

**RECORD OF DECISION**

**for**

**Proposed Issuance of an Endangered Species Act**

**Section 10(a)(1)(B) Incidental Take Permit**

**to the**

**Deschutes Basin Board of Control Member Districts:**

**Arnold Irrigation District (AID)**

**Central Oregon Irrigation District (COID)**

**Lone Pine Irrigation District (LPID)**

**North Unit Irrigation District (NUID)**

**Ochoco Irrigation District (OID)**

**Swalley Irrigation District (SID)**

**Three Sisters Irrigation District (TSID)**

**Tumalo Irrigation District (TID)**

**and the**

**City of Prineville, Oregon**

**for the**

**Deschutes Basin Habitat Conservation Plan**

**U.S. Fish and Wildlife Service**

*RECORD OF DECISION FOR THE PROPOSED ISSUANCE  
OF A SECTION 10(A)(1)(B) INCIDENTAL TAKE PERMIT*

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OF A SECTION 10(A)(1)(B) INCIDENTAL TAKE PERMIT*

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## Introduction

This Record of Decision (ROD) was prepared by the U.S. Fish and Wildlife Service (Service) in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. §4321 *et seq.*), as amended. Because the Draft Environmental Impact Statement (DEIS) was developed prior to the effective date of the Council on Environmental Quality's updated regulations implementing NEPA, the Final EIS (FEIS) and this ROD were completed under the previous regulations in the interest of time and efficiency. The updated regulations became effective on September 14, 2020 (40 CFR § 1506.13).

The purpose of this ROD is to document the decision of the Service in response to an application submitted by the Deschutes Basin Board of Control's eight member districts—the Arnold Irrigation District (AID), Central Oregon Irrigation District (COID), Lone Pine Irrigation District (LPID), North Unit Irrigation District (NUID), Ochoco Irrigation District (OID), Swalley Irrigation District (SID), Three Sisters Irrigation District (TSID), and the Tumalo Irrigation District (TID)—and the City of Prineville, Oregon, (collectively, the applicants) for an Incidental Take Permit (ITP) for species listed under the Endangered Species Act of 1973 (ESA) (16 U.S.C. §1531 *et seq.*), as amended. The information contained in this ROD is based on the ITP application, the Deschutes Basin Habitat Conservation Plan (DBHCP, Biota Pacific, 2020), the FEIS addressing this action (USFWS 2020a), and other information in the administrative record. The Service's decision to issue the ITP follows a determination that the ITP issuance criteria under section 10(a)(2)(B) of the ESA have been met. The ITP permits the incidental take of two species (covered species) listed under the ESA that occurs due to the continued storage, release, diversion, and return of irrigation water by the DBBC member districts, and groundwater withdrawals, effluent discharges, and surface water diversions by the City of Prineville.

This ROD presents the Service's permit decision and the rationale supporting the decision, identifies the reasonable range of alternatives considered in the FEIS, and discusses whether all means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted (40 CFR § 1505.2).

## Proposed Action

The Service proposes to issue an ITP to the applicants, under the authority of section 10(a)(1)(B) of the ESA for a period of 30 years from the date of permit issuance. Documents used in the preparation of this ROD include the following, all herein incorporated by reference:

- Final Deschutes Basin Habitat Conservation Plan (Biota Pacific 2020);
- Final Environmental Impact Statement Addressing the Issuance of Incidental Take Permits for the Deschutes Basin Habitat Conservation Plan (USFWS 2020a);
- Biological Opinion on the DBHCP (USFWS 2020b);
- Findings and Recommendations for the Proposed Issuance of an ESA section 10(a)1(B) ITP for the DBHCP (Service 2020c).

## Purpose and Need

The purpose of the Federal action is to fulfill the Service's section 10(a)(1)(B) conservation authorities and obligations and to render decisions on the ITP application requesting authorization of incidental take of two species listed as threatened under ESA—the Oregon spotted frog and the bull trout. The need for the Federal action is to respond to the applicants' request for an ITP for the covered species and covered activities as described in the DBHCP. Any permit issued by the Service must meet all applicable issuance criteria and implementation should be technically and economically feasible. *See* 16 U.S.C. §1539(a)(2)(B); 43 CFR § 46.420(b). Issuance criteria includes, without limitation, requirements that the applicants will minimize and mitigate the impacts of the taking to the maximum extent practicable and the taking will not appreciably reduce the likelihood of survival and recovery of the covered species in the wild.

## Project Description

The Project is as described in Chapters 3 and 6 of the final DBHCP (Biota Pacific, 2020). The DBHCP covers the activities of the applicants that influence surface hydrology and water quality in the Deschutes Basin of Central Oregon. These covered activities include the storage and release of water at irrigation reservoirs, the diversion of water from natural streams, and the return of water to natural streams. Groundwater pumping and seasonal discharge of treated effluent are also covered activities for the City of Prineville. Each of the covered activities is associated with an identified structure or feature, such as a dam, reservoir, diversion, or return. The DBHCP covers four dams and reservoirs, 47 large and small surface diversions, 14 wells (12 current and 2 future), and 37 returns. These covered activities, as described in the DBHCP, occur within the Permit Area and are likely to result in the incidental take of covered species for which the applicants are requesting incidental take authorization.

The DBHCP includes measures to minimize adverse effects to and the likelihood of take of the covered species. Minimization measures include modifying the timing and volume of flows from all four irrigation storage reservoirs to better align with the life history needs of the covered species. For example, winter flows from Wickiup Reservoir will increase from a minimum of 100 cubic feet per second (cfs) to a variable range between 400-500 cfs over the life of the ITP. In addition, seasonally-specific flow adjustments (ramping rates) will be deployed to minimize abrupt water level changes; and reservoir level fluctuations will be minimized during the breeding and rearing periods of the covered species to optimize conditions for the covered species. Other measures to minimize the amount of take of covered species include, but are not limited to, reducing diversions to maintain minimum in-stream flows and the maintenance and/or replacement of fish screens to the current National Marine Fisheries Service standards.

The mitigation associated with the DBHCP includes providing additional volumes of water to be released to enhance habitat for the covered species. For example, increasing volumes of water (by 3,000 to 9,000 acre-feet per year) will be provided from Crescent Creek Reservoir over the life of the permit to provide additional water aligned with the life history needs of the covered species. Additional mitigation includes the establishment of multiple conservation funds to either lease additional water for in-stream purposes or to enhance and restore habitats for the

covered species. For example, the Upper Deschutes Conservation Fund provides \$150,000 per year for the life of the DBHCP to support habitat restoration and other activities in the Upper Deschutes Basin to benefit the covered species.

Habitat and species monitoring components are included to ensure that the minimization and mitigation measures are providing the conservation benefits anticipated, as described in Chapter 7 of the DBHCP (Biota Pacific 2020).

### Plan Area

The Plan area for the DBHCP in Central Oregon covers all waters downstream of the covered activities where covered species could be impacted by altered hydrology or water quality. The upstream limits of the covered lands and waters are those locations where the covered activities first influence surface hydrology. On the Deschutes River and Ochoco Creek, the covered lands begin at the full-pool elevations of Crane Prairie and Ochoco Reservoirs, respectively. On Crescent Creek, Whychus Creek, Crooked River, McKay Creek, and Lytle Creek, the first points of influence are dams or diversion structures operated by the applicants. On Tumalo Creek, the first point of influence is the outfall from TID's Crater Creek diversion, and on Trout Creek the first point of influence is a return flow from NUID. The downstream limit of all covered lands and waters is the mouth of the Deschutes River. Within the covered stream reaches, the covered lands and waters extend only to stream channels and floodplains potentially subjected to surface inundation as described in the DBHCP (Biota Pacific 2020).

### Covered Species

The Service's ITP would authorize incidental take of two species (Table 1). The DBHCP includes measures to minimize and mitigate the impacts of the taking on all covered species, to the maximum extent practicable, and otherwise comply with the permitting criteria of 16 U.S.C. §1539(a).

**Table 1. Covered species under the Deschutes Basin Habitat Conservation Plan**

Common Name	Scientific Name	ESA Status
Bull trout	<i>Salvelinus confluentus</i>	threatened
Oregon spotted frog	<i>Rana pretiosa</i>	threatened

### Covered Activities

The applicants are requesting authorization from the Service for take of the Oregon spotted frog and the bull trout associated with the storage and release of water at irrigation reservoirs, the diversion of water from natural streams, the return of water to natural streams, groundwater pumping, seasonal discharge of treated effluent, and those activities necessary to carry out all mitigation and other conservation measures identified in the DBHCP and/or the ITP. The covered activities are described in greater detail in Chapter 3 of the DBHCP (Biota Pacific 2020). All covered activities will be implemented in accordance with the terms of the DBHCP and ITP.

## **Protection Measures and Conservation Strategies**

The ITP is conditioned on implementation of the DBHCP. The applicants developed the DBHCP with technical assistance from the Service, the National Marine Fisheries Service, the Bureau of Reclamation, and the Oregon Water Resources Department. Impact avoidance and minimization measures associated with the covered activities are described in Chapter 2 of the FEIS and in Chapter 6 of the DBHCP. The duration of the ITP is 30 years. The conservation strategy of the DBHCP is intended to offset the impacts of the taking of the covered species through a combination of minimization and mitigation measures.

## **Monitoring and Adaptive Management**

Chapter 7 of the DBHCP describes specific adaptive management and monitoring measures to ensure the requested take of the Oregon spotted frog and the bull trout are not exceeded. Adaptive management and monitoring will be used to evaluate and respond to potential new information and changed circumstances within the plan area, and thereby ensure that the conservation measures identified in the DBHCP are being implemented adequately and meeting the goals and objectives outlined in the DBHCP. Chapter 7 of the DBHCP also describes the reporting requirements to be implemented as part of the proposed action.

## **Alternatives**

The Service evaluated a range of alternatives to the proposed action. Four alternatives were analyzed in the FEIS, including a no-action alternative (Alternative 1), the applicant's proposed Alternative (Alternative 2 or Preferred Alternative), an Enhanced Variable Streamflows Alternative (Alternative 3), and an Accelerated Schedule for Enhanced Variable Streamflows (Alternative 4). Additional alternatives were also evaluated by the Service in the preparation of the FEIS and consideration of the DBHCP, but were eliminated from detailed study. The alternatives eliminated from detailed study included: (1) accelerated timelines for minimum flows; (2) increased permit term; (3) reduced covered species; (4) reduced permit term; (5) reduced geography of the covered lands; (6) reduced long-term flow minimums; (7) a restoration/enhancement focused alternative; (8) an on-farm efficiency/demand reduction alternative; (9) an alternative reflecting items in a previous litigation's proposed preliminary injunction; and (10) a no take alternative. Descriptions of these alternatives and why they were not considered for detailed study are provided in the FEIS. The following provides brief summaries of the no-action alternative as well as the three action alternatives.

### ***Alternative 1 – No Action***

The regulations for implementing NEPA require that an EIS include an evaluation of a no-action alternative (40 CFR § 1502.14). The no-action alternative may be described as the future circumstances without the proposed action. It can include predictable actions by persons or entities other than the Federal agencies involved in a project action acting in accordance with current management direction or level of management intensity. When a proposed action involves updating an adopted management plan or program, the no-action alternative assumes the continuation of the existing management plan or program. The no-action alternative

considered in the FEIS assumes continuation of the actions covered in the current ESA section 7 Biological Opinion for the Upper Deschutes River to address take of Oregon spotted frog (USFWS 2017, 2019); the actions covered in the current Biological Opinion for the Deschutes River Basin Projects to address take of Middle Columbia River steelhead trout (National Marine Fisheries Service 2005); and other predictable current and future conditions.

### ***Alternative 2 – Proposed Action/Habitat Conservation Plan***

The FEIS identifies Alternative 2, the proposed action, as the Service's preferred alternative. Under the proposed action, the Services would each issue a 30-year ITP to the applicants for incidental take of each agency's respective covered species likely to be caused by covered activities in the Deschutes Basin. The applicants would implement the DBHCP, as summarized below.

The Deschutes River Basin (or Deschutes Basin) is a 10,700-square-mile area that encompasses the Deschutes River and its tributary watersheds to its confluence with the Columbia River. The specific area in which the ITPs would apply is limited to narrow corridors of covered river and stream segments and covered reservoirs and diversion structures, and connected floodplains and wetlands that could be affected by changes in operation and maintenance of covered facilities. See Chapter 3 of the DBHCP, *Scope of the HCP*, for details on the covered lands and waters.

Under the proposed action, the applicants would implement the DBHCP conservation strategy. The conservation strategy consists of a series of conservation measures to minimize and mitigate (i.e., offset) the adverse effects of the take of the covered species that can result from the covered activities. The conservation measures are intended to address the effects of take on the covered species. Conservation measures include actions that would change the timing and volume of water released from covered reservoirs and streamflow in covered rivers and creeks. Conservation measures also include the establishment of conservation funds to support habitat restoration and enhancement projects, as well as additional funding for in-stream water leasing programs. Detailed descriptions of the conservation measures are provided in Chapter 6 of the DBHCP, *Habitat Conservation*.

The conservation strategy also provides an adaptive management and monitoring program to ensure that it is achieving the intended benefits to the covered species.

### ***Alternative 3 – Enhanced Variable Streamflows***

Under Alternative 3, the Services would each issue 30-year ITPs to the applicants for incidental take of each agency's respective covered species likely to be caused by the covered activities in the Deschutes Basin. The applicants would implement the DBHCP, as described for the proposed action, but with modifications to the conservation strategy presented in Table 2-5 of the FEIS (USFWS 2020a). These modifications would increase fall and winter flows in the Deschutes River below Wickiup Dam sooner than under the proposed action, target higher minimum flows during above-normal and wet years throughout the permit term, and protect (via an instream water right) for uncontracted fish and wildlife storage releases on the Crooked River

instream to Lake Billy Chinook. All other conservation measures and the adaptive management and monitoring program would be the same as under the proposed action.

***Alternative 4 – Accelerated Schedule for Enhanced Variable Streamflows***

Under Alternative 4, the Services would each issue a 20-year ITP to the applicants for incidental take of each agency’s respective covered species likely to be caused by the covered activities in the Deschutes Basin. The applicants would implement the DBHCP as described for the proposed action, but with a 20-year permit term and modifications to the conservation strategy presented in Table 2-6 of the FEIS (USFWS 2020a). A 20-year permit term is considered for Alternative 4 to address accelerating flow modifications and the uncertainty about covered species’ responses to flow modifications. A 20-year permit term would allow for adjusting the conservation strategy sooner than under a 30-year permit term for the proposed action and Alternative 3.

Alternative 4 is similar to Alternative 3 in that it increases fall and winter flows on the Deschutes River sooner than under the proposed action and protects releases of uncontracted (fish and wildlife) storage from diversion on the Crooked River instream to Lake Billy Chinook. Alternative 4 also accelerates the timing of fall and winter flow increases on the Deschutes River and achieves a higher minimum flow compared to the proposed action and Alternative 3; and increases minimum storage season flows on the Crooked River to 80 cubic feet per second (cfs) below Bowman Dam. All other conservation measures and the adaptive management and monitoring program under Alternative 4 are the same as for the proposed action.

**Decision and Rationale**

The Service’s decision is to select the proposed action (Alternative 2, described above), and issue an ITP that is consistent with the take minimization, mitigation, and monitoring measures described both above and in more detail in the DBHCP. Issuance of the ITP authorizes the incidental take of two covered species identified in Table 1, subject to incidental take limits and other requirements of the DBHCP during the 30-year term of the ITP. The Service’s No Surprises Rule (50 CFR §17.32) would apply to the ITP.

Based on the findings in the FEIS (USFWS 2020a), our Biological Opinion (USFWS 2020b), our ESA section 10 Findings and Recommendations (USFWS 2020c), this ROD, and other information in the administrative record, the proposed action is not likely to appreciably reduce the likelihood of the survival and recovery of the covered species in the wild, and the DBHCP complies with the permitting standards of 16 U.S.C. § 1539(a)(1)(B). The DBHCP is approved because full implementation would meet the statutory criteria for issuance of an ITP under section 10 of the ESA. Implementation of the DBHCP and issuance of the ITP fulfills the Service’s statutory mission and responsibilities while meeting the agency purpose and need to conserve listed species.

As described further in the FEIS, the proposed action was designed to incorporate conservation measures to minimize and mitigate take of covered species while adopting all practicable means to avoid, minimize, and/or mitigate environmental harm on other aspects of the environment. As

described in Chapter 2, the proposed action requires the implementation of conservation strategies that would ensure any adverse effects from the take of the covered species is offset consistent with ESA section 10(a)(2)(B) issuance criteria. Potential effects associated with the proposed action are largely equivalent (not adverse or beneficial) compared to the no-action alternative for the majority of other resources evaluated. In some cases, adverse impacts can be reduced but not eliminated, and were therefore determined to be unavoidable.

### **Conditions**

As required by section 10(a)(1)(B) of the ESA, the ITP requires implementation of the DBHCP to insure that the impacts of take of the covered species caused by covered activities will be minimized and mitigated to the maximum extent practicable. These conditions for implementation of the DBHCP are also incorporated into the findings of the Service's Biological Opinion and ESA section 10 Findings and Recommendations for the Proposed Action. Any changes to the DBHCP shall be subject to the provisions described in Chapter 6 and 9 of the DBHCP. In addition to implementing the DBHCP, additional terms and conditions include, but are not limited to, the following (consistent with the ITP):

- Upon locating a dead, injured, or sick Oregon spotted frog or bull trout or any other endangered or threatened species, contact the Service's Bend Field Office at 541-383-7146, for care and disposition instructions. Use extreme care when handling sick or injured individuals to ensure effective and proper treatment. Also take care in handling dead specimens to preserve biological materials in the best possible state for an analysis of cause of death. Along with the care of sick or injured endangered/threatened species, or preservation of biological materials from a dead specimen, the permittee is responsible for ensuring that evidence intrinsic to the specimen is not unnecessarily disturbed.
- The Service shall be allowed to conduct site visits for the duration of the ITP.
- Provide the Service with reports on all monitoring and project activities as described in the DBHCP. Reports must contain descriptions of circumstances that triggered adaptive management and how the adaptive management was implemented; description of all occurrences of changed circumstances and how they were addressed; description of any unforeseen circumstances; progress made in achieving biological goals and objectives; any problems that occurred and how they were handled; description of cost expenditures and other information related to funding assurances; an annual work plan including an implementation schedule and entities responsible for implementation; and any other pertinent information such as actions taken by any State or Federal agencies related to implementation of the DBHCP. Any changes to future mitigation and monitoring will be made only with the concurrence of the Service.

### **Environmentally Preferable Alternative**

The NEPA implementing regulations at 40 CFR § 1505.2(b) require that the ROD identify the alternative or alternatives that is/are considered to be "environmentally preferable," i.e., the alternative that causes the least damage to the biological and physical environment and best protects, preserves, and enhances historical, cultural, and natural resources. This is not

necessarily the agency-preferred alternative, which the FEIS identifies as Alternative 2 due to that action meeting the statutory requirements for permit issuance under 16 U.S.C. § 1539(a)(1)(B).

The Service identifies Alternative 3 (Enhanced Variable Streamflows) as the environmentally preferable alternative. Alternative 3 increases Upper Deschutes River winter flows earlier in the permit term, providing greater conservation benefit to the Oregon spotted frog. In addition, Alternative 3 provides greater conservation benefit to the covered (fish) species in the Crooked River because water released for the benefit of fish and wildlife purposes (including the covered species) will not be diverted out of stream thus providing flow and reduced temperature benefits to the covered species.

## **Public Involvement**

### ***Scoping***

The Service published a Notice of Intent on July 24, 2017, to announce preparation of the EIS and to solicit public comments on the scope of the EIS. The official public comment period began July 24, 2017 and ended on September 22, 2017. Four public scoping meetings were held; two in Madras, Oregon on August 14, 2017 and two in Bend, Oregon on August 15, 2017. Fifty-five comment letters were received from state and Federal agencies, local governments, stakeholders and non-profit or community organizations. A scoping report was prepared and is included as Appendix 1-C of the FEIS.

Based on the scoping process and internal coordination, the Service identified three major areas of concern, largely focused on water management issues, economic impacts, and the current environmental conditions. Concerns were raised about: minimum instream flows sufficient to support the life history needs of the covered species, specific mechanisms for water conservation and the relationship to state water rights, water quality, groundwater impacts, piping and modernization strategies, non-essential uses of water, and economic impacts and funding mechanisms.

### ***DEIS***

A Notice of Availability of the Draft EIS (84 FR 53164-53167) was published in the Federal Register for public review on October 4, 2019 in accordance with requirements set forth in NEPA (42 USC § 4321 et seq.) and its implementing regulations (40 CFR § 1500–1508). An extension of the public comment period was published in the Federal Register on October 29, 2019 (84 FR 58169), and public comments on the Draft EIS and the Draft DBHCP were accepted during the total 60-day Federal public comment period which ended on December 3, 2019. Two public open-house meetings were held during the comment period in Bend, Oregon and Prineville, Oregon on October 15, 2019 and October 16, 2019, respectively. Each public meeting included a 40-minute presentation summarizing the Draft EIS and DBHCP, including an overview of issues identified during the scoping period, alternatives carried forward for further analysis, and a summary of affected resources. Technical experts involved in the development of the Draft DBHCP and Draft EIS were in attendance to address any questions from the public.

During the comment period, comments were accepted on the Draft EIS and the Draft DBHCP. The Service received 1,611 comment letters, emails, or faxes including 2 from Federal agencies (U.S. Forest Service and U.S. Environmental Protection Agency, Region 9), 4 from State of Oregon agencies (Oregon Department of Water Resources, Oregon Department of Environmental Quality, Oregon Department of Agriculture and the Oregon Department of Fish and Wildlife), 3 from local agencies and governments (Deschutes County, Jefferson County, and the Jefferson County Soil and Water Conservation District), 1 from a Native American Tribe (The Confederated Tribes of the Warm Springs), 24 from organizations (Center for Biological Diversity, Trout Unlimited, Deschutes River Conservancy, Portland General Electric, American Whitewater, Oregon Farm Bureau, etc.), 192 letters from the general public, and numerous form letters, many including personal additions. Comments received during the public comment period include (but are not limited to) concerns relating to:

- Oregon spotted frog and bull trout take levels
- Oregon spotted frog and bull trout populations
- Minimum flow requirements
- Cultural resources
- Minimizing and mitigating to the maximum extent practicable
- The Project's proposed minimization and mitigation measures
- Adaptive management
- Economic impacts
- Uncertainty
- Relationship to the Bureau of Reclamation's actions
- Alternatives
- Hydrologic modeling

The Services' responses to comments received were incorporated into the FEIS and resulted in some minor modifications and clarifications in the FEIS and the Final DBHCP. A summary of comments received, the Services' responses, and changes made to the DEIS, are included in Appendix 1-E of the FEIS, and Attachment 1 of this ROD.

### ***FEIS***

The FEIS was filed with the Environmental Protection Agency on October 30, 2020, and noticed in the Federal Register on November, 6, 2020 (84 FR 71086). While public comments were not requested on the FEIS, we received a small number of comment letters from the Environmental Protection Agency and other stakeholders. These comment were considered by the Service and are summarized in Attachment 2 of this ROD.

**Decision on Permit Issuance**

Based on the foregoing findings with respect to the proposed action, the Service's decision is to select the proposed action (Alternative 2), and issue an ITP to the applicants, Permit Number TE89773D-0.

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Robyn Thorson  
Regional Director,  
U.S. Fish and Wildlife Service

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Date

**References**

Biota Pacific. 2020. Final Deschutes Basin Habitat Conservation Plan. Prepared for Arnold Irrigation District, Central Oregon Irrigation District, Lone Pine Irrigation District, North Unit Irrigation District, Swalley Irrigation District, Three Sisters Irrigation District, Tumalo Irrigation District and the City of Prineville.

U.S. Fish and Wildlife Service. 2020a. Final Environmental Impact Statement for the Deschutes Basin Habitat Conservation Plan. U.S. Fish and Wildlife Service Oregon Fish and Wildlife Office.

U.S. Fish and Wildlife Service. 2020b. Biological Opinion on the Deschutes Basin Habitat Conservation Plan and the Bureau of Reclamation's Operations for the Deschutes Project. U.S. Fish and Wildlife Service Oregon Fish and Wildlife Office.

U.S. Fish and Wildlife Service. 2020c. Findings and Recommendations for the Proposed Issuance of an Endangered Species Act Section 10(a)(1)(B) Incidental Take Permit for the Deschutes Basin Habitat Conservation Plan. U.S. Fish and Wildlife Service Oregon Fish and Wildlife Office.