



## ATTACHMENT O

Principles for Conducting Endangered  
Species Act Section 7 Consultations

**Principles for Conducting Endangered Species Act  
Section 7 Consultations on Water Development  
and Water Management Activities Affecting  
Endangered Fish Species in the San Juan River Basin\***

## **1.0 Endangered Species Act Compliance**

The San Juan River Basin Recovery Implementation Program (Program) was established in 1991. The goals of the Program are:

1. To conserve populations of Colorado pikeminnow and razorback sucker in the Basin consistent with the recovery goals established under the Endangered Species Act.
2. To proceed with water development in the Basin in compliance with federal and state laws, interstate compacts, Supreme Court decrees, and federal trust responsibilities to the Southern Ute Indian Tribe, Ute Mountain Ute Tribe, Jicarilla Apache Tribe, and the Navajo Nation.

The Program is intended to provide measures for compliance with the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA) for water development and water management activities in the Basin.

These principles for conducting ESA section 7 consultations have been adopted by the Program's Coordination Committee. The principles have been reviewed by the U.S. Fish and Wildlife Service (Service) and found to be consistent with the ESA and its implementing regulations (50 CFR Part 402). These principles will be used as a guide to define how Program actions will be used to provide ESA compliance for impacts to listed fish species in the Basin from water development and water management activities.

## **2.0 Indian Trust Responsibilities**

On June 5, 1997, the Secretaries of Commerce and the Interior signed Secretarial Order 3206. That Secretarial Order directed both Departments to carry out their responsibilities under the ESA in a manner that harmonizes the federal trust responsibility to the tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation. In recognition of the vital role of the sovereign tribes in both water

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\* Adopted by the Coordination Committee, San Juan River Basin Recovery Implementation Program, June 19, 2001.

development and water management activities and endangered species conservation in the Basin, the Coordination Committee supports the Service in its commitment to notify the tribes when it receives any request for consultation that might affect tribal assets. Additionally the Coordination Committee urges the Service, consistent with the applicable regulations and policies, to address the section 7 consultation needs of the tribes. Moreover, the Coordination Committee recognizes that the Department of the Interior intends to use its authority to the fullest extent possible to preserve and protect the water resources of the tribes in the Basin.

### **3.0 Long Range Plan**

The Program's initial Long Range Plan (LRP) was necessarily focused on the approximate seven-year research period as defined in the Service's October 25, 1991 Animas-La Plata biological opinion issued to the Bureau of Reclamation. The LRP defined the principal Program actions scheduled for completion through 1997. The efforts during the research period did not include implementation of specific, on-the-ground recovery actions that would directly benefit endangered fish or their habitat. Now that the initial research period has concluded, the Program's Biology Committee is in the process of identifying and prioritizing all foreseeable actions determined to be necessary to achieve recovery of endangered fish and their habitats in the Basin, including projects requiring capital construction funds, and is developing an updated LRP. The Coordination Committee will review the recommendations of the Biology Committee and adopt an updated LRP, incorporating capital, monitoring, and research projects as appropriate. The LRP, as amended and updated annually, will be the basis for formulating annual budgets, making funding requests to Congress and state legislatures for the Program, and provision of funding by Western Area Power Administration from power revenues pursuant to P.L. 106-392. The LRP will be reviewed annually by the Program and modified as needed to reflect new information and actions needed to achieve recovery while continuing with water development. Additionally, amendments to the LRP will reflect available funding and changes in priorities for implementation of recovery actions. Any actions proposed in the LRP will be in compliance with the ESA.

### **4.0 Incidental Take**

Section 9 of the ESA and federal regulation pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened fish and wildlife species, without a special exemption. Take of listed fish and wildlife species is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to these species by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to these species to such an extent as to significantly disrupt normal behavior

patterns which include, but are not limited to breeding, feeding or sheltering. Incidental take is defined as take that results from, but is not the purpose of, carrying out an otherwise lawful activity.

Incidental take statements contained in biological opinions exempt federal action agencies and sponsors of water development and water management activities (project sponsors) from the ESA's section 9 prohibitions so long as they are in compliance with any reasonable and prudent measures and implementing terms and conditions that minimize take. The Service will include incidental take statements in all biological opinions for activities in the Basin, even when no take is anticipated. As stated in 50 CFR 402.14(i)(2) "reasonable and prudent measures along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."

The reasonable and prudent measures provided in an incidental take statement are nondiscretionary, and must be undertaken so that they become binding conditions of any federal discretionary activity, for the exemption in section 7(o)(2) to apply. The federal agency has a continuing duty to regulate the activity covered by an incidental take statement included in a biological opinion. If the federal agency (1) fails to assume and implement the terms and conditions or (2) fails to retain oversight to ensure compliance with the terms and conditions, the protective coverage of section 7(o)(2) may lapse.

## **5.0 Section 7 Consultations**

The Program is intended to identify and implement actions that assist in the recovery of the species and provide compliance with sections 7 and 9 of the ESA for water development and water management activities in the Basin. It is recognized that federal agencies and/or project sponsors may wish to carry out actions that provide ESA compliance for their activities independently of the Program, and not rely on the Program to provide actions for ESA compliance. In addition, federal agencies and/or project sponsors may modify their activities to eliminate or minimize adverse effects, avoid jeopardy, and/or avoid adverse modification of critical habitat, and by so doing, remove the need for actions by the Program to provide ESA compliance.

### ***5.1 Consultations on New and Existing Water Development and Water Management Activities in the Basin***

- A. For the purposes of the Program and section 7 consultations, it is assumed that:
  - (1) the Program will produce a list of actions defined in the LRP that can be implemented to assist in the recovery of the species,
  - (2) the funding will be available to implement the LRP,
  - (3) participants will take appropriate steps to implement those actions, and
  - (4) actions will be implemented in accordance with the schedule in the LRP, as periodically amended.

- B. Actions and accomplishments under the Program, as defined in the LRP, are intended to assist in the recovery of the species and provide the reasonable and prudent alternatives that avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat from water development and water management activities in the Basin. Program actions are also intended to provide the reasonable and prudent measures needed to minimize take of listed fish.
  
- C. When Section 7 consultation is initiated, the Service will determine if progress toward recovery has been sufficient for the Program to serve as a reasonable and prudent alternative or measure. The Service will also consider whether the probable success of the Program is compromised as a result of a specific water depletion or the cumulative effect of depletions. The Service will consider Program and non-Program actions throughout the Basin in evaluating the sufficiency of the Program to serve as a reasonable and prudent alternative or measure. The Service will make its assessment based on the best available scientific and commercial data as required by the ESA. The Service will assess the sufficiency of Program actions in proportion to the potential impacts of a proposed federal action. That is, the smaller the impact of a federal action, the lower the level of actions by the Program or others needed to avoid jeopardy and/or destruction or adverse modification of critical habitat.

The Service will determine whether progress by the Program is sufficient to provide a reasonable and prudent alternative or measure based on the following factors:

- 1. Actions that will result in a measurable positive population response, a measurable improvement in habitat for the fishes, legal protection of flows needed for recovery, or a reduction in the threat of immediate extinction.
  - 2. Status of fish populations.
  - 3. Adequacy of flows.
  - 4. Magnitude of the impact of the activity (including, but not limited to, contaminant and fish migration impacts).
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- D. If the Service finds during a Section 7 consultation that Program and non-Program accomplishments are sufficient as defined under C above, the biological opinions will identify the actions and accomplishments of the Program that support the Program serving as a reasonable and prudent alternative or measure.

- E. If the Service finds that progress of the Program is not sufficient at the time of the consultation, biological opinions in the Basin will be written to identify which action(s) in the LRP must be completed to provide the reasonable and prudent alternative or minimize take.
1. For existing activities, these actions will serve as the reasonable and prudent alternative or measure if they are completed according to the schedule identified in the LRP, as amended.
  2. For new activities, these actions will serve as a reasonable and prudent alternative or measure so long as they are completed before the impact from the activity occurs.
- F. The Service may conclude that some action not listed in the LRP is necessary to serve as a reasonable and prudent alternative or to minimize take for an activity under consultation. If this occurs, the Service will notify the Coordination Committee in writing, identify the additional action needed, and provide Committee members an opportunity to review the action, and incorporate the action into the LRP. Coordination with the Coordination Committee will not alter the time frame for consultation. Incorporation of new actions into the LRP under this paragraph is expected to be a rare event. If the reasonable and prudent alternative or measure is not incorporated into the LRP by the Coordination Committee, the Service will work with the federal agency and sponsor to ensure compliance with section 7.
- G. The Service will work with the federal action agency(ies) and project sponsors during consultation to attempt to identify mutually agreeable opportunities to minimize impacts. It is also recognized that: (1) it is the responsibility of the federal action agency(ies) to make the final determination of the definition of the activity brought to consultation, and (2) it is the Service's responsibility to make the determination as to whether jeopardy to any species and/or destruction or adverse modification of critical habitat will occur and to identify reasonable and prudent alternatives and measures for the activity.
- H. The Service has ultimate authority and responsibility for determining whether the Program has provided or can provide a reasonable and prudent alternative or measure. Final authority over what constitutes a reasonable and prudent alternative lies with Service. It is recognized that the Service retains the authority for determining section 7 compliance under the ESA.
- I. Section 7(a)(1) of the ESA directs federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of listed species. Conservation recommendations provided by the Service in a biological opinion are discretionary agency activities to further minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

The Program may be used to fulfill conservation recommendations provided by the Service to a federal action agency. However, compliance with section 7(a)(1) is the responsibility of federal agencies.

- J. The Program will be responsible for monitoring implementation of all Program actions, including those Program actions identified as reasonable and prudent alternatives and measures in biological opinions, and reporting results to the Service on an annual basis.

## **5.2 Service Review and Assessment of Program**

Revisions to the LRP, including insertion of actions needed to achieve recovery, will normally occur in the annual review and update of the LRP, and all parties to the Program, including the Service, will make recommendations to update the LRP. If the Service concludes, at any time and independent of any consultation, that the Program is not implementing actions on schedule, and that this may impact the ability of the Program to provide reasonable and prudent alternatives or measures, the Service will provide a written assessment to the Coordination Committee. The assessment will include the Service's recommendations for corrective actions. The Coordination Committee, in cooperation with the Biology Committee, will have an opportunity to modify timing, funding, and/or priorities in the LRP to ensure that the Service can rely on the Program to provide reasonable and prudent alternatives and measures.

## **6.0 Minor Depletion Allowance**

In 1992, the Service instituted a minor depletions account. Between March, 1992 and December, 1998, the Service consulted individually on approximately 58 proposed "minor depletions" that ranged in quantity from 0.02 acre-feet/year (AF/yr) to 500 AF/yr, lasting from a few weeks to perpetuity. No biological opinions were issued under this initial minor depletion account after December, 1998, and the account is now closed to new depletions. On September 21, 1999, the Service issued an "Intra-Service Section 7 Consultation for Minor Depletions of 100 Acre-feet or Less from the San Juan River Basin." This opinion provides for a cumulative total of 3,000 AF/yr of new minor depletions in the Basin. The minor depletion allowance increases the efficiency of and streamlines the section 7 process, benefitting water development and water management activities included in the biological opinions on minor depletions, while protecting the endangered and native fish community.

The following guidelines will be used by the Service in conducting section 7 consultation on new minor depletions under the September 21, 1999 biological opinion:

1. A minor depletion is defined as a depletion of 100 AF/yr or less. However, the Service may use its discretion to allow larger depletions to be included in the minor depletion account based on impacts to listed species and critical habitat.

2. In rendering biological opinions on federal actions resulting in minor depletions, the Service will consider all new information concerning impacts and the status of the listed species and their habitats, and good faith implementation of the Program in determining if the Program can avoid the likelihood of jeopardy and/or destruction or adverse modification or minimize impacts of any incidental take.
3. The Service will maintain a minor depletions account wherein the aggregate of all new minor depletions allowed by the Service through section 7 consultation and under the September 21, 1999 opinion may result in a total annual depletion of not more than 3,000 AF/yr.
4. The Service will review each proposed federal action for consideration under the September 21, 1999 biological opinion and utilize that biological opinion to facilitate consultation so long as a proposed depletion fits within the 3,000 AF/yr ceiling and does not compromise the purposes for which the minor depletion opinion was issued.
5. Once the 3,000 AF/yr limit is reached for new depletions under the September 21, 1999 biological opinion, the Service will assess the effects of further minor depletions on listed species and issue an opinion to cover further minor depletions, if appropriate.
6. Depletions that were in existence as of October 25, 1991, the date of the Animas-La Plata Project biological opinion, are included in the environmental baseline for that opinion and will not be counted against any minor depletions account. The minor depletion accounts are only for new depletions. ESA consultation may still be required for historic depletions occurring prior to October 25, 1991, if those depletions have a federal nexus.

## **7.0 Reinitiation of Consultation**

- A. This section describes the process of reinitiation of consultation on water development and water management activities for which the Program is providing the reasonable and prudent alternative or measure.
- B. As provided in 50 CFR 402.16, reinitiation of consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and one of the following occur:
  1. The amount or extent of taking specified in the incidental take statement is exceeded.

2. New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.
  3. 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.
  4. A new species is listed or critical habitat designated that may be affected by the identified action.
- C. If it is determined that reinitiation of consultation may be necessary, the Service will provide such information to the Coordination Committee. Program participants will attempt to identify actions that can be implemented to ensure that, in the reinitiated consultation, the Program continues to serve as the reasonable and prudent alternative and measure. If the Program cannot implement actions to serve as the reasonable and prudent alternative and measure, the federal action agency(ies) and/or project sponsor will work with the Service independently of the Program to resolve ESA issues. Compliance with the ESA is ultimately the responsibility of the federal action agency(ies).
- D. If reinitiation is necessary, the following courses of action will be taken, so long as they do not slow or delay reinitiation of consultation:
1. If the amount or extent of taking specified in the incidental take statement is exceeded. The assessment and determination of whether incidental take has been exceeded is a matter of review and discussion between the action agency(ies) and the Service. If additional reasonable and prudent alternatives or measures are needed, the Service will identify the actions needed, and provide the Program with the opportunity to incorporate those actions into the LRP and implement those actions.
  2. If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. In certain situations, recovery actions in the LRP that were utilized as a reasonable and prudent alternative or measure may no longer be effective or appropriate. These situations may include, but are not limited to:
    - a. Critical deadlines for specified recovery actions are missed
    - b. Specified recovery actions are determined to be infeasible; and/or

- c. Significant new information about the needs or population status of the fishes becomes available.

The Service will notify the Coordination Committee when such a situation is foreseeable or actually occurs. If the Coordination Committee becomes aware of such a situation before the Service, they will notify the Service. The Coordination Committee will work with the Service to evaluate the situation and develop the most appropriate response to restore the Program as a reasonable and prudent alternative or measure, such as adjusting the LRP so the action can be achieved, developing a supplemental recovery action for incorporation into the LRP, shortening the time frame on other recovery actions, etc. The determination of the amount and extent of impact to a species and/or critical habitat is strictly a Service responsibility.

If the Program can no longer serve as a reasonable and prudent alternative or measure, the Service will develop a reasonable and prudent alternative or measure, if available, with the federal action agency(ies) and the project sponsor. In this situation, the reasonable and prudent alternative or measure will be consistent with the intended purpose of the action, within the federal agency's legal authority and jurisdiction to implement, and will be economically and technologically feasible.

3. 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. If an activity is modified in such a manner so as to require reinitiation of consultation, the Service will identify additional or different action items from the LRP to serve as reasonable and prudent alternatives or measures for the activity where possible.
4. If a new species is listed or critical habitat designated that may be affected by the identified action. The Service will make recommendations to the Coordination Committee for amendments to the Program and LRP to avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat, or to minimize take for any new fish species listed as threatened or endangered. The Program participants will then decide whether to make the amendments. If the amendments are made, the Service will use the amended LRP action items as reasonable and prudent alternatives or measures. If the Program cannot be amended, then consultation will be reinitiated and reasonable and prudent alternatives or measures will be developed with the federal action agency(ies) and project sponsors.

- E. All biological opinions issued will contain language requesting the applicable federal agency(ies) to retain discretion to reinitiate consultation should reinitiation become necessary.

## **8.0 Modification of Principles**

These principles have been adopted by the Coordination Committee. The principles have been reviewed by the Service and found to be consistent with the ESA and applicable regulations and policies. Experience may dictate a need to modify these principles in the future.

A review of these principles may be initiated by any voting member of the Coordination Committee. These principles may be modified or amended by vote of the Program participants, pursuant to normal voting procedures as defined in the “San Juan River Basin Recovery Implementation Program” (Service, 1992), as amended. However, modifications to the principles will be subject to review by the Service to assure continued compliance with the ESA and applicable regulations in conducting section 7 consultations on water development and water management activities in the Basin. Should the Service find that proposed modifications or modifications to these principles are inconsistent with the ESA or applicable regulations or policies, the Service will notify the Coordination Committee in writing, with recommendations for bringing the principles into compliance with the ESA.