Before the U. S. House of Representatives Committee on Resources

Oversight Field Hearing, Grand Island, Nebraska

February 16, 2002

Testimony 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.

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