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ENDANGERED SPECIES ACT: THE PLATTE RIVER COOPERATIVE AGREEMENT AND CRITICAL HABITATS

OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

February 16, 2002 in Grand Island, Nebraska

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OVERSIGHT FIELD HEARING ON THE "ENDANGERED SPECIES ACT: THE PLATTE RIVER COOPERATIVE AGREEMENT AND CRITICAL HABITATS"

Saturday, February 16, 2002
U.S. House of Representatives
Committee on Resources
Grand Island, Nebraska

The Committee met, pursuant to call, at 1:07 p.m., in the Hornady-Marshall Auditorium, College Park, 3180 West Highway 34, Grand Island, Nebraska, The Honorable Tom Osborne, presiding.

Mr. OSBORNE. The Committee on Resources will come to order.

The Committee is meeting today to hear testimony on the Endangered Species Act: The Platte River Cooperative Agreement and Critical Habitats.

I might mention by way of preface that although this is a field hearing, this is still a Congressional oversight hearing and we request that the audience and participants maintain and follow the rules and decorum of the House. You should refrain from verbal outbursts such as applause or booing. There are a lot of people here today. We do not have the time to listen to all of you, we will keep the hearing record open to receive written testimony.

I might mention that all of the people testifying today have some direct role in the determination of critical habitat or the cooperative agreement. We have a great many groups that have an interest in this—agriculture groups, conservation groups and so on. And it is my understanding that there have been one or two groups that feel they have been excluded, but the invitations have been issued by the Resources Committee, not by me or my staff, and we have determined these people that we think have the greatest input, the greatest impact on the subject matter at hand today.

As we mention in the opening statement, we are amenable to receiving written statements from any group. We also will stay, after the hearing is over, my staff, myself maybe some people from the Resources Committee, and we will be willing to listen to anyone that has commentary, that has questions. And so we are very glad that you are all here today, but we would like to have you adhere to those rules.

So with that, we will proceed with the hearing, and I would like to at this point start with a brief opening statement and then

Congressman Denny Rehberg will also have a chance to make an opening comment.

STATEMENT OF THE HONORABLE TOM OSBORNE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. OSBORNE. First of all, I would just like to point out the reason for the hearing. As almost everyone here knows, the Endangered Species Act is probably about as far-reaching an Act as Congress has ever passed. It impacts a great many people.

An example that may not be typical but is certainly disturbing is what happened in the Klamath Basin in Oregon last year. As many of you know, the irrigation water was cutoff in the Klamath River primarily to protect the short-nosed sucker and actually because of some protection for the Coho salmon fishery. And of course, many farmers lost their crops, they lost their irrigation water and some of them were bankrupted. So this came as somewhat of a surprise to lots of people. They already had their crops in the ground and it was a very upsetting situation.

And to make things somewhat worse, the subsequent studies have indicated, by the National Research Council, that what was done was inappropriate, that it really did not help the short-nosed sucker, it did not help the Coho salmon, and therefore was unnecessary.

And so the reason we are doing this today is to make sure that we do not have something like that happen where people are caught unaware, where all of the parameters have not been laid out and discussed. We are not here to in any way attack or pillory Fish and Wildlife, we are here to try to understand exactly what is going on, make sure that all the cards are laid on the table and so that the endangered species, human beings, farmers, ranchers, municipalities, recreational users of the river are able to maximize whatever outcome that we can arrive at.

This hearing has been called for basically two different purposes: One is to examine the cooperative agreement and the in-stream flows in the Platte River as they relate to the cooperative agreement; and then second, the designation of critical habitat for endangered species in Montana, North Dakota, South Dakota, Minnesota and Nebraska. This designation, it is my understanding, is supposed to come out March 15, and so this hearing has been scheduled now so we get as much preliminary information as we possibly can as to what that critical habitat designation may look like, and give us some chance to respond if there are concerns.

The procedure—as I mentioned earlier, we need to bear in mind that this is not a town hall meeting, it is a more formal setting at the present time, and so we will proceed accordingly.

The desired outcome of this hearing is as follows: As I mentioned, we are going to provide information to all of the concerned parties and we want to use that information proactively. So often, as I have experienced government in my short period of time, we spend an awful lot of time pointing fingers and finding out who to blame and looking backward. And the main objective today is to find out what the facts are and say here is where we are today. This is our situation, this is the hand that has been dealt us, and

where do we go from here. What can we do constructively, proactively to make this situation work better. And so I hope that is the mindset that we carry forward.

As you know, the endangered species involved would be the whooping crane, the pallid sturgeon, the least tern, the piping plover has been listed as a threatened species but not endangered, and then of course peripheral and maybe not so peripheral for some of you, the black-tailed prairie dog is a candidate for endangered or threatened listing and we may touch upon that a little bit today.

Each witness will be given 5 minutes to read a prepared statement and those will be followed by questions from Congressman Rehberg and myself. So with that, we will proceed with the hearing.

Congressman Denny Rehberg is from Montana. Denny was the Secretary of State—

Mr. REHBERG. Lieutenant Governor.

Mr. OSBORNE. —Lieutenant Governor, I am sorry, in Montana for 6 years and is a rancher in Montana. He knows a great deal about such issues as we are dealing with today and I just really appreciate his being here because he had to change his schedule to get here.

Jerry Moran from Kansas was supposed to be here, but he had a funeral that came up today unexpectedly and so he would have been here. So Denny and I will be the only two that will be present. So Denny, why do you not go ahead and make any comments that you might have at this time.

STATEMENT OF THE HONORABLE DENNIS REHBERG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. REHBERG. Thank you, Congressman Osborne and thank you for allowing me the opportunity to enter into your legislative district and for those of you that have made me feel at home.

You know, one of the things you find when you move to Washington, D.C. and you start identifying the problems that exist with many of the national pieces of legislation that occur in that arena is that a lot of people support reform, as long as it does not change anything.

And that is one of the things that we find with the Endangered Species Act. We know it has problems or you would not have the joke "shoot, shovel and shut up." Any time a joke like that is established, it is more reflective of a problem that exists. And I thank you, Tom for inviting me to this hearing because I think you clearly have the same understanding that I do, that oftentimes when these rules and regulations are developed around a national piece of legislation, in my case in Montana, Washington, D.C. is 2000 miles from my district. Some people think the sun rises and sets on the Potomac and they do not have a clear understanding of what it is like to try and live under the rules and regulations and laws that were created by someone that might have had a pretty good idea from their own perspective representing 15 square blocks in downtown New York City. But if we were ever to try and create a critical habitat out of Central Park or re-establish the grizzly bear or

the wolf in their backyard, they might have a different feeling about it.

So it is important for Congress to have hearings in places like Nebraska for the specific opportunity that we can highlight and showcase and hear from people that have to try and deal with a rule or law or regulation that does not make sense to a rural part of the state, the Midwest or the West. And that is what we are here to do today.

I was appointed by Chairman Hansen, Jim Hansen, the Chairman of the Resources Committee, to an Endangered Species Working Group. The purpose of that group was five Republicans, five Democrats to try and sit down and come up with some changes that we could get through Congress. It took us 2 months to agree at what time and what room we would meet, so that would give you an indication of the complexities and the controversies that were going to exist with any kind of reform that would be considered seriously by the U.S. Congress.

That committee has pretty well folded. We almost go to the point where we could talk about sound science and a peer review committee, but we were still having some difficulties. So a point comes finally when you need to come out to the public, such as yourself, and hear from those of you, hopefully after the hearing and the audience and those of you who are witnesses today, to help us identify the areas where we think that we can have logical change, a reform that people can understand, or maybe we can give you some input in an area where you have not considered or you just need to know there is Congressional support for making change or studying something further. It is part of our role, it is part of our duty as elected officials, and it gives me a great deal of pleasure to be here with you in Nebraska today.

So I look forward to hearing from the witnesses and again, Congressman Osborne, thank you for giving me an opportunity to attend this hearing in your district.

Mr. OSBORNE. Thank you for being here, Denny. I know you are anxious to do away with the introductory comments, but I was asked to read a brief statement from Jim Hansen, who is the Chairman of the Resources Committee. Jim is from Salt Lake, so he has to be at the Olympics and was required to be there actually, he had planned to be here if he could. But I will just read two or three paragraphs that he wrote. He said:

"I would like to welcome everyone to today's hearing on behalf of the House Resources Committee. I wish I could be with you today.

"The Endangered Species Act has a profound impact on all our lives. The proposed critical habitat for the piping plover will affect your livelihoods, your access to agricultural water and your enjoyment of the land around you. I share your concerns for these things, I am a rural man myself. My people are farm people, I understand the profound impact Federal limitations on land use and access can have on people's lives.

"I am a strong advocate for public access and multiple uses of our land and resources. Over the years, I have been appalled by the problems the Endangered Species Act has created for countless landowners, farmers and business owners.

"While people have been harmed, this law has done little, if anything, to actually help species. We must reform the ESA into a useful law that helps both wildlife and people. My committee will begin that process this year."

What Jim says is exactly the way he feels, he feels that the Endangered Species Act certainly fulfills a purpose, but it has caused a great deal of consternation and I know that he does plan to do whatever he can to make some modifications that make it more effective.

[The prepared statement of Chairman Hansen follows:]

Statement of The Honorable James V. Hansen, Chairman, Committee on Resources

I would like to welcome everyone to today's hearing on behalf of the House Resources Committee. I wish I could be with all you today. The Endangered Species Act has a profound impact on all of our lives. The proposed critical habitat for the Piping Plover will affect your livelihoods, your access to agricultural water and your enjoyment of the land around you.

I share your concern for these things. I'm a rural man myself. My people are farm people. I understand the profound impact federal limitations on land use and access can have on people's lives.

I am a strong advocate for public access and multiple uses of our land and resources. Over the years, I have been appalled by the problems the Endangered Species Act has created for countless landowners, farmers and business owners.

While people have been harmed, this law has done little, if anything, to actually help species. We must reform the ESA into a useful law that helps both wildlife and people. My committee will begin that process this year.

I commend Representative Osborne for holding this hearing today. He has emerged on the Resources Committee as a strong advocate for rural America and the diverse use of the land. I admire his vision and hard work in bringing the ear of Washington to Grand Island to hear your concerns today.

He has rolled up his sleeves and worked hard to protect your interests. He will be a judicious and balanced voice in the coming debate over ESA reform.

This important hearing is the first in a series of three hearings the committee will hold on ESA. Later this spring, we will introduce legislation that improves ESA. It won't be sweeping reform. This is a little like eating an elephant. You do it one bite at a time.

The first bite will make sure that sound science in used in making ESA decisions that affect us. It will require peer review of these decisions by respected regional scientists. This not only ensures good science, it ensures local expertise and input on the management of local resources.

I look forward to the excellent suggestions Mr. Osborne and Mr. Rehberg will bring back to Washington following this hearing. Please follow up with these members and feel free to follow up with the committee staff as we begin the critical work of ESA reform this year.

Mr. OSBORNE. So at this time, I would like to recognize the first panel of witnesses before us. We have Mary Ann Bach, who is the Regional Director of the Great Plains Region, U.S. Department of Interior, Bureau of Reclamation. We have Commissioner Keys, who is from the Bureau of Reclamation, we are glad to have him here. Mr. Morgenweck who is from U.S. Fish and Wildlife Services in Denver and oversees this region, this area, we appreciate his being here. We have Mr. Bob McCue, who I understand at one time was here in Grand Island and he is currently with the Ecological Services as a Supervisor in Region 6. We are glad to have you people here and we will start, I believe with Commissioner Keys, is that correct, on the first opening statements.

As you all know, you will be given the lights, 5 minutes green light, 1 minute of amber light and then when the red light comes on, we hope that you will have concluded your remarks. Thank you.

STATEMENTS OF THE HONORABLE JOHN KEYS, COMMISSIONER, BUREAU OR RECLAMATION, U.S. DEPARTMENT OF THE INTERIOR ACCOMPANIED BY RALPH MORGENWECK, EXECUTIVE DIRECTOR, U.S. FISH AND WILDLIFE SERVICE AND ROB McCUE, ECOLOGICAL SERVICES SUPERVISOR, U.S. FISH AND WILDLIFE SERVICE, REGION 6

STATEMENT OF THE HONORABLE JOHN KEYS

Mr. KEYS. Mr. Chairman, I am John Keys, Commissioner of the Bureau of Reclamation. It is indeed a pleasure to be here today to testify before the Committee on the participation of the Department of the Interior in the Platte River Recovery Implementation Program. I would ask that my full written statement be made part of the record for this hearing, please.

Mr. OSBORNE. Without objection.

Mr. KEYS. We are going to handle this in two different stretches. I will talk about the agreement and then Mr. Morgenweck will address the critical habitat issues for the plover.

Bureau of Reclamation and the Fish and Wildlife Service have been extensively involved in implementation of the Cooperative Agreement for Platte River Research and other efforts relating to the Endangered Species Act along the Central Platte River in Nebraska. Mr. Morgenweck and I are the Department's representative on the Governance Committee for that agreement, and Ms. Bach and Mr. McCue are our alternates on that Committee.

That Cooperative Agreement is an effort to collaboratively develop a basin-wide program for recovery of those four endangered or threatened species that you talked about earlier.

Of course, the North and South Platte Rivers rise in the snowfields in Colorado and Wyoming and come together at North Platte to form the Platte River. In those basins, the North and South Platte Basins, there is over 7.1 million acre-feet of water stored for projects in those three states. It involves about 190 storage facilities and there is ultimately about 1.9 million acres of land irrigated with that water. And of course, it proves power generation and municipal and industrial water supplies at the same time.

These projects and other activities along the Platte River, including the habitat for threatened and endangered species that use the Big Bend Reach in central Nebraska.

Now on May 15, 1978, Fish and Wildlife Service first designated critical habitat for the whooping crane along the Central Platte River. Now under a court order, they are working with critical habitat designations for the piping plover. There have been a lot of efforts over these years that have led up to the Cooperative Agreement between the states and the Federal Government. Because of the four threatened or endangered species listings in the Platte Basin, there have been a lot of concerns about the effects of existing water projects on habitat, the prospects of as many as 57 individual Section 7 consultations for all of our projects under the Endangered Species Act. And then there is the prospect of having

to develop operating conditions for those projects to operate and protect those species. All of these factors provide a strong basis for the need for us to come to some kind of agreement that would ensure a basin-wide Endangered Species Act compliance program and a way for us to deal with those 57 separate consultations that were possible out there.

Some of the projects affected by those listings are the Federal dams on the North and South Platte Rivers; the Colorado Big Thompson Project in Colorado. There are six municipal and industrial withdrawals of water from the river along the Front Range that would be affected, and there are hydropower facilities that would be affected. The main one here is the power plant at McConaughy.

Now the Cooperative Agreement was first signed in 1997 and after three and a half years of discussion and negotiations, it was signed by the Governors of Colorado, Wyoming and Nebraska and the Secretary of the Interior. That agreement established a basis for a basin-wide Platte River species recovery program, and it set the mechanism in place for a recovery program to be developed that would allow existing water-related Federal activities to proceed in compliance with the Endangered Species Act, without having to do full consultation on each one individually. That proposed basin-wide recovery plan and its agreement also sets proposed adaptive management. In other words, as we are implementing this thing, what changes should be made to is, is there something that we would encounter along the way, somebody may have been adversely impacted or it did not quite make it in an area and we could adaptively manage that program to get away from some of those harms or shortfallings along the way.

The recovery program purposes include habitat and benefits for conservation and recovery throughout the basin, and it does it on a cooperative, collaborative consensus type basis. In other words, we are not going to run over one single person to accomplish an end here. ESA compliance for existing and new water-related activities in the Platte River Basin are one of the big reasons that we are working on it. Also, trying to prevent future listings. If we do these things, we can anticipate where we may need to do something else that might prevent a future listing. It would also mitigate any new water-related activities, as set forth in the new depletion plans for each one of the states; in other words, looking to the future, when we may need more water in some of those basins. And it gives us an organizational structure to ensure that state and stakeholder involvement in the recovery program is a reality. We need to have those folks involved in the process that would be affected in the end.

Some of the key elements of that proposed recovery plan for the first increment—the first increment covers about 13 years—but one of the main parts of that is to try to improve flows in the Central Platte River, trying to reduce those shortages to the Fish and Wildlife Service target flows. And some of our first looks at that say that it would take somewhere between 130,000 and 150,000 acre-feet to do that. We would achieve that with the development of three water regulation projects. The first one is the Tamarack groundwater recharge project, the second one is modification of

Pathfinder Dam in Wyoming and third is an environmental account for water in Lake McConaughy. The results of all three of those should produce somewhere around 80,000 acre-feet of that water. Let me hasten to add that not a single acre-foot of that water would be taken from anyone. If there was any water purchases, it would be done from a willing buyer and on a willing buyer-willing seller basis.

The next part of it would be the implementation of the Water Action Plan. That is for getting that additional water to get it up to the 130,000 to 150,000. That would be developed with the states, the water users, the Federal agencies and the conservation groups and would focus on incentive-based ways to get that done. Again, not taking water from anyone.

The second basis of the proposed recovery plan is land, the acquisition of about 10,000 acres of habitat land from willing participants over this 13-year period. Again, there would be no condemnation of lands to accomplish this. It includes lands that are already out of production or they are in production but they are part of the program. That 2600 acre Cottonwood Ranch that is part of Nebraska Public Power District's are there would be included in there.

The third part of it is the adaptive management program that I talked about before.

Now long-range and certainly well past the 13 years, is the objective of trying to get up to 29,000 acres of land into this adaptive management program. Certainly the 9000 acres that are protected and managed by the Platte River Whooping Crane Trust, the Audubon Society and the Nature Conservancy in the Valley would be included in that. This is not something that we are just trying to add to.

Now as I said, the agreement originally set for 3 years. In December of 2000, the agreement was extended to June 30 of 2003, so that all three states and the Department and that 10-person committee can complete the necessary work. So we still have about a year and a half left on putting these plans together.

Now how does the process work? I think the first thing to talk about with the Cooperative Agreement is the Governance Committee. There are 10 members on that Governance Committee, two of which are Ralph Morgenweck and myself. There is one representative from each state, there are the two Federal members, there are two members representing the conservation organizations and there are three members representing water users in those states that are subject to the consultation.

Now the Governance Committee operates by consensus. It generally meets every month and recently they have been meeting very regularly trying to get stuff worked out. Funding for the operation of this thing is provided by the three states and the Federal Government.

Now where are we right now? Right now, the Governance Committee is working to develop the proposed program, has been doing that for over 3 years. Certainly, we are hustling to try to meet that June 30, 2003 deadline. Most of the key elements to the program have already been agreed to. There are some details to be worked out and a few issues.

The draft Environmental Impact Statement, once the Governance Committee agrees on major elements of the program, that draft Environmental Impact Statement will be produced. Concurrent with that draft statement will be a Biological Assessment of the program under the Endangered Species Act.

Then after that is done and the draft Environmental Impact Statement is put out, the Fish and Wildlife Service would then issue their Biological Opinion on that.

As I said, adaptive management is the way this thing will work and as new things come up to be addressed, they will certainly be done so.

Mr. OSBORNE. I am afraid I have to interrupt you here. If you all can watch that monitor in front of you, there is a red light there.

Mr. KEYS. Oh, goodness, I did not even see that.

Mr. OSBORNE. When that red light comes on, that means you have got to wrap up. So you might want to turn it to you.

Mr. KEYS. I knew they turned it the other way for some reason.

Let me just summarize, sir, by saying that we feel that this agreement is the way to go for the Platte River Basin. There will be no taking of water, there will be no taking of land and the byword is willing buyer, willing seller for obtaining that land and water. Existing uses will be protected under it, existing uses of groundwater and surface water will be grandfathered. The question is future development and how that is handled. We feel that is a state issue, certainly that is why the three states are there, the waters belong to the state and that is their big decision, is how to handle future development.

Certainly when we get through, we will answer any other questions.

Mr. OSBORNE. There will be some questions. Thank you.

[The prepared statement of Mr. Keys follows:]

Statement of John W. Keys, III, Commissioner, Bureau of Reclamation, U.S. Department of the Interior

Mr. Chairman, my name is John Keys. I am Commissioner of the U.S. Bureau of Reclamation, Department of the Interior. I am happy to be here to provide you with information concerning the participation of the Department of the Interior in development of the Platte River Recovery Implementation Program. I am accompanied by Ralph Morgenweck, Regional Director for the Mountain Prairie Region of the U.S. Fish and Wildlife Service, and Maryanne Bach, Regional Director for the Great Plains Region of the Bureau of Reclamation. My written testimony deals with the cooperative agreement and with the proposed critical habitat for the piping plover, as requested in the Committee letter. My oral testimony will address the cooperative agreement aspects of the statement. Mr. Morgenweck will answer any questions on critical habitat issues.

Both Reclamation and the Service have been extensively involved in the implementation of the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska (Cooperative Agreement). Mr. Morgenweck and I are the Department's official representatives to the Platte River Governance Committee. Ms. Bach is my alternate to the Committee and Bob McCue serves as alternate for Mr. Morgenweck. Staff from both agencies have been involved in all of the meetings and in the work of the Governance Committee and its subcommittees (which I will describe later in more detail). In addition, Reclamation and the Service are co-leads in preparing a Programmatic Environmental Impact Statement (PEIS) and the Service is responsible for preparing a Biological Opinion on the proposed recovery program.

The Cooperative Agreement is an effort to collaboratively develop a basinwide program for the recovery of four threatened or endangered species (whooping crane,

piping plover, least tern, and pallid sturgeon). My statement will cover several major aspects of the Cooperative Agreement including the Department's role in its implementation, some background and history leading up to the Agreement, some key features of the Agreement, a summary of the accomplishments and decisions of the Governance Committee to date, and my understanding of upcoming actions.

Background and History

The North and South Platte Rivers originate from snowmelt in the Rocky Mountains in Colorado. The rivers enter Nebraska via Wyoming and Colorado to form the Platte River at North Platte, Nebraska. Water projects on the North and South Platte store over 7.1 million acre-feet of water in 190 storage facilities, irrigating 1.9 million acres, generating power, and providing municipal water supplies and recreation.

These projects and other activities have affected the Platte River, including the related habitat of the four threatened or endangered species (noted above) that use the "Big Bend Reach" of the Platte in Central Nebraska.

On May 15, 1978, the Service designated critical habitat for the whooping crane along the central Platte. Under court order, the final designation of critical habitat for the piping plover is currently pending.

Factors Leading to the Cooperative Agreement

With the existence of four threatened or endangered species in the Platte River Basin, there were concerns about: the effects of the existing water projects on the habitat of these species; the prospects of having to undertake numerous individual consultations under Section 7 of the Endangered Species Act (ESA) throughout the basin; and the possibility of operating conditions being placed on those projects to protect the listed species. All these factors provided a strong impetus for water users, the three States, the Federal government, and conservation groups to get together to look for a better way to bring the various projects into compliance with the ESA and to provide a level of certainty for water users in the basin. Some of the projects involved included:

- The Federal dams on the North Platte River in Wyoming and the Colorado–Big Thompson Project in northern Colorado;
- Six municipal and industrial water projects along the Front Range of Colorado which, pursuant to biological opinions by the Fish and Wildlife Service issued to the Forest Service, were required to implement reasonable and prudent alternatives to offset depletions to the Central Platte in Nebraska;
- The hydropower facilities in Nebraska, including Kingsley Dam/Lake McConaughy, have licenses issued by the Federal Energy Regulatory Commission which are conditioned upon the development of a recovery program.

The Cooperative Agreement

On July 1, 1997, after three and a half years of discussion and negotiation, the Cooperative Agreement was signed by the Governors of Wyoming, Nebraska, and Colorado, and the Secretary of the Interior. The Cooperative Agreement established the basis for a basinwide endangered species recovery program for the Platte River and is the mechanism through which a recovery program is to be developed to allow existing, water-related Federal activities to proceed in compliance with the ESA, but without the need for full consultation on each individual project.

The Proposed Basinwide Recovery Program

The Cooperative Agreement sets forth a proposed adaptive management program to be implemented on an incremental basis with the first increment lasting thirteen years. Many details of the second increment will be worked out during the first increment based upon new data collected as a result of research and monitoring conducted during the first increment.

The purposes of the recovery program include:

- to secure defined benefits for the target species and their associated habitats to assist in their conservation and recovery through a basinwide cooperative approach agreed to by the three states and the Department;
- to provide ESA compliance for existing and new water-related activities in the Platte River Basin;
- to help prevent the need to list more basin-associated species pursuant to the ESA;
- to mitigate new water-related activities in a manner that will not increase the responsibilities of other signatory states, as set forth in the New Depletions Plans of the individual states; to establish and maintain an organizational structure that will ensure appropriate state government and stakeholder involvement in the implementation of the recovery program.

Key elements of the proposed recovery program for the first increment, as set forth in the Cooperative Agreement, are:

- improve flows in the central Platte through reducing shortages to the Service's target flows by 130,000 to 150, 000 acre feet. This will be achieved by: (1) Development of three water regulation projects—the Tamarack groundwater recharge project in Colorado; (2) Modification to Pathfinder Dam in Wyoming; and (3) an "environmental account" in Lake McConaughy in Nebraska, which are anticipated to provide approximately 80,000 acre-feet.
- implementation of a Water Action Plan to provide the additional water. This Plan, developed collaboratively with the States, water users, Federal agencies and conservation organizations, focuses on incentive-based water supply and conservation measures.
- acquire 10,000 acres of suitable habitat from willing participants between Lexington and Chapman, Nebraska. This includes Nebraska Public Power District's 2600 acre Cottonwood Ranch. (Note that many of the details concerning the acquisition and management of habitat have been and are being worked out with the Governance Committee's Land Subcommittee, whose members include many local landowners. For example, they have helped the Governance Committee develop policies concerning tax losses resulting from implementation of the recovery program and relationships with local landowners).
- utilize an adaptive management approach, using monitoring and research results. An Integrated Research and Monitoring Program has been drafted which includes various research measures to investigate channel stability issues.

The Cooperative Agreement sets forth a long-range objective of protecting 29,000 total habitat acres. Included in this 29,000 acres are 10,000 acres to be acquired during the first increment, and 9,000 acres currently protected and managed by the Platte River Whooping Crane Trust, the National Audubon Society, and the Nature Conservancy within the Central Platte Valley.

The period prescribed in the Cooperative Agreement for development of the recovery program was three years. However, in December 2000, this was extended to June 30, 2003, in order to allow the three States, the Department, and the other members of the 10 member Governance Committee to complete the necessary work.

How Does this Process Work?

First, the Cooperative Agreement established a Governance Committee to review, direct, develop policies, and oversee the development of the Proposed Program. The Governance Committee consists of ten members, plus their alternates. Members include one representative per state selected by the Governors; two Federal members including Reclamation and the Service; two members representing conservation organizations; and the final three members representing water users in the three States who have a federal nexus and are subject to ESA consultation.

The Governance Committee, which operates on a consensus basis, generally meets on a monthly basis to conduct official business and/or participate in technical sessions covering major components of the Proposed Program.

The Governance Committee hired Dale Strickland as the Executive Director. Mr. Strickland plays a key role in the functioning of the Committee. He assists and coordinates the management of the Committee's work, facilitates communications, and coordinates the wide range of activities involved in developing a consensus-based recovery program.

Much of the detailed work and analysis has been carried out by subcommittees of the Governance Committee utilizing staff from the participating organization and outside contractors. In addition, local landowners in Nebraska have actively participated in the work of the Land Subcommittee.

Funding for the implementation of the Cooperative Agreement comes from the three states and the Federal government, as set forth in the agreement.

Where Are We Now?

- The Governance Committee has been working on the development of the proposed program for over three years, meeting monthly and sometimes more often. Key elements of the program have already been agreed to, but there are a few remaining issues to be worked out.
- Once the Governance Committee comes to an agreement on the major elements of a proposed program, the Department will analyze the elements of that program in a draft Programmatic EIS (DEIS) which will likely be available for public comment about six months later.
- Concurrent to preparation of the DEIS, a Biological Assessment will be completed.

- Subsequent to the release of the DEIS, the Service will then prepare a draft Biological Opinion on the Proposed Program which will be available for public review.
- There will be a number of additional items and actions to continue to be worked out over the coming months.

While some have expressed concerns about the relative pace of the process, it is important to understand that the Platte River effort has, from the beginning, been based on the premise that all solutions and decisions should be reached by consensus. While that process may take a little longer at the front end, we believe that in the long run, it will be a better solution that can be widely supported. Throughout the process, no one party has forced their position on any of the other parties. We have had to work through our differences. Or, in some cases, we agreed to disagree, but then found a path to keep the process moving forward. I would also like to note that we have been fortunate to have had considerable help and advice from local landowners and private citizens. Their input has greatly improved the options we have considered and will significantly improve the Proposed Program. I would like to thank them for their hard work their time, and their dedication.

Piping Plover Critical Habitat

I will now provide information to the Committee concerning the process of designating critical habitat for the northern Great Plains population of piping plovers, noted by the Committee as a principal focus of the hearing. My comments will describe the generic procedure associated with the designation process. Finally, I will provide information specific to the piping plover proposal and the likely outcomes of the proposal on the area in which the species and its critical habitat is present.

Definition of Critical Habitat

The Endangered Species Act (ESA) defines critical habitat, in Section 4, as those specific geographic areas that are essential for the conservation of a threatened or endangered species and which may require special management considerations.

A designation does not establish a refuge or sanctuary for the species and only applies in situations where Federal funding or a Federal permit or activity is involved.

Not all areas found within the boundaries designated as critical habitat are essential for the conservation of the species. Human-made structures such as boat ramps, roads, and parking lots are not proposed to be designated as critical habitat for the piping plover even though they fall within designated boundaries.

Economic Analysis

Section 4 of the ESA also requires that an analysis of the potential economic impacts of designating critical habitat be conducted as part of the designation process. The analysis estimates the possible costs of the proposed critical habitat on federal actions involving private landowners, tribes, and Federal, State, and local agencies. The estimated costs include possible future consultations under Section 7, and project modifications resulting from these consultations. Based on recent court decisions, the Service is completing economic analyses which reflect the co-extensive economic impacts of critical habitat designation and the economic impacts associated with the listing of a species.

Areas may be excluded from the critical habitat designation if the benefits of excluding it outweighs the benefits of designating the area as part of critical habitat, unless the Secretary of the Interior determines that the failure to designate critical habitat will result in the extinction of the species.

Outcomes of Critical Habitat Designation

The principal outcome of a critical habitat designation is the requirement, under Section 7 of the ESA, that Federal agencies consult with the Service before taking actions, issuing permits, or providing funding for activities that might adversely modify critical habitat. In some cases, the designation creates no new consultation workload for an activity. This is because consultation for Federal activities that may affect species listed as threatened or endangered is already required, whether or not critical habitat has been designated.

The Service seeks to work with landowners and Federal agencies as early as possible in the consultation process to identify measures to reduce or eliminate effects to listed species or designated critical habitat. Most projects go through unmodified. Some projects are modified through informal consultation with input from landowners and Federal agencies. In some cases, Federal agencies request initiation of formal consultation.

Piping Plover Critical Habitat Designation

The northern Great Plains breeding population piping plover, a migratory shorebird, was listed under the ESA in 1986 as a threatened species. The Service chose not to designate critical habitat at that time. As a listed species, the piping plover is already protected wherever it occurs and Federal agencies are required to consult on any action they take that might affect the species, regardless of critical habitat designation.

The critical habitat for the Great Plains breeding population of the piping plover was proposed in response to litigation brought by Defenders of Wildlife against the Service for failure to designate critical habitat. The Service was ordered by the Federal court to propose critical habitat for the northern Great Plains piping plover by May 31, 2001 and to issue a final rule by March 15, 2002.

The proposal includes 196,576 acres of habitat and 1,338 river miles in Minnesota, Montana, North Dakota, South Dakota, and Nebraska. Proposed areas of critical habitat for the plover include prairie alkali wetlands and surrounding shoreline; river channels and associated sandbars and islands; and reservoirs and inland lakes and their sparsely vegetated shorelines, peninsulas, and islands. While large sections of the river corridors are proposed as plover critical habitat, the designation is narrowly drawn to exclude most non-river related development. In addition, throughout the designated area, human structures such as mainstem dams, buildings, marinas, boat ramps, bank stabilization and breakwater structures, row-cropped or plowed agricultural areas, sand pits, high bank bluffs along the Missouri River, and roads are not proposed for critical habitat for the plover even if they fall within critical habitat designation boundaries.

As part of the rulemaking process, the Service held informational meetings in the affected states during the summer of 2001 and accepted public comment, reopening the comment period to allow extensive comment on the proposed rule.

Piping Plover Critical Habitat—Economic Analysis

A draft economic analysis for the piping plover designation was developed by Bioeconomics, Incorporated, a Montana-based economic consulting firm. The draft analysis was completed to comply with court decisions requiring an expanded economic impact analysis and was submitted for public review and comment in January 2002.

The draft analysis for the Great Plains population of the piping plover finds that over the next 10 years, the estimated future costs of Section 7 consultations to private applicants and other Federal agencies would be approximately $552,500 per year. Of that sum, no more than $58,000 is attributable to the designation of critical habitat.

In Nebraska, the analysis foresees 5 formal consultations per year and 38 informal consultations per year for the plover on the Platte, Loup and Niobrara Rivers. The primary activities in Nebraska likely to result in consultation are expected to be associated with direct modifications of the river or its shorelines, such as bank stabilization, water depletion, sand and gravel mining operations, levee construction and water well fields. Because of previous consultations conducted on behalf of species associated with these three rivers, the presence of other listed species in the area, and the already-designated critical habitat for the endangered whooping crane, the report concludes that there would be little additional costs in Nebraska.

In closing, Mr. Chairman, the consensus-based Platte River process has been a learning experience. But let me stress that it is moving forward and I believe it will result in a plan to both protect the myriad of species and provide the crucial level of certainty for land owners, farmers, and other water users in the three-state Platte River Basin.

That concludes my testimony, I am pleased to answer any questions.

STATEMENT OF RALPH MORGENWECK, EXECUTIVE DIRECTOR, U.S. FISH AND WILDLIFE SERVICE

Mr. MORGENWECK. Mr. Chairman, I will address a few comments about the critical habitat designation for the piping plover.

First, what is critical habitat? The designation involves the identification of lands or river corridors, in this case, that are found within a geographic area where the particular species, in this case the piping plover, are found. And those areas that are identified are those that provide the life requisites for that particular species, so places to breed, places to raise their young, et cetera. Those

areas are also identified that may need some kind of additional management but they are also judged to be required for the conservation of that species. Well, what does the conservation of the species mean? In the context of the Endangered Species Act, when we say conserving the species, what it means is bringing to bear all those things that we can do to get the species to a point where the Endangered Species Act is no longer required to protect it.

In addition to that, there may be some areas that are not currently occupied by the species that are judged to be required for the recovery of the species. They also may be identified as critical habitat.

Along with the identification from a biological standpoint, is required an economic analysis and in the course of evaluating the economic analysis, certain areas may be dropped from critical habitat designation if the benefits of designating it are not as great as the disbenefits of the economic impact, as long as that exclusion of those areas that may be dropped will not result in the extinction of the species. So that is a process that the Fish and Wildlife Service has to go through as they evaluate the economic impact.

The reason that we are designating critical habitat is that it clearly says in the Endangered Species Act that at the time of listing, critical habitat should be designated unless it is not determinable, which means you get another year to do the work, or if there is some reason that designation of critical habitat would result in some threat to the species, for example vandalism of nesting areas or something of that sort.

But over the years, what has really driven us to where we are now is the case law decisions made by Judges. Historically the Fish and Wildlife Service has not designated critical habitat at the time of listing. There are many in the Fish and Wildlife Service who question the true conservation value of designation of critical habitat but nonetheless, the law is very clear, and there have been a series of lawsuits that have spoken very, very clearly that the Service is obligated to designate critical habitat. As a result of a lawsuit, the Fish and Wildlife Service has been ordered by the court to designate critical habitat for the piping plover. Further, the court has ordered us to designate that critical habitat by the 15th of March of this year. We have published a proposal in the FEDERAL REGISTER, received comment on that for 60 days, we then re-opened the comment period when the economic analysis became available, that too was published for public comment for another 30 days. So we have received about 90 days worth of comments on the proposal, about 30 days worth of comments on the economic analysis.

I know that there are many concerns about was that sufficient time. The issue of whether or not additional time can be made available is a question that is being discussed now by the Department of Interior with the Justice Department because it would require the approval of the Judge who is handling this case, to give us that additional time and I am sorry to say I do not have an answer to that question today. But those discussions are certainly ongoing.

So I think, Mr. Chairman, I will conclude with those remarks and take any questions that you have.

[A letter submitted for the record by Mr. Morgenweck follows:]

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Extension
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22 March 2000

Sharon Whitmore
Acting Nebraska Field Supervisor
U.S. Fish & Wildlife Service
203 W 2nd St
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Dear Sharon,

This is in response to your letter dated 6 March 2000 requesting comments on your Draft Milestones R3-1 Document. I offer the following comments.

Whooping Crane

Off-river roost sites should be included in your list of suitable habitat if, in fact, an adaptive resource management approach is taken. The data is overwhelming in that whooping cranes are birds of palustrine and lacustrine wetlands NOT riverine habitat. While whooping cranes do use the Platte River for roosting, it may be that the loss of wetlands bordering the river has had a greater impact on use. During 1940 through 1985 there were 534 confirmed sightings in the lower 48 states. Only 10 or 1.2% were on the Platte River. This percentage would be even less if Canadian sightings were included.

From 1970 through 1998, 38% of the years exhibited no confirmed whooping crane sightings along the Platte River. On average, less than 1% of the population was confirmed in the Platte Valley during the same time frame (0-3% in any given year). The number of confirmed sightings on riverine habitat anywhere within the migration corridor is less than 3% of the total. Anecdotal evidence along the Platte suggests that whooping cranes were attracted to the vast wetlands in the late 1940s and early 1950s before extensive drainage occurred (Currier et. al, 1985. Migratory Bird Habitat on Platte and North Platte Rivers in Nebraska, p.29).

During the 1981-1984 radio-tracking study of whooping cranes, 18 whoopers were tracked on 3 southbound and 2 northbound migrations. None of them used the Platte River (see Marshall Howe's 1989 FWS Technical Report of this study). In fact, I became part of the ground-tracking crew in the spring of 1984 after 2 subadult whoopers spent 22 days near Hershey along the North Platte River and the original tracking crew had to attend to other obligations. These birds never used the river for roosting, rather they used the same palustrine wetlands that the sandhill cranes use in that particular staging area.

I co-authored a paper on whooping crane migration ecology in Nebraska (Lingle, et.al, 1987. Migration ecology of whooping cranes in Nebraska. Proc International

Crane Workshop, China) that describes habitat use. Once again, wetlands were the predominant habitat type for roosting. Also, refer to Amy Reichert's 1999 Ph.D dissertation on whooping crane habitat use from the University of Nebraska.

Development of wetlands in the Platte Valley by The Nature Conservancy and other conservation groups has resulted in use by whooping cranes as well. Even at Bosque Del Apache NWR in New Mexico, the cross-fostered whoopers roost in the highly regulated water impoundments adjacent to the Rio Grande River unless the impoundments freeze. Only then will they roost in the river.

My point is that off-river roost sites must be included not only for biological but also for economic reasons as well. NPPD's Cottonwood Ranch is a case in point. As you know, the FWS intends to clearcut a gallery forest and engineer a channel which meets the definition of roost habitat. The purple loosestrife problem, the sediment concerns, and the ongoing disking necessary to maintain the open river channel will be a costly experiment. This does not even consider the loss of biological diversity resulting from the clearcutting efforts currently underway. It may be less costly and more beneficial to whoopers to create wetlands in the former wet meadows there. By restoring marginal croplands to prairie and wetlands, the same benefits to whoopers may be attained. If not, the more intensive clearcutting route can be taken.

It is interesting to note that since the completion of the Kingsley Dam in 1941, the whooping crane population has increased 13-fold. My point here is that use or population size may not necessarily prove a cause and effect relationship. I wonder if the Platte River would even be considered if the FWS was charged with designating critical habitat today. Whooping crane experts that I have visited with would be hard pressed to consider the Platte River given our current state of knowledge. Certainly none would be willing to state on a witness stand that the continued existence of the species would be in jeopardy if the Platte River were to disappear. That aside, the development of off-river roost sites will not diminish the need to maintain instream flows due to the direct positive relationship of river stage to groundwater levels in the adjacent aquifer.

On page 4 of the Draft R3-1 Document states "In February and March, rising ground water levels thaw the soil and initiate biological responses of soil organisms." What specific studies on what soil organisms were used as a basis for this statement? I am not aware of such studies yet I know this argument has been used as a basis for instream flow requests and other legal proceedings. If there are any, you should include them in this document with supporting evidence.

Least Terns and Piping Plovers

At the February Monitoring and Research Workshop held at the Trust offices, it was interesting to note that the species experts did not think it wise to create permanent nesting habitat due to the problems associated with predation. That the central Platte River does not offer any naturally occurring nesting habitat for these species is amply demonstrated by fact that ~~there were~~ no tern or plover chicks were known to fledge on any natural river sandbar during the entire decade of the 1990's. A 50-60 day window of flows less than about 1500 cfs during late May through mid July is necessary to allow for nesting and subsequent fledging. This did not happen in the 1990s. Nests and/or young were flooded out. The efforts exhibited by conservation groups to provide nesting habitat

for these birds can only be characterized as a dismal failure. The habitat simply does not exist under current conditions.

My study of the nesting ecology of both species from Chapman to Lexington during 1985-1991 chronicles the situation (see annual reports submitted to FWS dated 1985, 1986, 1987, 1988, 1989, 1990). My nesting habitat data and population estimates during those years do not agree with Tables 1-2 and 1-3 (op cited, Lingle 1993. Causes of nest failure and mortality of least terns and piping plovers along the central Platte River. Pages 130-134 in Proc. Missouri River and it tributaries: piping plover and least tern symposium). River use was greatest in 1985 following back-to-back 100-year flood events during the summers of 1983 and 1984. This stochastic event created plentiful sandbars along the river which were used by both species. The shift to sandpits occurred during the subsequent years to the extent that sandpits or dredge islands are the only places where young have fledged in recent years.

This begs the question as to whether it is in the best interest of the species' long term well-being to attract them to an area where they are likely to be flooded or eaten by predators. The best production occurs at Lake McConaughy and the lower Platte River but the Cooperative Agreement does not allow for those areas to be considered. Clearly stochastic flood events provide the necessary requirements for these species to nest throughout their range and it is this ephemeral nature of that type of habitat with which these species evolved. It is unrealistic to think we can replicate these types of flood events through releases from the Environmental Account stored in Lake McConaughy. The birds will nest at sandpits and one way to insure their success is to hire tern and plover wardens to guard each nest/young 24 hours a day through the nesting season. One other way to provide habitat is to ensure instream flows do not exceed 800 cfs during the nesting season.

Pallid Sturgeon

How you can monitor the impact of flow releases on a fish species that may or may not exist 200+ miles downstream is beyond my comprehension. Fortunately, I do not have to deal with that problem.

Other Species of Concern

The institutionalized clearcutting of riparian forests that is currently underway under the guise of endangered species habitat augmentation can only be characterized as dendrophobic (dendrophobia is the irrational fear or hatred of trees). No one knows what is being lost since there are no thorough inventories being done prior to treatment. The avifauna associated with these riparian zones is rich with neotropical migrants (e.g. willow flycatcher and Bell's vireo) that are experiencing serious population declines elsewhere in their range. Riparian cottonwood forests are perhaps the most endangered habitat type in the West and Southwest yet here they are treated like musk thistles.

The arbitrary and capricious nature of the Cooperative Agreement is best revealed by the fact that the federally endangered Bald Eagle was not included in the list of target species. This was done despite the fact that the central Platte River hosts one of the largest wintering concentrations in the lower 48 states and has an increasing number of

nesting eagles. I realize they will be delisted in July but the signatories of the agreement did not know this in July 1997. How can one federally listed species be ignored while others are not?

In conclusion, the Platte River and its associated wildlife is a national treasure that needs to be protected for what it is. We are not going to remove the dams, plug the diversions, and take out the bridges so that the river can act as it did prior to European development. The forces of nature acting on the system now are vastly and permanently different than they were historically. Maintaining a base flow in the summer to prevent fish kills, converting marginal cropland back to wet meadows, and protecting greenways along the riparian corridor will go a long way towards providing benefits not only to the target species but to the larger biotic community as well. The fatal flaw in this process may be trying to prop the protection of the Platte using the ESA as a foundation. Once again, the Platte needs to be protected for what it is; a resource serving the agricultural, municipal, biological, and spiritual needs of the region. Aldo Leopold once said that the first step to wise ecological tinkering is to keep all of the cogs of the wheel. We would be well served to heed his advice and proceed with a holistic and reasoned concept of how best to protect the river and its unique wildlife. Let us use adaptive resource management in its broadest sense and proceed cautiously and carefully.

Sincerely,

Platte Watershed Program Coordinator

cc. Tom Franti
Dale Strickland
Curt Brown

Mr. OSBORNE. Thank you very much for your testimony. I realize it takes some time and some thought to prepare a statement and even though you may not be able to read the entire statement, it will go on the record, it will go to the Resources Committee and it will be a valuable resource.

I guess I would like to start with the beginning. I talked about being proactive and I am afraid I may violate my own rule a little bit here, but we will go back to May 15, 1978, the Fish and Wildlife Service designated critical habitat for the whooping crane on the Central Platte, a 56-mile long corridor, three miles wide from Lexington to Chapman. I think everybody is aware of that designation.

I would like to quote from a letter from Gary Lingle, Gary worked for the Whooping Crane Trust for a number of years, studied the whooping crane. I think he currently works for University of Nebraska-Lincoln. And in his letter, he said this, "The data is overwhelming in that whooping cranes are birds of palustrine and lacustrine wetlands, not riverine habitat." Now that is fancy language to mean that they normally do not live on rivers.

"During the 1981-1984 radio tracking study of whooping cranes, 18 whoopers were tracked on three southbound and two northbound migrations, none of them used the Platte River. These birds never used the river for roosting, rather they used the same palustrine wetlands that the sandhill cranes use in that particular staging area."

He goes on to say, "Once again, wetlands with a predominant type habitat for roosting. It is interesting to note that since the completion of the Kingsley Dam in 1941, the whooping crane population has increased 13 fold. I wonder if the Platte River would ever be considered if the Fish and Wildlife Service was charged with designating critical habitat today. Whooping crane experts that I have visited with would be hard pressed to consider the Platte River, given our current state of knowledge. Certainly, none would be willing to state on a witness stand that the continued existence of the species would be in jeopardy if the Platte River were to disappear."

Now the reason I read this is that this is certainly one who is independent, this was a person who worked for the Whooping Crane Trust for many years, studied the river very closely, has no ax to grind. Much of what I have heard anecdotally backs this up, this type of thing, that very, very few whooping cranes are ever seen on the Platte River.

And so since we have made this designation of 56 miles, that is where it all started and that is what has gotten us to this point with the Cooperative Agreement and the critical habitat and so on.

Do you gentlemen see any way that that can be re-evaluated? It does not seem to me that we would continue to move forward with something that makes no sense if the science is not there. And so I would appreciate your comments on this and I realize most of this designation was done probably long before you were in your current jobs and we are not blaming anyone here, but we are just asking is there anything that can be done to rectify this situation, given what appears to be some fairly strong evidence that the whooping crane really does not use that stretch of the Platte River in the way that many people have assumed that they do.

Mr. MORGENWECK. Mr. Chairman, I might have a bit of a disagreement with the contents of the letter. I believe since 1966, we have confirmed sightings of about 171 whoopers as they pass through the area and I believe that somewhere in the neighborhood of 140 some were found to be using the river, the remainder were in fact roosting in areas—the wetlands along the Platte.

I think that as years have gone on, I think the evidence is quite strong, and there is certainly some room for differences of opinion as to whether or not the Platte is essential for roosting. I also think that it does indicate that whoopers perhaps do use several kinds of habitat for roosting purposes.

Mr. OSBORNE. If you will speak more directly into your microphone, I think it will be better.

Mr. MORGENWECK. So I would say, No. 1, I have some disagreement with the contents of the letter.

The second point you raise was can you revisit critical habitat designations. The answer is yes. They could be revisited, they could be revised to reflect more current science, so yes, that is always a possibility.

I guess the third point would be the question whether or not the designation of critical habitat by itself, as opposed to the listing of the species, whether that is in fact causing a great deal of economic impact that would have not been there were it just for the listing. In other words, does the critical habitat designation add an additional economic burden that simply having it listed under the Endangered Species Act does not cause. And generally we find those things to be fairly small increments.

Mr. OSBORNE. I appreciate your answer. I guess my question to you would be, there may be disagreement on the data. When you talk about 170 sightings, that certainly is not annual, it maybe what—

Mr. MORGENWECK. It was since 1966.

Mr. OSBORNE. —four or five a year—three or four a year?

Mr. MORGENWECK. Well, there are less than 200 birds also.

Mr. OSBORNE. What I am saying is that if we are looking at two to three to four to five birds a year out of 150 to 200, it seems to me that that is not a critical habitat. Now I am not an expert, you are, but I am saying would you be willing to have that revisited and have the research examined by an independent review committee? Is this something that would make sense?

Mr. MORGENWECK. As a matter of fact, in the construction of the Cooperative Agreement and the recovery program that we are now negotiating, peer review plays a very important part. The committees have developed peer review protocols to be used. The models that we are using, the data that we are using, all are available for peer review any time that the Governance Committee chooses, whether it be issues related to what whooping cranes use in terms of habitat, whether it is flow targets, whatever it is. And we are very supporting of that peer review process.

Mr. OSBORNE. I appreciate that.

Mr. Rehberg.

Mr. REHBERG. Thank you, Congressman Osborne. I am going to be able to leave Nebraska with a suntan, I thank you for that.

[Laughter.]

Mr. REHBERG. Hard to explain to my folks back home how I picked that up in the Midwest.

Mr. Keys, I understand that the National Academy of Sciences recently completed the peer review of the scientific basis for the decisions made in the Klamath last summer. There are equivalent concerns raised here about the quality of the science. In your opinion, are the similarities between how the data was interpreted in the Klamath Basin to what has been done over the years here on the Platte? And I guess more importantly, do you foresee the same kind of decision made by various government entities that precipitated the protests on the Klamath and then the ultimate uproar and then now the Academy of Science's study?

Mr. KEYS. Mr. Chairman, Mr. Rehberg, the National Academy of Science review that was done on the Klamath certainly indicated that there were conclusions drawn from a shortage of data there that may not have been adequate at the time. It said that the Fish and Wildlife Service may have set some lake levels or release levels higher than they should have been. It also told the Bureau of Reclamation that we should not operate that lake level system any lower than we had in the past, that there was no justification for doing that. We are in the process of working that review into the Biological Assessment for the Klamath Basin and reissuing it in the near future.

Comparison with this system here—any time that you have an Endangered Species Act listing and a drought, you have set up for a Klamath situation. You throw onto that the lack of an adjudicated river system and then you are bound for disaster. And then when people do not talk to each other, you almost cannot avoid a disaster. And that is what happened in Klamath.

The beauty of this situation here is the agreement and the cooperation among all the parties. The states are involved, the water users are involved, the Federal Government is involved—all of those folks are talking. Should this be peer reviewed? Yes, absolutely yes. At that time when this agreement and all of its stuff is together in about a year and a half, it will be done. There is a peer review protocol built into the process up to that point and certainly when it is over, that will be accomplished.

To me, the set up here of this committee keeps us from having a Klamath.

Mr. REHBERG. As I was listening to your testimony, I was wondering do you have the ability in the numbers that you establish for a standard or historic level of consideration for multiple year drought? I am sorry, I cannot speak to Nebraska, but I can tell you in my own home county, we are entering our sixth year of drought, statewide it is 4 years. And so decisions are made on the levels of areas like Flathead Lake, where we were all caught off guard last year. We allowed the dam to produce more hydro than they should have early in the season. Of course it went to California—that is another issue. And then later on in the year, we were caught in violation and my point to you is are you currently considering multiple year droughts, can you consider that and are we headed for a situation similar to Klamath even though you have a cooperative agreement, if you establish too high a level for a standard?

Mr. KEYS. Mr. Chairman, Mr. Rehberg, the answer to your question is a resounding yes, it has been considered and certainly we are trying to craft that thing so that it does not happen.

When I was first involved in this thing, I asked my folks what effect on the system does us making that water available for this agreement make—in other words, the 130,000 to 150,000. The answer is that water does not have a measurable effect on the system. When they evaluated the system and its effect at Grand Island, the reduction in the water flow was 50 cubic feet per second. In a river the size of the Platte River with its wide braided channels, you cannot measure 50 second feet, it is that small.

We then asked OK, how serious was the drought that you considered. The worst drought that has been measured in this basin was in the early 1950's. They put that drought on the operation that we are talking about and then they followed it with another one. In other words, they put two of those droughts back to back to each other and it still did not have a measurable impact on the Platte River. That is a degree of comfort for us that we will not have that devastating effect on the river system.

When I talked about adaptive management, if you see that maybe there is a potential for having three of them, then we start adapting so that we do not impact those economic resources that we depend on.

Mr. REHBERG. What happens in June 2003 if things are not done? Will land transfer, title be affected, will projects be affected or are they so affected now that it will not matter, it will just be a continuation, we will ask for a continuation and nobody will notice?

Mr. KEYS. Certainly with the schedules that we have right now, we anticipate it being done. I would say that if it is not done, it is too important to us to just cut it off and say we are done, we would look to extend that so that we get it done right. It is too important to the State of Nebraska, the State of Wyoming and Colorado and to the resource here for us to short change that.

Mr. REHBERG. But you have the power to short change—you have the power to stop project by ruling if it is not done by June 2003?

Mr. KEYS. To stop projects, I am not sure what you mean, sir. If it means diversion of water, certainly I do not have that kind of power myself.

Mr. REHBERG. I am just wondering what authority establishes the June 3, I know it becomes a goal and I worry that we do not come to an agreement as well, but I am worried about the effects on private property rights and irrigators and economic development. Even though economic development cannot necessarily be considered when it is established for critical habitat, we cannot ignore economic development and how it affects communities and lives and so if June 3, 2003 comes along and the authorities come in and say well, sorry, but we gave you until June 2003 to get this done and you did not get it done, so now we are going to affect or change one of your operating procedures, thereby affecting my ability to pay for my kids' shoes. I am going to be a little cranky. And so, you know, I just want to know what is going to happen if 2003 comes along and nothing is done.

Mr. KEYS. Mr. Chairman, Mr. Rehberg, I would anticipate if it is not done, we would extend that consultation so that we could finish it. I would defer to Mr. Morgenweck if he has a better answer than that.

Mr. MORGENWECK. The objective we have in this program is to have a consensus agreement among the parties and we have extended this program to try to do that. I think we are optimistic that we can meet our goals. I guess there is always the opportunity to consider further extensions if that were absolutely necessary. Hopefully it will not be.

Mr. OSBORNE. Thank you, Mr. Rehberg. I would like now to turn to the topic of least terns and piping plovers. And again referring to Mr. Lingle's letter and again pointing out the fact that he worked for Whooping Crane Trust, is not representative of any farm-ranching operations, currently works for the University of Nebraska. This was his observation after a number of years working with the Whooping Crane Trust.

And I quote him in the letter, "The Central Platte River does not offer any naturally occurring nesting habitat for these species [the least tern, piping plovers] is amply demonstrated by the fact that no tern or plover chicks were known to fledge on any natural river sandbar during the entire decade of the 1990's. The 50 to 60 day window of flows less than 1500 cubic feet per second during late May through mid-July is necessary to allow for nesting and subsequent fledging. This did not happen in the 1990's. Nests and/or young were flooded out."

Now what he is saying here is that in that 56-mile stretch of the Platte, those who studied the issue could not find any record of any fledging of least terns or piping plovers over a 10-year period. And I think there are many people here today who are of the same opinion.

The concern that we have is that if we designate critical habitat for the piping plover in that same stretch of river and it really is unnecessary, again, this is something that we would like to have considered. When he talks about a 50-60 day window of flows of less than 1500 cubic feet per second, what he is saying here is that these flows cannot be manipulated through McConaughy. I think the assumption is that we can have pulse flows, we can put 8000 cubic feet per second down at certain times of the year and then we can reduce it to 2400 cubic feet per second in May and then we can reduce it. But the point is that if you have a reasonable range below McConaughy at any point, you are going to go over 1500 cubic feet per second. And what that does is it floods out the nest and it did every year for 10 years. Now again, there may be disagreement here and my question is simply would you be willing to submit to a further peer review rather than just saying this is a critical habitat region. Can we make sure we have the data to indicate that this is necessary?

I imagine, Mr. Morgenweck, you would be the one to answer that question.

Mr. MORGENWECK. Yes, I would be. A couple of points. First a general point and then I will get to the specific question that you asked about peer review of it as well.

I think that it is perhaps too narrow a point of reference to pick a particular decade to look at what has happened in terms of fledging on the river. And the reason I say that is this. These birds evolved in systems that saw periodic high flows, that saw the creation and erosion of sandbars in the river systems over a period of time and took advantage of those new sandbars that were lightly vegetated to nest. And one of the things that has happened over the years since we have controlled the flow on the Platte is that the ability to have those newly created sandbars is much reduced because the flows have been changed and high flows have been attenuated. So the situation that these birds evolved under has changed at the hand of man.

Now I think that also we have to take a larger view of what is happening with the population as a whole. I do not think we can just look at the piping plovers and least tern on the Platte River and say well, you know, the habitat has changed here, so therefore the Platte is not important any more. I think we have to look at what is happening overall, and overall, there has been some pretty tough going for these species.

Now we have had some good fortune on the Missouri system as it relates to the piping plover over the last 5 years or so, since there were very, very high water events in 1997 and 1998 on the Missouri that did in fact create a great deal of nesting habitat and the birds capitalized on it and increased their populations on the Missouri River something like 470 percent over the last few years. But nonetheless, the species still is not at the point of recovery. So I think there is a contribution that the Platte can make.

The second part of your question was peer review. I again have nothing but good things to say about peer review. The way I view it we cannot lose. If we find that we are wrong and peer review can correct it, that is good. If we find that we did get the biology right, that is good too.

Mr. OSBORNE. Well, I appreciate your answer and I appreciate the spirit with which you answered, which is obviously to try to do the right thing. Often times people get locked into positions and then they want to defend that position in the face of all reason and I do not believe that is the case here.

So we would welcome that opportunity, because if for 10 straight years, there has been no fledging, we realize that it is a much larger issue than the 56 miles of the Platte, but does it make sense to designate 56 miles of the Platte River as critical habitat for the piping plover if there are no piping plovers nesting in the river and it is almost impossible to control the flows because of rainwater. It does seem odd that the one success story we have had has been sand pits, has been the shores of Lake McConaughy and those are exempted from critical habitat designation, it is my understanding. And yet we are trying to force it onto the river, which does not seem to work. So this is what I would like to see somebody do, is to make sure that we have got our facts straight. I hate to see us dismiss 10 straight years of data and say well, that is maybe just an oddity, we are not sure that that is the fact. I think we ought to check it out a little bit further.

So anyway, I appreciate that and Mr. Rehberg, I believe it is your chance.

Mr. REHBERG. Just a couple more questions, Mr. Chairman.

Mr. Keys, real quickly, the 10,000 acres that you intend to purchase, are you going to use land and water conservation funds or is that a state function?

Mr. KEYS. Let me call on the persons doing that. Mary Ann.

Ms. BACH. Mr. Rehberg, the land acquisition is acquisition in the broadest of terms because it can be through lease arrangements, through conservation easements, through a whole assortment of land approaches. And that funding, the particular funding, is actually an item that is estimated under the cost of the program in contrast to the land and water conservation funds. However, I know Fish and Wildlife has some arrangements on ground already and I might ask Dr. Morgenweck if he has anything more to add.

Mr. MORGENWECK. Congressman, I do not think that the actual source of the funding has been determined yet in terms of the land acquisition. One of the important points about land acquisition—acquisition of interests in land, and I think it is very important for us to remember what we are trying to do in the Platte does not necessarily mean that we have to acquire in fee title. Easements would be great, other arrangements whereby the habitat is there, who owns it is not so important.

There are restrictions when you use Federal money to purchase land interests that may not be there if the money were appropriated under another authority. Land and Water Conservation Act has very specific requirements. So I do not know what the best source of money might be.

One thing I might add is that Congress has I think helped all of us in the last go around when they created a series of new grants for states and for private landowners, something in the neighborhood of I believe $135 million that can be granted to states and tribes to work on things like endangered species or species that are declining, trying to get to them before they are listed, and perhaps some of those funds may also be used to acquire interests in land. So we have some more options than we had a couple of years ago.

Mr. REHBERG. Mr. Keys, just so I can close the loop then, the 29,000 acres that you talk about, is that inclusive of the 10,000 or is that an additional 29,000?

Mr. KEYS. It is inclusive, yes.

Mr. REHBERG. And that is all anticipated to be inside of the cooperative area or strictly in Nebraska?

Mr. KEYS. Inside the cooperative area, sir.

Mr. REHBERG. OK. Mr. Morgenweck, one question for you. In your recent op ed on critical habitat, you write, "Critical habitat has no effect on private landowners unless they are undertaking a project that requires Federal permits or funding. So far the Fish and Wildlife Service has not included Federal farm programs as ones that trigger the Fish and Wildlife Service to review the activities; however, some Fish and Wildlife Service officials have expressed a desire to include all farm programs as ones that would trigger a review of the program by the Fish and Wildlife Service. Is this your intended policy?

Mr. MORGENWECK. Wherever there is a Federal program that funds or permits an activity that could affect endangered species,

then a consultation may be required if upon examination there would be some adverse effect. We have worked with the NRCS in Nebraska on a number of issues to evaluate whether or not the programs require consultation. In one case that I can recall, and I may ask Bob McCue to help me which specific ones they were, NRCS did an extensive evaluation as to whether or not these programs led to any depletions from the Platte and found they did not. And so as a result, there was no consultation required because there were no negative effects.

Mr. REHBERG. But when you are creating a definition of critical habitat and you include the opportunity to be able to include private land within that critical habitat, even if the endangered species had not been present in that location but it may have an environment conducive to the recreation and then I come in for emergency assistance for piping water to put in a tank for cattle in all pastures that I have not had water in because of drought for 3 years, you are telling me then that under your definition, there is an opportunity because I took that Federal dollar for the cost share on the piping, to have my land included in the critical habitat for the black-tailed prairie dog.

Mr. MORGENWECK. I am not sure that I understand the question, but let me take a crack at it and if you will tell me whether or not I got it right.

[Laughter.]

Mr. MORGENWECK. The critical habitat designation or the listing of a species can trigger the Section 7 consultation. It is not the consultation that then drives us to designate critical habitat and so I was not sure from your question which way you were asking.

Mr. REHBERG. But if you have the opportunity and you made the statement in your opening statement that if you had the opportunity to include land that was not—did not currently have an endangered species inside of a critical habitat. All right, now let us set aside that private land over there into a critical habitat because it has the potential of housing a black-tailed prairie dog population. I go in, because of a drought, third or fourth year, my springs dry up, I get a Federal payment on my cost share to bring water out to there. You are telling me then that can kick in the determination that that should be included in that critical habitat because it has got the potential because there is a town a mile away or for some other reason cannot be the area where they are re-established because of some other reason.

Mr. MORGENWECK. I think the answer is no. And the reason I think the answer is no is that the—what you describe, that is currently unoccupied habitat that has the elements for life for a particular species can be designated as critical habitat if it is viewed that that is needed to recover the species—that is true. All right, now if you have that species—I am sorry, that designation has been made and you want to take an action in that now designated critical habitat. If the farm program that you are availing yourself of, if we have evaluated that with the NRCS, we may have found that there is no effect, thus no consultation is required. Generally what we want to do with NRCS is to consult, what we call a programmatic level; in other words, look at that particular activity across an entire state and do one consultation on that and deal

with it that way, so that the individual landowner is not burdened with having to deal with a consultation for emergency stock watering, for example.

Mr. REHBERG. OK, that brings me then to my real question, CRP. Do you intend to use the Federal payments that go to CRP for the purposes of establishing critical habitat areas for the re-establishment of some of the issues such as the piping plover?

Mr. MORGENWECK. I would say no, I would say CRP would not have a bearing on designating critical habitat.

Mr. REHBERG. OK.

Mr. KEYS. Mr. Chairman, Mr. Rehberg, let me finish the answer on your question on whether it is in the cooperative area. The cooperative area does include all of the critical habitat for the species. In this case, all the critical habitat is in Nebraska, so all of that land would be obtained in Nebraska.

Mr. REHBERG. Thank you.

Mr. OSBORNE. OK, we will go one more round of questions. We do not want to wear you guys out; however, you are the key players here, we really want to make sure we have a chance to talk to you a little bit.

Mr. Keys, you made one statement earlier and I know you made it in good faith. I guess I would take some issue when you talked about 80,000 acre-feet being contributed into the environmental account, being used in the cooperative agreement and that that would not be taken from anyone. I think some would disagree.

I remember in 1990, 80,000 acre-feet were dumped down the Platte—or down the canal in the river out of Lake McConaughy, dropped it about three feet at a time of year where that water that would later be used for irrigation could not be used. Effectively, it did not do anybody any good and it did not seem to do the species any good and it did ruin the walleye spawn because I am a walleye fisherman, and so all the eggs were left high and dry in the lake because the walleye had just spawned. And it seems like sort of a capricious and arbitrary decision. So I just wanted to point out to you that I think that many people feel that water that is released out of McConaughy or down the river at times of the year where that water is not captured for irrigation, sometimes it is not even used for power, does have a cost to it and that it is something that really is not necessarily non-impact water.

Let me just ask one more question and I will refer to the work by David Bowman of the Fish and Wildlife Service here in Grand Island, 1994, and this is what he said, he said, "While the information used by the Service in formulating the target flows is the best available, continual acquisition and analysis of scientific and habitat management information are necessary." And what he said is that, "however, in written testimony, the Central Platte NRD has stated that the same in-stream flow target numbers, when used by the Nebraska Game and Parks Commission in an in-stream flow water rights application before the Nebraska Department of Water Resources, were rejected by the State of Nebraska as being too high. Nonetheless, the Fish and Wildlife Service continues to use the in-stream flow target numbers that were rejected after a thorough review on the record."

Can you explain how this action is consistent with the assumption that was included in the original goal for the in-stream flows, which essentially said, you know, we are going to work this out by consensus. I have heard that word used several times today and yet it seems that there have been cases where there has been considerable argument as to the in-stream flow, the target flows, and their validity based on some research, and yet oft times these concerns have been disregarded out of hand.

Do you have any comment as to how this should be addressed? Do you think this is appropriate behavior or do you feel that when the State of Nebraska says these flows are too high, we do not think this is right, that some process should be put into play at that point?

Mr. MORGENWECK. Mr. Chairman, two comments. One, you previously mentioned an incident I think in 1990 where a substantial amount of water was—

Mr. OSBORNE. It was about that, it was 12 years ago I believe. It may have been in regard to the FERC relicensing, but the Fish and Wildlife Service was involved, I believe, at that point in the decision.

Mr. MORGENWECK. If I could, Mr. McCue, on my left, was here at that time and I might ask him to provide a couple of comments on that.

Mr. OSBORNE. Sure.

Mr. MORGENWECK. And then I would answer your other question.

Mr. MCCUE. As I remember it, that was required by FERC under one of the annual licenses for Nebraska Public Power Districts' effort and it came out of their water storage. I think that before long, we all realized that it really was not doing much good other than lowering the lake and we in the Service supported the request by NPBD to stop that flow.

Mr. OSBORNE. That is good to hear. I had the wrong culprit.

[Laughter.]

Mr. OSBORNE. But the point is that releases like that that do not seem to make much sense do set people's teeth on edge and they do cause people to have a certain amount of concern and cynicism. So I just wanted to point that out to you. But I guess my final question was simply the issue of consensus and if the State of Nebraska or some other reputable agency says we just do not agree with these target flows, do we automatically stay with Fish and Wildlife Service or is there some negotiation process?

Mr. MORGENWECK. A couple of comments. One is that there have been other situations I believe where the State of Nebraska has used our target flows and the testimony behind them to support water rights applications I believe by Nebraska Game and Parks, for example, and I think at least one other case as well.

One of the offers that we have made to the Governance Committee repeatedly is that as it relates to target flows, we are perfectly willing and ready to have them peer reviewed any time that the Governance Committee chooses. And the reason that we have this standing offer is that we know that as time goes on and we learn more, both about the species and about how the river itself operates, that it may be time to modify the flow target. So far the Governance Committee has chosen not to have those peer reviewed.

I think that at some point, they will get to the point where they will believe that it is time. And we are perfectly willing to participate and support that in any way that we can.

I would just say that in their thinking some of the members of the Governance Committee look at it this way—well, if we have it peer reviewed and we find the Service is wrong and the levels go down, in other words, the flow targets are less, well, that is good because that frees up more water for other considerations. On the other hand, if it is peer reviewed and found that the flow targets are too low, then do we have to support the Fish and Wildlife Service at these higher flow targets? So I think the members sometimes find themselves in a situation where they are not really sure that they want the peer review to happen right now. But I think that it will happen and we are supportive of it.

Mr. OSBORNE. I am glad to hear that and I think most people would be on the side of actual data and you hear the term sound science that seems to depend so much on who is doing the research, and I know in talking to Secretary Norton, she is adamant on the importance of true independent peer review and true sound science. And I know she feels badly about the Klamath Basin situation and that probably could have been averted by sound science. And so we appreciate your attitude and your spirit about the thing and we will hold you to that and we hope that most people will want accurate data so we may be able to get some things done that way.

Congressman Rehberg, do you have any further questions?

Mr. REHBERG. I do not.

Mr. OSBORNE. OK, we will let you out of this hot box here and we will turn down the lights a little bit. We are going to need about a three or 4 minute break here to do that. So we will take a short break while we get our next panel ready. And I want to thank you gentlemen for being here and also Ms. Bach for being here, we appreciate your testimony.

[Recess.]

Mr. OSBORNE. In the interest of time, we would like to get started. I would like to introduce the panel of The Honorable Ed Schrock, State Senator, Chairman of the Natural Resources Committee; Mr. Rex Amack, Director of the Nebraska Game and Parks Commission; Mr. Merlyn Carlson, Director, Nebraska Department of Agriculture and Mr. Jim Cook, the Legal Counsel, Nebraska Department of Water Resources.

The Chairman now recognizes Senator Schrock to testify for 5 minutes. We hope we have got the monitor working correctly. So we appreciate you gentlemen being here and Mr. Schrock, proceed.

STATEMENT OF THE HONORABLE ED SCHROCK, NEBRASKA STATE SENATOR, CHAIRMAN OF THE NATURAL RESOURCES COMMITTEE

Mr. SCHROCK. Congressman Osborne, Congressman Rehberg, ladies and gentlemen. I am a landowner, irrigator and farmer in northern Phelps County. I am a third generation farmer, my sons are the fourth generation, I farm with two sons, and the fifth generation is in diapers.

I am here today to testify the Cooperative Agreement for Endangered Species on the Platte River and the proposed designation of a critical habitat for the piping plover.

Nebraska has established a clear system of water rights based upon the uses of water and the priority dates of those uses. Creatively solving some of the endangered species issues in the Platte River Basin requires that we consider means of flexibility within these rights while at the same time protecting those rights and uses for future generations.

As we speak, the legislature and my committee specifically are considering various pieces of legislation related to leasing and banking water and the conversion of water rights between uses. My committee has advanced a bill, LB-1023 to the full legislature for debate. This bill creates a water policy task force which will examine five issues relating to water policy in Nebraska over the course of 18 months at a cost of $750,000, and one of the subcommittees will address the Endangered Species Act. It is supported by Governor Johanns and supported by Senator Wehrbein, who is Chair of the Appropriations Committee.

While the state was likely to have considered these issues in its own timeframe, the Cooperative Agreement discussions are forcing us into the situation of considering many of these issues in a compressed timeframe. While these issues are important to resolving endangered species issues in the context of the Cooperative Agreement, it is more important that we legislators of the state consider very carefully the long-term effects that any of these actions might have. The legislature will not jeopardize the Constitutional rights of our citizens or our agriculture economy in the state because of rushed or ill-considered measures.

That being said, let me extend my support to the Cooperative Agreement process. A cooperative process among the states and the Federal Government—let me emphasize the cooperative part, because my understanding is that many of the delays and arguments in finalizing this program are a result of the Federal agencies insisting on their way as the only way. A cooperative process is the most effective way to protect and manage the species of concern and at the same time consider the needs of the state and its citizens.

This agreement, given adequate funding and participation of the Fish and Wildlife Service in truly a cooperative fashion has the ability to provide meaningful management of the Endangered Species Act in question, to preserve and protect the people, the social systems and the economies of the basin and also to serve as a model for the entire nation. However, it is only when the leaders of the Fish and Wildlife Service and its sister agencies can communicate effectively their own vision of how the Act was intended to work for the benefit of the species and the people to the field representatives of the agencies, that programs such as this can work.

Often times it appears to me, the best intention of all parties notwithstanding, that individuals within the participating groups misuse the powers granted to them by the people of the United States and ultimately thwart what is best for all. It would be a tragedy if this potentially landmark program was destroyed by some of these individuals who feel very strongly that their opinions and

visions are what is best for everyone. It seems that these individuals would rather have contentious legal battles instead of a program built upon mutual trust and a goal of finding the truth through adaptive management and good scientific investigation.

It is exactly this apparent use of individual opinions rather than sound measured scientific knowledge that disturbs me as I read about and hear from my constituents regarding the proposed designation of critical habitat for the piping plover.

And I am going to have to be a little faster, I can see that.

In my own District, the Central Nebraska Public Power and Irrigation District's FERC relicensing shows what effects it can have from such a listing. This 14-year relicensing was long and contentious, not so much because of the existence of endangered species but because of the critical habitat designation of the Central Platte River for the whooping crane. I want to emphasize that it was the habitat, not the species, which caused most of the problems for relicensing. Additionally, the economic analysis provided by the Service did not consider the costs incurred by the irrigation district. No analysis was made of impacts to sand and gravel mining, housing developments, recreation, municipal water supplies, agriculture and I could go on.

Last, I want to discuss the species itself and the proposed critical habitat designation. I want this Committee to know that I believe the Endangered Species Act, as conceived, is an important and meaningful piece of legislation. I support protecting endangered species and their habitat when it is truly in the interest of the species and does not come at an undue price to the public.

However, much of this proposed designation for critical habitat for the piping plover is not appropriate. Historical data indicates that this species was never very abundant on the Central Platte and in fact may never even have nested in this region until after water development activities took place. Evidence exists today that in much of the area proposed for designation, piping plovers have never nested. Indeed, except for sand pits and other artificially created habitat, which are specifically excluded from the designation, there has been no piping plover nesting above Grand Island, Nebraska for over 10 years. This is not critical habitat either in fact or by the Service standards applied elsewhere in the designation. If there were natural habitats where nesting regularly occurred, then these areas should be specifically defined as provided in the law, and then properly designated. Blanket designations of large, undescribed reaches of land without any nesting violates the law and further undermines the credibility of the Fish and Wildlife Service.

I am sorry I had to hurry through this. If you have any questions, I would be glad to answer, but just let me tell you, I have lived on my farm all my life. I live in the house I grew up in. My neighbors and my farmers and the people of this state are good stewards of the land. We want to work with you in a cooperative manner, whether it be the Congress of the United States or the U.S. Fish and Wildlife, but we want reasonable solutions to reasonable problems. That is why I and many others decided we needed a water policy task force, and it is made up mainly of irrigators

and farmers, but environmentalists, municipalities and other concerns are also represented.

One of the problems we had in the hearing was that everybody said the task force was too big, but then everybody says to me I want to serve on that task force, including Mr. Carlson from the Department of Agriculture. He was left off and he wants on. So I have to draft an amendment to put Mr. Carlson on the Water Policy Task Force.

Mr. CARLSON. Thank you.

Mr. SCHROCK. And I will gladly do that.

Nobody wanted to exclude anybody from this, but it has the potential to help us solve a lot of our problems. I do not want the legislature to solve our water problems, I want farmers and irrigators to solve our problems and one of the problems is the Endangered Species Act. But I hope it can become a positive and not a negative.

Thank you for your time.

Mr. OSBORNE. Thank you, Mr. Schrock. I did not know you could talk that fast.

[Laughter.]

Mr. OSBORNE. Mr. Amack.

[The prepared statement of Mr. Schrock follows:]

Statement of The Honorable Ed Schrock, Nebraska State Senator, 38th Legislative District

Good afternoon ladies and gentlemen. My name is Ed Schrock and I am the Nebraska State Senator from the 38th Legislative District. Currently, I serve as chair of the legislature's Natural Resources Committee. I am also a landowner and farmer in northern Phelps County. I am here today to testify regarding the Cooperative Agreement for Endangered Species on the Platte River and the proposed designation of critical habitat for the piping plover.

The Cooperative Agreement is important to Nebraska as it provides a means to resolve most Endangered Species Act consultation issues and it serves as the basis for the Federal Energy Regulatory Commission licenses for the Central Nebraska Public Power and Irrigation District and for Nebraska Public Power District. It also serves as the basis for the reasonable and prudent alternatives for other water related activities such as the surface water irrigation projects in the Nebraska panhandle that receive water from federal reservoirs in Wyoming.

This proposed program has, as its cornerstones, provided land and water to protect and improve the habitat for three endangered species, including the piping plover, and to test whether or not the actions taken for these species might benefit a fourth species, the Pallid Sturgeon, which occasionally enters the lower Platte.

While the Cooperative Agreement provides a means to handle issues related to the four endangered species, it also has impacts upon individual residents and businesses within the state and requires consideration of legislation by the state to enable the state to fully comply with some of the proposed provisions of this program.

Many of the issues related to managing endangered species in the Platte basin require changes in the timing and quantity of water flowing in the Platte River. Nebraska has very specific laws related to water allocation and use that have served the state well for over 100 years. Indeed Nebraska's constitution provides for the right of its citizens to use the surface waters of the state for beneficial purposes. These constitutional and legal provisions are the foundation for much of Nebraska's agricultural economy as well as the communities built around that economy. Since those early laws were passed there is now the recognition that it is not just the uses of surface water that impact the river but that the use of our vast and important ground water resources are linked integrally with our rivers and streams. Because resolving the biological issues require modifying some of our actions related to the river, we must also address the relationship of ground water and surface water of the state.

Nebraska has also established a clear system of water rights based upon the uses of the water and the priority date of those uses. Creatively solving some of the endangered species issues in the Platte Basin requires that we consider means of

flexibility within these rights, while at the same time protecting those rights and uses for future generations.

As we speak, the legislature and my committee specifically, are considering various pieces of legislation related to leasing and banking water rights, conversion of water rights between uses, establishing a legal linkage between ground water and surface water and so on. My committee has advanced a bill, LB 1023, to the full legislature for debate. This bill creates a Water Policy Task Force which will examine five issues relating to water policy in Nebraska over the course of eighteen months at a cost of $750,000.00.

While the state was likely to have considered these issues in its own time frame, the Cooperative Agreement discussions are forcing us into the situation of considering many of these issues in a compressed time frame. While these issues are important to resolving endangered species issues in the context of the Cooperative Agreement, it is more important that the legislature of the state consider very carefully the long term effects that any of these actions might have. The legislature will not jeopardize the constitutional rights of our citizens or our agricultural economy in Nebraska because of rushed or ill-considered measures.

That being said, let me extend my support to the Cooperative Agreement process. A cooperative process among the states and the federal government—let me emphasize the cooperative part, because my understanding is that many of the delays and arguments in finalizing this program are a result of the federal agencies insisting on "their way is the only way"——a cooperative process is the most effective way to protect and manage the species of concern and at the same time consider the needs of the state and of its citizens.

Because under the formal procedures of the Endangered Species Act, only those activities with a direct federal nexus are required to consult, and therefore often times mitigate for impacts to endangered species, the costs of the Act often are levied only upon a few, leading to an unbalanced burden for what is truly a national issue. Under this proposed program many water related activities not normally within the purview of the Act are brought into the mix, this increases the burden upon the state and results in not just our consideration of legislation which I mentioned earlier, but also an increase in costs. These costs are a result of federal actions on behalf of the entire nation. For these reasons, I believe that the federal government should bear the majority of costs for these activities. It is my understanding that as the drafters of this proposed program have developed the details of the program, they have discovered their original estimate of 75 million dollars is likely to be only half of what is needed to adequately fund the program. While a 150 million dollar program is small by comparison to similar programs in California and Florida, it is a huge commitment upon the part of the states. Because Nebraska, in particular, is already incurring costs related to the implementation of this program through water and habitat and through potential changes to our laws, I feel that it is the responsibility of Congress to fund the additional cash portion of this program.

This program, given adequate funding and the participation of the Fish and Wildlife Service in a truly cooperative fashion, has the ability to provide meaningful management for the endangered species in question, to preserve and protect the people, social systems, and economics of the basin, and also to serve as a model for the entire nation. However, it is only when the leaders of the Fish and Wildlife Service and its sister agencies can communicate effectively their vision of how the Act was intended to work for the benefit of the species and people, to the field representatives of the agencies, that a program such as this can work.

Often times, it appears to me, the best intentions of all the parties notwithstanding, that individuals within the participating groups misuse the powers granted to them by the people of the United States, and ultimately thwart what is best for all. It would be a tragedy if this potentially, "landmark" program were destroyed by a few individuals, who feel very strongly that their opinions and visions are what is best for everyone. It seems that these individuals would rather have continuous legal battles instead of a program built upon mutual trust and a goal of finding the truth through adaptive management and good scientific investigation.

It is exactly this apparent use of individual opinions rather than sound, measured scientific knowledge that disturbs me as I read about and hear from my constituents regarding the proposed designation of critical habitat for the piping plover.

Aside from the obvious lack of scientific foundation for large parts of this proposed designation and from the obvious procedural disregard for public input in the process, which I will address shortly, there is already a far better means to protect this bird and its habitat than by a critical habitat designation. This means is the Cooperative Agreement. Here is a proposed program whose sole purpose is to manage and protect piping plovers, least terns and whooping crane habitat and to do it in

a cooperative fashion using adaptive management techniques and relying upon the collection of sound scientific data to guide those decisions. This is a process that is not an edict from some over-zealous bureaucrat but a process that involves the states and the people who live along the river and work with these birds regularly. This is the way to truly and effectively protect and manage these birds. Using an alternative program is not without precedent. In the process of this very proposed listing, several areas were excluded based upon the existence or proposed existence of a management plan that adequately protected the birds and their habitat. Perhaps the best example of this is the exclusion of Lake McConaughy from the proposed designation. This lake's shore, unlike the Central Platte River, IS the nesting area for one of the largest concentrations of piping plovers anywhere in North America. Yet because the owner of this lake, the Central Nebraska Public Power and Irrigation District, has a Federal Energy Regulatory Commission license that requires them to have a shoreline management plan that includes protection of the birds, this lake was excluded. Certainly a program developed by a group including the Fish and Wildlife Service and the three states and participants such as the district is adequate protection without the undue regulation and restrictions that may come from critical habitat designation.

Regarding the procedural issues surrounding this proposed designation, I am appalled at the actions of the Fish and Wildlife Service. The Service has had since 1985, when it listed the piping plover as threatened, to designate critical habitat. At that time the Service, in my view, correctly found that it was not appropriate to designate critical habitat, because of the transitory nature of the birds' nesting requirements. Notwithstanding that original finding as a result of a lawsuit, the Service has now, for the very reasons it found inappropriate in 1985, proposed critical habitat designation. In June of 2001 the Service proposed this designation, providing only an incomplete environmental analysis, not the least omission of which was an economic analysis. This so-called economic analysis dated November 2001, was released to the public December 28, 2001, with a requirement that comments were due in 30 days. Clearly the Service had the time after the court decision to compile the necessary data and complete the necessary analyses in a timely manner to fulfill their obligations; and yet, the Service chose not to release this document until they held it for over a month and then during a holiday week. Not only was it released when few people were available, but it was to be provided to the public electronically over the Department of the Interior's website that was and is inaccessible. Clearly, this was meant to restrict public participation. Perhaps more importantly, the 30-day comment period required by the Service is in clear violation of the 60-day review requirement of the Act. Even with a court order setting their schedule, the Service cannot use its own negligence as an excuse for not complying with the law.

Notwithstanding the unacceptable procedural elements, the economic report provided by the Service was, in my opinion, completely inadequate. The argument that there is little or no additional economic impact as a result of habitat designation beyond the species listing does not ring true nor does it comply with the recent decision of the 10th Circuit Court regarding economic analyses. In my own district, the Central Nebraska Public Power and Irrigation District's FERC relicensing shows what effects can result from such a listing. This 14-year relicensing was long and contentious, not so much because of the existence of endangered species, but because of the critical habitat designation of the central Platte River for the whooping crane. I want to emphasize that it was the habitat NOT the species, which caused most of the problem in that relicensing. Additionally, the economic analyses provided by the Service did not consider the costs incurred by individuals and businesses either directly or as lost opportunities. No analysis was made of impacts to sand and gravel mining, housing developments, recreation, municipal water supplies, agriculture, and I could go on. Clearly this report is inadequate to depict the true costs of this proposed legislation.

Lastly, I want to discuss the species itself and the proposed critical habitat designation. I want this committee to know that I believe the Endangered Species Act, as conceived, is an important and meaningful piece of legislation. I support protecting endangered species and their habitat when it is truly in the interest of the species and does not come at an undue price to the public.

However, much of this proposed designation for critical habitat for piping plovers is not appropriate. Historical data indicates that this species was never very abundant on the central Platte and in fact may never even have nested in this region until after water development activities took place. Evidence exists today that in much of the area proposed for designation, piping plovers have never nested. Indeed, except for sand pits and other artificially created habitat which are specifically excluded from the designation, there have been no piping plovers nesting above

Grand Island, Nebraska, for over 10 years. This is not critical habitat either in fact or by the Services standards applied elsewhere in the designation. If there are natural habitats where nesting has regularly occurred then those areas should be specifically defined as provided in the law and then properly designated. Blanket designation of large undescribed reaches of land without any nesting violates the law and further undermines the credibility of the Fish and Wildlife Service.

I thank you for this opportunity to provide input into this important process, and for your time.

STATEMENT OF REX AMACK, DIRECTOR, NEBRASKA GAME AND PARKS COMMISSION

Mr. AMACK. Congressman Osborne and Representative Rehberg, it is a privilege and honor for me to be here today in America's heartland, Grand Island, Nebraska and represent the Game and Parks Commission.

I grew up just south of here about 60 miles if the crow was flying, if you are rolling a flat tire, it is about 75. I grew up on a farm and currently am somewhat of a displaced farmer, working in government in a very challenging time and a very challenging number of issues that it seems like when we get our arms all around the issues, more of them emerge. The Endangered and Threatened Species Act is certainly an issue that has given Nebraska political leaders, given Nebraska civic leaders, given Nebraskans as a whole a very stiff challenge really.

You have asked me here today to share the Commission's views regarding the Platte River Cooperative Agreement and the Game and Parks Commission experiences in protecting species in Nebraska in coordination with the United States Fish and Wildlife Service and the Nebraska Game and Parks Commission acting along.

Well, let me say that the Nebraska Game and Parks Commission certainly joins the Nebraska legislature and Governor Mike Johanns of the state in supporting the Cooperative Agreement. And while we have not played any major role in the development or management of that agreement, we have served on a number of the working committees and we fully support the intent and goals of the Platte River Cooperative Agreement.

The issue I think that has been said here many times is that what we really need is a lot of cooperation and togetherness and the Governance Committee addresses that and gives us a tool. Some of the problems with rules and regulations and laws is you have to have tools to implement them, and sometimes we do not have that. The most common tool that I hear for Endangered Species Act or any other rule or regulation or law that is difficult to administer is common sense. And sometimes it seems like the laws do not allow for that to happen. And so I think it is important to take into consideration what tools we can be given, what tools people can have to reach a consensus of common sense.

Next year will be the 30th anniversary of the Endangered Species Act. The Endangered Species Act was preceded in 1966 by the Endangered Species Preservation Act. The Endangered Species Preservation Act established authority to create a list of endangered species and a minimal program to conserve them. A year later, there were four species—no, excuse me—a year later, the first list contained the black-footed ferret, the Florida panther, the

whooping crane, the bald eagle and the California condor. Five years later, in 1973, the Endangered Species Act was enacted. the House passed the bill 390 to 12 and the Senate passed a similar measure on a 92 to 0 vote. President Richard Nixon signed the new bill into public law.

The new law expanded its predecessor by making all plants and animals eligible for listing, including subspecies. It also established threatened species as those likely to become endangered. The Endangered Species Act established protection of species by making it illegal to take endangered species and provided harsh penalties.

Well, what started out as 114 species across America is now over 1000 and it is still growing. It is important, I think, for us all to realize that the U.S. Congress and Senate passed these laws and assigned primarily the United States Fish and Wildlife Service to handle them. But the United States Endangered Species Act does not belong to the United States Fish and Wildlife Service, in my judgment. It belongs to the citizens of the United States. And how we choose as a society to implement those laws and bring them into a situation that will work for everybody is basically our choice.

And I would conclude my remarks by saying that the Game and Parks Commission, we work with a lot of programs with the United States Fish and Wildlife programs to enhance, preserve, protect species. In Nebraska, we rarely if ever work by ourselves independently, we work with Nebraska landowners. Nebraska is 97 percent privately owned and Nebraska landowners are the key ingredient to species protection and recovery programs. Without the cooperation and help from landowners, we are not on first base.

Thank you.

Mr. OSBORNE. Thank you, Mr. Amack. Mr. Carlson.

[The prepared statement of Mr. Amack follows:]

Statement of William Rex Amack, Director, Nebraska Game and Parks Commission

Mr. Chairman and members of the Committee on Resources, it is a privilege and honor to provide testimony to you this afternoon here in America's Heartland at Grand Island, Nebraska representing the Nebraska Game and Parks Commission. My name Rex Amack. I am a native Nebraskan having grown up on a farm on the Republican River in Webster County near Red Cloud about 60 miles due south of this hearing room. I have worked for the Nebraska Game and Parks Commission since June, 1967. I have served the Commission as Agency Director since April, 1988.

You have asked me here today to share the Commission's views regarding the Platte River Cooperative Agreement and the Game and Parks Commission's experiences protecting species in Nebraska in coordination with the United States Fish and Wildlife Service and the Nebraska Game and Parks Commission acting alone.

The Nebraska Game and Parks Commission has been a participant in the Platte River Cooperative Agreement since its inception. Although the Commission has not played a major role in the formation or operation of the Cooperative Agreement, we have been involved in committee work developing the Nebraska Program and we fully support the Agreement's intent and goals. The issue is extremely complex and there are no simple solutions to the problems and conflicts that have arisen during the past several decades over the future use of Platte River water. The waters of the Platte River serve the people of Wyoming, Colorado and Nebraska in many ways. The Platte provides municipal and industrial water supplies for about 3.5 million people, it is used to irrigate millions of acres of farmland, it generates millions of dollars of hydroelectric power, and it provides a variety of habitat for fish and wildlife, including the four endangered species that are the subject of the Cooperative Agreement. The Platte and the associated reservoirs provide anglers, hunters, wildlife viewers, boaters and other outdoor recreation enthusiasts opportunities to

pursue and enjoy their activities, resulting in significant social and economic benefits.

Protection and restoration on an ecosystem scale is more effective than trying to save one species or one small habitat at a time. A basin approach such as the Cooperative Agreement is preferable to a piecemeal approach. The Cooperative Agreement is attempting to bring the many parties of the basin together to attempt to find solutions to the many problems associated with limited water resources and threatened and endangered species.

By bringing all effected parties together, everyone gets a chance to provide input and to see how the process is established so there is not the perception of the federal government, especially the United States Department of the Interior, carrying out its mission without input or other parties' considerations.

The Cooperative Agreement provides the opportunity through the Governance Committee and the Committees that are addressing land, water, and technical issues, for Nebraska farmers, Natural Resources Districts, irrigation districts, state agencies, and conservation organizations to have a place and voice at the table, and to help shape the recovery programs. Input from all Platte River interests is essential for successful cooperative management of the Platte River resource.

The Cooperative Agreement is in the best interests of Nebraska's citizens.

Next year is the 30th anniversary of the Endangered Species Act which was preceded by the 1966 Endangered Species Preservation Act. The Endangered Species Preservation Act established the authority to create a list of endangered species and a minimal program to conserve them. A year later the first list contained the black-footed ferret, the Florida panther, the whooping crane, the bald eagle, and California condor. Five years later, in 1973, the Endangered Species Act was enacted. The House passed the bill 390 to 12 and the Senate passed a similar measure on a 92 to 0 vote. President Richard Nixon signed the new bill into public law. The new law expanded its predecessor by making all plants and animals eligible for listing, including subspecies. It also established threatened species as those likely to become endangered. The Endangered Species Act established protection of species by making it illegal to "take" endangered species and provided harsh penalties.

What started out as 114 species across America is now over 1000 species and growing annually. A few species have perished, but there have been success stories such as the bald eagle, Peregrine falcon and American alligator. Twenty seven species have been removed from the list.

Congress has wrestled over reauthorizing the Endangered Species Act for years. Some believe the Act is too burdensome, others believe the Act needs to be strengthened and actions need to be sped up and more species listed and critical habitat established. One key to addressing this issue is to find ways to reward landowners for conservation that protects and restores valuable habitat for these species. More than half of the listed species occur on private or non–Federal lands. Private landowners are critical to the conservation and recovery of most of the listed species. Partnerships with landowners are essential in this process.

The United States Fish and Wildlife Service works with private landowners in the conservation and recovery of species by providing technical assistance and through "safe harbor" agreements. A safe harbor agreement assures landowners that improving habitat for species will not restrict land-use options on their land in the future. The key to recovery is the cooperation of many partners working together to develop innovative conservation and management actions that benefit the species, while accommodating socioeconomic goals.

The Nebraska Game and Parks Commission is granted general authority under Nebraska statutes, which state, "the commission shall have sole charge of the state's parks, game and fish, recreational grounds, and all things pertaining thereto." With that broad authority comes great responsibility towards those resources. Nebraska's wildlife is owned by all citizens and the Commission is charged with the welfare of our state's flora and fauna. The Nebraska Legislature has also enacted the Nongame and Endangered Species Conservation Act.

The Mission statement of the Nebraska Game and Parks Commission is, "Stewardship of the state's fish, wildlife, parks, and outdoor recreation resources in the best long-term interests of the people and those resources." If future generations are to enjoy those resources, we must perpetuate and enhance all fish, wildlife, and park resources for recreational, aesthetic, educational, and scientific use by Nebraska citizens and their visitors.

One of the Commission's goals is to conserve ecosystems upon which Nebraska Nongame resources depend. To attain that goal, we have established five objectives.

1. Conserve the land and water base that support nongame resources.
2. Increase the appreciation and awareness of nongame resources.

3. Attain the knowledge necessary for conservation of nongame resources.
4. Conserve viable populations of nongame resources.
5. Secure funding and the work force needed to carry out conservation activities for nongame resources.

"Through Statute the Nebraska Legislature finds and declares:

(1) That it is the policy of this state to conserve species of wildlife for human enjoyment, for scientific purposes, and to insure their perpetuation as viable components of their ecosystems;

(2) That species of wildlife and wild plants normally occurring within this state which may be found to be threatened or endangered within this state shall be accorded such protection as is necessary to maintain and enhance their numbers;

(3) That this state shall assist in the protection of species of wildlife and wild plants which are determined to be threatened or endangered elsewhere pursuant to the Endangered Species Act by prohibiting the taking, possession, transportation, exportation from this state, processing, sale or offer for sale, or shipment within this state of such endangered species and by carefully regulating such activities with regard to such threatened species. Exceptions to such prohibitions, for the purpose of enhancing the conservation of such species, may be permitted as set forth in the Nongame and Endangered Species Conservation Act; and

(4) That any funding for the conservation of nongame, threatened, and endangered species shall be made available to the commission from General Fund appropriations, the Nongame and Endangered Species Conservation Fund, or other sources of revenue not deposited in the State Game Fund."

The U.S. Fish and Wildlife Service has been given similar responsibilities on the Federal level, but with many more restrictions placed upon them. Many people attack the Service for doing the job Congress has assigned them to do. The Endangered Species Act belongs to the citizens of the United States, not the U.S. Fish and Wildlife Service. They administer the Act and with that responsibility comes great criticism. They continue to be sued from groups for not listing species as well as from parties attempting to overturn their decisions to list species and their critical habitats.

The Commission is always looking at ways to work with landowners that benefit them as well as wildlife. Generally, when steps are taken to protect threatened and endangered species and their habitats, you are improving habitat for other species.

Many of the new federal programs are system-based problem solving, looking at the big picture and will be working with the private landowners. In Nebraska, 97% of the land is privately owned. To have any chance for success in recovery programs, working successfully with private landowners is an absolute must.

There are definitely species that have polarized citizens of our state including the prairie dog, whooping crane and pallid sturgeon, but there are success stories such as the river otter that is a State endangered species that had been trapped out of existence. A very successful reintroduction program through our agency has restored that species to most of the state's river systems in the past 25 years. This program may not have received press coverage that programs such as the gray wolf reintroduction in Yellowstone or the red wolf in the southeast, but it also saw no opposition by the landowners and citizens of the state. The river otter has never been listed as a federal endangered species as it has remained plentiful in some portions of its range, it has been a state endangered species from the beginning of the state list. We are proud of this successful re-introduction and believe it serves as a example of how a species can be saved.

The demand for wildlife technical assistance by private landowners along the Platte River has increased dramatically during the last 10 years. The U.S. Fish and Wildlife Service and the Nebraska Game and Parks Commission have provided technical advice and funding to hundreds of private landowners along and near the Platte River. Clientele include landowners who wish to improve their property for duck and goose hunting, ranchers seeking ways to improve their pastures for cattle and wildlife, and grain farmers wanting to convert marginal cropland to grasslands. The U.S. Fish and Wildlife Service and the Nebraska Game and Parks Commission have programs that can pay producers up to 100% of habitat restoration costs and in some cases provide an annual land use payment. All private lands programs the Commission sponsors are done strictly on a voluntary basis.

Funding provided by the U.S. Fish and Wildlife Service through their Partnerships for Fish and Wildlife Program have been critical in helping to meet the demands of private landowners. As more and more duck and goose hunters discover the benefits of brush clearing and wetland slough development, demand for these projects will very soon outstrip the availability of funds. A Nebraska Environmental Trust grant was received several years ago to provide additional funds for habitat projects along the Platte River. Although most landowners are primarily interested

in improving their land for waterfowl hunting, secondary benefits to island clearing include improved habitat for whooping and sandhill cranes, piping plovers, least terns, and other wildlife.

The recent increased demand for private lands assistance along the Platte River resulted in the hiring this winter of a biologist who will focus solely on assisting private landowners along the Platte River from Gothenburg to Columbus. This individual is being jointly funded by the Game and Parks Commission and The Nature Conservancy. We are currently in the process of setting up local advisory groups made up of farmers and ranchers to determine what types of programs are needed to improve the Platte Valley's grazing lands for cattle and wildlife production. The Game and Parks Commission has applied for a $900,000 federal grant through the U.S. Fish and Wildlife Service to provide funding for a cost-share assistance program that will benefit producers along the Platte River.

Two programs through the U.S. Department of Agriculture, the Wetland Reserve Program and the federal Wildlife Habitat Incentives Program have been very beneficial in the region to producers and wildlife. The Wetland Reserve Program will pay for the cost of wetland restoration and can pay producers up to 100% of the agricultural value of their land if they are willing to enter into a conservation easement. The Wetland Reserve Program encourages producers to graze and hay wetlands in this program to help maintain the habitat benefits. The Wildlife Habitat Incentives Program has been used to do several projects aimed at improving grazing lands in the Platte River Valley.

Recent Projects

In December 2001, Todd Tyler, a farmer in Merrick County put nearly 900 acres of his Platte River land in the Wetland Reserve Program under perpetual easement. The U.S. Department of Agriculture paid the landowner 100% of the agricultural value of his land. The Game and Parks Commission along with Pheasants Forever, and Ducks Unlimited paid for an easement on an additional 37 acres that did not qualify for the program. The Game and Parks Commission and U.S. Fish and Wildlife Service will likely be contributing additional funds towards the restoration. Within the last two months, five landowners in the immediate vicinity of the Tyler farm have inquired about enrolling in the Wetland Reserve Program.

In December 2001, two landowners downstream of the Ft. Kearny Hike–Bike bridge enlisted the support of the Nebraska Game and Parks Commission, U.S. Fish and Wildlife Service, Platte River Crane Trust, and the National Audubon Society to clear brush from several Platte River islands to improve goose and duck hunting. A secondary benefit will be improved viewing of sandhill cranes by the public from the Game and Parks Commission's viewing bridge.

In December 2001, two landowners near Shelton enlisted the support of the Game and Parks Commission and U.S. Fish and Wildlife Service to remove trees and brush from several islands and create a warm water slough. These landowners were primarily interested in improving duck and goose hunting but sandhill cranes and potentially whooping cranes, least terns and piping plovers will also benefit.

During October 2001 a producer along the Platte River near Kearney requested the Game and Parks Commission's assistance to remove cedar trees from a pasture to improve grazing and wildlife productivity. Cedars were removed using funds from the Game and Parks Commission, U.S. Fish and Wildlife Service and the Nebraska Environmental Trust. The Commission is working with the producer to set up a planned grazing system. Sandhill cranes and other wildlife will benefit from this project.

Successful projects with U.S. Fish and Wildlife Service and Threatened and Endangered species

Section 6 Funding Program

Under Section 6 of the Endangered Species Act, the U.S. Fish and Wildlife Service provides funds annually for work on federally listed species. This can include inventory, research or conservation projects. In the past the Commission has received funds to do work (primarily research and inventory) on the species including: whooping crane, least tern, piping plover, American burying beetle, pallid sturgeon, Topeka shiner, western prairie fringed orchid, blowout penstemon and the Ute Lady's tresses orchid. Through this research we have gained a better understanding of the ecology, biology and distribution of these species which in turn has aided the development of more effective conservation strategies for these species.

Blowout Penstemon

The U.S. Fish and Wildlife Service provided funding for research to better understand what management practices would benefit this species. In addition, the U.S. Fish and Wildlife Service has collaborated with University of Nebraska-Lincoln

researchers to re-introduce this species at several sites on National Wildlife Refuges in Nebraska. The Penstemon is making progress toward recovery.

Western Prairie Fringed Orchid Pesticide Protection

The Commission is currently conducting research in cooperation with landowners in Pierce County to develop methods for herbicide application that will not be harmful to the orchid but will meet the landowners objectives of complying with the noxious weed control act. The U.S. Fish and Wildlife Service is a cooperator in the project. Once the techniques have been developed, we will develop a program to provide financial and technical assistance to landowners to incorporate the methods.

Raptor Electrocution Program. A cooperative program including the U.S. Fish and Wildlife Service, Nebraska Game and Parks Commission, and all power companies in Nebraska that are members of the Rural Electric Association. The power companies have agreed to report any raptor electrocutions to the U.S. Fish and Wildlife Service and have agreed to make modifications to the structures where the electrocutions occurred. This program has been operating since 1988 and allows the industry to report electrocutions without being in violation of the Endangered Species Act.

The Tern and Plover Conservation Partnership is a well-developed program of data collection, conflict mitigation, public involvement and education. In order to conduct these activities on private lands, a high level of cooperation and trust is required between wildlife managers, landowners, river users, federal and state law enforcement officials, and gravel mining companies. This partnership has been very successful in raising the awareness of every one involved about Threatened and Endangered species while addressing the needs of the gravel mining industry. The Tern and Plover Conservation Partnership, which includes the University of Nebraska Cooperative Extension, Nebraska Game and Parks Commission, the U.S. Fish and Wildlife Service, Western Sand and Gravel, Arps Gravel and Concrete, Mallard Sand and Gravel, Overland Sand and Gravel, Lyman–Richey Corporation, the Nebraska Environmental Trust, the Nebraska Air Boaters Association, the Great Plains Council of Girl Scouts, has developed these relationships and stands uniquely poised to affect meaningful conservation and conflict mitigation. In addition to these partners, 14 mining companies and landowners serve as "cooperators" allowing access to their land and participating in program activities and 75 to 100 volunteers contribute their time through the "Adopt a Colony" program. Federal Law Enforcement officials support this effort and are impressed with the effectiveness of this partnership and it's ability to address both the species and industries needs without law enforcement involvement.

Surveys of Threatened and Endangered species in Nebraska usually involve the Fish and Wildlife Service and Nebraska Game and Parks Commission personnel. Depending on the survey, coordination of efforts is the responsibility of one or the other agency and participation may include biologists from each of the agencies and possibly from other cooperators. Survey results are provided to all participants and shared with the public. These surveys are possible because of the cooperation between the Nebraska Game and Parks Commission and the Fish and Wildlife Service. Neither agency has sufficient staff to effectively carry out all these surveys alone but by combining our efforts, we are able to successfully accomplish these important activities. Threatened and Endangered bird species surveys conducted that involve biologist from both agencies include the Bald Eagle Mid–Winter and Nesting surveys, Least tern and piping plover surveys and Whooping Crane Migration Monitoring activities. Threatened and Endangered Species Surveys and Monitoring activities include informal agreements with Nebraska Public Power District, Central Nebraska Public Power and Irrigation District, United States Fish and Wildlife Service, The Nature Conservancy, the Nebraska Environmental Trust and others to assist with conducting these activities.

Thank you.

[An attachment to Mr. Amack's statement follows:]

NEBRASKA ENDANGERED AND THREATENED SPECIES
and
CANDIDATE SPECIES FOR FEDERAL LISTING

NGPC 11/01 mif

Common Name	Scientific Name	State Status	Federal Status
BIRDS - 6 Species			
Eskimo Curlew	*Numenius borealis*	Endangered	Endangered
Whooping Crane	*Grus americana*	Endangered	Endangered
Interior Least Tern	*Sterna antillarum athalassos*	Endangered	Endangered
Bald Eagle	*Haliaeetus leucocephalus*	Threatened	Threatened
Piping Plover	*Charadrius melodus*	Threatened	Threatened
Mountain Plover	*Charadrius montanus*	Threatened	Proposed Threatened
MAMMALS - 5 Species			
Black-footed Ferret	*Mustela nigripes*	Endangered	Endangered
Swift Fox	*Vulpes velox*	Endangered	
River Otter	*Lutra canadensis*	Threatened	
Southern Flying Squirrel	*Glaucomys volans*	Threatened	
Black-tailed Prairie Dog	*Cynomys ludovicianus*		Candidate
FISH - 7 Species			
Pallid Sturgeon	*Scaphirhyncus albus*	Endangered	Endangered
Topeka Shiner	*Notropis topeka*	Endangered	Endangered
Sturgeon Chub	*Macrhybopsis gelida*	Endangered	
Blacknose Shiner	*Notropis heterolepis*	Endangered	
Lake Sturgeon	*Acipenser fulvescens*	Threatened	
Northern Redbelly Dace	*Phoxinus eos*	Threatened	
Finescale Dace	*Phoxinus neogaeus*	Threatened	
INSECTS - 2 Species			
American Burying Beetle	*Nicrophorus americanus*	Endangered	Endangered
Salt Creek Tiger Beetle	*Cincindela nevadica lincolniana*	Endangered	Candidate
REPTILES - 1 Species			
Massasauga	*Sistrurus catenatus*	Threatened	Eastern subspecies candidate
MUSSELS 1 Species			
Scaleshell Mussel	*Leptodea leptodon*	Endangered	Endangered

PLANTS - 7 Species			
Hayden's (Blowout) Penstemon	*Penstemon haydenii*	Endangered	Endangered
Colorado Butterfly Plant	*Gaura neomexicana ssp. coloradensis*	Endangered	Threatened
Saltwort	*Salicornia rubra*	Endangered	
Western Prairie Fringed Orchid	*Platanthera praeclara*	Threatened	Threatened
Ute Lady's Tresses	*Spiranthes diluvialis*	Threatened	Threatened
Ginseng	*Panax quinquefolium*	Threatened	
Small White Lady's Slipper	*Cypripedium candidum*	Threatened	

15 State Endangered Species
9 Species State and Federal Endangered
1 Species State Endangered /Federal Threatened
1 Species State Endangered/Federal Candidate Endangered
4 Species State Endangered

13 State Threatened Species
4 Species State and Federal Threatened
1 Species State Threatened/Federal Proposed Threatened
8 Species State Threatened

1 Species Federal Candidate Threatened

STATEMENT OF MERLYN CARLSON, DIRECTOR, NEBRASKA DEPARTMENT OF AGRICULTURE

Mr. CARLSON. Yes, Congressman Osborne and Chairman and Congressman Rehberg and other guests, my role as Director of the Nebraska Department of Agriculture is to do my best to promote and protect agriculture in this great state. In my promotional role, I can tell you that our producers here raise some of the finest quality, safest food you will find in this nation and maybe even in the world. And we just do not raise a little, we raise a lot. Our 50,000 producers are at or near the top nationally in a number of categories including cattle, hogs, corn, soybeans, alfalfa, great northern beans, green sorghum and the list goes on. These products eventually become your steaks and your pork chops and your snack food and your morning cereal.

And water is the key to unlocking the source of this bountiful food supply. In Nebraska, we are fortunate to be blessed with nearly 24,000 miles of rivers and streams and underground aquifers making it possible to irrigate over eight million acres of cropland, and to some extent, in my opinion, irrigation equals food security, or you could say irrigation ensures food security.

So when I think about the Endangered Species Act and how it is being implemented in Nebraska, I must say that I do have some concerns for our farmers and our ranchers and for our communities and our counties and even for our state as a whole. I say this because roughly one in every four Nebraskans depend on agriculture for employment, so anything that negatively affects the water supply to our producers also has a potential to ripple through our entire economy and the impact of the Cooperative Agreement and the critical habitat designation for the piping plover and the designation effect to the use of groundwater, depending on how they are finalized, could be substantial.

For example, in the Platte River where much of the good irrigated ground is selling for between $1500 and $1800 an acre or even higher, the inability to irrigate forces farmers to revert to dry land practices. The possibility of corn reaching 225 bushel yield drops to 50 bushels per acre or below because the region simply does not get enough rainfall to produce a corn crop. In many instances, farmers will be forced to fallow the ground, which means they will get only a crop once every 2 years and this can translate into lost income, into lost jobs, into lost tax revenue and crop farmers may not be the only ones feeling the pinch under those circumstances. What about the fertilizer and the seed corn dealers and the elevators? They depend on a thriving agriculture industry, so whatever affects farmers also affects those industries.

What about livestock producers? They also figure into the picture because Nebraska, we feed 40 percent of our feed grains to our own livestock.

And on to another note, the difference between property tax values on irrigated land and on dry land could potentially make huge dents in revenues. These are monies that are relied on by county governments and by school district entities that cannot afford loss of income in these lean budget time. Let me say that again—lean budget times.

My concerns are not without basis. Of the top 10 corn producing counties, all but Chase County have a Platte River connection. Regarding the top 10 soybean producing counties, six border the Platte. Of the major hay producing counties, three—Dawson, Lincoln and Scottsbluff—have Platte River ties and another three—Cherry, Sheridan and Dawes—have a Niobrara River connection, an area being scrutinized as piping plover habitat.

So far, I have listed my concerns as they affect producers of both crops and livestock and agriculture input dealers. But I also want to note my concern for the future of value-added production in the state. We have been and will continue to push for economic development in Nebraska, based around taking our raw agriculture products and adding value through processing. This helps more of these agriculture dollars close to home, helping to fuel our rural economies. But these types of facilities often require great quantities of water and we do not want to shut the door on those opportunities and say that our water is all gone. So we need to keep the value-added initiative in mind as we continue to work on the Cooperative Agreement.

My point in all of this is that Nebraska agriculture producers have a great deal at stake in the development of the Cooperative Agreement and the designation of the proposed critical habitat for piping plover. But we are not the only ones. The cost and the consequences of both issues, while affecting every single farming and ranching operation in the state, will also impact the economies that depend on them, including the rural economies as well. Agriculture must continue to have a seat at the table in any discussions on each of these matters.

In addition, besides just having a seat at the table, I cannot emphasize enough importance on having sound scientific information and you mentioned that earlier, Congressman, during the discussion in order to make the best possible decisions. I mention this because of the Klamath River issue. You are all aware of how this situation escalated last year when regulators shut off irrigators in order to protect flows for specific threatened and endangered species of fish. Now a recent report from the National Research Council citing new scientific evidence that does not support the need for these higher water levels.

So in closing let me say now is the time for level heads to keep the level of our streams that supports a shared beneficial use. Thank you.

Mr. OSBORNE. Thank you, Mr. Carlson. Mr. Cook.

[The prepared statement of Mr. Carlson follows:]

Statement of Merlyn Carlson, Director, Nebraska Department of Agriculture

My role, as Director of the Nebraska Department of Agriculture, is to do my best to promote and protect agriculture in this great state. In my promotional role, I can tell you that our producers here raise some of the finest quality, safest food you'll find in this nation, and maybe even in the world. And we don't just raise a little, we raise a lot. Our 50,000 producers are at or near the top nationally in a number of categories, including cattle, corn, soybeans, alfalfa meal, great northern beans, grain sorghum, and the list goes on. These products eventually become your steaks, your pork chops, your snack foods, your morning cereal.

Water is the key to unlocking the source of this bountiful food supply. In Nebraska, we are fortunate to be blessed with nearly 24,000 miles of rivers and

streams, and underground aquifers, making it possible to irrigate 8.1 million acres of cropland. To some extent, in my opinion, irrigation equals food security.

So, when I think about the Endangered Species Act and how it is being implemented in Nebraska, I must say that I do have some concerns for our farmers and ranchers, for their communities and counties, and even for the state as a whole. I say this, because roughly one in every four Nebraskans depend on agriculture for employment, so anything that negatively affects the water supply to our producers, also has the potential to ripple through our entire economy. The impact of the Cooperative Agreement and the critical habitat designation for the piping plover, depending on how they are finalized, could be substantial.

For example, in the Platte Valley, where much of the good irrigated ground is selling for between $1,500 to $1,800 an acre, the inability to irrigate forces farmers to revert to dryland practices. The possibility of corn reaching 225 bushel yields drops to 50 bushels per acre or below because the region simply does not get enough rainfall to produce a corn crop. In many instances, farmers will be forced to fallow ground, which means they'll only get a crop once every two years. This can translate into lost income, lost jobs, lost tax revenue. And crop farmers may not be the only ones feeling the pinch under these circumstances. What about the fertilizer and seed corn dealers, the elevators? They depend on a thriving agriculture industry, so whatever affects farmers, also affects these industries. What about our livestock producers? They also figure into the picture because in Nebraska, we feed roughly 40 percent of our feed grains to our own livestock.

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My point in all of this is that Nebraska's agriculture producers have a great deal at stake in the development of the Cooperative Agreement and the designation of proposed critical habitat for the piping plover. But, they aren't the only ones. The costs and consequences of both issues, while affecting every single farming and ranching operation in this state, will also impact the economies that depend on them. Agriculture must continue to have a seat at the table in any discussions on each of these matters.

STATEMENT OF JAMES R. COOK, LEGAL COUNSEL, NEBRASKA DEPARTMENT OF WATER RESOURCES

Mr. COOK. Thank you. I think you are both aware that I am here substituting for Roger Patterson today. Roger is the Director of our Department. Unfortunately, his mother passed away earlier this week and that is the reason he is not able to be here with you today.

Most of the written testimony I have submitted is devoted to explaining the Platte River Cooperative Agreement process and its status and I will limit my verbal remarks to that issue as well.

Roger is the Nebraska member on the Governance Committee that Mr. Morgenweck referred to earlier. I am the alternate member for Nebraska on that Committee.

I might also indicate to you that later in my testimony, I am going to refer to the last page of my testimony which was a comparison chart. We will talk about the relationship between flows and I will bring that to your attention later.

Nebraska is supportive of and fully participating in the Platte River process to develop an endangered species program for the Platte. Our previous experiences in this state and in other places have indicated to us that the collaborative approach should be preferable to relying strictly on a regulatory approach implemented just by the U.S. Fish and Wildlife Service. However, supporting that process does not necessarily mean that it will lead to a program that is acceptable to Nebraska. I think it is very important to realize there will be many factors that will be considered by the Governor and by the other local entities that will be responsible for implementation of that program once it is fully designed. Several of those factors are outlined in my written testimony.

I would be glad to answer any questions about the details of the proposed endangered species program, but I will emphasize only one aspect of that in my remarks, because of time today. That is Nebraska's own state new depletion plan. As explained in the written remarks, if we are to have a basin-wide voluntary program, each state must develop a depletion plan that prevents new uses begun on or after July 1, 1997 from causing new depletions to target flows in the Lexington to Chapman reach of the Platte River. A group of Nebraskans representing those entities that would be responsible for implementing a new depletion plan has been meeting since early 1998 to develop that plan.

In Nebraska, the Platte River has been essentially closed to new surface water developments for a number of years. In fact, several large water projects have been denied through our own state mechanisms over the last several years, at least in part because of our own version of the Endangered Species Act. Nebraska legislature adopted a bill similar to that in effect in the Federal legislation in Congress in the mid-1970's.

However, groundwater development has continued and it is probable that the vast majority of the potential uses that would be affected by a new depletion plan would be uses of groundwater.

The new depletion plan we have been working on is not complete, but it is important to describe how it has evolved and how the current version of the plan relates to the Endangered Species Act. If I could, as I mentioned earlier, I would like to draw your attention to this comparison chart, which is the last page in my written testimony. This chart shows all of the different in-stream flow rates relevant to the issues being discussed today. Those in red are the Nebraska in-stream flows appropriations, those are the ones that have Nebraska water rights. The light green, dark green and dark blue bars shows the U.S. Fish and Wildlife target flows for dry, normal and wet years, respectively.

The original version of the Nebraska new depletion plan would have required new groundwater users to offset any adverse effects of their new use on the Fish and Wildlife Service target flows; that is, the flows depicted by the green and blue bars. That, however, proved to be unacceptable in Nebraska. And as a result, we have modified the process and we now have a different approach.

The approach involves a two-step process. First, the new user would be responsible for offsetting any adverse effects to Nebraska water rights, not the target flows. Those Nebraska water rights include the in-stream flow appropriations shown in red on the chart. In part, those appropriations are for threatened and endangered species, but as you can see, they tend to be lower than the target flows.

Second, to the extent that offsetting depletions to water rights fail to also offset the depletions to the target flows, the State of Nebraska, not the groundwater users, would be responsible for any remaining offset required to meet program objectives.

The significance is that Nebraska groundwater users would not be regulated on the basis of the green and blue target flows, but would have their obligations determined on the basis of interference with Nebraska's own water rights, including the red in-stream flows. Approaching new depletions in that way will not eliminate all our concerns about the Fish and Wildlife Service target flows. Very substantial state expenditures might be needed to offset depletions to those flows; however, it does avoid placing the burden for those flows on Nebraska agriculture or on other groundwater users. The depletion issues those users would face under the plan are issues Nebraska needs to address, whether or not we have a basin-wide program for threatened and endangered species. As Senator Schrock mentioned earlier, the Endangered Species Act is what has brought us to the table, but it is something we must deal with on our own regardless of that.

Given the time limits here, it is not possible to discuss all of the potential obstacles to success of the program. Some of the obstacles may need to be addressed by the Congress. Included among those will be the need for additional funding for the cost of the program, ensuring that the three states have adequate time to modify policies and provide the funding that we are required to provide and, if necessary, provide more flexibility in the Endangered Species Act when, as is true in the Platte, the science is uncertain, but the parties are willing to engage in a program that would be positive for the species and also improve the scientific basis for future actions.

That concludes my testimony, I would be glad to answer any questions.

[The prepared statement of Mr. Cook follows:]

Statement of James R. Cook, Legal Counsel, Nebraska Department of Natural Resources

Mr. Chairman and members of the committee, my name is Jim Cook. I am legal counsel for the Nebraska Department of Natural Resources and am testifying today on behalf of Roger Patterson, the department director. Roger fully intended to appear before your committee this afternoon. I am sorry to report that he is unable to do so because his mother passed away Tuesday and the funeral is today. I know he would be glad to answer any questions you might have at a later time or to provide additional information if desired.

In Roger's absence I will present testimony today on two subjects: (1) the Platte River Cooperative Agreement and (2) the proposed designation by the U. S. Fish and Wildlife Service of critical habitat for the piping plover. Most of my remarks will be devoted to the Cooperative Agreement. In my comments on that subject I will attempt to summarize the proposed "program" as it exists today, discuss Nebraska's reasons for participating in the ongoing process to formulate that program, relate some important considerations Nebraska will be facing before we make a decision on initiation of the program, and indicate how Congress might be able

to help that process be successful. With regard to the critical habitat issue, I have attached a copy of Mr. Patterson's August 10, 2001 letter about the proposed habitat designation. That letter summarizes and explains the department's position on that subject.

PLATTE RIVER COOPERATIVE AGREEMENT

Introduction and Summary of the Platte River Cooperative Agreement

On July 1, 1997, Nebraska, Colorado, Wyoming and the United States Department of the Interior entered into a partnership to develop a basin-wide recovery "program" for threatened and endangered species in the Central Platte River Basin. Called the Platte River Cooperative Agreement (PRCA), the program's primary purpose is to provide recovery oriented habitat for the whooping crane, piping plover and the interior least tern. The pallid sturgeon, which uses the Platte only near its mouth, is also a target species for the proposed program. For now it is uncertain whether any efforts other than those intended for the benefit of the other target species will be directed specifically towards sturgeon recovery.

A ten-member governing body call the Governance Committee (GC) has been responsible for the activities undertaken to date and would be responsible in the future if the program is actually implemented. The GC includes representatives from the U.S. Fish and Wildlife Service (USFWS), the U.S. Bureau of Reclamation, each of the three states, water users from three geographic areas in the Platte River Basin, and environmental organizations. Dale Strickland of West Inc., is the Executive Director for the current effort.

The proposed program would take a phased, adaptive management approach. Assuming the cooperating partners agree to the terms of the program, the first phase is expected to be 13 years in length. It would have three primary components; the Water Action Plan (WAP), the Depletion Plans, and a Habitat Plan, each of which is described in more detail below. Water goals for the program relate to "target flows", which have been identified by the U.S. Fish and Wildlife Service (USFWS). For information purposes, an attachment to this testimony compares the "species" and "annual pulse" components of the USFWS target flows to water rights granted by Nebraska for instream flow purposes.

Water Action Plan (WAP)

The target flows for the endangered species in the Central Platte reflect the flow levels the USFWS believes are needed to provide adequate habitat for those species. Actual daily flows historically have fallen short of those target flows, in the aggregate, by an average of approximately 417,000 acre feet (af) per year. There is substantial disagreement about whether the identified target flows are biologically or hydrologically necessary or even beneficial to the habitat and/or recovery of the species. While the USFWS believes they are, they have also stated they are willing to review and possibly revise the target flows as better science becomes available.

In the meantime, incremental improvements in flows would be sought. The goal during the first increment of the proposed program would be to reduce shortages to the current target flows at Grand Island by an average of 130,000 to 150,000 af per year. Three projects already being implemented or planned by the three States will produce an estimated 80,000 af per year. The first project is an "environmental account" (EA) in Lake McConaughy, where 10% of the storable inflows between October and April are stored, managed and released with the objective of reducing shortages to target flows. There is a cap of 100,000 af that can be stored annually and a 200,000 af total storage cap. Since its creation in 1999, the EA has been used to improve flows in the central Platte throughout much of the summers of both 2000 and 2001.

The second project is an enlargement of Pathfinder Reservoir in Wyoming. Water from that project will be managed with a similar objective; it is still in the planning stage, but if implemented would provide 34,000 af in storage capacity for the program.

The third project is the Tamarack Project in Colorado. The Tamarack Project, which is expected to yield an average of about 10,000 af in the habitat area, would take water out of the river during times of excess flows (most often during the winter months) and temporarily store it in shallow alluvial aquifers where it would naturally return to the river at times when flow shortages are more likely. Tamarack is under construction and currently is partially operational.

The additional 50,000 to 70,000 af necessary to realize the 130,000 to 150,000 af goal for the first increment will be obtained through other projects. Those projects will be selected throughout the basin, must be acceptable to the states, and will be

implemented throughout the first increment of the program. They are most likely to be storage and retiming and/or conservation oriented.

A Reconnaissance Level Water Action Plan which lists the projects now proposed was completed in September, 2000, and will be revised as necessary.Inclusion of projects in the WAP simply means that they will be advanced to the feasibility level of study to undergo further analysis (i.e. engineering studies, economic and social impacts studies, etc.). Changes are likely before final decisions are made.

Depletion Plan

While the WAP is designed to put "new water" into the river (water that would not normally be there, at that time), each state's Depletion Plan will be designed to prevent increased shortages to target flows caused by new or expanded uses of water begun on or after July 1, 1997. New uses that contribute to target flow shortages would be subject to mitigation, either with water or with dollars that could be used to produce water. An overview of Nebraska's current draft New Depletion proposal, which is subject to change, follows:

- In addition to the need to prevent new depletions to target flows, Nebraska's plan has the objective of protecting flows needed by senior surface water rights from depletions caused by new or expanded uses of water.
- The flows proposed for use as "target flows" for the Lexington to Chapman reach are what are referred to as the "species flows" and the "annual pulse flows" developed by the U.S. Fish and Wildlife Service. As mentioned earlier, a comparison of those flows with the Nebraska instream flow appropriations is attached to this testimony. Use of the "target flows" does not mean that the state believes those flows are necessary to prevent jeopardy to the species involved.However, if a Platte River Program is actually implemented, those flows would serve as the initial reference points for determining (1) periods of flow shortage, i.e. when new depletions would have to be offset, and (2) periods of flow excess, i.e. when water was available for retiming so it could serve as the required offset for new depletions during flow shortages.
- For new or expanded uses of groundwater or surface water begun between July 1, 1997 and December 31, 2003, the draft proposes that the state would determine the extent to which those increases in water use would cause new depletions to "target flows" and would implement projects and programs as necessary to offset those new depletions when they occur.
- For new or expanded uses of groundwater beginning 1–1–2004 or later, a two step process would be used to offset any new depletion to "target flows." First, those making a new or expanded use of groundwater would be responsible for offsetting new depletions to flows needed for senior Nebraska surface water rights including the Nebraska instream flow appropriations. The draft proposes that the state would be responsible for the second step of the process, which would be to offset depletions to "target flows" caused by new or expanded uses of groundwater to the extent those depletions would not otherwise be offset as a result of the offsets for depletions to water right flows.
- Also beginning 1–1–2004, any new surface water appropriations would be subject to state imposed conditions to avoid or offset new depletions to "target flows." No special provisions would be needed to prevent new depletions to senior surface water rights because such protection is an inherent part of the surface water appropriation system.
- Periodically, perhaps every 5 years starting on or around 2008, the state would conduct a new land use inventory to determine changes in irrigated acres, collect additional information as needed, and assess the overall sufficiency of the combined offset measures to offset depletions to "target flows." If more offset water was being provided than was determined necessary through that assessment, credit for the offset of future new depletions would be available. If not enough offset water was being provided, the state would implement projects and programs as necessary to make up the deficiency.

Land Component

Terrestrial habitat is also deemed necessary to meet the needs of the species. The proposed program would over time result in the development and protection of 29,000 acres of terrestrial habitat between Lexington and Chapman. This long-term goal could change as a result of adaptive management. The goal for the first increment of the proposed program would be to develop and/or protect at least 10,000 acres. NPPD's Cottonwood Ranch property located between Overton and Elm Creek (2,650 acres) would be dedicated to the program. That would leave an unmet first increment need of 7,350 acres. That habitat would be acquired from willing participants via leasing, conservation easements, and purchases. The initial focus would

be placed on riverine and wet meadow type habitat that would or could form a "habitat complex". Some limited quantity of other types of habitat, such as sandpits, likely would also be acquired. Also, the Platte River Whooping Crane Maintenance Trust, the Nebraska Game and Parks Commission, the Nature Conservancy, and the Audubon Society currently own several thousand acres of potentially eligible habitat. Eventually, those holdings are expected to contribute to meeting the 29,000 acre goal, but they will not count toward the 10,000 acre first increment goal.

Why Nebraska is Participating in the C.A. Process

Relicensing by the Federal Energy Regulatory Commission of the Platte hydropower projects indicated to Nebraskans that there were many problems with the non-collaborative regulatory approach under the ESA. The costs expended as part of that process and the frustrations experienced with it did not set an example most were willing to repeat. On the other hand, the collaboration that occurred in negotiating the Cooperative Agreement eventually provided the basis for much more acceptable relicensing provisions and demonstrated that better ways of meeting the species needs could be found. Choices between the strictly regulatory approach and the collaborative method were going to have to be made soon relative to other water uses, most notably ESA consultations regarding the operation of the North Platte projects that are so important to the Panhandle. Problems were also expected with other activities in Nebraska (e.g. Section 404 projects). In addition, many uncertainties existed about the application of the ESA to activities which were not then being treated as subject to the ESA, but which also affect flows, such as groundwater use. That combination of reasonably predictable but unacceptable consequences for some activities and huge uncertainty for others suggested to Nebraska that trying to meet the species needs in ways that inflicted less pain on water users and others was well worth the effort.

Possible Advantages to the Proposed Program

The following is a list and explanation of what Nebraska sees as the potential advantages of continuing with the collaborative approach which would serve as the foundation for the Cooperative Agreement:

• Basinwide approach—important both for funding and for providing water

The recovery process will be very resource intensive and far beyond what the directly affected interests or the State of Nebraska could accomplish by themselves. Because the program is to address the impacts of water related activities throughout the basin, it is imperative that the entire basin contribute to the recovery process. It is also important to recognize that some of the upper reaches of the North and South Platte Rivers flow through areas that are owned and/or managed by various Federal agencies. Actions by those agencies have also contributed to the river's current condition and there also are numerous federal water supply and irrigation projects and facilities on the Platte.

• Incremental approach

The initial recovery actions proposed by the USFWS are far beyond what could be done in a single step process, and there are concerns that some of the requirements and actions might even be in excess of what is even beneficial to the species. An incremental approach will allow for actions to be implemented only after careful planning and that will hopefully prevent undue hardship from being imposed. The incremental approach will also allow for further study and possible refinement of recovery actions and proposals.

• Grandfathering of pre 7–1–1997 water uses

One of the concerns in Nebraska regarding the ESA is that water could be taken from people with existing developments. The grandfathering of pre 7–1–1997 uses will prevent adverse impacts on those current uses. Without a program and the included grandfather clause there is nothing to insure that pre 1997 uses would be protected.

• Voluntary measures used throughout, rather than measures being imposed through the regulatory process

As discussed earlier, the Platte system extends into three states. The states and their citizens know what actions are realistic, economically feasible and politically acceptable. By building the program on voluntary participation rather than mandatory requirements, those involved will be far more motivated to make the program work for both the species and for the people living in the area.

• Peer reviews

The peer review process will allow for proposed actions to be evaluated by outside authorities and hopefully minimize the possibility of implementing activities that are of little or no benefit to the species. Some of these proposed activities will be

very costly, so it is imperative that all actions be reasonable, beneficial and scientifically supported.

• Adaptive management will be employed

Everyone involved in the process recognizes that there are many questions relative to the proposed recovery actions. Those include: details about how and to what extent the Platte River hydrologic system interacts with the underlying ground water system; how river flows relate to sediment movement and what effect each has on the streambed and banks; and basic questions about trends in species population numbers. It is important that the program be allowed the flexibility to change as more information is learned about the river, the species and their desired habitats.

• Having a seat at the table

Allowing the states, the water users and the environmental community to participate in the decisionmaking process for the Platte river species will be beneficial to the species, the USFWS, and the stakeholders in the basin. It will help soften fears about implementation of the ESA, and the collective thinking that is employed will encourage actions that are feasible, beneficial and more acceptable.

• Federal financial assistance to be provided

As discussed earlier the importance and appreciation of the basin and associated species carries far beyond the borders of the three states. Federal agencies own, have control of, and/or manage lands and water usage facilities on the river and the recovery program will be more expensive than could be borne by the states or by their water users

• Better opportunity to achieve equity among those contributing to habitat declines

Without a collaborative program, only those subject to federal jurisdiction would be held responsible for taking the steps deemed necessary by the USFWS to recover the species. This could place a disproportionately heavy burden on a few.The process outlined in the Cooperative Agreement will provide the forum for a more equitable distribution of that burden.

Important Considerations Prior to Nebraska's Acceptance of the Program

Final decisions by the states and by the Department of Interior are still a ways off and each party likely will have its own set of considerations about the advantages and disadvantages of the proposed program before it decides whether accepting the proposed program is the right thing for it to do.For Nebraska, that decision will depend upon a number of factors including the following:

• Achieving equity among the three states and the federal government

The significance of the Platte River, associated habitats and identified species extends far beyond the borders of the state. Nebraska needs to believe that the burden of protecting and restoring these habitats and species will be borne equitably among the three states and the federal government.

• Having a better understanding of what will happen if no program is implemented

Nebraska needs a clear understanding of the implications of the "No Action" or no Program alternative, so that we can determine the best choice for Nebraskans. For example, how or would both present and future groundwater uses be treated in the absence of a collaborative effort?

• The ability of Nebraska to develop and implement an acceptable "new depletion plan"

The Nebraska New Depletions proposal summarized earlier in this testimony demonstrates the difficulty of implementing a program that requires the integrated management of groundwater and surface water where that has not previously been done and in a hydrologic system as complex and extensive as is the Platte. It is important to remember, however, that the need for groundwater management to protect streamflows may exist in Nebraska whether or not Nebraska decides to participate in the proposed program. The question may be whether the timeline for initiating the proposed program is too short for the concept of integrated management to be first accepted and implemented by Nebraskans.

• Public acceptance

Nebraskans also need to believe that the actions being imposed are based on good science, that the proposed recovery actions are reasonable and justified and that the program is in the best interest of the citizenry.

• Program costs

Like most other states, Nebraska is currently experiencing substantial revenue shortfalls. Budgets have been trimmed, but more will be needed. All of this comes at a time when the state and its citizens will be asked to do more and more. To

aid with that concern, more federal assistance will be needed as additional burdens are imposed.

How Congress Could Help

• Provide an increased level of funding

The original program budget of $75 million, which was developed using 1997 dollars, was based on some assumptions that since have proven to be incorrect. Those costs, which were to be shared 50% by the federal government and 50% by the states collectively, have risen to an estimated $150 million based on 2001 dollars. They may go higher as cost estimates are improved and there will be many costs to the states not included in the estimates, e.g. the cost of implementing the new depletion plans. More federal dollars will be required and there are numerous reasons why additional federal financial support would be warranted. First, there is a very substantial federal presence in the Platte River Basin. The government has many flood control and water supply projects in the basin and owns millions of acres of land in the national forests and in other federal holdings. The activities performed or not performed by the government on those lands has significant impact on the water yield from those lands and consequently on the flows in the Central Platte. Also, the Platte is without question a national resource. There is substantial federal interest in the endangered species that would be benefited by the Program and in the migratory waterfowl for which the Central flyway is so critical. The federal government will also benefit greatly from the research that will be conducted as part of the program.

• Insure that the states have adequate time to implement changes to state laws and to appropriate any state funds needed

The current timeline for reaching a decision on the implementation of the program is sometime in the latter part of 2003. For Nebraska and perhaps for all states, that initial decision will need to be followed by many other affirmative decisions if the program is to be successful. The Nebraska Legislature will need to adopt new laws and provide what may prove to be substantial amounts of funding for the costs of the program and the costs of the projects needed to offset new depletions caused by new and expanded water users. In our state, seven natural resources will need to implement groundwater management plans that will, for the first time, require the regulation of groundwater to protect streamflows. Some of those decisions cannot be expected immediately after the decision to initiate the program. We anticipate that the program will allow sufficient time for those decisions to be made, but if that proves to be a problem, congressional assistance could be sought.

• Support use of flexibility under the ESA, particularly whenever states are willing to engage in cooperative efforts.

Flexibility is certainly needed in the Central Platte where scientific questions seem to be more abundant than answers. Whether the USFWS and the three states will be able to find the flexibility required to reach mutually acceptable goals for the Platte under the ESA as currently written remains a concern.

PROPOSED DESIGNATION OF PIPING PLOVER CRITICAL HABITAT

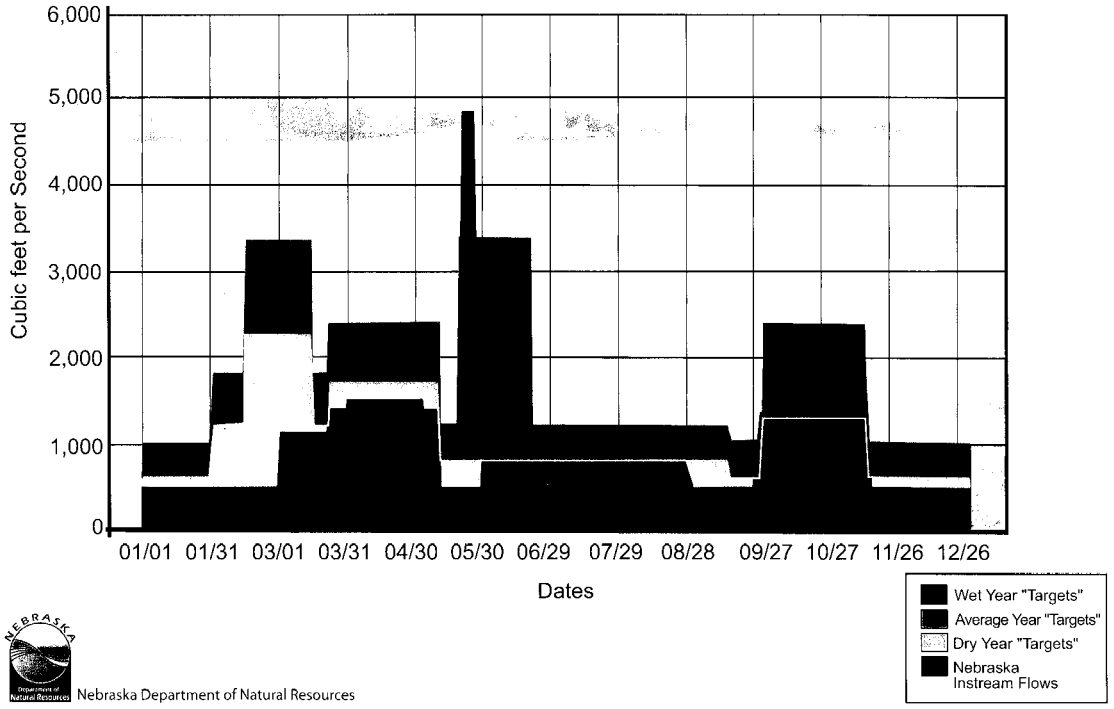
The Nebraska Department of Natural Resources submitted comments on the proposed designation of critical habitat for the piping plover in a letter dated August 10, 2001. Rather than repeat the substance of those comments here, the letter is attached to this testimony. However, I do want to emphasize one comment in the August 10 letter. That concerns the relationship between the proposed Platte River Recovery Program and the critical habitat designation. If the three states and the Department of Interior are successful in establishing a basinwide program for the Central Platte endangered species, including the piping plover, designation of critical habitat for that reach would be unnecessary and inappropriate. We therefore continue to urge exclusion of the Central Platte from the designation. If the Service feels compelled to include that area for now because the Program has not yet been established, that area should be deleted when the Program is established.

That concludes my testimony. Thank you. I would be glad to attempt to respond to any questions.

[Attachments to Mr. Cook's statement follow:]

Comparison

USF&WS "Target Flows" and Nebraska "Instream Flows"
for Platte River at Grand Island



Nebraska Department of Natural Resources

August 10, 2001

Nell McPhillips
South Dakota Ecological Services Field Office
U.S. Fish and Wildlife Service
420 South Garfield Avenue, Suite 400
Pierre, SD 57501

RE: Proposed Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover [66 Fed. Reg. 31760 (June 12, 2001)]

Dear Ms. McPhillips:

On June 12, 2001, the United States Fish and Wildlife Service (USFWS) published in the Federal Register its "Proposed Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover" (Proposed Designation). According to the Federal Register Notice, the deadline for submitting comments on the proposal is August 13, 2001.

The notice which was published in the Federal Register was inadequate in a number of ways. That notice included only a single large-scale map of Nebraska and legal descriptions of parcels proposed to be designated. It would be impossible for a land owner to know if they would be affected by the Proposed Designation based on the large scale and large tracts identified in the notice. Obviously critical habitat does not fit neatly into the rectangular grid system of land surveys. The notice attempts to cure this inadequacy by stating that the critical habitat does not include "developed areas" and "other lands . . . unlikely to contain primary constituent elements." However the Proposed Designation provides no information as to the location of these excluded areas. In the absence of more precise information as to the actual and specific lands to be identified as critical habitat it is difficult to comment on the Proposed Designation.

On Wednesday, July 18, 2001, a public informational meeting was held by USFWS staff in Grand Island, Nebraska regarding the Proposed Designation. At that meeting there were numerous maps and aerial photographs delineating areas along the Platte, Loup and Niobrara Rivers in Nebraska as piping plover critical habitat. It was explained that all of the land lying within the general delineations would not be the actual critical habitat but only those which met certain criteria. Questions to your staff at the meeting were generally answered by pointing to a specific tract or island and saying "that could be critical habitat" and pointing to another and saying "that probably wouldn't be critical habitat. It was quite confusing for the general public to know exactly what specific parcels would be designated.

Perhaps of greatest concern regarding the Proposed Designation is the fact that USFWS has not completed the economic impact analysis which is required in § 4(b)(2) of the Endangered Species Act (ESA) and an environmental analysis under the National Environmental Policy Act. As the Tenth Circuit Court made clear in New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service, Congress intended that the USFWS conduct a full and complete analysis of all economic impacts of a critical habitat designation. Section 4(b)(2) of the ESA states that "[t]he Secretary shall designate critical habitat . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" (emphasis supplied). By presenting a general Proposed Designation on maps and photos without any underlying documentation, the USFWS has made it extremely difficult for any informed or useful review and commentary by concerned individuals and entities.

For these reasons, it is imperative that USFWS provide:

1. The economic and environmental impact analysis of the Proposed Designation as required by the Endangered Species Act § 4(b)(2).
2. maps which show both the general boundaries of the areas along the Platte, Niobrara and Loup Rivers proposed for designation as piping plover critical habitat and the delineation of the specific tracts of land proposed to be designated and/or the location of all lands excluded from the designation sufficient to allow members of the public to easily ascertain which areas are included in the designation and those that are not.
3. Republish the Notice for the "Proposed Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover" which includes the information in 1 and 2 above.
4. Provide all persons and entities 120 days from the republication of the Notice in which to file comments on the Proposed Designation.

In addition to the above, I suggest that the USFWS consider excluding, at least for now, the Central Platte River portion of the Proposed Designation. We are concerned that the proposal is not based on a consistent application of the criteria relating to "primary constituent elements." Reasons used for exclusion of other rivers,

e.g. limited documented nesting, could appropriately be used as reasons for excluding this portion of the Platte at this time. A concerted effort is being made by the States of Nebraska, Wyoming and Colorado together with the USFWS to develop a program under the Cooperative Agreement. If that program is implemented, the Central Platte will have an increased availability of nesting sites, but will also be eligible for such an exclusion because the program will include conservation management plans that specifically address the conservation and recovery of the piping plover. If you conclude you are unable to exclude the Central Platte now, we believe a commitment should be made to review and remove the designation once a program is in place.

I recognize the USFWS is under court order to make a final critical habitat designation for the northern great plains population of piping plovers by March 15, 2002. However, the USFWS needs to recognize that those individuals and entities who may be affected by such designation are entitled to all relevant information for review and comment during the designation process.

Thank you for the opportunity to comment.

Sincerely,

Roger K. Patterson
Director

Mr. OSBORNE. Thank you very much. We will now start a round of questioning.

Mr. Schrock, a very difficult question, but I would like to ask you what relation you see between surface and groundwater in regard to the Cooperative Agreement. We have a potential critical—well, we have a critical habitat designation of 56 miles, three miles wide. Can you explain your understanding of exactly what this does to groundwater, how far out from the river, has anybody determined this, where are we allowed to drill wells or not. Any thoughts you have. I know this would probably be under the purview of your Committee to try to figure this out, but I would appreciate your thoughts.

Mr. SCHROCK. Congressman Osborne, I believe that even a hydrologist cannot explain the underground water in the state of Nebraska. Having said that, there is a connection between groundwater and surface water. The water that flows in the Platte River does recharge the underground water, but also the irrigation wells that are close to the proximity of the river do have an impact on river flows. To what extent, I do not know. How far it goes out depends upon the area and the region. I am not a hydrologist but I believe that we can acknowledge that there is a connection between groundwater and surface water in this state.

If we do not, I think there would be a series of lawsuits and then the courts will decide if there is a connection between groundwater and surface water. And I think we are finding that out on the Republican River Basin as the water master and our state officials negotiate with Kansas on what is happening in the Republican River Basin. For your information, Representative Rehberg, that is a basin in southwest Nebraska, south of the Platte, which we are having a little trouble with Kansas on the understanding of who should be able to use the water and who should not be able to use the water.

But there is a connection. What the extent is—it depends on how close it is to water, what the formation of the sands and gravels are underneath that water, but I do not think even hydrologists

understand what is going on in Nebraska, nor do I think they ever will understand.

Mr. OSBORNE. I understand there is even some connection between the Platte River and water over in the Republican Basin and of course we have got some problems out near Bridgeport with wells and a lawsuit.

Mr. SCHROCK. Right. I might—may I just quickly add for Representative Rehberg's benefit, if you took the water that is stored underground in the state of Nebraska and put it on top of the ground, if Nebraska was level, the state would be 33 feet deep in water. Of all the states west of the Mississippi, nobody has near the water resources that we have. It is very valued by our farmers and it does not seem to be depleting. That is kind of amazing to me and many other people. There are areas, but they are mainly isolated, where the groundwater table has declined. But for the most part in our state—and part of that is due to the efficiencies that farmers have instigated in their irrigating systems. We are not using as much water to produce crops as we used to, we are becoming more efficient. And I think that helps in the long run.

Mr. OSBORNE. As I see this, there is going to be a battle shaping up between the Fish and Wildlife Service possibly and irrigators in where do you draw the line. And I am assuming that some of the purview of your proposed committee would be to examine these issues. Do you see any adequate independent review system that is not in the hip pocket of the state of Nebraska and not in the hip pocket of the Fish and Wildlife Service that could maybe come to some equitable understanding as to where you can drill a well and where you cannot without depleting the Platte River?

Mr. SCHROCK. You are never going to do something when it comes to regulation that will satisfy all farmers. But let me tell you, this task force is going to have a facilitator and a consultant and I think they are going to keep our feet to the fire, and hopefully some meaningful information will come out of that in at least 18 months from the time that the task force has been appointed. So maybe there will be some answers there we do not already have. Hopefully that will be the case.

Mr. OSBORNE. Mr. Carlson, do you feel that agricultural interests have had adequate representation in the formulating of the Cooperative Agreement? Do you feel that—

Mr. CARLSON. That is a good one. I think so. That is out of my purview but from my understanding, I would say that we have been at the table and I think we have been heard. And I think agriculture, as I said in my testimony, are in support of a shared beneficial use. But let us do it on an economic and a balanced beneficial use basis.

Mr. OSBORNE. All right. And last, Mr. Cook—Mr. Amack, I am saving you for Mr. Rehberg.

[Laughter.]

Mr. OSBORNE. Currently McConaughy contributes roughly 100,000 acre-feet?

Mr. COOK. Up to that much.

Mr. OSBORNE. Up to that. Pathfinder, 34,000 acre-feet; Tamarack, 10,000 acre-feet.

Mr. COOK. Tamarack has several phases, the first phase would be 10,000 acre-feet, that is correct.

Mr. OSBORNE. And I believe the Colorado Supreme Court may have reversed some of the machinations with which they have determined their contribution in other areas and I do not know where that stands. But my question to you, given those figures and also the amount of land that we are to contribute, do you feel that Nebraska is being treated fairly in this issue? Do you feel like it is an equitable distribution?

Mr. COOK. That is one of the toughest issues we have dealt with, Congressman. The question of fair share has been an issue that we have talked with the other states about. Certainly as you look at not only what would be coming out of Lake McConaughy, but also the other water projects that are in feasibility stage right now, we have a number of those in the Water Action Plan that Mr. Keys mentioned earlier. The majority of those are also in Nebraska, so Nebraska would be providing more than what you would call a fair share of water if you wanted to divide water up strictly on the basis of where the contributions to the problem have come from.

One of the difficult things to deal with though is the closer you can get to the habitat area, the more efficient you can be in managing that water and in meeting the objectives. The farther away you get from the habitat area, the more timing problems you have, the more difficulty in making releases and later there is an intervening rainfall event that provides more water. So there are arguments for providing the water closer to the habitat area as well.

We are not done discussing the fair share issue yet. It is still an issue that is on the table, it is one that we have had to lay to the side for awhile because we have had to deal with some other issues like channel stability and some other things, but it is still an issue that we have to get resolved, and it will be an issue for the Governor when the time for a final decision comes.

Mr. OSBORNE. When you visit the South Platte River near Deckers, which I have done a few times, there is a lot of water. When it hits Ogallala, many times of the year, there is nothing. And 10,000 acre-feet is not much of a contribution, it is almost all coming out of the North Platte. So I think it is something we ought to bear in mind.

Mr. Rehberg.

Mr. REHBERG. Thank you, Congressman Osborne.

Could I ask a quick question of Senator Schrock first and that is are you wells, your well water adjudicated or is it strictly surface water?

Mr. SCHROCK. The surface water is adjudicated, the well water is not.

Mr. REHBERG. Is there movement afoot within your state to adjudicate the wells?

Mr. SCHROCK. In certain areas of the state, the wells are controlled. I will tell you we have a system of natural resource districts, I believe there are 23—am I right there, Jim?

Mr. COOK. Yes.

Mr. SCHROCK. Twenty-three. And they have the authority to regulate water within their district. A lot of times the problem is those districts are not basin-wide and so you have to take a basin-wide

approach to it. And you know, those of us in Nebraska feel that is where our water management should come from with our natural resource districts. And they have been working for 30 years and working well. Some may say they have not responded quick enough, some may say they are responding too quick, but we do have mechanisms in place to control underground water pumping where the citizens of that area deem it is necessary.

Mr. REHBERG. Thank you. Mr. Carlson, I can attest to the quality of your farming practices. I did feed cattle for a few years.

Mr. CARLSON. I thought you would challenge some of my—

Mr. REHBERG. No, you got some of my Montana money. The only thing I will challenge you on is football, I represent the state that did win the National Championship.

[Laughter.]

Mr. REHBERG. Montana won the Division 2 national title.

[Laughter.]

Mr. REHBERG. I promised Mr. Osborne I was not going to bring that up, but I had to. Sorry.

[Laughter.]

Mr. REHBERG. Mr. Amack, I wrote down your term "displaced farmer," I like that. When people ask me, they say you must be crazy for having quit ranching, I said no, just deranged. So now I will refer to it as displaced, I like that term better than deranged.

You know, one of the reasons I wanted to be at this hearing and one of the reasons I wanted to talk to individuals such as yourself is my concern about prairie dogs in Montana and the likelihood that they are going to in fact—some consider prairie dogs for listing as an endangered species. You have been tasked with the assignment, I believe, or your agency, of coming up with a solution to keep it from happening, at least from the perspective of Nebraska. We wish you all good will.

How do you intend to do that and I guess a broader question is I think you mentioned that you were not part of the Cooperative Agreement, maybe I misunderstood you, that you were not a participant, and clearly you have a good working relationship with landowners because you are 97 percent owned by deeded property as opposed to my state, which is almost 35 percent owned by the Federal Government. That does not even take into account state and local ownership.

So I guess I want a little discussion from you about your relationship with landowners, how you have been able to create a good working relationship and how do you hope to offset the potential devastation that would occur if we are so foolish—if anybody is listening—in listing the prairie dog as an endangered species in this country.

Mr. AMACK. I got the easy question. Well, Congressman, Rehberg, the black-tailed prairie dog is a very difficult issue and one of the things that is most difficult with it is that when Congress establishes laws for the people of the United States to live by and follow, it seems that often times as laws get in place, it is not an easy thing to do, you have a House that has lots of votes and you have a Senate that has votes and you have to get together and come out with conclusive legislation that is a public policy for this country. But then there is another side to that public policy,

in the courtroom. And the black-tailed prairie dog issue was driven by a lawsuit. Now that brings a whole other transfer. In other words, we have now transferred the public policy from the chambers in Washington to the chambers in a courtroom and the public policy takes a different approach. And this public policy now as being set forth has challenged—through lawsuits the United States Fish and Wildlife Service was challenged that the black-tailed prairie dog is threatened and 11 states were involved in this—the land mass involved.

From one perspective, it is an excellent idea to try to solve resource issues on a regional basis rather than a 56-mile stretch of river in Nebraska. But on the other side, you have to have some consensus that that the problem is there and that has been an issue with the black-tailed prairie dog, because in the 11 states, and Nebraska is one, our science, our biologists do not agree that the black-tailed prairie dog merits listing under the endangered species act.

So we kind of got in a situation where we outran out headlights. The government is usually way behind their lights and run into something, because it was dark, but in this case we, to a certain extent, outran them. We were trying to meet deadlines without data, we were trying to develop programs and recovery programs without a lot of data. And so in the state of Nebraska right now, we are somewhat still gathering data, still trying to gather some consensus of what we might do.

We created a task force which included landowners and government leaders, community leaders, conservation leaders. And it has been very difficult to try to shape some sort of plan to deal with the prairie dog. And part of it is there are so many unknowns. There is the CCAA phase of what might happen here, a very complicated safe harbor type formula. It is hard to understand, it's hard to get an explanation of it.

And here is a case that I mentioned earlier in my opening remarks where we do not have very many tools. It is not any different than when you are farming, when you are building a house, when you are setting public policy, you have to have tools to do it. If you do not have the tools—

Mr. REHBERG. Were you responsible as an agency for the plan that was put together on the river otter?

Mr. AMACK. Yes.

Mr. REHBERG. How was that done successfully? I mean here again you did not hear about it as being as much of a contentious issue as the wolves are in Montana or the grizzly bear. Of course, I do not know if river otter would eat anybody.

Mr. AMACK. They do not eat people.

Mr. REHBERG. OK, that might be the difference.

Mr. AMACK. Although we did hear from a lot of fishermen that they do eat fish and we did hear from some fishermen that they do—

Mr. REHBERG. Can you use the same format to placate the judiciary and the national agencies in the way you developed your plan for the prairie dog, as you did with the river otter or are they two different issues and there is nothing that we can learn from that in Montana or Washington?

Mr. AMACK. My feeling is, Congressman, that they are substantially different and it might be a good comparative analogy to what you said, the river otter compared to the grizzly bear, I mean there is a substantial difference in trying to formulate recovery programs. But in the case of the river otter, as you mentioned, they do not eat people, they do eat fish, we had a lot of meetings with landowners and the rivers that we put the otters in, they were indigenous here once, they took to it and it has been a very successful program. People that see them, people that have them on their property really enjoy them.

Mr. REHBERG. Which is really the way to the Endangered Species Act, we have put the incentive in the wrong place. We have created a disincentive for people to do the right thing, it becomes a punishment and that is why, again, the shoot, shovel and shut up.

Mr. AMACK. Exactly.

Mr. REHBERG. So you have in fact tried to create an incentive for them.

Mr. AMACK. Uh-huh.

Mr. REHBERG. There was another question I was going to ask but it has slipped my mind right this second. I will think of it in a second. I am too young for this, Tom.

[Laughter.]

Mr. OSBORNE. I am old enough, I cannot remember anything at all.

[Laughter.]

Mr. OSBORNE. Well, we appreciate this panel being here. Mr. Rehberg has to leave about 3:30 and we want to make sure we get to the next panel. If he has to go out in the middle of the panel, do not take offense, I will stay here.

Mr. REHBERG. I wanted to ask Mr. Cook a quick question and that is—unfortunately, I wish I had asked Mr. Morgenweck the same question, but you think of it after they leave the panel.

I worry about adding new species. You know, it is nice to have a Cooperative Agreement, but what happens after your cooperative agreement and you start coming up with new and creative species that are dying or threatened and you want to add them. And I guess my question is what is to stop the Fish and Wildlife Service from doing that, that once the Cooperative Agreement has been established, adding additional species and does it mess up your Cooperative Agreement?

Mr. COOK. Congressman Rehberg, I do not think there is really anything to stop them from doing that. Whether it messes up the Cooperative Agreement will depend a lot on what the habitat needs of that species is. If it happens to be habitat that is very compatible with the target species we have in the Cooperative Agreement now, we are probably in good shape. One of the objectives of the Cooperative Agreement is to try to prevent listing of additional species. So if we can do that by doing the things we are going to do for the whooping crane, piping plover, least term and pallid sturgeon, then we are all better off for that.

I think we all worry about what happens if there is a species that has an entirely different need or especially if it is one that happens to conflict in habitat needs with the habitat needs of the four that we are targeting. And I do not have an answer for that,

that is something we would try to work through as a Cooperative Agreement if we were faced with that.

Mr. REHBERG. OK, thank you.

Mr. OSBORNE. I would like to thank the panel for being here and we will go ahead and jump right into the next panel. We appreciate you coming.

[Applause.]

Mr. OSBORNE. At this time we would like to recognize the last panel of witnesses. For those of you who are anxious to say something, as I said, I will stay around and my staff will stay around. If you do not want to stay, we certainly understand and that will be fine with us, but if you feel like there are some things you want to get off your chest, we will stay and listen to what anybody has to say.

Having said that, I would like to introduce Tom Schwarz, who is on the Board of Directors of Nebraska Water Users, who will be a member of this panel; Mr. Dave Sands, the Executive Director of the Audubon Nebraska; Mr. Ron Bishop, the General Manager, Central Platte Natural Resource District and Don Kraus, the General Manager, Central Nebraska Public Power and Irrigation District.

We appreciate you gentlemen, your patience, we appreciate you being here today, and with that, we will start with Mr. Schwarz.

STATEMENT OF TOM SCHWARZ, BOARD OF DIRECTORS, NEBRASKA WATER USERS

Mr. SCHWARZ. Thank you, Congressman. Good afternoon, ladies and gentlemen, my name is Tom Schwarz, I am a farmer from Bertrand, Nebraska and I am here reporting the Nebraska Water Users (NWU).

NWU is an organization that is devoted to educating the public regarding irrigated agriculture and protecting the rights of those involved in that practice. Our membership is statewide and we represent both surface and groundwater users, many of whom farm along the Platte River Valley.

Our organization traces its roots to a Federal court order issued 12 years ago this week. Early in the relicensing of Central and NPPD, environmental organizations, with the backing of the U.S. Fish and Wildlife Service, attempted to require the districts to release water stored for irrigation, supposedly to benefit endangered species. Before the order was stayed, 80,000 acre-feet of water was dumped, and to this day, no benefits to the species were ever shown. This example is not an extreme, it is exactly what Fish and Wildlife is demanding now as we work on a Cooperative Agreement, a process borne out of the FERC Projects license settlements.

In theory, the process looks good—spread the cost to protect habitat for endangered species among three states and the Federal Government. Instead of one endless consultation after another on hundreds of projects, we will have one consultation to cover all of them. Instead of blindly releasing water and protecting undefined habitat, we will have a program based upon an incremental approach using adaptive management to evaluate our activities before we make errors.

That was the theory. NWU has grown concerned about the promises made. The very word "cooperative" has become suspect as time and again, a part of the deal would be brokered by the governing committee of the Cooperative Agreement would be undone by low level Fish and Wildlife persons. "Cooperative" to the Service apparently means "my way."

For example, recently a new mitigation was introduced that calls for adding sediment to the river. Not only was Nebraska being asked to provide 130,000 acre-feet of water and 10,000 acres of habitat, now the ridiculous idea of adding thousands and thousands of tons of sand to the river has been introduced. Needless to say, there has been no peer review of the shoddy science that led to this faulty conclusion. The Service pushed ahead with this deal because the program they designed appeared in their modeling to actually harm the habitat because the new water they were adding might remove sediment for sand bars and affect the river channel.

This brings me to my next point, which is the exact purpose of a cooperative agreement for any endangered species program. I have always believed the purpose was to help the species, but it appears that in the Central Platte, the purpose is to gain power through control of water and land. The evidence is overwhelming, every spring, 500,000 sandhill cranes use the river. Their numbers have increased since the 1960's. Of the 150 whooping cranes that migrate a few weeks later, never more than a handful of them land on the Platte River. Yet the Service says there is not enough habitat for those 150 birds. How can this be when the Service uses sandhill crane habitat as a surrogate for the whoopers?

The Platte River is the only river for which the Service has developed target flows. It does not seem to matter that the flows desired by the Service decrease habitat for whooping cranes in every bridge segment but two, by making the water too deep.

Another example is the piping plover. The only place that piping plovers have nested west of Columbus in the last 10 years is on sand pits created by the gravel industry, even though hundreds of natural sandbars exist. Yet the Service has proposed critical habitat for this bird through this entire reach, specifically excluding the only areas the birds use, the sand pits.

Gentlemen, the system that we now have related to administering the ESA is broken. I do not believe that what we now experience in central Nebraska is what Congress intended.

I am a farmer and an irrigator. I live on the land and I love to watch birds and wildlife. I favor protecting endangered species. I want my children to appreciate and respect nature. I believe that habitat that is truly critical for a species should be protected if it does not unduly harm private individuals.

I do not believe you should designate over 100 miles of river where the birds do not nest, especially when the very goal is habitat improvement. I do not believe that the law should be evaded by Federal agencies, that the public should be excluded from participating or that incomplete data and opinions should be used as fact and as a basis for extending regulation.

Thank you.

Mr. OSBORNE. Thank you, Mr. Schwarz. Mr. Sands.

[The prepared statement of Mr. Schwarz follows:]

Statement of Tom Schwarz, Bertrand, Nebraska, representing the Nebraska Water Users

Good afternoon Ladies and Gentlemen. My name is Tom Schwarz. I am a farmer from Bertrand, Nebraska, and I am here representing the Nebraska Water Users, also known as NWU.

NWU is an organization that is devoted to educating the public regarding irrigated agriculture and protecting the rights of those involved in that practice. Our membership is statewide and we represent both surface and ground water users, many who farm here along the Platte River.

Our organization traces its roots to a federal court order issued 12 years ago this week. Early in the relicensing process for FERC Projects 1417 and 1835—the hydroelectric projects of Central Nebraska Public Power and Irrigation District (or Central) and Nebraska Public Power District (or NPPD)—environmental organizations, with the backing of the U.S. Fish and Wildlife Service, attempted to require the districts to release water stored for irrigation, supposedly to benefit endangered species.

Before the order was stayed 80,000 acre feet of water was dumped and to this day no benefits to the species were ever shown.

This example is not an extreme. It is exactly what Fish and Wildlife is demanding now as we work on the Cooperative Agreement, a process born out of the FERC projects license settlements.

In theory the process looks good. Spread the costs to protect habitat for endangered species among three states and the federal government. Instead of one endless consultation after another on hundreds of projects, we will have one consultation to cover all of them. Instead of blindly releasing water and protecting undefined habitat, we will have a program based upon an incremental approach using adaptive management to evaluate our activities before we make errors.

But that was the theory. NWU has grown concerned about the promises made. The very word "cooperative" has become suspect as time and again a part of the deal brokered by the governing committee of the Cooperative Agreement would be undone by low level Fish and Wildlife persons. "Cooperative" to the Service apparently means "my way."

For example recently a new "mitigation" was introduced that calls for adding sediment to the river. Not only was Nebraska being asked to provide 130,000 acre feet of water and 10,000 acres of habitat, now the ridiculous idea of adding thousands and thousands of tons of sand to the river each year had been introduced.

Needless to say there has been no peer review of the shoddy science that led to this faulty conclusion. The Service pushed ahead with this deal because the program they designed appeared in their modeling to actually harm the habitat because the "new" water they were adding might remove sediment for sandbars and affect the river channel.

This brings me to my next point and that is the exact purpose of a Cooperative Agreement or any endangered species program. I have always believed the purpose was to help the species. But, it appears that in the Central Platte, the purpose is to gain power through control of water and land.

The evidence is everywhere. Every spring 500,000 Sandhill cranes use the river and their numbers have increased since the 1960s. Yet of the 150 whooping cranes that migrate a few weeks later, and never more than a handful of them land on the Platte, we don't seem to have enough habitat. How can that be when the Service uses Sandhill habitat as a surrogate for the whoopers?

The Platte River is the only river for which the Service has developed target flows. It doesn't seem to matter that the flows desired by the Service decrease the habitat for whooping cranes in every bridge segment but two by making the water too deep.

Another example is the piping plover. The only place that piping plovers have nested west of Columbus (roughly 50 miles downstream from here) in the last 10 years is on sandpits created by the gravel industry, even though hundreds of natural sandbars exist. Yet the Service has proposed critical habitat for this bird throughout this entire reach—specifically excluding the only areas the birds use, the sand pits.

Gentlemen, the system that we have now related to administering the ESA is broken. I don't believe that what we experience in central Nebraska is what Congress intended.

I am a farmer. I live on the land and I love to watch birds and wildlife. I favor protecting endangered species. I want my children to appreciate and respect nature. I believe that habitat that is truly critical for a species should be protected IF it does not unduly harm private individuals.

I do not believe you should designate over 100 miles of river where the birds do not nest—especially when the very goal is habitat improvement. I do not believe that the law should be evaded by federal agencies, that the public be excluded from participating, or that incomplete data and opinions be used as fact and as the basis for extending regulation.

Thank you.

STATEMENT OF DAVE SANDS, EXECUTIVE DIRECTOR, AUDUBON NEBRASKA

Mr. SANDS. Good afternoon, Congressmen. My name is Dave Sands and I am the Executive Director of Audubon Nebraska. But up until about 5 years ago, I enjoyed a very different career, as my brother and I ran a third-generation meat business that produced steaks from Nebraska beef. I was raised with an appreciation for the cattle industry in our state and my father also instilled a deep appreciation for Nebraska's rivers, prairies and wildlife.

My love of the outdoors eventually led to a membership in Audubon and, on occasion, I would volunteer to represent Audubon Nebraska's positions in the state legislature. About a decade ago, I was approached by Audubon's national office to become involved in a Federal project—the FERC relicensing of Kingsley Dam.

From a business standpoint, I understood that farmers needed the flows that Kingsley provided, to grow the corn that fed the cattle that our company processed and sold nationwide. I was keenly aware of all the families that depended upon that chain of events from the sandhills ranchers to my own. In addition, the river provided power, recreation and drinking water for millions of people throughout the basin. Clearly, there were human uses that needed to be preserved.

From a conservation perspective, the case was also compelling. The Platte River is a world-class wildlife resource that annually attracts millions of waterfowl, the largest gathering of cranes on earth and regular visits from some of the rarest cranes on earth. Habitat for these birds has steadily declined over the past century due to a substantial reduction in the river's flows and new projects threatened the flows that were left. Above all, the Endangered Species Act now required any project in the basin with a Federal connection to address these concerns, and Kingsley Dam was at the front of the line.

Given these facts, I recognized the obvious. The Platte River is so important for both agriculture and wildlife, that we cannot afford to harm either one. For this reason, I told our national office that I would jump into the Platte issues on two conditions. One condition, that we base our positions on the best science available and the second condition, that we would never advocate for the taking of water from an existing irrigator. Audubon agreed and we have been working toward that end ever since.

At Audubon Nebraska, this philosophy is not confined to the Platte River, as the organization actively pursues collaboration over confrontation, especially when it comes to the ESA. In a state were 97 percent of the land is in private hands, meeting the concerns of landowners is vital, or a recovery program will not work for the species or the people who live on the land. On private lands,

incentives and involvement make a lot more sense than regulations and resentment.

Others in the state share this view. This was demonstrated several years ago when we participated in a diverse group of Nebraskans convened by Senator Bob Kerrey to find common ground on reauthorization of the ESA. There was more consensus than some might imagine, and all agreed that the ESA could be improved with:

- Greater stakeholder and public involvement in the process;
- Decisions based on good science and peer review;
- Emphasis on recovery planning crafted to reduce conflict with economic activities;
- Financial incentives for landowners;
- An educational and technical assistance program for the public and landowners; and
- Increased appropriations for impacted Federal agencies.

These ESA improvements that were envisioned 5 years ago could be used to describe the goals of the Platte River Cooperative Agreement today.

Stakeholder involvement should be at the top of any conservation agenda, and it has certainly been a priority of the Cooperative Agreement. This involvement is formally recognized on the agreement's Governance Committee, which includes state, Federal, water and conservation interests on a 10-member board that requires nine votes to act. Involvement is further magnified through Governance Committee meetings, subcommittees, state advisory groups, education and communication among the various participants and their peers. The Cooperative Agreement may be lacking in some things, but stakeholders and their opinions are not among them.

This is a strength because the outcome can only be a program with a solid scientific foundation that is crafted to reduce economic conflicts. There is recognition that the Platte's loss of habitat and flows must be reversed, but any program should be voluntary, with financial incentives for the conservation of water and land. Any action under the program will be measured for its benefit to the species, and as better science becomes available, management will adopt accordingly to maximize the results for each dollar spent.

This is the way the ESA should work and it is worth pursuing because the stakes are so high. To understand what is at stake, I would remind you that it took over 13 years and more than $30 million to relicense Kingsley Dam. If the Cooperative Agreement fails, not only would Kingsley's license be subject to further review, every project in the basin could be subjected to proportional scrutiny and costs, which means that lawyers would do very well at the expense of water users and wildlife.

While there is much to lose if this effort fails, the payoff from success would be equally dramatic. ESA conflicts that have persisted on the Platte for 20 years would finally be resolved throughout the entire basin, bringing some much needed regulatory certainty to those involved. In addition to enhancing habitat for endangered species, habitat would be protected for many other valuable species as well, including a half million sandhill cranes that provide a $25 million to $50 million boost to the area economy each

year through tourism. More water in the river would benefit drinking water supplies by recharging municipal wells in the valley. Moreover, this would all be accomplished without significant changes in the existing irrigation or power generation. A successful Cooperative Agreement could even serve as a national model that is used to resolve other ESA conflicts that may come down the road, both here and elsewhere.

One of those issues may already be in sight with the designation of critical habitat for the piping plover. Certainly the identification of critical habitat is an important part of the Endangered Species Act because the decline of a species is often linked to the loss of habitat. There are other people here today who can better speak to the science behind the designation, but in our view, the uproar over the designation again points to the need for a more collaborative, incentive-based effort on private lands.

For example, suppose for a moment that there was something like a CRP program for endangered species habitat on private lands that paid landowners to continue the same sound stewardship that protected that habitat in the first place. Under this program, the designation of critical habitat would be akin to the designation of highly erodible land under the CRP program, and give one a better chance of getting their land into the program. This could create a very different view of the designation and spur private conservation instead of fear in the affected area.

These are the kinds of innovative solutions that are needed to increase the effectiveness of the ESA, and the Platte River Cooperative Agreement is a huge step in the right direction. With a resolve to work together, along with sufficient funding and support from Congress, we can preserve both water use and wildlife in the Platte River Valley. The truth is, we cannot afford to do anything less.

Mr. OSBORNE. Thank you very much, Mr. Sands.

[The prepared statement of Mr. Sands follows:]

Statement of Dave Sands, Executive Director, Audubon Nebraska

Up until five years ago, I enjoyed a very different career, as my brother and I ran a third-generation meat business that produced steaks from Nebraska Beef. I was raised with an appreciation for the cattle industry in our state, and my father also instilled a deep appreciation for Nebraska's rivers, prairies, and wildlife.

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Others in the state share this view. This was demonstrated several years ago when we participated in a diverse group of Nebraskans convened by Senator Bob Kerrey to find common ground on reauthorization of the ESA. There was more consensus than some might imagine, and all agreed that the ESA could be improved with:

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Stakeholder involvement should be at the top of any conservation agenda, and it has certainly been a priority of the Cooperative Agreement. This involvement is formally recognized on the agreement's Governance Committee, which includes state, federal, water, and conservation interests on a ten-member board that requires nine votes to act. Involvement is further magnified through Governance Committee meetings, sub-committees, state advisory groups, education, and communication among the various participants and their peers. The Cooperative Agreement may be lacking in some things, but stakeholders and their opinions are not among them!

This is a strength because the outcome can only be a program with a solid scientific foundation that is crafted to reduce economic conflicts. There is recognition that the Platte's loss of habitat and flows must be reversed, but any program should be voluntary, with financial incentives for the conservation of water and land. There is also an agreement to minimize adverse third-party impacts that can be readily identified. Any action under the program will be measured for its benefits to the species, and as better science becomes available, management will adapt accordingly to maximize the results for each dollar spent.

This is the way the ESA should work, and it is worth pursuing because the stakes are so high. To understand what is at stake, I would remind you that it took over 13 years and more than $30 million to relicense Kingsley Dam. If the Cooperative Agreement fails, not only would Kingsley's license be subject to further review, every project in the basin could be subjected to proportional scrutiny and costs, which means that lawyers would do very well at the expense of the water users and wildlife.

While there is much to lose if this effort fails, the payoff from success will be equally dramatic. ESA conflicts that have persisted on the Platte for 20 years would finally be resolved throughout the entire basin, bringing some much needed regulatory certainty to those involved. In addition to enhancing habitat for endangered species, habitat would be protected for many other valuable species as well, including a half-million sandhill cranes that provide a $25 to $50 million boost to the area economy each year through tourism. More water in the river would benefit drinking water supplies, by recharging municipal well fields in the valley. Moreover, all of this would be accomplished without significant changes in existing irrigation or power generation. A successful Cooperative Agreement could even serve as a national model that is used to resolve other ESA conflicts that may come down the road, both here and elsewhere.

One of those issues may already be in sight with the designation of critical habitat for the piping plover, although I suspect that it will be far less complex than the central Platte. Certainly, the identification of critical habitat is an important part of the Endangered Species Act, because the decline of a species is often linked to its loss of habitat. However, the fact that so many people are concerned by this recent designation probably says more about people's perceptions of the law, than it does about its actual impact on landowners. There are other people here today who can better speak to those impacts and the science behind the designation. In

our view, the uproar over the piping plover again points to the need for a more collaborative, incentive-based effort on private lands.

For example, suppose for a moment that there was something like a CRP program for endangered species habitat on private lands, that paid landowners to continue the same sound stewardship that protected the habitat in the first place. Under this program, the designation of critical habitat would be akin to the designation of highly erodable land under the CRP Program, and give one a better chance of getting their land in the program. This could create a very different view of the designation and spur private conservation instead of fear in the affected area.

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[An attachment to Mr. Sands' statement follows:]

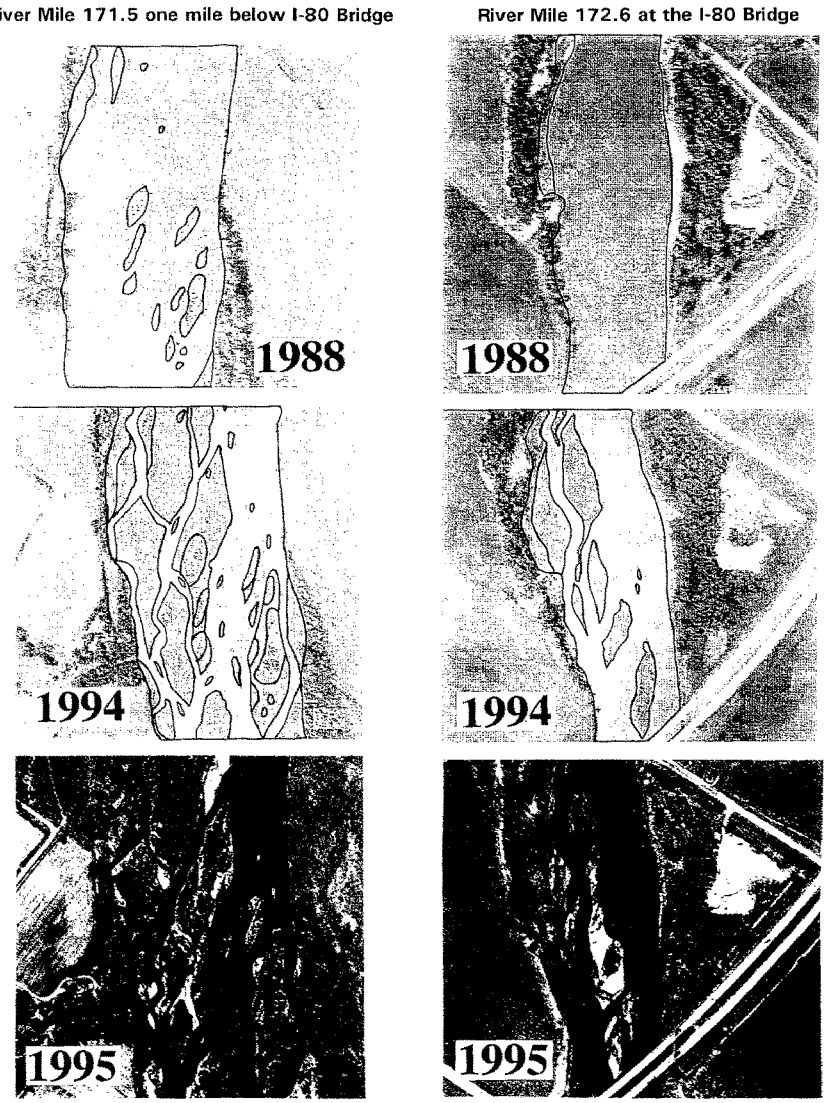

Figure 1. Photographic comparison of river channels near Grand Island in 1988, 1994, and 1995. Most of the 1988-1994 vegetative expansion was still present after high flows in 1995.

Mr. OSBORNE. Mr. Bishop, I see that you have submitted three documents for the record.

Mr. BISHOP. Yes, I have, Congressman.

Mr. OSBORNE. And in order to maintain proper form, I have got to announce what they are. Comments on proposed designation of critical habitat submitted by Central Platte NRD, August 10, 2001; comments on proposed designation of critical habitat submitted by Bud Falen law office on behalf of Nebraska Habitat Conservation Coalition January 25, 2002; comments on proposed designation critical habitat submitted by Central Platte NRD, January 28, 2002.

Having said that, please proceed.

STATEMENT OF RON BISHOP, GENERAL MANAGER, CENTRAL PLATTE NATURAL RESOURCE DISTRICT

Thank you, Congressman, and thanks to both of you Congressmen for taking the time to come out to Grand Island and hold this hearing. I appreciate the opportunity to speak before you today. My name is Ron Bishop and I am General Manager of the Central Platte Natural Resources District located here in Grand Island.

We have been long involved in Endangered Species Act issues, including the Platte River Cooperative Agreement in-stream flows and critical habitat. We are in fact the holder of an in-stream flow water right on the Platte River for piping plover, least tern and whooping crane. I want to visit with you just a little bit about some of our concerns regarding the Platte River Cooperative Agreement. We have been an active participant trying to keep track of what is going on here, and our long-term involvement has been not only by attending meetings, but also serving on numerous committees that they have had, and that has provided us with insight into the process and has given us some real reason for concern.

Some of our principal concerns deal with things such as the U.S. Fish and Wildlife Service target flows. The states do not believe, we do not believe, nor do they accept as accurate the target flows demanded by U.S. Fish and Wildlife Service on the Platte River. We, here in Nebraska, have good reason not to believe the Fish and Wildlife target flow numbers. Some of those same flows were used by the Nebraska Game and Parks Commission in-stream flow water right application before the state and their Department of Water Resources. And Fish and Wildlife Service employees were brought in to provide the evidence to support those numbers. The water right hearing was conducted like a district court trial, so we had the opportunity, utilizing the rules of evidence and courtroom procedures to determine the science behind Fish and Wildlife Service numbers through depositions, examination and cross examination. And that science did not hold up for the State of Nebraska.

As one example of how Fish and Wildlife numbers held up, after reviewing all the evidence and testimony, including the testimony of a Fish and Wildlife Service expert, the State of Nebraska rejected their target flow of 2400 cubic feet per second for whooping crane, and instead, established a flow of 1350, some 45 percent less, as the flow needed to provide optimum habitat for migrating whooping cranes, but nevertheless, Fish and Wildlife Service is still

holding to that 2400 cfs for whooping crane and it is being demanded as part of the Platte River Cooperative Agreement.

We are also concerned about direct and third party costs. We are very concerned about the risk of an extension of a Federal nexus to groundwater in Nebraska. Fish and Wildlife Service has indicated that pumping groundwater that is conjunctively tied to the surface water of the Platte is adversely affecting those target flows that we talked about as being too high earlier for endangered species and, therefore, affecting or taking or harming the species. They are, therefore, demanding as part of the Cooperative Agreement that there be no new uses of surface water or groundwater that would reduce or deplete in any way their demanded target flows. So we are talking about no new uses for agriculture, no new uses for municipal, no new uses for industry unless an equal amount of water is provided back to the river from some other source.

They have gone on to say that if such a program is not developed, that they have the authority, through the Endangered Species Act, to come after water users through other Federal programs such as—and these are quotes from them—crop commodity payments, conservation reserve programs, wetland reserve programs, wildlife habitat incentives program, wetland conservation, rural electric programs and several others. And since there may be some question about that, I am going to provide both of you documentation of their stating those at different times at different places.

We are also concerned about the fair share components of the program requiring Nebraska to contribute far more in land and water and control of its natural resources.

There are several other things that we are concerned about, one of them is quite a little bit of what we call obstinance on the part of the Federal Government.

We are also concerned about the proposed designation of critical habitat for piping plover and that is why we submitted the other three documents that we did. Rather than go over it in detail, because we do not have the time to summarize the 25 to 35 pages of material and shortcomings that we found in Fish and Wildlife's designation, we will just ask you to please look over those documents.

All of these things that we are talking about really point to a need for a more effective Endangered Species Act. Unfortunately, the present Endangered Species Act, regardless of its intent, has failed at recovering the listed species and has instead endangered the economic wellbeing of thousands of farmers and thousands of communities all across the west. Particularly troubling is some of the Federal abuse that has recently come to light under the present Act, the problems with the Canada lynx, as well as the shortcomings of the current law, as has become evident through the Klamath Falls.

We think that there needs to be a revised Endangered Species Act and one of the keystones of that revision needs to be utilizing good, sound science and to assure that it, it needs to be sound, scientific, independently reviewed science that is utilized for the Endangered Species Act.

I see I have run over by about a minute. I think for the opportunity and I will see that both of you get forwarded the material regarding the impacts from other Federal programs.

Mr. OSBORNE. Thank you, Mr. Bishop. I know that Congressman Rehberg may have to leave. We will go ahead with Mr. Kraus and then I will defer to Mr. Rehberg if he does want to ask one round of questions and then he can leave and I will proceed.

[The prepared statement of Mr. Bishop follows:]

Statement of Ron Bishop, General Manager, Central Platte Natural Resources District

Committee Members,

My name is Ron Bishop. I am the General Manager of the Central Platte Natural Resources District headquartered here in Grand Island. I am here today not only because of my personal interest in and commitment to the conservation of our natural resources, but am here at the specific direction of Central Platte NRD's Board of Directors who share my commitment to conserve these valuable resources.

Central Platte NRD is a Nebraska political subdivision responsible for, among other things, the development and execution of plans, facilities, works and programs relating to the development and management of fish and wildlife habitat. We have long been involved in ESA issues including the Platte River Cooperative Agreement (CA), instream flows, and critical habitat. Central Platte NRD is the holder of instream flow water rights on the central Platte River, including instream flows for the endangered and threatened piping plover, interior least tern and whooping crane. We are involved in a variety of endangered species matters in the Platte River basin including the Pallid Sturgeon/Sturgeon Chub Task Force (a coalition of entities involved in the study and management of these two endangered fishes), the Platte River Cooperative Agreement, and the Nebraska Habitat Conservation Coalition.

Platte River Cooperative Agreement

Central Platte NRD is an active participant in the efforts of the "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats on the Central Platte River in Nebraska (July 1997)". Under the terms of the CA, signatories are undertaking activities to plan, acquire, restore and manage land and interests in land to provide habitat for the designated target species. Our long-term involvement in this effort, through not only attending meetings but also serving on numerous committees, has provided us with insight into the process and has also given us reason for concern. We are committed to staying involved in the effort in order to keep up to speed on the process; evaluate what's going on and how it could affect Central Platte NRD and our constituents; and guide the direction of the process and influence decisions because this Program could dictate the future of Platte Valley resources.

Our principle concerns include the following:

USFWS Target flows—The states do not believe, nor do they accept as accurate, the target flows demanded by U.S. Fish and Wildlife Service (FWS) for the Platte River.

We here in Nebraska have good reason not to believe the FWS target flow numbers. Some of those same flow numbers were used by the Nebraska Game and Parks Commission in an instream flow water rights application before the State's Department of Water Resources and FWS employees were brought in to provide the evidence to support those numbers. The water rights hearing was conducted like a district court trial, utilizing the rules of evidence and other courtroom procedures. This process allowed us and the other parties, through depositions, examination, and cross examination, to explore the "science" behind the FWS numbers. As one example of how FWS numbers held up, after reviewing all the evidence and testimony including the testimony of a FWS "expert", the State of Nebraska rejected the FWS target flow of 2400 cfs for Whooping Cranes and instead established a flow of 1350 cfs (44% less) as the flow needed to provide optimum habitat for migrating Whooping Crane. Nevertheless the original 2400 cfs for Whooping Crane flows is still being demanded by FWS in the Platte River Cooperative Agreement.

Nebraska's obligations as part of the CA, and those of all involved, must be based on independently peer reviewed and scientifically sound determinations of actual species needs for each of the FWS's target flows. Just as Central Platte NRD's and Nebraska Game and Parks' applications for instream flow water rights on the cen-

tral Platte River underwent extensive scrutiny before the Nebraska Department of Water Resources, the FWS must submit it's target flows for independent scrutiny and independent, scientific peer review.

Direct and third party costs—The CA and proposed Program documents originally estimated first Increment Program costs at $75 million. Current estimates have risen to in excess of $146,000,000.00. Who will be burdened with paying this amount is still unresolved.

These costs are only the "program" costs and do not include all the costs associated with the restriction and limitation of Nebraska's right to use ground and surface water. These direct and third party costs must be analyzed to determine the impacts and costs of such regulatory control upon potential water users. Such actions could substantially curtail or eliminate economic development opportunities in our NRD and across central and western Nebraska. The increased costs attributable to changes required in water use and Nebraska law, to changes required in the operation and activities on Nebraska political subdivisions, and the cost of lost economic development opportunities must be determined and weighed against the real benefits of the proposed Program.

Risk of extension of federal nexus—The framers of the ESA envisioned a law that would protect species believed to be on the brink of extinction, rare species like the bald eagle and whooping crane. I believe it's fair to assume that they never imagined a law that could potentially reach out to affect the lives and operations of agricultural producers and communities who pump groundwater from wells 5 miles north of the Platte River.

The FWS has indicated that pumping groundwater that is conjunctively tied to the surface waters of the Platte is adversely affecting target flows for endangered species and therefore affecting or "taking" or "harming" the species.

They are therefore demanding that there be no new uses of surface water or groundwater that would reduce or deplete in any way their demanded "target flows". They have gone on to say that if such a program isn't developed that they have the authority, through the Endangered Species Act, to come after water users through other federal programs.

Other projects and programs with a federal connection that, according to FWS, could be used by them to regulate irrigation and other water uses include such things as:

- Crop Commodity payments
- EQIP—Environmental Quality Incentive Program
- CRP—Conservation Reserve Program
- RC&D's—Resource Conservation and Development
- PL–566
- WRP—Wetland Reserve Program
- WHIP—Wildlife Habitat Incentives Program
- Swampbuster–Wetland Conservation
- Rural Electric Program
- Conservation Technical Assistance from Department of Agriculture.

Fair share—The CA is founded on the principle that a basin wide solution for endangered species concerns in the Platte River watershed is required. This principle is in turn grounded on each of the three states and the federal government equitably sharing the costs of actions required to comply with ESA. The determination of the fair share to be contributed by each state has yet to be made. Components of the proposed Program require Nebraska to contribute far more in water and control of its natural resources and to receive less credit for resource management. The fair share concept must be applied to properly apportion ESA compliance between the states and the federal government in a manner which proportionately reflects the actual impacts of state activities on endangered species and which reflects actual water consumption.

Obstinate federal government—Cooperation and mutual trust are cornerstones of the CA process. However despite words to the contrary, federal actions to date fall far short of full and good faith cooperation. Federal representatives involved in the various CA committees have adhered to pre-compromise opinions and courses of action, in spite of reason, arguments and persuasion to the contrary by the three states and their representatives. They have failed to meet deadlines, failed to pursue courses of actions, which would avoid obstructions and, if it required compromise on the part of the DOI, failed to meaningfully respond to genuine proposals, which would have led to a Program. The FWS position was often cloaked in concerns about abdicating authority for the protection of endangered species under the ESA or veiled in oblique suggestions of the lack of any prevailing federal authority requiring a change in position.

A proposed Program is sought because the FWS have rendered opinions concerning "potential" effects on certain target species. Such opinions are based on the collective exercise of personal judgments by a small group of FWS biologists. For FWS to maintain that within this amalgamation of human judgment, there is no basis for compromise is incredible and displays a lack of good faith. As a result of these opinions, many currently regulated and even unregulated entities, including governmental, private and commercial entities will be required to cut back, curtail or forego water use with little or no consideration of: 1) the costs to Nebraskans, 2) the impacts on vested rights, 3) the equities of such infringements, or 4) compensation for such takings and infringements.

The CA and proposed Program must require the FWS and other federal participants to sincerely pursue new methods and integrate the professional judgment of independent experts, using sound and peer reviewed science, to identify the actual water and other habitat needs of the target species.

A recent example of the FWS's obstinate and uncoordinated approach in working on the CA is the way they have dealt with the Habitat Protection Plan (HPP). Despite the efforts of a wide range of area landowners, resource specialists and habitat experts and literally years of work on the document with ample opportunity for incorporation of input, the local office of the FWS frustrated the process as it neared completion. They apparently snubbed the direction of their Regional Office in Denver and that of the Governance Committee and insisted on incorporation of their own approach. This flies in the face of the "cooperative" spirit of the effort. As a matter of policy, Program documents such as the HPP must be approved by the Governance Committee and once approved become an accepted part of the proposed Program. That is, they represent the consensus position, not solely that of the FWS or a few of its employees.

Proposed Designation of Critical Habitat for the Piping Plover

Another timely example of the effects of ESA in the central Platte Valley involves the FWS's proposal to designate critical habitat for the piping plover. The Central Platte NRD is troubled by the FWS's approach to propose critical habitat for the piping plover and their associated supporting documents including their draft Economic Analysis and draft Environmental Assessment. We have twice submitted comments and have requested an extension of time to address these concerns. Not because the species isn't in need of reasonable conservation and management efforts, but because of the FWS's legal and factual deficiencies in the designation process. As a result of these significant shortcomings, we have formally requested the FWS withdraw the proposed critical habitat designation and redesignate critical habitat in accordance with the statutory and regulatory requirements. Our comments, and more extensive comments submitted on behalf of the Nebraska Habitat Conservation Coalition (of which Central Platte NRD is a member), can readily be made available if desired.

Our comments submitted on January 28, 2002, pointed out several key points. For example, the proposed critical habitat designation fails to comply with the mandates of the ESA. The FWS's designation of unsuitable habitat as critical habitat is arbitrary and capricious. As in the southwestern willow flycatcher case (New Mexico Cattle Growers Association et al v. U.S. Fish and Wildlife Service), the FWS is claiming that entire river reaches in Nebraska must be designated based solely on their potential for suitability. This directly flies in the face of the recent decision in the 10th Circuit U.S. Court of Appeals.

When the FWS listed the species, it got out of designating critical habitat by claiming that the nesting of the species is "ephemeral," i.e. the birds are always moving around and the habitat is always changing, thus, it is not possible to designate critical habitat. Now, the FWS wants to designate critical habitat on the exact same basis. The record does not square FWS's about-face. It is arbitrary and capricious.

The FWS's draft Economic Analysis of the affects of critical habitat designation also fails to comply with the mandates of the ESA. The piping plover critical habitat designation documentation claims to analyze both the incremental impact of designation and the impacts co-extensive to listing and critical habitat designation, but it accomplishes neither.

The proposed critical habitat designation constitutes a significant threat to the present and future economic well being of many central Platte River valley communities. The FWS's proposal notes a variety of activities (both public and private) which may adversely modify critical habitat. The FWS notes that these activities include such common and necessary practices as road and bridge construction and maintenance, operation and maintenance of dams, bank stabilization projects, dredging operations, and construction of dwellings. Most disturbing, the FWS

specifically note that "water development projects such as ground water withdrawal for water supply and other river depletions" could comprise an adverse modification of critical habitat and taking under ESA. Central Platte River regional economies are critically tied to municipal, agricultural, industrial and domestic water supplies provided by and associated with groundwater and with the Platte River. The designation of critical habitat will adversely affect the economic and social health of the region and must be fully evaluated.

The FWS's environmental assessment fails to comply with the mandates of the National Environmental Policy Act. The FWS claims to analyze the environmental, economic, social, historical and "custom and culture" impacts of the proposed critical habitat designation through a draft environmental assessment. In short, this document finds no environmental impact resulting from the designation of critical habitat for the piping plover. The FWS's analysis in this document is clearly erroneous and fails to comply with federal law.

Given the inappropriately short time for evaluation and comment set by the FWS and the critical importance of the economic issues related to any designation of critical habitat, the Central Platte NRD formally requested an extension of the period for review and comment for an additional 30 days. The Service's establishment of a January 28, 2002, deadline for public comment was utterly insufficient.

In comments submitted on August 10, 2001, Central Platte NRD requested copies of all necessary documents required by the NEPA and ESA. These documents include the FWS's complete alternatives analysis, detailed maps and descriptions of the bounds of the proposed critical habitat sufficient to allow the public to determine precisely the lands to be designated. The FWS has yet to correct its use of inaccurate and non-qualifying maps or provide any of the other information requested other than the draft Economic Analysis. Given the magnitude of the enforcement powers that come to the FWS with the designation of critical habitat to curtail or cease "adverse modification of critical habitat" it is essential that the critical habitat be particularly and accurately described. Based on these comments and the FWS's absence of scientific support for the proposed designation, its lack of legal support for the designation, lack of consideration of alternative habitat management and conservation efforts and lack of appropriate evaluation of social impacts, the FWS should withdraw its critical habitat designation for the piping plover and re-issue a proposed designation, draft economic analysis and draft EA/EIS in compliance with federal law.

Need For a More Effective ESA

Unfortunately, the ESA has failed at recovering and delisting species. Only 31 species have been delisted since 1973—seven due to extinction and twelve due to "data error" (never should have been listed in the first place). The remaining species are either located outside of the United States (and therefore receive no protection from ESA) or were beneficiaries of other activities such as the banning of DDT.

Particularly troubling is federal abuse of the Act that has recently come to light. The Wall Street Journal (January 24, 2002) reported on a scandal over a high-profile December 2001 survey to count threatened Canada lynx. Seven employees from the FWS, Forest Service and a state agency submitted hair samples from captive lynx and tried to pass them off as wild. When caught, the employees claimed they were testing the DNA identification process being utilized. Another explanation is that they were trying to establish lynx use in places where they don't exist, potentially blocking national forests to human use. I understand Rep. Scott McInnis (R., Colorado) has scheduled hearings into the matter, while several agencies are investigating how far the fraud extended.

A more effective ESA should incorporate the following concepts:

Respect the Primacy of State Water Law—State water law is a complex matrix that often establishes property rights to water. The ESA must be clarified to ensure that the Act is in harmony with and clearly recognizes the primacy of state water law.

Utilize Good Science—The law requires that every ESA action must be based on scientific information on a species or its habitat. To ensure fair and sensible decision-making, this information must be accurate and as thorough as possible. Scientific information can be improved by requiring minimum scientific standards and fair, independent, and impartial peer review.

Support Equitably Shared Burdens—The ESA itself calls for "encouraging" states and private parties through a system of incentives to implement a program to conserve species "for the benefits of all citizens". Contrary to this statement, ESA implementation often has been heavy-handed and inflexible, and the burdens of conservation have been placed disproportionately on private landowners and small and

rural communities. If all citizens benefit from species conservation, then all citizens should help bear the costs even handedly!

Be Fair to Property Owners—Some ESA mandates have severely restricted the use and value of private property. When severe restrictions occur without compensation by the federal government, the Act shifts costs and burdens to individuals and businesses that should be shared by all citizens. The ESA must be modified to prevent these inequities and encourage landowners to welcome protection of these species. Specifically, when private property is preserved in habitat conservation plans, the landowner must be compensated in a timely fashion.

Establish Cost Effective Recovery Plans—Recovery plans are expensive to implement. Many of the costs are the direct expenses and lost opportunities of private parties and state and local governments. Costs to non-federal parties should be minimized by requiring implementation of the least costly recovery plan that would achieve the recovery of the species.

Provide Incentives to Conserve Habitat—ESA restrictions apply when land or water serves as habitat for endangered species. To avoid ESA regulation, some property owners have destroyed habitat to discourage the entry of protected species. The Act should be amended to provide incentives for property owners to conserve, rather than destroy, habitat and to provide regulatory certainty to property owners who voluntarily participate in conservation plans.

Encourage Public Participation—Private citizens, businesses and communities, especially those directly affected by conservation decisions, should have a prominent role in the ESA decision-making process. The Act should provide for earlier and more meaningful opportunities for citizens to participate, more citizen involvement in recovery plans, critical habitat designations and a more prominent role in the consultations process for applicants for federal permits.

I believe our experiences here in the Platte Valley with regards to ESA clearly point out the need for these modifications in the ESA. An ESA amended to incorporate these concepts would better aid the Nation in the resolution of complex endangered species issues and help avoid the train wrecks that have plagued the implementation of the existing law. In the process we, here in Nebraska, can better protect the habitats of the central Platte River and the species that rely on them.

NOTE: Letters dated August 10, 2001, January 25, 2002 and January 28, 2002 concerning critical habitat for the piping plover have been retained in the Committee's official files.

STATEMENT OF DONALD D. KRAUS, GENERAL MANAGER, CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT

Mr. KRAUS. Good afternoon. My name is Don Kraus, I am the General Manager of the Central Nebraska Public Power and Irrigation District. We provide surface water to approximately 220,000 acres and benefit over 300,000 additional acres by maintaining reliable groundwater tables. The project also produces hydropower, which is sold at wholesale.

I am primarily testifying today about the Cooperative Agreement, but I also have some comments on the proposed critical habitat designation for piping plover.

Mr. OSBORNE. Excuse me, Don, would you move a little closer to your microphone—pull it toward you. Thank you.

Mr. KRAUS. In the mid-1980's, Central and Nebraska Public Power District began proceedings to renew the FERC licenses for both our systems. This provided a Federal nexus and invoked the consultation requirements of the Endangered Species Act. In consultation, the Fish and Wildlife Service asked for far more than our fair share of mitigation. The proposed water measures would have been devastating to Central and its customers and the financial impacts of all measures were estimated to be over $150 million. Central's total annual budget is about $10 million.

The projects needed approval in each basin state. The states and the Interior signed the Cooperative Agreement of 1997. It outlines a basin-wide program for endangered species. The program will provide habitat and environmental flows to mitigate existing water activities and include plans to mitigate new depletions and a collaborative process for research monitoring and change. We are now in the final phase of filling in program details.

The Cooperative Agreement allowed the districts to settle their FERC proceedings based on a program. This would not have been possible without the leadership of the Denver office of the Fish and Wildlife Service. Under the settlement, the districts provide to the program water and storage in an environmental account, habitat and monitoring. Central's costs for environmental measures are about $20 million plus lost hydropower revenue.

Central supports the program because it beats the alternative. Without a program, the FERC proceedings could be reopened and further measures imposed on us. Other Federal nexus water projects such as irrigation projects in the Nebraska panhandle using water from Federal reservoirs in Wyoming are in the same situation.

It is also important that the proposed program address our technical disagreements with the Service on issues like year-round flow requirements. Everyone agrees that we should use the best science, but it is not so easy to agree on what science is best. The program is phased, collaborative and we use adaptive management and peer review to change direction as we learn. As we incorporate these concepts into detailed planning, however, we struggle to balance certainty with the need for flexibility and change.

Our biggest problem is money. When the Cooperative Agreement was signed, we estimated the first 10 to 13 years would cost $75 million plus the new depletions programs. Our estimate is now $150 million and the cost of the new depletions plans have also risen. A program must be in the interest of each state as a whole.

For new water users without a clear Federal nexus, a new depletions plan is difficult to swallow. The program benefits to those water users are limited and mitigation water will be costly. Each state must handle its own new depletions and in Nebraska, state funding will likely be needed. The states are also contributing water to the program, it was discussed earlier, estimated at 80,000 acre-feet yield with a value that is not well represented by the cost figures.

For these reasons we have to anticipate coming to you for help. Federal environmental law and policy are established on behalf of the entire nation. Here they apply to migratory birds that visit in our area for a few days or weeks. If it is in the nation's interest to offer these birds special protections when visiting Nebraska, the Federal Government should bear a majority of the cost. Without a program, the cost of Federal policy is piecemeal litigation, risks regarding outcome, lack of coordination and delay. When we come to you for Federal appropriations, I urge you to give us your support.

Very briefly, the proposed piping plover critical habitat designation plays into fears up and down the Platte Valley about the Federal Government program. Critical habitat designation is intended

for areas with substantial current species use, not areas where species use is rare or expected in the future with habitat management.

Areas that are already protected do not need to be designated. The Service applies these standards to other rivers in the proposed designation, excluding areas used by only a few piping plovers. In contrast, the Service proposes to designate 200 miles of the Platte River, even though very few piping plovers nest in the Central Platte River region. Those that do nest here use management habitat or off-river sandpits. The Service needs to be consistent in designated habitat and much more complete in its economic analysis or it risks losing public credibility in developing a program.

I thank you for this opportunity to testify.

[The prepared statement of Mr. Kraus follows:]

Statement of Donald D. Kraus, General Manager, The Central Nebraska Public Power and Irrigation District

Good afternoon. My name is Don Kraus. I am the General Manager of The Central Nebraska Public Power and Irrigation District (Central). Central is a not-for-profit political subdivision, governed by a board of elected representatives, established under the laws of Nebraska to provide surface water irrigation and hydropower. Our Kingsley Dam Project stores water in Lake McConaughy in western Nebraska for an irrigation distribution system 150 miles downstream in the central Platte River area. We provide surface water for approximately 220,000 acres of farmland, and indirectly serve over 300,000 additional acres irrigated from wells by maintaining a reliable elevated groundwater table. The project also produces hydropower, which we sell in the wholesale market.

I am primarily testifying today about the Cooperative Agreement, but I also have some comments on the proposed critical habitat designation for piping plover.

Central's hydroelectric plants are licensed by the Federal Energy Regulatory Commission. In the mid–1980s Central and the Nebraska Public Power District (NPPD) (collectively the Districts) began proceedings to renew our long-term licenses for the Kingsley Dam project and a smaller, interrelated project operated by NPPD. This provided the "federal nexus" needed to invoke the consultation requirements of the Endangered Species Act. The Fish and Wildlife Service (Service) proposed that substantial environmental conditions be placed in our licenses. The water release conditions implicated the water rights of thousands of Nebraska farmers, and would have substantially reduced their protection against drought. By our estimate, the Service's final proposed conditions would have cost over $150 million. Central expected to bear about 80% of that burden. Our total annual budget is about $10 million.

To put this in perspective, the Districts' projects are two among hundreds on the North or South Platte Rivers. The Service did not apportion mitigation among those projects, but instead tried to get as much as possible from each project as it needed a federal permit. This approach was not efficient or equitable. After ten years, the Districts had spent over $35 million on legal fees and technical studies with no reasonable end in sight.

Water projects needed federal approvals in each basin state, including federal dams on the North Platte River that serve Wyoming and western Nebraska and municipal water projects in Colorado. The states and the Department of the Interior agreed in 1994 to try to develop a basin-wide cooperative approach. This led to the Cooperative Agreement of 1997 and the bare bones of a basin-wide Program. The process to fill in Program details is now in its final phase. If adopted, the proposed Program will provide habitat land and water to benefit three threatened or endangered species: the whooping crane, the interior least tern and the piping plover. It will also test whether actions taken for these species might benefit the endangered pallid sturgeon, which occasionally enters the lower Platte.

The proposed Program is phased. During the first thirteen-year increment, it will acquire and protect 10,000 acres of habitat, working toward a long-term goal of 29,000 acres. The proposed Program also provides for environmental flows in the river. Flows now fall short of Fish and Wildlife Service "target flows" by an average of 417,000 acre-feet in an average year. The Districts and others believe that the target flows are not justified, but we have agreed that during the first increment, the Program will reduce shortages to target flows by 130–150,000 acre-feet. The long-term Program water goal is undefined—'sufficient" flows for species needs.

These measures provide ESA compliance for all water-related activities that existed as of July 1, 1997, the date the Cooperative Agreement was signed. The proposed Program also has new depletions programs to be administered by the individual basin states. They mitigate the impacts on target flows of any water use added later.

The Cooperative Agreement allowed the Districts to settle their FERC licensing proceedings based on our participation in the anticipated Program to address the entire basin together. This settlement would not have been possible without the leadership of the Denver office of the Fish and Wildlife Service. Under the settlement, the Districts provide storage in an "environmental account" for water we contribute and for Program water from upstream projects, 2650 acres of habitat and annual species and habitat monitoring. Additional license requirement include a further 4700 acres of non–Program habitat. The measures in our license will cost about $20 million. I want to note that we could offer a significant amount of water in a proposed Program because the Program will mitigate the impacts of new development on our project.

The relicensing proceeding was long and contentious because decisions had to be made up front, leaving no way to accommodate our sharp technical disagreements. It is easy to agree that we should use the "best science", but when scientists disagree, it is not so easy to agree on whose science is best, or what is a conservative approach and what is mere speculation. Substantial technical disagreement remains today, but we have looked for ways to go beyond that disagreement. First, the proposed Program is phased, so that long-term goals and commitments are periodically revisited. Second, the proposed Program is committed to an "adaptive management" approach. We agreed to disagree, and to use the Fish and Wildlife Service's approach to land and water as a starting point. But we are also actively exploring alternatives, carrying out extensive monitoring and research, arranging for peer review, and changing our approach as experience or research warrants. Third, decisions are to be collaborative. The Program gives both our state and the water users voting seats and prevents unilateral changes of direction. The Program is also committed to involving local land and water users in Nebraska, to working with only willing participants, to paying taxes on Program lands and to acting as a good neighbor.

These aspects of the proposed Program were critical to reaching agreement but are also the most difficult to analyze and to carry into specific planning. As a result, they have been revisited over and over again. I want to commend Ralph Morgenweck, the Director of the Denver office of the Fish and Wildlife Service on adopting this innovative approach in lieu of command and control, and on his hard work to find and keep a difficult balance between certainty and flexibility. It has clearly been a struggle both within his organization and with stakeholders to find the right balance, and that struggle is not yet over. But Ralph's willingness to use creativity has been essential and will continue to be needed for the Program to succeed.

Central supports the proposed Program because it beats the alternative. Bluntly, if the Cooperative Agreement does not lead to a Program, or the Program fails, the FERC proceedings could be reopened and further measures imposed on the Districts. Other "federal nexus" water related activities, such as the irrigation projects in the Nebraska panhandle that receive water from federal reservoirs in Wyoming, also have strong incentives to participate.

But for new water users without a clear federal nexus, the Program's new depletions plan is difficult to swallow. Program benefits to these water users are limited and mitigation water will be costly—probably beyond their willingness to pay. In Nebraska, development of a new depletions plan may involved statutory changes, and addressing surface vs. ground water issues that have not fully matured. In addition, some Nebraskans are very disturbed at inviting the federal government into decisions about private property. For a Program to be adopted, it must be in the interests of the state as a whole. The state has and will continue to need to commit substantial resources to address the new depletions issues.

Unfortunately, a greater commitment of resources is needed elsewhere as well. When the Cooperative Agreement was signed, total costs of the first ten- to thirteen-year increment were estimated to be $75 million, not including the costs of new depletions programs. At this point, estimates have risen to $150 million, and are not final. There are several reasons for the increase. Land prices have risen sharply as groups began buying river lands for hunting. Experience has shown that some land restoration costs were not correct. A study of water supply and conservation options showed that water will be more difficult and expensive to obtain than anticipated. In addition, about a year and a half ago, the Department of the Interior raised issues about sediment transport and vegetation control based on preliminary studies

for the environmental impact statement. After coordination with outside consultants, we agreed to expand our research in this area, including small-scale exploration of potential sediment and vegetation control measures on Program lands, and then to apply successful measures as appropriate on other Program lands. These activities increased both research and restoration costs. The sediment and vegetation issues and efforts to define Program success also made us look hard at the research and monitoring program, to be sure it will give us the data and experience to "adaptively manage" the Program as we intended. In addition, we naively expected administrative costs of a Program to be minimal, with Program participants donating needed support. Experience has shown we will need a small staff. While efforts are always made to keep costs as low as possible, we need the tools for success and they will cost more than we first thought.

Our biggest problem is where to get the money and water to carry out a Program. If and when we agree on Program details, we anticipate coming to you with our hats in our hands. Federal environmental law and policy are established on behalf of the entire nation. Here, they are applied to migratory species that simply visit in our area, to our great expense. Typically two to six whooping cranes visit in the spring for a few days. Longer visits, and fall stopovers are more rare. The interior least tern and piping plover arrive in June, nest, fledge their young, and are gone by mid–August.

If it is in the nation's interest to offer these birds special protections during their stays in Nebraska, I would respectfully submit that the nation needs to help pay for those protections. Nebraska has a limited population to tax and its ability to support a more costly Program is limited. This is particularly true since the costs of a new depletions program are also much more than anticipated. Opportunity costs of foregone development could also be substantial and affect the tax base. It should also be recognized that the states are contributing water to the Program with value that is not well represented by the cost figures. The three major state water projects have an estimated yield of 80 thousand acre-feet in reduction of flow shortages. The Cooperative Agreement assigns these projects a negotiated "cost" of under $17 million over the first thirteen years, but replacing that water could cost five times that amount. For these reasons, I believe that the Federal Government should and will need to bear the majority of costs of a Program. If not, the cost to federal policy is piecemeal litigation, risk regarding outcome, lack of coordination through the basin, and delay. When we come to you in Congress to ask for federal appropriations, and I urge you give us your support.

I would like to comment briefly on the proposed piping plover critical habitat designation. Frankly, it plays into all of the fears of farmers up and down the Platte River Valley about letting the federal government in the door through a Program.

The proposed designation for the Platte River is not well grounded in science or law. Critical habitat designation is intended for areas with substantial current species use—not areas where species use is rare or hoped for or expected in the future if management changes are made. Areas that are already protected by other programs or plans do not need to be designated.

These standards were applied to other rivers in the notice, but contrast sharply with the proposal to designate the entire 200-mile Platte River from Cozad to the mouth. Very few piping plover nest in the central Platte River region. Those that do nest in the area use managed, protected areas or sandpits near the river. Bird-use data from sandpits are the only justification for including many reaches of the central Platte River, but the sandpit areas themselves are excluded. On other rivers, the Fish and Wildlife Service specifically excluded areas of similar limited and ephemeral use. The Service should be consistent in its approach to the Platte River.

Perhaps portions of the Platte River, particularly the lower Platte, are appropriate to designate. But in proposing to designate the entire central Platte River, the Fish and Wildlife Service contradicts itself. Throughout our relicensing proceeding we were told that the central Platte River had little or no suitable habitat for piping plovers. That was why the Service needed large-scale mitigation, and ultimately a Cooperative Agreement and a Program. Now we are told the entire river's habitat is already in a condition that must be preserved for the species to survive. This does not make sense, and it undermines the credibility of the collaborative efforts in the Cooperative Agreement.

Perhaps the Service is looking ahead to conditions that may exist under the proposed Program or after individual water user mitigation. If so, the law is clear that critical habitat designation is not available until the habitat actually exists. Perhaps there is a fear that we will no longer be willing to address piping plovers in the central Platte River area if it is not designated critical habitat. Certainly the ESA doesn't recognize this justification. I want to be clear that Central, under its license and through the Program, will be actively working toward achieving habitat for

piping plovers whether or not there is a designation of critical habitat in the area. The Cooperative Agreement and proposed Program were developed without such a designation and will also continue regardless.

After desirable habitat for piping plover has been created in the central Platte area, the Service can consider critical habitat designation. I would expect, however, that designation would then be unnecessary because the lands will already be protected by a Program or by whatever agency ordered the habitat restoration. Piping plover habitat on the shores of Central's Lake McConaughy was excluded from the proposed designation because these lands are already protected under the terms of our FERC shoreline management plan. Managed riverine piping plover habitat should be treated similarly.

The Program is written so that the proposed critical habitat designation should not impact covered water-related activities. But in my view, the economic report provided by the Service is completely inadequate in addressing impacts if the Program is not adopted, and on water users not covered by the Program. Our experience with critical habitat has been high expense for studies, high expense for litigation, high expense for mitigation measures, lengthy delays in federal and state approvals, and lost opportunity costs.

I thank you for you for this opportunity to offer testimony for your consideration, and for your time.

Mr. OSBORNE. Thank you, Mr. Kraus. Mr. Rehberg.

Mr. REHBERG. Thank you, Congressman Osborne, and let me once again thank you for calling this hearing in Nebraska and inviting me to be a part of it. It is a very important process that we find ourselves in as Congressmen and one of the things I am struck with as I listen to your constituents and colleagues, and I admire you for the ability to bring these people together to testify today, you have done a good job in bringing the appropriate people and I have found them very helpful.

The thing that strikes you and I hope it strikes a number of people throughout the Midwest, the west and hopefully we can finally get the folks back east to understand, as many of these decisions nowadays in the environmental arena are so combative and controversial that they are being decided by the courts, which is not the place to have them decided or oftentimes being done in an Executive Order by the President and that is not particularly the best arena as well.

And so if Congress is not going to lose its opportunity to include the public and make the rational, right decisions, we are cooked. Essentially the things that you talk about, I am not sure we have an answer right now.

Mr Kraus and Mr. Bishop, you talk about sound science, but we have to come to a conclusion who best could decide which of the science is most sound. Mr. Sands, I do not disagree with your idea that perhaps creating habitat through financial incentives of increasing CRP might seem like a good idea, but for those of us who actually deal in cycles, mineral cycles and water cycles, and have to deal with grass, I can tell you that we are loving our environment to death because as we add acreage in CRP, while we may create additional habitat, if you go in and you take your finger and start playing with some of those plants, you will find that we are actually in fact killing those plants with kindness because of underuse. You can under-graze grass every bit as dead as you can create a dead plant by over-grazing it. So it is good to have this healthy dialog and I thank you for being a part of it.

I am not going to ask you the esoteric questions of who would decide sound science, but I would like to go back to you, Mr. Kraus,

real quickly if I could and ask you the costs. You feel the Federal Government ought to pick up the difference in cost.

Mr. KRAUS. Yes. We have a program, the costs have increased but it is really looking at value and I think there is a huge value to be received by the Federal Government to develop a collaborative, develop a cooperative process. I think that is important. You are going to avoid litigation, you are going to have a coordinated effort.

I think it was mentioned earlier the 80,000 acre-feet supplied by the three states. Value in the fair share document is less than $17 million. If we were to look at fair market value of that water, five or six times that amount. So I am saying there are equity issues here that I think need to be discussed. I think there are a number of reasons why the Federal Government would find it in the best interest of everyone to assume a greater share.

Mr. REHBERG. Mr. Schwarz, we have all talked a little bit about consensus. Do you have a consensus-building process within the state of Nebraska, an official entity that does that? The only reason I ask that, when I was Lieutenant Governor in Montana, I created a consensus council for natural resource purposes. These issues are so similar to what we have only we get a little more emotional, we throw buffalo guts at people and things like that.

[Laughter.]

Mr. REHBERG. I have not seen any of that yet today. So we created a consensus council, we started out calling it the Office of Dispute Resolution, and it is where everybody is an equal, there is no U.S. Fish and Wildlife Service that oversees the process, everybody is an equal when they come to the table—you and the Fish and Game and our own Department of Natural Resources and the Bureau of Rec. Do you have anything similar to that in the State of Nebraska?

Mr. SCHWARZ. Not really. Of course, in issues like this, you know, ESA is always the trump card. As a rule, it seems like when we work with Fish and Wildlife, you know, it is our way or the highway.

Mr. REHBERG. Mr. Sands, we have the advantage in Montana of hearing from Lewis and Clark, they actually kept pretty good journals and they talk about some of the over-grazing the buffalo caused. You in your statement mentioned the fact that dewatering of water is creating a habitat problem. I would suspect, is that not a historical problem, that if you went back 100 years, you would find reference to the fact that water had been depleted within the Platte over the course of the last 100 years? And how can that be the problem that has created the habitat shortage for the endangered species that we are now discussing?

Mr. SANDS. Well, the habitat needed by cranes is a wide treeless channel essentially. And historically, you get a huge spring melt in the Rockies that comes roaring down the Platte and if there are any seedlings on the banks or on the sand bars, it would wash those seedlings away with ice scourings and other things. And so that is essentially what kept the Platte from becoming a narrow tree-lined river like you would see back east. And parts of the Platte have become that, they have become narrow and tree-lined and have little use by cranes and plovers and so forth. So you

know, certainly development in the basin, throughout the basin, has removed that natural hydrologic cycle and that is why trees have started to encroach on the river, grow on the banks, grow on the sand bars and reduce the habitat that is found in the Platte Valley.

Mr. REHBERG. Thank you, Mr. Osborne, I have no further questions, and once again let me thank you.

Mr. OSBORNE. Thank you, Denny, for being here.

Mr. REHBERG. Thank you all.

[Applause.]

Mr. OSBORNE. I will proceed and ask maybe a round of questions here of you gentlemen and I appreciate very much your being here.

First of all, Mr. Bishop, in your written testimony, you cite an example of a local Fish and Wildlife Service office apparently ignoring the direction of the regional office in Denver; is that correct?

Mr. BISHOP. Yes, that had to do with the habitat plan.

Mr. OSBORNE. It was concerning the habitat protection plan.

Mr. BISHOP. There was a considerable amount of work done on that and if you are interested, I would be happy to detail in more detail the circumstances there, but basically after working on it by a number of local landowners as well as a lot of the agency people involved in the Cooperative Agreement, the work was more or less overridden by the local office and it almost set aside a great deal of work that had been done by everyone and it is still unresolved totally at this point. I will be glad to outline for you—

Mr. OSBORNE. That is not the way things normally work where you have the lower rung on the ladder overruling the next higher rung. It does not work that way in the military, does not work that way in football—

[Laughter.]

Mr. OSBORNE. —so we might want to look into that a little bit, because it is frustrating I am sure when you go to a lot of work and all of a sudden have it overturned without much reason or at least much apparent reason. And I do not know all the details.

Second, how would you characterize your organization's involvement in the process for establishing in-stream flow requirements and the pulse flow requirements for the Platte River? In other words, do you feel like you were adequately involved? Do you feel like you had adequate input?

Mr. BISHOP. We attempted to make input, Congressman, but we are still living with the numbers that U.S. Fish and Wildlife Service proposed seven or 8 years ago when we got into this Cooperative Agreement and we have made no real progress at changing the numbers in spite of a great deal of evidence that has been submitted through—starting back with the FERC relicensing, the evidence that is available through the State of Nebraska Department of Water Resources hearing process that addressed many of those flows. We are still living with those, what we think are excessively high flows and in fact, Nebraska is going to have to offset any new depletions to those flows. So that just increases the amount of impact to the state of Nebraska, trying to offset those high flow numbers.

Mr. OSBORNE. Well, I have not been at this a long time, but I have heard from a number of people that it seemed like there was

reasonably good science behind the 1300 cubic feet per second at Grand Island in late May and early June and to have that ramped up to 2400 cubic feet per second is a significant difference and some people might say well it really is not a cost to anybody, but that is water that could be used for irrigation purposes.

Mr. BISHOP. Absolutely.

Mr. OSBORNE. In our current situation with Lake McConaughy, at one time it was strictly for irrigation, now there is significant recreational value, there is also hydroelectric power starting in 1988 and now we have an endangered species account. So we have got a four-way stretch and we have got dry years, so sending a lot of water down the river, if it is unnecessary, is certainly a concern. It would seem that we need to have some further investigation of that.

Mr. Schwarz, I want to just touch on the sediment issue and I would like to underscore what you said earlier and that is the idea that—apparently there is some attempt to try to make the river look like it looked several years ago, maybe 80 or 100 years ago. And in doing that, we have to have more sediment in the river, I have heard using 100 dump trucks a day, I have heard pushing an island into the river and now lately kind of an unclear plan. But my understanding also is that, as you mentioned, one of the reasons we need the increased sediment is because the increased target flows will scour the river and create the need for more sediment, which seems like a circular argument. Do you have anything further—or have I restated your case?

Mr. SCHWARZ. Well, that is the problem. I mean as you add more water, you need more sediment and it is just kind of a never-ending cycle to that extent.

The core of the problem is that, you know, we cannot really have a designer river here. I think the comments of Mr. Sands were very accurate regarding the historical basis of the river. And I think at some point, we have to accept the fact that we are not going to be able to go back to that. Those dams are in place and the bridges are in place and I do not think we are going to see a major move in this state at least to remove those bridges and dams. I think we need to take the water we have available and use it to the best extent we can to help these species. And I think there are ways we can recover these species without just taking 400,000 acre-foot of water and running it down the river to do some of the things that are being proposed. I think with lesser amounts of water, we can develop wetlands along the river and I honestly believe we have the ability to recover these species. That is something that is within our grasp, particularly with respect to the term and plover. Now the whooping crane, of course, we have got some issues there that are outside of our control.

Mr. OSBORNE. I notice that in the target flow issues, the No. 1 priority was a pulse flow, a very high pulse flow, during wet years, which got up to maybe as much as 12,000 cubic feet per second, which undoubtedly would cause some flooding and I think that is the intent, to flood some of the pasture lands which in turn creates some insect life and some food for some of the species. But I believe in another conversation I had with you, you indicated that there might be the possibility of creating wetlands through some flooding

procedures without having to run all that water down the river in order to flood those wetlands. It is certainly an idea that I think should be explored. It would make some sense to me at any rate.

Mr. Sands, do you have any comments? We are not trying to pick on you, because I know that your heart is in the right place and I think you want to do the right thing. And I certainly agree with your idea of financial incentives. One of the problems I see is that in the Platte Valley, you are often talking about $1500 to $2000 an acre land and to do something in CRP or to have people set that aside, you are getting into a pretty high-priced program and I am assuming that would be government money you would be talking about here; is that correct?

Mr. SANDS. Yes, I am talking about a government program. But let me I guess clarify what I was suggesting, that something like the CRP program, not necessarily keeping land in grass to protect endangered species, but if you have endangered species habitat, you protect that habitat whatever it is, but on the Platte, I think we can do a lot—we can spread our money by using a variety of tools. Conservation easements I think are a great way to protect land or leases are another way to protect land. Actually, I would be surprised if there is very much fee title acquisition of land through the Cooperative Agreement, I think these other tools would probably be preferable, which would spread the money a lot further.

Mr. OSBORNE. And last, the last question, Mr. Kraus, I know that your organization has been really heavily involved in the Cooperative Agreement, maybe more so than any other organization that I know of, and I would just like a fairly frank appraisal of how you have seen that process. Do you feel like it has been a good smooth process or have there been some frustrations or anything that you would suggest that might be done to improve the situation?

Mr. KRAUS. Well, I think Tom mentioned the delay, a year and a half ago we kind of thought we knew where we were and there was a new issue raised with the sediment. The states then contracted to provide some additional assistance and really had to address the sediment issue, a brand new issue that came up. We hopefully have eliminated new issues, we have discussed problems we have had with getting people to agree upon a set of—really finding the flexibility in the ESA. I think it has been with the leadership or Ralph Morgenweck in the Denver office, when they get involved, they can help find that flexibility in the ESA and move past some of these tough issues.

There are a number of equity issues that are still out there. I think we have made progress and it has taken longer than we all thought, but we have still got some tough issues to work through—fair share, one; money, how we work through that issue. And so I think we are making progress, but I think we are tight to get to June 30, 2003—it is going to be tight.

We have tried to identify four major issues to work through over the next month and hopefully we can kick off an EIS activity. We are optimistic, but we are not there yet. But I think certainly from Central's perspective, we are going to keep working on this pro-

gram. We think it is best, it is in everyone's best interest to try to develop a cooperative effort on this.

Mr. OSBORNE. It is my understanding that Central is highly motivated to get the Cooperative Agreement to work because of your experience with FERC, is that correct?

Mr. KRAUS. That is correct. We would have the—if it does not work, if we have no cooperative agreement, we have the option of Fish and Wildlife Service trying to reopen our license, impose additional habitat upon us, additional water requirements upon our users and I think that would be a very disappointing conclusion and we hope it does not occur, and likely would lead to litigation and those kinds of things.

Mr. OSBORNE. Thank you. I would like to thank the panel.

If you would give me the license, I need to mention two or three things for the record and then I would like to maybe take three or 4 minutes just to summarize some of my thoughts and again, those of you who want to stay we would be glad to do so.

For the record, we have to make notice of a letter from Ruth Warren of Hastings, Nebraska, which will be entered into the record.

Mr. OSBORNE. A statement from Dave Burkholder from Cozad, Nebraska.

Mr. OSBORNE. A statement from Paul Currier, the Executive Director of Platte River Whooping Crane Maintenance Trust, Inc.

Mr. OSBORNE. And a statement by Don Adams representing Nebraskans First.

[The letters referred to follow:]

Ruth Warren
1334 North Hewett Avenue
Hastings, NE 68901
February 9, 2002

Representative Tom Osborne
819 North Diers Ave., Suite 3
Grand Island, NE 68803

Dear Representative Osborne:

I will not be able to attend your meeting on February 16 regarding the Endangered Species Act and Critical Habitat Designation.

However I want you to know that I am a long time member of Sierra Club and a person concerned for the environment. Please do nothing to weaken the ESA. Please respect our natural environment.

May I remind you of something said by Tom Harkin: We did not inherit this world from our parents; we are borrowing it from our children.

Yours truly,

Ruth Warren

Ruth Warren

Field Hearing of the Committee on Resources
Piping Plover Critical Habitat Designation
Grand Island, Nebraska
Feb. 16, 2002

Testimony Submitted by:
David Burkholder
P.O. Box 88
Cozad, NE. 69130

Field tests conducted by the Nebraska Public Power District, and others, have shown that more Piping Plover chicks can be fledged by developing protective habitat in the environs of the Platte River than can be fledged on unprotected islands created by flooding the river in an attempt to create "natural" sand bars in the river itself. If the Committee does not have this data, I can provide copies of the original studies for them. The main threat to these birds comes from the increase in predators afforded by the development of increased vegetation on the banks of the Platte River. The increased vegetation is due to multiple actions of human settlement of the land. Irrigation is certainly one of this endeavors: road building, flood control, aggregate mining, and others contribute equally to the channeling of the river and increased vegetation on the banks.

The issue of the Platte River Cooperative Agreement and Critical Habitat Designation has very little to do with protecting an Endangered Species. It has everything to do with whether intensive irrigated cultivation on farmland in the reaches of the Central Platte River Valley will continue as we have known it for the last 60 years. I think that the Committee, and Congress itself, owes the citizens of the valley a hearing on the merits of this topic. It is possible that the "highest and best" use of this land is not for agricultural production, or for settlement by the human species. If the citizens of the United States are so persuaded, they should enact legislation to condemn the land for public use and place the whole valley in a protected area. And, they should pay the owners of all the property so condemned for its present value as the Constitution clearly requires them to do for any public taking of private property.

Please quite using the ESA as a cover for another agenda. It is time to put the real issue on the table and discuss it openly.

"Hearing on The Endangered Species Act: The Platte River Cooperative Agreement and Critical Habitats"

February 16, 2002 at 1:00 p.m.
Hornaday-Marshall Auditorium,
College Park, in Grand Island, Nebraska

To: The U.S. House of Representatives Committee on Resources
From: Paul Currier, Executive Director, Platte River Whooping Crane Trust, 6611 W. Whooping Crane Dr., Wood River, NE 68883 (308) 384-4633.
RE: Testimony in favor of the Platte River Cooperative Agreement

I appreciate this opportunity to provide written testimony for this hearing. Although I concur with Dave Sands' testimony regarding wildlife issues on the Platte and support for the Cooperative Agreement process, I am providing the following more detailed comments for consideration by the Committee on Resources.

As a Nebraskan I am very proud of our wildlife heritage on the Platte. The Platte truly is a world-class wildlife spectacle. The famous birder Roger Tory Peterson places it as one of the top 12 birding hot spots in the world. The 500,000 sandhill cranes, 7-9 million ducks and geese, and 300 species of migratory birds that travel through central Nebraska each year is a natural wonder, exceeded in few other places in the world. The migration includes all of the wild flock of whooping cranes, which number just 176 birds today. A number of other endangered and threatened species are among the migrants as well: Bald Eagle, Peregrine Falcon (recently removed from listing), Piping Plover, Least Tern, Eskimo Curlew, Prairie White-Fringed Orchid, and the American Burying Beetle. I have attached a "Platte River Profile" and "Platte River Wildlife Notes" that more fully describe the role of the Platte for these migratory species.

The Platte River Whooping Crane Maintenance Trust, Inc., was formed in late 1978 to help protect the habitat along the Platte for these migratory species. The Trust was created as part of a court-approved settlement over the construction of Grayrocks Dam in Wyoming. The settlement satisfied requirements of the Endangered Species Act, ***and*** allowed the completion of the Grayrocks project. In the 20 years that the Trust has been in operation, we have protected 10,000 acres of habitat along the river between Overton and Grand Island. We have also established an effective habitat management, education, and research program. We have been active in promoting sound water management for the river that protects wildlife interests, while maintaining irrigation, power, and other uses of the river's water resources. Our goal has been, and continues to be directed at developing water resource plans that do not take water away from existing irrigators.

In its 20 year existence, the Trust has recognized that habitat protection for migratory birds on the Platte will not be easy. Our monitoring of the habitat indicates that the essential elements of the native ecosystem, open river channels and wetland meadows near the channel, have been, and continue to decline. Much of our management has

therefore been directed at maintaining these habitat components. Historic flows that once maintained open, treeless channel areas have been reduced by about two-thirds. Likewise approximately 75% of the wet meadow grassland feeding habitat for cranes and other birds has been drained and/or converted to cropland.

These changes have affected bird use on the river. The 60 mile reach of the Platte between North Platte and Overton has almost completely been abandoned by cranes as it filled with forests. In recent years, additional tree development on the river channel has continued (see enclosed Figure 1). Near Grand Island, 18% to 20% of the channel roost area for cranes was lost in just 6 years (1988-1994). Wet meadow and channel losses have concentrated birds on the river, creating a potential catastrophic event from disease or storms. Our efforts at clearing river channel trees and replanting wet meadows are directed at improving the habitat for migratory species. But water management is also needed to make those efforts truly effective. I have also attached a copy of our most recent newsletter that discusses these management challenges. We believe that our management has been effective. In a recent study conducted by my staff, we identified that 68% of the sandhill cranes on the river are using areas that have been cleared and managed by conservation interests.

Often wildlife issues on the Platte have been very controversial. It is my belief that they are often controversial because of misunderstandings about what the conservation community is proposing and trying to accomplish on the river. Hopefully this testimony will help defuse some of the controversy over the Endangered Species Act, the Platte River Cooperative Agreement, and proposed designation of critical habitats. These issues are not black and white, right or wrong, anti-farmer or pro-farmer, anti-wildlife or pro-wildlife. These are very complicated issues that cannot be resolved quickly, but as an environmental representative, I believe that we can and will be able to reach an amicable agreement that provides for protection of wildlife and protects landowner's rights and irrigation interests as well. In order to reach such an agreement, we must approach these issues in a deliberate, organized, and rational way. Hearings such as this one are important in moving the discussions forward, but we need to extend those discussions far beyond what is said at this hearing today in order to resolve these issues.

There appears to be widespread confusion about the Endangered Species Act, species protection, the designation of critical habitat, and the role of the Platte River Cooperative Agreement in developing an endangered species recovery program for the central Platte. In the media, these issues often become garbled and are not well understood by the general public or local landowners. In our view, although the Endangered Species Act has created a great deal of controversy, it has worked well for nearly 30 years. It was a bold move by Congress to create a process for identifying rare, threatened, and endangered species, and their habitats, and to ensure that actions of the Federal Government, funded of course by all of us as taxpayers, do not jeopardize the continued existence of these fragile species. In our view, the law was designed to head-off conflicts between species and habitat protection, and future development. It also focuses special conservation efforts that help limit the number of species listed as threatened and

endangered, and has led to species recovery and down-listing of a number of species as a result. In central Nebraska two examples are indicative of this success – the Bald Eagle is currently undergoing a process to down-list the species from endangered to threatened, and the Peregrine Falcon has been taken off the list altogether.

The ESA protects against harm to listed species directly, but it also protects the habitat for these species. One element of the law allows for the designation of specific "critical habitat" necessary for recovery. Such designations are based on biological evidence of the species needs, but in reality, critical habitat designations are often limited as a result of economic and political concerns. For instance, when whooping crane critical habitat was proposed in the 1970s for the Platte, Hall County and parts of Hamilton and Merrick Counties were part of the proposed geographical area. Protests from local interests resulted in a reduction of the area designated as critical habitat to exclude Hall County and other areas of the Platte to the east. To the credit of those who objected, there had only been a few whooping crane sightings in Hall County and further east on the Platte since 1939. Over the past 30 years, however, a number of whooping cranes have and continue to use areas in Hall, Merrick, and Hamilton counties, even though critical habitat has not been designated there. The occurrence of whooping cranes on the Platte has increased, as well, in recent decades as the population of the wild flock has expanded. Under ESA, the habitat for such species is still protected even though it has not been designated as "critical", because whooping cranes are using it.

The recent U.S. Fish & Wildlife Service proposal to designate critical habitat for the piping plover was sparked by a legal action against the Service by Defenders of Wildlife, which took issue with the Service's failure to designate habitat for the species. The Service was directed by the court to review and consider designation of appropriate habitat for the piping plover throughout the country. That is why habitat designation has been proposed for the central Platte and other reaches of Nebraska's rivers. Designation of piping plover habitat will focus protection efforts on these areas, but it doesn't significantly change protection of piping plovers under the law. The fact that the birds are already using the designated habitat means that that habitat is already protected under ESA, and protected against significant federal actions that would result in alteration of the habitat. Designation of critical habitat could strengthen court challenges to habitat mitigation and protection efforts, but only if proposed actions under the Endangered Species Act are inadequate to protect the species. Critical habitat designation may focus protection efforts, but it doesn't suddenly protect habitats that were previously unprotected.

The designation of critical habitat for the piping plover is an entirely separate issue from the Cooperative Agreement process underway for the central Platte. The Cooperative Agreement signed in 1997 between the Department of Interior and the states of Colorado, Wyoming, and Nebraska, is designed to develop a negotiated recovery program for Platte River endangered species that meets ESA requirements, provides regulatory certainty, and allows for an adaptive process for land and water management over the long-term. The target species for the program are whooping cranes, least terns, piping plovers, and

the pallid sturgeon, but the hope is that recovery efforts will also help prevent listing of additional species. Program goals for the first 13-year increment of the program are to provide 130,000 to 150,000 ac-ft of water dedicated to reducing deficits for the target species, and protection of 10,000 acres of habitat along the central Platte. Designation of piping plover critical habitat will not change the goals or direction of the proposed program. In our view the water goals are very modest, and amount to re-regulation of about 10% of the annual flows in the river. The result will not be a dramatic change in river operations. In fact, for most people, there will be no noticeable change in flows.

In addition to representatives from Federal and State governments, water and land interests, and environmental representatives are included on the governance committee and the proposed governance structure under the recovery program. The process has reached a critical stage after 5 years, with a tentative agreement on scope and process. We are not there yet, but hopefully remaining issues will be resolved and a program can be implemented sometime in 2003. Most likely, none of the program participants will be completely satisfied with the agreement. Everyone has had to compromise in order to move the process forward. But once a program is developed, positive efforts can finally be made at resolving ESA conflicts on the Platte that have persisted for 20 years.

The Cooperative Agreement is also a part of the FERC Relicensing agreement for McConaughy Reservoir. Without an agreement, it is likely that some parties will request a re-opening of the licenses for the Reservoir, and a re-consideration of reservoir operations that meet ESA needs on the central Platte. None of us involved in the relicensing hope that that happens. A settlement agreement is much preferred to a continuing struggle over endangered species protection.

The value of the Endangered Species Act is much broader than protection of the whooping cranes, piping plovers, least terns, pallid sturgeon, and other listed species. Endangered species provide us with an early warning about ecosystems in peril. The habitat changes on the Platte over the past 80 years – reduction in flows, development of forests over extensive portions of the floodplain, and loss of wet meadows adjacent to the channel have affected many numbers of native species. In addition to listed species, there are a number of fish in the river, amphibians, and butterflies that are also under consideration for listing. These species are all responding to the same habitat changes. Protection of endangered species will ultimately protect the habitat for many other species as well.

But ultimately, endangered species protection protects the quality of life for those of us that live, recreate, and work in the Platte Valley. Protecting flows in the river protects drinking water supplies for the City of Kearney, City of Grand Island, and the municipalities of Lincoln and Omaha. 70% of the state's population depends on drinking water supplies from the Platte. In addition, water in the Platte is responsible for recharging the groundwater beneath more than 1,000,000 acres adjacent to the river, and for maintaining the thousands of irrigation wells that are hydrologically connected to the river's shallow aquifer. Leaving water in the Platte protects habitat for sandhill cranes

and waterfowl and maintains a very viable economic tourism base. A study conducted a few years ago estimated that crane tourism generates $25-50 million dollars annually. And finally, a recreation study conducted several years ago also indicated that the majority of Nebraskan's favor habitat protection, even if it costs them additional dollars. Not surprisingly, most Nebraskan's when asked favored rivers that have water running in them.

What is needed is a balance between protection efforts for endangered and threatened species and other wildlife and the economic interests of farmers, ranchers, irrigators, and power generators. We're hopeful that the Cooperative Agreement is that balance. We will see real benefits for the environment, with no dramatic changes in current irrigation. The farm economy will be sustained, and the economics of tourism will continue. Active farming and ranching operations will continue to be an important part of the management of habitat on the Platte. Water management will enhance flows for wildlife, maintain drinking water supplies and quality, recharge valley well fields, and provide recreation; and aesthetic appeal.

I appreciate the opportunity to provide testimony in this hearing and hope that completion of the Cooperative Agreement will resolve many of the issues on the river.

NEBRASKANS FIRST

Protecting Nebraska's Groundwater for Agriculture

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TESTIMONY OF NEBRASKANS FIRST

FOR THE RECORD
Submitted to:
House of Representative Resources Committee
Field Hearing
Grand Island, Nebraska
February 9, 2002

- Nebraskans First is a statewide coalition of Nebraska irrigators dedicated to the responsible stewardship of our land and water and protecting Nebraska's groundwater for agriculture.

- The Nebraskans First position on the Platte River Cooperative Agreement, the proposed piping plover critical habitat designation, and the Endangered Species Act in general can be succinctly stated as follows:

  The United States Fish and Wildlife Service (USFWS) is the federal agency instigating and directing these habitat and species programs in Nebraska.

  The USFWS has demonstrated that it will abuse its authority and violate the public trust and freely impose its regulatory might against irrigators and landowners using bogus science to authorize such regulatory actions.

Specifically:

- USFWS employees were recently caught planting tufts of lynx hair from a captive pet onto rubbing posts used to identify the existence of creatures in two national forests in Washington. Had this fraud not been discovered, a critical habitat designation for the Canadian lynx would likely have been designated.

- The National Academy of Sciences determined that there was no scientific basis supporting the decision of the USFWS and the National Marine Fisheries Service to shut off irrigation water to Klamath Basin farmers last year for the purported benefit of salmon and suckerfish. This abuse of power by these federal agencies was devastating to 1,400 family farms in the Klamath Basin.

- Most recently, a federal district judge in Arizona ruled that the USFWS designation of over 700,000 acres of land for the cactus ferruginous pygmy owl was unlawful because the USFWS failed to fully evaluate the economic impacts on designated areas in southern Arizona. The USFWS based their critical habitat designation on their assessment that there would be no economic impacts. A Phoenix economist

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NEBRASKANS FIRST is a non-profit, non-partisan, grassroots organization of Nebraska farmers

concluded that such designation would cost city, industry and private residents billions of dollars.

- In light of these fraudulent actions that have violated the public trust, the USFWS has surrendered its credibility and legitimacy. They no longer can be trusted.

We conclude, therefore, that the past designation of critical habitat for the whooping crane, the proposed critical habitat for the piping plover, and the demands for increased river flows in the Platte River pursuant to the Cooperative Agreement are quite likely based on unsound or insufficient science.

Therefore, Nebraskans First insists that all studies, reports and analyses being cited and relied upon by the USFWS to support their claim for critical habitat designations and increased Platte River flows be thoroughly reviewed by independent certified experts for the purpose of determining the validity and soundness of same.

Nebraskans First will not sit idly by as a federal rogue agency, which the USFWS has unfortunately evolved into, pushes their anti-irrigation and anti-private property rights programs here in Nebraska.

Respectfully,

Don Adams, Jr.

Rare lynx hairs found in forests exposed as hoax

By Audrey Hudson
THE WASHINGTON TIMES

12-17-01

Federal and state wildlife biologists planted false evidence of a rare cat species in two national forests, officials told The Washington Times.

Had the deception not been discovered, the government likely would have banned many forms of recreation and use of natural resources in the Gifford Pinchot National Forest and Wenatchee National Forest in Washington state.

The previously unreported Forest Service investigation found that the science of the habitat study had been skewed by seven government officials: three Forest Service employees, two U.S. Fish and Wildlife Service officials and two employees of the Washington Department of Fish and Wildlife.

The officials planted three separate samples of Canadian lynx hair on rubbing posts used to identify existence of the creatures in the two national forests.

DNA testing of two of the samples matched that of a lynx living inside an animal preserve. The third DNA sample matched that of an escaped pet lynx being held in a federal office until its owner retrieved it, federal officials said.

After the falsified samples were exposed by a Forest Service colleague, the employees said they were not trying to manipulate or expand the lynx habitat, but instead were testing the lab's ability to identify the cat species through DNA analysis, said Joel Holtrop, a Forest Service official.

"Even if that is the case, it was inappropriate," Mr. Holtrop said.

Forestry officials, conservationists and retired federal officials said they were outraged that the data were tampered with and said they are skeptical it was an attempt to test the lab.

"I would find the evil-twin argument more plausible," said Bob Gordon, executive director of the National Wilderness Institute.

"That would be like bank robbers taking money from a bank and saying they were just testing the security of a bank, they weren't really stealing the money. That's beautiful, but I don't think it will fly," Mr. Gordon said.

Retired Fish and Wildlife Service biologist James M. Beers called the false sampling amazing but not surprising.

"I'm convinced that there is a lot of that going on for so-called higher purposes," Mr. Beers said.

The employees have been counseled for their actions and banned from participating in the three-year survey of the lynx, listed as a threatened animal under the Endangered Species Act. Federal officials would not name the offending employees, citing privacy concerns.

The lynx listing and habitat study began in 1999 during the Clinton administration and concludes this year. It was criticized by Westerners as a political move to impose restrictions on public lands.

Radical environmental groups felt the restrictions didn't go far enough.

To protect the habitat of the felines, roads would have to be closed to vehicles, and off-road vehicles, snowmobiles, skis and snowshoes would have been banned. Livestock grazing and tree thinning also would have been banned.

"It was rigged from the word go; it was full of bad biology and bad politics," Mr. Beers said. "It gave them [the federal government] carte blanche to go after ski resorts, stop road building and go after ranchers and tree cutters."

When the Vail Ski Resort announced an expansion of trails into possible lynx habitat, the radical animal-rights group Earth Liberation Front (ELF) torched five buildings and four ski lifts in protest. The Oct. 18, 1998, fire caused $12 million in damage and was the largest act of eco-terrorism in the United States. No arrests were made, and the statute of limitations expired in October.

This past summer, ELF planted spikes in hundreds of trees to sabotage a timber sale and protect the lynx and spotted owls in the Gifford Pinchot National Forest — one of the forests where the false samples were planted.

This isn't the first time forestry officials have encountered questionable studies to identify the presence of lynx in the Northwest.

In 1999, a scientist hired by the federal government submitted lynx hair samples supposedly found in the Oregon Cascades, farther south than where the animals were thought to exist, said Chris West, spokesman for the American Forest Resource Council.

Federal officials spent thousands of hours and tens of thousands of dollars trying to duplicate the finding but found no evidence of the creatures.

The hairs were never validated, the samples were thrown out, and the contractor was never paid, Mr. West said.

"These are cases of rogue biologists trying to influence natural-resources policy," Mr. West said.

"There has clearly been some shenanigans going on here," he said of the false sampling in Washington.

Forest Service officials say this year's errant sampling was caught and therefore did not affect the integrity of the sample survey.

"We have looked at it carefully and feel the overall integrity of the sampling effort is in place, and the ongoing results will have valid scientific and sound results," said Heidi Valetkevitch, Forest Service spokeswoman.

However, the incident has damaged the integrity of the federal agencies within their own ranks and in the communities they serve.

"It destroys the credibility of the hard work we are trying to do to track these animals," said one retired Forest Service employee.

Mr. Gordon said the false sampling aggravates an already distrustful relationship between Westerners and the federal government.

"This revelation makes all the projects these offices and individuals were involved in suspect, and may merit review," Mr. Gordon said.

Norton Says Report Will Affect Klamath Water Decision

Monday, February 04, 2002

Associated Press

GRANTS PASS, Ore. — Future decisions on sharing water between Klamath Basin farmers and endangered fish will take into account criticism by the National Academy of Sciences of last year's irrigation cutbacks, Interior Secretary Gale Norton said Monday.

Norton had initiated the review by a panel of experts, which concluded there was no scientific basis for the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to require minimum water levels last year to protect endangered suckers and threatened coho salmon during a drought.

"I am concerned by the weaknesses revealed by the National Academy of Sciences study," Norton said in a statement from Washington, D.C. "By challenging the analysis, the NAS study will affect our decision-making process for this year and future years."

Norton called on the new director of the Fish and Wildlife Service, Steve Williams, and the commissioner of the U.S. Bureau of Reclamation, John Keys, to evaluate the academy conclusions and report to her within 10 days.

How the academy's review will affect water allocations for the Klamath Project won't become clear until early April, when the Bureau of Reclamation is due to issues its operations plan for the Klamath Project, which serves 225,000 acres straddling the Oregon-California border and amounts to about half the irrigated farmland in the basin.

Before that can happen, Fish and Wildlife must issue a new biological opinion considering whether irrigation plans will jeopardize the survival of endangered shortnosed suckers and Lost River suckers in Upper Klamath Lake, the project's primary reservoir. NMFS must do the same for threatened coho salmon downstream in the Klamath River downstream.

With few options available to them in the short term for dealing with poor water quality during a drought, both agencies increased minimum water levels for fish last year, leaving little for farmers. That led to protests and rallies on behalf of farmers, lawsuits over the water allocations, legislative proposals and $134 million in economic losses.

Based on the report's criticism of a lack of hard data, NMFS will take a new look at the models used to analyze water temperatures in the Klamath River, said David Cottingham, deputy director of the agency's office of protected resources.

"We were surprised by some of the findings, but at the same time feel like they supported some of our findings," he said.

During the summer, when water can reach temperatures lethal to salmon, the young fish need enough water in the mainstem of the Klamath River to reach the cold water flowing out of tributaries, Cottingham said.

Farmers felt some vindication that what they have been saying along was scientifically valid, but still have no guarantee that they will have full irrigation deliveries this year, said Dan Kleppen, executive director of the Klamath Water Users Association.

"There is a glimmer of hope here," Kleppen said. "If the common sense comes out, this NAS report can prevail and provide some more flexibility for Klamath Project operations."

But farmers are still too gun-shy from past conflicts to be reaching out to other interests for long-term solutions, he added.

"It needs to be emphasized the report is also critical of the Bureau of Reclamation's management proposals and is not a blank check to take unlimited amounts of water from Upper Klamath Lake," said Carl Ullman, an attorney for the Klamath Tribes, which hold the suckers sacred.

"It emphasizes that it's preliminary and will probably change as new data is added and existing data is reviewed more thoroughly"

No matter how the water allocations shake out between farms and fish, there will be lawsuits challenging them, said Kleppen and environmental consultant Andy Kerr.

"It ain't over," Kerr said. "What it shows is more scientific research is necessary. But in the end where do you place the burden of proof? Extinction is irreversible."

Sen. Ron Wyden, D-Ore., said he was angry that last year's water cutbacks were made on the basis of insufficient scientific data, but hoped the academy's report would help a $175 million package to restore the Klamath Basin ecosystem get through Congress.

Widespread restoration of the Klamath Basin ecosystem will be necessary for long-term resolution of the water conflict, said Peter Moyle, a University of California at Davis fisheries biologist who served on the committee that produced the report.

"Ultimately, things have got to change up there," he said. "They are certainly in a tough place."

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No *small* victory

Arizona judge vacates pygmy owl habitat.

In what is being called a major victory for the Arizona cattle industry, a federal judge in Phoenix has eliminated all critical habitat designated for the state's population of the cactus ferruginous pygmy owl.

In her order, U.S. District Judge Susan R. Bolton ruled the U.S. Fish and Wildlife Service's (USFWS) designation of critical habitat for the pygmy owl unlawful, because the agency failed to fully evaluate economic and other impacts on designated areas in southern Arizona.

Although it benefits the state's cattle ranchers, Judge Bolton's ruling was issued in response to a lawsuit filed by the Tucson-based Southern Arizona Home Builders Association (SAHBA), along with the National Association of Home Builders and the Home Builders Association of Central Arizona.

In their lawsuit, the homebuilders challenged both the listing of the Arizona pygmy owl population as an endangered species and the designation of more than 700,000 acres of land in Arizona as critical habitat. Judge Bolton rejected the challenge to the listing but vacated the critical-habitat designation.

Continued on WB20

Arizona Cattle Growers Association Director of Natural Resources "Doc" Lane with fellow lobbyists at the state capitol in Phoenix. Lane says instead of offering a fair, well-researched case when it came to designating habitat for the pygmy owl, the U.S. Fish and Wildlife Service simply said, "We gotta have it all."

Continued from WB19

DOESN'T DO ITS HOMEWORK

When requesting endangered status for a species, the listing agency is supposed to show what areas should be protected in order for the species to recover.

In many cases today, the USFWS doesn't bother to do the homework necessary to outline those areas, says Arizona Cattle Growers Association Director of Natural Resources "Doc" Lane. "They aren't set up to figure out what the economic impact is. When the suit for the pygmy owl came along, they didn't have the resources to determine habitat. What they did was draw a line around all the historic ranches and say, 'We gotta have it all.'"

> THE CRITICAL-HABITAT DESIGNATION PLACED AN UNFAIR BURDEN ON BOTH PRIVATE LANDOWNERS AND THE STATE OF ARIZONA.
>
> —Terry Clangor

SAHBA President Terry Clangor says, "The critical-habitat designation placed an unfair burden on both private landowners and the state of Arizona. The Fish and Wildlife Service designated land as critical habitat based on its potential to become suitable for owls in the future, without regard to legitimate land uses."

Federal agencies are prohibited from issuing permits and other land-use approvals that would adversely impact critical habitat, regardless of whether the land is actually occupied by members of a protected species.

In 1999 the USFWS designated over 730,000 acres of land located in Pima, Pinal, Maricopa and Cochise Counties pygmy-owl critical habitat, of which more than 430,000 acres is owned by the state of Arizona and held in trust for public education.

An additional 155,000 acres of private land was also designated, including 60,000 acres in Pima County. Most of the critical habitat in Pima County

is located in the northwest Tucson metropolitan area, impacting construction of schools, churches, homes, roads, businesses, shopping centers, social service agencies and related activities.

COSTLY DESIGNATION

In a report submitted to the USFWS in 1999, Phoenix economist Elliott Pollack concluded the designation would cost the city, industry and private residents billions of dollars. USFWS consultants contended that there would be no impacts resulting from the designation. However, at a hearing called by Judge Bolton in July, USFWS attorneys admitted the agency's economic analysis was inaccurate.

The judge also found the approach used by the agency for the designation unlawful. "The most significant aspect of the court's ruling was the statement that a 'broader reconsideration' of critical-habitat designation is required," said SAHBA attorney Norm James. "It is inappropriate for the U.S. Fish and Wildlife Service to designate vast areas of land as critical habitat for a species without regard to whether the land is actually occupied and contains essential habitat features."

While the pygmy owl is rare in Arizona, it is regarded as common over much of its range, including Mexico. In a report submitted to the USFWS a year ago, University of Arizona researchers concluded pygmy owls were common in the Mexican state of Sonora, immediately south of the international border. The population in Mexico, where most of the pygmy owl's range is found, was not listed, nor was the population in south Texas.

> 'THE MOST SIGNIFICANT ASPECT OF THE RULING WAS THAT A 'BROADER RECONSIDERATION' OF CRITICAL-HABITAT DESIGNATION IS REQUIRED.'
>
> —Norm James

A large block of land already exists in southern Arizona that contains potential habitat for the pygmy owl. For example, Organ Pipe Cactus National Park contains more than 330,000 acres of federal land administered by the National Park Service. The Cabeza Prieta National Wildlife Refuge and the Buenos Aires National Wildlife Refuge together contain more than 1,000,000 acres of federal land and are administered by the USFWS. Those areas are already subject to land-use restrictions and border Mexico but were not designated as critical habitat.

Owls have recently been sighted in both Organ Pipe Cactus National Monument and in the Buenos Aires National Wildlife Refuge and adjoining areas. They could inhabit other regions of Central America also. In designating critical habitat, however, the USFWS focused primarily on state and private land, including land in Pinal County and eastern Maricopa County, in addition to the Tucson metro area. ◆

—Edited by Farm Progress staff.

Mr. OSBORNE. So we really appreciate those folks who have taken the time to write a statement. They will be entered into the record, they will be forwarded to the Resources Committee in Washington.

And last, let me just say this, that after having listened today and talking to Chairman Hansen and others, there is a very strong feeling among many people that the Endangered Species Act needs to be reformed. Probably the main difficulty that I see is that part of the Endangered Species Act is intended to protect the species without any regard to economic impact. That is part of the law.

More recently, the 10th Circuit Court of Appeals, which has been referred to several times, has somewhat overturned that and said you have to do an economic impact statement. So apparently that is now entering into the picture. But I think that it is really important to also understand the political reality. Most of the people in this room would probably, even if you are very much in favor of protecting species, would probably say we need to have some changes made, some of it has gotten a little unreasonable. But it is important to remember that there are an awful lot of people, largely in urban areas, largely on both coasts, who really like the idea of protecting species. Many of them may have not seen many of these species, they may not have been on the land, and many of them contribute to political parties. Therefore, the political reality of changing the Endangered Species Act is much more difficult in Washington than it is here and I think it is important to know that.

Third, I would mention that the administration, Gale Norton, is really interested in maybe changing the mindset of those who administer the Endangered Species Act and I am putting words in her mouth but I know that she is very interested in having a really clear-cut, independent peer review, and accurate data. And as we can tell today, there have been some times when that may be a little shaky as to really how independent it has been, how adequate the data has been. And that is where she is coming from, but that has to filter down through all the levels and percolate, and that takes some time.

I think I agree with Mr. Kraus that the Cooperative Agreement is certainly good in principle. There may be some concerns as to who is carrying the burden, is Nebraska really disproportionately affected. And those are things that other wiser people than I will have to decide.

I think that there is considerable argument that the critical habitat designation for the whooping crane, the least tern and the piping plover on that 56-mile stretch of the Platte River, if all of the facts are laid on the table, may be in question whether that is really appropriate, and I think that is something that should be reviewed. We did hear some assurance from Fish and Wildlife that they would be open to having that happen and so we are going to push for that.

And then last, I would just mention that Nebraska needs a comprehensive water plan. I think that this is something that Mr. Schrock mentioned, I think that everybody can begin to sense that water is getting tighter—the demands of municipalities, the demands for irrigation, electricity, and so we need to have a plan,

we need to have a systematic water law, which most western states have, which we do not have. And so I think his committee is going to be very, very important.

And then last, of course, Nebraska is in a uniquely favorable position in terms of water. As I sit on the Resources Committee and listen to other people from western states, we have a tremendous asset that they do not have. Most of them have very, very sparse water supplies and many of them have way more people. And so we have a very good situation, but we do need to protect it and we do need to be very proactive.

Having said that, we will close the hearing. I want to thank everyone for coming, I want to thank the panelists, and as I said, I will stay around for a little bit.

I would also like to thank the people here at College Park. They obviously made this available, I think they moved some people around and we appreciate that. The Hall County Extension Service; Rich Bringelson, Susan Holstein, Kristin Young, Jackie Pessegrich-Gringelson at College Park; the court reporter Bill Warren, we appreciate you being here; and Jeff Johnson from Grand Island Senior High School.

So thank you all for coming and we will stay as long as you want. I will listen—I have been beat on before and so I am ready to be beat on again if you want to do that.

Thank you.

[Whereupon, the Committee was adjourned at 3:52 p.m.]

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