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INTEGRATING NEW VALUES WITH OLD USES IN THE RELICENSING OF
KINGSLEY DAM AND RELATED FACILITIES
(MAKING PART OF THE PROBLEM A PART OF THE SOLUTION)

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DAMS: WATER AND POWER
IN THE NEW WEST

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**INTEGRATING NEW VALUES WITH OLD USES IN THE RELICENSING OF
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I. Existing Project

A. Description of the Surface Water Facilities

The original hydropower licenses for Kingsley Dam and its related facilities were issued to the Districts (Central Nebraska Public Power and Irrigation District and Nebraska Public Power District) in 1937, during the severe drought of the 1930's. The two coordinated projects consist of a series of dams, reservoirs, canals and power plants, on both the mainstem and on the canals. They stretch over 170 miles on and adjacent to the North and South Platte Rivers and the Platte River. The 51-mile-long whooping crane critical habitat reach in the "Big Bend" area of the Platte River is at the downstream end of the projects' area. The major storage facility is the 1.8M acre foot Lake McConaughy impounded by Kingsley Dam on the North Platte River in western Nebraska. Although the projects are licensed for hydropower, the primary purpose of the projects always has been to satisfy irrigation needs of the farmers on 215,000 acres of highly productive farmland in central Nebraska. Hydropower revenues subsidize the projects' irrigation facilities. Project canals are used to transport water to the hydropower facilities on the canals and to 14 irrigation canals for delivery to irrigation users with contracts for storage water. Storage for irrigation has been maximized by managing storage levels for maximum long-term drought protection. During the irrigation season hydropower production is largely dependent on irrigation releases. Project facilities also supply important recreational resources to 100,000's of visitors and supply cooling water benefits to NPPD's 1,300 MW Gerald Gentleman electric generating plant.

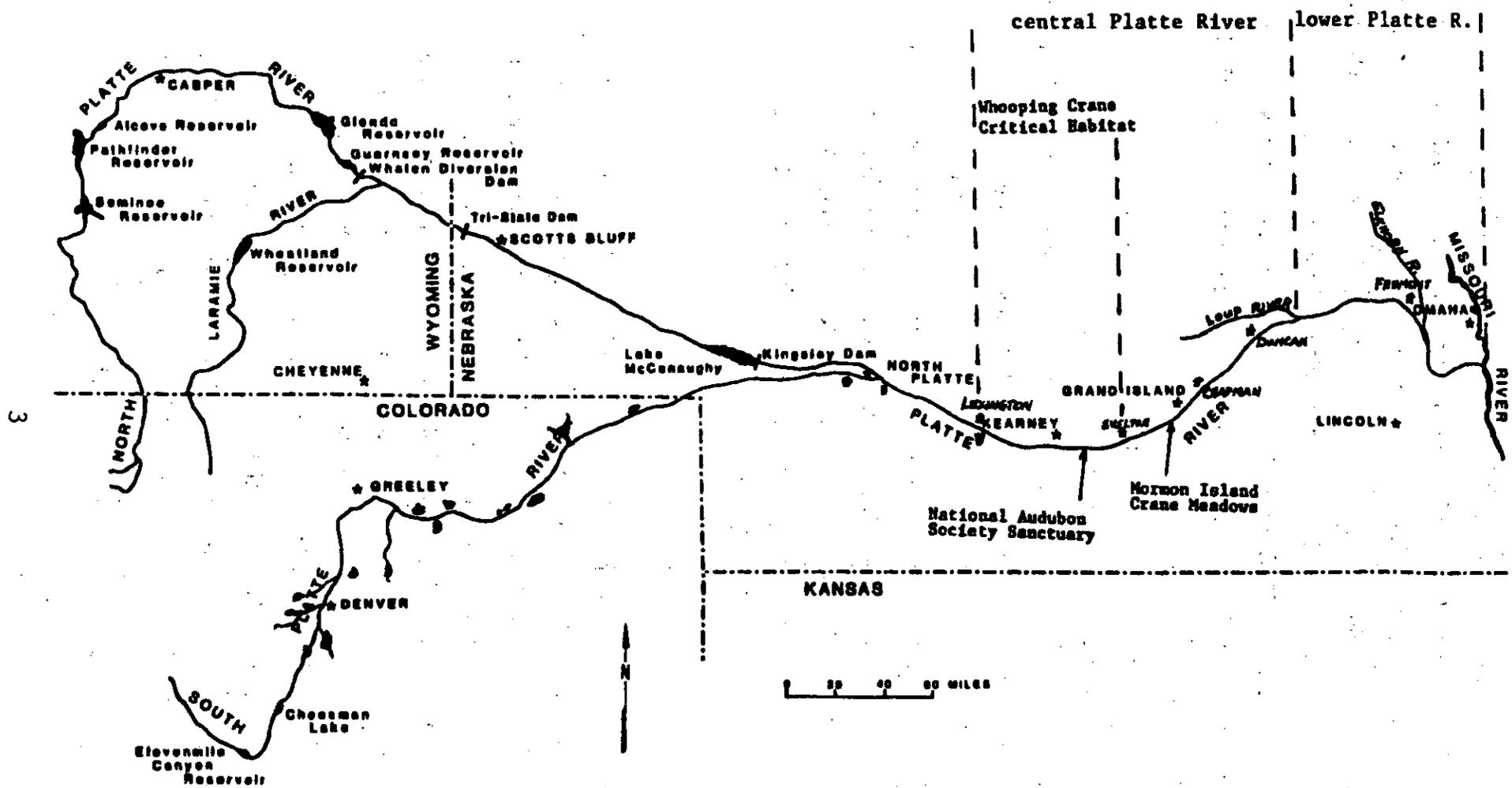
B. Ground Water Supply

Additionally, the Districts unintentionally have become a large supplier of ground water due to approximately 600,000 af (acre feet) of annual seepage from the Districts' facilities. This seepage supplies supplemental irrigation water to approximately 500,000 acres. This has created large ground water mounds that are estimated to store as much as 3 to 4 times the amount of water in Lake McConaughy, the largest surface storage facility in the basin. High ground water levels have caused problems for the Districts in some areas.

C. FERC (Federal Energy Regulatory Commission) Licenses

The Districts' licenses expired in the summer of 1987. The projects have been operating with annual licenses for 10 years. New license applications were not accepted as complete by FERC until 1990, 5 years after the first submittal of new applications. The DOI (Department of the Interior), Wyoming, Colorado, EPA, environmental organizations, and over 50 other parties intervened in the formal relicensing proceedings. As a result of litigation by the environmental groups, FERC ordered interim habitat protection measures including provision for instream flows but later issued a stay on the flow requirements. FERC issued a draft EIS in 1992. But due to extensive and severe criticism, including from DOI, FERC issued a revised draft EIS in 1994 which had to be supplemented later that year. DOI economists estimate the current economic value of the projects is 555.8-805.8 (1994 \$ million) with hydropower benefits valued at \$55M, recreation valued at \$417-667M, irrigation water supply valued at \$15.8M and cooling water supply valued at \$67.9M.

Section 7 ESA (Endangered Species Act) consultation was initiated in 1996. A December 1996 draft biological opinion concluded the continued operation of the projects, as proposed by FERC staff, was likely to jeopardize four species and adversely modify critical whooping crane habitat. The continued operation would cause an annual depletion of 305,500 af in the critical habitat area and increase target flow shortages by 137,000 af. It also would contribute to continued degradation of habitat for four species listed under the ESA.



Platte River drainage in Colorado, Wyoming, and Nebraska.

FWS provided 2 RPA's (reasonable and prudent alternatives). RPAI is a stand-alone alternative that sets forth the water, land and other measures needed if there is no basin-wide program. RPAII would rely on the activities anticipated in a program. FWS stated that RPAII would be recommended in the final opinion if there was a basin-wide agreement. FWS has just informed FERC that the parties have reached agreement and that the final opinion will utilize RPAII. It will need additional time to revise the draft final opinion.

II. Interrelationship to Other Projects and Uses in the Basin

A. Dependence on Flows from Upstream

The North and South Platte Rivers which originate from snowmelt in the Rocky Mountains in Colorado, enter Nebraska via Wyoming and Colorado and join to form the Platte River at North Platte, Nebraska. Because of the projects' downstream geographic location, the operation of the projects is almost completely dependent on inflows from upstream. Approximately 70-80% of the inflow into Lake McConaughy is from upstream return flows primarily from irrigated lands in western Nebraska supplied from BOR (Bureau of Reclamation) reservoirs in Wyoming. Releases from Lake McConaughy are timed to supplement South Platte flows from Colorado.

B. Basin Development

With over 15 major dams, the Platte River Basin is considered one of the most highly developed in the world. Over 70% of the flows are diverted for consumptive use. The 2.6M af of average annual flow that existed in the critical habitat reach in the early 1900's has been reduced to 1M af. Development of water in the basin started in the 1850's. Irrigation diversions intensified for the remainder of the century but expanded greatly with BOR's construction of large storage reservoirs in Wyoming beginning with completion of Pathfinder Dam in 1913. The storage capacity of the BOR dams is 2.8M af of the total basin storage capacity of 7.2M af. Most of the storage is in Wyoming (47%), with Colorado storing 23% and Nebraska storing 23%. Although the BOR reservoirs in Wyoming account for most of the total North Platte River storage, only 25% of that water is used in Wyoming; the remaining 75% is supplied to irrigators in western Nebraska. The upstream storage facilities

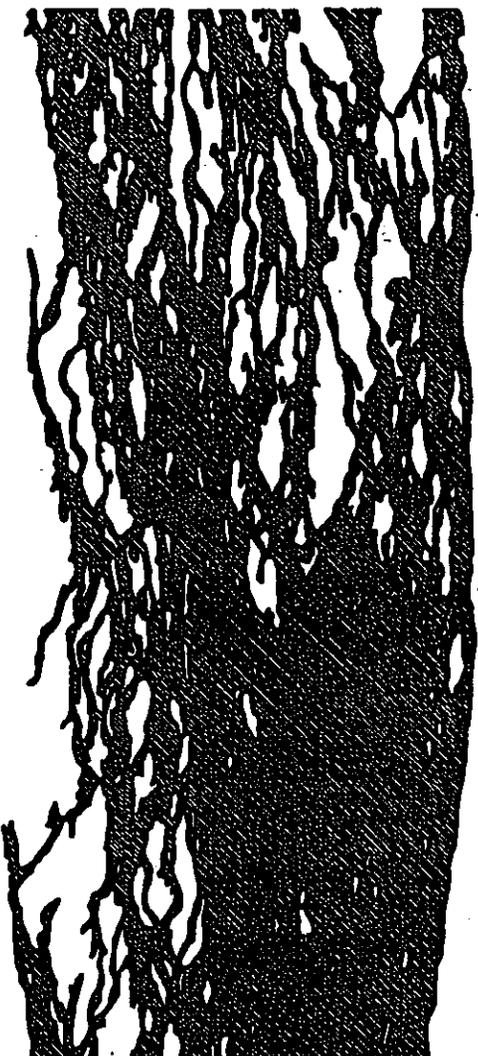
are a mix of BOR's multiple use dams primarily operated for irrigation and power, Corps of Engineer's flood control projects, municipal and industrial water facilities and small private stock water ponds. The North, South and Platte Rivers supply municipal and industrial water to approximately 3.5M people including the Front Range population in Colorado from Fort Collins to Douglas County and to 70% of the people in Nebraska. They also supply surface irrigation water to approximately 2M acres in the three states. The current crop production in the basin, except for the area east of Grand Island, depends on irrigation water and accounts for over 80% of the consumptive use in the basin.

Additionally, there have been extensive new uses of hydrologically connected ground water along the North Platte River in Wyoming below Guernsey Dam and in central and western Nebraska, and along the South Platte River in Nebraska. The wells in Wyoming are administered in relation to surface water users but they have not been calculated as part of Wyoming's 25% share of the water allocated by the Supreme Court. The wells in Nebraska are not administered.

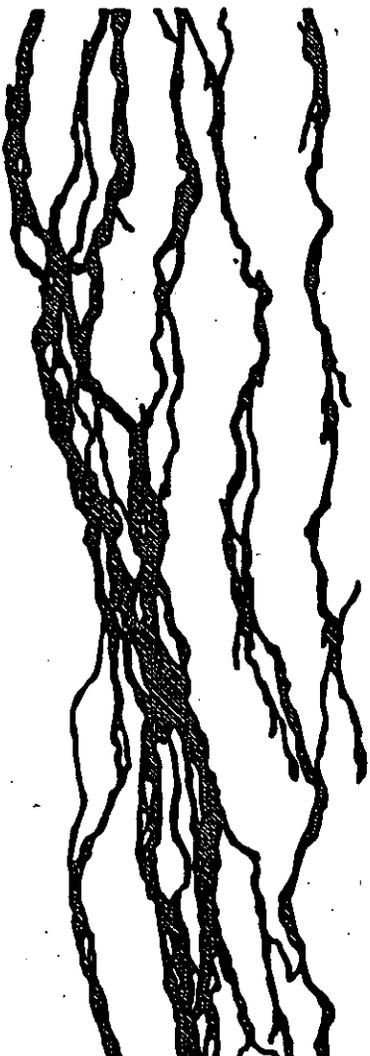
C. Development Impacts

Upstream development has greatly altered the magnitude and timing of flows and the sediment transported to Nebraska and to the critical habitat reach. A river once characterized as 2 miles wide and 1 inch deep with wide unvegetated channels has been narrowed to 10%-20% of its former width. The 115 miles below the projects' main-stem dams to Lexington is now a narrow channel with forested banks. The river below Lexington is wider but it too is narrower, with many large, permanent, heavily vegetated islands replacing formerly unvegetated sandbars. This reach of the river still provides important migratory bird habitat but it too continues to degrade. The high spring peak flows that formed and maintained the wide channel were greatly reduced from upstream developments in Wyoming and Colorado. However, the shape of the annual hydrograph has considerably flattened since Kingsley Dam was completed in 1941. Many of the riverine subirrigated wet meadows have disappeared or are converted to cropland.

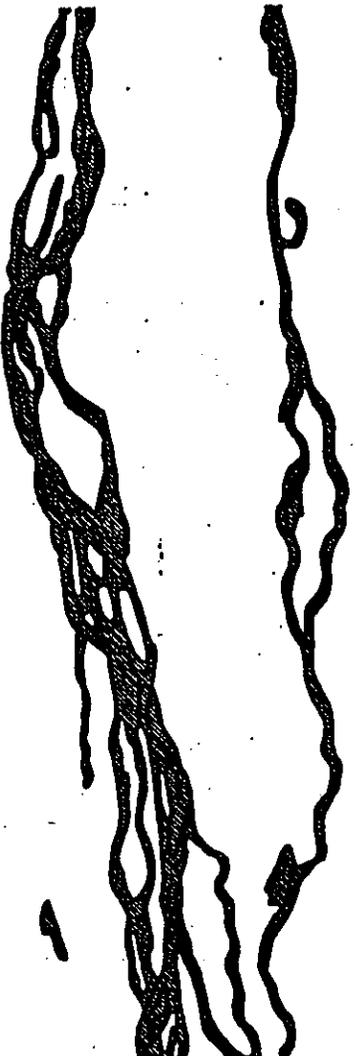
River Channel and Riverine Habitat



1938



1969

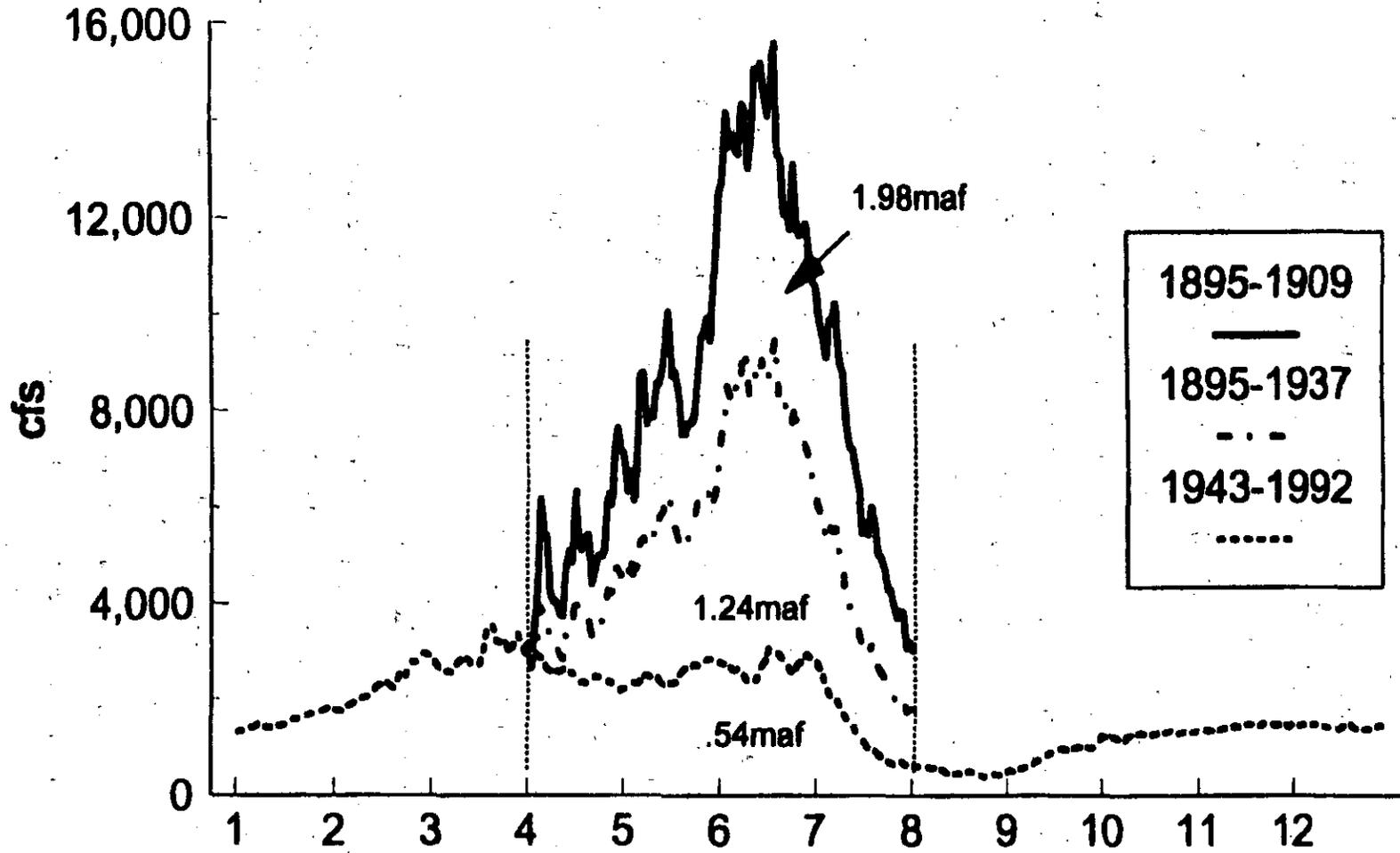


1982



**River channel area (shaded) near Odessa
in 1938 1969 and 1982.**

Platte River at Duncan



III. New Values

A. Wildlife

The riverine habitat along the North Platte and Platte Rivers historically contained wildlife habitat of great value, especially to migratory birds. It is the narrow section of the hourglass shaped migration corridor from South and Central America, Mexico and the southern part of the United States to the northern great plains states and Canada. Most of the valuable river channel is so severely degraded that it no longer provides habitat to many of the species which had depended on the riverine habitats. However, the remaining habitat, below Lexington, continues to be nationally and internationally significant and is used by 7-9M waterfowl annually for breeding and migratory habitat. Over 80% of the world's sandhill cranes and 90% of the mid-continental population of white fronted geese spend 4-6 weeks in the spring resting and feeding before migrating to their breeding grounds to the north.

The Platte River within the project area also is important migratory habitat for the only remaining wild reproducing whooping crane flock of approximately 136 birds. The whoopers regularly stop to rest and feed on the Platte River on their way from the Texas coast to northern Canada on their 2,500-mile migration. A total of nine species listed as endangered or threatened under the ESA depend on lands in the projects' area, including piping plovers and interior least terns which nest on unvegetated sandbars in the river and sandpits along the river. The endangered pallid sturgeon inhabit the lower reaches of the Platte and appear to need the high spring pulse flows for spawning.

When the projects were licensed, Congress did not require consideration of the habitat values. Our society valued birds at that time but protective efforts were primarily focused on the harm caused by hunting. That focus has changed to concern for habitat protection. Congress, in a reflection of the changed values of our society, now requires consideration and protection of habitat and has set forth requirements in the NEPA (National Environmental Policy Act), in the Federal Power Act and in the ESA. The ESA requires consultation with the FWS so that action agencies, like FERC, can insure that their actions are not likely to jeopardize listed species or adversely destroy critical habitat. 16 U.S.C.

§ 1536(a)(2). The FWS is required to recommend RPA's, if any, to avoid the likelihood of jeopardy or adverse modification.

Pursuant to fulfilling the purpose of the ESA to conserve the habitat on which species depend, the Fish and Wildlife Service has established target flows that should be provided to the remaining habitat. It has determined that an additional annual average of 417,000 af of water is needed to reduce the shortage relative to current flow conditions in the Big Bend reach. Additionally, a joint Federal/state/water user study concluded that 29,000 acres of wet meadow and channel habitat should be restored and preserved.

B. Other New Values

1. Municipal water

All three basin states have a need for additional municipal water but this is most pronounced in Colorado with the largest population and greatest rate of growth in the basin. Agriculture is declining in some parts of the basin and some of the growing municipalities in Colorado are acquiring and converting irrigation water to municipal uses. In the 1980's, Wyoming proposed the Deer Creek Project on a tributary of the North Platte to provide municipal water for Casper. Nebraska claims this proposal violates the 1945 North Platte Decree. 325 U.S. 589 (1945).

2. Recreation

Ecotourism from people coming to see the still extraordinary sight of 100,000's of birds during the spring migration is adding millions of dollars to Nebraska's economy. Additionally, the current economic value of the recreation resources of the projects is greater than the combined value of hydroelectric power, irrigation and cooling water supply. This is primarily based on the valuable recreational resources provided by Lake McConaughy and the canyon lakes along the canals.

IV. Major Activities Interrelated and Interdependent to the FERC Relicensing

A. Nebraska v. Wyoming, No. 108 Original

In 1945, after 11 years of litigation, the Supreme Court issued its decree limiting development in Colorado and Wyoming and apportioned the surface water of the North Platte River between the Whalen and Tri-State diversion dams (the pivotal reach) during irrigation season, 25% to Wyoming and 75% to Nebraska. Colorado and the United States also were parties. The contribution of the Laramie River to the water supply in the pivotal reach was considered by the Court in its apportionment. Although requested by the United States, the Court did not then enjoin future tributary development in Wyoming but stated that any party could invoke the Court's jurisdiction if such development threatened the equitable apportionment in the future. In 1986, Nebraska petitioned the Supreme Court to enforce its 1945 decree, alleging that existing and threatened tributary development, including the pending construction of Deer Creek Dam and Reservoir on a tributary of the North Platte River below Casper, Wyoming, threatened the equitable apportionment. The Court granted Nebraska's petition.

In 1988, Nebraska sought to amend its pleadings to modify the decree to require each of the three states to share the burden of providing instream flows necessary to preserve critical wildlife habitat on the North Platte River, and in 1991 sought a global non-irrigation season apportionment of flows for, among other things, recreation, fish and wildlife, including endangered and threatened species and the critical habitat. The Court twice denied Nebraska's attempts to secure "an affirmative obligation to protect wildlife". Trial is set for September 1998.

Nebraska is anticipated to claim large monetary damages from Wyoming based on alleged injury to the critical habitat, increased environmental costs of the FERC relicensing, and other environmental damage, as well as injury to hydropower, irrigation and other interests allegedly caused by increased use of water by Wyoming since 1945. Nebraska also may possibly seek increased flow of water from Wyoming for wildlife habitat needs. However,

the other parties are anticipated to claim that unregulated wells in Nebraska caused any such injuries.

B. Section 7 Consultations

1. BOR's Wyoming and Colorado Projects

The operation of the Federal dams on the North Platte River and of the Colorado Big Thompson Project on a South Platte River tributary have been under Sec. 7 consultation for a number of years. Since 1978 FWS had determined that depletions in the basin were likely to jeopardize listed species and result in adverse modification to critical habitat. Therefore, the BOR, in coordination with FWS and water users, has been constructing a basin-wide hydrological model so that legally required reasonable and prudent alternatives could be developed. The model is in the process of being validated. As the model was being finalized, water users in the 3 basin states have been increasingly concerned that water deliveries would be curtailed.

2. Municipal and Industrial Water Supply Projects on Forest Service Lands in the Front Range, Colorado

A number of Forest Service's authorizations for water projects have or are about to expire. In 1993 FWS issued draft biological opinions which included recommendations for 7 municipal and industrial water projects to avoid violation of the ESA by forgoing diversions equal to the projects' consumptive use. The project sponsors strongly objected and claimed that the water would never get to habitat in Nebraska but would be diverted by surface water users in Colorado or wells in Nebraska. These users suggested to Secretary Babbitt that he initiate basin-wide discussions to resolve the water use/ESA conflicts and a basin-wide program be developed which could serve as the RPA for all water projects in the basin. After contacting the three Governors and 6 months of negotiations, an MOA (Memorandum of Agreement) was signed in June 1994 which provided for 3 state/DOI negotiations to develop a basin-wide resolution of the issues.

V. Basin-Wide Negotiations

A. Current Status and History

Considering that it took 6 months to negotiate an MOA which only committed the states and DOI to talk, it is encouraging that on May 15, 1997, after 3 years of discussions, the negotiators for the 3 states, DOI and water users from all states agreed on a CA (Cooperative Agreement) and its 13 attachments. The Governors and the Secretary of the Interior have committed to sign the CA subject to final editorial revisions.

After the MOA was signed, the Secretary assigned the Asst. Secretary of Water and Science to lead DOI's negotiating team and the Governors appointed high level staff to negotiate on their behalf. The sessions were open to the public, and environmental groups and water users were encouraged to attend or participate in the sessions. At first, only the governmental representatives were "at the table" with other persons as observers and commentators. That situation changed and representatives of all interest groups were given opportunity for full participation. The number of people attending the sessions ranged from 70, including observers, to 10. The first sessions were confrontational, with frequent venting of anger at the FWS, and there was a tendency for the host state's negotiators to "grandstand" for the local constituencies. There were a number of times that either the states or DOI presented positions that were untenable to the other parties, and it appeared that the MOA process was dead. But no entity was willing to be the one to walk away from the negotiations. Although it was difficult at times, all the interested parties, except for the environmentalists, stuck it out. The environmentalists have not participated since February 1997. Many of the biggest issues were differences among the states and they met many times, without DOI present, to resolve those. The 1996 FERC initiation of consultation inserted a new urgency in the talks and finally, in late 1996, a "small" negotiating team of 17 and a drafting team of 5 were established. Although there were never just 17 at the sessions, this smaller group made real progress, developed innovative solutions, refined solutions and resolved the larger issues.

The CA and attachments represent compromise by all parties and a sincere attempt to agree to all that was possible to agree to now and to establish a process to resolve the issues after

more information is developed later. The 3 years it will take to do NEPA and ESA evaluations on a recovery implementation program will be used to develop the information needed to resolve the outstanding issues. A detailed set of milestones was developed to address these data and knowledge insufficiencies; they must be accomplished in order for FWS to continue to rely on RPA's described in the CA.

B. Key Elements of the Cooperative Agreement and Attachments

1. During the anticipated 3 years of the CA, the parties are to develop a basin-wide recovery implementation program for whooping cranes, piping plovers, interior least terns and pallid sturgeons that would serve as the RPA for existing and new water-related activities in the basin. The program has to be one that benefits the species and their Platte River habitats, that helps prevent future listings under the ESA, that will mitigate impacts of new water projects in a manner that will not increase the burden on the other states and is one that the parties can agree to. During the term of the CA certain research activities including developing habitat baseline information, determining how long it will take for the habitat to respond to conservation measures and a detailed water conservation study are to be accomplished. Another agreement between FWS and the Districts [10(j) Agreement], which is to settle all of the wildlife issues in the FERC relicensing and which is dependent on the CA, sets forth the District's responsibilities during the CA and the proposed program alternative. The states and DOI will have to sign a new agreement to implement a program.

2. The parties agreed to a proposed program alternative to be evaluated under NEPA along with other alternatives. FWS is to give its biological opinion on the sufficiency of the proposed alternative to serve as the RPA for all projects in the basin and on the preferred alternative, if different from the proposed alternative. If the preferred alternative is not acceptable to the parties, new, more difficult negotiations will ensue. The proposed alternative includes land and water components. The water component provides for 3 proposed water reregulation projects, a water conservation program and programs for offsetting depletions from new water-related activities including ones not subject to the ESA.

3. The costs of the CA activities, \$5M, and of the proposed alternative (approximately \$70M for the 1st increment) are to be shared equally by DOI and the states. The states have agreed to split their share with Colorado and Nebraska each responsible for 40% and Wyoming responsible for the remaining 20%. However, if the outcome of Nebraska v. Wyoming results in an order for damages to be paid to Nebraska or for more water from upstream states, the fair share distribution is to be reconsidered and if not resolved, any party can withdraw from the CA or any program. In this event, FWS will reinitiate Sec. 7 consultation on all projects which relied on the CA or any program. Project proponents who rely on the CA or a program are required to request and agree to "reopeners" in their Federal authorizations so consultation can be reinitiated if no program is implemented, if the program fails or if conforming amendments are needed due to future program modifications.

4. RPA's for Sec. 7 consultations during the term of the CA will provide for existing projects to be treated the same as the Front Range Projects in that they will be responsible for their share of the land and water needed to restore the habitat in the critical habitat reach. The time limits on the RPA's for the Front Range Projects are to be extended for 3 years. New projects are to replace their consumptive use below their diversions but the replacement is to be in the same state as the diversion occurs.

5. Under the proposed alternative, one objective is to reduce the target flow shortage by 130,000 to 150,000 af annually during the 1st increment of the proposed program alternative. The states disagree on FWS' target flow numbers but will use them for certain purposes until modified by FWS based on a peer review process during the first increment. Under the proposed program alternative the states will reregulate flows to reduce shortages by 70,000 af. Wyoming proposes to modify Pathfinder Dam to capture 54,000 af of water lost to sedimentation. The 1904 storage right should provide an average yield of 25,000 af for the downstream habitat and 9,600 af for additional municipal water. (Because this would supply the same amount of water as the hotly contested Deer Creek Project, Wyoming will withdraw its Deer Creek proposal if Pathfinder is modified.) Nebraska's share

of water is to be supplied by the Districts, which after difficult and lengthy negotiations with FWS, agreed to modify the Nebraska plan submitted by Governor Nelson. There is to be a 100,000 acre foot environmental account in Lake McConaughy, administered by the FWS, which will accrue 10% of the inflows between October and March. The Districts will release water for its project operations in a manner that will also benefit the habitat. Colorado will provide an average of 10,000 af to the South Platte River from Tamarack, a ground water recharge project near the Nebraska state line which will withdraw excess flows and release water during shortage periods.

The remaining 60,000 af of shortage reduction is to be achieved through water conservation/ water supply projects. These are to be identified through a study by an outside consultant to be conducted during the first 18 months after the CA is signed. The conservation measures are to be identified in time for their impacts to be evaluated under NEPA. Most of the state funds expended during the term of the CA will be used for this study and other related water information. Additionally, under the 10(j) Agreement, the Districts agree to make available to any program the net amount of water saved from conservation measures (approximately 10,000-14,000 af annually) required by a settlement in a Nebraska water litigation which did not put restrictions on the subsequent use of the saved water.

6. Each state will be responsible for mitigating for the future depletions in its own state. Colorado will measure the amount of mitigation needed by an innovative methodology based on population growth and the type of water used to serve additional people, e.g., tributary or nontributary ground water, imported water, or conversion of agricultural water. It estimates that it will need to supply 10,000 af in the next 15 years and intends to supply the water from ground water recharge projects. Colorado is to regularly validate its future water use projections. Wyoming and Nebraska will develop their proposals during the term of the CA but in time for analysis of the impacts under NEPA. Nebraska has committed to specific milestones to investigate and propose solutions to the problem caused by its lack of well administration. Releases from Pathfinder to the EA in McConaughy, and from Tamarack and from the EA in McConaughy to the critical habitat

area must be legally protected from existing and new ground and surface water diversions. Nebraska has committed to enact remedial legislation within two years of agreement on a program.

7. The proposed program alternative uses an incremental adaptive management approach whereby the response of species and habitat will be monitored and revisions made to the measures and goals based on such response. The length of the first increment is from 10-13 years and is to be based on the time it will take to accomplish the water conservation measures and for the species to respond to the land and water conservation measures. This is to be determined during the term of the CA.

8. The CA and proposed program alternative provide a governance structure which establishes a Governance Committee to oversee the CA and a program. The 3 water user representatives will represent different geographic areas. Each state, BOR and FWS have one representative and the environmental communities in the three states are to have 2 representatives.

9. During the term of the CA, a land committee is to be established to develop a plan for implementing the 10,000-acre acquisition, restoration and maintenance goal of the 1st increment of the proposed program. The long-term goal is 29,000 acres. The committee is to work with the local community so that sufficient land or interests in land can be acquired from willing sellers.

10. According to detailed milestones for the term of the CA, a water management committee is to develop a tracking accounting procedure for determining the depletion/accretion impacts for the 3 regulation projects, water conservation projects and new water projects. Nebraska and Wyoming are to submit specified data on new and expanded well development in their states.

11. The CA only provides that the Districts are to carry out the actions required of them in any FERC license. However, the 10(j) Agreement sets forth what the FWS and the Districts will request to be imposed as license conditions. Colorado and Wyoming, which are parties to the relicensing, have been requested to join in this settlement stipulation. Nebraska Game and Parks Commission is expected to agree to the settlement, and other parties have or will be asked to participate in the settlement. The agreement, among other things, (1) establishes the rules for the operation of the environmental account and the reoperation of the projects to provide improved flow conditions; (2) requires the Districts to provide, restore and maintain 2,600 acres of habitat in the critical habitat reach and an additional 4,700 acres above the critical habitat for migratory birds with required time schedules, expenditures and future approvals by FWS; (3) requires the Districts to participate in the program's water conservation program and to make available to a program approximately 10,000-14,000 af of net conserved water; (4) provides that there will be no increase in the volume of water used by the Districts; (5) requires up to \$100,000 for habitat monitoring on District lands; (6) requires the Districts to request FERC to include license amendments to account for revised or additional responsibilities for the Districts based on modifications to any program or if no program is implemented or if a program is terminated; and (7) if a program is not adopted or is terminated, the Districts will assume certain program responsibilities and will continue to operate its water component of the proposed program during the period of reinitiation of Sec. 7 consultation. These measures are estimated to cost \$35M.

C. Lessons Learned

1. *The right timing and a crisis for all parties is crucial.* Until water users in all states faced the real possibility that they each would have to implement measures that were far more onerous than they believed tolerable, there was no way to even start basin-wide negotiations. In my almost 20 years of involvement in Platte River and Kingsley issues, I have participated or observed at least 6 attempts by DOI to develop a basin-wide solution or attempts to negotiate issues in the FERC relicensing. Every one of them failed. It was not until the Front Range project proponents, the BOR contractors in all 3 states and

the Districts were facing the same imminent threat that the states even agreed to start to talk to DOI and to each other about a cooperative approach. The crisis seemed to recede when some water users believed that the ESA would be weakened but when the political winds changed, each of the non-Federal parties knew they had to stick it out. Increased pressure by FERC to finish the relicensing provided useful deadline incentives to the negotiators. The release of the details of RPAI, which indicated to each water user what to expect if they each had to go it alone, provided the additional incentive for the parties to seek solutions to the major remaining issues instead of continually viewing issues as all or nothing "deal breakers". The Supreme Court ruling that evidence could be submitted on environmental injury and the potential that the Special Master could recommend that Wyoming and Colorado should supply more water for the habitat provided additional incentives for them to resolve the environmental problem. The basin-wide agreement should avoid a court-imposed solution.

2. The ESA is the great convener and the great conciliator. Without the pressure induced by the potential power of the ESA, the states and its water users would have had no incentive to resolve the serious environmental issue of the degradation of the Central Platte. It is even causing Colorado to take remedial steps to halt the serious decline in native fishes in the South Platte River so that it can avoid more species and critical habitat being listed under the ESA. In the past Colorado and its water users had tried to use the South Platte Compact as a shield in litigation and had attempted to weaken the ESA. Neither worked but Congress merely amended the ESA to direct the states and FWS to work together to resolve ESA/water development conflicts. Ironically, that is what happened.

The continued threat of the ESA is purposefully used in the CA and the proposed program alternative because it is needed to keep the states working together against the "common enemy." The states do not really trust each other to fulfill their commitments. They are depending on the ESA to be an equally sufficient threat to ensure that each party will do what it promised and to ensure that the problems that will arise if Nebraska wins its environmental injury claims will be successfully negotiated.

3. This type of alternative dispute resolution is very time consuming and more labor and emotionally intensive than the Federal government issuing a mandate or a biological opinion. We are encouraged by this administration and by current societal values to resolve disputes in a cooperative and collaborative manner. However, shrinking governments with less staff and funds make these intensive efforts more difficult. It is especially difficult for the government employees, who are having to do more with less.

4. Not only must the timing be right, but the right people need to be involved. The appointment of Asst. Sec. Rieke and later Asst. Sec. Beneke sent a message to the states that DOI was taking the negotiations seriously and was willing to commit high policy-level staff. The Governors responded by appointing persons who reported directly to them. Additionally, the persons who eventually negotiated the deal were much more attuned to the values of the "new west" than those who were involved in previous settlement attempts.

5. The negotiators and the interest groups were able to act differently in different arenas. The FERC administrative and the Supreme Court litigations are very adversarial. Although the pit bull litigators did not participate in the negotiations, it is surprising that once the early venting of anger was finished, the negotiators were able to develop a working relationship. They were eventually comfortable enough to state their concerns and positions frankly and most of the time could do so in a non-antagonistic manner.

6. The Feds are not always the "bad guys". The differences and distrust among the states were often more difficult than those with DOI. Sometimes they had to work it out themselves but sometimes the discussions with DOI were less confrontational and we were able to mediate solutions between states.

7. The current ESA is flexible enough to handle conflicts with western water projects. I believe that the CA and the process it establishes is fully consistent with

the ESA. These once again demonstrate that the ESA is not so rigid that it cannot accommodate innovative solutions to difficult problems.

8. It was possible to tackle a task that I once thought was virtually impossible because there were so many issues involved and so many related actions. There were hundreds of issues and subissues to be resolved, addressed, recognized or considered. One by one, they were resolved, or a process was developed for dealing with them or they were purposefully put off for another day. Some of the latter may never need to be addressed.

9. While the environmentalists were at the table, they provided thoughtful insights and useful ideas. Their comments illuminated weakness in certain of the parties' positions. However, the environmental community was not united. One environmental group attended the negotiations for over a year and was in agreement with DOI's positions. That group stopped attending the sessions because it was requested to do so by representatives of other environmental groups who disagreed with DOI's position. Eventually all environmental representatives chose not to attend the last few months of the intensive negotiations. It will be interesting to see who the environmental community nominates, or if they nominate anyone; to fill its two seats on the Governance Committee.

There is much yet to be accomplished. The hardest negotiations may occur after a decision in Nebraska v. Wyoming or after identification of a preferred alternative if it is substantially different from the proposed alternative. However, I believe that the working relationships we have established will improve during the term of the CA. That relationship and the continued clout of the ESA lead me to continue to be optimistic that a Platte River Basin-Wide Recovery Program will be implemented and the objective of a program will be achieved.