

Statement of John W. Keys, III
Commissioner, Bureau of Reclamation
U.S. Department of the Interior
on
Endangered Species Act: The Platte River Cooperative Agreement
and Critical Habitats
Committee on Resources
United States House of Representatives
Field Hearing at Grand Island, NE
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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.

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