



**Written Statement of
Kara Gillon
Senior Staff Attorney, Defenders of Wildlife
Before the Subcommittee on Water and Power
Committee on Natural Resources
United States House of Representatives**

On H.R. 2515

A Bill to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program in the States of Arizona, California and Nevada, and for other purposes

July 24, 2007

Madam Chairwoman and Members of the Subcommittee, I am Kara Gillon, Senior Staff Attorney with Defenders of Wildlife. Thank you for this opportunity to speak with you today on H.R. 2515, a bill to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program.

Defenders of Wildlife (“Defenders”) is a national, nonprofit membership organization dedicated to the protection of all native wild animals and plants in their natural communities. Headquartered in Washington, D.C., Defenders has field offices in Albuquerque, NM, where I am located, and throughout the Colorado River basin states, in Tucson, AZ, Sacramento, CA, and Denver, CO.

I will ask leave to supplement this with some documents that I am relying on for some of my comments today. Before summarizing our concerns with the Multi-Species Conservation Program, also known as the “MSCP,” and proposed authorizing legislation, I first want to address briefly the Lower Colorado River – how it has been managed over the last seventy years and why the MSCP could do a better job addressing the environmental degradation suffered by the Colorado River and Delta.

We appreciate the effort and resources put into the MSCP. At its inception, Defenders seized on the opportunity presented – long-term, large-scale habitat improvement and species recovery where before there was very little. Unfortunately, the final MSCP provides lesser protections for fewer species over a smaller area.

Ten years ago, the Bureau of Reclamation found in a biological assessment of its historic and ongoing operations that “[H]uman-induced change since the beginning of the century has resulted in an ecosystem having significantly different physical and biological characteristics. Such changes have taken place as a result of the introduction of exotic plants (such as salt cedar), the construction of dams, river channel modification, the clearing of native vegetation for agriculture and fuel, fires, increasing soil salinity, the cessation of seasonal flooding, and lowered water tables.”¹ It is as if man created an entirely different river.

Native wildlife is finding survival in an altered Colorado River basin more difficult. These changed processes no longer naturally sustain riparian forests and meadows, fail to provide young fish access to flooded lands and leave young fish more susceptible to predation by sight-feeding, non-native predators.

The plight of the “Big River Fishes” highlights this extreme ecological degradation. All four fish are listed as endangered under the Endangered Species Act – the Colorado pikeminnow; bonytail; razorback sucker; and humpback chub. The Colorado pikeminnow has been extirpated from the lower basin and is not even considered by the MSCP. The bonytail also has been virtually extirpated from the wild. Razorback sucker populations have declined from 50,000 to 5,000 fish over the last ten years with very small wild populations; they are not self-sustaining. There is only one small population of the humpback chub in the lower basin.

Habitat restoration and fish augmentation performed without regard to the well-known threats to listed species are likely to fail. Years of river restoration efforts have shown us that successful river restoration is critically dependent on understanding and addressing the causes of the river’s decline (Palmer et al., 2006; Aronson & Le Floch, 1996). The restored habitats and stocked fish will continue their decline because the MSCP does not address the root causes of habitat degradation and low fish survival – the impounding, storing, and diverting of the river’s waters without regard to the natural hydrograph that naturally sustains the cottonwood-willow forest, mesquite bosque, and backwaters that harbor razorback suckers, bonytails, southwestern willow flycatchers and other fish and birds, compounded by the stocking of non-native predatory fish.

Success of the conservation plan is also questionable because there are no goals or objectives for habitat restoration. Without goals or objectives, there are no metrics for measuring success. For example, we do not know if cottonwood-willow habitat is successful if we find one southwestern willow flycatcher, a flycatcher nest, or ten flycatchers. We also do not know that mitigation will occur prior to adverse impacts or if permanently lost habitat will be maintained in perpetuity. We also do not know how the MSCP will select habitat creation and restoration sites; thus we do not know if the MSCP will select sites that are off-channel or hydrologically connected to the river.

Lastly, the MSCP purports to ensure the survival of imperiled fish and wildlife for the next fifty years yet fails to address perhaps the largest threat wildlife will face in this century – global warming. In 2004, a report prepared for the Pew Center on Global Climate Change synthesized published

¹ Bureau of Reclamation, DESCRIPTION AND ASSESSMENT OF OPERATIONS, MAINTENANCE, AND SENSITIVE SPECIES OF THE LOWER COLORADO RIVER 83 (1996), available at <http://www.usbr.gov/lc/region/g2000/batoc.html>.

global warming studies and concluded that there was “convincing evidence” that anthropogenic global warming had significantly affected natural systems and that “[t]he addition of climate change to the mix of stressors already affecting valued habitats and endangered species will present a major challenge to future conservation of U.S. ecological resources” (Parmesan & Galbraith, 2004).

In fact, this year, Working Group II of the Intergovernmental Panel on Climate Change (“IPCC”) issued a Summary for Policy Makers which states with medium confidence that 20-30% of plant and animal species assessed in the report have an increased chance for extinction if the average global temperature increases by more than 1.5-2.5° Celsius. According to the IPCC, an increase in temperatures above this range would drastically alter ecosystem structure and functions, species’ ecological interactions, and species’ geographic ranges (IPCC, 2007).

Colorado River fish and wildlife are particularly susceptible to adverse effects because of their concentrated habitat and their location in the Southwest. Global warming is likely to cause temperatures in the American West to increase above levels which increase a species chances for extinction, according to the IPCC. Furthermore, the IPCC predicts with very high confidence that global warming will lead to decreased snow pack, more winter flooding, and reduced summer flows for the mountains of the American West. Global warming effects likely to affect the Colorado River fish include precipitation decreases in the lower-basin by mid-century, early snowmelt runoff in the upper-basin, decreased overall runoff, and increased evaporation rates (Garfin & Lenart, 2007). Therefore, global warming is likely to produce changes in stream flows, precipitation, water temperature, and ecosystem structure which could very well result in an increased probability of fish extinction in the Southwest, such as in the Colorado River (National Assessment Synthesis Team, 2001).

The imperiled status of many of these fish leave them less equipped to adapt to habitat modifications presented by global warming, making the possible effects upon them even more severe and leaving them more vulnerable to extinction. The MSCP is a rare, but foregone, chance to assist wildlife through the looming bottleneck of complex effects of global warming.

To institutionalize the MSCP, as called for in the proposed legislation, may instead present one more challenge to wildlife conservation in the lower Colorado River.

We too face increasing challenges from a highly regulated river system, increasing water use, drought, and climate change. The National Research Council has recently synthesized several studies that tell us historical conditions are no longer a reliable indicator of future conditions, with future droughts exceeding those of recent experience. First, our streamflow record in the basin is only a small subset within a range of greater variability than previously thought. For example, we are learning that although up to 16.5 million acre-feet of water has been allocated to users in the United States and Mexico, the river naturally yields 12.5 million acre-feet to 14.7 million acre-feet of water. In addition, studies show a trend of increasing temperatures across the basin and a reduction in future streamflow (National Research Council, 2007). The MSCP, however, does not confront any of these challenges. For this reason, the success of proposed habitat restoration and fish augmentation is highly uncertain.

In the face of growing challenges, the desire for certainty will increase. To provide the level of certainty contemplated here can only come at the expense of assurances for another – the environment. Instead, we suggest legislation that preserves the Secretary of the Interior’s authority

as “water master.” Think instead in terms of flexibility and resiliency, where mechanisms may be created that create opportunities for all – whether through new opportunities and creative ideas for storage, instream flow, water acquisition programs, or reservoir re-operation. Certainty, whether over water supply or other resources and gained only at the expense of others, will create an untenable and unsustainable condition.

This legislation will have the effect of constraining the Secretary of the Interior at precisely the time we need more opportunities for the Colorado River system. Provisions that codify the Program Documents and No Surprises and direct the Secretary to perform certain functions are inappropriate.

There is no precedent for the constraints placed on the Secretary of the Interior

The legislation proposed here is far, far different from that for other endangered fish programs authorized by Congress. Nearby and oft-cited examples are the Upper Colorado River Endangered Fish Recovery Program and the San Juan River Endangered Fish Recovery Program.

Legislation for the MSCP should only do what may be necessary for federal participation in the program: authorize appropriations; authorize the federal party to acquire interests in land and/or water, accept or provide grants, and enter into contracts and cooperative agreements; and authorize the federal party to carry out aspects of the program. Rather than simply authorize the Secretary’s participation, HR 2515 directs the Secretary to take a certain course of action. Doing so confines the Secretary’s authority as “water master” for the next fifty years.

Moreover, codifying the Program Documents would encourage other programs to emulate this legislative approach despite the fact that key documents – the Implementing Agreement and the Funding and Management Agreement – were not made available for public review and comment.

HR 2515 also constrains future Congresses. The bill contains what is, in effect, a legislative no surprises policy requiring future Congresses to explicitly state if legislation applies to the MSCP, turning traditional legislative drafting and interpretation on its head.

An HCP and “No Surprises” are Inappropriate due to the level of federal influence

The MSCP is a combination of Endangered Species Act (“ESA”) sections 7 and 10, providing coverage for federal and non-federal participants. Use of a section 10 Habitat Conservation Plan, or HCP, is inappropriate in light of the federal nexus associated with nearly all lower Colorado River activities. Section 10 and use of the “No Surprises” policy are only appropriate where there is no federal nexus.

The provision in the bill directing the Secretary to act in accordance with the Program Documents not only enacts No Surprises assurances for the non-federal participants but also for federal parties. Neither the Endangered Species Act nor its regulations authorize extension of No Surprises to federal agencies.

The federal government is implicated in nearly every aspect of lower Colorado River operations, due to the Secretary of the Interior’s role as “water master”. The Bureau of Reclamation has been delegated responsibility for operating and maintaining the extensive network of dams, water

diversions, levees, canals, and other water control and delivery systems on the River. Reclamation's authority and discretion are guided by a body of treaties, Congressional enactments, compacts, and other agreements known as the law of the river.

In 1928, Congress passed the Boulder Canyon Project Act which authorized the construction of a dam system on the River. Importantly, the Act reserved for the federal government broad authority over the operation of the dam system. As the Supreme Court in *Arizona v. California* explained, it was the United States' undertaking of this ambitious project and its concomitant assumption of responsibility for its operation, that "Congress put the Secretary of Interior in charge of these works and entrusted him with sufficient power . . . to direct, manage, and coordinate their operation."²

Unlike biological opinions for federal agencies pursuant to section 7, which could change in future consultations, section 10 HCPs include No Surprises assurances. In general, if the status of a species covered by an HCP worsens because of unforeseen circumstances, the Fish and Wildlife Service will not require conservation or mitigation measures in addition to those in the HCP without the consent of the permittee.

To obtain these assurances available only to non-federal parties, the MSCP parties employed a section 7/10 hybrid that pooled federal and non-federal actions and effects as interrelated. If No Surprises prohibits the Fish and Wildlife Service from requiring additional mitigation measures from non-federal participants in terms of land, water or other resources, the Fish and Wildlife Service may be equally constrained in requesting changes to federal activities.³

In other words, there is a high degree of federal influence in lower basin operations. Section 10 of the ESA relates solely to authorizing take of listed species by non-federal entities. Use of section 10 and the No Surprises policy are therefore inappropriate.

The degree of federal influence renders direction to the Secretary unnecessary

Similarly, given the authority possessed by the Secretary as "water master," directing a water accounting agreement is unnecessary and unwise. The Secretary has ample authority to provide for the comprehensive management and control of the Lower Basin system. Indeed, the Secretary need not be authorized or directed to enter into a water agreement any more than he needs authority to enter into the Colorado River Water Delivery Agreement or to develop surplus or shortage guidelines. And again, to direct the Secretary to enter into this water agreement is problematic because the Program Documents do not mention the need for such an agreement, even after comment that the documents were vague as to the sources and use of water for the MSCP, and there will be no future opportunity to comment on such agreement.

² *Arizona v. California*, 373 U.S. 546, 589-90 (1963).

³ See Lower Colorado River Multi-Species Conservation Program Implementing Agreement at Sec. 7.2 (recognizing that federal and non-federal actions are so interconnected that a federal action could arguably be included in a section 10 permit), available at <http://www.usbr.gov/lc/lcrmscp/publications/FinallA.pdf>.

The MSCP does not cover all listed species

Defenders was a member of the MSCP Steering Committee during the mid-1990s, during which we sought opportunities for the MSCP to include the Colorado River Delta within its coverage and conservation areas. After extensive negotiations with other MSCP participants and after the Steering Committee voted not to endorse an agreement where the MSCP would give good faith consideration of conservation opportunities in Mexico, Defenders withdrew in late 1998.

The Colorado River basin encompasses nine states: seven in the United States and two in Mexico. The MSCP planning area, however, only “comprises areas up to and including the full-pool elevations of Lakes Mead, Mohave, and Havasu and the historical floodplain of the Colorado River from Lake Mead to the Southern International Boundary.” Although these fish naturally occurred in this area, the MSCP wrongly excludes the Colorado pikeminnow from consideration; it offers no conservation measures for the fish. Moreover, the MSCP “Planning Area” does not encompass the entire area that may be affected by the covered actions – the Colorado River Delta. Several endangered species, including the razorback sucker, Yuma clapper rail, desert pupfish, and vaquita, find a home there, are affected by activities along the lower Colorado River, and deserve protection.

Conclusion

In its current form, the Lower Colorado River MSCP preserves the Secretary’s role as water master of the Colorado River. Defenders of Wildlife has long advocated for flexibility in Colorado River management in order to increase the reliability and predictability of use of river resources. Such flexibility, however, should not come at the expense of the Secretary’s environmental authorities and obligations nor should the Secretary relinquish his role as water master in lower Colorado River management in an attempt to achieve such flexibility.

Providing for increased levels of flexibility in river management will be critical to meeting the demands of both human and environmental water users in the future, particularly as Upper Basin use and the impacts of climate change decrease overall water availability in the Colorado River system. Defenders believes that HR 2515 goes beyond what it needed to authorize the MSCP and may limit our options to address future challenges.

Thank you very much for the opportunity to provide testimony today. I will be glad to answer any questions.

References

- J. Aronson, J. and Le Floch, E. 1996. *Vital landscape attributes: missing tools for restoration ecology*, Restoration Ecology 4: 377-387.
- Garfin, Gregg and Lenart, Melanie. 2007. *Climate Change: Effects on Southwest Water Resources*, 6 Southwest Hydrology 6:16-34 (2007).
- IPCC, 2007. Climate change 2007: Mitigation. Contribution of Working group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [B. Metz, O. R. Davidson, P. R. Bosch, R. Dave, L. A. Meyer (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. Available at <http://www.ipcc.ch/SPM040507.pdf> (last visited July 20, 2007).
- McCarty, John P. 2001. *Ecological Consequences of Recent Climate Change*, 15 Conservation Biology 15:320-331.
- National Assessment Synthesis Team, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*, Report for the US Global Change Research Program, Cambridge University Press, Cambridge UK (2001). Available at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/foundation.htm> (last visited July 20, 2007).
- National Research Council, National Academies, *Colorado River Basin Water Management* (2007).
- Palmer, M.A. et al. 2005. *Standards for ecologically successful river restoration*, J. of Applied Ecology 42:208-217.
- Camille Parmesan & Hector Galbraith, Pew Center on Global Climate Change, *Observed Impacts of Global Climate Change in the U.S.* (2004), available at http://www.pewclimate.org/docUploads/final_ObsImpact.pdf (last visited July 20, 2007).