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Nebraska v. Wyoming: The End or Collaboration?

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NEBRASKA V. WYOMING:
THE END OF COLLABORATION?

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Strategies in Western Water Law and Policy:
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NEBRASKA V. WYOMING: THE END OF COLLABORATION?

by Wendy Weiss and James R. Montgomery

The situation on the Platte River is unusual in that the states of Nebraska, Wyoming, and Colorado and the United States are proceeding simultaneously down two parallel tracks: collaboration, through the Cooperative Agreement and a proposed recovery program, and litigation. *Nebraska v. Wyoming*, No. 108, Original (U.S. Sup. Ct. filed Oct. 6, 1986). You've heard about the collaboration. Now for the other side of it. As attorneys for Colorado and Wyoming, we won't pretend to be neutral, and try as we may to be objective, our account of the facts will undoubtedly be colored by our opinions.¹ We will also simplify by limiting our discussion to the Nebraska claims that raise endangered species issues, which are also the claims that are driving the case.²

The Litigation

Background

The ongoing case has its origins in an opinion and Decree entered by the Supreme Court in 1945, equitably apportioning the waters of the North Platte River among Nebraska, Wyoming, and Colorado. *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the "original Decree").

The current litigation began in 1986, when Nebraska filed an original proceeding in the United States Supreme Court, alleging that Wyoming was threatening to violate the original Decree. Colorado and the United States (which operates major storage projects on the North Platte) were also named as defendants because they were parties to the original case, although Nebraska's

¹ Any opinions contained in our remarks are our own and do not represent those of the states of Colorado or Wyoming.

petition did not assert claims of violation against Colorado or the United States.

The Environmental Issues

Although the original Decree was limited both in geographic reach -- ending at Tri-State Dam about 1 mile east of the Wyoming-Nebraska state line -- and in types of uses -- confined to irrigation -- and did not apportion water for wildlife or downstream wildlife habitat, Nebraska has throughout the long and tortuous course of this lawsuit sought to make wildlife part of the case. She has been only partly successful. In 1988, 1991, and again in 1994, Nebraska sought to add separate claims seeking a new apportionment for wildlife uses in the central Platte River. The Special Master and the Supreme Court refused to consider claims for a new apportionment for those purposes. However, they ruled that Nebraska is entitled to present evidence of *all* her equities as part of her existing case.

Nebraska's 1986 petition to enforce the original Decree sought to enjoin proposed water projects on two tributaries of the North Platte in Wyoming, Deer Creek and the Laramie River,³ and objected to Wyoming's actions with respect to the Inland Lakes in Nebraska. In 1993, the Supreme Court granted Nebraska's motion for summary judgment on the Inland Lakes issue. *Nebraska v. Wyoming*, 507 U.S. 584 (1993). The Court also ruled that the original Decree did

² Other claims and counterclaims, which the parties have settled, include issues relating to Wyoming's accounting of water stored in reservoirs above Pathfinder Reservoir, Glendo Reservoir uses, river carriage loss calculations, and operation of Bureau reservoirs in water-short (or "allocation") years.

³

Nebraska also complained of Wyoming's refusal to honor a 1978 agreement between Nebraska and Basin Electric Power Cooperative under which Nebraska agreed to the construction of Grayrocks Reservoir on the Laramie in exchange for Basin's commitment, *inter alia*, to deliver a certain amount of water to the confluence with the North Platte. Wyoming has since issued a permit for Basin's releases, which will require Wyoming to protect the water. At times Nebraska has also argued that the depletion of Laramie River flows by reason of the operation of Grayrocks Reservoir would violate the apportionment unless such depletions were accounted as part of Wyoming's 25% apportionment of natural flow in the downstream reach of the North Platte River that was apportioned on a percentage basis by the 1945 Decree. The Master recently issued a summary judgment ruling that Nebraska is precluded by the 1978 Settlement Agreement from asserting that Grayrocks depletions must be accounted as part of the percentage apportionment.

not apportion the Laramie River or tributaries, such as Deer Creek, that join the mainstem below Pathfinder Reservoir, but that Nebraska could seek to modify the Decree to enjoin new development. The Court also clarified that, where a party sought modification of the Decree, a heightened burden of proof would apply, requiring the party to demonstrate serious injury by clear and convincing evidence.

In 1994, Nebraska moved to amend her petition to add claims to modify the Decree to apportion the Laramie and to enjoin development on Deer Creek and other tributaries below Pathfinder, to restrict groundwater development and to expand the geographic limits of the apportionment to enjoin Wyoming development on Horse Creek, a tributary entering the river below Tri-State Dam. Nebraska also renewed her attempt to seek a year-round, rather than irrigation-season, apportionment, including an apportionment for wildlife uses. The Special Master and the Court again rejected Nebraska's request to file a claim seeking a year-round apportionment, but accepted the remainder of Nebraska's claims.⁴ *Nebraska v. Wyoming*, 515 U.S. 1 (1995).

While the Court ruled that Nebraska cannot seek "broad new apportionments," the Court also ruled that, in presenting its case to modify the Decree to "enjoin discrete Wyoming developments," Nebraska is entitled to present evidence of environmental injury. *Nebraska v. Wyoming*, 515 U.S. at 10. Because modification of the Decree would require a "weighing of the equities" and proof of injury, the Court refused to limit at the initial pleading stage the scope of "equities" that it would consider at trial.

Under the pre-trial orders issued by the Special Master, Nebraska's evidence in support of her claims, including a description of expert testimony and the bases for such testimony was to have been disclosed on May 30, 1997. Although Nebraska had fought long and hard for the right to assert injury to wildlife and environmental interests as part of her injury case, her disclosure did not contain specific evidence or quantification of such environmental injury. Recognizing that there is no consensus as to whether, or how, to address the needs of the federally listed species

⁴ The Court also accepted certain amended claims filed by Wyoming.

that use the central Platte River, Nebraska did not conduct an environmental analysis. Instead, Nebraska's expert concluded that there is a "federal environmental mandate" that will require Nebraska's water to be reallocated for the benefit of those species. Therefore, Nebraska concludes, any increase in water use in Wyoming causes environmental injury to Nebraska. Nebraska's proffered evidence includes a quantification of post-1945 increases in depletions of the North Platte River and its tributaries in Wyoming, but no specific analysis of the impact of such increased depletions on environmental values in Nebraska. Wyoming's defensive case disclosure revealed that Wyoming's evidence would contradict Nebraska's evidence of post-1945 increases in depletions and would show that, while Nebraska was arguing that it was injured by post-1945 increases in depletions in Wyoming, Nebraska itself had increased its depletion of the North Platte River and Platte River by many times the amount of post-1945 increases in Wyoming. Wyoming's defensive case also includes environmental analyses intended to show that the impacts on flows in Nebraska and wildlife and endangered species uses as a result of post-1945 changes in Wyoming have been negligible.

In light of the 1993 and 1995 decisions, Wyoming, Colorado, and the United States all believed that Nebraska was left with only modification claims. However, in 1997, Nebraska revealed that she would again assert claims that Wyoming had violated the 1945 Decree. In her disclosure and in a subsequent motion to bifurcate issues for trial, Nebraska made clear that she had prepared her case for trial "principally as an enforcement case." The distinction between enforcement and modification is important for two reasons. First, the 1993 decision clarified that there is a big difference in the burden of proof. A claim to enforce a decree requires only a showing by a preponderance of evidence that the Decree has been violated, while a claim to modify a decree, like a claim for a new equitable apportionment, requires a clear and convincing showing of substantial injury based upon a weighing of all the equities. Second, damages could be available as a potential remedy for a decree violation, but not for a prospective change in the respective rights and obligations of the states.

In October 1998, Wyoming filed motions to dismiss and for summary judgment (essentially in the alternative), supported by Colorado and the United States, seeking to have the Special Master

confirm that Nebraska's remaining claims are for modification, not enforcement, of the Decree and dismissing Nebraska's purported enforcement claims. Wyoming's position was that the Court defined the Nebraska claims and the respective burdens of proof in the 1993 and 1995 opinions. Nebraska responded that her amended petition seeks an order modifying the Decree to impose new injunctions designed to carry out the "predicate of the apportionment" or "in aid of the apportionment," and that the Court did not determine the appropriate burden of proof for such a claim in either its 1993 or 1995 opinions. On May 7, the Master ruled on Wyoming's motions in an order that clarifies the issues to be tried.

The Master denied Wyoming's motions on the technical ground that the enforcement claims that Wyoming sought to have dismissed were not pled in Nebraska's amended petition over which the Court accepted jurisdiction in the 1995 opinion, but rather constituted Nebraska's anticipated legal theory. However, the Master "read Wyoming's motion to dismiss as, in part, a cry for help." He responded by stating that, with the possible exception of Wyoming's groundwater pumping that would take water "directly" from the apportioned reach of the river, Nebraska's case will be tried as a case for modification of the Decree. The Master characterized Nebraska's distinction between a claim to modify the Decree to impose new injunctions to carry out the "predicate of the apportionment" and a claim for modification of the apportionment itself as a distinction without a difference. In either event, the Master noted that the claim would seek the imposition of new injunctions, which would require a showing of substantial injury upon a weighing of the equities.

The Cooperative Agreement

We will focus on those aspects of the Cooperative Agreement that relate to, and in some respects overlap, the issues raised in the litigation.

On July 1, 1997, the Governors of Wyoming, Colorado and Nebraska and the Secretary of the Interior signed the "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitat Along the Central Platte River, Nebraska" (Cooperative

Agreement). The Cooperative Agreement sets up an interim program while Interior completes NEPA review of a proposed basin-wide recovery program, which was hammered out by the three states, the Fish and Wildlife Service, and Reclamation in intensive negotiations that lasted more than three years.⁵ The proposed program is intended to:

1. secure defined benefits for the four listed species and their associated habitats to assist in their conservation and recovery;
2. serve as the reasonable and prudent alternative to offset the effects of existing and new water related activities in the Platte River basin for which the U.S. Fish and Wildlife Service would otherwise issue jeopardy opinions under § 7 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*;
3. help prevent the listing of additional species; and
4. mitigate new water related activities in each state (including those not subject to § 7) in a manner that will not increase the mitigation responsibilities of the other states, with the intent that mitigation will be implemented in the state where the activity occurs.

Under the proposed recovery program, each of the three states is to contribute its "fair share" of water and money: Wyoming 20% and Colorado and Nebraska 40% each. Fifty percent of the entire program will be funded by the Fish and Wildlife Service.

The water component of the proposed program is to provide water toward meeting the Fish and Wildlife Service's current target flows by an average of 130,000 to 150,000 acre-feet per year by the end of the first phase of the program (10-12 years). To accomplish this, the states would commit to the following:

⁵ Water users and environmental groups also participated in the negotiations and, although not signatories to the agreement, have seats on the governance committee.

1. restore the original storage capacity of Pathfinder Reservoir in Wyoming;
2. establish an environmental account in Lake McConaughy in Nebraska;
3. develop a groundwater recharge and river re-regulation project on or near Tamarack State Wildlife Area in Colorado.

These three actions are expected to provide approximately 70,000 acre-feet of water. A basin-wide study will look for ways to augment flows by an additional 60,000 acre-feet through water conservation and water supply options.

As a result of the Cooperative Agreement, the Federal Energy Regulatory Commission granted to the Central Nebraska Public Power and Irrigation District and the Nebraska Public Power District 40-year licenses for the continued operation of Lake McConaughy and other water and power facilities. Those licenses will be reopened if the Cooperative Agreement or proposed program are not implemented or fail.

Relationship Between the Litigation and the Cooperative Agreement

The Cooperative Agreement and proposed program resolve a number of issues that are involved in the litigation:

1. The Deer Creek Project: Wyoming will not build the Deer Creek Project, but will use some of the enlarged capacity of Pathfinder for municipal purposes. Nebraska has agreed to this. However, the Master has declined to dismiss Nebraska's Deer Creek modification claims from the lawsuit because, under the Pathfinder Reservoir Modification Stipulation, Wyoming is not required to surrender her Deer Creek

Reservoir construction permits until the Pathfinder modification is completed. And the Pathfinder modification must still undergo environmental and other review before it becomes a reality.

2. Economic burdens of complying with the ESA: The three states have agreed to a formula for allocating financial responsibility for mitigating the effects of past development on the habitat.
3. Providing water for the listed species' habitat: Each of the states has agreed to contribute a minimum amount of water to the program.
4. Future development: Each of the states has agreed to mitigate new water related activities in a manner that will not increase the mitigation responsibilities of the other states. This would include tributary and groundwater development⁶
5. Impact on the FERC relicensing proceeding: Although not stated as a separate claim in the case, the Lake McConaughy relicensing proceeding (to which Wyoming and Colorado were parties) and the potential mitigation responsibilities of the Nebraska districts fueled the debate over the burdens of ESA compliance. Under the Cooperative Agreement, the power districts received 40-year licenses with less onerous conditions than would otherwise have been imposed. As noted above, these licenses will be reopened if the collaborative effort fails.

Thus, the negotiated program resolves many of Nebraska's concerns. Yet the case continues, as if with a life of its own, making the fate of the Cooperative Agreement and proposed program uncertain.

The Cooperative Agreement contains an off ramp that allows each signatory to reconsider its participation in the agreement based on the outcome of the case. Such reconsideration includes the right to require modification of the program and, in the absence of an acceptable modification, the right to withdraw from the Cooperative Agreement and proposed program. (See Appendix A.) The proposed program contains similar language (Appendix B).

The positions of the parties and of the amici curiae in the litigation appear to have shifted based in part on developments surrounding the Cooperative Agreement.⁷ When Nebraska sought to amend her petition in 1988 to add a claim for apportionment for wildlife uses, she sought to add specific claims against the United States and Colorado, as well as Wyoming, to enjoin all future depletions of the North Platte River by any party in part because such depletions would injure wildlife and endangered species in central Nebraska. The United States opposed that amendment, arguing that the matter of flows for endangered species and wildlife was better addressed in other forums, such as consultation under the Endangered Species Act and other federal environmental review. The United States has maintained that position consistently throughout the case and its primary concern in the litigation at this time appears to be to see that the ultimate outcome of the litigation does not interfere with the success of the Cooperative Agreement.

Nebraska's litigation position with respect to the wildlife issues has been difficult to pin down. As indicated earlier, Nebraska fought hard for years to assure that wildlife and endangered species issues would be considered in any weighing of equities in the case. When negotiation of the Cooperative Agreement was nearing completion, the issue of the relationship between the Cooperative Agreement and the litigation was front and center. Colorado and Wyoming believed

⁶ In the litigation, Wyoming and the United States also reached a stipulation under which Wyoming will replace irrigation season depletions from irrigation wells with priorities after February 18, 1994, the date that Nebraska filed its groundwater claims.

⁷ We have taken care not to disclose information that was exchanged only in confidential settlement negotiations. The information contained in our remarks about the relationship between the Cooperative Agreement and the litigation has been taken from statements made to the Special Master in open court at status conferences or in progress reports submitted by the parties to the Special Master.

that the signing of the Cooperative Agreement would dispense with the need to address the wildlife issues in the litigation. They demanded that Nebraska drop the issues from the lawsuit in conjunction with signing the Cooperative Agreement. Nebraska refused, taking the position that, if she were to be successful in arguing that Wyoming had violated the Decree, injury to wildlife and endangered species would be part of the injury that Nebraska would assert to have resulted from such past violations. Thus, while the parties agreed that the litigation was not the proper forum for directly determining and quantifying specific flow requirements for endangered species, Nebraska nevertheless would retain the right to argue that her injury from alleged violations included injury to wildlife and endangered species.

Two significant environmental groups, the Platte River Whooping Crane Habitat Maintenance Trust and the Audubon Society have been granted amicus curiae status in the litigation. They consistently sought to broaden the scope of evidence that would ultimately be presented at trial, suggesting that they should be granted some active "litigating amicus" status to provide evidence of the flow needs of endangered species should Nebraska or the United States decline or fail to do so. When the negotiations surrounding the cooperative agreement were nearing completion, the Trust and Audubon opposed the agreement. The Trust appeared at a status conference in the litigation in 1997 to oppose the Pathfinder Modification Stipulation, indicating that they would seek the right to put on evidence of endangered species and wildlife needs that were not part of Nebraska's proffered evidence. However, when it became apparent that the Cooperative Agreement would proceed, both the Trust and Audubon eventually signed on to the agreement. Audubon and the Trust have been conspicuously in proceedings in *Nebraska v. Wyoming* of late, suggesting that their energies are no longer to be focused on trying the endangered species flow requirements in the Supreme Court case.

Wyoming signed on to the Cooperative Agreement despite her fear of the possible double jeopardy that might result from collaboration on the one hand and litigation on the other. Because of the provisions of the Cooperative Agreement that allowed parties to reconsider

their involvement based on the outcome of the litigation and because the parties agreed that the Supreme Court was not the forum for determining specific flow requirements for endangered species, Wyoming was able to sign on the Cooperative Agreement, while continuing to defend herself in the litigation. The Master's recent ruling restricting Nebraska's possible claims of past violations to a narrow set of ground water wells that might "directly" take water from the apportioned reach has now significantly reduced the risk that Wyoming might be subject to such liability in the lawsuit as to cause it to reconsider its involvement in the Cooperative Agreement.

The Master's recent ruling has confirmed that a modification of the Decree will be considered only upon a weighing of all the equities. Wyoming believes that, in the context of endangered species and wildlife issues, the weighing of equities will require the Court to consider impacts of Nebraska's post-Decree changes as well as Wyoming's. In other words, if Nebraska asserts that Wyoming's post-Decree changes have affected wildlife and endangered species uses of water in the central Platte, in weighing the equities the Court will consider how Nebraska's own post-Decree uses have affected Platte River flows in central Nebraska. It may have been Nebraska's desire to avoid this full weighing of the equities that drove Nebraska to revert to its decree enforcement theories instead of proceeding full steam with its allegations of injury to wildlife that it had fought so hard to bring into the case. The shape of the case that Nebraska ultimately will take to trial remains to be seen.

The Uncertain Future

The Special Master's recent ruling gives welcome definition to the issues to be tried at the upcoming trial. However, no trial schedule is set and trial this year seems increasingly unlikely. Meanwhile, the parties are implementing the Cooperative Agreement and NEPA review of the proposed program is proceeding. Whether the litigation and the collaborative effort can continue to coexist and whether a recovery program will ultimately emerge despite the litigation are questions we cannot answer with any certainty.

E. establishment of a governance structure that will ensure appropriate state government and stakeholder involvement in the completion of NEPA compliance tasks, in the implementation of research and other projects beneficial to the target species and their associated habitats, and in the development of a Program.

II. RELATIONSHIP OF THE COOPERATIVE AGREEMENT AND ANY PROGRAM TO NEBRASKA V. WYOMING, AND OTHER MATTERS

A. The signatories to this Cooperative Agreement are also parties to Nebraska v. Wyoming, No. 108 Original, expected to go to trial during the term of the Cooperative Agreement. Because certain matters in that proceeding may overlap with issues addressed by the Cooperative Agreement and to be addressed by any Program, each signatory reserves the right to reconsider its participation in the Cooperative Agreement and in any proposed Program based upon the outcome of Nebraska v. Wyoming, whether by settlement or decision. Such reconsideration shall, without restriction, include the right to require modification of the respective obligations and undertakings proposed to be assumed by each of the signatories in the Program to equitably account for the outcome of Nebraska v. Wyoming, and in the absence of an acceptable modification, the right to withdraw from the Cooperative Agreement or from any proposed Program.

B. In the event of such withdrawal, or if any signatory withdraws from this Cooperative Agreement for another reason, or if the Cooperative Agreement terminates and a Program is not adopted, FWS believes such a situation warrants reinitiation of consultation and will reinitiate all ESA section 7(a)(2) consultations, referenced in Paragraph VIII below, which relied upon the Cooperative Agreement and the proposed Program as a component of their reasonable and prudent alternatives, and which are subject to reinitiation pursuant to 50 C.F.R. § 402.16.

C. Because it is the intent and the commitment of the signatories to this Cooperative Agreement to work cooperatively and in good faith to resolve resource issues relating to threatened and endangered species habitats along the Central Platte River in Nebraska, the signatories make the following additional commitments for so long as all signatories remain signatories of this Cooperative Agreement.

1. The signatories agree that the pending trial in Nebraska v. Wyoming does not present the appropriate forum for establishing the specific water flow requirements for threatened and endangered species or their habitat in Nebraska. Those requirements are more appropriately defined and addressed in this Cooperative Agreement and a Program, both of which the signatories enter into or may enter into voluntarily.

2. With the exception of Nebraska v. Wyoming, each state agrees that during the term of this Cooperative Agreement, it shall not, in any judicial or administrative proceeding: (1) assert a position adverse to either of the other states on any issue relating to the target species or the associated habitats, or (2) assert a position adverse to a water related activity in either of the other states on any issue relating to the target species or the associated habitats if that water related activity is covered by this Cooperative Agreement, unless the other state consents to that assertion.

III. RELATIONSHIP OF ACTIVITIES UNDER THE COOPERATIVE AGREEMENT TO ANY SUBSEQUENT PROGRAM OR SECTION 7(a)(2) CONSULTATION

Attachment III to this Cooperative Agreement is a Proposed Alternative for evaluation under NEPA and ESA entitled Proposed Platte River Recovery Implementation Program.

The signatories anticipate that the process to comply with NEPA and the programmatic section 7 consultation process will take approximately three years and have planned specific activities defined in Attachment I, "Milestones for the Cooperative Agreement," which are to take place during that period and which are exempt from or do not require further NEPA review. The Proposed Alternative is designed and other Program alternatives should be designed to build upon these activities. If the term of the Cooperative Agreement is less than three years because a Program is reviewed and agreed to in a shorter period of time, any uncompleted activities planned for the three-year period will be implemented if appropriate within the context of the agreed-to Program. For purposes of the NEPA baseline evaluation, the activities planned to be undertaken during the term of the Cooperative Agreement will be considered part of the Program alternatives evaluated.

If the Proposed Alternative or an alternative Program is agreed to following NEPA and ESA evaluation, the activities undertaken during the term of the Cooperative Agreement will be credited to the appropriate state or the federal government as contributions to the Program. Similarly, if no Program is adopted, consistent with Paragraph VIII below, activities undertaken during the term of the Cooperative Agreement will be credited to the appropriate entity for purposes of ESA evaluations.

IV. RESEARCH AND RELATED ACTIVITIES

Research and analysis undertaken pursuant to this Cooperative Agreement will be designed to resolve issues or fill knowledge gaps concerning actions required to induce measurable improvements to the recovery of the target species and their associated

**COOPERATIVE AGREEMENT FOR PLATTE RIVER RESEARCH
AND OTHER EFFORTS RELATING TO ENDANGERED SPECIES HABITATS
ALONG THE CENTRAL PLATTE RIVER, NEBRASKA**

ATTACHMENT III

**PROPOSED PLATTE RIVER RECOVERY
IMPLEMENTATION PROGRAM**

In the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska ("Cooperative Agreement") among the Department of the Interior ("DOI") and the States of Colorado, Nebraska and Wyoming, DOI and the three states propose that a basin-wide cooperative program be developed relating to four target species (interior least tern, whooping crane, piping plover and pallid sturgeon) listed as threatened or endangered pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.*, and their associated habitats.¹ In this document, DOI and the states set forth a Proposed Platte River Recovery Implementation Program ("Program"). The Program builds upon the Cooperative Agreement and includes certain activities and contributions from the states and the federal government to be conducted during incremental time periods as described below.

The signatories proposing this Program are also parties to Nebraska v. Wyoming, No. 108 Original, expected to go to trial during the term of the Cooperative Agreement. Certain matters in that proceeding may overlap with issues addressed by the Program, and it is possible that a final decision will not have been issued by the end of the term of the Cooperative Agreement. In such circumstances, the signatories may agree that the Program be implemented while the proceeding is pending, but each signatory reserves the right to reconsider its participation in the Program based upon the outcome of Nebraska v. Wyoming, whether by settlement or decision. Such reconsideration shall, without restriction, include the

¹ For purposes of this Program document and its appendices, the term "associated habitats" means, with respect to the interior least tern, whooping crane, and piping plover, the Platte River Valley beginning at the junction of U.S. Highway 283 and Interstate 80 near Lexington, Nebraska, and extending eastward to Chapman, Nebraska, including designated critical habitat for the whooping crane. With respect to the pallid sturgeon, the term "associated habitat" means the Lower Platte River between its confluence with the Elkhorn River and its confluence with the Missouri River. "Associated habitats" shall include critical habitat in the Platte River Basin which may be subsequently designated by the U.S. Fish and Wildlife Service for the target species. The Governance Committee may, through the adaptive management process, agree to undertake, fund or give credit for activities outside the associated habitats with the intent to focus activities to create the greatest biological benefit to the target species.

right to require modification of the respective obligations and undertakings proposed to be assumed by the signatories in the Program to equitably account for the outcome of Nebraska v. Wyoming, and, in the absence of an acceptable modification, the right to withdraw from the Program. Notwithstanding Paragraph IV.F below, if a signatory withdraws from the Program because an acceptable modification is not adopted, the U.S. Fish and Wildlife Service ("FWS") believes such situations would warrant reinitiation. Therefore, it will reinitiate all ESA section 7(a)(2) consultations referenced in Paragraph IV below which relied upon the Program as a component of their reasonable and prudent alternatives, and which are subject to reinitiation pursuant to 50 C.F.R. § 402.16.

I. PROGRAM PURPOSES

A. The purpose of this Program is to implement certain aspects of the FWS' recovery plans for the target species that relate to their associated habitats by providing for the following:

1. securing defined benefits for the target species and their associated habitats to assist in their conservation and recovery through a basin-wide cooperative approach that can be agreed to by the three states and DOI;
2. serving as the reasonable and prudent alternative to offset the effects of existing and new water related activities² in the Platte River Basin that, in the absence of such a Program, would be found by FWS to be likely to jeopardize the continued existence of the target species or adversely modify designated critical habitat;

² For purposes of this Program document and its appendices, the term "water related activities" means activities and aspects of activities which (1) are subject to section 7(a)(2) of the ESA; (2) occur in the Platte River Basin upstream of the confluence of the Loup River with the Platte River; and (3) may affect Platte River flow quantity or timing, including, but not limited to, water diversion, storage and use activities. Those changes resulting from land use activities which affect flow quantity and timing will be considered impacts of a "water related activity." Changes in temperature and sediment transport will be considered impacts of a "water related activity" to the extent that such changes are caused by activities affecting flow quantity or timing. "Water related activities" do not include those components of land use activities or discharges of pollutants that do not affect flow quantity or timing. "New water related activities" are new surface water or hydrologically connected groundwater activities including both new projects and expansion of existing projects, both those subject to and not subject to section 7(a)(2) of the ESA, which may affect the quantity or timing of water reaching the associated habitats and which are implemented after the effective date of the Cooperative Agreement.

C. **NEPA Compliance.** No Program will be implemented prior to DOI completing, in compliance with NEPA, rigorous environmental evaluation of this proposed Program along with a range of reasonable alternatives which achieve Program objectives.

D. **Legislative Approval.** Certain funding commitments made in this proposed Program are subject to approval and appropriations by the appropriate state and federal legislative bodies.

E. **No Delegation or Abrogation.** Although this document sets forth a cooperative process, all signatories to this Program recognize that they each have statutory responsibilities that cannot be delegated, and that this Program does not and is not intended to abrogate any of their statutory responsibilities.

F. **Consistency with Applicable Law.** This Program is subject to and is intended to be consistent with all applicable federal and state laws and interstate compacts and decrees.

G. **Effect on Litigation.** With the exception of the pending trial in Nebraska v. Wyoming, each state agrees that during the term of the Program, it shall not, in any judicial or administrative proceeding: (1) assert a position adverse to either of the other states on any issue relating to the target species or the associated habitats; or (2) assert a position adverse to a water related activity in either of the other states on any issue relating to the target species or the associated habitats if that water related activity is covered by the Program, unless the other State consents to that assertion.

H. **Conforming Federal Funding or Authorizations.** Any person or entity undertaking a water related activity which accepts federal funding or a federal authorization and which relies on the Program as a component of its reasonable and prudent alternative in section 7 consultation must agree: (1) to the inclusion in its federal funding or authorization documents of reopening authority, including reopening authority to accommodate reinitiation upon the circumstances described in Paragraph IV.F; and (2) to request appropriate amendments from the federal action agency as needed to conform its funding or authorization to any Program adjustments negotiated among the three states and DOI, including specifically new requirements, if any, at the end of the first increment and any subsequent Program increments. FWS believes that the Program should not serve as the reasonable and prudent alternative for any water related activity for which the funding or authorization document does not conform to any Program adjustments. Notwithstanding Paragraph VI.G above, the states shall not be restrained from taking a position adverse to one another in administrative or judicial proceedings to compel the action agency to include reopening authority in any such federal funding or authorization. Nothing in this paragraph is intended to waive the right of any person or entity undertaking a water related activity to withdraw from the Program pursuant to Paragraph IV.H.