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Comments on NISP DEIS Treatment of Nebraska Threatened and Endangered Species

Summary

According to the U.S. Fish and Wildlife Service in its “Biological Opinion on the Platte River Recovery Implementation Program”:

The continued existence of the whooping crane (*Grus americana*), interior least tern (*Sterna antillarum*), northern Great Plains population of the piping plover, (*Charadrius melodus*), and pallid sturgeon (*Scaphirynchus albus*), collectively referred to as “the target species,” depends on protecting and restoring the central and lower Platte River ecosystem. The existing degraded habitat in the Platte River ecosystem has resulted primarily from extensive development of Platte River basin water resources. The existing trends and conditions of Platte River habitat and ecosystem processes, and the status of the populations of the four target species lead the U.S. Fish and Wildlife Service to conclude that the survival and future recovery of these species cannot be ensured without significant changes made to improve current environmental conditions. (USFWS 2006a, p.11)

Extensive research has proven that recovering these four federally-listed threatened or endangered species depends on restoring the Platte River and its adjacent lands to ecological health and integrity (Committee 2004). Above all, this must involve restoring the Platte’s depleted annual water flows and restoring, as far as is feasible, the historical timing of high and low flows (Committee 2004; USGS 2006).

As USFWS notes, upstream water depletions (“developments”) have been the main factor in degrading the Platte River ecosystem and bringing these species to the edge of extinction. Further water depletions are the main threat to their survival. Loss of “pulse flows” and high flows would also undermine recovery efforts (Anderson 2008; Committee 2004).

We contend that if permitted, NISP will cause additional depletions in the already severely degraded Platte River Basin. It will also likely deplete pulse flows and high flows. This will further jeopardize the existence of the endangered whooping crane, interior least tern and pallid sturgeon and the threatened piping plover, by adversely impacting their designated critical habitat in central Nebraska.

Three of these species are on the brink of extinction. Extinction is forever. For these reasons, the Corps should deny a permit for the NISP project.

NISP's Admitted Harms

Proponents of NISP admit that their project will harm the Nebraska “target species.” In the NISP EIS “Biological Assessment,” “Impacts to Federally Listed Species in Nebraska” (section 6.6), they state:

Operation of the Proposed Project will result in 37,125 AF of new depletions to the South Platte River on an average annual basis. . . . The Proposed Project is designed to deliver a firm annual yield of up to 40,000 AF to the Participants Approximately 37,125 AF of the 40,000 AF of firm annual yield will be consumed annually (depletions) and the remainder of the yield will return the Poudre and South Platte rivers as return flows. (ERO Associates 2007, pp. 42-43)

In appendix B to the DEIS, the “Biological Assessment,” NISP proponents admit: “The Proposed Project operations qualify as a new surface water or hydrologically connected ground water activity that may affect the quantity or timing of water reaching the associated habitats of the [Nebraska] target species” (ERO Associates 2007, p.45).

Table 6 of the Biological Assessment, “Preliminary determination of effects to federally listed species from operation of the proposed project,” states that because of these depletions, NISP is “likely to adversely affect” the least tern, pallid sturgeon, piping plover, whooping crane and Western prairie fringed orchid (ERO Associates 2007, pp.49-50).

The U.S. Fish and Wildlife Service concurs that NISP will harm the Nebraska “target species.” In their “Biological Opinion” on NISP, received by the Corps of Engineers October 5, 2007, the Service concurs that the water depletions associated with the NISP project are likely to reduce flows on the Platte River through Nebraska and that therefore, NISP will adversely affect “the target species” (DEIS, Appendix B, “Biological Opinion,” p. 22).

Platte River — R.I.P.

However, project proponents and federal regulators hasten to assure us that these harms to Nebraska’s suite of “target species” are O.K. Although NISP will harm these species, these harms will not “jeopardize” the species continued existence.

According to the DEIS’s “Biological Assessment”: “The Proposed [NISP] Project Participants intend to participate in the Platte River Recovery Implementation Program [hereafter, Platte River—R.I.P] which is “implementing actions designed to assist in the conservation and recovery of the whooping crane, least tern, northern Great Plains

population of the piping plover, and the pallid sturgeon” (DEIS “Biological Assessment,” p.43).

According to USFWS, the water depletions caused by NISP are “being addressed” by the “Colorado Plan for Future Depletions,” a component of Platte River—R.I.P, so they will not jeopardize the “target species” (DIES “Biological Opinion,” pp.22-23).

According to the DEIS’s “Biological Assessment”: “The Corps [of Engineers] intends to rely on the provisions of the Program [Platte River—R.I.P] to provide ESA compliance for potential impacts to the target species and whooping crane critical habitat” (p.44).

In sum, Platte River—R.I.P is presented as a “get out of jeopardizing endangered species almost free” card, not just for NISP proponents, but for anyone and everyone with a water development scheme in the Platte River basin in Wyoming, Colorado or Nebraska. It is “almost free,” because if developers are willing to pay the small amounts necessary to participate, they can deplete Platte River water with impunity.

We disagree. We do not believe Platte River — R.I.P represents sufficient mitigation for the water depletions and associated harms to the Nebraska “target species” that NISP proponents and federal regulators admit NISP will cause.

Once again, according to the DEIS, NISP “will result in 37,125 AF of new depletions to the South Platte River on an average annual basis.” But under Platte River — R.I.P., NISP proponents will not be required to pay for restoring the full 37,125 AF of depletions their project will cause. Hence the NISP project represents a net harm to the Nebraska “target species”—three of which are so far gone that they are listed as “endangered”: in imminent danger of extinction.

The DEIS states:

the State of Colorado is in compliance with its obligations under the [Platte River — R.I.P] Program . . . Accordingly, the impacts of the Proposed Project to the target species, whooping crane critical habitat, and other listed species in the central and lower Platte River addressed in the PBO are covered and offset by operation of Colorado’s Future Depletions Plan as part of the Program. The Corps intends to rely on the provisions of the Program to provide ESA compliance for potential impacts to the target species and whooping crane critical habitat. Toward this end, the Corps is forwarding with this BA a Recovery Agreement signed by the Applicant (Northern Colorado Water Conservancy District). (DEIS, “Biological Assessment,” pp. 44-45).

However, the state of Colorado has so far done little to ensure an increase of water flowing into the Platte River in Nebraska. It is only “in compliance with its obligations” under Platte River — R.I.P. because those obligations are so weak.

Furthermore, the “recovery agreement” proposed by the Corps (appendix D) does not commit NISP proponents to actions that will fully mitigate the harms of NISP to the Nebraska target species. This largely meaningless gesture does not deserve the name of “recovery agreement.”

Main Insufficiencies of Platte River — R.I.P.

The NISP DEIS makes it clear that NISP proponents intend to rely solely on the provisions of the Platte River — R.I.P to provide ESA compliance for any potential impacts that NISP depletions will cause the target species and their critical habitat in the Platte River Basin (DEIS “Biological Assessment, pp. 43-44).

But relying solely on Platte River — R.I.P to permit NISP “is to enable existing water-related activities to continue to operate much as they have in the past, and allow new water-related activities in the Platte River Basin” that will further harm the target species (USFWS 2006a, p 222). The very water-depleting “developments” that have severely degraded these endangered species’ critical habitat will be allowed to continue.

The Platte River — R.I.P’s own EIS sugarcoats the damaging effects that future water projects such as NISP will cause, even while explaining how these very kinds of water projects have, in the past, “likely jeopardized the continued existence of the federally listed whooping crane, least tern, pallid sturgeon and the threatened piping plover and destroy or adversely modify whooping crane critical habitat along the Platte River in Nebraska” (USFWS 2006a, p. 16). The USFWS Biological Opinion on the Platte River — R.I.P goes into great detail about the many adverse effects such water depletions have had on the “target species” and their habitat (USFWS 2006a, 222ff.; see also Committee 2004).

As “mitigation” for allowing these proven, devastating harms to continue, the Platte River — R.I.P. offers an untested three-state compact that is supposed to bring more water and ecologically better flows to the Platte River in Central Nebraska. The people in charge of assuring it does so are primarily political appointees of the pro-development state governments, with a strong vested financial and ideological commitment to further water developments to fuel ever more demographic and economic growth (USFWS 2006b). This is a classic case of the foxes watching the henhouse.

Officials at USFWS, the Army Corps of Engineers and other federal environmental agencies are supposed to monitor the implementation and success of Platte River — R.I.P. Participants are scheduled to take a comprehensive look at the project’s success— in a dozen years. In the meantime, our discussions with these federal officials suggest they are simply “signing off” on new water development projects in the basin, now that there is a program in place.

New water depletions are permitted now, because of the existence of Platte River — R.I.P. We will see, in a dozen years, whether Platte River — R.I.P. is working. What is wrong with this picture?

One problem is that it isn't clear that anyone is paying sufficient attention to the total amount of new water depletions that will be permitted under this program. So even if Platte River — R.I.P. succeeds in providing some new sources of water for the lower Platte, these improvements could be overwhelmed by the new harms that the program permits.

Another problem is that if future reviews show that Platte River — R.I.P. is not working, the damage caused by the new depletions that it allows will probably not be reversible. It is unlikely that new dams and diversions will be decommissioned, or that new water projects that are very far along will be halted.

Platte River — R.I.P. has only been in operation since January 1, 2006 and the program will first be evaluated for its effectiveness in a dozen years. By that time, all the water development that is possible in the Platte River Basin (and some that isn't) will probably have been permitted. But extinction is forever.

It is premature to permit NISP before the Platte River — R.I.P. has shown any success in improving water flows along the Platte River in Nebraska.

It is premature to permit NISP before the three state's making up the "compact" have shown they can reject damaging water projects that take more water out of the river than is possible without damaging critical habitat for the target species.

If the three states that entered into Platte River — R.I.P. were serious about improving conditions for the Nebraska target species, they would focus, for now, solely on those parts of the project designed to improve flows on the lower Platte. Only after these efforts showed proven, long-term success might it be permissible to carefully allow some new water depletions.

By instead rushing to lock in many new water depletions now before they have improved conditions in and along the Platte River in Nebraska, these three states clearly show their real priorities: more growth, regardless of the environmental consequences.

The states and the federal government here fail to meet their legal obligations to protect threatened and endangered species under the Endangered Species Act. The ESA does not countenance allowing real, undeniable, current harms on the basis of hypothetical, doubtful, future benefits to threatened and endangered species.

Further Insufficiencies of Platte River — R.I.P.

There are several further important flaws in relying on the Platte River — R.I.P. for ESA compliance:

- NISP's proponents plan to fill Glade Reservoir with "unappropriated" runoff of the Cache la Poudre River. NISP, if permitted, would take the peak flows from the

Poudre River, which would reduce peak flows on the South Platte River (Anderson 2008). According to U.S. Fish and Wildlife Service hydrologist Don Anderson, the Platte River — R.I.P depends on these peak flows for their Tamarack Project located near the Colorado-Nebraska state line (Anderson 2008). This project retimes these flows to increase flows in the lower Platte Basin in the late summer, to support the needs of endangered species in their critical habitat. Without peak flows to fill the recharge basins at the Tamarack site, the success of the Platte River — R.I.P cannot be guaranteed.

- Peak flows – flows that will be removed from the lower Platte River by NISP – recharge wetlands and wet meadows that support food for the whooping crane and other wildlife, such as insects, crayfish, frogs, small fish and aquatic vegetation ^{3 pg 85}. With fewer wetlands that provide a source of food and shelter necessary for the whooping crane and other endangered and threatened species, the survival of these species is jeopardized (Committee 2004).
- Platte River — R.I.P depends for much of its future increased flows on buying up (and drying up) water from irrigated Nebraska farms (USFWS 2006b). But Nebraskans may not be willing or able to sell enough water to offset the depletions caused by NISP—and by the many other water schemes currently being hatched in Colorado and Wyoming.
- The Platte River Basin is over-appropriated and Colorado has struggled to provide even minimum flows to Nebraska in some years. If NISP depletions cannot be mitigated with water from Nebraska, it isn't clear that Colorado will be able provide these mitigating flows.
- Current and future drought conditions that are certain to occur could make offsetting ongoing NISP depletions difficult or impossible to accomplish in drought years.
- The Platte River — R.I.P EIS notes that adverse affects of global warming could reduce flows in the Platte and could have negative impacts on endangered species (USFWS 2006a, p.95). Recent studies suggest that global warming is likely to significantly reduce rainfall and water availability in the central Rockies, including in the upper Platte River basin. But the potential impact of global warming is not addressed in the NISP DEIS.
- It is possible the baseline depletions assumed by the Platte River — R.I.P have not accounted for the delayed affects from groundwater pumping in eastern Colorado and Nebraska (USGS 2006). If NISP is permitted before these depletions are realized and new growth becomes dependant on its water, there might be no way to compensate for these miscalculations.

- NISP operations will diminish the quality of the water in the Poudre River (Ayres Associates 2008). This could harm water quality further down the Platte River Basin. This in turn could negatively affect endangered and threatened species in Nebraska.

Conclusion

NISP proponents, the USFWS and the Army Corps of Engineers all agree that if NISP is built, it will likely adversely affect the endangered whooping crane, the endangered least tern, the endangered pallid sturgeon and the threatened piping plover. Furthermore, in a warming world with increasingly scarce and fought-over water, harms to these species' designated critical habitat in central Nebraska may be impossible to reverse.

Once again, according to the U.S. Fish and Wildlife Service, the continued existence and recovery of these threatened and endangered species depends on protecting and restoring water flows to the central and lower Platte River ecosystems. The survival of these species cannot be ensured without significant changes made to improve current environmental conditions (USFWS 2006a, p.11; Committee 2004).

But NISP represents more of the same. It will cause water depletions, remove peak flows, and in general, hasten the extinction of these "target species." For these reasons, the Corps of Engineers should deny a permit for the NISP project.

Citations

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