

## Comment PWI-03

navgal navGAL - Comments on Navajo-Gallup DEIS and Draft BO

Page 1

**From:** "Tom Pitts" <tpitts@waterconsult.com>  
**To:** "Rege Leach" <RLeach@uc.usbr.gov>, <navgal@uc.usbr.gov>  
**Date:** Thu, Jun 28, 2007 12:46 PM  
**Subject:** Comments on Navajo-Gallup DEIS and Draft BO

WATER CONSULT Engineering and Planning Consultants

535 North Garfield Avenue, Loveland, Colorado 80537

Phone: 970-667-8690

FAX: 970-667-8692

E-mail: h2orus@waterconsult.com

Rege,

Attached are 1) letter to Rick Gold and 2) detailed comments on DEIS and Draft BO 3) Attachment 1 to WWDSC comments: Final Section 7 Principles.

Please contact me if you have any questions.

Thanks,

Tom Pitts

JUN 28 2007

## Comment PWI-03 – continued



**Water Consult**

Engineering and Planning Consultants

535 North Garfield Avenue • Loveland, CO 80537-5548

Phone: 970-667-8690 • FAX: 970-667-8692

E-Mail: h2orus@waterconsult.com

June 28, 2007

Mr. Rick Gold, Regional Director  
Upper Colorado Region  
U.S. Bureau of Reclamation  
125 S. State Street, Room 6107  
Salt Lake City, UT 84138-1147

SUBJECT: Comments on Draft Navajo-Gallup Water Supply Project  
DEIS and Biological Opinion

Dear Rick:

On behalf of the Water Development Steering Committee, San Juan River Basin Recovery Implementation Program (Program), I am submitting these comments on the draft environmental impact statement (DEIS) and biological opinion for the Navajo-Gallup Water Supply Project (NGWSP) dated March 2007.

The Steering Committee does not contest the need for the NGWSP. These comments should not be interpreted or inferred to contest the need for the project. The concerns of the Steering Committee are that 1) the Section 7 Principles adopted by the Program are followed, 2) the flow recommendations not be interpreted as limiting water development in the San Juan basin, and 3) that the consultation be conducted consistent with previous consultations and ESA regulations.

The Steering Committee's general comments are as follows:

1. The San Juan River Basin Recovery Implementation Program (Program) was initiated in 1992 to conserve and recovery populations of two endangered fish species in the San Juan River basin while allowing water development to proceed in compliance with all applicable federal and state laws. It is recognized and agreed that the Program is intended to provide the measures for compliance with the Endangered Species Act for water development and water management activities in the basin. The specific 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; and

2) To proceed with water development in the basin in compliance with federal and state laws, interstate compacts, Supreme Court decrees, and federal trust

## Comment PWI-03 – continued

Mr. Rick Gold  
June 28, 2007  
Page 2

responsibilities to the Southern Utes, Ute Mountain Utes, Jicarillas, and the Navajos.  
(SJRIIP Program, September 2006)

2. With respect to Section 7 consultations, the Program adopted “Principles for conducting Endangered Species Act Section 7 Consultations on Water Development and Water Management Activities Effecting Endangered Fish Species in the San Juan River Basin”. The Section 7 Principles define the procedures that U.S. Fish and Wildlife Service will use in conducting Section 7 consultations on water projects in the San Juan basin and how the Service will consider actions by the Program in determining whether the Program can provide ESA compliance for water projects in the basin.

3. The Recovery Program developed and approved flow recommendations to benefit endangered fish species in the San Juan River basin. It is recognized that these flow recommendations will be modified in the future through adaptive management. Furthermore, it is recognized in the Program document that these flow recommendations are not absolute and are not inviolate. They are recommendations designed to aid in the recovery of endangered fish based on the best available information in 1999. Providing flows for endangered fish is one component of the multifaceted Program that is considered by the Service in Section 7 consultations.

4. Both the DEIS and the draft biological opinion imply and assume that the flow recommendations are inviolate and limit depletions in the San Juan River basin. This assumption and implication is completely incorrect and contradicts the goals of the San Juan River Basin Recovery Implementation Program stated above.

5. Because the DEIS and BO make this assumption, an approach is proposed in the BO that transfers depletions to NGWSP from projects that have already been consulted on, and are in the ESA environmental depletion baseline. The sole purpose of this procedure is to reduce NGWSP calculated impacts on the flow recommendations (Biological Assessment, Reclamation, August 16, 2005). The BA shows that when the total effects of NGWSP are added to the existing environmental baseline, the flow recommendations are not met in all cases.

6. Based on our review of the Section 7 regulations (50 CFR 402), the transfer of depletions from the environmental depletion baseline to projects which are not in the baseline is not consistent with the regulations. According to the regulations, new projects must be added to the environmental baseline and the effects of the project, when added to the baseline, must be considered. Projects in the baseline include all projects that have been previously consulted on.

7. This approach also introduces the use of “unused depletions” in the environmental baseline in the Section 7 process. This approach is inconsistent with all previous consultations in the San Juan River basin and the Section 7 regulations.

8. As stated above, the sole purpose of this exercise is to avoid impacts on the flow recommendations. Section 7 regulations and the Section 7 Principles for the Program do not require compliance with the flow recommendations. The flow recommendations, unlike the

## Comment PWI-03 – continued

Mr. Rick Gold  
June 28, 2007  
Page 3

implication and assumption in the DEIS and draft biological opinion, are not a cap on depletions. Statements and assumptions to that effect are incorrect and need to be eliminated from both the DEIS and the biological opinion.

9. If the Section 7 Principles are applied, compliance with the ESA should be achieved without the depletion guarantee approach based on the accomplishments of the Program toward recovery of the endangered fish species. These accomplishments are identified in the draft biological opinion.

10. In general, the approach in the draft biological opinion 1) does not appear to comply with Section 7 regulations; 2) is inconsistent with the goals of the San Juan River Recovery Implementation Program; 3) does not conform to the principles for conducting Section 7 consultations developed by the Program; 4) is inconsistent with procedures applied in all previous consultations in the basin; and 5) assumes that the flow recommendations are inviolate, contradicting both the Principles, the Program document, and Section 7 regulations.

If this procedure is applied, however, the procedure of the “depletion guarantee” needs to be made available to any and all future water users who may choose to use the procedure. The draft BO appears to restrict application of the depletion guarantee and unused depletions to NGWSP.

We have included in our comments a discussion of alternatives that would be consistent with the Section 7 regulations and the goals of the Program. These include either 1) eliminating the “transfer” of previously used depletions, and consulting on the new depletions in addition to the baseline, recognizing both that the flow recommendations will not be met, and the Program will likely offset those impacts, or 2) reduce depletions on existing projects to reduce the total baseline and then add in the full depletions from NGWSP in order to avoid violating the flow recommendations.

Our detailed comments are attached.

If you have any questions, please contact me at your convenience.

Sincerely,

*/s/ Tom Pitts*

Tom Pitts  
Coordination Committee Representative, Water Development Steering Committee,  
San Juan River Basin Recovery Implementation Program

## Comment PWI-03 – continued

**Comments on  
Draft Environmental Impact Statement  
and  
Draft Biological Opinion  
for the Navajo Gallup Water Supply Project**

Submitted by  
Water Development Steering Committee  
San Juan River Basin Recovery Implementation Program  
Tom Pitts, Coordination Committee Representative \*  
June 28, 2007

### **Introduction**

The comments are in two parts. Part 1 addresses the draft environmental impact statement (DEIS). Part 2 addresses the draft biological opinion.

### **Part 1. Comments on the DEIS**

**P.V-13: “The inability to implement the SJRBRIP was considered to be an impact to the endangered fish. A Navajo Depletion Guarantee is included as a component of both action alternatives to ensure the proposed project depletions do not result in exceeding the depletions allowed under the current Flow Recommendations using all projects currently modeled in the ESA baseline at full development”.**

**1. Comment:** The ability to implement the SJRBRIP is not dependent on adherence to the flow recommendations. The goals of the SJRBRIP are as follows:

- 1) Recover endangered fish species in the San Juan River basin.
- 2) Develop water in the San Juan River basin in accordance with interstate compacts, state water law, and Indian trust responsibilities in compliance with the Endangered Species Act.

The flow recommendations are only one component. In the SJRIP, there is no concept of “exceeding the depletions allowed under the current flow recommendations”. There is no cap on depletions other than the interstate compacts, state water law, and tribal trust responsibilities. The SJRIP Program document (September, 2006) states:

“The flow recommendations are not sacrosanct or inviolate, and are subject to change through adaptive management as new information on habitat and biological response to flows is obtained from the Program’s long-term monitoring activities.”

Throughout the DEIS, there is a misinterpretation of the San Juan River Basin Recovery Implementation Program and compliance with the Endangered Species Act under that Program. Further, there is no mention of the Principles for conducting Section 7 consultations in the San Juan River basin. These Principles are attached. The Principles define the methods by which ESA compliance is achieved. All actions of the Recovery Program contribute to mitigation of

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Water Consult, 535 N. Garfield Avenue, Loveland, Colorado  
Phone: 970-667-8690 – Email: [h2orus@waterconsult.com](mailto:h2orus@waterconsult.com)

## Comment PWI-03 – continued

water depletions in the San Juan basin, including not only contributing flows, but also other actions such as nonnative control, habitat development, and construction of fish passages and fish screens.

1

Numerous statements are made in the DEIS that there is a requirement that flow recommendations be met, represent a cap on development, and limit development in the San Juan basin under interstate compacts, state water law, and the United States' trust responsibilities to tribes. These statements mislead the public and should be eliminated from the document.

The approach in the DEIS needs to be modified to reflect the fact that there are no requirement to meet the flow recommendations developed by the SJRBRIP. All statements in the DEIS should be eliminated that imply or infer that the flow recommendations represent a cap on development, imply a development allowance, or limit the ability of NGWSP (or any other project) to comply with the Endangered Species Act. A full and accurate explanation of the SJRBRIP is needed.

2

**P.V-15: “(1) Under the No Action Alternative, future uses with valid water rights and environmental clearances would likely continue assuming that the Flow**

**2. Comment:** See comment 1. above. This statement, which attempts to characterize the no action alternative, is erroneous and misleading.

3

**P. V-31: “The SJRPNM Alternative would use the remaining depletions available according to the Flow Recommendations.”**

**3. Comment:** See comments above. The flow recommendations do not determine the level of remaining depletions in the San Juan basin. The statement is misleading and should be eliminated or modified.

4

**P. V-147: “Operation of Navajo Dam**

**The operation of Navajo Dam to mimic the natural hydrograph of the San Juan River by implementing the SJRBRIP Flow Recommendations is the centerpiece of a strategy to facilitate recovery of endangered fish species and, therefore, provides, at present, the primary mechanism that supports ESA compliance for water development to continue in the Basin. In 1991, the status of endangered fish in the San Juan River made additional water depletions in the Basin uncertain.”**

**4. Comment:** The underlined portions of this statement misrepresent the elements of the San Juan Recovery Program and the Section 7 Principles adopted by the Program. It should be modified.

5

**P.V-148: “Allowance was made in the Flow Recommendations for the San Juan River for development of other operating criteria that may provide for additional water development as long as the Flow Recommendations themselves are met and the nature of the release hydrographs are not altered.”**

**5. Comment:** This statement is not factual. Additional water development is not controlled by the flow recommendations, and there are no statements in the flow recommendations (Holden,

6



## Comment PWI-03 – continued

1999) that ‘provide for additional water development as long as the flow recommendations themselves are met and the nature of the release hydrographs are not altered.’

**“P. V-148: “The presently defined operating rules and model configuration do not indicate availability for substantial additional depletions in the Basin with the present Flow Recommendations. Furthermore, modification of the operating rules and/or improvement in the simulation of system operation in the San Juan River would be required to demonstrate the possibility of further development within the present Flow Recommendations.”**

**6. Comment:** See comment 1. above. This statement is out of context with the SJRBRIP, the Section 7 Principles, Section 7 regulations, and is erroneous. There is no requirement to demonstrate the possibility of further development in the San Juan basin consistent with the flow recommendations in order to have further water development in the basin.

7

**P. VI-3: “If there is a different approach taken to the section 7 consultation that will provide for full development of the proposed project in the absence of the depletion guarantee, or there are other changes in terms of water development or status of listed species, Reclamation may have to re-initiate section 7 consultation. If such re-initiation were to occur, additional measures could be required for the proposed project to be in compliance with the ESA and to avoid jeopardy to the Colorado pikeminnow and razorback sucker.”**

**7. Comment:** This statement implies that the only way to provide for full development of the NGWSP in compliance with the ESA is with a depletion guarantee that assures that the flow recommendations will be met when NGWSP is fully developed. This statement is erroneous. The Section 7 Principles identify the means by which USFWS will consider all components of the SRRBRIP in providing for ESA compliance for water projects. Those procedures have not been applied to NGWSP. In lieu of complying with those procedures, the erroneous assumption has been made that compliance with the ESA means that the flow recommendations define allowable water development in the San Juan basin and must be met by NGWSP and all future water projects. Per the Section 7 Principles, additional measures could be required for the proposed project only if the Service found that the SJRBRIP were not providing those measures. The statement misrepresents ESA compliance under the SJRBRIP.

8

### Part 2. Comments on the Draft Biological Opinion

9

#### A. Key Excerpts from Biological Opinion:

**Jicarilla Apache Nation and Gallup Water Supply (P.8):** The BO states that of the 8,700 acre-feet baseline depletion of 6,740 acre-feet is already in the baseline depletion for the Jicarilla

“The plans for the Jicarilla Apache Nation Navajo River Water Supply Project Apache Navajo Nation River Water Supply Project, have not been used, and are being transferred to the Navajo Gallup Water Supply Pipeline (NGWSP). The basis for this is: (JANNRWSP) include the allowance to deliver all or part of this water to other uses, including the NGWSP, at a time that it should be needed. The NGWSP

## Comment PWI-03 – continued

plans to use 6,570 acre-feet previously committed to JANNRWSP plus 170 acre-feet of other unused JAN water supply, requiring 1,960 acre-feet of new depletion (Table 3).”

The supply is also met by a new depletion of 1,960 acre-feet.

**Navajo Nation Supply (P. 8):** The Navajo Nation portion of the NGWSP depletion is 27,193 acre-feet per year (Table 3). The Navajo Nation portion of the NGWSP is comprised of 20,782 acre-feet per year of unused depletions currently in the hydrologic baseline and 6,411 acre-feet per year of new depletions (Table 3). Another 3,100 acre-feet will be returned to the San Juan River by return flow from the Navajo Indian Irrigation Project (NIIP) by the time the Navajo nation demands reach the full 27,193 acre-feet. This reduces the net new depletion to 5,271 acre-feet per year.

If at some point in the future the amount of the unused depletions is less than 20,782 acre-feet per year, the Navajo Nation will guarantee the availability of this remaining depletion by reducing their total water use in the basin.

**Depletion Guarantee:** This section clarifies the conditions of the Depletion Guarantee and describes the commitments necessary to monitor depletions and maintain compliance with the ESA. **The Depletion Guarantee is a commitment by the Navajo Nation that ensures that depletion for the NGWSP will be offset by unused Navajo Nation NIIP depletions in the basin.** That portion of the NGWSP depletion that consists of unused depletions currently in the hydrologic baseline (20,782 acre-feet) is attributed to Navajo Nation uses in New Mexico. Unless the sum of actual depletions from all uses listed in the hydrologic baseline shown in Table 4, plus all NGWSP uses reach the total listed in the baseline (854,371 acre-feet) plus 5,271 acre-feet, the full NGWSP depletion of 35,893 acre-feet will be allowed (Table 3). The depletion for projects that may be added to the hydrologic baseline at a date later than the date of the Biological Opinion for NGWSP will not be counted in this analysis.

If the depletion conditions described in the paragraph above are reached, the Navajo Nation will reduce its total depletion to stay below the allowed total for the basin. This could be accomplished by changes in operation of any of the Navajo projects that deplete water from the San Juan River. The maximum depletion guarantee requirement is 20,782 acre-feet. Changes in the flow recommendation or in species status may result in reduction or removal of this guarantee in the future, based upon reconsultation.

**NOTE:** Table 4 (page 10) “Baseline and Current Depletion Summary in the San Juan Basin” shows that the Navajo Indian Navigation Project depletions in the “Riverware baseline” of 301,498 acre-feet. The estimated current Navajo depletion is 176,727 acre-feet leaving presently unused 124,771 acre-feet. Table 4 shows that the total unused depletions in the basin are 231,449 acre-feet.

### **B. Comments:**

8. 50 CFR 402 (Section 7 regulations) states in the definitions section (402.02), in part, as follows:



## Comment PWI-03 – continued

***“Effects of the action refer to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. . .”(emphasis added)***

9. In the discussion of the project depletions, the term “environmental baseline” has been avoided. The discussion is in terms of the ‘hydrologic baseline’ and, in Table 4, the “Riverware baseline.” In all previous consultations in the San Juan basin, the biological opinions have included an ‘environmental depletion baseline’ against which the impacts of the project are compared, in accordance with the Section 7 regulations. The BO needs to 1) include the environmental depletion baseline for NGWSP and 2) compare the impacts of the project to that baseline.

The biological assessment (BA) equates the ‘Riverware baseline’ to the environmental baseline. The BA includes the ‘unused depletions’ in the environmental baseline:

*“The environmental baseline depletion in the San Juan basin, including the JANNRWSP, totals about 854,000 acre-feet per year. The current depletion in the San Juan River below Navajo dam is estimated to average about 623,000 acre-feet per year. That leaves an unused depletion of about 231,000 acre-feet per year under current conditions.”*

The Riverware baseline is essentially identical to ‘environmental depletion baseline’ used in previous consultations in the San Juan basin. The environmental depletion baseline should include the depletions listed described as the Riverware baseline in Table 4.

10. The Section 7 regulations do not allow offsetting new depletions with unused depletions in the environmental baseline, transferring the impacts of projects that have been consulted on to projects that have not been consulted on, or incorporating the depletions of projects that have not been consulted on into the environmental baseline in order to avoid adding the impacts of those projects to the environmental baseline. The impacts of the project being consulted on must be added to the environmental baseline, regardless of the status of actual implementation of projects that have been previously consulted on. The preamble to the 50 CFR 402 (Federal Register, Vol. 51, No.106, June 3, 1986) states with respect to comments on the ‘effects of the action’:

*“One commenter urged the Service to exclude Federal actions that have completed consultation from the environmental baseline unless it can be shown that the actions are reasonably certain to occur. The Service declines to adopt this suggestion. In issuing its biological opinion on an action, the Service’s finding under section 7(a)(2) entails an assessment of the degree of impact that action will have on listed species. **Once evaluated, that degree of impact is factored into all future section 7 consultations conducted in the area.** These impacts will continue to be considered as part of the environmental baseline **unless the Service receives notice from the Federal agency that the proposed action will not be implemented or unless the***

## Comment PWI-03 – continued

**biological opinion on the proposed action is no longer valid because reinitiation of consultation is required.**” (Emphasis added)

Depletions cannot be removed from the environmental baseline, even if they are ‘unused’ to allow another project to offset its depletions with unused depletions, as proposed for NGWSP, whether or not same party owns the projects.

In the NGWSP, some 20,782 acre-feet of “unused depletions’ depletions have been removed from the baseline and those depletions transferred to NGWSP for 20 to 50 years. Based on the language in the depletion guarantee, the compensation for this transfer, if ever required, will be from NIIP, a project that has been consulted on and is in the baseline. In addition, the BO removes 6,740 acre-feet that is already in the baseline due to the Jicarilla Apache Navajo Nation River Water Supply Project and has not been used, and transfers the depletion to the Navajo Gallup Water Supply Pipeline (NGWSP). It is not clear whether the JAN project has been consulted on; however it is clear that the JAN project is in the baseline. The procedure does not comply with either the intent or letter of the Section 7 regulations.

11. No basis is provided for the assertion that there are, in fact, ‘unused’ depletions totaling 231,449 acre-feet as portrayed in Table 4. There is no definition of ‘unused’ depletions. They are listed for both projects that have been consulted on (ALP, NIIP, Long Hollow), some projects that may not have been consulted on, and areas (Animas River, Upper San Juan, Piedra, etc). The unused depletions appear to be the calculated difference between the ‘Riverware baseline’ and the ‘estimated current’ depletion. The source of the ‘estimated current’ depletions is not stated in the BO or the BA. However the BA, in reference to the ‘current’ depletions provides the following footnote: **“3. The current status of the non-Indian depletions has not been verified by the states and has not been updated since 1995. It is, therefore, approximate.”**

The ‘current depletion’ estimate appears to be a 1995 preliminary estimate of depletions that was never accepted by the states or the Hydrology Committee, and has no role in defining the environmental baseline. Apparently, it is an artifact of development of the San Juan hydrology model that was never incorporated into the model, and has no role in defining the environmental baseline in either Riverware or the Section 7 process. It has not been used in any previous Section 7 consultation in the San Juan basin. It is being used in this consultation to manufacture ‘unused depletions’. The ‘unused depletions are then used to avoid the fundamental requirement of Section 7 regulations to consider the full direct and indirect effects of the NGWSP when “added to the environmental baseline.”

12. The proposed procedure allows the Navajo Nation to fully develop both NIIP and NGWSP as long as there are ‘unused’ depletions in the basin from all other projects listed in the current ‘Riverware’ or “hydrologic” baseline.

“Unless the sum of actual depletions from all uses listed in the hydrologic baseline shown in Table 4, plus all NGWSP uses reach the total listed in the baseline (854,371 acre-feet) plus 5,271 acre-feet, the full NGWSP depletion of 35,893 acre-feet will be allowed (Table 3).”

Both NIIP and NGWSP can be fully developed with no reduction in depletions by NIIP or other Navajo projects in Table 4 until some 20 to 50 years hence. (The biological assessment submitted by Reclamation suggests that it may be 20 to 50 years before any reductions in Navajo

## Comment PWI-03 – continued

depletions will occur per the ‘depletion guarantee.’) Based on this language, if the “actual depletions” never reach 854,371 acre-feet, there will be no reduction in Navajo depletions for NIIP, NGWSP, or other Navajo projects.

13. Depletion Guarantee (P. 9): The depletion guarantee approach does not address the effects of the action (35,893 acre-feet per year depletion by NGWSP). It does not take into account the fact that NGWSP effects are unlike those of NIIP and other projects that are already in the baseline (from which these depletions are being transferred) due to differences in demand and impacts on flows in the San Juan basin. The BO assumes that NIIP depletions already in the hydrologic baseline have the same effects as depletions not in the hydrologic baseline (NGWSP), an assumption that cannot be supported. The “effects” of the project are not defined, as required by Section 7 regulations.

14. The BO states that the new depletion is only 6,411 acre-feet per year and that is reduced by 3,100 acre-feet per year that will be returned to the San Juan River by return flow from the Navaho Indian Irrigation project. If the 3,100 acre-feet per year retention is included as a return flow reducing NIIP depletions in the original NIIP biological opinion, it cannot be used to offset NGWSP depletions, as it is already in the environmental baseline, without reconsultation on NIIP.

15. **“Unless the sum of the actual depletions from all uses listed in the hydrologic baseline shown in Table 4, plus all NGWSP uses reach the total listed in the baseline, (854,371 acre-feet) plus 5,271 acre-feet, the full NGWSP depletion of 35,893 acre-feet will be allowed (Table 3).”**

There is no definition of “actual depletions” in the Biological Opinion or in Table 4. If the actual depletions are assumed to be the difference between “estimated current” and “Riverware baseline,” then that is not an accurate definition of “actual depletions” (see comment No. 2 ) and cannot be used as a measure of actual depletions in the future. The Section 7 regulations do not allow using “actual depletions” as an indicator of impacts, as opposed to depletions in the environmental baseline.

16. **“The maximum depletion guarantee requirement of 20,782 acre-feet. Changes in flow recommendation or in species status may result in reduction or removal of this guarantee in the future, based upon reconsultation.”**

Changes in flow recommendations or species status may also result in increasing the depletion guarantee in the future. The Service cannot commit in this biological opinion to a “maximum depletion guarantee”.

17. **“No specific detailed accounting of depletions will be required unless the sum of NIIP and Animas La Plata Project (ALP) depletion reaches 290,000 acre-feet (Table 4).”**

No basis is provided for this limitation on detailed accounting under this criterion. If the sum of the depletions from these two projects never reach 290,000 acre-feet, there will never be any accounting for environmental baseline depletions.

18. **“If this condition is met, all depletions listed in the baseline for NGWSP will be monitored on a 5-year cycle to coincide with the USBR consumptive use and loss report.**

## Comment PWI-03 – continued

**Depletions will be reported by categories listed in the hydrologic baseline shown in Table 4 and the total computed.”**

It is not clear who is responsible for monitoring “all the depletions listed in the baseline” or reporting those on a 5-year cycle in categories listed in the hydrologic baseline. The BO needs to identify the responsible party (ies).

It is also not clear exactly what depletions are being monitored: depletions in the baseline or the actual depletions? Are actual depletions average annual depletions? If they are average annual depletions, over what time period must they be defined, i.e. 5 year, 10 year running average, etc.? If the Service proceeds with this approach, a definition of ‘actual depletions’ needs to be incorporated into the BO, along with a description of the relationship of ‘actual depletions’ to the environmental depletion baseline, which also needs to be defined and added to the BO.

**19. “The SJRRIP Hydrology Committee will be responsible for viewing the accounting of the depletions. The Committee will also implement the San Juan River Basin Hydrology Model (SJRBM) to assure compliance with the flow recommendations as specified in the NGWSP BA for limits identified by the Navajo Nation at the time the completion guarantee is implemented.”**

The SJRRIP Hydrology Committee is not an arm of the Service or Reclamation. The Hydrology Committee works under the direction of, and is accountable to, the SJRRIP Coordination Committee. The Coordination Committee appoints members to the Committee and funds their participation. The Service cannot unilaterally direct the Hydrology Committee to perform any function required by the biological opinion, or otherwise. Furthermore, it is not the job of the Hydrology Committee “to assure compliance with the flow recommendations as specified in the NGWSP BA . . .”

These responsibilities need to be assigned to parties other than the Hydrology Committee.

**20. “As a result of monitoring, Reclamation will identify the point at which the sum of actual uses for these categories plus the NGWSP reach the totals stated in the hydrologic baseline for NGWSP plus 5,271 acre-feet.”**

No statement is made as to who is responsible for “monitoring.” Once again, this statement allocates the entire unused depletion account established by the Service to NGWSP, which is not acceptable. It needs to be available to any project sponsor providing a valid depletion guarantee, including those who chose to re-open consultations based on the new procedure.

**21. “The depletion for projects that may be added to the hydrologic baseline at a later date than the date of the Biological Opinion for NGWSP will not be counted in this analysis.”**

The meaning of this statement is unclear. Furthermore, those future projects may, like NGWSP, choose to use “unused depletions” to offset their depletions to some uncertain future time, as has NGWSP. In that case, they must be counted, as those projects will be using the ‘unused’ depletions for offsets.

If the Service finds that this approach is valid, depletions by a project which span a period of only 20 years, for example, could be considered to have no effect on the fish since they can also



## Comment PWI-03 – continued

be using “unused depletions” in the baseline, and the effects would be completed long before the ‘unused depletions’ in the basin are consumed.

22. Either of the following approaches should be considered in order to ensure compliance with Section 7 regulations and the Section 7 Principles adopted by the Program:

- A. Revise the baseline and then add the effects of NGWSP.
- B. Assess the impacts of NGWSP when added to the current baseline.

These approaches are discussed below.

**A. Revise the baseline and then add the effects of NGWSP:**

1) Remove 20,782 acre-feet per year from the NIIP project biological opinion and the 6,740 acre-feet for the JANNRWSP from the environmental depletion baseline. (This will likely require reopening the NIIP biological opinion, redefining the project with 20,782 acre-feet less depletions. It is not clear whether the JANNRWSP has been consulted on and needs to be reopened, or the depletions simply need to be removed from the baseline.)

2) Run the Riverware model to determine the effects of the reduced NIIP and JANNRWSP depletions, define the new environmental baseline.

3) Add the effects (35,783 acre-feet of depletions) of NGWSP to the revised baseline as required by the Section 7 regulations and define the impacts of the new depletions.

**B. Assess the impacts of NGWSP when added to the current baseline.**

The sole purpose of the depletion guarantee and transfer of ‘unused depletions’ is to avoid adverse impacts on the flow recommendations for endangered fish species. The BA states:

***3.2.2.1 Full NGWSP Development plus Baseline Depletion***

The full NGWSP depletion of 35,893 acre-feet per year was included in the model with the baseline depletions described in Section 3.2.1. The summary of flow statistics resulting from this configuration appears in Table 3.5. Thirteen of the flow statistics required under the SJRIP flow recommendations (see Table 3.1) cannot be met, including the maximum duration between meeting the 10,000, 8,000 and 2,500 cfs criteria. Two of the 8,000 cfs statistical criteria are also missed.

Another option is simply to run the model with the 35,893 acre-feet of depletions added to the existing baseline, as was done for the BA, and accept the fact that the flow recommendations will not be met. The Section 7 Principles, San Juan Recovery Program document, and Section 7 regulations do not require that the flow recommendations be met. They are but one indicator of project impacts on the status of the endangered fish.

The goals of the Program are 1) recovering endangered fish and 2) develop water in compliance with State water law, interstate compacts, and Indian trust responsibilities to the tribes. The San



## Comment PWI-03 – continued

Juan Recovery Program was designed to allow both goals to be achieved by taking actions to recover the fish while water development proceeds.

As unequivocally stated by the Service in the BO, the Program is making progress towards recovery. That is what allows depletions from all projects that have been consulted on under the Program to continue in compliance with ESA in the San Juan River Basin. Given the accomplishments of the Program, there is no reason to expect that the full NGWSP depletion would not comply simply because flow recommendations are not always met.

23. Under the NGWSP BO, NIIP and NGWSP, and only these projects, get the benefit of the ‘unused depletions’ calculated in Table 4 from both Navajo and non-Navajo projects (“Unless the sum of actual depletions from all uses listed in the hydrologic baseline shown in Table 4...”). The BO is, therefore, prohibiting other project sponsors from utilizing the ‘unused depletions’ in the environmental depletion baseline in future Section 7 consultations. If the “unused depletion” account being established for Section 7 purposes is available to NGWSP, it should be likewise available to any project sponsors choosing to use it in a similar manner. The language in the BO needs to be modified to ensure that the ‘unused depletions’ are available to all project sponsors. All project sponsors should be allowed to provide a valid ‘depletion guarantee’ that provides for offsetting project depletions when – but only if -- all unused depletions in the environmental depletion baseline are exhausted, per the NGWSP BO. The Section 7 Principles for the San Juan Recovery Program should be modified to incorporate this approach.

24. Should the biological opinion be issued in its current form, the procedures applied will very likely become common in the San Juan basin. The following questions need to be addressed, among others:

What is the environmental depletion baseline for future Section 7 consultations on projects that provide a ‘depletion guarantee’? How will the ‘unused depletion’ account being established in the NGWSP BO be allocated to projects and accounted for?

What is the baseline for future Section 7 consultations on projects which do not provide a ‘depletion guarantee’?

Some options for addressing these questions are provided below:

If the Riverware baseline (Table 4) is not the environmental depletion baseline to which the impacts of new projects using the ‘unused depletion’ account and providing a depletion guarantee must be added, then the environmental baseline must be redefined both for NGWSP and for future projects. The environmental baseline would be adjusted to incorporate the (1995) ‘current depletions’, rather than the full depletions for those projects presently included in the environmental depletion baseline, given that the current depletions from these sources that are used in the NGWSP apparently represent the best available information regarding impacts of those projects. The ‘unused depletions’ would be calculated and made available to all project sponsors providing a depletion guarantee. The depletion guarantees could take many forms, including curtailing depletions of the project under consultation, a promise to implement agreements with other water users to extinguish depletions, etc. Future consultations on projects providing a depletion guarantee would avoid having to conduct a flow impact analysis, given that the impact is already considered in the baseline. Depletions covered by a guarantee and ‘unused depletions’ would be assumed to have no impact on flows or flow recommendations.

## Comment PWI-03 – continued

Depletion guarantees would be called on only if all ‘unused depletions’ in the account (currently 231,449 acre-feet) are used up, per the procedures defined in the NGWSP BO. The baseline could be adjusted periodically to incorporate the total depletions and ‘actual depletions’ from new projects consulted on and actual depletions from any projects not consulted on, per the procedures defined in the draft NGWSP BO. This would allow subtraction of depletions in the account that are used up, but addition of ‘unused depletions’ from new projects that have been consulted on, but are not fully using the depletions consulted on. The unused depletion account could continue to grow, depending on the rate of use of actual depletions vs. new consultations.

Consultations on projects that do not provide such a depletion guarantee would have impacts measured against the present environmental depletion baseline, plus any new projects not providing a depletion guarantee. Only projects that do not provide a depletion guarantee would be added to this baseline. The depletions from projects providing a depletion guarantee would not be added to this baseline due to the fact that those projects would be using ‘unused depletions’ already in the baseline, consistent the NGWSP BO. Only new projects not providing a depletion guarantee would be incorporated into Riverware for the purpose of evaluating the impact of new projects on flows and the flow recommendations.

## Comment PWI-03 – continued

### **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 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

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\* Adopted by the Coordination Committee, San Juan River Basin Recovery Implementation Program, June 19, 2002.

## Comment PWI-03 – continued

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

## Comment PWI-03 – continued

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



## Comment PWI-03 – continued

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).
- 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.

## Comment PWI-03 – continued

- 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

## Comment PWI-03 – continued

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.

## Comment PWI-03 – continued

### 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:

## Comment PWI-03 – continued

- 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.



## Comment PWI-03 – continued

### **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.