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Correspondence with U.S. Fish and Wildlife Service and National Marine Fisheries Service

This attachment contains correspondence between Reclamation and the U.S. Fish and Wildlife Service on Section 7 consultation regarding the potential effects of interim surplus criteria downstream on listed species and upstream of Lake Mead in the United States, and in the Colorado River Delta area of Mexico. Downstream of Lake Mead the consultation also addressed changes in water delivery points under California's Colorado River Water Use Plan. Upstream of Lake Mead the consultation involved minor operational changes of Glen Canyon Dam operation on evaluation of the effects from the Colorado River corridor below Glen Canyon Dam. Consultation with the National Marine Fisheries Service addressed effects on aquatic species in the Colorado River estuary and the upper Sea of Cortez.



United States Department of the Interior

BUREAU OF RECLAMATION
Lower Colorado Regional Office
P.O. Box 61470
Boulder City, NV 89006-1470

IN REPLY REFER TO:

LC-2011
ENV-7.00

MAY 22 2000

MEMORANDUM

To: Mr. David Harlow, State Superintendent, Arizona Ecological Services,
2321 W. Royal Palm Road, Suite 103, Phoenix AZ 85021

From: William E. Rinne, Area Manager
Boulder Canyon Operations Office

Subject: Species List for Conducting an Accounting of the Potential Effects of Interim Surplus Criteria, Elements of the California Water Plan Requiring the Secretary of the Interior's Approval, and Associated Conservation Measures on Listed or Proposed Species and Designated or Proposed Critical Habitat

Per 50 CFR §402.12(c), this is a request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area. Based on our previous discussions and pending a determination of effects, if any, on the reach of the Colorado River from immediately above Lake Mead to flows into Lake Powell, the minimum action area for the proposed actions encompass the lower Colorado River from Lake Mead to the southerly international boundary, including the 100-year flood plain and Lakes Mead, Mohave, and Havasu to full pool elevations.

The actions being considered in this accounting are (1.) interim surplus criteria which is intended to provide surplus water (that above a normal year of 7.5 million acre-feet) to the lower basin states (AZ, CA, NV) for a period of 15 years (2001-2015), (2.) Secretary's approval, via implementation agreements with California, for the transfer of up to 400,000 acre feet/year of California's entitlement water from the current diversion at Imperial Dam to an up stream point of diversion at Lake Havasu, and (3.) associated conservation measures that may be developed as part of the action subject to the accounting of effects. Detailed descriptions of these actions are being prepared.

Based on our previous consultation (1996-97) on lower Colorado River operations and maintenance and recent discussions among our staffs, the effects of the proposed actions on the following species and critical habitat will be determined:

- Endangered: Southwestern willow flycatcher, brown pelican, Yuma clapper rail, razorback sucker, and bonytail
- Threatened: Desert tortoise

- Potential Proposed: Black rail, yellow-billed cuckoo
- Critical Habitat: Bonytail and razorback sucker

Your concurrence or modification of this list is requested.

If you have questions regarding this request and the action elements, please contact Tom Shrader at 702-293-8703.

1s/ William E. Rinne

cc: Ms. Nancy Kaufman
Regional Director
Region Two
Fish and Wildlife Service
PO Box 1306
Albuquerque NM 87103-1306

Mr. Mike Spear
California-Nevada Operations Manager
Fish and Wildlife Service
2800 Cottage Way, Room W-2606
Sacramento CA 95825

Mr. Ken Berg
Field Supervisor
Fish and Wildlife Service
Carlsbad Field Office
2730 Loker Avenue West
Carlsbad CA 92008

bc: Commissioner,
Attention: W-6333
Regional Director, Boulder City NV
Attention: LC-2011, LC-2311, LC-2312, LC-2316
Regional Director, Salt Lake City UT
Attention: UC-438, UC-720
Area Managers,
Attention: YAO-1000, YAO-1400, YAO-2200, BCOO,1000, BCOO-1010, BCOO-4400,
BCOO-4600



United States Department of the Interior

U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951
Telephone: (602) 640-2720 FAX: (602) 640-2730



In Reply Refer To:

AESO/SE
2-21-00-I-273

June 5, 2000

6-13 MR 1300/1400
4600

Memorandum

To: Area Manager, Boulder Canyon Operations Office, Bureau of Reclamation,
Boulder City, Nevada

From: ^{KEATING} Field Supervisor

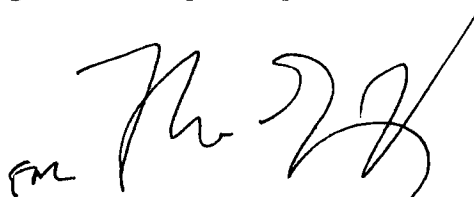
Subject: Request for Concurrence with Species List for Potential Effects of Interim Surplus
Criteria, Elements of California Water Plan Requiring Secretary of the Interior's
Approval, and Associated Conservation Measures on Listed and Proposed Species
and Designated or Proposed Critical Habitat

The Fish and Wildlife Service has reviewed the list of listed, proposed and candidate species in your memorandum dated May 22, 2000 for the subject project. We concur with the list of species provided, with the addition of the following species to your list.

Bald eagle (Haliaeetus leucocephalus)
Desert pupfish (Cyprinodon macularius)

This list does not include species found in or adjacent to the Colorado River above Lake Mead. Should the impact area of the project be expanded to include the Colorado River above Lake Mead, please contact us to obtain a list of species to be considered for that area. This list also does not include any species found in the Republic of Mexico that are not found in the United States. Species under jurisdiction of the National Marine Fisheries Service are also not included in this concurrence.

If there are any questions regarding this list of species, please contact Lesley Fitzpatrick (x236) or Tom Gatz (x240).


David L. Harlow

surplus species list:LAF:kh



BUREAU OF RECLAMATION

United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240



AUG 14 2000

Memorandum

To: Eluid L. Martinez, Commissioner, Bureau of Reclamation

From: John Lashy, Solicitor, U.S. Department of the Interior

Subject: Interim Surplus Guidelines and the Endangered Species Act - Possible Effects in the Republic of Mexico

The Secretary of the Interior currently manages the lower Colorado River system in accordance with federal law, including the 1964 Decree of the U.S. Supreme Court in *Arizona v. California*, the Colorado River Basin Project Act of 1968 (CRBPA), and Long Range Operating Criteria (LROC) adopted pursuant to the CRBPA. Within this legal framework, the Secretary makes annual determinations regarding the availability of surplus water from Lake Mead, by considering various factors, including the amount of water in storage and predictions for natural runoff. The 1964 Decree provides that if sufficient mainstream Colorado River water is available for release (primarily from Lake Mead) to satisfy annual consumptive use in the states of Arizona, California, and Nevada in excess of 7.5 million-acre feet, as determined by the Secretary, such excess consumptive use in Arizona, California and Nevada is "surplus."

Interim Surplus Guidelines currently being developed by the Bureau of Reclamation are intended to be used by the Secretary through the year 2015 in making annual determinations of surplus conditions. Reclamation is preparing these guidelines in compliance with applicable federal law, including the provisions of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). An issue has arisen whether Reclamation must, as part of its ESA compliance, consider any effects of the proposal to adopt these guidelines on species in Mexico listed as endangered or threatened under the Endangered Species Act. This issue is complex, involving analysis of international treaties, domestic statutes and regulations, as well as the Supreme Court's 1964 Decree. Its resolution has attracted considerable attention outside as well as inside the Executive Branch.

I am in the process of analyzing this issue and discussing it with the Department of Justice and the Department of Commerce, as well as other agencies in Interior. Among other things, I am reviewing statements made on behalf of the United States in prior litigation such as *Defenders of Wildlife v. Lujan*, 504 U.S. 555 (1992), and considering the recent complaint filed in D.C. District Court challenging the adequacy of Reclamation's existing Lower Colorado ESA compliance. *Defenders of Wildlife, et al. v. Babbitt et al.*, No. 1:00CV01544 (D.D.C. filed June 28, 2000).

The adoption of interim surplus guidelines is a high priority for Secretary Babbitt, and it is important that we move that process forward. Therefore, while we continue our internal discussions on this complex legal issue, consultation between Reclamation and agencies with consultation responsibility over the species involved (the U.S. Fish and Wildlife Service and the National Marine Fisheries Service) should continue. The continuation of consultation does not reflect any conclusion on our part that consultation is required, as a matter of law or regulation, on any possible impact the adoption of interim surplus guidelines may have on U.S.-listed species in Mexico. Rather, Reclamation's consultation on these effects should proceed with the express understanding that it may exceed what is required under applicable federal law and regulations and does not establish a legal or policy precedent. The exchange of information between Reclamation and the consulting agencies during this consultation may prove useful in any event, such as for use in any future discussions with the Republic of Mexico pursuant to section 8 of the ESA, which directs the Secretary to promote the conservation of listed species beyond our borders, including by agreements with foreign governments. ESA § 8(b). I understand that much of this information is already available in Reclamation's Draft EIS on this project.

The ongoing discussions with the consulting agencies should also take into consideration the fact that the United States cannot unilaterally control hydrologic conditions in the Colorado River south of the international boundary. Under the terms of the U.S.-Mexican Water Treaty of 1944, waters of the Colorado delivered to the Republic of Mexico are subject to its control, and the treaty contains no provisions requiring Mexico to use any of that water for species preservation in the Delta. Finally, the discussions should take into account mandates and limitations on Reclamation's actions pursuant to the Supreme Court's 1964 Decree. Because of the unique complexity of this situation, if these discussions produce suggestions for measures to minimize or avoid adverse effects on listed species, we will need to review them to determine their consistency with these various legal requirements.

Please contact me if you have any questions or concerns regarding this matter.

cc: Jamie Clark, Director, U.S. Fish and Wildlife Service
Penny Dalton, National Marine Fisheries Service



United States Department of the Interior

BUREAU OF RECLAMATION

Boulder Canyon Operations Office
P.O. Box 61470
Boulder City, NV 89006-1470

IN REPLY REFER TO:

BCOO-1000
ENV-7.00

AUG 31 2000

MEMORANDUM

To: Mr. David Harlow, Field Supervisor, US Fish and Wildlife Service,
2321 West Royal Palm Road, Suite 103, Phoenix AZ 85021-4951

From: Mr. William E. Rinne
Area Manager

Subject: Final Biological Assessment and Request for Formal Section 7,
Endangered Species Act(ESA), Consultation on Interim Surplus
Criteria (ISC), Secretarial Implementation Agreement (SIA) for
California Water Plan Components, and Conservation Measures
(August 2000)

Reclamation requests formal consultation with the Fish and Wildlife Service (FWS) pursuant to section 7 of the ESA for the above referenced actions. The Secretary of the Interior, acting through Reclamation, is considering the adoption of specific ISC under which surplus water conditions may be declared in the Lower Colorado River Basin and the execution of SIAs that provide for a change in point of delivery of Colorado River water for use within California. Several conservation measures would also be implemented as part of these proposed actions.

The attached Biological Assessment was prepared to evaluate the likely effects of these proposed actions on listed species or critical habitat as required by the ESA. The Biological Assessment includes determinations that the proposed action may affect the endangered Southwestern willow flycatcher, Yuma clapper rail, razorback sucker, and bonytail chub; and may adversely modify critical habitat for the razorback sucker.

An initial draft of the Biological Assessment was provided to your office and to applicants for the SIAs on August 15, 2000, for review. We have subsequently considered comments received from the FWS and two applicants, San Diego County Water Authority and Imperial Irrigation District, in revising the attached Biological Assessment. Copies of the applicant comment letters are

also attached for your reference. Additional responses to points raised in your August 22, 2000 memorandum are provided in the remainder of this memorandum.

After further consideration, we have decided to limit this consultation to the ISC, SIAs and associated conservation measures. The water administration and quantification of priority 3 agricultural entitlements are no longer part of the proposed actions, and therefore, have been removed from the attached Biological Assessment.

We have also provided more information, beginning on page 35 of the Biological Assessment, on how any indirect effects associated with the proposed actions will be addressed. The overall approach is to assure ESA coverage for any indirect effects of the ISC and SIAs, through either section 10 permits issued with the adoption of Habitat Conservation Plans (HCPs) and/or project specific section 7 consultations, if necessary.

With regard to your suggestion to raise the river bed to offset aquatic impacts of all Lower Colorado Region operations, we believe the viability of this option should continue to be evaluated through the Multi-Species Conservation Program (MSCP) process. As we have discussed before, this option addresses issues beyond these proposed actions and would be difficult and very expensive to implement and sustain on such an incised channel and a sediment deficient hydrology.

Based on our mutual discussions during our meetings of August 15 and 18, 2000, we had not settled on a replacement ratio for backwater, marsh, and riparian habitat. We agree that should any habitat be lost, it is likely that it will be necessary to provide habitat in excess of that lost to achieve equal value of replacement. However, we do not believe that a specific replacement ratio for this consultation is appropriate in light of the following circumstances: 1) changes in point of delivery on the Colorado that result from conservation and transfer activities will ramp up gradually and likely not reach 200,000 acre-feet before 2008, 2) potential impacts are based on a maximum movement of 400,000 acre-feet with a lesser amount being more likely, 3) it is not certain that there will be any impacts to occupied flycatcher habitat from a decline in groundwater levels, and 4) Reclamation has previously committed to work with the MSCP Partners on a long-term on and off site compensation plan for historical flycatcher habitat as specified in RPA 11 of the April 30, 1997, Biological Opinion on Lower Colorado Rivers operations and maintenance. Because much remains to be refined with regard to flycatcher habitat needs regarding moist soils, micro climate, food base requisites and others factors, we think it is better to commit to replacement of any of the 372 acres of

occupied habitat with habitat of equal value. In addition, we commit to restore, protect and/or enhance approximately 124 acres of riparian habitat primarily for Southwestern willow flycatchers within the next 5 years and 62 acres of restored or replaced backwater and marsh habitat. By undertaking these activities in the near future instead of when effects occur, Reclamation will be able to ensure that the acreage of compensation habitat will always be in excess of any losses due to the proposed actions, thereby fulfilling our responsibilities under the ESA.

Since our working generalization for potential flycatcher habitat is based solely on subjective height densities for habitat types, and has no further refined classification for moist soils, micro climate, and food base requisites, we feel it is inappropriate to compensate for an unknown amount of habitat with a specific predetermined ratio until complete site suitability is determined on the basis of known requisites.

With regard to any potential effects of the proposed adoption of ISC on ESA listed species in the Republic of Mexico or the Gulf of California, Reclamation is preparing additional information that will supplement this assessment. We will provide this additional information to your office along with the National Marine Fisheries Service in the near future. The purpose of providing this additional information is to address effects, if any, of the proposed adoption of ISC on ESA listed species in the Republic of Mexico. This information will be provided pursuant to and consistent with guidance we have received from the Solicitor of the Department of the Interior (see Solicitor John Lesby's Memorandum of August 14, 2000, to Mr. Eluid Martinez, Commissioner, Bureau of Reclamation). His memorandum provided that, "The continuation of consultation does not reflect any conclusion on our part that consultation is required, as a matter of law or regulation, on any possible impact the adoption of interim surplus guidelines may have on US listed species in Mexico. Rather, Reclamation's consultation on these effects should proceed with the express understanding that it may exceed what is required under applicable Federal law and regulations and does not establish a legal or policy precedent."

After the document was printed for distribution, a last minute correction in the model run for changes in elevation for the river solely for the month of April, was required as a result of change in point of diversion. The net effect of this revision will be that predicted impacts to backwater and river surface area will be slightly less (<12%) than shown in the document, and any corresponding adjustment in conservation measures will be similarly revised. As soon as the corrected elevations are integrated into the Geographic Information Systems model, the new analysis will be distributed.