



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Wyoming State Office
P.O. Box 1828
Cheyenne, Wyoming 82003-1828



In Reply Refer To:
6840 (930) P

September 25, 2007

Instruction Memorandum No. WY-2007-039
Expires: 9/30/2008

To: Field Managers

From: State Director

Subject: Section 7 Consultation Guidance for Projects Resulting in Platte River Depletions

Purpose: This Instruction Memorandum (IM) will provide guidance, effective immediately, for completing section 7 consultation in accordance with the Endangered Species Act (ESA) as amended (16 U.S.C. 1531 *et seq.*) with the U.S Fish and Wildlife Service (FWS) on projects resulting in consumptive water use in the Platte River Basin of Wyoming. These projects are those that have a Federal nexus, either internally (BLM proposed project) or externally (a BLM authorized or permitted project).

Policy/Action: Since 1978, the FWS has consistently found through formal section 7 consultations with Federal agencies that actions resulting in depletions to flows in the Platte River system are likely to jeopardize the continued existence of one or more federally-listed threatened or endangered species and adversely modify critical habitat. The four federally-listed species that have been the focus of recovery efforts (i.e., “target species”) are the whooping crane (*Grus americana*), the northern Great Plains population of the piping plover (*Charadrius melodus*), the interior least tern (*Sternula antillarum*), and the pallid sturgeon (*Scaphirhynchus albus*). Other federally listed species occurring within the Platte River Basin that may be affected by consumptive water use within the Platte River include the western prairie fringed orchid (*Platanthera praeclara*).

In 2006, an agreement was signed between the governors of Wyoming, Colorado, and Nebraska, and the U.S. Secretary of the Interior (Interior) to implement a basin-wide *Platte River Recovery Implementation Program*(Program). The purpose of this Program is to provide ESA compliance for water users in the Platte River Basin upstream of the Loup River confluence in Nebraska for effects on the target species and critical habitat, as well as other federally-listed species occurring in the Platte River Basin, while managing certain land and water resources to provide benefits for those species. This Program went into effect on January 1, 2007.

This Program will continue for as long as this recovery effort is determined to be necessary and as long as the signatories agree to continue participating in the Program. Through this Program, the states and the Federal government will provide land, water, and scientific monitoring and research to evaluate Program benefits for the target species. The effectiveness of various

Program actions will be re-evaluated at the end of the Program's 'first increment' (approximately year 2020), and suitable actions for a subsequent Program increment will be determined at that time.

With or without the three-state Program, projects within the Platte River Basin with a Federal-nexus must undergo section 7 consultation with FWS for actions that may affect federally-listed species, including potential effects of project-related depletions. This requirement under the ESA does not change with implementation of the Platte River Program. However, an important benefit of the Program for individual water-related projects in the Platte River Basin of Wyoming will be to provide, in most cases, a streamlined, programmatic process for addressing depletion-related impacts to the target species, whooping crane critical habitat, and the western prairie fringed orchid.

Streamlined consultation is made possible by the programmatic biological opinion issued by FWS on June 16, 2006 (PBO), which determined that the Program, including the continuation of existing and certain new water-related activities in the Platte River Basin, is not likely to jeopardize the continued existence of the four target species or the western prairie fringed orchid, nor adversely modify designated critical habitat in Nebraska. Therefore, when an individual project is 'covered by the Program' this means its flow-related effects are considered to be already addressed under this 2006 PBO, including likely actions and effects evaluated in the Final Environmental Impact Statement. The often laborious process of developing a stand-alone biological opinion (BO) addressing the incremental effects associated with an individual project can be replaced, under this Program, by a much simpler boilerplate "tiered BO" confirming that the relevant water uses are covered.

The streamlined consultation procedure is detailed below. It is important to note that these procedures are the result of several years of cooperative discussion and negotiation among the states of Wyoming, Colorado, Nebraska, the Department of the Interior agencies, and several other stakeholders of the Program. Consequently, these procedures have been agreed to by all parties and should be adhered to as closely as possible in order to facilitate the completion of BLM's section 7 responsibilities under ESA.

Procedures for Streamlined Section 7 Consultation

(1) For water-related activities with a Federal nexus (i.e., Federal permitting; Federal monies) in the Platte River Basin of Wyoming, the project proponent, working with BLM, first needs to make the following two determinations:

Hydrological Connection

The depletive effects of projects whose water supply is solely derived from sources that are considered "not hydrologically connected" to the Platte River system do not need to be addressed in consultation with FWS. This includes wells that are located and constructed such that, if water were withdrawn continuously for 40 years, the cumulative stream depletion would be less than 28 percent of the total volume of groundwater withdrawn from that well, i.e., wells that are not in the "28 percent-in-40-years zone". Maps illustrating these zones in various North Platte basins have been compiled by the SEO and are available on the BLM Wyoming State Office GIS server and individual PDF maps are available at the following link:

<ftp://seoftp.wyo.gov/North%20Platte%20Green%20Areas/Green%20Area%20Map%20PDFs/>.

De Minimus Water Uses

Fish and Wildlife Service policy is that water-related activities in the Platte River Basin resulting in less than 0.1 acre-foot/year of depletions in flow to the nearest surface water tributary to the Platte River system have an insignificant effect on the Platte River target species, and thus do not require consultation with FWS for potential effects on those species. Similarly, detention basins designed to detain runoff for less than 72 hours, and temporary withdrawals of water (*e.g.*, for hydrostatic pipeline testing) that return all the water to the same drainage basin within 30 days, are considered insignificant and do not require consultation.

(2) If BLM has determined that the water use is either: (a) less than 0.1 acre-foot; or (b) not hydrologically connected to the Platte River Basin in Wyoming, then section 7 consultation is not required. However, if BLM has determined that water use is at least 0.1 acre-feet, and that the water used is hydrologically connected to the Platte River Basin in Wyoming, BLM sends a letter to FWS, and a carbon copy to SEO (see 'contact information' section below), initiating section 7 consultation for effects to downstream federally listed species and critical habitat occurring in the Platte River Basin. Water depletions to the Platte River system may affect the federally listed whooping crane (*Grus americana*), interior least tern (*Sterna antillarum*), piping plover (*Charadrius melodus*), pallid sturgeon (*Scaphirhynchus albus*), and western prairie fringed orchid (*Platanthera praeclara*). In addition, depletions may contribute to the destruction or adverse modification of designated critical habitat for the whooping crane.

Wyoming State Engineer's Office:

State Coordinator, Wyoming's Depletions Plans
Platte River Recovery Implementation Program
State Engineer's Office
Herschler Building, 4E
Cheyenne, WY 82002
(307) 777-7641
pstump@seo.wyo.gov

U.S. Fish and Wildlife Service:

Wyoming Field Office
U.S. Fish and Wildlife Service
5353 Yellowstone Road
Cheyenne, WY 82003
(307)772-2374

(3) The BLM will need to instruct the project proponent to contact Phil Stump at the SEO to begin the project-related information sharing process through which the SEO will determine if the water used constitutes a new or existing depletion to the Platte Basin. The BLM should make every effort possible to assist external project proponents in contacting the SEO. This can be done through an information letter, explained through a process document, providing the SEO phone and email contact information, etc.

The basic project-related information that needs to be provided by the project proponent is explained within Attachment 1 of this memorandum. Attachment 1 contains *Attachment D* of the ESA guidance document developed by the FWS for project proponents conducting consultations.

(4) Once the SEO determines the depletion status, if needed, the SEO will work with the project proponent to develop a proposed plan. The plan may include mitigation (i.e., water replacement) or a description of terms and conditions with which the project proponent must comply. The project proponent may need to take other actions before the SEO can approve the proposed project (e.g., a water right transfer or change in use petition, etc.).

(5) Once the SEO and project proponent reach agreement on a mitigation plan for the proposed project, a Wyoming Platte River Recovery Agreement (Agreement) is signed by both the project proponent and SEO.

(6) The SEO will send a letter to the project proponent, BLM, and FWS acknowledging approval of the mitigation plan and signature of the Agreement by both parties.

(7) Once BLM receives the SEO's letter, BLM will send a streamlined template Biological Assessment (BA) incorporating information from the mitigation plan to the FWS. A copy of this template BA is provided in Attachment 2 of this memorandum.

(8) The FWS now has all the information it needs in order to issue an ESA letter of concurrence to BLM.

The long-term success of this streamlined section 7 consultation process will be determined by the extent to which all participants in the Program continue to work cooperatively to fulfill our obligations under the ESA. We ask that all BLM Wyoming staff help to facilitate this process by following the above guidelines as closely as possible. While the learning curve may be steep during the initial months of Program implementation, this process will become easier as we all acquire experience.

Questions regarding this IM should be directed to Tyler Abbott, Wyoming BLM State Office Botany Coordinator at (307) 775-6227 (Tyler_Abbott@blm.gov).

/s/ Robert A. Bennett

2 Attachments

1 - Attachment D of ESA Guidance Document (3 pp.)

2 - Template Biological Assessment (4 pp.)

Attachment 1

ATTACHMENT D OF ESA GUIDANCE DOCUMENT FOR PLATTE RIVER DEPLETIONS IN WYOMING: INFORMATION NEEDED BY WYOMING STATE ENGINEER'S OFFICE (SEO) TO EVALUATE WATER-RELATED ACTIVITIES

August 29, 2007 – Provisional - Subject to Change

Background

This purpose of the document is to assist project proponents who are seeking coverage by the Program. If the proposed water-related activity will deplete more than 0.1 acre feet in the Platte River system and will rely on surface water or hydrologically-connected groundwater, the basic information described below needs to be documented. This process is depicted in Box no. 5 of the flow chart in Attachment C. Upon receipt of this information, the SEO State Coordinator will evaluate whether the activity is 'existing' or 'new.' If the water-related activity is deemed to be an 'existing water-related activity,' the State Coordinator will determine whether the applicant needs to take any further action to be covered by the program. If further actions are required, a Wyoming Platte River Recovery Agreement (Attachment B) will need to be executed between the water user and the SEO to document the terms and conditions of coverage under the Program.

Instructions

Please send a letter with the information described below to the State Coordinator of Wyoming's Depletions Plan and send a carbon copy to the Wyoming Field Office of the U.S. Fish and Wildlife Service in Cheyenne at the addresses provided below:

State Coordinator, Wyoming's Depletions Plan
Platte River Recovery Implementation Program
State Engineer's Office
Herschler Bldg., 4E
Cheyenne, WY 82002
(307)777-7641
pstump@seo.wyo.gov

Wyoming Field Office
U.S. Fish and Wildlife Service
5353 Yellowstone Road
Cheyenne, WY 82003
(307)772-2374

Information Needed

Briefly describe: (1) Project; (2) Applicant/Water User; (3) Project location; and (4) Federal action (e.g., permit or authorization) associated with the Project.

Please provide a contact name, mailing address, phone number, and email address of the applicant/water user.

Description of water use should include:

- ◆ Location of Water Supply
 - Identify the sub-basin area (see attached figure):
 - Colorado State Line to Pathfinder Dam
 - Pathfinder Dam to Guernsey Dam
 - Below Guernsey Reservoir to the Nebraska State Line excluding Horse Creek basin
 - Upper Laramie River Basin
 - Lower Laramie River Basin
 - Horse Creek Basin
 - South Platte River Basin
 - If applicable, name of the surface water source of the water supply; e.g., Horse Creek, tributary of Sweetwater River.
- ◆ Type of Water Use (irrigation, municipal, industrial, domestic, livestock, wildlife, fish propagation, recreation, wetland enhancement, oil and gas development, pipeline construction, soil compaction, etc.)
- ◆ Amount of Water Use on a One-time or Average Annual basis. For example:
 - X acre feet for pipeline hydrostatic testing, horizontal directional drilling, concrete mixing, dust abatement, and other project-related activities
 - X acre feet of pond with Y acres of surface area at high water line to meet livestock watering, fish propagation, or wetland enhancements needs
 - X acre feet to serve Y population of municipal service area needs
 - X acre feet from well or direct flow right for livestock or wildlife
 - X acre feet of water to operate a Y-megawatt power-generation plant or Y production ethanol plant
- ◆ Water Supply Appropriator
(Please list the name of the water supply appropriator providing the amount of water use described above.)
 - One-time Use: If you are obtaining/leasing a temporary water supply, please provide the name of water supply provider or appropriator. If the water will be returned to the Platte River system describe the timing and location of the return discharges.

Note: The appropriator and the water user will likely need to execute a WSEO Temporary Water Use Agreement. Forms are available on the

internet from the Surface Water Division:

<http://seo.state.wy.us/SW/index.aspx> or by calling (307) 777-6475.

- Permanent: If you are obtaining a permanent water supply to offset new or increased depletions due to this activity, please provide the name of the appropriator; i.e., private agricultural water right holder, industrial water user, etc..
- If you are the water appropriator, describe the status of filing for a SEO permit to appropriate surface water or groundwater or include the SEO Permit Numbers and allowable diversion quantities of your existing water rights.

New Water-Related Activities

If the WSEO State Coordinator determines that the project does not qualify as an existing water-related activity, the applicant can decide whether to seek coverage under the Program as a new water-related activity. The applicant will need to submit additional information; such as, a depletions analysis, which estimates the monthly long-term depletions and/or accretions at the location of the proposed project. In accordance with Wyoming's Depletions Plan, the State Coordinator will determine if mechanisms are available to offset the new depletions or if the applicant must provide a mitigation plan to offset the new depletions. This process is depicted in Box nos. 8., 9., and 10. of the flow chart in Attachment C.

Attachment 2

TEMPLATE BIOLOGICAL ASSESSMENT & REQUEST FOR FORMAL SECTION 7 CONSULTATION: WYOMING

Text shown in blue should be provided by the applicant

[DATE]

[FROM FEDERAL ACTION AGENCY
TO U.S. FISH & WILDLIFE SERVICE]

This letter contains the Biological Assessment addressing potential impacts from operation of the [Project] on federally-listed species and designated critical habitats. With this submission, we are requesting initiation of Formal Consultation under Section 7(a) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (“ESA”), concerning the whooping crane (*Grus americana*), interior least tern (*Sternula antillarum*), northern Great Plains population of the piping plover (*Charadrius melodus*), pallid sturgeon (*Scaphirhynchus albus*) (collectively referred to as the “target species”), and designated critical habitat of the whooping crane. We further request initiation of Formal Consultation for the western prairie fringed orchid (*Platanthera praeclara*), [include other non-target listed species or critical habitats, as needed]. We have determined that the Project is not likely to adversely affect the American burying beetle (*Nicrophorus americanus*) and will have no effect on the Eskimo curlew (*Numenius borealis*).

[Briefly describe: (1) Project; (2) Applicant; (3) Project location; and (4) Federal action (e.g., permit or authorization) associated with the Project.]

For an Existing Water-Related Activity

Based on a determination by the Wyoming State Engineer’s Office (SEO), this project is an existing water-related activity which will not increase depletions to the Platte River system and is covered by the Program’s Wyoming Depletions Plan. A copy of the determination received from the SEO is attached to this biological assessment.

Description of water use should include:

- Location of Use (e.g., the service district, the county, the irrigation district, the industrial facility)
- Source of Water (e.g., water from X wells located in Y county providing up to Z acre-feet of supply annually; X acre-feet of storage rights from Y reservoir)
- Use of Water (e.g., approximately X domestic water taps, X acres of irrigated cropland, operation of an X-megawatt power-generation plant, up to X miles of pipeline hydrostatic testing, etc.)

Note: Depletions to Platte River flows (if any) associated with existing water-related activities covered by the Wyoming Depletion Plan do not need to be estimated.

For a New Water-Related Activity

Based on a determination by the Wyoming State Engineer's Office (SEO), this project is a new water-related activity which [will not result in new depletions] [or] [will result in new depletions to the Platte River Basin requiring mitigation in order to be covered by the Program's Wyoming Depletions Plan]. A copy of the determination received from the SEO is attached to this biological assessment.

Description of water use should include:

- Location of Use (e.g., the service district, the county, the irrigation district, the industrial facility)
- Source of Water (e.g., water from X wells located in Y county providing up to Z acre-feet of supply annually; X acre-feet of storage rights from Y reservoir)
- Use of Water (e.g., approximately X domestic water taps, X acres of irrigated cropland, operation of an X-megawatt power-generation plant, up to X miles of pipeline hydrostatic testing, etc.)

Description of water replacement (mitigation) should include:

- A description of the mitigation measures agreed upon to comply with Wyoming's Plan (or with the Federal Depletion Plan). A copy of the corresponding Platte River Recovery Agreement between the project proponent and the State of Wyoming may be provided to meet this information need.

The Platte River Recovery Implementation Program (PRRIP), established in 2006, is implementing actions designed to assist in the conservation and recovery of the target species and their associated habitats along the central and lower Platte River in Nebraska through a basin-wide cooperative approach agreed to by the States of Wyoming, Nebraska, and Colorado and the U.S. Department of the Interior [Program, I.A.1.]. The Program addresses the adverse impacts of existing and certain new water related activities on the Platte River target species and associated habitats, and provides ESA compliance¹ for effects to the target species and whooping crane critical habitat from such activities including avoidance of any prohibited take of such species. [Program, I.A.2 & footnote 2.]. The State of Wyoming is in compliance with its obligations under the Program.

¹ "ESA Compliance" means: (1) serving as the reasonable and prudent alternative to offset the effects of water-related activities that FWS found were likely to cause jeopardy to one or more of the target species or to adversely modify critical habitat before the Program was in place; (2) providing offsetting measures to avoid the likelihood of jeopardy to one or more of the target species or adverse modification of critical habitat in the Platte River basin for new or existing water-related activities evaluated under the ESA after the Program was in place; and (3) avoiding any prohibited take of target species in the Platte River basin.

For Federal actions and projects participating in the Program, the Platte River Recovery Implementation Program Final Environmental Impact Statement (FEIS) and the June 16, 2006 programmatic biological opinion (PBO) serve as the description of the environmental baseline and environmental consequences for the effects of the Federal actions on the listed target species, whooping crane critical habitat, and other listed species in the central and lower Platte River addressed in the PBO. These documents are hereby incorporated into this Biological Assessment by this reference.

Table II-1 of the PBO (pages 21-23) contains a list of species and critical habitat in the action area, their status, and the Service's determination of the effects of the Federal action analyzed in the PBO. The Service determined in the PBO that the continued operation of existing and certain new water-related activities may adversely affect but would not likely jeopardize the continued existence of the endangered whooping crane, interior least tern, and pallid sturgeon, or the threatened northern Great Plains population of the piping plover. Further, the Service found that the continued operation of existing and certain new water-related activities may adversely affect but would not likely jeopardize the threatened bald eagle and western prairie fringed orchid associated with the central and lower reaches of the Platte River in Nebraska, and was not likely to destroy or adversely modify designated critical habitat for the whooping crane. The bald eagle was subsequently removed from the federal endangered species list on August 8, 2007.

The Service also determined that the PBO Federal Action would have no effect to the endangered Eskimo curlew. There has not been a confirmed sighting since 1926 and this species is believed to be extirpated in Nebraska. Lastly, the Service determined that the PBO Federal Action, including the continued operation of existing and certain new water-related activities, was not likely to adversely affect the endangered American burying beetle.

[Insert applicable BA text describing potential affects to non-target listed species, their critical habitats, if any, and/or site-specific affects to any listed species/critical habitat]

INSERT APPLICABLE LANGUAGE BELOW:

The above-described Project operations qualify as an "existing water related activity" because they are surface water or hydrologically connected groundwater activities implemented on or before July 1, 1997, within the intent and coverage of the Program. [Program, I.A. footnote 3]. The existing water related activity conforms to the criteria in Section III of Chapters 2 or 3 of the Depletions Plan, Platte River Basin, Wyoming (Wyoming's Depletions Plan [Program, Attachment 5, Section 7]) and:

1. The existing water related activity is operated on behalf of Wyoming water users;
2. The State Coordinator has determined that the activity qualifies as an existing water related activity; and
3. If required by the State Coordinator, the Applicant has signed a Wyoming Recovery Agreement to document any mitigation requirements need to qualify as an existing water activity.

-AND/OR-

The above-described Project operations qualify as a “new water related activity” because such operations constitute new surface water or hydrologically connected groundwater activities which may affect the quantity or timing of water reaching the associated habitats of the target species implemented after July 1, 1997. [Program, I.A. footnote 3]. The new water related activity conforms to the criteria in Section II of Chapters 2 or 3 of Wyoming’s Depletions Plan and:

1. The new water related activity is operated on behalf of Wyoming water users;
2. The new water related activity can be completed without exceeding an existing water related baseline or benchmark as described in Wyoming’s Depletions Plan or the Applicant has requested, and the State of Wyoming has agreed, that the depletions resulting from the new water related activity will be mitigated with water from the Wyoming Water Bank; and
3. The Applicant has signed a Wyoming Recovery Agreement with the Wyoming State Coordinator to document the requirements to qualify for the status described in 2. above.

[Note: It is understood that a Project may include existing and new water related activities. In these situations, the activities within the Project must be categorized as “existing” or “new” and biological assessment will address both categories.]

Accordingly, the impacts of this activity to the target species, whooping crane critical habitat, and other listed species in the central and lower Platte River addressed in the PBO are covered and offset by operation of Wyoming’s Depletions Plan as part of the PRRIP.

The Applicant intends to rely on the provisions of the Program to provide ESA compliance for potential impacts to the target species and whooping crane critical habitat. The [Federal Agency] intends to require, as a condition of any approval, that the Applicant fulfill the responsibilities required of Program participants in Wyoming. The [Federal Agency] also intends to retain discretionary Federal authority for the Project, consistent with applicable regulations and Program provisions, in case reinitiation of Section 7 consultation is required.

This letter addresses consultation on all listed species and designated critical habitat, including the referenced Platte River target species and whooping crane critical habitat. Potential impacts from construction and operation of the Project to any other federally-listed threatened or endangered species and designated critical habitats will be addressed within the applicable biological opinion prepared by the Service, in accordance with the ESA.

/FROM FEDERAL ACTION AGENCY/