected between the two species.

The reintroduction effort will not negatively impact UCR steelhead. Given the life-history differences between UCR spring-run Chinook salmon and steelhead (e.g., discrete run, spawn, and emergence timing), adverse ecological interactions between the experimental spring-run Chinook salmon population and steelhead are expected to be minimal. There is the possibility of some incidental take of UCR steelhead by activities directed at the experimental population (e.g., handling of steelhead that is incidental to the collection of spring-run Chinook broodstock). However, the level of incidental take of UCR steelhead is expected to be minimal, and non-lethal. Additionally, while the limited protective regulations in this final rule will apply to the nonessential experimental population of UCR spring-run Chinook salmon, any actions that might directly or indirectly take steelhead in the Okanogan River subbasin must comply with the 4(d) protective regulations for West Coast steelhead (71 FR 5178; February 1, 2006).

Comment 5: One commenter was concerned about the genetic risks to the Methow population of spring-run Chinook salmon posed by "alien" stocks straying into the Methow subbasin from the reintroduction effort in the Okanogan River subbasin.

Response: No "alien" stocks of spring-run Chinook salmon would be used in the reintroduction program. The reintroduction effort will use Methow Composite hatchery stock, a stock originating in the Methow subbasin that is currently propagated at the Winthrop National Fish Hatchery. This stock is considered the most closely related to the historical spring Chinook salmon run in the Okanogan River subbasin and determined to be the best for the reintroduction program (see EA Subsection 2.5.3, Authorize the Reintroduction Using a Different Hatchery Stock). As previously mentioned, the proposed reintroduction program will likely reduce the impact of the Methow Composite stock on wild UCR spring-run Chinook salmon in the Methow subbasin by relocating the release of 200,000 smolts from the Methow River to the Okanogan

River subbasin.

Comment 6: One commenter was concerned that harvest targeting reintroduced UCR spring-run Chinook salmon stocks would impede recovery by resulting in the over-harvest of co-mingled Methow subbasin salmon and steelhead.

Response: Although the wild Methow and the reintroduced UCR spring-run Chinook salmon populations would co-mingle in the ocean and mainstem Columbia River during adult migration, neither population will be marked with an adipose-fin clip and thereby be subjected to higher sport-harvest rates (see EA Subsection 1.7.1.2, Spring-run Chinook Salmon Reintroduction Program (Methow Composite Stock)). Successful reintroduction of an experimental UCR spring-run Chinook salmon population will expand the spatial distribution of the UCR Spring-run Chinook Salmon ESU in the Upper Columbia River Basin, thus aiding in recovery.

Comment 7: One commenter requested information regarding the effectiveness of a previous reintroduction effort by the CTCR in the Okanogan River subbasin using the Carson stock of hatchery spring-run Chinook salmon.

Response: CTCR staff informed us that Chinook smolts were released in the Okanogan River subbasin from 2002 through 2006 to evaluate the potential for a reintroduction program (see EA Subsection 2.5.3, Authorize the Reintroduction Using a Different Hatchery Stock). The Carson stock releases were terminated in 2006 in favor of obtaining a broodstock source more genetically similar to the historical Okanagan subbasin stock that would better support a long-term reintroduction program. We could not find any published literature on the effectiveness of the Carson spring-run Chinook salmon reintroduction efforts. According to CTCR staff, the 2002-2006 Carson stock reintroduction effort demonstrated that spring-run Chinook salmon

could successfully rear in Omak Creek and emigrate out of the Okanogan River subbasin. The study was short-term and limited in scope. Additional information may be obtained from CTCR staff.

Comment 8: One commenter requested information regarding the designation of other nonessential experimental populations, and whether they had been successful.

Response: To date, NMFS has designated two nonessential experimental populations under section 10(j) of the ESA.

On January 15, 2013, NMFS designated Middle Columbia River steelhead reintroduced above the Pelton Round Butte Hydroelectric Project (Oregon) as a non-essential experimental population under section 10(j) of the ESA. For additional information see: http://www.gpo.gov/fdsys/pkg/FR-2013-01-15/html/2013-00700.html.

On December 31, 2013, NMFS issued a final rule establishing a nonessential experimental population of Central Valley spring-run Chinook salmon and associated protective regulations under section 4(d) of the ESA. For additional information see: http://www.westcoast.fisheries.noaa.gov/central_valley/san_joaquin/san_joaquin_reint.html

NMFS has not had sufficient time yet to determine the effectiveness of these NMFS 10(j) reintroduction efforts.

The USFWS has used Section 10(j) of the ESA to reintroduce scores of threatened and endangered species throughout the U.S. For additional information see: http://ecos.fws.gov/ecos/home.action

Comment 9: One commenter questioned whether the proposed reintroduction would divert resources away from recovery efforts targeting extant spring-run Chinook salmon

populations, and expressed concerns that the reintroduction would impose a financial burden on Okanogan County ratepayers.

Response: Funds allocated to salmon recovery and habitat restoration by Public Utility Districts, the Bonneville Power Administration and other federal agencies are already established and would not change as a result of the reintroduction program. Because there would be no change or redirection of these allocated funds with, or without, the designation of UCR spring-run Chinook salmon as a NEP in the Okanogan River subbasin, the reintroduction program would not impose any additional financial burden on Okanogan County ratepayers.

Comment 10: Two commenters expressed concern that the introduction of spring-run Chinook salmon would bring additional regulatory burdens, and that the "threatened" status accompanying a nonessential experimental population might lead to an upgraded endangered status in the future.

Response: This is a concern that we have specifically sought to address throughout the rulemaking process, and as a result, no additional regulatory burdens would occur as a result of this designation. The underlying intent of the nonessential experimental population is to utilize the flexibility and discretion afforded under section 10(j) of the ESA to manage the introduced population in a manner that minimizes regulatory burdens and the potential risk of ESA liability to the local community. Section 10(j) allows us to promulgate tailored protective regulations to ensure that the potential implication(s) of the introduced population are minimized for private stakeholders. An exception to the take prohibitions was included in the proposed rule to address this specific concern by allowing take of spring-run Chinook in the NEP area that is incidental to an otherwise lawful activity (see section CFR 223.301(c)(3)(vi) in this final rule). In this final rule, we have included additional language in this exception to further protect individuals acting

lawfully from the take prohibitions by clarifying that "any fish that is incidentally taken in a manner allowed by this paragraph may not be collected and must be immediately returned to its habitat." This clarifying language will help ensure that an individual does not errantly retain, transport, or possess a fish outside of the Okanogan River NEP Area where the take prohibitions for endangered UCR spring-run Chinook salmon would apply.

The nonessential experimental population designation also minimizes the regulatory burden under section 7 of the ESA for federal actions. Section 10(j) allows that an experimental population deemed "nonessential" is treated as a species proposed for listing during interagency consultations under section 7 of the Act, requiring federal agencies to confer (rather than consult) with NMFS on actions that are likely to adversely affect the experimental population. Any recommendations that result from the conference are advisory in nature only, further minimizing any regulatory burden associated with the designation of the experimental population.

There is no risk that the reintroduced population will be upgraded to "endangered" status. The "threatened" status that accompanies the reintroduced nonessential experimental population designation will remain unchanged "in perpetuity" (see EA Subsection 4.1.1.5, Short-term and Long-term Timeframes Used for Analyses of the EA).

Comment 11: One commenter was concerned that the reintroduction will only serve to justify future acquisition of private lands for the purposes of habitat restoration and protection.

Response: We respectfully disagree that the reintroduction program will serve as justification for, or provide an incentive for, enhanced land acquisition for habitat conservation. The reintroduction program does not encourage nor require additional land acquisition to be successful. There is adequate potential spring-run Chinook salmon habitat available in the Okanogan River subbasin to support the reintroduction effort (see EA Subsection 3.5.4,

Okanogan Subbasin Habitat Availability). Although the 10(j) designation is not a justification to acquire land for habitat conservation purposes, the CTCR and any other entity retain the legal rights to pursue land acquisitions in the Okanogan River subbasin to protect salmon and steelhead habitat. Similarly, landowners retain the legal right to pursue, accept and reject proposed property transactions as they see fit.

Comment 12: One commenter asked whether non-tribal members would be afforded equal harvest opportunities as tribal members on hatchery-origin UCR spring-run Chinook salmon from the Okanogan River subbasin.

Response: The CTCR is developing a fishery management plan to harvest returns to the Okanogan River subbasin if such harvest is required to reduce the proportion of naturally spawning hatchery-origin spring-run Chinook salmon. Washington Department of Fish and Wildlife has not submitted a harvest plan that would include recreational fishing for spring-run Chinook salmon in the Okanogan River subbasin. However, Washington Department of Fish and Wildlife may desire to coordinate with co-managers to set recreational fishing seasons in addition to regulations already established by the CTCR for tribal fisheries in the mainstem Columbia River above Wells Dam for Leavenworth spring-run Chinook salmon returning to the Chief Joseph Hatchery.

After review of the comments and further consideration, we have decided to adopt the proposed rule that was published in the Federal Register (78 FR 63439) on October 24, 2013, with only non-substantive editorial changes. Minor modifications were made to remove unnecessary regulatory language and provide clarity. The modifications make no change to the substance of the rule.

Findings

Based on the best available information, we determine that the release of a NEP of UCR spring-run Chinook salmon in the Okanogan River NEP Area will further the conservation of UCR spring-run Chinook salmon. Fish used for the reintroduction will come from the Methow Composite hatchery program located at Winthrop National Fish Hatchery. These fish are included in the UCR spring-run Chinook salmon ESU and have the best chance to survive and adapt to conditions in the Okanogan River subbasin (Jones et al., 2011). They are expected to remain geographically separate from the existing three extant populations of the UCR spring-run Chinook Salmon ESU during the life stages in which the NEP remains in, or returns to, the Okanogan River; at all times when members of the NEP are downstream of the confluence of the Okanogan and Columbia Rivers, the experimental designation will not apply. Establishment of a fourth population of UCR spring-run Chinook salmon in the Okanogan River subbasin will likely contribute to the viability of the ESU as a whole. This experimental population release is being implemented as recommended in the 2007 Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, while at the same time ensuring that the reintroduction will not impose undue regulatory restrictions on landowners and third parties.

We further determine, based on the best available information, that the designated experimental population is not essential to the ESU, because absence of the experimental population will not reduce the likelihood of survival of the ESU. An Okanogan spring-run Chinook salmon population is not a requirement for delisting because the population is extirpated. Implementation of habitat actions in the recovery plan are expected to increase the viability of the Methow, Wenatchee, and Entiat populations to meet ESU recovery criteria without establishment of an Okanogan population. We therefore designate the released population as a Nonessential Experimental Population.

Information Quality Act and Peer Review

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

Classification

Executive Order 12866

This final rule has been determined to be not significant under Executive Order (E.O.) 12866.

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

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies

to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy at the Small Business Administration at the proposed rule stage that this rule will not have a significant economic effect on a substantial number of small entities. No comments were received regarding the economic impact of this final rule on small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. Because this rule requires no additional regulations on small entities and would impose little to no regulatory requirements for activities within the affected area, a final regulatory flexibility analysis is not required and one was not prepared.

Executive Order 12630

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

Executive Order 13132

In accordance with E.O. 13132, we have determined that this final rule does not have federalism implications as that termed is defined in E.O. 13132.

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

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

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969, we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this final rule. We made the draft EA available for public comment along with the proposed rule, received one set of comments, and responded to those comments in an Appendix to the EA. We have prepared a final EA and FONSI on this action and have made these documents available for public inspection (see ADDRESSES section).

Government-to-Government Relationship with Tribes (E.O. 13175)

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the federal government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes) we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

The CTCR Reservation lies within the experimental population area. In 2010 staff members of CTCR met with NMFS staff. They discussed the Tribe's developing proposal to

reintroduce UCR spring-run Chinook salmon in the Okanogan River subbasin and designate it as an ESA 10(j) experimental population.

Since that meeting CTCR and NMFS staffs have been in frequent contact, including explaining the rule-making process and evaluations involved in reviewing any proposal from the Tribes. These contacts and conversations included working together on public meetings held in Okanogan and Omak, WA (December 5, 2011, and November 5, 2013) and monthly status/update calls describing activity associated with the NEPA and ESA reviews associated with the proposal and final rules.

In addition to frequent contact and coordination among CTCR and senior NMFS technical and policy staff, we also discussed hatchery production changes affected by the Chief Joseph Hatchery and the associated aspects of the 10(j) proposal with the Parties to United States v. Oregon (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, and the Shoshone-Bannock Tribes of the Fort Hall Reservation; the States of Washington, Oregon, and Idaho; and the United States (NMFS, USFWS, Bureau of Indian Affairs, and the Department of Justice)). The current 2008-2017 United States v. Oregon Management Agreement (2008) anticipated the development of the Chief Joseph Hatchery. Footnote #5 to Table B-1 Spring Chinook Production for Brood Years 2008-2017 states that the parties to the Agreement "anticipate that the proposed Chief Joseph Hatchery is likely to begin operations during the term of this Agreement. The Parties agree to develop options for providing … spring Chinook salmon eggs to initiate the Chief Joseph program when it comes online." (p. 99). This will include coordinating with the "Production Advisory Committee" (PAC) which is responsible to "coordinate information, review and analyze … future natural and artificial

production programs … and to submit recommendations to the management entities." (p. 14) The U.S. v Oregon Policy Committee, in February 2012, approved changes to the Agreement that identified the marking and transfer of 200,000 UCR spring-run Chinook salmon pre-smolts to Okanogan River acclimation ponds, and the prioritization of this production, in relation to other hatchery programs in the Methow River subbasin. The footnote has been modified to reflect these changes. The PAC includes technical representatives from " … the Warm Springs Tribe, the Umatilla Tribes, the Nez Perce Tribe, the Yakama Nation, and the Shoshone-Bannock Tribes." (p.14). It is these technical representatives who will review adult management proposals associated with this final rule. Those representatives are senior staff from the identified tribes and will be in communication with their respective governments. We invite meetings with tribes to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with the affected tribes.

References Cited

A complete list of all references cited in this final rule is available upon request (see FOR FURTHER INFORMATION CONTACT).

Dated: July 7, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

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List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports.

For the reasons set out in the preamble, part 223 of chapter II, title 50 of the Code of Federal Regulations, is amended as follows.

Part 223--THREATENED MARINE AND ANADROMOUS SPECIES

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

Authority: 16 U.S.C. 1531 et seq.; subpart B, §§ 223.201 and 223.202 also issued under 16 U.S.C. 1361 et seq.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, in the table in paragraph (e) under "Fishes," add an entry for "Salmon, Chinook (Upper Columbia River spring-run ESU-XN)" after the entry for "Salmon, Chinook (Upper Willamette River ESU)" and before the entry for "Salmon, Chum (Columbia River ESU)" to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species[1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
* *	*	*	*	*	*
Fishes					
* *	*	*	*	*	*
Salmon, Chinook (Upper Columbia River spring-run ESU-	Oncorhynchus tshawytscha	Upper Columbia River spring-run Chinook salmon only when, and at	[Insert Federal Register citation and date when published]	NA	223.301

XN).		such times, as they are found in the mainstem or tributaries of the Okanogan River from the Canada-United States border to the confluence of the Okanogan River with the Columbia River, Washington.			
* *	*	*	*	*	*

[1]Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

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3. In § 223.301, add paragraph (c) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

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(c) Okanogan River UCR spring-run Chinook Salmon Experimental Population (Oncorhynchus tshawytscha). (1) The Upper Columbia River (UCR) spring-run Chinook salmon population located in the geographic area identified in paragraph (c)(5) of this section shall comprise the Okanogan River nonessential experimental population (NEP), and shall be treated as a "threatened species" pursuant to 16 U.S.C. 1539(j)(2)(C).

(2) Prohibitions. Except as provided in paragraph (c)(3) of this section, the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) relating to endangered species apply to UCR spring-run Chinook salmon in the Okanogan River NEP Area, defined in paragraph (c)(5) of this section.

(3) Exceptions to the Application of Section 9 Take Prohibitions in the Experimental Population Area. Take of UCR spring-run Chinook salmon that is otherwise prohibited by paragraph (c)(2) of this section and 50 CFR 223.203(a) in the Okanogan River NEP Area is allowed, except as otherwise noted, provided it falls within one of the following categories:

(i) Any activity taken pursuant to a valid permit issued by NMFS under § 223.203(b)(1) and (7) for scientific research activities;

(ii) Aid, disposal, or salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3);

(iii) Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan (HGMP) that complies with the requirements of 50 CFR 223.203(b)(5);

(iv) Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan (TRMP) that complies with the requirements of 50 CFR 223.204;

(v) Any harvest-related activity consistent with state harvest regulations and an approved Fishery Management Evaluation Plan (FMEP) that complies with the requirements of 50 CFR 223.203(b)(4); or

(vi) Any take that is incidental to an otherwise lawful activity, provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of the otherwise lawful activity. Otherwise lawful activities include, but are not limited to, agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations. Any fish that is incidentally taken in a manner allowed by this paragraph may not be collected and must be immediately returned to its habitat.

(4) Prohibited take outside the NEP area. Outside the Okanogan River NEP Area, UCR spring-run Chinook salmon are not considered to be part of the NEP, irrespective of their origin, and therefore the take prohibitions for endangered UCR spring-run Chinook salmon apply.

(5) Geographic extent of the Okanogan River NEP Area. The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR spring-run Chinook salmon in this defined Okanogan River NEP Area are considered part of the NEP, irrespective of where they originated.

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