



United States Department of the Interior

FISH AND WILDLIFE SERVICE
9325 S Alda Road
Wood River, Nebraska 68883



Date

FWS Tails ID#

Mr./Mrs. [Name]

[Title]

[Agency]

[Address]

[City, State, Zip Code]

RE: [Project Name] Project, [County Location] County, [State]

Dear [Mr./Mrs.] :

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] (Project) on federally listed species and designated critical habitat.

The Federal Action reviewed in this biological opinion is the [Project Name] Project, located at [location description], [county name] County, [state]. The Project is [project description and purpose].

Background

On June 16, 2006, the U.S. Fish and Wildlife Service (Service) issued a programmatic biological opinion (PBO) for the 13-year first increment of the Platte River Recovery Implementation Program (PRRIP) and water-related activities¹ affecting flow volume and timing in the central and lower reaches of the Platte River in Nebraska. On August 27, 2018, the Service issued a supplemental programmatic biological opinion (Supplement) for an extension of the PRRIP through 2032. These two biological opinions are hereinafter referred to collectively as the PBOs. The action area for the PBOs includes 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.

¹ 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.

INTERIOR REGION 5
Missouri Basin

Kansas, Montana*, Nebraska, North Dakota, South Dakota

INTERIOR REGION 7
Upper Colorado River Basin

Colorado, New Mexico, Utah, Wyoming

*PARTIAL

- 1) funding and implementation of the PRRIP through 2032, the anticipated first increment of the PRRIP, as extended; and
- 2) continued operation of existing and certain new water-related activities² including, but not limited to, Reclamation and Service projects that are (or may become) dependent on the PRRIP for ESA compliance during the first increment of the PRRIP, as extended, for their effects on the target species³, whooping crane critical habitat, and other federally listed species⁴ that rely on central and lower Platte River habitats.

The PBOs establish 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 PBOs being Tier 1 and all subsequent site-specific project analyses constituting Tier 2 consultations covered by the PBOs. 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 PBOs.

Although the water depletive effects of this Federal Action to central and lower Platte River species have been addressed in the PBOs, 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 states or the federal depletions plan. The Service has determined that the [Project Name] Project meets the above criteria; therefore, this Tier 2 biological opinion regarding the effects of the [Project Name] Project on the target species, whooping crane critical habitat, and western prairie fringed orchid in the central and lower Platte River can tier from the PBOs. This Tier 2 biological opinion does not address potential effects from construction and operation of the Project on any other federally-listed threatened or endangered species and designated critical habitats outside of the PRRIP action area. Those effects will be addressed by the appropriate Field Office of the Service, in accordance with the ESA.

² “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.

³ The “target species” are the federally listed endangered whooping crane (*Grus americana*), the endangered pallid sturgeon (*Scaphirynchus albus*), the threatened northern Great Plains population of the piping plover (*Charadrius melodus*), and the interior least tern (*Sternula antillarum*) that was delisted February 12, 2021 but is still addressed as a target species under the PRRIP, but not tied to ESA compliance.

⁴ Other listed species present in the central and lower Platte River include western prairie fringed orchid (*Platanthera praeclara*), American burying beetle (*Nicrophorus americanus*) and Eskimo curlew (*Numenius borealis*).

Table II-1 of the Supplement (pages 6-8) 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 PBOs.

The Service determined in the Tier 1 PBOs 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 whooping crane, interior least tern, pallid sturgeon, piping plover, and western prairie fringed orchid 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 bald eagle was subsequently delisted under the ESA on August 8, 2007 and the interior least tern was delisted on February 12, 2021. Bald eagles continue to be protected by the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. For more information on bald eagles, see the Service's webpage at: <http://www.fws.gov/migratorybirds/BaldEagle.htm>. Interior least terns continue to be protected by the Migratory Bird Treaty Act.

The Service also determined in the Tier 1 PBOs that the 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 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 Supplement were beyond the scope of the PBOs 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 “may affect, and likely to adversely affect” for the whooping crane, pallid sturgeon, piping plover, and the western prairie fringed orchid in the central and lower Platte River. We also concur with your determination of may affect, and likely to adversely affect, for designated whooping crane critical habitat.

We also concur with your determinations of “may affect, but not likely to adversely affect” for [species, and “no adverse modification of critical habitat” for species]. You have also made the determination of no effect for the [species]. We acknowledge those no effect determinations.

Scope of the Tier 2 Biological Opinion

This Project is a component of “the continued operation of existing and certain new water-

related activities” requiring a federal action to be evaluated in the Tier 1 PBOs, and flow- 4
related effects of the Federal Action are consistent with the scope and the determination of
effects in the PBOs. Because [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 the Project is provided to the extent described in
the Tier 1 PBOs.

This biological opinion applies to the Project’s effects to listed endangered and threatened
species and designated critical habitat as described in the PBOs for the period of the first 26
years of the PRRIP (i.e., the anticipated duration of the PRRIP first increment and
extension).

Description of the Federal Action

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

Status of the Species/Critical Habitat

Species descriptions, life histories, population dynamics, status and distributions for the
whooping crane, piping plover, pallid sturgeon, and western prairie fringed orchid, as well as
a description of the designated critical habitat for the whooping crane, are set out in the PBO
on pages 76-98; 115-146; and 150-156, and in the Supplement on pages 17-24 and 33-53,
and are hereby incorporated by reference.

Climate change was evaluated as a potential threat to the species and whooping crane
critical habitat in the Supplement. The terms "climate" and "climate change" are defined by
the Intergovernmental Panel on Climate Change (IPCC). "Climate" refers to the mean and
variability of different types of weather conditions over time, with 30 years being a typical
period for such measurements, although shorter or longer periods also may be used (IPCC
2007, p. 78). The term "climate change" thus refers to a change in the mean or variability of
one or more measures of climate (e.g., temperature or precipitation) that persists for an
extended period, typically decades or longer, whether the change is due to natural
variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate
can have direct or indirect effects on species. These effects may be positive, neutral, or
negative and they may change over time, depending on the species and other relevant
considerations, such as the effects of interactions of climate with other variables (e.g., habitat
fragmentation) (IPCC 2007, pp. 8-14, 18-19).

Changes in temperature and/or precipitation patterns will influence the status of the Platte
River system. These changes may contribute to threats that have already been identified and
discussed for piping plover, pallid sturgeon and western prairie fringed orchid in the Tier 1
PBOs.

[Discuss changes in status of target species/critical habitat since the Tier 1 PBOs were issued, or

include a statement saying “Since issuance of the Service’s PBO and the Supplement, there have been no substantial changes in status.”]

Environmental Baseline

The Environmental Baseline sections for the Platte River and for the whooping crane, piping plover, pallid sturgeon, and western prairie fringed orchid, and whooping crane critical habitat are described on pages 157-211 and 219-221 of the Tier 1 PBO and pages 54-81 of the Supplement, and are hereby incorporated by reference.

[Discuss changes in status of target species/critical habitat in the action area since the Tier 1 PBOs were issued, or include a statement saying “Since issuance of the Service’s PBO and the Supplement, there have been no substantial changes in status of target species/critical habitat in the action area.”]

Effects of the Action

Since issuance of the Tier 1 PBO, our analyses under the ESA include consideration of ongoing and projected changes in climate. The Supplement considered these impacts. In our analyses, we used our best professional judgement to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change. Actions that are undertaken to improve the river ecology and habitats for listed species not only address human activities, but also contribute to listed species and whooping crane critical habitat resiliency to climate change.

Based on our analysis of the information provided in your biological assessment for the Project, the Service concludes that the proposed Federal Action will result in a [a/an existing depletion, new depletion, or a combination of existing and new depletions]. These depletions are associated with [briefly describe here, or by reference, the specific water supply sources, water uses, amount information, etc. (e.g. in Colorado, use the *Supplemental Worksheet for PRRIP BA*)].

[Include as needed:] As an existing water-related activity, we have determined that the flow-related adverse effects of the Project are consistent with those evaluated in the Tier 1 PBOs for the whooping crane, piping plover, pallid sturgeon, western prairie fringed orchid, and whooping crane critical habitat.

[Include as needed:] 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 PBOs for the whooping crane, piping plover, pallid sturgeon, 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 PBOs, include those site-specific effects here. In that instance, the Incidental Take

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 pages 102 to 104 of the Supplement, and are hereby incorporated by reference. [Discuss any changes in cumulative effects, if any, since the Tier 1 PBOs was issued, or include a statement saying “Since issuance of the Service’s PBO and the Supplement, there have been no substantial changes in cumulative effects to the species.”]

Conclusions

The Service concludes that the proposed Project is consistent with the Tier 1 PBOs for effects to listed species and critical habitat addressed in the Tier 1 PBOs. After reviewing site specific information, including: 1) the scope of the Federal Action; 2) the environmental baseline; 3) the status of the whooping crane, piping plover, pallid sturgeon, and western prairie fringed orchid 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; and 5) any cumulative effects, it is the Service’s biological opinion that the Project, as described, is not likely to jeopardize the continued existence of the whooping crane, pallid sturgeon, piping plover, or western prairie fringed orchid in the central and lower Platte River. The Project is also not likely to destroy or adversely modify designated critical habitat for the whooping crane.

This Tier 2 biological opinion does not address potential effects from construction and operation of the Project on any other federally-listed threatened or endangered species and designated critical habitats outside of the PRRIP action area. Those effects will be addressed by the appropriate Field Office of the Service, in accordance with the ESA.

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. 7

Sections 7(b)(4) and 7(o)(2) of ESA do not apply to the incidental take of federally listed plant species (e.g., 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 PBOs' Incidental Take Statements (pages 309-326 of the PBO and 111-115 of the Supplement), except those specific to the interior least tern, 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 PBOs 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 PBOs, include any site-specific Reasonable and Prudent Measures and Terms and Conditions here. See the format in the PBOs Incidental Take sections]

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 8 adjustments (Program Document, section VI). Reinitiation of consultation over the Project will not be required at the end of the first increment including the extension (a period covering the first 26 years of the PRRIP) provided a subsequent Program increment or additional first increment Program extension is adopted pursuant to appropriate ESA and NEPA compliance procedures, and, for a subsequent increment, the effects of the Project 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 at the address below.

Field Supervisor
Nebraska Ecological Services Field Office
U.S. Fish and Wildlife Service
9325 S Alda Road
Wood River, NE 68883

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 Supplement (page 117) and are hereby incorporated by reference.

Literature Cited

Platte River Recovery Implementation Program Document. 2006.

Addendum to the Platte River Recovery Implementation Program First Increment Extension. 2017.

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.

U.S. Department of the Interior. 2018. Platte River Recovery Implementation Program First Increment Extension Final Environmental Assessment.

U.S. Fish and Wildlife Service. 2018. Supplemental Biological Opinion on the Platte River Recovery Implementation Program First Increment Extension.

We appreciate the opportunity to review and comment on this proposed project. Should you have questions, please contact [FWS lead biologist] within our office at [email address] or [phone number].