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By the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held

AUG 20 1996



MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Debra Man
for
EXECUTIVE SECRETARY

9-13

August 6, 1996

To: Board of Directors (Committee on Legislation--Information)
(Water Planning and Resources Committee--Information)
From: General Manager
Submitted by: *for* Debra C. Man, Chief
Planning and Resources
Subject: Lower Colorado River Multi-Species Conservation Program Update

Timothy D. ...
Robert W. Schermyp

RECOMMENDATION

For information only.

EXECUTIVE SUMMARY

A Memorandum of Agreement (MOA) to develop a species conservation program for the Lower Colorado River was executed on August 2, 1995, on behalf of the U.S. Department of the Interior, and water, hydroelectric power, and wildlife management agencies in Arizona, California, and Nevada. The MOA specified a three-year period for development of a multi-species conservation plan (MSCP) and provided the participants with assurances that the U.S. Fish and Wildlife Service (Service) and the Bureau of Reclamation (Reclamation) would work with the States through the MSCP process to meet the requirements of the Endangered Species Act (ESA) while accommodating water and power needs. Several external developments have until recently slowed progress toward initiating planning activities for the Lower Colorado River Multi-Species Conservation Program (Program). In December 1995 and January 1996, four Notices of Intent to Sue letters were sent by two environmental organizations (the Defenders of Wildlife and Southwest Center for Biological Diversity) raising legal and procedural concerns with the MOA for development of the Program. Their primary concerns focused on the decision to delay the ESA section 7 consultation on the effects of lower Colorado River operations on endangered species, and the granting of interim regulatory assurances relative to the requirements of the ESA by the MOA. In addition, several water and power entities were hesitant to fully commit to development of the Program absent a federal agreement to share the costs of the Program.

A strategy for allaying the concerns of the environmental organizations, ensuring regulatory compliance, and proceeding with efforts to initiate planning activities for the Program has been developed. The strategy entails:

- (1) preparation and execution of a Memorandum of Clarification (MOC) to prevent misinterpretation of the August 1995 MOA;
- (2) Reclamation completing its biological assessment and proceeding with formal section 7 consultation;
- (3) a commitment from the Defenders of Wildlife, in exchange, to support the Program process and withdraw its Notice of Intent to Sue as it applies to the Program;
- (4) execution of a cost-sharing agreement between the U.S. Department of the Interior and the Lower Colorado River Multi-Species Conservation Program Steering Committee;
- (5) preparation of Requests for Proposals (RFPs) to support development of the conservation plan; and
- (6) implementation of interim conservation measures during the planning period.

DETAILED REPORT

A Memorandum of Agreement (MOA) to develop a species conservation program for the Lower Colorado River was executed on August 2, 1995, on behalf of the U.S. Department of the Interior, and water, hydroelectric power, and wildlife management agencies in Arizona, California, and Nevada¹. These agencies are all represented on the Lower Colorado River Multi-Species Conservation Program Steering Committee (Steering Committee). In a letter to your Board dated May 23, 1995, you were informed of the Steering Committee's progress and the terms of the MOA. The MOA specified a three-year period for development of a multi-species conservation plan (MSCP) and provided the participants with assurances that the U.S. Fish and Wildlife Service (Service) and the Bureau of Reclamation (Reclamation) would work with the States through the MSCP process to meet the requirements of the Endangered Species Act (ESA) while accommodating water and power needs. In September, 1995, based on the MOA, Reclamation and the Service agreed to coordinate endangered species planning efforts with the Steering Committee and to delay completion of Reclamation's section 7 consultation on the effects of Lower Colorado river operations and maintenance activities until completion of the MSCP.

In response, several environmental organizations (American Rivers, Arizona League of Conservation Voters, Defenders of Wildlife, Environmental Defense Fund, Grand Canyon Trust and Southwest Center for Biological Diversity) raised specific legal and procedural concerns over the MOA and the decision to delay the section 7 consultation. In December, 1995,

¹ Arizona Department of Water Resources, Arizona Game and Fish Commission, Colorado River Board of California, California Department of Fish and Game, Colorado River Commission of Nevada, Nevada Division of Wildlife.

and January, 1996, Defenders of Wildlife (on behalf of several of the organizations listed above) and the Southwest Center for Biological Diversity sent a total of four Notices of Intent to Sue, pursuant to the requirements of the ESA, to the State and federal participants on the Steering Committee requesting immediate reinitiation of the section 7 consultation and revocation of the MOA.

Following several meetings among the State participants and with the U.S. Department of Justice and the Department of the Interior Solicitor's Office, the Steering Committee has developed a strategy to resolve the concerns of the environmental community and to ensure continuing progress of the MSCP. The strategy includes: (1) development of a Memorandum of Clarification (MOC, Attachment 1), acceptable to all parties, to clarify the terms of the August, 1995, MOA; (2) reinitiation of the federal Lower Colorado River section 7 consultation; and (3) a commitment from Defenders of Wildlife to support development of the MSCP and withdraw its Notice of Intent to Sue, upon execution of the MOC.

The MOC was signed by the last of the seven original signatories to the MOA on July 17, 1996. The MOC reiterates the long-term goal of developing a comprehensive, ecosystem-based conservation strategy, and seeks to allay the concerns of the environmental organizations that the Service has committed to pre-determine the outcome of regulatory actions under the Endangered Species Act. In exchange, Defenders (and the organizations it represents) has agreed to withdraw its Notice of Intent to Sue as it applies to the MSCP, and support and participate in the MSCP process.

Reclamation and the Service entered into a consultation agreement on March 29, 1996, which provides for public review of Reclamation's draft biological assessment (the comment period closed on May 15) and the Service's draft biological opinion (from November 30, 1996 to January 15, 1997). Metropolitan submitted comments on the draft biological assessment focusing on the consultation's environmental baseline, geographic and biological scope, and findings of potential affect for several endangered species and their critical habitats. Reclamation plans to deliver the final biological assessment to the Service in August. Completion of the final biological opinion by the Service is expected by April 15, 1997. In the biological opinion, the Service will conclude whether existing operations and maintenance activities result in either a "non-jeopardy" or "jeopardy" effect on the subject species (i.e., will not or will jeopardize the continued existence of any threatened or endangered species). Additionally, the Service will determine whether an incidental taking of listed species or adverse modification of critical habitat is expected to occur. If an incidental taking or jeopardy is expected, the Service will develop reasonable and prudent measures (RPMs) or alternatives (RPAs) for Reclamation's implementation. A jeopardy opinion could have a dramatic effect on Reclamation's operations and maintenance activities, with concomitant effects on water and hydroelectric power users.

The Service has committed in the MOC to consider implementation of interim conservation measures (ICMs) developed by the Steering Committee and the status of MSCP planning efforts when developing RPMs or RPAs. To the extent the Service is able to rely on the cooperative MSCP process and implementation of ICMs for its RPAs/RPMs, it can avoid requiring other actions which could impact water and power operations. To ensure that the

MSCP has progressed sufficiently to serve as the basis for potential RPMs or RPAs in the section 7 consultation, the Steering Committee agreed on July 18 to proceed with the \$4.5 million, three-year plan development process and initiate planning efforts. This decision was based on the recent signing of the MOC and a 50-percent federal cost-sharing agreement between the U.S. Department of the Interior and the Steering Committee. The latter agreement was executed on June 26 by Department of the Interior Assistant Secretary for Water and Science, Patricia Beneke and Gerald R. Zimmerman, Chairman of the Steering Committee. The attached cost-sharing agreement (Attachment 2) indicates that \$800,000 of joint funding is available to initiate planning efforts in Fiscal Year 1996, including a \$200,000 National Fish and Wildlife Foundation matching grant obtained through appropriated Reclamation funds. Draft Requests for Proposals for a Program Administrator, a Program Facilitator, and a Plan Development Consultant are currently circulating for review by the Steering Committee.

The three States have committed to fund 50-percent of the three-year \$4.5 million budget, for a total of \$2.25 million. Within the States' budget, 50-percent (\$1.125 million) is to come from California, 30-percent (\$675,000) from Arizona, and 20-percent (\$450,000) from Nevada. The Six Agency Committee has already collected a total of \$935,000 of California's obligation, of which Metropolitan has provided a total of \$391,000 to date. The Six Agency Committee is including an additional \$175,000 in the Fiscal Year 1996-97 budget for the Program, with Metropolitan providing between \$80,000 and \$100,000 of the anticipated budget. Metropolitan's contribution overall should amount to approximately 10-percent of the \$4.5 million effort.

MRM:jpa

Attachments

MRMMLSP/Board

MEMORANDUM OF CLARIFICATION

This Memorandum is written to clarify the meaning of the Memorandum of Agreement for Development of a Lower Colorado River Species Conservation Program (MOA), executed on August 2, 1995, and attached hereto (Attachment 1). Insofar as the language of the MOA may be inconsistent with this Memorandum of Clarification (MOC), the latter document shall control.

Having reviewed the MOA, and in order to promote and move forward the development of said Program, the signatories to the MOA and this MOC agree that the MOA was intended and shall be construed to mean that the purpose of the MOA is to develop a Multi-Species Conservation Program (MSCP), which will:

- conserve habitat and work toward the recovery of "included species" within the 100-year floodplain of the Lower Colorado River (LCR), pursuant to the Endangered Species Act (ESA) (see species list attached hereto, Attachment 2), and attempt to reduce the likelihood of additional species listings under the ESA; and
- accommodate current water diversions and power production and optimize opportunities for future water and power development, to the extent consistent with law.

The parties acknowledge that there are now or may be federal activities within the 100-year floodplain of the LCR which will be subject to section 7 consultation under the ESA. The parties intend that:

During section 7 consultation on these actions, the U.S. Fish and Wildlife Service shall review and consider (1) conservation measures developed by parties participating in the MSCP, and (2) the status of MSCP development, when developing any reasonable and prudent alternatives and reasonable and prudent measures (RPAs and RPMs)¹. The parties hereto recognize that other measures may be considered when developing RPAs and, or, RPMs if, in the judgment of the Fish and Wildlife Service, items (1) and (2) do not satisfy the provisions of the ESA.

Any language in the MOA referring to the MOA or other planning activities as providing "regulatory assurance" or "interim regulatory assurances" under section 7 of the ESA is hereby clarified to remove any implication of guarantee of exemption for the signatories from the requirements of the ESA.

The signatories to the MOA and MOC reaffirm their commitment to compliance with all applicable laws, as stated in Articles II and V of the MOA:

¹ As defined in the ESA (16 U.S.C. §1531 et seq.) and its implementing regulations (50 CFR §402).

"Signatories to the MOA recognize each has statutory responsibilities which cannot be delegated, and the MOA does not and is not intended to abrogate any of those statutory responsibilities." [Article II]

"The MOA is subject to all applicable federal and state laws and nothing herein shall be construed to alter, amend or affect existing laws." [Article V]

MEMORANDUM OF CLARIFICATION SIGNATORIES

United States of America

Lin E. Toxin
United States Department of the Interior

5/29/96
Date

State of Arizona

Rita P. Pearson
Arizona Department of Water Resources

7/17/96
Date

Duane S. Shoupe
Arizona Game and Fish Commission

6-27-96
Date

State of California

Patricia Wolf
California Department of Fish and Game

6/12/96
Date

Mark R. Zimmerman
Colorado River Board of California

6-12-96
Date

State of Nevada

Jim Tompkins
Colorado River Commission of Nevada

7/9/96
Date

William B. Molini
Nevada Division of Wildlife

6/7/96
Date

1
2
3 **LOWER COLORADO RIVER**
4 **MULTI-SPECIES CONSERVATION PROGRAM**

5
6 **AGREEMENT**

7
8 BETWEEN THE

9
10 **UNITED STATES**
11 **DEPARTMENT OF THE INTERIOR**

12 AND THE

13
14 **LOWER COLORADO RIVER**
15 **MULTI-SPECIES CONSERVATION PROGRAM**
16 **STEERING COMMITTEE**

1 costs. The Department of the Interior shall expend only non-reimbursable funds for the
2 Program.

3 2.4 By this Agreement, the Parties desire to establish funding commitments
4 and arrangements and provide for certain other actions in support of the Program during those
5 fiscal years.

6 IN CONSIDERATION of the above recitals and the mutual covenants herein contained,
7 the Parties hereto agree as follows:

8 **3. EFFECTIVE DATE**

9 This Agreement shall become effective on the effective date of an agreement,
10 approved by the respective governing authorities of, and entered into on or before September
11 30, 1996, among, the entities representing the states of Arizona, California, and Nevada, by
12 which those states agree to collectively fund 50 percent of the costs of developing the Program
13 and implementing certain interim conservation measures during fiscal years 1996 through 1999,
14 and to otherwise carry out the applicable provisions and purposes of this Agreement.

15 **4. COST-SHARING FOR FISCAL YEAR 1996**

16 4.1 For fiscal year 1996, the Bureau of Reclamation ("Reclamation") shall
17 reserve for the Program 300 thousand dollars (\$300,000) for endangered species conservation
18 activities to be disbursed for the following specific purposes as follows:

19 4.1.1 Two-hundred thousand dollars (\$200,000) for the development of
20 the Program, if the nonfederal entities provide a 2:1 match of 400 thousand dollars (\$400,000).

21 4.1.2 One-hundred thousand dollars (\$100,000) for interim conservation
22 measures that support the purposes of the Program.

23 4.2 For fiscal year 1996, the Fish and Wildlife Service shall reserve 100
24 thousand dollars (\$100,000) for certain interim conservation measures that support the purposes
25 of the Program.

4.3 This combined federal and nonfederal funding of 800 thousand dollars
(\$800,000) for fiscal year 1996 will initiate the first year of work under the Program. The
federal share of such funding is non-reimbursable.

.....

1 IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed
2 on the day and year first above written.

3 UNITED STATES DEPARTMENT OF THE INTERIOR

4
5 By: Patricia J. Beneke
6 Patricia J. Beneke
7 Assistant Secretary for Water and Science

8
9 By: John G. Rogers
10 acting on behalf of:
11 John G. Rogers, Acting Director
12 Fish and Wildlife Service

13
14 LOWER COLORADO RIVER
15 MULTI-SPECIES CONSERVATION PROGRAM
16 STEERING COMMITTEE

17 By: Gerald R. Zimmerman
18 Gerald R. Zimmerman
19 Chairman