

# ESA Consultations Involving Platte River Depletions: Information for Project Proponents in Wyoming on the Platte River Recovery Implementation Program



U.S. Fish and Wildlife Service  
Mountain-Prairie Region  
August 30, 2007 – Subject to Updates

## Purpose

The purpose of this document is to provide general guidance to water-related project proponents in **Wyoming** regarding Endangered Species Act (ESA) consultations with the U.S. Fish and Wildlife Service (Service) on the effects of water-related activities in the Platte River Basin, and how the effects to listed species in Nebraska are addressed under the Platte River Recovery Implementation Program.<sup>1</sup>

## History

Since 1978, the Service 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 (the “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*).

In 2006, a landmark agreement was signed between the governors of Colorado, Nebraska and Wyoming 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, while managing certain land and water resources to provide benefits for those species. This Program went into effect on January 1, 2007.<sup>2</sup>

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

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<sup>1</sup> **Disclaimer:** This document provides general guidance only; in case of disagreement or ambiguity with respect to Platte River Recovery Implementation Program Agreement documents or Fish and Wildlife Service policies, those Program documents and Service policies take precedence over statements made in this document.

<sup>2</sup> The complete set of documents associated with this Program is available at [www.platteriver.org](http://www.platteriver.org).

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

### Significance of the Program for project consultations in Wyoming

With or without the three-state Program, federal-nexus projects in the Platte River basin must undergo Section 7 ESA consultation with the Service 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 process** for addressing depletion-related impacts to the target species and whooping crane critical habitat.<sup>3</sup>

Prior to implementation of the Program in 2007, interim measures were in place to offset the impacts of project depletions to the target species until such time as a satisfactory Recovery Program was in effect to address those impacts. Typically, these "interim measures" included annual payments to the National Fish and Wildlife Foundation for management and/or acquisition of land or water to improve habitat conditions.

With the Program now in place, those interim measures are no longer needed, as participation in the Program provides ESA compliance for effects on the target species for all existing and, in most cases, new water-related activities.<sup>4</sup>

### How do I "consult under the Program", and what are my obligations?

Because Interior and the three states believe that the cooperative, basin-wide Program will be the most effective means of protecting and restoring habitat for these species, a streamlined consultation process is available for those who agree to be covered by the Program.

Streamlined consultation is made possible by the **programmatic biological opinion of June 16, 2006**, 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 nor adversely modify

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<sup>3</sup> Note that programs targeting a specific geographic area and/or involving multiple individual actions of a similar nature commonly can be handled through a single consultation with the Service known as a *programmatic consultation*. For the sake of simplicity in this document, the term "project" is used, however it should be understood that "programs" also are potentially relevant to this discussion.

<sup>4</sup> The Program document defines "Existing water related activities" to 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, which are implemented after July 1, 1997. See page 2 of the Platte River Recovery Implementation Program for the complete definitions of these terms.

designated critical habitat in Nebraska.<sup>5</sup> 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 programmatic biological opinion (PBO), including likely actions and effects evaluated in the Final Environmental Impact Statement (FEIS)<sup>6</sup>. 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.

For water-related activities in the Platte River basin of Wyoming which require a federal action (for example, a §404 permit) and/or involve federal monies, the project proponent, working with the lead federal agency in the consultation process, needs to take the following procedural steps to be ‘covered by the Program’:<sup>7</sup>

#### *Non-hydrologically-connected water uses*

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 the Service. 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% of the total volume of groundwater withdrawn from that well, *i.e.*, wells that are not in the ‘28%-in-40-years zone’. (Maps illustrating these zones in various North Platte basins are available from the Wyoming State Engineer’s Office (SEO)).

#### *De minimis water uses*

The Service’s 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 the Service 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’ time are considered to have an insignificant effect, and do not require consultation.

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<sup>5</sup> The complete Programmatic Biological Opinion is available at [www.platteriver.org/library/BO/Platte\\_River\\_FBO\(June16\).pdf](http://www.platteriver.org/library/BO/Platte_River_FBO(June16).pdf)

<sup>6</sup> The Final EIS for the Platte River Recovery Implementation Program was published in May 2006, and may be accessed at [www.platteriver.org/library/FEIS/Volume%201/Volume1TOC.pdf](http://www.platteriver.org/library/FEIS/Volume%201/Volume1TOC.pdf)

<sup>7</sup> These steps are more thoroughly spelled out in *Depletions Plan, Platte River Basin, Wyoming* (the “Wyoming Plan”), which is available at [www.platteriver.org/library/Program-Documents/Dec-2005/Program.pdf](http://www.platteriver.org/library/Program-Documents/Dec-2005/Program.pdf) as Attachment 5, Section 7. Water-related activities that are considered a federal rather than State of Wyoming responsibility may be addressed as described in the *Federal Depletions Plan* (same Web site, Attachment 5, Section 10).

### *Existing water-related activities*

‘Existing water-related activities’ include surface water or hydrologically-connected groundwater activities that were implemented prior to July 1, 1997. These activities qualify for streamlined consultation under the Platte River Recovery Implementation Program, should the project proponent choose to be covered by the Program.

Normally, no analysis of depletions to the Platte River system will be requested by the Service or SEO for these consultations. However, the Service will need confirmation from the Wyoming State Engineer’s Office that the action qualifies as an existing activity. The project proponent will need to provide basic information about the existing water-related activity (see Attachment D) to attain the SEO’s certification (for example, a basic description of the proposed project including pre-1997 historic operations, etc.) If the water user must take some action for the existing water-related activity to be covered by Wyoming’s Depletions Plan, a Wyoming Platte River Recovery Agreement (Attachment B) should be established between the water user and the state to document the terms and conditions for that coverage.

In addition, a **biological assessment** (BA) must be provided to the Service by the lead federal agency. To address effects on the downstream Platte (Nebraska) target species, the three-page “Template Biological Assessment and Request for Formal Section 7 Consultation” should be used (Attachment A.) This BA must describe the *water sources* and *water uses* associated with the action. Questions regarding information needed for this BA may be directed to the Service or to the lead federal agency.

Upon satisfactory completion of these steps, the Service can issue a ‘tiered biological opinion’ to the lead federal agency documenting that the project’s water-related activities are covered by the Program and are not likely to jeopardize the continued existence of the target species nor adversely modify critical habitat. (This is called a ‘tiered’ BO because it references and tiers off of the June 16, 2006 PBO).

### *New water-related activities*

‘New water-related activities’ are new surface water or hydrologically-connected groundwater activities implemented after July 1, 1997 which may affect the quantity or timing of water reaching the Platte River system. (This includes the expansion of existing projects as well as new projects.)

Wyoming provides a flow chart outlining the consultation process for new water-related activities in the Platte River basin of Wyoming (Attachment C). In general, the following steps are required to address new water-related activities (refer to the flow chart for additional details):

- Complete a depletions analysis, including monthly estimates of the average long-term depletions and/or accretions at the location of the proposed action.

- The project proponent has the option of requesting to address depletions under Wyoming’s Depletions Plan and the Platte River Program.
- The Wyoming State Coordinator reviews the depletions analysis. If it is evident that the new water-related activity can be covered by Wyoming’s Depletions Plan, the State Coordinator will document that the activity will be covered by the Plan. If it is apparent that the activity will result in increased depletions and that the project proponent will need to provide mitigation in order for the activity to be covered by the Plan, the State Coordinator will determine whether mechanisms are available to offset the new depletions and may request a mitigation plan from the project proponent for these depletions. Following review of the proponent’s mitigation plan, the State Coordinator may recommend coverage under Wyoming’s Depletions Plan.<sup>8</sup>
- If a mutually-acceptable proposal for addressing new depletions is developed, a Wyoming Platte River Recovery Agreement (Attachment B) is completed which documents the mitigation requirements for the new water-related activity, and outlines the responsibilities of the project proponent and the state in achieving those requirements. If the proposed water-related activity can be covered by Wyoming’s Depletions Plan without further actions by the water user, the SEO will notify the Service in writing of the reasons for coverage under the Plan and this Agreement would not be necessary.
- Upon satisfactory completion of these steps, the Service can issue a ‘tiered biological opinion’ to the lead federal agency documenting that the project’s water-related activities are covered by the Program and are not likely to jeopardize the continued existence of the target species or adversely modify critical habitat.

### Alternatives

Seeking ESA coverage under the Platte River Recovery Implementation Program is entirely voluntary. Project proponents always have the option of seeking to offset their water-related impacts to the target species through stand-alone consultations with the Service that do not rely on the Program.

However, should a project proponent opt not to seek coverage or be unable to obtain coverage under the Program as described above, the proponent will need to complete an independent Section 7 consultation on the effects of the project. Biological assessment (BA) information required by the Service to prepare a stand-alone biological opinion would, in this case, include additional details on the timing, magnitude and frequency of

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<sup>8</sup> Note that the ability of Wyoming to ‘cover’ a project under their Plan may depend upon the availability of sufficient water to offset the hydrologic effects of the proposed activity through the Wyoming Water Bank or other sources. Such water may not be available, in which case the project proponent may not have the option of being covered by Wyoming’s Depletions Plan.

depletions associated with both existing and new water-related project actions. Project-specific conservation measures will be required to offset corresponding adverse effects on the species, and may be substantially more costly in terms of time and money than measures required under the Program.

Typically, **for existing water-related activities**, preparation of the BA and development and implementation of suitable conservation measures independent of the Program would be more costly and time-consuming for the project proponent and the federal agencies than participation in the Program as described above.

**For new water-related activities** not covered by the Program, net new depletions to the Platte River system typically will need to be offset through the acquisition of some other water source and/or the retirement of an existing consumptive water use.

What are the possible risks or downsides to seeking Program coverage?

**Program Continuity.** Conceivably, any of the four signatories to the Program Agreement (the three governors and the U.S. Secretary of the Interior) could withdraw from the Agreement, or the state or federal participants could fail to meet their commitments under the Program. Should that occur, and should it consequently be determined that the Program no longer provides benefits commensurate with those anticipated by the 2006 Programmatic Biological Opinion, it is possible that the Program would no longer serve to provide ESA coverage for the target species. In such a situation, consultation on the effects of the project actions may need to be re-initiated. However, such a turn of events is considered unlikely, and should this occur Interior would seek practical and reasonable alternatives for project proponents who already had agreed in good faith to participate in the Program.

New Federal depletions

‘Federal depletions’ are those associated with federal water-related activities wherein the water rights are held by a federal agency and that water is used for a primarily ‘national benefit’ (as opposed to supplying local users). Examples of new federal depletions may include, but are not limited to:

- New water storage facilities, impoundments, and consumptive water uses at National Wildlife Refuges, Waterfowl Production Areas, and National Fish Hatcheries;
- New consumptive water uses at National Forests, Parks, Monuments, Cemeteries, and Historic Sites, including recreational, habitat improvement, administrative, and emergency uses; and
- New depletions associated with activities at federal facilities that provide benefits that are primarily national in scope, such as national defense, national security, or national research and development activities (*e.g.*, U.S. military bases; U.S. National Renewable Energy Laboratory).

In these cases, ESA coverage for the new or expanded water-related activity cannot be provided by the Wyoming Plan. Project proponents may opt to seek ESA coverage via procedures outlined in the Federal Depletions Plan.<sup>9</sup>

Situations may arise in which classification of project depletions as a “federal” or “non-federal” responsibility may not be obvious. In such cases, final classification of the project will be made by the Service in coordination with the U.S. Bureau of Reclamation and the State of Wyoming, with oversight by the Program Governance Committee<sup>10</sup>.

Am I covered for *all* Endangered Species Act impacts under the Program?

Not necessarily. Coverage provided by the Program is limited to the *off-site effect* of streamflow depletions on the *downstream target species* and the western prairie fringed orchid. Potential *on-site* or other *local* impacts to other federally-listed species (for example, impacts to the Wyoming Toad or the Preble’s Meadow Jumping Mouse) are *not* covered by the Program. To the extent a project may affect one or more of those other federally-listed species, its effects will need to be assessed separately in the biological assessment on a project-by-project basis during the ESA consultation process.

➤ Who may I contact with my questions?

For questions about the **Section 7 ESA consultation process** in Wyoming, contact the Wyoming Field Office at the U.S. Fish and Wildlife Service: (307) 772-2374.

For questions about project coverage under **Wyoming’s Depletion Plan**, including compliance with Wyoming water law and state certification, contact the Wyoming State Coordinator: (307) 777-7641.

For questions about **describing relevant water sources, uses, and/or estimating depletive effects** associated with a particular project, contact the USFWS Platte River hydrologist: (303) 236-4484.

<sup>9</sup> [www.platteriver.org/library/Program-Documents/Program-Document-Dec-2005/Program.pdf](http://www.platteriver.org/library/Program-Documents/Program-Document-Dec-2005/Program.pdf), Attachment 5, Section 10.

<sup>10</sup> The Platte River Governance Committee has ten members: two representatives from the U.S. Department of the Interior, one from each of the three states, one water-user representative from each of the three states, and two environmental-interest representatives. The Committee periodically meets to review Program progress, approve Program expenditures, oversee Program actions, and resolve Program disagreements.

## ATTACHMENT A

### WYOMING

# TEMPLATE BIOLOGICAL ASSESSMENT & REQUEST FOR FORMAL SECTION 7 CONSULTATION

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 compliance<sup>11</sup> for effects to the target species and whooping crane critical habitat

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<sup>11</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

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.

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

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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.

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/**

**ATTACHMENT B**

**TEMPLATE NO. 1**

**WYOMING PLATTE RIVER RECOVERY AGREEMENT**

This RECOVERY AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, [Year], by and between the Wyoming State Engineer (State Engineer), acting on behalf of the State of Wyoming and **name of Water User** (“Water User”).

WHEREAS, in 2006, the Secretary of the Interior and the Governors of Wyoming, Nebraska and Colorado 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, are not likely to jeopardize the continued existence of the target species or destroy or adversely modify their designated critical habitat in Nebraska. The Service also concluded that implementation is not likely to jeopardize the threatened bald eagle or western prairie fringed orchid in Nebraska (the bald eagle has since been removed from the federal endangered species list); 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 Wyoming; and

WHEREAS, the State of Wyoming has prepared and the Governance Committee of the Program has approved the Depletions Plan, Platte River, Wyoming (Wyoming’s Depletions Plan), which defines the existing water related activities and certain specific new water related activities that are covered by the Program and the PBO;

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

WHEREAS, Water User desires certainty that its depletions can occur consistent with Section 7 and Section 9 of the ESA and therefore its Biological Opinion through participation in the Program; and

WHEREAS, the existing water related activity will be operated on behalf of Wyoming water users.

NOW THEREFORE, Water User and the State Engineer agree as follows:

(Example Situations)

If the State Coordinator has determined that the activity will qualify as an existing water related activity without terms and conditions, **this agreement will not be necessary**. For example, if the water user is rehabilitating an existing water supply system that will not increase depletions or the water user is proposing a project that will rely on a change of use approved by the Wyoming Board of Control, then the State Engineer would simply document such findings in a letter to the Federal Action Agency.

OR

If the State Coordinator has determined that the activity will qualify as an existing water related activity subject to certain terms and conditions, this agreement can be used to document those terms and conditions. For example, a water user seeking a replacement well may be required to cement the old well and/or voluntarily abandon an existing water right. (Note: This could also be documented with conditions on the permit for the replacement well.) Another example, the water user could acquire and retire depletions from an existing water related activities as defined in Wyoming's Depletions Plan and thereby ensure the activity can be completed without exceeding an existing water related activity benchmark or baseline.

OR

If the water user is proposing a new water related activity, the agreement would be used to document the terms and conditions for coverage by Wyoming's Depletions Plan and the Program. For example, the water user could acquire replacement water to offset the new depletions. Another example, the water user could seek and receive replacement water from the Wyoming Water Bank through the Director of the Wyoming Water Development Office. (Any agreements for water from the water bank should be attached to this agreement.)

OR

If the water user is proposing a project that includes both existing and new water related activities, the agreement could be used to document the quantification of the two activities, and perhaps, place conditions on each to ensure there is proper mitigation.

The following general conditions will apply to this agreement:

1. The State Engineer, his employees, and the State of Wyoming do not waive their sovereign immunity by entering into this agreement and specifically retain immunity and all defenses available to them as sovereigns pursuant to W.S. 1-39-104(a) and all other laws.

2. The construction, interpretation and enforcement of this agreement shall be governed by the laws of the State of Wyoming. Venue for any court action shall be in the First Judicial District, Laramie County, Wyoming.

3. Water user shall indemnify, defend and hold harmless the State of Wyoming, the State Engineer, and its officers, agents, employees, successors and assignees from any and all claims, lawsuits, losses and liability arising out of the Water User's failure to perform any of Water User's duties and obligations hereunder or in connection with the negligent performance of Water User's duties or obligations or participation in the Program.

4. This Agreement, consisting of three (3) pages, represents the entire and integrated Agreement between the State Engineer and Water User and supersedes all prior negotiations, representations, and agreements, whether written or oral.

**Signatures.** IN WITNESS THEREOF, the parties to this Agreement through their duly authorized representatives have executed this Agreement, on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this Agreement as set forth herein.

This Agreement is not binding on either party until approved by A&I Procurement and the Governor of the State of Wyoming or his designee, if required by Wyo. Stat. § 9-2-1016(b)(iv).

The effective date of this Agreement is the date of the signature last affixed to this page.

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Water User Representative Date

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Patrick T. Tyrrell Date  
Wyoming State Engineer

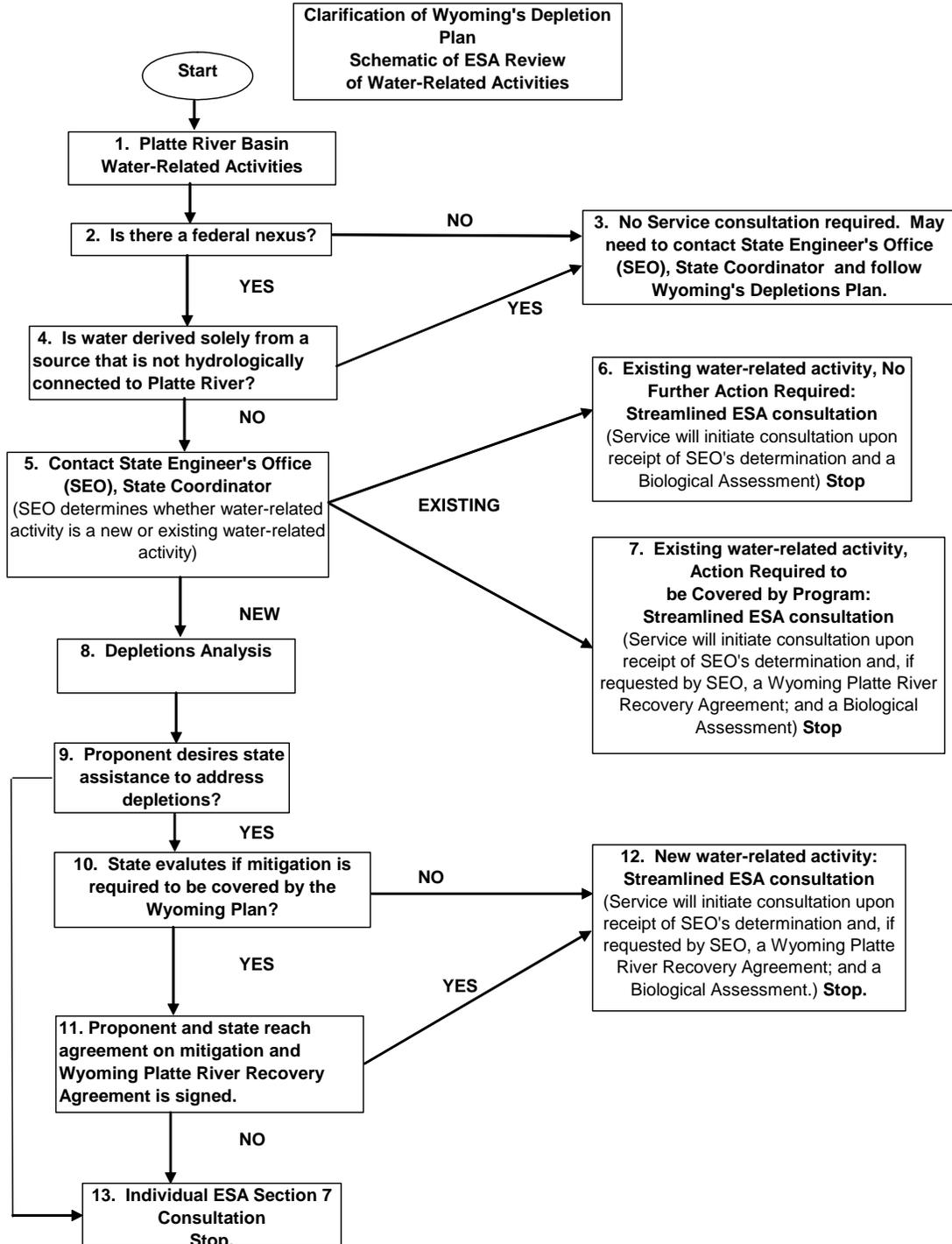
Wyoming Attorney General's Office Approved as to Form:

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Date

# ATTACHMENT C

## Flow Chart Derived from Wyoming's Depletions Plan



## **ATTACHMENT D**

### **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](mailto: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.