

**PRINCIPLES FOR CONDUCTING ENDANGERED
SPECIES ACT FORMAL SECTION 7
CONSULTATIONS ON WATER DEVELOPMENT
AND WATER MANAGEMENT PROJECTS
AFFECTING
ENDANGERED FISH SPECIES IN THE SAN JUAN
RIVER BASIN**

**Revision Approved by the Coordination Committee, San Juan River
Basin Recovery Implementation Program
(August 2022)**

1.0 Endangered Species Act Compliance

The San Juan River Basin Recovery Implementation Program (Program) was established in 1992 as a result of a reasonable and prudent alternative (RPA) identified in the 1991 Animas-La Plata Project, Colorado and New Mexico Biological Opinion (Animas La-Plata BO [Service 1991]). The goals of the Program that resulted from the RPA are:

1. To conserve populations of Colorado pikeminnow (*Ptychocheilus lucius*) and razorback sucker (*Xyrauchen texanus*) in the San Juan River Basin (Basin) consistent with the recovery goals established under the Endangered Species Act, 16 U.S.C. § 1531 et seq. (ESA).
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 principles for conducting ESA section 7 consultations (Principles) are to be used as a guide to incorporate Program actions into ESA compliance for consultations on water development and management activities that impact listed fish species in the Basin. The Program actions are not only intended to be consistent with the recovery goals of the two species but also provide the following: (1) be incorporated as conservation measures in the proposed action, (2) be part of reasonable and prudent alternatives (RPAs) in a jeopardy opinion, and (3) be part of reasonable and prudent measures to minimize incidental take for compliance with sections 7 and 9 of the ESA. The Principles were originally adopted in 2001 by the Program's Coordination Committee

(CC) to guide all future consultations on water development and management activities in the Basin.

These 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). If anything, herein is determined to be inconsistent with the ESA or its implementing regulations, the ESA and its implementing regulations govern, and the inconsistent language herein shall be modified as soon as possible. Nothing herein shall be interpreted to modify the role and responsibilities of the Service or any action agency when consulting on water development or management activities that impact listed fish species in the Basin under the ESA.

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 Indian tribes, tribal sovereignty, and statutory missions of the Departments. The Secretarial Order strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species and directs the Departments to avoid or minimize the potential for conflict and confrontation. In recognition of the vital role of the sovereign tribes in water development and management projects, and listed fish species conservation in the Basin, the CC supports the Service in its commitment to notify the tribes in the Basin when it receives any request for consultation that might affect tribal assets. Additionally, the CC urges the Service, consistent with the applicable regulations and policies, to address the section 7 consultation needs of the tribes. Moreover, the CC 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 (LRP)

The Program's LRP, first adopted in 1995 and revised when needed, identifies specific on-the-ground recovery actions that would directly benefit listed fish or their habitats (Service 2016). The Program's Biology Committee (BC), in concert with the Service Program Coordinator, is responsible for identifying and prioritizing these and other identified foreseeable actions considered necessary to achieve recovery of listed fish and their habitats, including projects requiring capital construction funds. These are identified as LRP goals, actions, tasks, or subtasks and are recommended by the BC to the CC for adoption into the LRP, which may require capital expenditures, as stated above, as well as monitoring and research projects and management actions. The LRP is also the basis for formulating annual work plan and the resulting 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 modified, as appropriate, when new information and actions are identified that are needed to achieve recovery while continuing with water development. Additionally, amendments to the LRP generally reflect available funding and changes in priorities for implementation of recovery actions. Any actions incorporated into the LRP must be consistent with the ESA and reflect the goals, criteria, and timelines of the recovery plans for the Colorado pikeminnow and razorback sucker.

4.0 Incidental Take

Section 9 of the ESA and Federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, 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 (16 U.S.C. § 1532). “Harm” is further defined (50 CFR § 17.3) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. “Harass” is defined (50 CFR § 17.3) as intentional or negligent actions that create the likelihood of injury to listed 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 (50 CFR. § 17.3) 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 the ESA provided that such taking is in compliance with the terms and conditions of an Incidental take statement.

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

Reasonable and prudent measures in an incidental take statement are non-discretionary and must be undertaken by the action agency as appropriate, for the exemption in section 7(o)(2) to apply. The action agency has a continuing duty to regulate the activity covered by the incidental take statement. The protective coverage of section 7(o)(2) may lapse if the action agency (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document. In order to monitor the impact of incidental take, the action agency must report the progress of the action and its impact on the species as specified in the incidental take statement (50 CFR §402.14(i)(3)).

5.0 ESA Section 7 Consultations

Section 7 of the ESA outlines procedure for interagency cooperation to conserve Federally listed species and designated critical habitats. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the Service to ensure it is not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.

Because the Program was established as a result of a section 7 consultation it is intended to identify and implement actions that assist in the recovery of the fish species and provide compliance with sections 7 and 9 of the ESA for water development and water management projects in the Basin. Federal action agencies and project proponents may elect to carry out actions that provide ESA compliance for their projects independently of the Program and not rely on the Program to provide actions for their project-specific ESA compliance. In addition, federal agencies and/or project sponsors may modify their activities to eliminate or avoid jeopardizing the continued existence of a fish species (jeopardy), eliminate or avoid destruction or adverse modification of critical habitat (adverse modification), or minimize take and, by so doing, remove the need for actions by the Program to provide ESA compliance.

5.1 ESA Section 7 Consultations on Existing and New Water Development and Management Projects in the Basin

- A. Water development and management projects that require section 7 consultation, are categorized as follows:
1. Existing projects – These are water development or management projects that were identified in the Animas La-Plata BO (Service 1991) as having a historical depletion but have not been consulted on per section 7 of the ESA and provided with formal ESA compliance for the depletions. Existing projects include projects that have been consulted on since initiation of the Program and currently receive ESA compliance based on Program actions but need to be reconsulted on subject to *Reinitiation of Consultation* (See 7.0).
 2. New projects – These are new water development or management projects that are not identified as historical depletions through the Animas La-Plata BO (Service 1991) and have not been consulted on previously per section 7 of the ESA.
- B. For the purposes of the Program and section 7 consultation on existing and new water development and management activities, it is assumed that: (1) the Program’s LRP includes defined actions that the Program has or will implement to support recovery of the fish species, (2) the LRP will continue to provide guidance for Program activities, (3) participants will take appropriate steps to implement those actions, and (4) actions will be implemented in accordance with the LRP schedule as that schedule may be adjusted. Because actions and accomplishments under the Program and defined in the LRP are intended to support recovery of fish species, those actions can and have provided compliance for ESA section 7 consultations. If the conclusion of a section 7 consultation on a water development or water management project in the Basin is that the project is likely to result in “jeopardy” and/or result in “adverse modification,” the Program recovery actions in the LRP may be used as the RPA to avoid the likelihood of jeopardizing the continued existence of listed fish species or the destruction or adverse modification of designated critical habitat. Program recovery actions can also be used as RPMs to minimize the incidental take and provide compliance with section 9 of the ESA.
- C. Since 1991, releases from Navajo Reservoir have been used to as a recovery action to provide ESA compliance for existing and new water development and management projects

throughout the Basin. In a modification from this historical practice, the CC urges the Service to prioritize uses of nonflow actions over use of Navajo Reservoir to provide RPAs and RPMs when conducting section 7 consultations on new water development and management projects. When considering the use of Navajo Reservoir as an RPA or RPM when conducting section 7 consultations on new water development and management projects, the CC encourages the Service to consider the effects on sustained Navajo Reservoir operations and ensure existing contractual or water right entitlements at or below Navajo Reservoir will not be impaired.

- D. A formal section 7 consultation is required when the federal action agency or agencies responsible for the project determines the proposed action may affect listed fish species or critical habitat (Figure 1). For formal consultations, the Service determines whether a proposed agency action(s) is likely to “jeopardize” the continued existence of a listed fish species and/or result in “destruction or adverse modification” of designated critical habitat. If the Service determines that a water development or water management project in the Basin is likely to have one or both of these effects, the recovery actions in the LRP may serve as the RPA to avoid the likelihood of jeopardizing the continued existence of listed fish species or the destruction or adverse modification of designated critical habitat. To evaluate whether the Program can provide an RPA or RPM for a project under consultation, the Service will review the Program’s progress towards recovery pursuant to the Service’s biennial Sufficient Progress Report, existing or planned LRP activities, and any LRP activities that have been or can be completed prior to the implementation of a new water development or management project. 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 and non-Program actions throughout the Basin. 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. Specifically, whether progress toward recovery and LRP activities can or continue to provide an RPA or RPM will be assessed in view of:

Whether Program activities have, or will result in, a measurable positive population response by the fishes, a measurable improvement in habitat for the fishes, legal protection of flows needed for recovery, or a reduction in the threat of immediate extinction;

1. The status of fish populations;
 2. Adequacy of flows; and,
 3. Magnitude of the project’s impact including, but not limited to, contaminant and fish migration impacts.
- E. If the Service finds during a section 7 consultation that Program and non-Program accomplishments are sufficient to avoid “jeopardy” and/or “destruction or adverse modification,” the BO for the project under consultation will identify the actions and accomplishments of the Program that support the Program serving as an RPA (Figure 1).

1. For existing water development and management projects, LRP activities will serve as the RPA if they are completed according to the schedule identified in the LRP, as amended.
 2. For new water development and management projects, any new LRP activities that may be required to avoid jeopardy will serve as an RPA if they are completed before the impact from the project occurs.
- F. If progress towards recovery in the basin has not been sufficient and/or if LRP activities are not adequate to serve as the RPA or have not previously been considered and need to be added, the Service will provide written notification to the CC describing activities that could be incorporated into the LRP in order for the LRP to adequately serve as the RPA (Figure 1). The CC can then decide whether to revise the LRP to include those activities. However, coordination with the CC cannot alter the time frame for the conclusion of a section 7 consultation.
- G. An incidental take statement will be included in all BOs (Figure 1). All incidental take statements identify RPMs necessary to minimize take. To determine whether the Program can provide these RPMs, the Service will review existing, scheduled, and new activities in the LRP. If there are Program activities that can serve as the RPMs, the BO will then detail which activities can serve as RPMs to minimize take (Figure 1).
1. For existing water development and management projects, these LRP activities will serve as the RPMs if they are completed according to the schedule identified in the LRP, as amended.
 2. For new water development and management projects, any new LRP activities needed may serve as the RPMs so long as they are completed before the impact from the project occurs.
- H. Activities required as RPMs to minimize take that are not listed in the LRP either as occurring, scheduled, or planned for implementation prior to the impacts from the new project occurring, will be provided by the Service to the CC in writing for potential incorporation into the LRP (Figure 1). As stated previously, Service coordination with the CC cannot alter the time frame for the conclusion of a section 7 consultation.
- I. If the CC does not wish to incorporate actions to serve as RPAs or RPMs into the LRP, and whereby the Service will work with the federal agency or agencies and water project sponsors to ensure compliance with section 7 consultation procedures. Many of these procedures are detailed in the “Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under section 7 of the Endangered Species Act ESA section 7 Consultation Handbook (1998)” and other more recently published guidelines. The Service will work with the federal action agency or agencies and project sponsors during consultation to attempt to identify mutually agreeable opportunities to minimize impacts. The CC recognizes that: (1) it is the responsibility of the federal action agency to determine if the action may affect listed species or critical habitat, and (2) it is the Service's responsibility to make a determination in its BO as to whether jeopardy to any species and/or

destruction or adverse modification of critical habitat will occur and to identify RPAs and RPMs.

- J. The Service has ultimate authority and responsibility for determining whether the Program provides an RPA or RPM and final authority over what constitutes an RPA or RPM. The Service retains the authority for determining the content of its BO issued under section 7 of the ESA.
- K. 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 BO are “the Services' non-binding suggestions resulting from formal or informal consultation that: (1) identify discretionary measures a Federal agency can take to minimize or avoid the adverse effects of a proposed action on listed or proposed species, or designated or proposed critical habitat; (2) identify studies, monitoring, or research to develop new information on listed or proposed species, or designated or proposed critical habitat; and (3) include suggestions on how an action agency can assist species conservation as part of their action and in furtherance of their authorities under section 7(a)(1) of the Act [50 CFR §402.02].” The Program may be used to fulfill conservation recommendations provided by the Service to a federal action agency. However, compliance with section 7 is the responsibility of federal agencies.
- L. The Program will be responsible for monitoring implementation of all Program actions including those identified as an RPA or RPMs in BOs, and for reporting results to the Service on an annual basis.

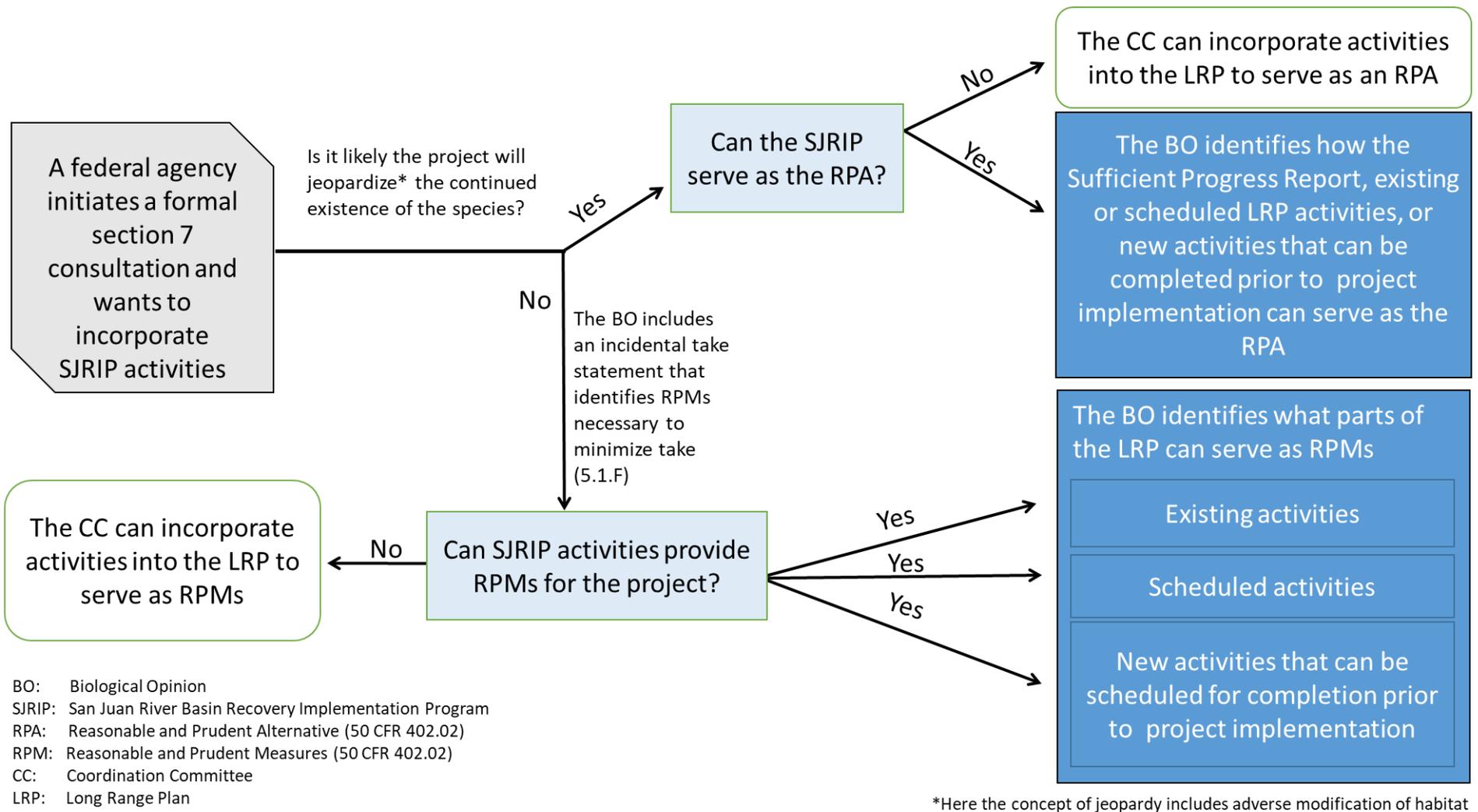


Figure 1. This flow chart applies to water development and management projects in the San Juan River Basin that rely on the San Juan River Basin Recovery Implementation Program (Program) for ESA compliance purposes and identifies decision points and information used to determine whether the Program can serve as a reasonable and prudent alternative or reasonable and prudent measure as part of a formal section 7 consultation on water development projects or management projects in the San Juan River Basin.

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 LRP review per Appendix A to the LRP and all parties to the Program, including the Service, will make recommendations to update the LRP, if needed. If the Service concludes, at any time and independently from any consultation, that the Program is not implementing actions on schedule and that this may impact the ability of the Program to provide the RPAs or RPMs as listed in a BO, the Service will provide a written assessment to the CC. The assessment will include the Service's recommendations for corrective actions. The CC, in cooperation with the BC, 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 the RPAs or RPMs. The Program requires the Service prepare a biennial written "Sufficient Progress" report assessing the Program's progress toward Colorado pikeminnow and razorback sucker recovery and the Program's ability to provide ESA compliance for the San Juan River Basin water development and management projects. These progress reviews will include analysis of any new BO relying on an RPA or RPMs provided under the Program.

6.0 Minor Depletion Allowance

At the initiation of the Program in 1992, an annual aggregate of 3,000 acre-feet (af) was set aside for small individual water uses as a minor depletions account. The Service consulted on approximately 58 "minor depletions" from March 1992 to December 1998 when the aggregate depletion total reached the 3,000 af ceiling of this initial minor depletions account. After the initial minor depletions account was closed, the Service issued "Intra-Service Section 7 Consultation for Minor Water Depletions of 100 Acre-feet or Less from the San Juan River Basin" on May 21, 1999 (Service 1999). This opinion provided for a second cumulative total of 3,000 acre-ft per year (af/yr) of new minor depletions in the Basin. The Service issued concurrence letters and memos to include new minor depletions under the umbrella of the second minor depletions account opinion. In a June 27, 2005 memo, the Service extended the 5-year term of this opinion indefinitely until the 3,000 af/yr threshold is reached (Service 2005). The minor depletion allowance increases the efficiency of, and streamlines, the section 7 process, benefitting water development and water management projects included in the BO on minor depletions, while protecting the listed and native fish community.

The following guidelines will be used by the Service in conducting section 7 consultation on new minor depletions under the May 21, 1999 BO (Service 1999):

- A. A minor depletion is defined as a depletion of 100 af/yr or less. Previously, some depletions > 100 af/yr were included in the minor depletion account but they have subsequently been removed and considered "major depletions."
- B. In rendering BOs on federal actions resulting in minor depletions, the Service will consider all new information concerning impacts and the status of the listed fish 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 of critical habitat

or minimize impacts of any incidental take.

- C. 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 May 21, 1999 BO (Service 1999) may result in a total annual depletion of not more than 3,000 af/yr.
- D. The Service will review each proposed federal action for consideration under the May 21, 1999 BO (Service 1999) and utilize that BO to facilitate consultation so long as a proposed depletion is not larger than 100 af/yr, fits within the 3,000 af/yr ceiling and does not compromise the purposes for which the minor depletion opinion was issued.
- E. Once the 3,000 af/yr limit is reached for new depletions under the May 21, 1999 BO (Service 1999), the Service will assess the effects of further minor depletions on listed fish species and issue an opinion to cover further minor depletions, if necessary and appropriate.
- F. Depletions that were in existence as of October 25, 1991, the date of the Animas-La Plata Project BO (Service 1991), 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.

7.0 Reinitiation of Consultation

- A. This section describes the process of reinitiation of consultation on water development and water management projects for which the Program is providing either an RPA to avoid jeopardy or RPMs to minimize incidental take.
- 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 take 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 BO.
 - 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 CC. Program participants will attempt to identify actions from the LRP that can be implemented to ensure that, in the reinitiated consultation, the Program continues to serve as either the RPA or provides RPMs. If the Program cannot implement actions to serve as the RPA or provide RPMs, 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 completion of consultation, as determined solely by the Service:

1. If the amount or extent of take 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 an additional RPA or RPMs 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 fish 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 the RPA or as RPMs may no longer be effective or appropriate. These situations may include, but are not limited to:
 - a. specified recovery actions are determined to be infeasible; and/or
 - b. significant new information about the needs or population status of the fishes becomes available.

The Service will notify the CC when such a situation is foreseeable or occurs. If the CC becomes aware of such a situation before the Service does, the CC will notify the Service. The CC will work with the Service to evaluate the situation and develop the most appropriate response to restore the Program as an RPA or to provide RPMs, such as adjusting the LRP so the proposed project by the action agency can be provided with ESA compliance, 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 fish species and/or critical habitat is strictly a Service responsibility.

If the Program can no longer serve as RPA or RPM, the Service will develop an RPA or RPM, if available, with the federal action agency(ies) and the project sponsor. In this situation, the RPA or RPM 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 project is subsequently modified in a manner that causes an effect to the listed fish species or critical habitat that was not considered in the BO. If a project is modified in such a manner as to require reinitiation of consultation, the Service may identify additional or different action items from the LRP if needed to serve as the RPA or as RPMs for the project where possible and may seek input from the Program's BC.

4. If a new fish species is listed or critical habitat designated that may be affected by the identified action. The Service will make recommendations to the CC 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 incidental 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 the RPA or to provide RPMs. If the Program is not or cannot be amended such that it continues to provide an RPA or RPM, then the Service will develop any RPAs or RPMs independently.

If the Program can no longer serve as RPA or RPM, the Service will develop an RPA or RPM, if available, with the federal action agency(ies) and the project sponsor. In this situation, the RPA or RPM 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.

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

8.0 Modification of Principles

These Principles have been adopted by the CC. 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 CC. 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 Final Program Document" (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 projects 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 CC in writing, with recommendations for bringing the Principles into compliance with the ESA.

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