



Testimony of

Kara Gillon

Senior Staff Attorney, Defenders of Wildlife

Before the Subcommittee on Water and Power

Committee on Resources

United States House of Representatives

On H.R. 5180

*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*

October 10, 2006

**Kara Gillon**  
**Staff Attorney, Defenders of Wildlife**  
**Testimony Before the House Resources Committee**  
**On H.R. 5180,**

***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***  
**October 10, 2006**

**Prepared Statement**

Thank you, Mr. Chairman and Members of the Subcommittee. I appreciate the invitation to speak on behalf of Defenders of Wildlife on H.R. 5180, a bill to authorize appropriations for the Bureau of Reclamation to carry out the Lower Colorado River Multi-Species Conservation Program.

My name is Kara Gillon, and I am a Staff Attorney with Defenders of Wildlife, located in their Albuquerque, New Mexico field office. Defenders of Wildlife (“Defenders”) is a national conservation organization headquartered in Washington, D.C., dedicated to the protection of native animals and plants in their natural communities.

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.

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.”<sup>1</sup> It is as if man created an entirely different river.

These changed processes no longer naturally sustain riparian forest, fail to provide young fish access to flooded lands and clear water leaves 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.

Native wildlife are finding survival in an altered Colorado River basin more difficult. We too face increasing challenges from a highly regulated river system, pervasive non-natives, increasing water use, drought, and climate change. At the same time, we are learning that although 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. The MSCP, however, does not face any of these challenges. For this reason, the success of planned habitat restoration and fish augmentation is highly uncertain.

The MSCP seeks to create and restore habitat, stock fish, and monitor its progress. Habitat restoration and fish augmentation without actions to ensure the success of these activities are likely to fail. Years of river restoration efforts have showed us that successful river restoration is critically dependent on understanding and addressing the causes of the river's decline. The restored habitats and stocked fish will suffer the same fates as the river itself because the MSCP does not address the root causes of habitat degradation and low fish survival – the impounding, storing, and diversion 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.

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 mitigated for in perpetuity. We also do not know how the MSCP will habitat maintenance and restoration sites; thus we do not know if the MSCP will select sites that are off-channel or hydrologically connected to the river.

To institutionalize the MSCP, as called for in the proposed legislation, may present yet another challenge to wildlife conservation in the lower Colorado. In the face of growing challenges, the desire for certainty will increase. However, certainty will come at the expense of others, just as it did in the past when a major player was left out of decision-making – the Colorado River and its fish, wildlife and bosque. Certainty, whether over water supply or other resources and gained only at the expense of others, will create an untenable and unsustainable condition.

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 for storage, instream flow, water acquisition programs, or reservoir re-operation.

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. To do otherwise would confine 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 – are not made available for public review and comment.

HR 5180 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 control

The MSCP is a combination of 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 all river activities through the position of the Secretary of the Interior as "water master." 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 Secretary of the Interior, on behalf of the federal government, serves as the "water master" for the lower Colorado River. 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."<sup>2</sup>

In 1928, Congress passed the Boulder Canyon Project Act,<sup>3</sup> 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."<sup>4</sup>

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.<sup>5</sup>

In other words, there is a high degree of federal control 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 control 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.

#### 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, "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." The MSCP "Planning Area"

does not encompass the area that may be affected by the covered actions – the MSCP should include the Colorado River Delta and its endangered species, including the razorback sucker, Yuma clapper rail, desert pupfish, and vaquita.

Thank you very much. I'd be happy to answer any questions.

## References

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<sup>1</sup> 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>.

<sup>2</sup> See Eric L. Garner and Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century*, 27 Ariz. St. L.J. 469 (1995).

<sup>3</sup> 43 U.S.C. § 617.

<sup>4</sup> *Arizona v. California*, 373 U.S. 546, 589-90 (1963).

<sup>5</sup> 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/FinalIA.pdf>.

**DISCLOSURE REQUIREMENT**  
Required by House Rule XI, clause 2(g)  
and Rules of the Committee on Resources

**A. This part is to be completed by all witnesses:**

1. Name: *Kara Gillon*
2. Business Address: *824 Gold Ave SW, Albuquerque, NM 87102*
3. Business Phone Number: *505-248-0118*
4. Organization you are representing: *Defenders of Wildlife*
5. Any training or educational certificates, diplomas or degrees or other educational experiences which add to your qualifications to testify on or knowledge of the subject matter of the hearing:  
*CV Attached.*
6. Any professional licenses, certifications, or affiliations held which are relevant to your qualifications to testify on or knowledge of the subject matter of the hearing:  
*CV attached.*
7. Any employment, occupation, ownership in a firm or business, or work-related experiences which relate to your qualifications to testify on or knowledge of the subject matter of the hearing:  
*CV attached.*
8. Any offices, elected positions, or representational capacity held in the organization on whose behalf you are testifying:

**B. To be completed by nongovernmental witnesses only:**

1. Any federal grants or contracts (including subgrants or subcontracts) from the Department of the Interior which you have received since October 1, 2000, including the source and the amount of each grant or contract: *None.*
2. Any federal grants or contracts (including subgrants or subcontracts) the Department of the Interior which were received since October 1, 2000 by the organization(s) which you represent at this hearing, including the source and amount of each grant or contract: *Spreadsheet attached.*
3. Any other information you wish to convey which might aid the members of the Committee to better understand the context of your testimony:



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## EXPERIENCE

### **Defenders of Wildlife Senior Staff Attorney**

Washington, D.C. & Albuquerque, NM  
October 2006 – present

*Staff Attorney*, October 2004 – September 2006;  
*Water Counsel*, October 2002 – September 2004;  
*Wildlife Counsel*, October 2000 – September 2002;  
*Associate Counsel*, January - September 2000;  
*Legal Fellow*, September 1998 - December 1999;  
*Legal Intern*, June - August 1998

- Litigate cases under federal wildlife and natural resource laws to conserve biological diversity;
  - *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53 (D.D.C. 2003)
  - Of counsel on brief of *amici curiae* in support of respondents in *Dept. of Transportation v. Public Citizen*, 541 U.S. 754 (2004)
  - participant in State Water Resources Control Board (Calif.) hearing on Imperial Irrigation District to San Diego County Water Authority water conservation and transfer project (2002)
- Advance Defenders' conservation policies;
  - develop Western Water Advocacy Project
  - perform policy research and analysis on western water issues
- Advocate Defenders' policy goals in legislative and administrative fora;
  - analyze and comment on environmental compliance documents affecting western river systems, in particular, the Lower Colorado River Multi-Species Conservation Program, elements of the Colorado River Quantification Settlement Agreement, transfer of title from federal reclamation facilities, and Bureau of Reclamation river management initiatives
- Advise staff on legal questions.

## EDUCATION

**Vermont Law School**, South Royalton, VT, May 1997

- *Juris Doctor*

**Georgetown University**, Washington, D.C., May 1994

- *Bachelor of Arts*, Classical Humanities

## MEMBERSHIPS

U.S.-Mexico Binational Advisory Group for Information Exchange and Advice on the Colorado River Delta, 2002 – present.

Middle Rio Grande Endangered Species Collaborative Program, Steering Committee, 2000 – 05, and Executive Committee, 2004-05.

## ARTICLES AND INVITED PRESENTATIONS (partial list)

Panelist, *Rio Grande Reservoir Symposium*, Upton Transboundary Resources Center and Natural Resources Journal of the University of New Mexico, Albuquerque, NM, April 22, 2006.

Panelist, “Water Rights – The Tribes, Mexico, the Compact and the Environment” at *Sharing the Risks: Shortage, Surplus and Beyond*, Colorado River Symposium, Water Education Foundation, Santa Fe, NM, September 29, 2005.

*Environmental and Other Implications of Operating the Yuma Desalting Plant: What of the Ciénega de Santa Clara?*, Pacific McGeorge Global Business & Development Law Journal (publication pending).

*Balance on the Rio Grande*, Albuquerque Tribune, December 4, 2003.

Panelist, “Salinity Solutions on the Colorado River” at *The Ties that Bind: Policy and the Evolving Law of the Colorado River Symposium*, Water Education Foundation, Santa Fe, NM, September 2003.

Coauthor, *Andrade Mesa Wetlands of the All-American Canal*, 42 Natural Resources J. 899 (2002).

Panel Presentation, *ESA in the Middle Rio Grande*, Law of the Rio Grande CLE Conference, Albuquerque, NM, January 2002.

*Watershed Down?: The Ups and Downs of Watershed Management in the Southwest*, 5 Univ. of Denver L. Rev. 395 (2002).

Coauthor, *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Desert Example*, 41 Washburn L.J. 14 (2001).

Panel Presentation, *Interjurisdictional Watershed Management*, 19<sup>th</sup> Annual Water Law Conference, American Bar Association, San Diego, CA, February 2001.

Panel Presentation, *Lower Colorado River Ecosystem Management: From Lee’s Ferry to the Gulf of California*, Law of the Colorado River CLE Conference, Tucson, AZ, May 2000.

## LICENSES

Member of the Massachusetts Bar, 1997

Member of the District of Columbia Bar, 2000



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Disclosure Requirement  
 House Rule XI, clause 2(g)  
 and  
 Rules of the Committee on Resources

Hearing Before the  
 Water and Power Subcommittee,  
 House Resources Committee  
 October 10, 2006

# Federal Grants from the Department of the Interior to Defenders of Wildlife, FY04-FY07.

## Department of the Interior Summary

| Grantor  | Project              | Award Date | Award Amount      | Received Date | Received Amount* |
|--|----------------------|------------|-------------------|---------------|------------------|
| Fish and Wildlife Service:<br>Wildlife Without Borders | Sea Otter            | 5/13/2004  | 20,000.00         | 9/24/2004     | 20,000.00        |
| Fish and Wildlife Service:<br>Wildlife Without Borders | EWCL                 | 9/10/2004  | 43,950.00         | 2/4/2005      | 19,820.10        |
| Fish and Wildlife Service:<br>Wildlife Without Borders | Parrots              | 5/18/2005  | 17,000.00         | 7/1/2005      | 17,000.00        |
| Fish and Wildlife Service:<br>Wildlife Without Borders | Jaguar Camera Survey | 3/24/2006  | 37,371.00         |               |                  |
|  |                      |            | <u>118,321.00</u> |               | <u>56,820.10</u> |

\* (as of 9/30/06)