

# PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM

## Attachment 5

### Section 9

#### COLORADO'S PLAN FOR FUTURE DEPLETIONS<sup>1</sup>

October 24, 2006

Colorado will be responsible for mitigating the impacts of new water related activities in Colorado on the associated habitats, in the manner described below.<sup>2</sup> As part of the proposed Program, the mitigation described below shall constitute the means for mitigating new water related activities in Colorado, except for water related activities pursued by entities electing not to participate in the Program. Subject to the planned NEPA and ESA reviews, the Department of the Interior ("DOI") agrees that Colorado's Future Depletions Proposal is a sufficient contribution by Colorado to offset the impacts of new water related activities in the South Platte River Basin in Colorado. If Colorado implements the mitigation program described below, new water related activities in Colorado will not adversely affect the "Current Regime of the River," as that term is used in the document entitled "An Environmental Account for Storage Reservoirs in the Platte River System in Nebraska," (Program Attachment 5, Section 5). For purposes of this document, "new water related activities" shall be used as that term is defined in the Platte River Recovery Implementation Program (Program Document), footnote 3. New water related activities shall not include augmentation for wells existing pre-June 30 1997, provided the augmented wells do not increase irrigated acreage beyond that irrigated on June 30, 1997.<sup>3</sup>

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<sup>1</sup> In the Cooperative Agreement and the Program Draft EIS, the Colorado Plan for Future Depletions was referred to as Tamarack II.

<sup>2</sup> Colorado offers this agreement as part of its efforts to resolve endangered species conflicts through a negotiated and mutually agreed upon basin-wide cooperative agreement and recovery program. Nothing in this agreement constitutes an admission by Colorado that any depletion to the North or South Platte Rivers or their tributaries in Colorado that have occurred or may in the future occur adversely affect or reduce state line flows. Similarly, Colorado does not admit that any changes in the amount or timing of flows at the Colorado-Nebraska or Colorado-Wyoming state lines that have occurred or may in the future occur reach or adversely affect endangered species habitat in Nebraska. This agreement is not intended, and should not be construed, to amend or modify the South Platte River Compact or any interstate decree, or to waive any rights thereunder.

<sup>3</sup> Prior to 2003, ground water users in the South Platte River Basin augmented their out-of-priority depletions with administratively approved annual substitute water supply plans. In 2003, the Colorado General Assembly required these ground water users to transition to a system of court-approved plans for augmentation. The applications for approval of the court-approved plans for augmentation must be filed with the water court no later than December 31, 2005. The courts may need a number of years to approve the proposed plans, during the interim the ground water users will continue to operate pursuant to administratively approved substitute water supply plans. Because the court-approved plans are permanent, the replacement obligations contained in those plans may be more stringent than those included in the administratively approved plans. In order to resolve a potential controversy concerning whether the use of ground water under more stringent terms constitutes an expansion of an existing project, the parties to the Cooperative Agreement, based on the assumption that the court approved augmentation plans will not result in increased consumptive use in Colorado, have agreed that wells in existence prior to June 30, 1997 and the augmentation sources for those wells included in any court-approved plans for augmentation will be deemed existing uses of water and not new water-related activities as long as the augmented wells do not increase irrigated acreage beyond that irrigated on June 30, 1997.

## **I. SOUTH PLATTE RIVER BASIN**

### **A. Population Estimates.**

The 1997 "Population Baseline" for Colorado's Future Depletions Plan is:

1. Northern Region -- Boulder, Weld, Larimer, Washington, Morgan, Sedgewick, Logan, Phillips (701,470)
2. Central Region -- Denver, Jefferson, Adams, Clear Creek, Gilpin, Park (1,766,207)
3. Southern Region -- Arapahoe, Douglas, Elbert (194,602)

Within 90 days after the inception of the Program, the Colorado State Demographer shall report the amount by which the population of each region is expected to increase over the Population Baseline by the end of the initial reporting period ("projected Population Increase"). At the end of each reporting period, Colorado will provide the Governance Committee an estimate by the Colorado State Demographer of the actual population in each region (which shall be the Population Baseline for the next succeeding reporting period), and an estimate of the projected Population Increase for the next succeeding reporting period.

### **B. Water Use and Effect Assumptions.**

Assumptions concerning per capita water use, supply source mix by region, and accretive/depletive effects of each supply source (including monthly distributions of said effects), set forth in this paragraph and the table below, represent reasonable estimates at the outset of the program, and may be modified by the Governance Committee based on information made available to that Committee by Colorado or others. The gross per capita water requirement in the South Platte River Basin in Colorado will be assumed to be 0.27 af/yr, with 35% consumptive use assumed for all municipal purposes, and 45% consumptive use assumed for agricultural irrigation purposes. It is anticipated that new water related activities within the three regions will be from six sources of supply to serve the Population Increase, each with a different depletive or accretive effect on flows in the South Platte River. The three regions will develop the six sources of supply in different combinations. It will be initially assumed that the sources of supply for new water related activities will be developed in the combinations and will have the accretive or depletive effect shown below:

<b>Source</b>	<b>Northern Region</b>	<b>Central Region</b>	<b>Southern Region</b>	<b>Accretive (or Depletive) Effect</b>
New Transbasin Imports	40%	30%	20%	64%
Nontributary Groundwater	0%	10%	50%	68%
Ag. to Urban Conversion	35%	5%	0%	10%
Conservation	5%	15%	10%	0%
Wastewater	10%	25%	10%	(41%)
Exchange/Reuse				
Native South Platte Flows	10%	15%	10%	(27%)

The Governance Committee has adopted assumptions concerning the monthly distribution of the accretive/depletive effect of the development of each source of supply, taking into consideration the accretive/depletive effect shown above, the weighted contribution to meeting total water demand, and the anticipated monthly return flow pattern based on municipal water use patterns. The assumptions shown herein or as may be modified by the Governance Committee shall be as measured at or near the point of use.

**C. Transit Loss Assumptions.**

Colorado's commitment to offset the cumulative accretive/depletive effect of new water related activities in the three regions (hereinafter referred to as "Cumulative Effect") will be as measured at or reasonably near the Colorado-Nebraska state line. The Cumulative Effect will be influenced by natural river gains and losses, and water uses and return flows downstream from the points of use. The three states have studied transit losses in a study entitled "Tracking/Accounting Procedure for Determining Depletion/Accretion Impacts for the Three Program Water Projects and New Water Related Activities, Including Water Conservation/Supply Projects." This study considered the routing of both accretions and depletions from the Kersey gauge to a point at or reasonably near the Colorado-Nebraska state line. This study indicated much higher transit losses than those set forth in the table below, but until the three states are able to more fully study transit loss issues as they exist in all states for both protected and unprotected flows, Colorado will temporarily use the monthly transit loss per-mile factors set forth in the table below. The transit loss assumptions will be updated when the final study and negotiations are concluded.

jan	feb	mar	apr	may	jun	jul	aug	sep	oct	nov	dec
.02%	.02%	.05%	.1%	.3%	.45%	.5%	.5%	.5%	.4%	.1%	.02%

**D. Reporting Periods.**

The Initial Reporting Period will be two years from the initiation of a Program. Subsequent Reporting Periods will be each five years thereafter, for so long as the Program is in effect. At the close of each reporting period, Colorado will report:

1. an estimate of the actual population in each region (which shall be the Population Baseline for the next succeeding reporting period);
2. any new information relevant to the continued use or modification of assumptions set forth herein for:
  - a) gross per capita water requirements, including assumptions regarding the relationship among municipal, industrial and agricultural use of water,
  - b) the accretive/depletive effect of each source of supply, and
  - c) the cumulative effect at the state line;

3. the operations and effects of projects to mitigate new depletive effects;
4. an estimate of the projected Population Increase for the next succeeding reporting period;
5. estimates of the net accretive/depletive effects and Cumulative Effect for the next reporting period; and
6. net changes in irrigated agricultural acreage, using readily available data.

Colorado will also submit annual information reports to the Governance Committee estimating population increase in each of the three regions, and describing water sources used to supply new water related activities including type of water source, works used and water quantities supplied. Colorado will promptly report to the Governance Committee any new information that significantly affects assumptions relied upon in this Program.

#### **E. Determination of Cumulative Effect -- Initial Reporting Period.**

Within 90 days after the inception of the Program, Colorado will provide to the Governance Committee a calculation of the average monthly distribution of the Cumulative Effect for anticipated water related activities in the South Platte River Basin in Colorado for the Initial Reporting Period. The calculation will be based on the projected Population Increase for that period, and the water use and transit loss assumptions described above or as may be modified by the Governance Committee. The Cumulative Effect as approved by the Governance Committee will determine the mitigation measures that will be undertaken by Colorado during the Initial Reporting Period.

#### **F. Determination of Cumulative Effect -- Subsequent Reporting Periods.**

Colorado will monitor actual water use and development in the South Platte River Basin in Colorado beginning July 1, 1997. At the end of the Initial Reporting Period, and at the end of each Subsequent Reporting Period, Colorado will report to the Governance Committee for its review and approval any adjustments in the Population Increase and in the Cumulative Effect for that period. Such adjustments will serve as the basis for calculations for the next succeeding Reporting Period. Any resulting increase or decrease in Cumulative Effect will be added to or subtracted from the Cumulative Effect to be mitigated in the next succeeding Reporting Period.

#### **G. Mitigation of Cumulative Effect.**

The signatories assume that the Cumulative Effect for any annual period is expected to be a mix of net accretions during the fall, winter and spring period, and net depletions in the late-spring to mid-summer period, resulting in an estimated total seasonal net depletive effect on an order of magnitude of less than 1,800 af/yr for each 100,000 additional people in the South Platte River Basin in Colorado. Based on these assumptions, Colorado will, in each Reporting Period, undertake such re-regulation projects within Colorado as are necessary to shift water flows at a point upstream from the Colorado-Nebraska state line and downstream from the last diversion in Colorado, from periods of net accretion to periods of net depletion. The re-regulation projects divert water in priority through existing ditch head gates or wells downstream of Colorado's

Washington County line. After diversion, this water recharges the alluvial aquifer of the South Platte River. Colorado will locate the recharge areas the distance necessary from the South Platte or its tributaries to result in accretions at locations downstream of the last river diversion in Colorado in periods of net depletion Colorado's commitment to re-regulate flows in any Reporting Period shall equal the total depletive effect by month for those months in which a net depletive effect will occur. To the extent that Colorado constructs projects or obtains the ability to re-regulate water in excess of the total depletive effect for those months in which a net depletive effect will occur, such capacity will be available for use in the next succeeding Reporting Period. Should total annual net depletive effects exceed the assumptions set forth above, Colorado reserves the option of reconsidering different measures to mitigate those effects under the Program.

#### **H. ESA Compliance.**

ESA compliance for South Platte Basin future depletions in Colorado will conform to the Program document. Except as described below, qualifying new water related activities that are in the South Platte Basin and are operated on behalf of Colorado water users are covered by the Colorado plan for future depletions. Exhibit A to this plan for future depletions is a draft schematic and explanation of how Colorado water users may qualify to use this plan in any ESA Section 7 consultation process for water projects in Colorado. Exhibit B is the template Biological Assessment and request for formal section 7 consultation (including template recovery agreement) that program participants may use to address potential impacts from operation of their new water activity on federally-listed species in Nebraska. Exhibit C is the template biological opinion the United States Fish and Wildlife Service will issue in response to the template Biological Assessment and request for formal section 7 consultation.

1. New water related activities would not be covered by this plan after the average annual water supply to serve Colorado's population increase from "Wastewater Exchange/Reuse" and "Native South Platte Flows" exceeds 98,010 acre feet during the February-July period described below. The 98,010 acre-foot figure represents gross water deliveries (supplies) to meet new demands for an average hydrologic year, and is not a consumptive use or diversion limitation. In analyzing proposed new water related activities that have supplies derived from the storage of native South Platte flows, only those supplies resulting from diversions to storage or wastewater exchange and reuse during the period from February through July will be counted toward the 98,010 acre-feet. In the event that a new water related activity is not covered by Colorado's plan pursuant to this Section I.H.1, Colorado and the activity's proponent can propose, as provided in Section E of the Program document, amendments that will allow Colorado's Plan to provide ESA compliance for that new water related activity.

2. The Colorado plan for future depletions does not cover the construction of a major on-stream reservoir located on the main stem of the South Platte River anywhere downstream of Denver, Colorado. In addition, the Colorado plan for future depletions does not cover hydropower diversion/return projects that divert water including sediments from the main stem of the South Platte River anywhere downstream of Denver, Colorado and return clear water to the South Platte River.

## **II. NORTH PLATTE RIVER BASIN**

### **A. Background Information.**

This document sets forth Colorado's Plan to address new water related activities in the North Platte River Basin, Jackson County, Colorado. Subject to ongoing NEPA and ESA reviews, and verification of certain assumptions, the parties to the Program Cooperative Agreement have agreed that Colorado's Depletions Plan is a sufficient contribution to offset alleged effects on endangered species habitats in Nebraska of new water related activities in the North and South Platte River Basin in Colorado. Colorado's Depletions Plan for the South Platte is also summarized in this subsection of the Program Water Plan.

Colorado proposes to include new water related activities in the North Platte River Basin in the Platte River Recovery Implementation Program (Program) and to offset alleged effects on endangered species habitats in Nebraska in accordance with this agreement. The following summary provides an outline of the procedures and methods Colorado will use to monitor existing and new water related activities for the North Platte Basin and how mitigation measures for endangered species issues might be implemented.

### **B. North Platte Decree.**

The decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the Decree), and modified by the Final Settlement Stipulation, March 13, 2001 enjoins Colorado from diverting water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres in Jackson county during any one irrigation season. The Decree also enjoins Colorado from storing more than 17,000 acre-feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County between October 1 of any year and September 30 of the following year. Finally, the Decree enjoins Colorado from exporting out of the basin of the North Platte River and its tributaries in Jackson County more than 60,000 acre-feet of water in any period of ten consecutive years. The Decree requires Colorado to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of water and to make such records available for inspection.

### **C. Existing Water Related Activities.**

In its 1945 opinion, the U.S. Supreme Court found that 131,800 acres were presently under irrigation in Jackson County in Colorado. Since then the number of acres being irrigated in any one year has been as high as 134,467. The Decree allows Colorado to irrigate up to 145,000 acres. For purposes of this Program, the parties to the Cooperative Agreement agree that depletion associated with the irrigation of up to 134,467 acres constitute existing uses and that depletions associated with the irrigation of between 134,468 and 145,000 acres in Jackson County constitute new water related activities. The irrigation storage and export limits in the Decree also represent existing uses as of 1945, and reflect the Supreme Court's recognition that transbasin diversions in some years exceeded 6,000 acre-feet. Since the limitations in the Decree represent historical uses in Jackson County, any depletions within those limits constitute existing water uses. Storing more than 17,000 acre-feet of water for irrigation purposes between October 1 of any year and September 30 of

3. Colorado's plan for future depletions will provide ESA coverage for new water related activities related to existing U.S. Bureau of Reclamation water supply projects that currently provide water for Colorado water users. At Colorado's discretion, new federal water related activities in Colorado that provide water to Colorado water users may be provided ESA coverage by the Colorado plan for future depletions. Nothing in the Colorado plan for future depletions shall be construed as changing the water rights, or ownership, of any federal water project.

The ESA compliance covered by this plan only concerns consultation on the target species. To the extent that a federal nexus activity has potential impact on "non-target" listed species, then impacts to those species must be addressed in that federal project's Biological Opinion (BO) required by ESA.

For the purposes of this section H. the following definitions apply:

***Covered*** means in compliance with the Endangered Species Act with regard to potential impacts to the least tern, piping plover, whooping crane and pallid sturgeon in and along the central and lower Platte River in Nebraska, for the duration of the First Increment.

***Average*** means the average estimated or modeled effect over a multi-decadal period of time including a mix of wet, normal and dry hydrologic conditions. Initially, this will be the 1947-1994 period used in the current version of the Central Platte Op Study Model and the Platte Programmatic EIS. However, this time period may be adjusted if the Governance Committee concurs.

**Major On-Stream Reservoir** means a reservoir of more than 2,000 acre-feet. It does not include new diversion facilities that may impound a small amount of water. Reservoirs, including gravel pit reservoirs, adjacent to the main stem of the South Platte River and reservoirs on tributaries to the South Platte River are not considered to be located on the "mainstem" for purposes of this paragraph.

#### **I. No Power to Limit Colorado Water Rights.**

Prior to the inception of this Program there was not legal authority to deny the appropriation of un-appropriated water of the State or prevent the diversion and re-diversion of legally re-usable water. Nothing in this Plan for Future Depletions shall be construed to authorize the Program to deny the appropriation of unappropriated water or prevent the diversion and re-diversion of legally re-usable water to achieve Program goals, objectives or Milestones.

#### **J. Commitment to Revise.**

This Plan for Future Depletions is premised on the assumptions contained herein. In the event that the assumptions underlying this plan are not realized, the State of Colorado commits to revise its Plan for Future Depletions accordingly.

the following year and exporting more than 60,000 acre-feet of water in any period of ten consecutive years are not permitted under the Decree, and, therefore, no new water related activities of these types are contemplated.

In addition to existing uses in accordance with the Decree, Jackson County's small population and limited industry consume a small quantity of water under prior existing rights. Colorado does not anticipate significant population growth in Jackson County during the term of the Cooperative Agreement or the First Increment of the program. The population baseline for Jackson County is 2022 people. Colorado estimates that the 2004 population for Jackson County is 1,554 people. The State demographer does not predict the Jackson County population to exceed 2022 people by the end of the First Increment.

Piscatorial, wildlife, and other environmental uses implemented on or before July 1, 1997 will constitute existing uses. Any water diverted for new uses for these purposes implemented after July 1, 1997 will constitute new water related activities.

#### **D. New Water Related Activities.**

For purposes of the Program Cooperative Agreement, the parties agree to the following:

1. *Agricultural Water Use:* Irrigation of more than 134,468 will constitute new water related activities. The parties agree that net depletions (diversions less return flows) associated with irrigating additional acres as measured at the Colorado - Wyoming state line equal .83 acre-feet per acre during the irrigation season. Colorado does not expect to have any new depletions during the first increment.
2. *Municipal and industrial use (M&I):* Colorado does not expect the Jackson County population to exceed 2022 in the First Increment. When population in Jackson County reaches 1900, Colorado will present a municipal and industrial new depletion plan to the Governance Committee for approval. Similar to the methodology adopted for the South Platte new depletion plan, new municipal and industrial water uses are assumed to be .27 acre-feet per capita per year. Consumptive use is 35% of gross water use, unless otherwise reported to the Governance Committee by the State of Colorado. The parties agree that the monthly distribution of the depletive effect of this municipal and industrial water use is the same as that defined for the South Platte Basin, unless otherwise reported to the Governance Committee by the State of Colorado.
3. *Piscatorial, wildlife, and other environmental uses:* To the extent that these uses are not incidental to an existing or new irrigation use, such uses implemented after July 1, 1997 will constitute new water related activities. Net depletions associated with such uses will be determined from Colorado Division of Water Resources information on actual annual net depletions. It is expected that all piscatorial, wildlife, and other environmental uses will have a federal nexus, but Colorado will monitor these uses through the Division of Water Resources and the water court resumes for Water Division No. 6. If there are significant piscatorial, wildlife, and other environmental uses occurring, which are not incidental to irrigation uses, and that do not have a federal nexus, then Colorado will present new depletion plan (to address these depletions) to the Governance Committee for approval. Colorado does not expect to have any new piscatorial, wildlife, or other environmental uses (which are not incidental to irrigation uses) in the first increment

### **E. Monitoring and Reporting.**

During the first increment, Colorado does not foresee any: projected increases in: 1) irrigated acreage in Jackson County over 134,467 acres; 2) population over the 2022 person "population baseline"; or 3) significant non-nexus piscatorial, wildlife, or other environmental uses (which are not incidental to irrigation uses). Similar projections will be made at the beginning of each subsequent reporting period. At the end of the first reporting period, and at the end of each subsequent reporting period, Colorado will report to the Governance Committee: the irrigated acreage, irrigation storage, transbasin diversions, and population in Jackson County. Colorado will also report on any non-nexus piscatorial, wildlife, and other environmental uses (which are not incidental to irrigation uses) and any new industrial uses occurring since 1997.

These South Platte River Basin derived assumptions probably significantly overstate actual M&I water use in Jackson County. The gross M&I consumptive use assumption of .27 acre-feet per year is probably high because lawn irrigation is less prevalent in Jackson County than in the South Platte River Basin. The actual monthly distribution of the depletive effects associated with M&I use in Jackson County is probably different than that of the South Platte Basin, since Jackson County's higher elevation and shorter, cooler summers limit lawn irrigation to a shorter time period than occurs in the South Platte Basin. Thus, M&I uses in Jackson County are likely to produce fewer depletions during the months of shortage to target flows at Grand Island in comparison with M&I uses in the South Platte Basin. However, in the absence of specific data, Colorado agrees to apply South Platte Basin assumptions to M&I use in Jackson County as of July of the year that begins the increment (e.g., July 2003, July 2008 etc.). If any new industrial uses occur beyond the 1997 level, or if the population appears that it will exceed the population baseline of 2022 people, or there are significant non-nexus piscatorial, wildlife, or environmental uses that are not incidental to irrigation uses, these would be considered new water related activities. New water related activities will be replaced on a one-to-one basis in the North Platte basin, if necessary, after consideration of timing and location and shortages to U.S. Fish and Wildlife target flows in Nebraska, in a manner consistent with the Decree.

### **F. ESA Compliance.**

Colorado commits to offset the net cumulative effects of depletions associated with new water related activities in the manner described within this depletion plan. It is the intent of Colorado that new depletions will be offset in accordance with Section I.A.4 and Section III.E.3 of the Program Document and this depletion plan. Because it is unlikely that new depletions will occur in the First Increment, Colorado will not propose a specific plan for mitigation at this time. ESA compliance for North Platte Basin future depletions in Colorado will conform to the Program Document.

**Exhibit A**  
**12-05-05**

**Platte River Recovery Implementation Program**

**Schematic and Explanation of Endangered Species Act Section 7 Consultation Process in Colorado**

This document illustrates how, with a Program in place, water related activities subject to Section 7(a)(2) consultation of the Endangered Species Act (ESA) will proceed through the consultation process and how Colorado's Future Depletions Plan relates to that process. Projects involving both "new" and "existing" water related activities will proceed on dual procedural pathways during the streamlined consultation process.

The bold text for each box as explained below corresponds to the wording in the schematic for that box. If nothing other than the wording in the schematic appears in this document, the wording in the schematic is considered to be self-explanatory. The various steps, or boxes, have been numbered to aid the discussion. However, the numeric order does not imply any sequence of steps. The steps in the schematic are:

Box 1) **Platte River Basin Water-Related Activity**. A Platte River basin water-related activity upstream of Chapman, NE.

Box 2) **Is there a federal-nexus?** If so, Section 7 consultation is required.

Box 3) **Activity is covered by the Program**.

Box 4) **Colorado and FWS notify each other of Federal Action subject to Section 7 consultation**. Colorado is under no affirmative duty to search for projects in the state that may be subject to Section 7 consultation, but if it becomes aware of one, this box highlights Colorado's agreement that it will pass the information along to the FWS. FWS agrees to notify Colorado after FWS is notified by a project proponent or a federal agency of an action subject to Section 7 consultation within the State.

Box 5) **Is it a New or Existing water related activity?** Colorado's Plan for Future Depletions specifies the means by which new water related activities, both those subject to and those not subject to Section 7(a)(2) of the ESA, will be addressed under the plan.

Box 6) **Existing water related activity covered by Program**. Federal action agency consults with FWS. Federal Action Agency to use Template Biological Assessment and secure signed Recovery Agreement by project proponent.

Box 7) **Federal Agency, applicant & State notified that Program covers the project. Platte River Section 7 obligations are known. If Colorado requirements for Program participation are met, including membership in the South Platte Water Related Activities**

**Program, Inc. (SPWRAP), streamlined consultation completed pursuant to Template Biological Opinion.**

Box 8) **Is it a "Federal" New water related activity?** Is the new water related activity addressed by the federal depletions plan (and not covered by the State plan)? Most of the time the answer to this question would be obvious, but if there were any question as to its status, Colorado and the FWS would decide on a case-by-case basis before proceeding. If it were a "federal" depletion then the Federal Depletions Plan would be used to address the depletion (Box 9). If that were not possible, the activity would be subject to a separate consultation "outside" of the Program (Box 11).

Box 9) **Use Federal Depletions Plan if possible.** (e.g., the federal agency is the "applicant").

Box 10) **Do Applicant & Colorado desire the Project to be covered by the State's Depletions Plan?** Because the Program is voluntary, the applicant and Colorado must elect for the project depletion to be addressed by the State's depletions plan. If the applicant or Colorado elects for the project not to participate in the Program then the project would be subject to a separate consultation "outside" of the Program (Box 11).

Box 11) **Section 7 Consultation conducted "outside of the Program".**

Box 12) **Federal Agency provides depletion analysis to FWS and Colorado.** The federal agency consulting with the Service is responsible for providing a project description of the proposed federal action, including information describing the proposed depletions. The necessary information is identified in the Template Biological Assessment. Meetings and discussions to define the project depletions will generally include the federal agency, applicant, Service, and the State. For new water related activities, the Service will consider the latest updates provided by the state pursuant to the terms of its depletions plan.

Box 13) **Colorado reviews the depletion analysis and makes a determination: Is the Project addressed by the State Depletions Plan?** Upon request of the FWS, Colorado will certify whether a federal nexus project has met State requirements for Program participation and is covered by the State's depletions plan. Proponent will sign Template Recovery Agreement.

Box 14) **Can State Depletions Plan be modified to include project depletion?** If the State does not certify a project as being within its plan, the State, subject to the amendment process set forth in the Program Document, Section E, may amend its plan.

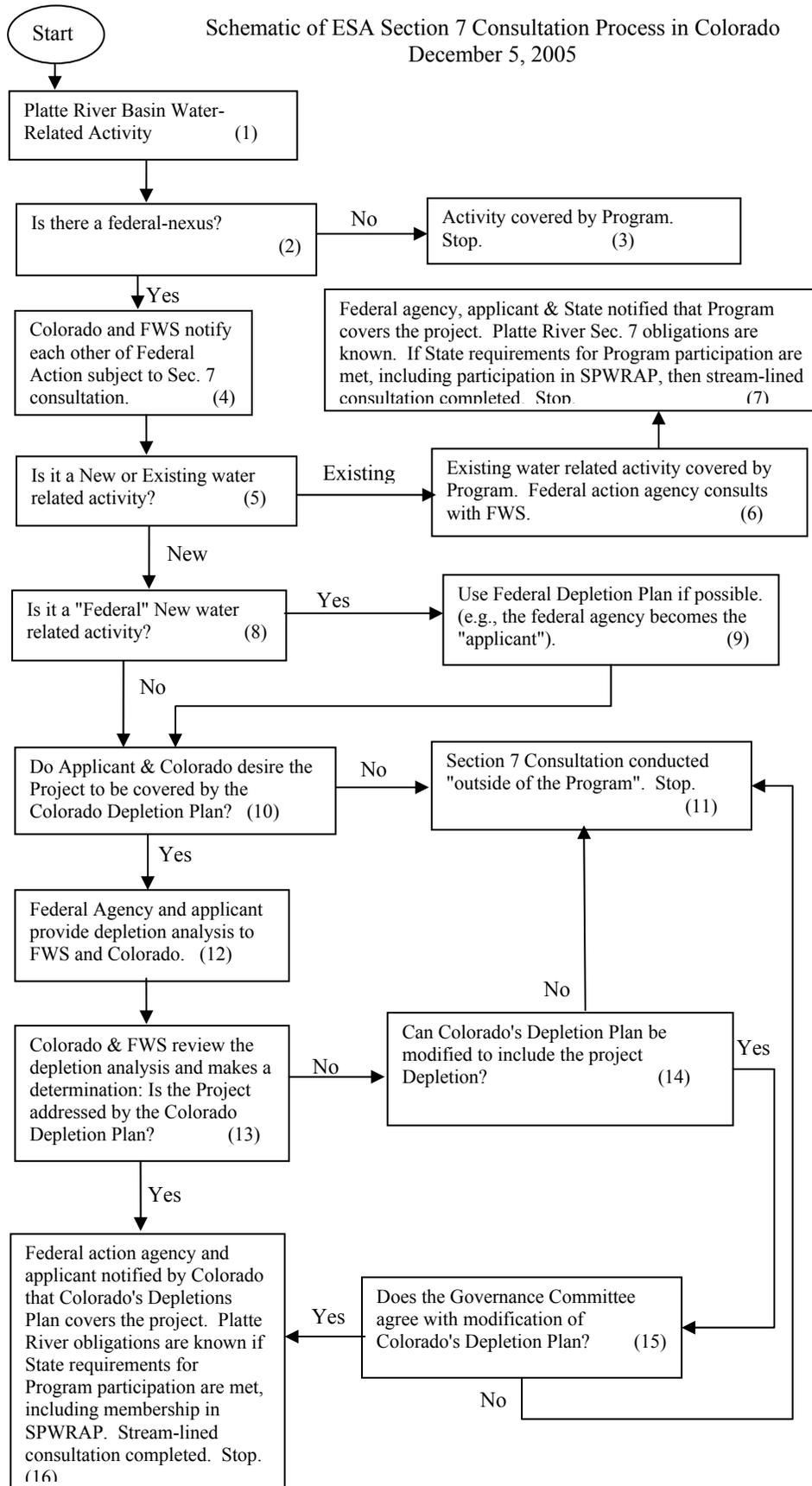
Box 15) **Does the Governance Committee agree with modification of State Depletions Plan?** If amendment of the State depletions plan is proposed, the State will follow the amendment process set forth in the Water Section (Program Document, Section E).

Box 16) **Federal Action Agency and applicant are notified by Colorado that Program / State Depletions Plan covers the project.** Platte River obligations are known. If State requirements for Program participation are met, including membership in the South Platte Water Related Activities Program, Inc. (SPWRAP), streamlined consultation completed pursuant to

Template Biological Opinion. If the proposed project depletions are covered by a State's depletions plan and if State requirements for Program participation are met, then the consulting federal agency, the applicant and the State would be notified by the FWS that the proposed project's effects to the target species are "covered" by the State's depletions plan. Annual reporting of all section 7 formal consultations will be provided to the Governance Committee.

Attachments: Template Biological Assessment  
Template Recovery Agreement  
Template Biological Opinion

Schematic of ESA Section 7 Consultation Process in Colorado  
December 5, 2005



**Exhibit B**  
**Oct. 20, 2006**

**TEMPLATE BIOLOGICAL ASSESSMENT  
& REQUEST FOR FORMAL SECTION 7 CONSULTATION**

[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 in Nebraska. 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 bald eagle (*Haliaeetus leucocephalus*) and 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 the Project.]

Operation of this Project will result in approximately \_\_\_ acre-feet of [choose: existing, new, or a combination of both existing and new] depletions to the South Platte River on an average annual basis. The source of water for the Project is [specify water rights, water uses, and source of supply].

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 Colorado, Nebraska, and Wyoming 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 target species and associated habitats, and provides ESA compliance<sup>15</sup> for effects to the target species and

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<sup>15</sup> "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.

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 Colorado is in compliance with its obligations under the Program.

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 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 LANGUAGE BELOW:**

The above-described Project operations qualify as an "existing water related activity" because they reflect the effects of a surface water or hydrologically connected groundwater activity implemented on or before July 1, 1997, within the intent and coverage of the Program. [Program, I.A. footnote 3].

**-OR-**

The above-described Project operations qualify as a "new water related activity" because such operations constitute a new surface water or hydrologically connected groundwater activity 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 Project conforms to the following criteria in Section H of Colorado's Plan for Future Depletions [Program, Attachment 5, Section 9]:

1. The Project is operated on behalf of Colorado water users;

2. The Project does not involve construction of a major on-stream reservoir located on the mainstem of the South Platte River anywhere downstream of Denver, Colorado;
3. The Project is not a hydropower diversion/return project diverting water including sediments from the mainstem of the South Platte River anywhere downstream of Denver and returning clear water to the South Platte River.
4. The Project does not cause the average annual water supply to serve Colorado's population increase from "Wastewater Exchange/Reuse" and "Native South Platte Flows" to exceed 98,010 acre feet during the February-July period.

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 Colorado's Future 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. Toward this end, the [Federal Agency] is forwarding with this letter a Recovery Agreement signed by the Applicant. [Template Recovery Agreement is attached]. The [Federal Agency] intends to require, as a condition of any approval, that the Applicant fulfill the responsibilities required of Program participants in Colorado, which includes participation in the South Platte Water Related Activities Program, Inc. (SPWRAP). 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/**

10-17-06

## PLATTE RIVER RECOVERY AGREEMENT

This RECOVERY AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, 2006, by and between the United States Fish and Wildlife Service (“Service”) and **name of Water User** (“Water User”).

WHEREAS, in 2006, the Secretary of the Interior and the Governors of Colorado, Nebraska and Wyoming signed a Cooperative Agreement to implement the Platte River Recovery Implementation Program (“Program”); and

WHEREAS, the Program implements certain aspects of the Service's recovery plans for four species (interior least tern, whooping crane, piping plover and pallid sturgeon) (collectively the “target species”) listed as threatened or endangered pursuant to the Endangered Species Act (“ESA”). The Program is intended to provide defined benefits for the target species and their associated habitats while providing for water development in the Platte River Basin to proceed in compliance with state law, interstate compacts and decrees, and the ESA; and

WHEREAS, on June 16, 2006, the Service issued a programmatic biological opinion (PBO) concluding that implementation of the Program, along with existing and a specified amount of new depletions, is not likely to jeopardize the continued existence of the target species or adversely modify their designated critical habitat in Nebraska. The Service also concluded that implementation is not likely to jeopardize the threatened western prairie-fringed orchid or the bald eagle in the central and lower Platte River; and

WHEREAS, Water User is the **choose one: owner/operator/contractor** of **name of water project or projects** (Water Project), which causes or will cause depletions to the Platte River system within Colorado; and

WHEREAS, Water User's Water Project is covered by the PBO to the extent described within the scope of that document; and

WHEREAS, Water User desires certainty that its depletions can occur consistent with Section 7 and Section 9 of the ESA.

NOW THEREFORE, Water User and the Service agree as follows:<sup>1</sup>

1. The PBO concluded that implementation of the Program will avoid the likelihood of jeopardy and adverse modification under Section 7 of the ESA for depletion impacts caused by projects consistent with Colorado's water plan under the Program. Water User's Water

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<sup>1</sup> Individual Recovery Agreement may be changed to fit specific circumstances.

Project is provided regulatory certainty under the ESA to the extent described in the PBO. Thus, any consultations under Section 7 regarding Water Project's depletions and other effects are to be governed by the scope and provisions of the PBO and actions of the Program. The Service agrees that no other measure or action shall be required or imposed on Water Project to comply with Section 7 or Section 9 of the ESA with regard to Water Project's depletion impacts or other impacts covered by the PBO. Water User is entitled to rely on this Agreement in making the commitment described in paragraph 2.

2. To the extent implementing this Recovery Agreement requires participation by Water User, including membership in the South Platte Water Related Activities Program, Inc. (SPWRAP), Water User agrees to fulfill those responsibilities required of Program participants in Colorado. Water User will not be required to take any action that would violate its decrees or the statutory authorization for Water Project, or any applicable limits on Water User's legal authority.

3. If the Service believes that Water User has violated paragraph 2 of this Recovery Agreement, the Service shall notify both Water User, the State of Colorado, and the Governance Committee. Water User and the Governance Committee shall have a reasonable opportunity to comment to the Service regarding the existence of a violation and to recommend remedies, if appropriate. The Service will consider the comments of Water User, Colorado, and the comments and recommendation of the Governance Committee, but retains the authority to determine the existence of a violation. If the Service reasonably determines that a violation has occurred and will not be remedied by Water User despite an opportunity to do so, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the reinitiation provisions in the Program and PBO. In that event, the Water Project's depletions would be excluded from the depletions covered by the PBO and the protection provided by the PBO Incidental Take Statement.

4. Nothing in this Recovery Agreement shall be deemed to affect the authorized purposes of Water User's Water Project or the Service's statutory authority.

5. The signing of this Recovery Agreement does not constitute any admission by Water User regarding the application of the ESA to the depletions of Water User's Water Project or regarding the validity of the facts or analyses relied upon by the Service or by the Program. The signing of this Recovery Agreement does not constitute any agreement by either party as to whether the Service's flow recommendations in the PBO are biologically or hydrologically necessary to recover the target species or meet the needs of designated critical habitat in Nebraska.

6. This Recovery Agreement shall be in effect until one of the following occurs:

- A. The Service removes the target species in the Platte River Basin from the endangered or threatened species list and determines that the Program is no longer needed to prevent the species from being relisted under the ESA; or

- B. The Service determines that the Program is no longer needed to recover or offset the likelihood of jeopardy to the target species in the Platte River Basin; or
- C. The Service declares that the target species in the Platte River Basin are extinct; or
- D. Federal legislation is passed or federal regulatory action is taken that negates the need for (or eliminates) the Program.
- E. The Program is terminated in accordance with the Program Agreement.

7. Water User may withdraw from this Recovery Agreement upon written notice to the Service. If Water User withdraws, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the reinitiation provisions in the Program and PBO.

8. In the event the Service reinitiates consultation on Water User's Water Project for any reason, Water User shall not be precluded from asserting in any future proceeding any claim, defense or challenge to the legal, scientific or technical basis for the imposition of any reasonable and prudent alternatives based on the signing of this Recovery Agreement, nor based on the fact that the Service had previously issued one or more biological opinions containing the facts, analyses, opinions or conclusions on which the Service then seeks to rely.

\_\_\_\_\_

Water User Representative

\_\_\_\_\_

Date

\_\_\_\_\_

U.S. Fish and Wildlife Service

\_\_\_\_\_

Date

Exhibit C

Platte River Tier 2 Biological Opinion Template  
For  
Water-Related Activities and Central/Lower Platte Species Addressed by the Platte  
River Recovery Implementation Program's Programmatic Biological Opinion

October 17, 2006

This biological opinion is provided in response to your [Date] request to initiate formal consultation pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended (ESA). Your Biological Assessment describes the potential effects of the [Project Name] on federally listed species and designated critical habitat.

The Federal Action reviewed in this biological opinion is the [provide the Project Name, Location, and a Short Description].

## I. Background

On June 16, 2006, the U.S. Fish and Wildlife Service (Service) issued a programmatic biological opinion (PBO) for the Platte River Recovery Implementation Program (PRRIP) and water-related activities<sup>2</sup> affecting flow volume and timing in the central and lower reaches of the Platte River in Nebraska. The action area for the PBO included the Platte River basin upstream of the confluence with the Loup River in Nebraska, and the mainstem of the Platte River downstream of the Loup River confluence.

The Federal Action addressed by the PBO included the following:

- 1) funding and implementation of the PRRIP for 13 years, the anticipated first stage of the PRRIP; and
- 2) continued operation of existing and certain new water-related activities<sup>3</sup> including, but not limited to, Reclamation and Service projects that are (or may become) dependent on the PRRIP for ESA compliance during the first 13-year stage of the PRRIP for their effects on the target species<sup>4</sup>, whooping crane critical habitat, and other federally listed species<sup>5</sup> that rely on central and lower Platte River habitats.

The PBO established a two-tiered consultation process for future federal actions on existing and new water-related activities subject to section 7(a)(2) of the ESA, with issuance of the PBO

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<sup>2</sup> The term “water-related activities” means activities and aspects of activities which (1) occur in the Platte River basin upstream of the confluence of the Loup River with the Platte River; and (2) may affect Platte River flow quantity or timing, including, but not limited to, water diversion, storage and use activities, and land use activities. Changes in temperature and sediment transport will be considered impacts of a “water related activity” to the extent that such changes are caused by activities affecting flow quantity or timing. Impacts of “water related activities” do not include those components of land use activities or discharges of pollutants that do not affect flow quantity or timing.

<sup>3</sup> “Existing water related activities” include surface water or hydrologically connected groundwater activities implemented on or before July 1, 1997. “New water-related activities” include new surface water or hydrologically connected groundwater activities including both new projects and expansion of existing projects, both those subject to and not subject to section 7(a)(2) of the ESA, which may affect the quantity or timing of water reaching the associated habitats and which are implemented after July 1, 1997.

<sup>4</sup> The “target species” are the endangered whooping crane (*Grus americana*), the interior least tern (*Sternula antillarum*), the pallid sturgeon (*Scaphirynchus albus*), and the threatened northern Great Plains population of the piping plover (*Charadrius melodus*).

<sup>5</sup> Other listed species present in the central and lower Platte River include the threatened bald eagle (*Haliaeetus leucocephalus*), western prairie fringed orchid (*Platanthera praeclara*) American burying beetle (*Nicrophorus americanus*) and Eskimo curlew (*Numenius borealis*).

being Tier 1 and all subsequent site-specific project analyses constituting Tier 2 consultations covered by the PBO. Under this tiered consultation process, the Service will produce tiered biological opinions when it is determined that future federal actions are “likely to adversely affect” federally listed species and/or designated critical habitat in the PRRIP action area and the project is covered by the PBO. If necessary, the biological opinions will also consider potential effects to other listed species and critical habitat affected by the federal action that were not within the scope of the Tier 1 PBO (e.g., direct or indirect effects to listed species occurring outside of the PRRIP action area).

Although the water depletive effects of this Federal Action to central and lower Platte River species have been addressed in the PBO, when “no effect”, or “may affect” but “not likely to adversely affect” determinations are made on a site-specific basis, the Service will review these determinations and provide written concurrence where appropriate. Upon receipt of written concurrence, section 7(a)(2) consultation will be considered completed for those federal actions.

Water-related activities requiring federal approval will be reviewed by the Service to determine if: (1) those activities comply with the definition of existing water-related activities and/or (2) proposed new water-related activities are covered by the applicable state’s or the federal depletions plan. The Service has determined that the [Project Name] meets the above criteria and, therefore, this Tier 2 biological opinion regarding the effects of [Project Name] on the target species, whooping crane critical habitat, western prairie fringed orchid, and bald eagle in the central and lower Platte River can tier from the June 16, 2006 PBO.

## **II. Consultation History**

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 Tier 1 PBO that the Federal Action, including the continued operation of existing and certain new water-related activities, may adversely affect but would not likely jeopardize the continued existence of the federally endangered whooping crane, interior least tern, and pallid sturgeon, or the federally threatened northern Great Plains population of the piping plover, western prairie fringed orchid, and bald eagle in the central and lower Platte River. Further, the Service determined that the Federal Action, including the continued operation of existing and certain new water-related activities, was not likely to destroy or adversely modify designated critical habitat for the whooping crane.

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.

The effects of the continued operation of existing and certain new water-related activities on the remaining species and critical habitats listed in Table II-1 of the PBO were beyond the scope of

the PBO and were not considered.

The Service has reviewed the information contained in the Biological Assessment submitted by your office on [Date].

We concur with your determinations of “likely to adversely affect” for the endangered whooping crane, interior least tern, pallid sturgeon, and the threatened northern Great Plains population of the piping plover, the western prairie fringed orchid, and the bald eagle in the central and lower Platte River. We also concur with your determination of “likely to adversely affect” for designated whooping crane critical habitat.

We concur with your determinations of “not likely to adversely affect” for the endangered American burying beetle, and of “no effect” to the endangered Eskimo curlew.

We concur with your determinations of “not likely to adversely affect” [for species, species, and “no adverse modification of critical habitat” for species].

We concur with your determinations of “no effect” [for species, species, and critical habitat].

### **III. Scope of the Tier 2 Biological Opinion**

The [Project Name] is a component of “the continued operation of existing and certain new water-related activities” needing a federal action evaluated in the Tier 1 PBO, and flow-related effects of the Federal Action are consistent with the scope and the determination of effects in the June 16, 2006 PBO. Because [the project proponent] has elected to participate in the PRRIP, ESA compliance for flow-related effects to federally listed endangered and threatened species and designated critical habitat from [Project Name] is provided to the extent described in the Tier 1 PBO.

This biological opinion applies to the [Project Name] effects to listed endangered and threatened species and designated critical habitat as described in the PBO for the first thirteen years of the PRRIP (i.e., the anticipated duration of the first PRRIP increment).

### **IV. Description of the Federal Action**

[Describe the Federal Action and any Interdependent and Interrelated Actions– use text from the Biological Assessment]

### **V. Status of the Species/Critical Habitat**

Species descriptions, life histories, population dynamics, status and distributions are fully described in the PBO on pages 76-156 for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle and western prairie fringed orchid, and whooping crane critical habitat and are hereby incorporated by reference. Since issuance of the Service’s PBO, [Discuss changes in status of target species/critical habitat since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since the PBO was issued].

## VI. Environmental Baseline

The Environmental Baseline sections for the Platte River and for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle and western prairie fringed orchid, and whooping crane critical habitat are described on pages 157 to 219 of the Tier 1 PBO, and are hereby incorporated by reference. Since issuance of the Tier 1 PBO, [\[Discuss changes in status of target species/critical habitat in the action area since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since that time\]](#).

## VII. Effects of the Action

Based on our analysis of the information provided in your Biological Assessment for the [\[Project Name\]](#), the Service concludes that the proposed Federal Action will result in [\[a/an existing depletion, new depletion, or a combination of existing and new depletions\]](#) to the Platte River system above the Loup River confluence. These depletions are associated with [\[briefly describe here, or by reference, the specific water supply sources, water uses, and associated water rights or permits\]](#).

[\[Select and/or delete from the following 2 paragraph\(s\) below as needed\]](#)

As an existing water-related activity, we have determined that the flow-related adverse effects of the [\[Project Name\]](#) are consistent with those evaluated in the Tier 1 PBO for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle, western prairie fringed orchid, and whooping crane critical habitat.

As a new water-related activity, we have determined that the flow-related adverse effects of the [\[Project Name\]](#) are consistent with those evaluated in the Tier 1 PBO for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle, western prairie fringed orchid, and whooping crane critical habitat, and these effects on flows are being addressed in conformance with the [\[Select the applicable depletion plan: Wyoming Depletion Plan, Nebraska New Depletion Plan, Colorado Plan for Future Depletions, Federal Depletions Plan\]](#) of the PRRIP.

[\[If the site-specific project/activity may affect listed species/critical habitat addressed in the PBO, include those site-specific effects here. In that instance, the Incidental Take Statement section below may need additional text.\]](#)

## VIII. Cumulative Effects

Cumulative effects include the effects of future State, local, or private (non-federal) actions that are reasonably certain to occur in the action area considered in this biological opinion. A non-federal action is “reasonably certain” to occur if the action requires the approval of a State or local resource or land-control agency, such agencies have approved the action, and the project is ready to proceed. Other indicators which may also support such a “reasonably certain to occur” determination include whether: a) the project sponsors provide assurance that the action will proceed; b) contracting has been initiated; c) State or local planning agencies indicate that grant of authority for the action is imminent; or d) where historic data have demonstrated an established trend, that trend may be forecast into the future as reasonably certain to occur. These

indicators must show more than the possibility that the non-federal project will occur; they must demonstrate with reasonable certainty that it will occur. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act and would be consulted on at a later time.

Cumulative effects are described on pages 194 to 300 of the Tier 1 PBO, and are hereby incorporated by reference. [\[Discuss any changes in cumulative effects, if any, since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since that time\].](#)

## **IX. Conclusions**

The Service concludes that the proposed [\[Project Name\]](#) is consistent with the Tier 1 PBO for effects to listed species and critical habitat addressed in the Tier 1 PBO. After reviewing site specific information, including: 1) the scope of the Federal Action, 2) the environmental baseline, 3) the status of the whooping crane, interior least tern, piping plover, pallid sturgeon, western prairie fringed orchid, and the bald eagle in the central and lower Platte River and their potential occurrence within the project area, as well as whooping crane critical habitat, 4) the effects of the [\[Project Name\]](#), and 5) any cumulative effects, it is the Service's biological opinion that the [\[Project Name\]](#), as described, is not likely to jeopardize the continued existence of the federally endangered whooping crane, interior least tern, and pallid sturgeon, or the federally threatened northern Great Plains population of the piping plover, western prairie fringed orchid, or bald eagle in the central and lower Platte River. The Federal Action is also not likely to destroy or adversely modify designated critical habitat for the whooping crane.

## **X. Incidental Take Statement**

Section 9 of ESA and federal regulations pursuant to section 4(d) of ESA prohibit the take of endangered and threatened species without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct, and applies to individual members of a listed species. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under ESA provided that such taking is in compliance with the terms and conditions of this incidental take statement.

Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of federally listed plant species (e.g., Colorado butterfly plant, Ute ladies' tresses orchid, and western prairie fringed orchid). However, limited protection of listed plants from take is provided to the extent that ESA prohibits the removal and reduction to possession of federally listed endangered plants or the

malicious damage of such plants on non-federal areas in violation of state law or regulation or in the course of any violation of a state criminal trespass law. Such laws vary from state to state.

The Department of the Interior, acting through the Service and Bureau of Reclamation, is implementing all pertinent Reasonable and Prudent Measures and implementing Terms and Conditions stipulated in the Tier 1 PBO Incidental Take Statement (pages 309-326 of the PBO) which will minimize the anticipated incidental take of federally listed species. In instances where the amount or extent of incidental take outlined in the Tier 1 PBO is exceeded, or the amount or extent of incidental take for other listed species is exceeded, the specific PRRIP action(s) causing such take shall be subject to reinitiation expeditiously.

[\[If the site-specific project/activity may affect listed species/critical habitat addressed in the PBO, include any site-specific Reasonable and Prudent Measures and Terms and Conditions here. See the format in the PBO Incidental Take Section\].](#)

## **XI. Closing Statement**

Any person or entity undertaking a water-related activity that receives federal funding or a federal authorization and which relies on the PRRIP as a component of its ESA compliance in section 7 consultation must agree: (1) to the inclusion in its federal funding or authorization documents of reopening authority, including reopening authority to accommodate reinitiation upon the circumstances described in Section IV.E. of the Program document; and (2) to request appropriate amendments from the federal action agency as needed to conform its funding or authorization to any PRRIP adjustments negotiated among the three states and the Department of the Interior, including specifically new requirements, if any, at the end of the first PRRIP increment and any subsequent PRRIP increments. The Service believes that the PRRIP should not provide ESA compliance for any water-related activity for which the funding or authorization document does not conform to any PRRIP adjustments (Program Document, section VI).

Reinitiation of consultation over [\[Project name\]](#) will not be required at the end of the first 13-years of the PRRIP provided a subsequent Program increment or first increment Program extension is adopted pursuant to appropriate ESA and NEPA compliance procedures, and, for a subsequent increment, the effects of the [\[Project name\]](#) are covered under a Tier 1 PBO for that increment addressing continued operation of previously consulted-on water-related activities.

This concludes formal consultation on the actions outlined in the [\[Date\]](#) request from [\[federal action agency\]](#). As provided in 50 CFR § 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: 1) the amount or extent of incidental take is exceeded; 2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; 3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or 4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, the specific action(s) causing such take shall be subject to reinitiation expeditiously.

Requests for reinitiation, or questions regarding reinitiation should be directed to the appropriate Field Office below.

[Depending on the State the project is located in, select the appropriate field office below and delete the other two]

Field Supervisor  
Nebraska Ecological Services Field Office  
U.S. Fish and Wildlife Service  
Federal Building, Second Floor  
203 West 2<sup>nd</sup> Street  
Grand Island, NE 68801

Field Supervisor  
Colorado Ecological Services Field Office  
U.S. Fish and Wildlife Service  
P.O. Box 25486  
Denver Federal Center  
Denver, CO 80225-0486

Field Supervisor  
Wyoming Ecological Services Field Office  
U.S. Fish and Wildlife Service  
5353 Yellowstone Road  
Cheyenne, WY 82003

## **XII. Conservation Recommendations**

Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of an action on listed species or critical habitat, to help implement recovery plans, or to develop information. Conservation recommendations are provided in the PBO (pages 328-329) and are hereby incorporated by reference.

## **XIII. Literature Cited**

Platte River Recovery Implementation Program document. 2006.

U.S. Department of the Interior. 2006. Platte River Recovery Implementation Program Final Environmental Impact Statement.

U.S. Fish and Wildlife Service. 2006. Biological opinion on the Platte River Recovery Implementation Program.

12-05-05

## PLATTE RECOVERY AGREEMENT

This RECOVERY AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, 2006, by and between the United States Fish and Wildlife Service (“Service”) and **name of Water User** (“Water User”).

WHEREAS, in 2006, the Secretary of Interior and the Governors of Colorado, Nebraska and Wyoming signed a Cooperative Agreement to implement the Platte River Recovery Implementation Program (“Program”); and

WHEREAS, the Program implements certain aspects of the Service’s recovery plans for four species (interior least tern, whooping crane, piping plover and pallid sturgeon) (collectively the “target species”) listed as threatened or endangered pursuant to the Endangered Species Act (“ESA”). The Program is intended to provide defined benefits for the target species and their associated habitats while providing for water development in the Platte River Basin to proceed in compliance with state law, interstate compacts and decrees, and the ESA; and

WHEREAS, on \_\_\_\_\_, 2006, the Service issued a programmatic Biological Opinion concluding that implementation of the Program, along with existing and a specified amount of new depletions, are not likely to jeopardize the continued existence of the target species or adversely modify their designated critical habitat in Nebraska; and

WHEREAS, Water User is the **choose one: owner/operator/contractor of name of water project or projects** (Water Project), which causes or will cause depletions to the Platte River system within Colorado; and

WHEREAS, Water User’s Water Project is covered by the Biological Opinion; and

WHEREAS, Water User desires certainty that its depletions can occur consistent with Section 7 and Section 9 of the ESA.

NOW THEREFORE, Water User and the Service agree as follows:

1. The Biological Opinion concluded that implementation of the Program will avoid the likelihood of jeopardy and adverse modification under Section 7 of the ESA for depletion impacts caused by projects consistent with Colorado’s water plan under the Program. Water User’s Water Project is a covered activity. Thus, any consultations under Section 7 regarding Water Project’s depletions are to be governed by the provisions of the 2006 Biological Opinion and actions of the Program. The Service agrees that no other measure or action shall be required or imposed on Water Project to comply with Section 7 or Section 9 of the ESA with regard to Water Project’s depletion impacts or other impacts covered by the Biological Opinion. Water User is entitled to rely on this Agreement in making the commitment described in paragraph 2.

2. Water User agrees not to take any action which would probably prevent the implementation of the Program. To the extent implementing the Program requires active cooperation by Water User, including membership in the South Platte Water Related Activities Program, Inc. (SPWRAP), Water User agrees to fulfill those responsibilities required of Program participants in Colorado. Water User will not be required to take any action that would violate its decrees or the statutory authorization for Water Project, or any applicable limits on Water User's legal authority.

3. If the Service believes that Water User has violated paragraph 2 of this Recovery Agreement, the Service shall notify both Water User and the Governance Committee. Water User and the Governance Committee shall have a reasonable opportunity to comment to the Service regarding the existence of a violation and to recommend remedies, if appropriate. The Service will consider the comments of Water User and the comments and recommendation of the Governance Committee, but retains the authority to determine the existence of a violation. If the Service reasonably determines that a violation has occurred and will not be remedied by Water User despite an opportunity to do so, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the reinitiation provisions in the Program and 2006 Biological Opinion. In that event, the Water Project's depletions would be excluded from the depletions covered by the Biological Opinion and the protection provided by the Incidental Take Statement.

4. Nothing in this Recovery Agreement shall be deemed to affect the authorized purposes of Water User's Water Project or the Service's statutory authority.

5. The signing of this Recovery Agreement does not constitute any admission by Water User regarding the application of the ESA to the depletions of Water User's Water Project or regarding the validity of the facts or analyses relied upon by the Service or by the Program. The signing of this Recovery Agreement does not constitute any agreement by either party as to whether the Service's flow recommendations in the Biological Opinion are biologically or hydrologically necessary to recover the target species or meet the needs of designated critical habitat in Nebraska.

6. This Recovery Agreement shall be in effect until one of the following occurs:

A. The Service removes the target species in the Platte River Basin from the endangered or threatened species list and determines that the Program is no longer needed to prevent the species from being relisted under the ESA; or

B. The Service determines that the Program is no longer needed to recover or offset the likelihood of jeopardy to the target species in the Platte River Basin; or

C. The Service declares that the target species in the Platte River Basin are extinct; or

D. Federal legislation is passed or federal regulatory action is taken that negates the need for (or eliminates) the Program.

7. Water User may withdraw from this Recovery Agreement upon written notice to the Service. If Water User withdraws, the Service may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the reinitiation provisions in the Program and Biological Opinion.

8. In the event the Service reinitiates consultation on Water User's Water Project for any reason, Water User shall not be precluded from asserting in any future proceeding any claim, defense or challenge to the legal, scientific or technical basis for the imposition of any reasonable and prudent alternatives based on the signing of this Recovery Agreement, nor based on the fact that the Service had previously issued one or more biological opinions containing the facts, analyses, opinions or conclusions on which the Service then seeks to rely.

\_\_\_\_\_  
Water User Representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
U.S. Fish and Wildlife Service

\_\_\_\_\_  
Date