



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Ecological Services  
764 Horizon Drive, Building B  
Grand Junction, Colorado 81506-3946

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ES/GJ-6-CO-99-F-033-CP104  
TAILS 65413-2010-F-0033

February 12, 2010

## Memorandum

To: Area Manager, Eastern Colorado Area Office, Bureau of Reclamation, Loveland, Colorado

From: Acting Western Colorado Supervisor, Ecological Services, Grand Junction, Colorado *Pam S. Gellat*

Subject: Windy Gap Firming Project Section 7 Consultation for Colorado River Water Depletions

This responds to your November 17, 2009, request for formal consultation for the subject project under section 7 of the Endangered Species Act (ESA). In accordance with section 7 of the ESA of 1973, as amended (16 U.S.C. 1531 et seq.), and the Interagency Cooperation Regulations (50 CFR 402), the Fish and Wildlife Service (Service) transmits this correspondence to serve as the final biological opinion for Colorado River water depletions associated with the Windy Gap Firming Project (WGFP). This biological opinion only addresses the Colorado River endangered fishes, other species will be addressed separately.

The Municipal Subdistrict, Northern Colorado Water Conservancy District, acting through the Windy Gap Firming Project Water Activity Enterprise (Subdistrict) is proposing to improve the firm yield from the existing Windy Gap Project. The proposed action is to divert additional water from the Colorado River at Windy Gap Reservoir and deliver it through the existing Colorado Big-Thompson Project facilities to a new reservoir east of the continental divide in Larimer County, about 8 miles southwest of Loveland, Colorado. The proposed Chimney Hollow Reservoir would have a capacity of 90,000 acre-feet. This reservoir will provide storage dedicated to the WGFP participants, which will allow additional diversions from the Colorado River to meet participants' needs on the eastern slope.

The original Windy Gap Project was addressed in a March 13, 1981, biological opinion, based on an estimated average annual diversion of 57,300 acre-feet. Since the Windy Gap Project was completed, it has not been able to divert the anticipated amount of water due to junior water rights and inadequate storage in Granby Reservoir. In 1999, the average annual depletions of the Windy Gap project were determined to be 18,779 acre-feet. The purpose of the WGFP is to firm up the project's yield by providing more storage.

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WGFP

A Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin was initiated on January 22, 1988. The Recovery Program was intended to be the reasonable and prudent alternative for individual projects to avoid the likelihood of jeopardy to the endangered fishes from depletions from the Upper Colorado River Basin. In order to further define and clarify the process in the Recovery Program, a section 7 agreement was implemented on October 15, 1993, by the Recovery Program participants. Incorporated into this agreement is a Recovery Implementation Program Recovery Action Plan (RIPRAP) which identifies actions currently believed to be required to recover the endangered fishes in the most expeditious manner.

On December 20, 1999, the Service issued a final programmatic biological opinion (PBO) for Bureau of Reclamation's Operations and Depletions, Other Depletions, and Funding and Implementation of Recovery Program Actions in the Upper Colorado River above the Confluence with the Gunnison River. The Service has determined that projects that fit under the umbrella of the Colorado River PBO would avoid the likelihood of jeopardy and/or adverse modification of critical habitat for depletion impacts. The Colorado River PBO states that in order for actions to fall within the umbrella of the PBO and rely on the RIPRAP to offset its depletion, the following criteria must be met.

1. A Recovery Agreement must be offered and signed prior to conclusion of section 7 consultation.
2. A fee to fund recovery actions will be submitted as described in the proposed action for new depletion projects greater than 100 acre-feet(AF)/year. The 2010 fee is \$18.99 per acre-foot and is adjusted each year for inflation.
3. Reinitiation stipulations will be included in all individual consultations under the umbrella of this programmatic.
4. The Service and project proponents will request that discretionary Federal control be retained for all consultations under this programmatic.

The original Windy Gap Project fits these criteria because a Recovery Agreement was signed in March of 2000 and the depletions existed when the Recovery Program was initiated. Because it was not a new depletion, no additional fees were submitted for compliance with the PBO. Hydrologic modeling for the PBO determined that the existing average annual depletion caused by the Windy Gap Project between 1981 and 1999 was 18,779 AF. The proposed WGFP would cause an additional average annual depletion of 21,317 AF/year. The average annual water depletion from the Colorado River as a result of the Windy Gap Project, including the additional depletions of the proposed firming project is 40,096 AF/year.

The subject project will cause a new average annual depletion of 21,317 AF of water from the upper Colorado River basin. In order to rely on the Recovery Program to offset the subject depletions, the project sponsors are to make a one-time monetary contribution for water depletions greater than 100 AF to help fund their share of the costs of recovery actions. If the



entire fee is paid at once, the one-time payment is calculated by multiplying the project's average annual new depletion (21,317 AF) by the water users share of Recovery Program costs (the charge) in effect at the time payment is made. For Fiscal Year 2010 (October 1, 2009, to September 30, 2010), the charge is \$18.99 per AF for the average annual depletion which equals a total contribution of \$404,809.83 for this project's share of the Recovery Program costs. This amount will be adjusted annually for inflation on October 1 of each year based on the Consumer Price Index. If payment is made in Fiscal Year 2010 for 10 percent of the estimated depletions, ten percent of the Fiscal Year 2010 total contribution (\$40,480.98), or total payment, will be provided to the Service's designated agent, the National Fish and Wildlife Foundation, at the time of issuance of the Federal approvals from the Bureau of Reclamation. Payment for the remaining 19,185.3 AF of depletions (90 percent) will be due at the time the construction commences at the rate in effect at that time. The payment will be included by the Bureau of Reclamation as a permit stipulation. The funds will be used for acquisition of water rights (or directly-related activities) to meet the instream flow needs of the endangered fishes; or to support other recovery activities for the endangered fishes described in the RIPRAP. All payments should be made to the Foundation.

National Fish and Wildlife Foundation  
Attn: Donna McNamara, Finance Department  
1133 15th Street, NW, Suite 1100  
Washington DC 20005

Each payment is to be accompanied by a cover letter that identifies the project and biological opinion number (ES/GJ-6-CO-99-F-033-CP104) that requires the payment, the amount of payment enclosed, and check number. A copy of the cover letter and a copy of the payment check shall be sent to the Service office issuing this biological opinion. The cover letter also shall identify the name and address of the payor, the name and address of the Federal agency responsible for authorizing the project, and the address of the Service office conducting the section 7 consultation. This information will be used by the Foundation to notify the payor, the lead Federal agency, and the Service that payment has been received. The Foundation is to send notices of receipt to these entities within 5 working days of its receipt of payment.

The Recovery Agreement was signed by the Service and the Subdistrict in March 2000. The Subdistrict agreed to make a one-time contribution to the Recovery Implementation Program to fund recovery actions specified in the Colorado River PBO. Reclamation has agreed to condition its approval documents to retain jurisdiction should section 7 consultation need to be reinitiated. **Therefore, the Service concludes that the subject project meets the criteria to rely on the RIPRAP to offset depletion impacts and is not likely to jeopardize the continued existence of the species and is not likely to destroy or adversely modify designated critical habitat.**

#### REINITIATION NOTICE

This concludes formal consultation on the subject action. 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 under the following conditions.

a. The amount or extent of take specified in the incidental take statement for the Colorado River PBO is exceeded. The Service has determined that no incidental take, including harm, is anticipated to occur as a result of the depletions contemplated in this opinion because of the implementation of recovery actions. The implementation of the recovery actions contained in the Colorado River PBO will further decrease the likelihood of any take caused by depletion impacts.

b. New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not considered in the Colorado River PBO. In preparing the Colorado River PBO, the Service describes the positive and negative effects of the action it anticipates and considered in the section of the opinion entitled "Effects of the Action." New information would include, but is not limited to, not achieving a "positive response" or a significant decline in population, as described in Appendix D of the Colorado River PBO. Significant decline shall mean a decline in excess of normal variations in population (Appendix D). The current population estimate of adult Colorado pikeminnow in the Colorado River is 600 individuals, with a confidence interval of  $\pm 250$ . Therefore, with the criteria established in Appendix D, a negative population response would trigger reinitiation if the population declined to 350 adults. The Recovery Program has developed recovery goals for the four endangered fishes. If a population meets or exceeds the numeric goal for that species, it will be considered to exhibit a positive response. The Service retains the authority to determine whether a significant decline in population has occurred, but will consult with the Recovery Program's Biology Committee prior to making its determination. In the event of a significant population decline, the Service is to first rely on the Recovery Program to take actions to correct the decline. If nonflow recovery actions have not been implemented, the Service will assess the impacts of not completing these actions prior to reexamining any flow related issues.

New information would also include the lack of a positive population response by the year 2015 or when new depletions reach 50,000 AF/year. According to the criteria outlined in Appendix D of the Colorado River PBO, a positive response would require the adult Colorado pikeminnow population estimate to be 1,100 individuals ( $\pm 250$ ) in the Colorado River (Rifle, Colorado to the confluence with the Green River). When the population estimate increases above 1,100, a new population baseline is established at the higher population level.

c. The Recovery Action Plan actions listed as part of the proposed action in the Colorado River PBO are not implemented within the required time frames. This would be considered a change in the action subject to consultation; section 7 regulations (50 CFR 402.16 (c)) state that reinitiation of consultation is required if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion. The Recovery Action Plan is an adaptive management plan because additional information, changing priorities, and the development of the States' entitlement may require modification of the Recovery Action Plan. Therefore, the Recovery Action Plan is reviewed annually and updated and changed when necessary and the required time frames include changes in timing approved by means of the normal procedures of the Recovery



Program, as explained in the description of the proposed action. In 2003 and every 2 years thereafter, for the life of the Recovery Program, the Service and Recovery Program will review implementation of the Recovery Action Plan actions to determine timely compliance with applicable schedules.

d. The Service lists new species or designates new or additional critical habitat, where the level or pattern of depletions covered under the Colorado River PBO may have an adverse impact on the newly listed species or habitat. If the species or habitat may be adversely affected by depletions, the Service will reinitiate consultation on the Colorado River PBO as required by its section 7 regulations. The Service will first determine whether the Recovery Program can avoid such impact or can be amended to avoid the likelihood of jeopardy and/or adverse modification of critical habitat for such depletion impacts. If the Recovery Program can avoid the likelihood of jeopardy and/or adverse modification of critical habitat no additional recovery actions for individual projects would be required, if the avoidance actions are already included in the Recovery Action Plan. If the Recovery Program is not likely to avoid the likelihood of jeopardy and/or adverse modification of critical habitat then the Service will reinitiate consultation and develop reasonable and prudent alternatives.

For purposes of any future reinitiation of consultation, depletions have been divided into two categories.

Category 1:

a) existing depletions, both Federal and non-Federal as described in the project description, from the Upper Colorado River Basin above the confluence with the Gunnison River that had actually occurred on or before September 30, 1995 (average annual depletion of approximately 1 million AF/year);

b) depletions associated with the total 154,645 AF/year volume of Green Mountain Reservoir, including power pool (which includes but is not limited to all of the 20,000 AF contract pool and historic user's pool), the Colorado Big-Thompson replacement pool; and

c) depletions associated with Ruedi Reservoir including Round I sales of 7,850 AF, Round II sales of 6,135 AF/year as discussed in the Service's biological opinion to Reclamation dated May 26, 1995, and as amended on January 6, 1999, and the Fryingpan Arkansas Project replacement pool as governed by the operating principles for Ruedi Reservoir but excluding 21,650 AF of the marketable yield.

Category 1 depletions shall remain as Category 1 depletions regardless of any subsequent change, exchange, or abandonment of the water rights resulting in such depletions. Category 1 depletions associated with existing facilities may be transferred to other facilities and remain in Category 1 so long as there is no increase in the amount of total depletions attributable to existing depletions. However, section 7 consultation is still required for Category 1 depletion projects when a new Federal action occurs which may affect



endangered species except as provided by the criteria established for individual consultation under the umbrella of the Colorado River PBO. Reinitiation of this consultation will be required if the water users fail to provide 10,825 AF/year on a permanent basis.

#### Category 2:

Category 2 is defined as all new depletions up to 120,000 AF/year, this includes all depletions not included in Category 1 that occur after 1995 regardless of whether section 7 consultation has been completed. This category is further divided into two 60,000 AF/year blocks of depletions.

The recovery actions are intended to avoid the likelihood of jeopardy and/or adverse modification of critical habitat and to result in a positive response as described in Appendix D of the Colorado River PBO for both 60,000 AF blocks of depletions in Category 2. However, prior to depletions occurring in the second block, the Service will review the Recovery Program's progress and adequacy of the species response to the Recovery Action Plan actions. According to the criteria outlined in Appendix D, a positive response would require the adult Colorado pikeminnow population estimate to be maintained at approximately 1,100 individuals in the Colorado River (Rifle, Colorado to the confluence with the Green River), unless the criteria in Appendix D is changed because of new information. If the adult Colorado pikeminnow population is maintained at approximately 1,100 adults or whatever is determined to be the recovery goal in the Colorado River, a new population baseline would be established to determine a positive or negative population response.

When population estimates for wild adult humpback chub are finalized, they will also be used to determine population response. As outlined in Appendix D, Colorado pikeminnow and humpback chub population estimates will serve as surrogates for razorback sucker and bonytail to assess the status of their populations for 10 years. Recovery goals for all four species were completed August 1, 2002. If a population meets or exceeds the numeric goal for that species, it will be considered to exhibit a positive response. However, short of reaching a specific recovery goal, trends in certain population indices provide an interim assessment of a species' progress toward recovery. This review will begin when actual depletion levels from the first depletion block reach 50,000 AF/year or the year 2015, whichever comes first.

Calculation of actual depletions is to be accomplished using Cameo gage records and State Division of Water Resources data (Appendix B of the Colorado River PBO). The review will include a determination if all the recovery actions have been satisfactorily completed, that all ongoing recovery actions are continuing, and the status of the endangered fish species. If it is determined that the recovery actions have all been completed and the status of all four endangered fish species has improved (based on criteria in Appendix D), then the Service intends that the Colorado River PBO would remain in effect for new depletions up to 120,000 AF/year (total of both 60,000 AF blocks of Category 2 depletions).

Monitoring, as explained in Appendix D, will be ongoing to determine if a population estimate of 1,100 ( $\pm$  one confidence interval) adult Colorado pikeminnow is maintained. If it is not



maintained, this would be considered new information and section 7 would have to be reinitiated. Population baselines will be adjusted as population estimates change. If the adult Colorado pikeminnow population estimates increase, a new population baseline will be established to determine a positive or negative population response. If the population estimate for Colorado pikeminnow in the year 2015 is greater than 1,100 adults, then the higher number will be used to establish a new population baseline. These numeric values may be revised as new information becomes available. Revisions will be made to Appendix D as needed.

If the 50,000 AF or 2015 review indicates that either the recovery actions have not been completed or the status of all four fish species has not sufficiently improved, the Service intends to reinitiate consultation on the Recovery Program to specify additional measures to be taken by the Recovery Program to avoid the likelihood of jeopardy and/or adverse modification of critical habitat for depletions associated with the second 60,000 AF/year block. Any additional measures will be evaluated every 5 years. If other measures are determined by the Service or the Recovery Program to be needed for recovery prior to the review, they can be added to the Recovery Action Plan according to standard procedures, outlined in that plan. If the Recovery Program is unable to complete those actions which the Service has determined to be required for the second 60,000 AF/year, consultation on projects with a Federal nexus may be reinitiated in accordance with ESA regulations and this opinion's reinitiation requirements. The Service may also reinitiate consultation on the Recovery Program if fish populations do not improve according to the criteria in Appendix D or if any positive response achieved prior to the 50,000 AF or the year 2015 is not maintained. Once a positive response is achieved, failure to maintain it will be considered a negative response.

If the Service reinitiates consultation, it will first provide information on the status of the species and recommendations for improving population numbers to the Recovery Program. The Service will reinitiate consultation with individual projects only if the Recovery Program does not implement recovery actions to improve the status of the listed fish species. The Service will reinitiate consultation first on Category 2 projects and second on Category 1 projects. The Service will only reinitiate consultations on Category 1 depletions if Category 2 depletion impacts are offset to the full extent of the capability of the covered projects as determined by the Service, and the likelihood of jeopardy to the listed fishes and/or adverse modification of critical habitat still cannot be avoided. The Service intends to reinitiate consultations simultaneously on all depletions within the applicable category.

If new information becomes available, if a new species becomes listed, if incidental take occurs, if the total average annual amount of water depleted by this project changes, or if any other project element changes which alters the operation of the project from that which is described in your correspondence and which may affect any endangered or threatened species in a manner or to an extent not considered in this biological opinion (see 50 CFR 402.16), formal section 7 consultation should be reinitiated. Reclamation has agreed to condition its approval documents to retain jurisdiction should section 7 consultation need to be reinitiated.

If you have any questions regarding this consultation or would like to discuss it in more detail, please contact me at (970) 243-2778, extension 26.

Sincerely,

Patricia S. Gelatt  
Acting Western Colorado Supervisor

Attachment

cc: FWS/UCREFRP, Denver

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## RECOVERY AGREEMENT

This RECOVERY AGREEMENT is entered into this 14<sup>th</sup> day of January, 2000, by and between the United States Fish and Wildlife Service (USFWS) and the Municipal Subdistrict, Northern Colorado Water Conservancy District (Subdistrict).

WHEREAS, in 1988 the Secretary of Interior, the Governors of Wyoming, Colorado, and Utah, and the Administrator of the Western Area Power Administration signed a Cooperative Agreement to implement the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Recovery Program); and

WHEREAS, the Recovery Program is intended to recover the endangered fish while providing for water development in the Upper Basin to proceed in compliance with state law, interstate compacts, and the Endangered Species Act; and

WHEREAS, the Colorado Water Congress has passed a resolution supporting the Recovery Program; and

WHEREAS, on December 2, 1999, USFWS issued a Programmatic Biological Opinion (1999 Opinion) concluding that implementation of specified elements of the Recovery Action Plan (Recovery Elements), along with existing and a specified amount of new depletions, are not likely to jeopardize the continued existence of the endangered fish or adversely modify their critical habitat in the Colorado River subbasin within Colorado, exclusive of the Gunnison River subbasin; and

WHEREAS, the 1999 Opinion in the section entitled "Reinitiation Notice" divided depletions into Category 1 or Category 2 for reinitiation purposes; and

WHEREAS, Subdistrict is the owner of the Windy Gap Project (Water Project), which causes or will cause depletions to the Colorado River subbasin within Colorado, exclusive of the Gunnison River subbasin; and

WHEREAS, Subdistrict desires certainty that its depletions can occur consistent with Section 7 and Section 9 of the Endangered Species Act (ESA); and

WHEREAS, USFWS desires a commitment from Subdistrict to the Recovery Program so that the program can actually be implemented to recover the endangered fish and to carry out the Recovery Elements.

NOW, THEREFORE, Subdistrict and USFWS agree as follows<sup>1</sup>

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



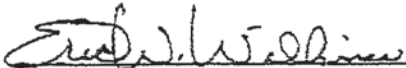
1. USFWS agrees that implementation of the Recovery Elements specified in the 1999 Opinion will avoid the likelihood of jeopardy and adverse modification under Section 7 of the ESA for depletion impacts caused by Subdistrict's Water Project. Any consultations under Section 7 regarding Water Project's depletions are to be governed by the provisions of the 1999 Opinion.

USFWS agrees that, except as provided in the 1999 Opinion, no other measures 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 1999 Opinion. Subdistrict is entitled to rely on this Agreement in making the commitment described in paragraph 2.

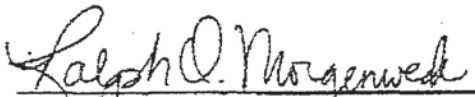
2. Subdistrict agrees not to take any action which would probably prevent the implementation of the Recovery Elements. To the extent implementing the Recovery Elements requires active cooperation by Subdistrict, Subdistrict agrees to take reasonable actions required to implement those Recovery Elements. Subdistrict 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 Subdistrict's legal authority. Subdistrict will not be precluded from undertaking good faith negotiations over terms and conditions applicable to implementation of the Recovery Elements.
3. If USFWS believes that Subdistrict has violated paragraph 2 of this Recovery Agreement, USFWS shall notify both Subdistrict and the Management Committee of the Recovery Program. Subdistrict and the Management Committee shall have a reasonable opportunity to comment to USFWS regarding the existence of a violation and to recommend remedies, if appropriate. USFWS will consider the comments of Subdistrict and the comments and recommendations of the Management Committee, but retains the authority to determine the existence of a violation. If USFWS reasonably determines that a violation has occurred and will not be remedied by Subdistrict despite an opportunity to do so, the USFWS may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the "Reinitiation Notice" section of the 1999 Opinion. In that event, the Water Project's depletions would be excluded from the depletions covered by the 1999 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 Subdistrict's Water Project or USFWS' statutory authority.
5. The signing of this Recovery Agreement does not constitute any admission by Subdistrict regarding the application of the ESA to the depletions of Subdistrict's Water Project. The signing of this Recovery Agreement does not constitute any agreement by either party as to whether the flow recommendations for the 15-Mile Reach described in the 1999 Opinion are biologically or hydrologically necessary to recover the endangered fish.



6. This Recovery Agreement shall be in effect until one of the following occurs:
- a. USFWS removes the listed species in the Upper Colorado River Basin from the endangered or threatened species list and determines that the Recovery Elements are no longer needed to prevent the species from being relisted under the ESA; or
  - b. USFWS determines that the Recovery Elements are no longer needed to recover or offset the likelihood of jeopardy to the listed species in the Upper Colorado River Basin; or
  - c. USFWS declares that the endangered fish in the Upper Colorado River Basin are extinct; or
  - d. Federal legislation is passed or federal regulatory action is taken that negates the need for [or eliminates] the Recovery Program.
7. Subdistrict may withdraw from this Recovery Agreement upon written notice to USFWS. If Subdistrict withdraws, USFWS may request reinitiation of consultation on Water Project without reinitiating other consultations as would otherwise be required by the "Reinitiation Notice" section of the 1999 Opinion.

  
General Manager  
Municipal Subdistrict, Northern  
Colorado Water Conservancy District

JANUARY 14, 2000  
Date

  
Regional Director, Region 6  
U.S. Fish and Wildlife Service

MARCH 20, 2000  
Date