

University of Colorado Law School

Colorado Law Scholarly Commons

Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration (Summer
Conference, June 8-11)

1999

6-11-1999

Platte River Endangered Species Partnership: Collaboration or Coercion in Disguise

Dale Strickland

Follow this and additional works at: <https://scholar.law.colorado.edu/strategies-in-western-water-law-and-policy>



Part of the [Administrative Law Commons](#), [Biodiversity Commons](#), [Business Organizations Law Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Land Use Law Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Strickland, Dale, "Platte River Endangered Species Partnership: Collaboration or Coercion in Disguise" (1999). *Strategies in Western Water Law and Policy: Courts, Coercion and Collaboration (Summer Conference, June 8-11)*.

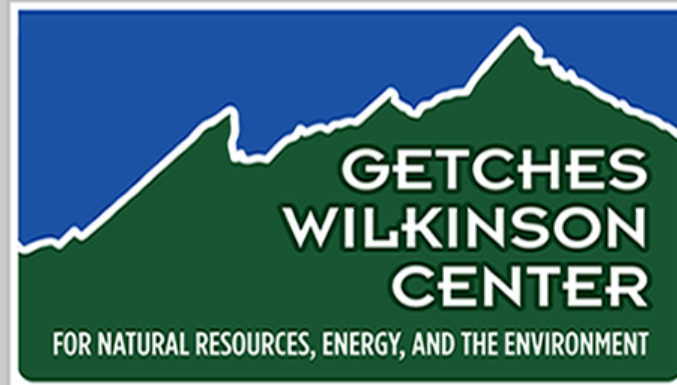
<https://scholar.law.colorado.edu/strategies-in-western-water-law-and-policy/20>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO LAW

UNIVERSITY OF COLORADO BOULDER



Getches-Wilkinson Center Collection

Dale Strickland, *Platte River Endangered Species Partnership: Collaboration or Coercion in Disguise*, in STRATEGIES IN WESTERN WATER LAW AND POLICY (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law, 1999).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

**PLATTE RIVER ENDANGERED SPECIES PARTNERSHIP:
COLLABORATION OR COERCION IN DISGUISE?**

Dale Strickland
Executive Director
Platte River Endangered Species Partnership
Cheyenne, Wyoming

Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
June 8–11, 1999

NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado

**PLATTE RIVER ENDANGERED SPECIES PARTNERSHIP:
COLLABORATION OR COERCION IN DISGUISE?**

by Dale Strickland

Introduction

To begin my talk I will address the question of whether the Cooperative Agreement (CA) among the states of Nebraska, Wyoming, and Colorado, and the U.S. Department of the Interior (Interior) is collaboration or coercion. I will then describe the CA and give a brief summary of our progress.

The CA was signed by the three states and interior, in July 1997. The agreement is designed to address endangered species issues affecting the Platte River Basin. The agreement has two main purposes:

1. To develop and implement a cooperative program (Program) designed to improve and conserve habitat for four threatened and endangered species that use the Platte River in Nebraska: whooping crane, piping plover, least tern, and pallid sturgeon.
2. To enable existing and new water uses in the Platte River Basin to proceed without additional actions beyond the Program required under the Endangered Species Act (ESA) for the four species.

In the past, the U.S. Fish and Wildlife Service (Service) analyzed the potential impact of water projects in the Platte River Basin on the four species on a project by project basis. This evaluation has led to project delays, increased costs, and in some cases project termination.

Yet, the Service still feels that habitat for the species in the Basin remains degraded. All parties agreed that there must be a better way to protect endangered and threatened species and manage the Basin's water.

Is this Coercion or Collaboration?

Webster defines coercion as government by force and collaboration as working together in some undertaking. Collaboration is also defined as working with the enemy. Some would argue that the states were forced to cooperate with the Service by the terms of ESA and that the Service is the enemy. However, the states had other options in dealing with ESA, many that had been pursued for over a decade. A careful examination of the CA illustrates that this effort is truly a collaboration. The parties have agreed to work together without giving up their ability to pursue other options. The strongest illustration of this freedom to act differently is that if one of the states or the federal government doesn't agree to the final Program, there is no Program.

What is the Cooperative Agreement and the Program?

The life of the CA is three years. During the three years the parties have agreed to design the Program, Interior has agreed to evaluate the Program under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), and the parties have agreed to establish milestones for the implementation of the program. We are over half way through the period of the CA. Much has been accomplished but we have lots of work left. The following is a brief description of the CA and a status report.

Besides the three states and Interior, the CA involves participation from water users, landowners, environmental groups, and other interested parties. All of the participants have agreed that since endangered species considerations will likely be part of the Platte River basin in the future, whether or not there is a Program, it is important that each party remain involved in the Program's development.

Committees. A Governance Committee with one member from each of the three states, three members representing water users, two members representing environmental groups, and two members representing federal agencies has been established to implement the CA. The state representatives are Dayle Williamson from Nebraska, Doug Robotham from Colorado, and Mike Besson from Wyoming. Water users are Brian Barels from Nebraska Public Power District (NPPD), Alan Berryman from Northern Colorado Water Conservation District (NCWCD), and Norm Demott from Goshen Irrigation District (GID). Dave Sands from the Audubon Society, Dan Luecke from the Environmental Defense Fund, and Paul Currier from the Crane Trust comprise the two environmental group representatives and an alternate. The federal agency representatives are Ralph Morgenweck (chairman of the Governance Committee) from the U.S. Fish and Wildlife Service and Patty Beneke from U.S. Bureau of Reclamation (BOR).

Several subcommittees have been established by the Governance Committee to directly address land, water, research and monitoring, and outreach. Like the Governance Committee, these subcommittees are comprised of individuals from the various interest groups. The work of the subcommittees is outlined in the form of Milestones in the CA. Subcommittees operate by consensus and bring disagreements to the Governance Committee in the form of majority and minority reports. The Governance Committee then acts on the recommendation from the subcommittees. All CA meetings are open to the public.

The Land Committee is developing recommendations on land component of the Program and is co-chaired by Rhodell Jameson and Vernon Nelson, both farmers and irrigators in central Nebraska. John Lawson from the BOR chairs the Water Management Committee in charge of developing a recommendations for a Water Conservation and Supply Action Plan and a means of tracking new water depletions or accretions. Jay Maher from Central Nebraska Public Power and Irrigation District (CNPPID) chairs the Technical Committee assigned with developing a framework for habitat and species monitoring and research as well as a peer review process. The Outreach Committee, chaired by Jeff Buettner with CNPPID, is charged with developing a plan

and program to involve the public and local governments in Program activities. Each of these subcommittees is important to the progress and success of the CA.

Adoption of the proposed Program by the parties to the agreement will require a federal decision related to the implementation of the ESA. The potential for environmental impacts to the natural and human environment based on this federal decision requires that Interior evaluate the proposed Program under NEPA. Curt Brown with the BOR heads the preparation of the Programmatic Environmental Impact Statement (EIS). The EIS is being developed on a separate but parallel track with the Program.

The Program. The Program is planned as an incremental process. The first increment will cover the CA period (three years) and an additional 10 to 13 years. The program has two short term goals for that first increment:

1. Reduce shortages to flows identified by the Service for the endangered species by 130,000 to 150,000 acre-feet per year; and,
2. Protect or restore 10,000 acres of habitat for the endangered species in the Central Platte River area between Lexington and Chapman, Nebraska.

The CA identifies sources of approximately 70,000 acre-feet of water. The water will come from restoring the original storage capacity of Pathfinder Reservoir in Wyoming, an environmental water account in Lake McConaughy in Nebraska, and a groundwater recharge and river reregulation project in Colorado. Options for the remaining 60,000–80,000 acre-feet of water are being considered by the Water Management Committee with the help of a Water Conservation Supply Study being conducted by an independent engineering consulting firm. The additional water will be made available through a volunteer and incentive based program.

Habitat acquisition is also incentive based. Lands will be acquired through a combination of leases, easements, and outright purchase. NPPD's Cottonwood Ranch between Overton and Elm Creek, Nebraska, (2,650 acres) will contribute to the first increment goal of 10,000 acres.

The Program will use an adaptive management process to develop the land and water for the species. That is, the program will go forward with management based on the best information available at the time the program begins. Management may and probably will change (adapt) as program monitoring and research provides new information.

Milestones. Milestones are designed to help focus CA efforts on specific tasks. Several of the Milestones continue throughout the CA and others are designed to be completed within one year. The Governance Committee and its subcommittees have made significant progress toward the completion of the CA Milestones.

The Land Committee has completed criteria and guidelines for assessing land habitat values of land that might be considered for the Program. The criteria have been tested on Cottonwood Ranch and a draft management plan has been prepared for the property. The committee has also developed a process for identifying a Land Interest Entity to hold leases, easements, and title to lands and has hired a contractor to assist in this effort. The committee has also started a Third Party Impacts analysis.

The Technical Committee has developed guidelines for the Governance Committee to use in peer reviewing elements in the proposed program and is working on the identification of monitoring and research needs of the Program. The Committee is also working with the Service to develop a means for determining biological response to the Program. The Service has hired a contractor to develop a baseline for the Central Platte for use in monitoring and measurement of a biological response. A first draft of the baseline document has been completed by the contractor. FERC Licenses have been issued to CNPPID and NPPD covering the district's hydro power facilities

along the Platte. The districts have completed draft monitoring and research protocols to meet their permit requirements and the protocols have been submitted to FERC

The Water Management Committee is working with a contractor to develop a draft Water Conservation Action Plan for balance of the water needed in the first increment (60,000–80,000 AF). The contractor has held numerous workshops with the committee and has defined methodology for determining hydrologically connected groundwater, existing flow conditions, and gain/loss factors as part of the Tracking/Accounting Procedure. The contractor has developed a screening process⁶ and a draft short list of alternatives for the 60,000–80,000 AF has completed most of the work necessary in preparation for the identification of water conservation/supply alternatives sources of Program water.

All three states are investigating their laws pertaining to the protection of Program water. The states are also monitoring new water developments. Colorado has developed a plan for estimating future depletions and has provided population estimates, growth estimates, and water use estimates. The Service has also requested National Fish and Wildlife Foundation to expend funds for flow augmentation.

The Governance Committee has selected the Nebraska Community Foundation to assist the Governance Committee with fiscal matters. The Governance Committee has formed a Finance Committee and has developed an operations budget and disbursement policy and procedures. An Outreach Committee has also been formed and has begun to develop and distribute educational and outreach materials. Interior has completed the early stages of an EIS including scoping. The EIS Team is well into data collection and the identification of alternatives to the Program. The Governance has held eleven meetings of the Governance Committee since April 1, 1998.

What are the Benefits of Participating in the Program?

Each of the parties has something to gain from a successful Program. One of the benefits for the federal government is that the Program will address the species needs by providing legal and institutional mechanisms (such as improving and protecting flows and mitigating new depletions) that will help move the species toward recovery. Benefits for the states include assurances of regulatory certainty for existing projects requiring federal approval or action and a way to satisfy the ESA and allow for new water development. Land owners and water users are assured that current uses can be continued and land and water will only be acquired from willing sellers. Environmental groups are assured that endangered species and perhaps other non-listed species will be benefitted. Other reasons for parties to support the CA include:

- Litigation is not an attractive option.
- A basin-wide approach is less expensive and more resource efficient than an individual permit by permit approach.
- The presence of a Program diminishes desire for the Service to pursue Section 9 activities.
- The Service's target flows are set aside under the Program and adaptive management determines how much water is necessary for the Program.
- Federal government pays for half of the overall Program.
- Everyone is in the "soup" together.

Summary

The CA brings together a wide range of governmental and private entities for the purpose of benefitting endangered species while allowing for current water activities and continued water development. The Governance Committee and subcommittees are comprised of individuals from the various interest groups and operate based on guidance from the CA.

The stakes are high for the three states, Interior, the environmental community, and the species. Our greatest challenge is to explain the program so that it is understood and supported by potentially affected parties. The CA has a lot of support but it has its detractors. The land and water issues are complicated and extremely important to the states and Interior. At the same time the ESA requires that Interior take steps to protect and recover the endangered species. The proposed Program gives the affected interests an opportunity to develop a joint solution to these difficult problems.