

Exhibit C

Platte River Tier 2 Biological Opinion Template  
For  
Water-Related Activities and Central/Lower Platte Species Addressed by the  
Platte River Recovery Implementation Program's Programmatic Biological  
Opinion

October 17, 2006

This biological opinion is provided in response to your [Date] request to initiate formal consultation pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended (ESA). Your Biological Assessment describes the potential effects of the [Project Name] on federally listed species and designated critical habitat.

The Federal Action reviewed in this biological opinion is the [provide the Project Name, Location, and a Short Description].

## I. Background

On June 16, 2006, the U.S. Fish and Wildlife Service (Service) issued a programmatic biological opinion (PBO) for the Platte River Recovery Implementation Program (PRRIP) and water-related activities<sup>1</sup> affecting flow volume and timing in the central and lower reaches of the Platte River in Nebraska. The action area for the PBO included the Platte River basin upstream of the confluence with the Loup River in Nebraska, and the mainstem of the Platte River downstream of the Loup River confluence.

The Federal Action addressed by the PBO included the following:

- 1) funding and implementation of the PRRIP for 13 years, the anticipated first stage of the PRRIP; and
- 2) continued operation of existing and certain new water-related activities<sup>2</sup> including, but not limited to, Reclamation and Service projects that are (or may become) dependent on the PRRIP for ESA compliance during the first 13-year stage of the PRRIP for their effects on the target species<sup>3</sup>, whooping crane critical habitat, and other federally listed species<sup>4</sup> that rely on central and lower Platte River habitats.

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<sup>1</sup> The term “water-related activities” means activities and aspects of activities which (1) occur in the Platte River basin upstream of the confluence of the Loup River with the Platte River; and (2) may affect Platte River flow quantity or timing, including, but not limited to, water diversion, storage and use activities, and land use activities. Changes in temperature and sediment transport will be considered impacts of a “water related activity” to the extent that such changes are caused by activities affecting flow quantity or timing. Impacts of “water related activities” do not include those components of land use activities or discharges of pollutants that do not affect flow quantity or timing.

<sup>2</sup> “Existing water related activities” include surface water or hydrologically connected groundwater activities implemented on or before July 1, 1997. “New water-related activities” include new surface water or hydrologically connected groundwater activities including both new projects and expansion of existing projects, both those subject to and not subject to section 7(a)(2) of the ESA, which may affect the quantity or timing of water reaching the associated habitats and which are implemented after July 1, 1997.

<sup>3</sup> The “target species” are the endangered whooping crane (*Grus americana*), the interior least tern (*Sternula antillarum*), the pallid sturgeon (*Scaphirynchus albus*), and the threatened northern Great Plains population of the piping plover (*Charadrius melodus*).

<sup>4</sup> Other listed species present in the central and lower Platte River include the threatened bald eagle (*Haliaeetus leucocephalus*), western prairie fringed orchid (*Platanthera praeclara*) American burying beetle (*Nicrophorus americanus*) and Eskimo curlew (*Numenius borealis*).

The PBO established a two-tiered consultation process for future federal actions on existing and new water-related activities subject to section 7(a)(2) of the ESA, with issuance of the PBO being Tier 1 and all subsequent site-specific project analyses constituting Tier 2 consultations covered by the PBO. Under this tiered consultation process, the Service will produce tiered biological opinions when it is determined that future federal actions are “likely to adversely affect” federally listed species and/or designated critical habitat in the PRRIP action area and the project is covered by the PBO. If necessary, the biological opinions will also consider potential effects to other listed species and critical habitat affected by the federal action that were not within the scope of the Tier 1 PBO (e.g., direct or indirect effects to listed species occurring outside of the PRRIP action area).

Although the water depletive effects of this Federal Action to central and lower Platte River species have been addressed in the PBO, when “no effect”, or “may affect” but “not likely to adversely affect” determinations are made on a site-specific basis, the Service will review these determinations and provide written concurrence where appropriate. Upon receipt of written concurrence, section 7(a)(2) consultation will be considered completed for those federal actions.

Water-related activities requiring federal approval will be reviewed by the Service to determine if: (1) those activities comply with the definition of existing water-related activities and/or (2) proposed new water-related activities are covered by the applicable state’s or the federal depletions plan. The Service has determined that the [Project Name] meets the above criteria and, therefore, this Tier 2 biological opinion regarding the effects of [Project Name] on the target species, whooping crane critical habitat, western prairie fringed orchid, and bald eagle in the central and lower Platte River can tier from the June 16, 2006 PBO.

## **II. Consultation History**

Table II-1 of the PBO (pages 21-23) contains a list of species and critical habitat in the action area, their status, and the Service’s determination of the effects of the Federal Action analyzed in the PBO.

The Service determined in the Tier 1 PBO that the Federal Action, including the continued operation of existing and certain new water-related activities, may adversely affect but would not likely jeopardize the continued existence of the federally endangered whooping crane, interior least tern, and pallid sturgeon, or the federally threatened northern Great Plains population of the piping plover, western prairie fringed orchid, and bald eagle in the central and lower Platte River. Further, the Service determined that the Federal Action, including the continued operation of existing and certain new water-related activities, was not likely to destroy or adversely modify designated critical habitat for the whooping crane.

The Service also determined that the PBO Federal Action would have no effect to the endangered Eskimo curlew. There has not been a confirmed sighting since 1926 and this

species is believed to be extirpated in Nebraska. Lastly, the Service determined that the PBO Federal Action, including the continued operation of existing and certain new water-related activities, was not likely to adversely affect the endangered American burying beetle.

The effects of the continued operation of existing and certain new water-related activities on the remaining species and critical habitats listed in Table II-1 of the PBO were beyond the scope of the PBO and were not considered.

The Service has reviewed the information contained in the Biological Assessment submitted by your office on [Date].

We concur with your determinations of “likely to adversely affect” for the endangered whooping crane, interior least tern, pallid sturgeon, and the threatened northern Great Plains population of the piping plover, the western prairie fringed orchid, and the bald eagle in the central and lower Platte River. We also concur with your determination of “likely to adversely affect” for designated whooping crane critical habitat.

We concur with your determinations of “not likely to adversely affect” for the endangered American burying beetle, and of “no effect” to the endangered Eskimo curlew.

We concur with your determinations of “not likely to adversely affect” [for species, species, and “no adverse modification of critical habitat” for species].

We concur with your determinations of “no effect” [for species, species, and critical habitat].

### **III. Scope of the Tier 2 Biological Opinion**

The [Project Name] is a component of “the continued operation of existing and certain new water-related activities” needing a federal action evaluated in the Tier 1 PBO, and flow-related effects of the Federal Action are consistent with the scope and the determination of effects in the June 16, 2006 PBO. Because [the project proponent] has elected to participate in the PRRIP, ESA compliance for flow-related effects to federally listed endangered and threatened species and designated critical habitat from [Project Name] is provided to the extent described in the Tier 1 PBO.

This biological opinion applies to the [Project Name] effects to listed endangered and threatened species and designated critical habitat as described in the PBO for the first thirteen years of the PRRIP (i.e., the anticipated duration of the first PRRIP increment).

### **IV. Description of the Federal Action**

[Describe the Federal Action and any Interdependent and Interrelated Actions– use text from the Biological Assessment]

## V. Status of the Species/Critical Habitat

Species descriptions, life histories, population dynamics, status and distributions are fully described in the PBO on pages 76-156 for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle and western prairie fringed orchid, and whooping crane critical habitat and are hereby incorporated by reference. Since issuance of the Service's PBO, [Discuss changes in status of target species/critical habitat since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since the PBO was issued].

## VI. Environmental Baseline

The Environmental Baseline sections for the Platte River and for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle and western prairie fringed orchid, and whooping crane critical habitat are described on pages 157 to 219 of the Tier 1 PBO, and are hereby incorporated by reference. Since issuance of the Tier 1 PBO, [Discuss changes in status of target species/critical habitat in the action area since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since that time].

## VII. Effects of the Action

Based on our analysis of the information provided in your Biological Assessment for the [Project Name], the Service concludes that the proposed Federal Action will result in [a/an existing depletion, new depletion, or a combination of existing and new depletions] to the Platte River system above the Loup River confluence. These depletions are associated with [briefly describe here, or by reference, the specific water supply sources, water uses, and associated water rights or permits].

[Select and/or delete from the following 2 paragraph(s) below as needed]

As an existing water-related activity, we have determined that the flow-related adverse effects of the [Project Name] are consistent with those evaluated in the Tier 1 PBO for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle, western prairie fringed orchid, and whooping crane critical habitat.

As a new water-related activity, we have determined that the flow-related adverse effects of the [Project Name] are consistent with those evaluated in the Tier 1 PBO for the whooping crane, interior least tern, piping plover, pallid sturgeon, bald eagle, western prairie fringed orchid, and whooping crane critical habitat, and these effects on flows are being addressed in conformance with the [Select the applicable depletion plan: Wyoming Depletion Plan, Nebraska New Depletion Plan, Colorado Plan for Future Depletions, Federal Depletions Plan] of the PRRIP.

[If the site-specific project/activity may affect listed species/critical habitat addressed in the PBO, include those site-specific effects here. In that instance, the Incidental Take Statement section below may need additional text.]

## **VIII. Cumulative Effects**

Cumulative effects include the effects of future State, local, or private (non-federal) actions that are reasonably certain to occur in the action area considered in this biological opinion. A non-federal action is “reasonably certain” to occur if the action requires the approval of a State or local resource or land-control agency, such agencies have approved the action, and the project is ready to proceed. Other indicators which may also support such a “reasonably certain to occur” determination include whether: a) the project sponsors provide assurance that the action will proceed; b) contracting has been initiated; c) State or local planning agencies indicate that grant of authority for the action is imminent; or d) where historic data have demonstrated an established trend, that trend may be forecast into the future as reasonably certain to occur. These indicators must show more than the possibility that the non-federal project will occur; they must demonstrate with reasonable certainty that it will occur. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act and would be consulted on at a later time.

Cumulative effects are described on pages 194 to 300 of the Tier 1 PBO, and are hereby incorporated by reference. [\[Discuss any changes in cumulative effects, if any, since the Tier 1 PBO was issued, or include a statement saying there are no substantial changes in status since that time\].](#)

## **IX. Conclusions**

The Service concludes that the proposed [\[Project Name\]](#) is consistent with the Tier 1 PBO for effects to listed species and critical habitat addressed in the Tier 1 PBO. After reviewing site specific information, including: 1) the scope of the Federal Action, 2) the environmental baseline, 3) the status of the whooping crane, interior least tern, piping plover, pallid sturgeon, western prairie fringed orchid, and the bald eagle in the central and lower Platte River and their potential occurrence within the project area, as well as whooping crane critical habitat, 4) the effects of the [\[Project Name\]](#), and 5) any cumulative effects, it is the Service’s biological opinion that the [\[Project Name\]](#), as described, is not likely to jeopardize the continued existence of the federally endangered whooping crane, interior least tern, and pallid sturgeon, or the federally threatened northern Great Plains population of the piping plover, western prairie fringed orchid, or bald eagle in the central and lower Platte River. The Federal Action is also not likely to destroy or adversely modify designated critical habitat for the whooping crane.

## **X. Incidental Take Statement**

Section 9 of ESA and federal regulations pursuant to section 4(d) of ESA prohibit the take of endangered and threatened species without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct, and applies to individual members of a listed species. Harm is further defined by the Service to include significant habitat modification or degradation

that results in death or injury to listed wildlife 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 listed wildlife by annoying it 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 is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under ESA provided that such taking is in compliance with the terms and conditions of this incidental take statement.

Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of federally listed plant species (e.g., Colorado butterfly plant, Ute ladies' tresses orchid, and western prairie fringed orchid). However, limited protection of listed plants from take is provided to the extent that ESA prohibits the removal and reduction to possession of federally listed endangered plants or the malicious damage of such plants on non-federal areas in violation of state law or regulation or in the course of any violation of a state criminal trespass law. Such laws vary from state to state.

The Department of the Interior, acting through the Service and Bureau of Reclamation, is implementing all pertinent Reasonable and Prudent Measures and implementing Terms and Conditions stipulated in the Tier 1 PBO Incidental Take Statement (pages 309-326 of the PBO) which will minimize the anticipated incidental take of federally listed species. In instances where the amount or extent of incidental take outlined in the Tier 1 PBO is exceeded, or the amount or extent of incidental take for other listed species is exceeded, the specific PRRIP action(s) causing such take shall be subject to reinitiation expeditiously.

[\[If the site-specific project/activity may affect listed species/critical habitat addressed in the PBO, include any site-specific Reasonable and Prudent Measures and Terms and Conditions here. See the format in the PBO Incidental Take Section\].](#)

## **XI. Closing Statement**

Any person or entity undertaking a water-related activity that receives federal funding or a federal authorization and which relies on the PRRIP as a component of its ESA compliance in section 7 consultation must agree: (1) to the inclusion in its federal funding or authorization documents of reopening authority, including reopening authority to accommodate reinitiation upon the circumstances described in Section IV.E. of the Program document; and (2) to request appropriate amendments from the federal action agency as needed to conform its funding or authorization to any PRRIP adjustments negotiated among the three states and the Department of the Interior, including specifically new requirements, if any, at the end of the first PRRIP increment and any subsequent PRRIP increments. The Service believes that the PRRIP should not provide ESA compliance for any water-related activity for which the funding or authorization document does not conform to any PRRIP adjustments (Program Document, section VI).

Reinitiation of consultation over [Project name] will not be required at the end of the first 13-years of the PRRIP provided a subsequent Program increment or first increment Program extension is adopted pursuant to appropriate ESA and NEPA compliance procedures, and, for a subsequent increment, the effects of the [Project name] are covered under a Tier 1 PBO for that increment addressing continued operation of previously consulted-on water-related activities.

This concludes formal consultation on the actions outlined in the [Date] request from [federal action agency]. As provided in 50 CFR § 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: 1) the amount or extent of incidental take is exceeded; 2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; 3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or 4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, the specific action(s) causing such take shall be subject to reinitiation expeditiously.

Requests for reinitiation, or questions regarding reinitiation should be directed to the appropriate Field Office below.

[Depending on the State the project is located in, select the appropriate field office below and delete the other two]

Field Supervisor  
Nebraska Ecological Services Field Office  
U.S. Fish and Wildlife Service  
Federal Building, Second Floor  
203 West 2<sup>nd</sup> Street  
Grand Island, NE 68801

Field Supervisor  
Colorado Ecological Services Field Office  
U.S. Fish and Wildlife Service  
P.O. Box 25486  
Denver Federal Center  
Denver, CO 80225-0486

Field Supervisor  
Wyoming Ecological Services Field Office  
U.S. Fish and Wildlife Service  
5353 Yellowstone Road  
Cheyenne, WY 82003



## **XII. Conservation Recommendations**

Section 7(a)(1) of ESA directs Federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of an action on listed species or critical habitat, to help implement recovery plans, or to develop information. Conservation recommendations are provided in the PBO (pages 328-329) and are hereby incorporated by reference.

## **XIII. Literature Cited**

Platte River Recovery Implementation Program document. 2006.

U.S. Department of the Interior. 2006. Platte River Recovery Implementation Program Final Environmental Impact Statement.

U.S. Fish and Wildlife Service. 2006. Biological opinion on the Platte River Recovery Implementation Program.