

PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM - SUMMARY

Why the Platte Program is Needed by Colorado

The Platte Program is designed to resolve escalating conflicts between water use and endangered species protection that affect continued water use and the federal permitting of existing and planned irrigation, municipal and industrial water supply projects in the Platte River basin in Colorado. Resolution of these conflicts is critical to the continued use and development of water supplies to meet the needs of Colorado's rapidly growing Front Range.

The Conflict

Water-related projects which need a federal authorization, funding, or are carried out by a federal agency require consultation with the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA). Federal agencies are required by Section 7(a)(2) of the ESA to insure that those actions are not likely to jeopardize listed species or adversely modify their designated critical habitat. Construction, operation and maintenance of water projects in the Platte River basin routinely require a Clean Water Act Section 404 permit from the Corps of Engineers. This includes routine projects such as pipeline crossings of jurisdictional waters and repair or rehabilitation of conveyance structures, which activities are frequently covered by nationwide permits. Many water storage or conveyance facilities located on forest lands require special use permits issued by the Forest Service. Federal action may also be present through the receipt of federal funding under certain agricultural assistance programs. The Bureau of Reclamation and Corps of Engineers also own major water collection, distribution and storage facilities that provide water to numerous ditch companies and municipalities or are used for flood control purposes in Colorado. These types of activities are all subject to Section 7 of the ESA.

The FWS believes that the Platte River resource is in a state of jeopardy, and that actions resulting in water depletions to the Platte River will continue the deterioration of the endangered species' habitat. The federally listed species at issue include the whooping crane, least tern, piping plover and pallid sturgeon. The FWS has issued "jeopardy" biological opinions for virtually all water-depletive projects in the Platte River basin since the late 1970s, citing either new or continued water depletions as contributing factors in jeopardizing the existence of these species and adversely affecting designated critical habitat. Notable examples include the biological opinions issued in 1994 for the renewal of Forest Service special use authorizations for six agricultural and municipal water projects along Colorado's Front Range. The 1994 opinions concluded that each of those existing water facilities would cause jeopardy to the listed species and adversely modify Platte River designated critical habitat in Nebraska. The depletions associated with one of those long-standing projects was 0.64 annual acre feet.

Under the jeopardy standard, individual water projects undergoing ESA consultation must avoid or fully offset all project depletions to FWS instream flow recommendations for the Platte River in the same amount, timing, duration and frequency in which they occur. Land acquisition and a sediment augmentation component may also be a required component of mitigation for federal authorizations that do not have the benefit of a recovery program.

Fulfillment of these requirements may, for some projects, simply not be possible. For many others, these requirements have delayed permitting and compromised water yield and cost-effectiveness of the projects.

What the Program Does

The States of Colorado, Nebraska and Wyoming and the U. S. Department of the Interior are entering into a comprehensive basin-wide Program to address habitat needs of the endangered species in the Central and Lower Platte River basin. This cooperative basin-wide approach is an equitable and effective means to resolve conflicts and provide greater certainty that the Platte River will continue as a reliable water source for both wildlife and the many people who reside and use water in the basin. The proposed Program will allow water use and development activities in each of the three states to continue, in compliance with the ESA and in accordance with state water law and entitlements under interstate compacts and decrees. The Program will set a goal to reduce basin-wide shortages by an average of 130,000 to 150,000 acre feet per year in lieu of the FWS requirement to replace 417,000 acre feet of shortages to the FWS "target flows." This water, along with land obtained for habitat, will constitute the mitigation needed to offset the impact of existing water projects on the Platte River species and habitat during the 13-year first increment of the Program. ESA compliance for future water related activities is afforded under the respective state plans to mitigate the effects of new water development. An overview of the Program is attached.

For Colorado, the Program will provide regulatory compliance under the ESA for both existing and prospective new water uses within the South Platte River basin. This compliance is needed for water providers to meet the water supply needs of the urban, agricultural, and industrial sectors of this rapidly changing and growing part of the state. The Program will:

- Provide an alternative to the requirement that historic and future water related activities in Colorado replace individual depletions on a one-for-one basis in amount and in timing at the Colorado-Nebraska state line.
- Provide streamlined ESA Section 7 compliance procedures and regulatory predictability for existing and future water related activities in Colorado. Project owners and operators who choose to rely on the Program will know their requirements prior to ESA consultation.
- Avoid the potential for prohibited "take" of listed species under ESA Section 9 for water-related activities covered by the Program.
- Avoid reinitiation of consultation over water-related projects affecting Platte basin flows that have been permitted since the 1997 signing of the Cooperative Agreement. The vast majority of these consultations contain interim requirements that are linked to the implementation of the Program. If a Program cannot be implemented and funded, these consultations will be subject to reinitiation, with uncertain outcomes as to ESA compliance requirements, individual mitigation of project impacts, and potential litigation.

- Satisfy Colorado's water-related mitigation requirements through the Tamarack Plan, which utilizes managed groundwater recharge from existing and future wells and ditches located in the lower reaches of the South Platte River in Colorado to re-time river flows from periods exceeding flow targets to periods short of target flows. Water re-regulation for the Tamarack Plan will be limited to water that physically and legally exceeds existing and future water demands in Colorado, i.e. water that would normally flow out of the state. This water will first be diverted for a beneficial use within Colorado; some of the return flows from this diverted water will subsequently reach the river in times of greater benefit to the Platte species.
- Provide potential benefits addressing two other issues important to the lower South Platte River in Colorado. The higher groundwater levels produced as a result of the managed groundwater recharge for the Program will benefit Colorado's Minnow Species of Concern. Additionally, the Tamarack Plan will put water in the South Platte River at times when it is not needed or cannot be utilized to reduce target flow shortages. This "new" water supply will enhance the effectiveness of augmentation plans and provide water for new uses within Colorado.
- Reduce pressure toward permanent dry up of agricultural lands along the lower South Platte for the benefit of federally listed species in Nebraska.
- Encourage development of improved science on the central Platte River through an adaptive management plan and integrated monitoring/research plan designed to test competing hypotheses of the Program's participants concerning species and habitat needs.

Benefits of a Programmatic Approach

Individual water users will need to decide whether to rely on the Program for purposes of ESA compliance for their water-related projects in the Platte River basin. The circumstances surrounding each project will inform the decision whether to participate under the Program or pursue stand-alone ESA consultation and project-specific mitigation. The requirements in the vast majority of stand-alone Section 7 consultations conducted independent of a Program have, to date, entailed time intensive negotiations and mitigation requiring that water users replace individual project depletions on a one-for-one basis. In contrast, under the programmatic approach toward Platte ESA compliance: (1) individual projects would be asked to contribute money, not water, to address their depletive impacts on the target species; (2) individual projects would rely on the Program's offsetting measures as their means to avoid jeopardy to the species and adverse modification of critical habitat under Section 7; (3) programmatic offsetting measures would avoid any prohibited "take" of target species for all federal nexus and non-nexus individual water activities participating under the Program; and (4) individual projects could take advantage of streamlined procedures for documenting ESA compliance.

Commitments and Costs under the Program

Colorado's responsibilities under the Program comprise 20% of the total Program budget in cash and cash-equivalent contributions. Colorado is contributing less water (27,000 out of the

130-150,000 annual acre foot shortage reduction) and more money, relative to the other states during the first increment of the Program. During the first increment of the Program, Colorado and its water users will be required to:

1. Develop the capability under the Tamarack Plan to provide an average of 10,000 acre feet annually of shortage reduction to FWS target flows by the end of year four of the Program; and re-regulate water in Colorado to avoid net increased shortages to target flows in the habitat pursuant to Colorado's Plan for New Depletions;
2. Participate in the business and operational activities of the Program; and
3. Provide \$24 million in cash or cash equivalent contributions to the Program (in 2005 dollars) to fund Program activities such as acquiring additional land and water, performing monitoring and research, and conducting Program operation and maintenance activities.

Role of the South Platte Water Related Activities Program, Inc. (SPWRAP)

The South Platte Water Related Activities Program, Inc. (SPWRAP), a Colorado nonprofit corporation, has been formed by Colorado water user participants under the Program to assist the State in fulfillment of various Program responsibilities including accounting and reporting requirements, obtaining interests in facilities, water rights and/or recharge credits, and assisting with the State's cash contributions to the Program, if necessary. In addition to the State of Colorado delegate, Colorado water users also have representation on the Program Governance Committee and advisory groups through membership in SPWRAP.

Membership in SPWRAP is the exclusive means by which individual water users may participate in the Platte River Program, and thereby be afforded the benefits and certainty of ESA compliance for their projects while avoiding stand-alone project mitigation requirements during Section 7 consultation under ESA. A certification of membership in SPWRAP is a prerequisite for water users to rely on the Program for purposes of ESA compliance. The river depletions about which FWS is concerned are both the depletions that have been occurring for decades, as well as the compounding effect of future depletions. Because of that and the fact that the costs of the Program are beginning now, fairness requires that all water users in the basin pay their fair share. As a result, water users who delay becoming members will be required to pay assessments for all prior years at the time they do join.