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NO SUCCESS LIKE FAILURE:¹ THE PLATTE RIVER COLLABORATIVE WATERSHED PLANNING PROCESS

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This article discusses the “collaborative” watershed planning process on one large, complex river system in the central United States: the Platte River in Colorado, Nebraska, and Wyoming. Discussions of the collaborative approach to environmental decision-making often proceed at a high level of abstraction.² This article focuses instead on the particulars of one collaborative watershed planning effort and attempts to add to the body of empirical data against which theoretical analyses of this approach must ultimately be tested.³

The views expressed in this article are based on work over a ten-year period while serving as general counsel and conservation director of American Rivers and subsequently as general counsel of the National Audubon Society. Having played an active role in numerous aspects of the Platte River controversy, I cannot address the issues as a “disinterested” academic. In defense of this effort, however, it is difficult to imagine how a truly disinterested observer could justify the investment of time and effort necessary to grasp the political and biological complexities of the Platte River. Empirical work carries for academics the notorious risk of becoming a sinkhole for time and effort, and an investigation of the Platte River

¹ BOB DYLAN, *Love Minus Zero/No Limit*, on BRINGING IT ALL BACK HOME (Columbia Records 1965) (articulating the deliciously ambiguous proposition “there’s no success like failure, and failure’s no success at all”).

* I gratefully acknowledge the help of Hope Babcock, Paul Currier, Beth Goldowitz, Mangot Zallen, and others involved in Platte River conservation efforts who prefer to remain nameless, in improving the accuracy of this reconstruction of the Platte River watershed planning process. Any remaining errors of fact or judgment are mine.

² See, e.g., Bradford C. Mank, *The Environmental Protection Agency’s Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L.Q.* 1 (1998) (citing numerous scholarly articles advancing arguments for and against the collaborative approach).

³ See DOUGLAS S. KENNEY, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATURAL RESOURCES MANAGEMENT (2000) (arguing for need for more empirical examinations of collaborative decision-making projects).

watershed effort presents those risks in spades. After-the-fact musings of a formerly engaged advocate may therefore provide a useful, if imperfect, window on this type of collaborative watershed planning process.⁴

My basic conclusion is that the Platte River collaborative watershed planning program—which is still ongoing—is fundamentally flawed because it is too heavily weighted in favor of parochial economic interests, it lacks clear procedural and substantive standards, and it is almost tailor-made to produce endless gridlock. Furthermore, if the process succeeds in generating any type of program to address Platte River management issues, the solution will almost certainly be a failure, both in absolute terms and relative to what could reasonably be achieved through traditional regulation or other, more innovative approaches.

This criticism is not a comment on either the wisdom or good faith of the many persons, within government and without, who have worked for many years to protect and restore the Platte River. Rather, it is a reflection of the difficult political circumstances that gave birth to this process in the first place. The process was launched in the midst of a concerted effort in Congress, vigorously opposed by the Clinton/Gore administration, to gut the Endangered Species Act (ESA)⁵ or repeal it altogether.⁶ The Platte process and similar efforts across the country were part of a grand plan developed by the Department of the Interior (DOI) to make the ESA less objectionable to development interests and thereby reduce the political pressure for legislative action.⁷ The architects of this political strategy, logically enough, made addressing the concerns of ESA opponents the highest priority; species and habitat conservation were secondary priorities.⁸ In other words, the Platte River process is not a balanced approach to environmental policy making because it was never intended to achieve the “best” results from a policy standpoint.⁹ Assessing the merits of the Platte process without regard to this larger political context would be both unfair and misleading. It nonetheless

⁴ For a different, more positive assessment of the Platte River collaborative process and its prospects for success by a former Department of Interior official, see Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000).

⁵ 16 U.S.C. §§ 1531-44 (1994).

⁶ See Sax, *supra* note 4, at 2380-82, 2394-2401.

⁷ See *id.* at 2380-82 (discussing the DOI's “Strategy for Preserving the Endangered Species Act,” which basically matches this account of the political motivations underlying the launch of the Platte program).

⁸ See *id.* at 2397-98.

⁹ See *id.* at 2397-2401.

seems appropriate to document and explain what has been sacrificed, both in terms of policy and wildlife protection, in implementing this political strategy. The worst possible outcome of the Platte River process would be for this flawed effort rooted in political expediency to be received as a model for how environmental planning *should* be conducted.

The question remains, of course, whether former Secretary of the Interior Bruce Babbitt and his assistants were correct in their political calculation that it was better to sacrifice the ESA in practice, as well as the wildlife and habitat protected by the ESA, at least in the short-term, rather than risk losing the ESA altogether. Reasonable minds can differ on this issue. It is simply impossible to know what might have transpired if the DOI had pursued one of several other political strategies. Another question is how the DOI's short-term political strategy will influence the future trajectory of U.S. biodiversity conservation policy. Do the Platte program and other similar efforts around the country herald a permanent narrowing of the nation's commitment to biodiversity conservation? Or will the Platte effort be viewed in historical perspective as a minor and unfortunate detour from the evolutionary development of new political and property norms reflecting the high public value of wildlife conservation? Time, of course, will tell.

I. A SKETCH OF THE PLATTE RIVER ECOSYSTEM

The Platte River is an enormously important and complex river system.¹⁰ The South Platte rises on the eastern slopes of the Rocky Mountains in Colorado and flows in a northeasterly direction into Nebraska. The North Platte rises in northern Colorado and flows through Wyoming and into Nebraska where it joins with the South Platte to form the Platte mainstem. The Platte River then flows east across Nebraska to Omaha where it joins the Missouri River.

¹⁰ The following description of the Platte River and its resources is derived in large part from OFFICE OF HYDROPOWER LICENSING, FED. ENERGY REG. COMM'N, REVISED DRAFT ENVIRONMENTAL IMPACT STATEMENT: KINGSLEY DAM (FERC PROJECT NO. 1417) & NORTH PLATTE/KEYSTONE DIVERSION DAM (FERC PROJECT NO. 1835) PROJECTS, NEBRASKA (FERC/REIS 0063) (1994) [hereinafter RDEIS]; and Margot Zallen, 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 (unpublished conference paper, presented at *Dams, Water and Power in the New West*, Eighteenth Annual Summer Conference of the Natural Resources Law Center, School of Law University of Colorado, Boulder, June 2-4, 1997).

Prior to the Platte's development starting in the nineteenth century, water flow in the Platte varied dramatically with the seasons.¹¹ Intermittent high spring floods, which carried large volumes of sediment down the river, created a twisting network of shallow, braided channels.¹² The Platte, it has traditionally been said, was a mile wide and an inch deep.¹³ The pre-settlement Platte in central Nebraska provided habitat for an abundance of wildlife, including many millions of migratory birds.¹⁴

Today, the Platte is one of the most heavily developed rivers in the world, with fifteen major dams as well as numerous smaller projects diverting an extraordinary seventy percent of the river's flow.¹⁵ Major developments on the river include a number of massive Bureau of Reclamation (BOR) dams, U.S. Army Corps of Engineers flood control projects, non-federal irrigation and power projects, municipal and industrial water facilities, and small stock watering ponds.¹⁶ The Platte supplies industrial and municipal water to approximately 3.5 million people, and supplies surface irrigation water to approximately two million acres in the three states.¹⁷ As a result of this development, the 2.6 million acre-feet of average annual flow in central Nebraska in pre-settlement times has been reduced to an average of one million acre-feet.¹⁸ The river's formerly erratic flow has been converted into a relatively even stream and the Platte now carries only a fraction of the sediments that formerly flowed down the river.¹⁹

The massive re-engineering of the Platte has led to extraordinary changes in the size and shape of the river itself, with devastating effects on the river's value as habitat for wildlife. Today, as a result of reduced water and sediment flows, and the virtual elimination of spring flood flows that periodically scoured the banks of vegetation, the river has narrowed considerably in many stretches, in some places to 10 to 20% of its former width.²⁰ All told, several hundred miles of riverine habitat have been essentially destroyed.²¹ According to the most recent data gathered by the

¹¹ See RDEIS, *supra* note 10, at 3-6.

¹² See *id.* at 3-22.

¹³ Zallen, *supra* note 10, at 5.

¹⁴ See *id.* at 8; see also RDEIS, *supra* note 10, at 3-52.

¹⁵ Zallen, *supra* note 10, at 4.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 4.

¹⁹ See *id.* at 5.

²⁰ *Id.*

²¹ See generally RDEIS, *supra* note 10, at 3-20 to 3-41.

Platte River Whooping Crane Maintenance Trust²² and the DOI,²³ the water development on the Platte is continuing to degrade the river's habitat values.

Despite its degraded state, the Platte still provides valuable habitat for several threatened and endangered bird species.²⁴ The single remaining wild population of migratory whooping cranes, numbering about 180, utilizes the Platte as migratory habitat while en route between their wintering grounds in Texas and their breeding area in northern Canada.²⁵ In 1978, the U.S. Fish and Wildlife Service (FWS) designated fifty-one miles in the so-called Big Bend reach of the Platte in central Nebraska as "critical habitat" for the whooping crane under the ESA.²⁶ The endangered interior least tern and the threatened piping plover nest on unvegetated sandbars and sandpits along the river.²⁷ The endangered pallid sturgeon inhabits the lower stretches of the Platte mainstem.²⁸ In addition to these threatened and endangered species, the Platte still provides habitat for millions of duck and other waterfowl.²⁹ Over eighty percent of the world's population of sandhill cranes spends several weeks each spring and fall on the river, creating one of the most magnificent wildlife displays in the United States.³⁰

Water development on the Platte River is subject to a number of federal and state laws. But the most important legal driver for species protection and habitat restoration efforts has been the federal ESA. Section 7 of the ESA imposes an obligation on federal agencies to ensure that actions subject to their jurisdiction are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."³¹ While the FWS has substantial authority to determine whether the requirements of the ESA

²² See Paul J. Currier, *Channel Changes in the Platte River Whooping Crane Critical Habitat Area, 1984-1995* (1996) (on file with author); Paul J. Currier, *Woody Vegetation Expansion and Continuing Decline on the Open Channel Habitat on the Platte River in Nebraska*, 7 PROC. N. AM. CRANE WORKSHOP 141-52 (1997).

²³ See Peter J. Murphy & Timothy J. Randle, *The Platte River Channel, History and Restoration*, at <http://www.platteriver.org/library/channelstability.pdf> (last visited Mar. 17, 2001).

²⁴ See RDEIS, *supra* note 10, at 3-52.

²⁵ See *id.* at 3-53.

²⁶ See 43 Fed. Reg. 20,938 (May 15, 1978); see also 50 C.F.R. § 17.95(b) (1997).

²⁷ See RDEIS, *supra* note 10, at 3-56.

²⁸ See Zallen, *supra* note 10, at 8.

²⁹ See *id.*

³⁰ See *id.*

³¹ 16 U.S.C. § 1536(a)(2) (1994).

are satisfied, ultimate responsibility for complying with the ESA rests with the "action" agencies. In addition, Section 9 of the ESA broadly prohibits the "taking" of threatened and endangered species, which has been interpreted by regulation to encompass habitat destruction.³²

The basic outlines of the physical "solution" to degradation of Platte River habitat and the consequent threats to threatened and endangered species have been clear to biologists for some time. The first priority is to avoid further depletions of the river's already heavily depleted flows. Water conservation, especially in the agricultural sector, is necessary to restore the river's lost volume to the extent practicable. Then, the flow of water that remains and that can be made available through conservation has to be aggressively managed to try to maintain the physical structure of the habitat and to maximize the value of the habitat for use by wildlife. Finally, preservation and active physical management (removing encroaching vegetation from riverbanks and islands) of certain key habitat areas are necessary.

In the early 1990s, based on research conducted by the FWS and others, the FWS defined so-called "target flows" in the critical habitat area that would provide suitable habitat for threatened and endangered species that roost in or nest adjacent to the river.³³ Based on the average annual difference between these target flows and actual flows, the FWS calculated the total average annual flow "deficit" in the river at 417,000 acre-feet.³⁴ In addition, the FWS identified, though without mathematical precision, the need to protect and manage remnant high spring flows in order to clear vegetation and maintain stream morphology.³⁵ Finally, the FWS concluded that 29,000 acres of channel and riverbank habitat needed to be restored and preserved, mostly in the form of large (2000-plus acre) habitat complexes.³⁶

³² 16 U.S.C. § 1538(a)(1)(B) (1994). See also *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) (upholding the DOI's interpretation of the "take" prohibition in the ESA).

³³ See Dep't of the Interior, The Department of the Interior's Amended Comments Under Section 10(j) of the Federal Power Act Before the Federal Energy Regulatory Commission (Aug. 11, 1994) [hereinafter Amended Comments].

³⁴ Memorandum from Fish and Wildlife Service, U.S. Dep't of the Interior (Oct. 17, 1994) (on file with author).

³⁵ See Amended Comments, *supra* note 33, at Enclosure 2 (entitled Department of the Interior's Rationale for Establishment of Channel Maintenance Requirements for the Platte River); see also *id.* at Enclosure 2, at Appendix B (entitled Rationale and Recommendations for Pulse Flow Requirements).

³⁶ See BIOLOGY WORK GROUP, PLATTE RIVER MGMT. JOINT STUDY, FINAL REPORT (1990).

The goal of these recommendations was not to return the river to pre-development conditions, but simply to improve conditions to a point that would avoid further harm to rare wildlife and degradation of critical habitat, as required by the ESA.

The most significant water projects on the river—because of their large size as well as their proximity to the critical habitat area in central Nebraska—are two power and irrigation projects operated by the Central Nebraska Public Power and Irrigation District (Central) and the Nebraska Public Power District (NPPD) (the Districts). The Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) issued the original licenses for the projects in 1937. The projects stretch for some 170 miles along the river and are designed to supply irrigation water, mostly to corn producers, with the revenues from hydropower generation subsidizing the irrigation aspect of the project.

In the mid-1980s, these two projects provided a regulatory opening to begin to address the adverse effects of the historic water development on the Platte. Both projects were subject to scheduled “relicensing” proceedings under the Federal Power Act (FPA).³⁷ A shining achievement of the American Progressive era, this legislation authorized private firms to own and operate power projects on public waterways, but subject to the condition that project licenses would have a maximum term of fifty years.³⁸ The FPA envisioned that dam owners could seek to have the projects relicensed, but Congress was careful to create no vested right to relicensing.³⁹ The FPA established a detailed regulatory review process to ensure that contemporary social values would be considered in deciding whether, to whom, and on what terms, to grant new licenses for existing dams.⁴⁰ Congress’ foresight eighty years ago in preserving the public’s right to decide how to manage public river resources played a crucial role in making habitat restoration on the Platte a practical possibility.

Review of the effects of existing water projects on Platte River wildlife and habitat is not limited to projects undergoing relicensing before the FERC. Under the ESA and its implementing regulations, existing federal

³⁷ 16 U.S.C. §§ 791a-828 (1994). As demonstrated by the chronology in the appendix, environmental advocates’ efforts to obtain modified project operations in order to protect and enhance downstream habitat actually began before the formal initiation of the relicensing process by several years.

³⁸ *See id.* § 799.

³⁹ *See id.* § 808.

⁴⁰ *See id.*; *see also* 18 C.F.R. § 16.2 (1998).

projects managed by the BOR and U.S. Army Corps of Engineers also are subject to review under the ESA when it appears that their operations may be affecting wildlife or wildlife habitat. In addition, various water projects in the Platte River Basin are located on National Forest System lands, and periodic review of permits for these projects also triggers review under the ESA.

Finally, the ESA applies to any new water development projects on the Platte. Over the twenty-five years since its enactment, the ESA developed into a virtually insurmountable barrier to new water development on the Platte. Given the fact that most of the river's flow is already being exploited for water supply purposes, and because the critical habitat is already seriously degraded and continuing to decline, any additional water withdrawals will almost certainly violate the ESA.

To add one final piece to the complex Platte River picture, the review of existing water development on the Platte River under the ESA has been proceeding in tandem with the case of *Nebraska vs. Wyoming*,⁴¹ an original action pending before the U.S. Supreme Court. The Court's original decree entered in 1945 enjoined certain development in Wyoming and Colorado and apportioned the surface water irrigation-season flows in the North Platte between Wyoming and Nebraska.⁴² In 1986, Nebraska petitioned the Court for permission to reopen this dormant case in order to seek an injunction blocking new proposed water developments in Wyoming that allegedly threatened Nebraska's apportionment.⁴³ As the case evolved, one of the major issues became whether and to what extent Wyoming's water development activity should be further restricted in order to protect instream flows that benefit wildlife.⁴⁴ Thus, in addition to the various federal administrative bodies addressing endangered species issues, the Court provided yet another forum in which to address the issues.

II. THE ORIGINS OF THE PLATTE WATERSHED PROGRAM

How and why the Platte River program got started makes an interesting story. The program was designed in part to address specific resource management challenges on the Platte. But the real impetus for the

⁴¹ 515 U.S. 1 (1995).

⁴² See 325 U.S. 589 (1945).

⁴³ See 479 U.S. 1051 (1987) (granting Nebraska's petition for an order enforcing the 1945 decree and for injunctive relief).

⁴⁴ See *Nebraska v. Wyoming*, 515 U.S. at 1.

program was an ambitious plan developed by Secretary Babbitt and his assistants to radically change the traditional approach to implementation of the ESA. This new policy was driven by the political objective of fending off vociferous efforts in Congress to gut if not repeal the ESA.

The Platte River watershed program was officially launched in June 1994, when Secretary Babbitt and the governors of Colorado, Nebraska, and Wyoming signed a Memorandum of Agreement (MOA) establishing the "Central Platte River Basin Endangered Species Recovery Implementation Program."⁴⁵ The agreement was a short statement committing the parties to work together to attempt to establish a basin-wide program to protect and restore Platte River habitat. The MOA process was not the first attempt at a watershed-level approach to Platte River issues. Indeed, it was essentially a replica of the failed "Management Joint Study" process launched in 1983.⁴⁶ Whether this latest effort will be any more successful remains to be seen.

The specific event which sparked official interest in launching the current Platte program was a set of draft ESA "biological opinions" issued by the FWS in 1993. The draft opinions addressed how operations of existing municipal and industrial water supply projects on National Forest lands in Colorado should be modified to avoid adverse effects on downstream habitat in Nebraska.⁴⁷ The permits for the projects were up for scheduled review under the Federal Land Policy and Management Act,⁴⁸ triggering the need for ESA analysis of each project. This consultation process generated a good deal of controversy in Colorado, in part because it represented the first instance in which the ESA had been applied to the review of how *existing* projects in Colorado affect downstream habitat. Because many other similar projects on Forest Service lands in Colorado were slated to undergo similar review, the Service's action galvanized a powerful political coalition to oppose ESA implementation in Colorado. The coalition appealed to the Governor of Colorado, Roy Romer, a confidante of Secretary Babbitt and a leading national figure in Democratic Party politics. The idea for a Platte

⁴⁵ Memorandum of Agreement for Central Platte River Basin Endangered Species Recovery Program (June 10, 1994) (on file with author).

⁴⁶ See Appendix (attached Chronology).

⁴⁷ See, e.g., FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, DRAFT BIOLOGICAL OPINION FOR JOE WRIGHT RESERVOIR (1993) (on file with author). See generally Wendy Weiss, *The Federal Government's Pursuit of Instream Flow Water Rights*, 1 U. DENV. WATER L. REV. 151, 174-75 (1998) (presenting a states' rights perspective on the controversy over ESA review of the Forest Service special use permits).

⁴⁸ 43 U.S.C. § 1701 (1994).

River habitat program grew out of direct conversations between Governor Romer and Secretary Babbitt.

From the DOI's perspective, the Platte River controversy presented an opportunity to implement an emerging new strategy for addressing the political challenges created by resource industry opposition to the ESA. From the first days of the Clinton administration, in part because of the spotted owl battles in the Pacific Northwest, the ESA had been politically controversial. Development interests mounted a credible effort in Congress to weaken if not repeal the Act, an effort that accelerated when Republicans gained a majority in the House of Representatives in the 104th Congress. In order to fend off these political attacks, the DOI adopted a strategy designed to demonstrate the "flexibility" inherent in the ESA. One of the DOI's first efforts focused on the Sacramento Bay Delta in California, where the DOI sought to resolve a longstanding endangered species/water development conflict through intense negotiations involving diverse "stakeholder" groups.⁴⁹ The Platte River effort was modeled on the Bay Delta initiative.⁵⁰

This larger political context is important in understanding the dynamics of the Platte River collaborative watershed process. The Platte River program was not initiated for the purpose of addressing resource protection needs *per se*, but rather to try to solve a political problem. The DOI's strategy was to take administrative steps that would placate industry and thereby hopefully blunt the push for new legislation. Thus, the basic purpose of the Platte River process was to ratchet down the burdens on water users because of ESA needs. The potential for accelerated losses of wildlife and wildlife habitat was, at best, a secondary consideration. The Platte River program placed the DOI in a decidedly conflicted position. DOI officials had a strong incentive, in order to further the DOI's political agenda, to manage the Platte River process to achieve a solution that was acceptable to water users in the Platte Basin. At the same time, the DOI had (and has) a legal responsibility to enforce the ESA. Reconciling these competing mandates has proven difficult, to say the least. Finally, the larger political context colored the DOI's efforts to rely on a so-called "collaborative" decision-

⁴⁹ See J. David Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: The Platte River Cooperative Agreement*, 3 GREAT PLAINS NAT. RESOURCES J. 119, 143-44 (1999) (describing the "CALFED Bay-Delta" and its interrelationships with the Platte program).

⁵⁰ See *id.* The Platte River effort also was partly modeled on the ongoing ESA program addressing conservation of endangered fish in the upper Colorado River Basin.

making process. Given the DOI's political goals, it is hardly surprising that collaboration felt to some participants more like a forced march.

While ESA review of the Colorado projects launched the Platte River process, the Central and NPPD projects, as discussed above, are actually far more important in terms of their influence on Platte River wildlife and wildlife habitat. Following the expiration of the project license in 1987, the FERC had made slow progress in moving the relicensing process forward. While the relicensing process continued, the projects operated under annual licenses without any substantial modification of project operations to address wildlife issues. From the Districts' perspective, the hefty legal and other costs of these long-running proceedings were no doubt offset by savings from delaying implementation of potentially expensive mitigation measures. As the relicensing delay continued, the FERC came under growing legal and political pressure to complete the relicensing process.⁵¹

In addition to the projects in Colorado and Nebraska, the proposed Platte River program also encompassed a number of large BOR projects in Wyoming. The FWS had long been on record with its concerns about how these projects affected downstream habitat, but no forward progress had been made in addressing these concerns. Based on events in the other basin states, it was apparent to all that the day of reckoning under the ESA for the BOR projects in Wyoming was drawing near.

Not surprisingly, water users and political leaders in the basin states generally embraced the launch of the Platte program. By recognizing the three basin states as full partners in a new kind of "collaborative" decision-making process the DOI instantly increased the ability of the water users and their political representatives in the basin states to control the outcome. From the perspective of NPPD and Central, a protracted negotiation process was undoubtedly seen as providing yet another potential opportunity to delay the relicensing process. A basin-wide approach also enhanced the likelihood of

⁵¹ Under Section 15(c) of the Federal Power Act, the Commission was required to establish expeditious procedures for relicensing and a deadline for submission of final application amendments. *See* Federal Power Act, *supra* note 37, at § 808. On May 5, 1988, the FERC issued an order granting a motion filed by American Rivers and the Sierra Club establishing a deadline for final license applications. *See* Central Nebraska Public Power and Irrigation District, 43 F.E.R.C. 61,225 (1988). In addition, in an opinion issued on February 4, 1992, the Court of Appeals for the D.C. Circuit recited that, "according to the Commission, new long-term licenses could issue in one and one-half years." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 962 F.2d 27, 37 (D.C. Cir. 1992). The longer the relicensing proceedings continued, the more glaring the FERC's noncompliance with its "expeditious relicensing" mandate became.

an equitable sharing of mitigation responsibilities among all the water projects in the basin and created an opportunity to argue for greater federal taxpayer help in paying project mitigation costs.

The launch of the program was less enthusiastically received by environmental interests. Most importantly, after spending a decade seeking to compel the FERC to relicense the Central and NPPD projects, an effort that appeared on the verge of bearing fruit, the MOA process seemed a dangerous diversion. After receiving assurances from the Secretary of the Interior that the MOA process would not serve as a pretext for further delays in the FERC relicensing, environmental interests tacitly acquiesced in the MOA process.

Following the execution of the initial agreement in 1994, a lengthy and complicated series of negotiations ensued. The agreement, which initially had a term of one year, was subsequently extended for six months, after which the negotiations simply continued without deadline. Over time, the range of interests "at the table" varied. The negotiators originally consisting only of representatives from the DOI and the three states. Later the process was expanded to provide seats for water and environmental interests. At the tail end of the process the two lead environmental groups, the National Audubon Society and the Platte River Whooping Crane Maintenance Trust, abandoned the process in frustration.⁵² The meetings all occurred at different locations in the three basin states, with many of the meetings conducted in a windowless conference room in the Continental Frequent Flyer Club at the Denver airport. As discussed below, the upshot of these discussions was a 1997 agreement extending the process of negotiation while simultaneously establishing sideboards for a potential program.

III. THE ELEMENTS OF THE "COOPERATIVE AGREEMENT"

On July 1, 1997, the DOI and the governors of the three basin states signed a second agreement, entitled a "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats

⁵² After the DOI and the states, over the objections of environmental interests, executed the 1997 Cooperative Agreement, *infra* note 53, the National Audubon Society and the Platte River Whooping Crane Maintenance Trust accepted the program as a *fait accompli* and agreed to participate in various meetings to help implement the Cooperative Agreement. Environmental Defense (formerly Environmental Defense Fund) also agreed to participate in Cooperative Agreement implementation.

Along the Central Platte River, Nebraska” (Cooperative Agreement or Agreement).⁵³ Despite the fact that this agreement followed three years of discussions about whether or not to have an agreement, this new agreement was also, in large measure, another agreement to attempt to agree.

The Cooperative Agreement provided that the parties would seek to develop a basin-wide management program for threatened and endangered species over a three-year period (with the option of an additional six-month extension). The Cooperative Agreement contemplated that the parties would negotiate and execute a third agreement before the program would actually go forward. Perhaps not coincidentally, this agreement to attempt to agree (with the six-month extension) placed the decision of whether or not to execute a third agreement just after the next national election and just before the inauguration of the next President.

The Cooperative Agreement states that the negotiation process is designed to produce a program that will be acceptable to all of the parties as well as comply with the ESA.⁵⁴ Thus, the agreement recites that the purpose of the “cooperative program” launched by the agreement was to:

(1) secure 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 the Department of the Interior (“DOI”); and (2) serve as the reasonable and prudent alternative to offset the effects of existing and new water related activities 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.⁵⁵

There is an obvious tension between the mandates to seek political consensus and comply with federal law, a problem that has bedeviled the entire process.

⁵³ The agreement is included in U.S. FISH AND WILDLIFE SERVICE, II APPENDIX A OF THE BIOLOGICAL OPINION ON THE FEDERAL ENERGY REGULATORY COMMISSION’S PREFERRED ALTERNATIVE FOR THE KINGSLEY DAM PROJECT (PROJECT NO. 1417) AND NORTH PLATTE/KEYSTONE DAM PROJECT (PROJECT NO. 1835) (1997) [hereinafter COOPERATIVE AGREEMENT].

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 2.

In addition to providing a framework for future discussions, the Cooperative Agreement described the basic outlines of a potential future program. In simple terms, the envisioned program would, over a period of ten to thirteen years, eliminate 130,000 to 150,000 acre-feet in water shortages and achieve the preservation and restoration of 10,000 acres of land.⁵⁶ These goals obviously fall below the FWS's Platte River restoration goals described above. The parties settled on this limited, so-called "first increment" approach because the states were unwilling to accept the targets previously developed by the FWS.⁵⁷ A more limited agreement provided a way for the parties to proceed with certain elements of a restoration program while agreeing to disagree about the ultimate scope of the program. The proposed program attached to the Cooperative Agreement simply states that "DOI and the states agree that the objectives of subsequent program increments will be defined by the DOI and the states . . . prior to the conclusion of the first increment."⁵⁸

To help determine what if any additional steps might be required, the parties proposed to rely on "an incremental adaptive management approach."⁵⁹ The idea, in brief, is that the effects of mitigation measures on wildlife and habitat would be monitored and future plans developed based on the results. The ten to thirteen year length of the first increment of the program was "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."⁶⁰

To meet the water goal for the first increment, the agreement outlined three water management projects, one in each of the three basin states, designed to yield approximately 70,000 acre-feet in reduced flow deficits in the critical habitat area.⁶¹ These included the Tamarack project in Colorado, which involves re-regulating flows in the South Platte by pumping river water into the ground during periods of excess flows for subsequent gradual release back into the river during periods of deficit.⁶² The second project

⁵⁶ *Id.* at Attachment III, at 4.

⁵⁷ The Cooperative Agreement recites the FWS's long-term goal of preserving and restoring 29,000 acres of land but, with regard to water flows, refers somewhat elliptically to the Service's "target flows" and states: "The states have not agreed that these target flows are biologically or hydrologically necessary to benefit or recover the target species." *Id.* at 4.

⁵⁸ *Id.* at Attachment III, at 5.

⁵⁹ Zallen, *supra* note 10, at 16.

⁶⁰ *Id.*

⁶¹ COOPERATIVE AGREEMENT, *supra* note 53, at Attachment III, at 9.

⁶² *Id.*

involves expanding the Pathfinder Reservoir in Wyoming in order to create greater storage capacity and permit re-regulation from periods of excess to periods of shortage (as well as providing new water for municipal consumption in Wyoming).⁶³ The final component involves creating a segregated "environmental account" in Lake McConaughy in Nebraska.⁶⁴ For the remaining 60,000 to 80,000 acre-feet of flow necessary to achieve the first increment water goals, the proposal calls for the parties to work together to identify additional re-regulation and water conservation projects.

The agreement indicates that the proposed first increment would serve to mitigate the effects of new as well as existing developments. As discussed, the ESA already effectively blocks new water development on the Platte. Insofar as the proposed program is designed to facilitate at least some new development, it arguably represents a retreat from the protections actually now in place on the Platte. The agreement appears to contemplate that new developments would be required to mitigate any net water depletions.⁶⁵ However, as discussed in greater detail below, it is uncertain whether mitigation measures for new development, such as re-regulating projects, could actually eliminate the adverse effects on new development. On a more positive note, the program seeks to reach new non-federal water development (such as wells) not subject to review under ESA Section 7,⁶⁶ while arguably subject to ESA Section 9, that authority has so far been more theoretical than real on the Platte.⁶⁷

Development of the program during the three-year period was governed by an elaborate administrative process. Atop the process was a so-called Governance Committee with three representatives from each of the basin states, three representatives of water users, two representatives from the DOI, and two representatives from environmental organizations in the three states.⁶⁸ The 1997 agreement provided that all policy issues must be agreed to by nine of the ten members of the committee, making a virtual consensus necessary to achieve forward progress.⁶⁹ Under the Governance Committee

⁶³ *Id.*

⁶⁴ *Id.* at Attachment II, at 5.

⁶⁵ *Id.* at 2 (stating that the proposed program would "mitigate new water related activities in a state in a manner that will not increase the mitigation responsibilities of other signatory states, with the intent that mitigation will be implemented in the state where the activity occurs").

⁶⁶ *See id.* at n.2.

⁶⁷ *See* COOPERATIVE AGREEMENT, *supra* note 53.

⁶⁸ *See id.* at 9-10.

⁶⁹ *See id.* at 10.

are a set of subcommittees and technical subgroups.⁷⁰ The program also hired an executive director, who has a small staff, as well as a number of consultants.⁷¹

The proposed program contains several important provisions affecting the allocation of affected property interests. One provision states that land acquisition would take place only on a willing seller basis.⁷² Utilities such as Central and NPPD routinely exercise the power of eminent domain against unwilling land owners in order to construct power generation facilities and transmission lines. It is, to say the least, not obvious why a willing-seller condition should be imposed on projects needed to mitigate the adverse environmental effects of utility projects.

In the same vein, notwithstanding the parties' decision not to address the scope of habitat restoration efforts past the first increment, the agreement contains an explicit understanding that approximately 13,000 acres of conservation lands previously acquired and restored by, among others, the National Audubon Society and the Nature Conservancy could be counted towards the land conservation efforts (if any) undertaken beyond the first increment.⁷³ Supporters of these conservation groups would likely be surprised to learn that these independent conservation efforts could be relied upon to offset mitigation responsibilities which traditionally and more logically have been assigned to water developers whose projects produced the adverse environmental impacts requiring mitigation.

The actual status of the proposed program outlined in the Cooperative Agreement was quite ambiguous in legal terms. The parties negotiated a proposed program which they believed would be politically acceptable to the DOI and the states and which also would pass muster under the ESA. However, the proposed program outlined in the Cooperative Agreement was not subjected to formal review under the National Environmental Policy Act (NEPA) or the ESA prior to the execution of the agreement.⁷⁴ This review would have been premature absent a more detailed and definitive program; indeed, the primary purpose of the Cooperative Agreement itself was to facilitate the work necessary to define the proposed program in greater detail so that the necessary environmental reviews could be conducted. At the same

⁷⁰ *See id.*

⁷¹ The organizational structure and work activities under the Cooperative Agreement are laid on a continuously updated website, at <http://www.platteriver.org> (last visited Mar. 17, 2001).

⁷² *See* COOPERATIVE AGREEMENT, *supra* note 51, at 5.

⁷³ *See id.* at Attachment III, at 8.

⁷⁴ *See id.* at 7-8.

time, the FERC relicensing proceedings, which already had been long delayed, would not wait upon a full-scale environmental review of the entire program. A basic purpose of the Cooperative Agreement negotiations, at least from the standpoint of Central and NPPD, had been to support relicensing decisions that would be different and hopefully more favorable for the Districts than what FERC would impose in individual relicensing orders in the absence of the program. The Districts hoped that FERC would rely upon the tentative program outlined in the Cooperative Agreement in its relicensing decision, even though the program itself had not yet been subjected to rigorous legal and scientific review.

This jury-rigged approach was obviously fraught with peril. Given the lack of rigor in the development of the program outlined in the Cooperative Agreement, there was a high likelihood that the "deal" struck in 1997 might have overlooked some serious technical or legal issues. As events have unfolded, the risk appears to have become a reality, throwing the viability of the entire program into doubt.

The DOI agreed to treat the program outlined in the Cooperative Agreement as the "proposed alternative" for the purpose of conducting the NEPA review of the program.⁷⁵ At the same time, the DOI explicitly did not guarantee that the proposed program would necessarily emerge from the NEPA process as the *preferred* alternative.⁷⁶ Obviously the DOI could not have made such a guarantee in advance of doing the substantive analysis necessary to support this conclusion, and such an advance commitment also would have exposed the DOI to the charge of prejudging the outcome of the NEPA review. Similarly, the DOI could not, consistent with the law, predict whether the biological assessment under the ESA would result in a favorable decision on the proposed program. Yet, at the same time, given the parties' commitment to proceeding by consensus, the parties certainly hoped and perhaps expected that the program outlined in the Cooperative Agreement would emerge essentially unchanged in the final version. Thus, the Cooperative Agreement process set in motion a potentially serious future clash between the expectations of the negotiators, on the one hand, and the demands of the law and science, on the other.⁷⁷

⁷⁵ Memorandum of Agreement for Central Platte River Basin Endangered Species Recovery Implementation Program (June 10, 1994) (on file with author).

⁷⁶ *See id.*

⁷⁷ In an ironic twist, after DOI and the states negotiated the Cooperative Agreement, then Assistant Secretary of Interior Patricia Beneke, the senior DOI official responsible for overseeing the Platte River collaborative process, resigned from the DOI and joined the firm

IV. PROGRESS (?) UNDER THE COOPERATIVE AGREEMENT

The results of the activities under the Cooperative Agreement over the last several years have been disappointing. Most significantly, the parties recently publicly acknowledged their failure to meet the deadline in the Cooperative Agreement for completing development of the program.⁷⁸ Whether the Cooperative Agreement process can ever produce a successful Platte River program is now very much in doubt.

As Central and NPPD had intended, the FERC relied on the tentative program in the Cooperative Agreement to finally bring the fourteen-year-old relicensing proceedings to a close. On July 29, 1988, FERC issued new forty-year licenses for the Central and NPPD projects.⁷⁹ The licensing orders were consistent with a FWS Biological Opinion on the relicensing applications, which essentially ratified the Cooperative Agreement as applied to the Districts' projects.⁸⁰ The new project licenses are a mixture of basic conditions for the Districts to follow in operating their projects over the short-term as well as a general mandate to cooperate in the implementation of the program expected to emerge from the Cooperative Agreement. However, the licenses also include several relatively more demanding requirements that would go into effect if the Cooperative Agreement fails.⁸¹ In addition, by including "reopener" clauses in the licenses, FERC made a general reservation of authority to modify the licenses in the future based on

of Van Ness Feldman, long-time outside counsel for Central. *See 2 Nominees, 1 Job Transfer, Much Waiting*, WASH. POST, July 19, 2000, at A21. This particular instance of the "revolving door" between government and business obviously undermines the credibility of government efforts to broker environmental agreements in an ostensibly even-handed fashion.

⁷⁸ *See* Platte River Governance Comm., Extension of the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska 2 (Dec. 15, 2000) (on file with author), [hereinafter Extension of the Cooperative Agreement].

⁷⁹ *See* Nebraska Public Power District, 84 F.E.R.C. 61,078 (1998) (order issuing license to NPPD); Central Nebraska Public Power and Irrigation District, 84 F.E.R.C. 61,079 (1998) (order issuing license to Central). *See also* Central Nebraska Public Power and Irrigation District, 84 F.E.R.C. 61,077 (1998) ("Order Approving Offer of Settlement and Issuance of New Licenses").

⁸⁰ U.S. FISH AND WILDLIFE SERVICE, I BIOLOGICAL OPINION ON THE FEDERAL ENERGY REGULATORY COMMISSION'S PREFERRED ALTERNATIVE FOR THE KINGSLEY DAM PROJECT (PROJECT NO. 1417) AND NORTH PLATTE/KEYSTONE DAM PROJECT (PROJECT NO. 1835) (1997) [hereinafter BIOLOGICAL OPINION].

⁸¹ *See* Extension of the Cooperative Agreement, *supra* note 78.

changed conditions or new information.⁸² Also, the FWS's Biological Opinion reserved the authority to "reinitiate" Section 7 consultations in the future if necessary.⁸³

In accordance with the proposed program, the licenses direct the Districts to operate an "Environmental Account" in Lake McConaughy.⁸⁴ The Districts are required to dedicate water to the environmental account, and, in addition, Central (the licensee for Lake McConaughy) is required to accept water contributed to the environmental account by other program participants.⁸⁵ The licenses also direct the Districts to acquire and manage up to approximately 8,000 acres of land for wildlife conservation purposes.⁸⁶ The licenses impose no direct water conservation obligation on the Districts. However, in the event the program collapses, the licenses direct the Districts to each invest several million dollars on approved water conservation measures.⁸⁷

Efforts to implement the Cooperative Agreement on a broader scale have proceeded with a continuous series of Governance Committee and other technical committee meetings. However, very little forward progress has been achieved on the substantive issues, and in some ways the process seems further from a conclusion in early 2001 than it was in 1997. Apart from the District licenses (which FERC would have issued by now with or without the program), no actual construction work has begun on other projects designed to re-regulate the river's flow or any aspect of the water conservation program. Furthermore, new modeling efforts have raised questions about whether the planned projects, if and when they are constructed, would yield the net increase in flows originally projected.⁸⁸ New modeling also has raised serious concerns about continued narrowing of the river channel as a result of the lack of sediment in the system.⁸⁹ It now appears that plans to mitigate the effects of past and future depletions by re-regulating remnant peak spring

⁸² *Id.* at 3.

⁸³ COOPERATIVE AGREEMENT, *supra* note 53, at 3, 8.

⁸⁴ Extension of the Cooperative Agreement, *supra* note 78, at 6.

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ Interview with Paul J. Currier, Executive Director, Platte River Whooping Crane Maintenance Trust, Inc. (on file with author) [hereinafter Currier Interview].

⁸⁹ *See* SIMONS & ASSOCIATES, INC., PHYSICAL HISTORY OF THE PLATTE RIVER IN NEBRASKA: FOCUSING UPON FLOW, SEDIMENT TRANSPORT, GEOMORPHOLOGY, AND VEGETATION (Aug. 2000) (on file with Platte River EIS Office), at <http://www.platteriver.org/library/simons.pdf> (last visited Mar. 17, 2001).

flows have the potential to make the problem of channel narrowing worse rather than better.⁹⁰ Some or all of these problems might have been avoided if a more rigorous technical review had proceeded the execution of the Cooperative Agreement. Absent an agreement on a definitive program proposal, the DOI has not yet published a draft environmental analysis of the program under NEPA or the ESA, much less completed this review process, as projected in 1997.

When they launched the Platte River program, DOI officials apparently harbored the hope that the process of different interests "working together" would, by itself, produce "its own prohabitat inertia."⁹¹ In the abstract, it is difficult to conceive how the process of different parties working together on a contentious issue could change the basic, strongly held political interests of the different actors. In any event, the latest reports from participants indicate that the process has created very little "prohabitat" solidarity.⁹²

In December 2000, the DOI and the states agreed, in effect, to a three-year extension of the cooperative agreement process.⁹³ The DOI reportedly proposed a two-year extension; the states proposed a three-year extension.⁹⁴ The parties eventually agreed to a two and one-half year extension, with an explicit proviso that the term could be extended an additional six months if necessary. This extension effectively means that six years are being devoted to the development of the Platte program. However, that figure understates the extent of the delay, because the Cooperative Agreement was proceeded by three additional years of negotiations. In addition, the Cooperative Agreement ostensibly reflected agreement on the essential elements of the program.

This lengthy delay obviously represents a major blow for the Platte River program. One major extension would seem to pave the way for other, perhaps unlimited additional extensions, unless and until some external legal or political event derails the process. The completion of the FERC relicensing proceedings, which represented one of the few factors creating external pressure to make forward progress, appears to have had the effect of slowing progress on the rest of the Platte River program. At some point, if the program continues on its current course, the DOI will have to declare the

⁹⁰ See *id.* at 71-79.

⁹¹ Sax, *supra* note 4, at 2401.

⁹² *Id.*

⁹³ See Extension of the Cooperative Agreement, *supra* note 78.

⁹⁴ Currier Interview, *supra* note 88.

program a failure and adopt some alternative course to ensure Platte River water projects are operating in compliance with the ESA.

V. FUNDAMENTAL ISSUES/CONCERNS

As suggested by the foregoing, there are in my view a number of fundamental defects with the collaborative watershed planning approach being pursued on the Platte River. For convenience, these concerns can be described as “procedural” and “substantive” in nature.

A. *Procedural Concerns*

1. Problematic Planning Unit

One fundamental problem is the choice of the Platte River Basin as the program management unit and the inclusion of the states of Nebraska, Wyoming, and Colorado as lead partners with the federal government in developing the Platte program.

From the *physical* perspective, there is obviously logic to attempting to approach Platte River wildlife issues by including the entire river basin in the three states. Water development projects throughout the basin have contributed to and continue to cause degradation of the riverine habitat.⁹⁵ As a matter of law and as a matter of fairness, water users in each state have a responsibility to contribute to the solution to the problem. In addition, water users and others throughout the basin will be affected by Platte River management decisions and therefore have a legitimate interest in ensuring that their voices are heard.

However, from the *political* perspective, the choice of the Platte River raises a concern about whether the appropriate unit for effective environmental decision-making has been selected. In general, environmental management decisions should be made by the smallest possible unit of government to provide affected citizens the largest possible role in the decision. At the same time, when a resource management decision affects a large geographic area, decision-making authority has to be lodged at a level of government whose jurisdiction includes all those who will be affected. Thus, everything else being equal, decisions affecting migratory bird species should logically be assigned to the national government. As stated in a report

⁹⁵ See SIMONS & ASSOCIATES, *supra* note 89, at 71-79.

by the conservative Political Economy Research Center: "when species range over territories larger than a state . . . the optimal locus of governmental regulation may be regional, national, or even international."⁹⁶

The choice in the Cooperative Agreement to delegate a significant portion of the federal government's decision-making authority to the three basin states conflicts with the fact that Platte River management decisions have national and even international consequences. After all, the threatened and endangered bird species that use the Platte migrate across many states. The national government should logically take the lead role in developing a Platte River management program. Subordinating a portion of the national authority in favor of the basin states inevitably elevates water development interests (which are concentrated in the three basin states) relative to wildlife conservation interests (which are broadly shared across the country).

Involving the three basin states is cause for even greater concern given that the target species are basically present only in Nebraska. One can reasonably presume that Nebraska has an interest in conservation of the wildlife habitat, along with an interest in protecting its water users. But neither Wyoming nor Colorado would directly benefit from the conservation of Platte River wildlife while both states have water development projects that could be burdened by new mitigation responsibilities. One hardly has to resort to elaborate political theory to recognize that political officials in the upstream states have a strong incentive to work to minimize the scope of the Platte River program as well as their individual state's contribution to such a program. The two upstream states have the most to lose from a Platte River program of any political jurisdictions in the United States.

Obviously, the shape of the Platte River "negotiating table" is not conducive to balanced consideration of development and wildlife issues. To whatever extent these basic structural political obstacles were recognized by DOI officials who launched the Platte River program, they were never publicly acknowledged or addressed.

2. Uncertain Management Standards

A second fundamental difficulty involves confusion over the standards governing the content of the future Platte River program. On the

⁹⁶ TERRY L. ANDERSON & PETER J. HILL, POLITICAL ECONOMY RESEARCH CENTER, ENVIRONMENTAL FEDERALISM (1996), at <http://www.perc.org/ps8.htm> (last visited Mar. 17, 2001).

one hand, the Cooperative Agreement calls for the development of a program that reflects "consensus" among all the parties. On the other hand, the program is supposed to ensure that project operations comply with the ESA.

The apparent hope of the DOI and some of the other parties is that the final program can satisfy both of these mandates. The odds seem strongly against it. The entire history of the Platte controversy suggests that the basin states' views about the optimal balance between development and wildlife conservation will depart significantly from what the ESA, which reflects a national policy-making perspective, will dictate. Thus, the two basic goals of the Platte River program are in serious conflict with each other. This conflict has slowed progress in developing a program, and postponed resolution of the ultimate questions about the kinds of policies which should be reflected in the program.

The parties may hope that a negotiated agreement will suffice to implement the goals of the ESA on the Platte regardless of whether the final program is in compliance with the ESA. Like the proverbial tree falling in the woods with no one there to listen, a violation of the ESA that is ignored by all relevant parties might simply be a nonevent. However, given the extensive legal rights of any of a variety of wildlife advocates to proceed in court to correct violations of the ESA, it seems unlikely that serious violations of the ESA could be ignored for long.

This raises a more fundamental question about the nature of the so-called "collaborative" watershed approach on the Platte. As discussed, if Platte River wildlife management decisions were actually guided by the preferences of the basin states, wildlife conservation would not receive equitable treatment along with development interests. The threat of direct ESA enforcement provides a powerful incentive for the states, despite their natural political preferences, to help develop a program that addresses the national interest in wildlife conservation and attempts to comply with the ESA. But if the ESA represents the ultimate legal standard for any legitimate Platte River program, what is the actual purpose of the so-called "collaborative" aspect of the program? Is the states' involvement ultimately more form than substance? On the other hand, if "collaborative" decision-making were really occurring, what would become of ESA compliance?

All these questions raise a basic question about whether the Platte River program should be viewed as a useful model for environmental decision-making. If collaborative programs such as that on the Platte are ultimately restricted by the terms of federal law, there is very little substance to this supposedly new approach. On the other hand, if there were substance to this new mode of environmental decision-making, there likely would be

little left to federal law and the valuable policies federal law is designed to advance.

3. Confused Procedural Rules

A third concern is the lack of effective or even intelligible procedural standards to guide the development of the program. On the one hand, the commitment to a "collaborative" approach implies a good deal of highly informal negotiation among a fairly limited set of parties. On the other hand, the DOI has a legal obligation, under the National Environmental Policy Act (NEPA) and the ESA, in particular, to follow various formal procedural steps designed to improve the quality of agency decision-making. At least on the Platte, these informal and formal processes do not appear to have worked together well.

NEPA, the Magna Charta of U.S. environmental law, imposes a powerful discipline on agency decision-making. By requiring agencies to describe in writing their proposed actions and their consequences, as well as alternatives to the proposed actions and reasons for rejecting them, the NEPA process produces better decisions. Equally important, by providing several formal opportunities for public review and comment, NEPA serves to promote broad-based public participation in environmental decisions. ESA is quite different from NEPA because it contains a number of substantive standards governing the actual outcomes of agency decision-making. But the ESA also includes a number of procedural provisions designed to discipline agency decision-making and to encourage public involvement.

The procedural requirements of NEPA and the ESA cannot easily be adapted to a process that relies on informal negotiation. If compliance with NEPA and ESA procedures precedes or coincides with negotiation, the time and effort required to execute the legal procedures will likely impede the negotiation process. On the other hand, if a proposal is developed through negotiation, and NEPA and ESA procedures are applied after-the-fact to the outcome of the negotiations, there is substantial risk that compliance with the procedures will be meaningless paperwork exercises, violating the spirit if not the letter of the law.

The organizers of the Platte River program opted, in effect, to run the second of these risks. In the Cooperative Agreement the parties memorialized a tentative agreement arrived at through informal negotiations. The agreement contemplated several additional years of informal negotiations, which, as discussed, have recently been extended for another three years. Only after a final agreement is reached will the DOI commence

formal public review of the program under the NEPA and the ESA. The DOI has made clear that, as a matter of law, it cannot make any advance commitment about how these reviews of the eventual program, if ever completed, will turn out. In addition, it is quite possible that agency compliance with these procedures will identify issues and concerns overlooked in the negotiation process.

From several perspectives, this process is profoundly unsatisfying. First, regardless of whatever public commitments the DOI makes, DOI officials will inevitably feel some pressure to manage the NEPA and ESA processes in order to ratify the outcome of the negotiation process. It is implausible that DOI officials will think long and hard about alternatives to a proposal hammered out over a period of years with political representatives from the three states. Thus, there is substantial risk that the NEPA and ESA processes could, in fact, turn out to be paperwork exercises.

Second, there is a significant danger that an informal process of negotiation will overlook important issues. The requirements of the NEPA and ESA impose discipline on agency decision-making. By contrast, the informality of negotiations, combined with an emphasis on crafting an agreement that resolves the dispute, creates a risk that threshold technical or scientific issues will simply be bypassed. In the Platte process, the reduction in sediment flows had long been identified as a serious concern in framing long-term management strategies to protect and restore the river channel. However, the issue was essentially ignored in crafting the tentative program outlined in the Cooperative Agreement. While the issue also might have been overlooked in the course of NEPA and ESA reviews of the program, it seems fair to conclude that these more formal processes would have had a better chance of elevating the issue sooner.

4. Uneven Negotiating Table

Other concerns arise from the identity of the interests participating in the Platte River collaborative process, and from the fact that participation in the process imposes resource demands on conservation interests. The Platte River negotiating table tilts in favor of development interests and against conservation interests.

The composition of the Governance Committee itself is seriously unbalanced. Direct representatives of water interests outnumber direct representatives of environmental interests by three to two. More importantly, however, the three state representatives expand the support for water development interests on the Committee. The representatives of the upstream

states, Wyoming and Colorado, have no natural political incentive to advocate wildlife protection measures of little or no value to their citizens. Nebraska brings somewhat more balanced incentives to the table, but has traditionally favored in-state water development interests over wildlife interests. The DOI simultaneously represents the FWS, which has an institutional interest in protecting wildlife, and the BOR, which has an institutional interest in avoiding burdensome new operating constraints on its projects.

Equally important, development interests and environmental advocates have wildly different capacities to marshal the resources to support their respective positions in the time-consuming Cooperative Agreement process. Environmental advocates working on the Platte bring an extraordinary amount of skill, energy, and passion to the issues. But compared to the environmental advocates, water-development interests are capable of deploying more lawyers, more hydrologists, more biologists, and so on. These differences matter because, after more than a decade of computer modeling and other voluminous environmental analyses, Platte River issues have taken on a mind-numbing legal, technical and scientific complexity. The complexity of the issues is compounded by the fact that current discussions assume knowledge of a long series of policy calls and political compromises over the preceding years.

In some inchoate sense, the Platte River program assumes that competing interests can be brought to the table in order to debate the issues and produce a balanced program. But that apparent premise is not grounded in reality. The type of collaborative program being pursued on the Platte relieves the federal government of some of its immediate decision-making responsibilities, but at the cost of imposing enormous new burdens on private and other non-federal participants. Because their constituency is so large and diffuse, conservation advocates are routinely at a disadvantage in contests with the representatives of relatively more cohesive and more easily organized economic interests.⁹⁷ This imbalance is clearly reflected in the kinds of expertise and staffing levels the conservation interests have managed to bring to the Cooperative Agreement process. Thus, far from ensuring a fair outcome, providing conservation groups a seat at the table along with

⁹⁷ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

other, more powerful interest groups simply ensures that wildlife interests will continue to be disadvantaged.⁹⁸

5. Gridlock by Design

A final concern with the current Platte River program is that it appears to be designed to produce decisions at the slowest conceivable pace. Numerous aspects of the current process encourage delay. The commitment to consensus decision-making means that enormous amounts of time have to be devoted to consultations with all the various parties and to hammering out compromises. In addition, the requirement that the Governance Committee achieve virtual unanimity on major policy decisions creates additional opportunities for delay and perhaps, ultimately, complete gridlock. The misguided emphasis in the Cooperative Agreement process on achieving a tentative political compromise rather than resolving outstanding technical issues has been yet another source of delay. The recent three-year extension of the Platte River confirms the slow pace of the effort so far.

Delay obviously defeats the Platte River restoration efforts. The status quo is the problem. Impediments to moving forward simply reinforce the status quo. It is difficult to avoid the conclusion that water development interests on the Platte embraced the collaborative approach, at least in part, because they believed it would ensure that as little as possible would happen over as long a period as possible.

B. *Substantive Concerns*

The second basic criticism of the Platte River program is that it is not producing a balanced program in terms of water use and development and conservation of threatened and endangered wildlife. Of course, an

⁹⁸ The challenge facing the environmental community on the Platte is compounded by the sometimes conflicting interests within the environmental community itself. While environmental advocates in Nebraska have been fairly single-minded in their advocacy of Platte River restoration efforts, Colorado environmental interests entered the Platte River program with a pre-existing commitment to work with the water development community in Colorado to identify water supply substitutes for the Two Forks project, a major water supply project in Colorado proposed by the city of Denver and opposed and ultimately defeated by environmentalists. The recognition that both existing and new development in Colorado would be required under the ESA to mitigate downstream impacts in Nebraska has had the effect of complicating the task of finding alternative water supply sources within Colorado.

appropriate threshold question is: "Compared to what?" For most of the twentieth century, the Platte River was extensively developed with little or no regard to the adverse consequences for wildlife. Modest efforts have finally begun to restore the river's depleted flows and repair the degraded habitat in the critical habitat area. Taking the long view, one might contend that "the fact that any real headway can be made seems almost miraculous."⁹⁹ Furthermore, given the intense political opposition to the ESA, modest steps to achieve the goals of the ESA are arguably preferable to more aggressive efforts that could hasten legislative efforts to severely weaken the ESA.

A different perspective is offered by consideration of the actual legal regime governing the operation of Platte River projects, in particular the NPPD and Central projects. The FPA relicensing provisions granted the Districts no rights to continue to operate their projects as in the past. The FPA required the FERC to decide whether and on what terms to issue new licenses for the projects based what would best serve the public interest. Congress included this authority in the FPA not because it specifically anticipated that modifications in project operations would be needed to protect wildlife, but rather to provide the government open-ended authority to periodically reassess the management of public waterways in light of society's evolving values and concerns. The ESA, as applied in the context of the relicensing proceedings, required the Districts to mitigate, to the extent economically feasible, the environmental harms that would flow from the continued existence and operation of the projects. While a full discussion of the legal particulars is beyond the scope of this article, it seems clear that the FERC relicensing orders did not meet this legal standard.¹⁰⁰

1. Reduced Restoration Goals

Bracketing the ultimate indeterminacy of the "compared to what" question, there are several reasons to believe the current program is

⁹⁹ Sax, *supra* note 4, at 2402.

¹⁰⁰ This assertion begs the question of why the conservation groups did not challenge the FERC licensing orders in court. Numerous different factors entered into the decision, but some undoubtedly included sympathy for the DOI's overall strategy of placating development interests in order to protect the ESA from repeal by Congress, the large financial cost and inherent risks of litigation, and uncertainty about the results the Platte River program might actually yield. The ultimate success or failure of the Platte watershed program will no doubt provide occasion to reassess the wisdom of the decision not to sue over the FERC orders.

fundamentally unbalanced. First, the program significantly dilutes the FWS's established goals for endangered and threatened species conservation. As discussed, the FWS previously set 417,000 acre-feet of water¹⁰¹ and 29,000 acres of land¹⁰² as the appropriate goals for the Platte River ESA conservation program. However, in order to obtain the states' agreement to the Cooperative Agreement, the DOI effectively abandoned these figures as the basic goals of the program. The DOI took this step despite the absence of any persuasive scientific argument that the figures were invalid. In lieu of these figures the DOI agreed, at least over the first increment of the program, to pursue only 130,000 to 150,000 acre-feet and 10,000 acres.¹⁰³ The parties, in effect, agreed to disagree about whether any additional land or water conservation efforts would be required.

The most immediate consequence of the DOI's abandonment of its original goals was that Central and NPPD were able to obtain new long-term licenses that were far more favorable than they likely would have been if the DOI had not abandoned its goals. Because the Districts' projects diverted large volumes of water for irrigation purposes, the projects contributed far more to habitat degradation than any of the other projects in the basin. According to figures developed by the FWS, the Districts' projects could properly be assigned responsibility for causing a deficit in flows of approximately 150,000 acre-feet.¹⁰⁴ Under ESA Section 7, the Districts could have been required to make up this entire deficit as a condition of receiving new licenses. The evidence also showed that the Districts could carry out these mitigation responsibilities without undermining the long-term economic viability of the projects.¹⁰⁵ Under the Cooperative Agreement program, however, the Districts were only required to contribute a small portion of the water needed for the total first-increment effort to reduce flow deficits by a total of 130,000 to 150,000 acre-feet.¹⁰⁶

¹⁰¹ See Memorandum from Fish and Wildlife Service, *supra* note 34.

¹⁰² See *supra* note 57 and accompanying text.

¹⁰³ See COOPERATIVE AGREEMENT, *supra* note 53, at Attachment III, at 4.

¹⁰⁴ See BIOLOGICAL OPINION, *supra* note 80, at 124.

¹⁰⁵ See Comments of the Conservation Intervenor on the Draft Biological Opinion for FERC Projects Nos. 1417 & 1835 (Jan. 15, 1997) (on file with author).

¹⁰⁶ See COOPERATIVE AGREEMENT, *supra* note 53, at Attachment III, at 4.

2. Encouragement of New Development

Second, the program also rolls back existing protections for Platte River wildlife by lowering the barriers to construction of *new* projects that would cause *new* flow depletions. New diversion projects on the Platte subject to review under ESA Section 7 are effectively barred. However, the Cooperative Agreement contemplates that actions under the program would serve as the ESA "reasonable and prudent alternative" under Section 7. The proposed program contemplates that developers of new projects would be required to offset any net depletions, presumably by constructing re-regulation projects. However, given that there is little truly "excess" water in the Platte system from an environmental standpoint, it is doubtful that any new development can be authorized on the Platte without further degradation of the habitat. Thus, the program actually serves to facilitate water development that would probably be harmful to wildlife and that probably would not take place in the absence of the program. The program holds out the possibility, so far unrealized, of more effective control over water developments on the Platte not subject to review under Section 7. However, this potential benefit appears to be outweighed by the disadvantages of the new development encouraged by the program.

3. Reallocation of Property Rights

Third, the program contemplates a major reallocation of property entitlements in Platte River resources, to the long-term detriment of public management authority over the river. One hotly disputed issue has been whether irrigators supplied with water from the District projects have vested property rights to continue to receive this water. Rights to receive water are regarded as a form of property in many contexts. However, there is a substantial argument that irrigators supplied by the Districts' projects cannot have obtained any greater rights in the water they receive from the projects than the Districts possess in the projects themselves. The Districts' rights in the projects are limited to a maximum term of fifty years under the FPA, and are subject to comprehensive modification upon relicensing. Accordingly, the argument proceeds, irrigators who receive water from District projects must have water rights that are limited to at least the same extent.¹⁰⁷ If water

¹⁰⁷ See Motion of Conservation Intervenor for Declaratory Order Regarding State Water Rights, Before the FERC (May 20, 1993) (on file with author).

can be redirected from irrigation to conservation purposes without infringing on property rights, the DOI obviously has far greater latitude in advancing Platte River conservation, now and in the future. Unfortunately, despite the public's strong legal claim to the authority to reallocate District-dependent water supplies, the Cooperative Agreement is apparently proceeding on the assumption that the irrigators have vested property rights in the water supplies.¹⁰⁸ Another example in the same vein, discussed above, is the provision of the Cooperative Agreement authorizing water users to rely on private conservation lands to meet their mitigation responsibilities.

4. Weakened Enforcement

Finally, whatever the ultimate scope of the program, the Cooperative Agreement undermines the enforceability of the program's goals by shifting a large portion of the compliance responsibility from individual water users to the program as whole. For example, under a traditional FERC license, Central and NPPD would have been required to implement water conservation measures directly. Under the proposed program, however, water conservation becomes a collective responsibility of the program. In addition to shifting certain mitigation costs from water users to the general public, this change makes it far more difficult to assign responsibility if specific water conservation measures fail and makes the entire program dependent on the vagaries of federal and state funding.

VI. ALTERNATIVE APPROACHES

If the DOI is pursuing a flawed approach for addressing Platte River threatened and endangered species issues, what would be a better approach?

First, the DOI should reverse the delegation of significant decision-making authority to the three basin states. Management decisions on the Platte affect migratory bird populations across major portions of the country. Basic responsibility for protecting migratory species has traditionally been assigned to the national government in order to safeguard the national interest in this resource. The case for preserving national authority over the Platte is

¹⁰⁸ See Platte River Endangered Species Partnership Office, *You've Heard About the Platte River Cooperative Agreement. You Have Questions. You Deserve Answers*, <http://www.platteriver.org/actions/govern/FAQ.htm> (last visited Mar. 17, 2001) (stating that "water rights would be retired or transferred only if the owner agreed and was compensated and other water rights are not adversely impacted").

especially compelling because two of the states in the basin, Colorado and Wyoming, have powerful political incentives to minimize the scope of the Platte conservation program at the expense of the national interest. The lack of progress under the Cooperative Agreement to date seems to confirm that some of the participants have little or no interest in seeing Platte wildlife conservation efforts succeed. The only solution that levels the playing field and gives equal weight to development and conservation values is to reject the notion that the basin states deserve some privileged role in determining the fate of Platte River wildlife.

Second, the Platte River conservation program should rely far more heavily on rigorous scientific and technical analysis and abandon the kind of seat of the pants horse-trading that characterized the development of the Cooperative Agreement. To date, scientific data on Platte River resource problems and technical information on alternative management strategies have played less of a role in Platte management decisions than political posturing by various state officials. In significant respects, however, the most important questions concerning the Platte are technical in nature: how much water can be made available for wildlife through water conservation, and with what effects on existing water uses? Can sediment flows be restored in the Platte? Do proposals to re-regulate current flows offer any actual net benefits for wildlife? Resolution of these issues should not be left to an inherently political research process, as under the Cooperative Agreement, but instead should be assigned to federal agency experts and consultants who enjoy the greatest possible independence from political influence.

Finally, there needs to be recognition that watershed-level management is indisputably a sound approach for addressing Platte River problems, but that there is no necessary connection between watershed-level management and so-called consensus or collaborative decision-making. A watershed-level approach recognizes that development throughout the basin has contributed to habitat degradation and facilitates a fair allocation of the burdens of mitigation among the states and different water users. Equally important, a watershed approach permits efficient coordination of efforts by individual project operators to improve water flow for the benefit of downstream habitat.

However, support for a watershed approach does not imply that government representatives or economic interests within the watershed should necessarily play a decisive role in making the management decisions for the watershed. For all the reasons discussed, granting the basin states and water users a predominant role under the Cooperative Agreement has ensured

that the final program, if any, will not provide a balanced approach to conservation and development.

An alternative, more balanced watershed planning program would be led by one or more federal agencies relying on extensive public input but reserving the final management decisions for federal officials. For example, the FERC has long had the authority to prepare "comprehensive" river plans,¹⁰⁹ an authority that might have been effectively deployed on the Platte in order to construct a broader planning framework for the Central and NPPD relicensing decisions. Likewise, the DOI likely has the authority, for example, under the NEPA, the ESA, and/or the Fish and Wildlife Coordination Act,¹¹⁰ to develop river plans that could provide comprehensive guidance for habitat restoration efforts. If additional federal statutory authority is needed, Congress can obviously enact it. Finally, the U.S. Supreme Court case of *Nebraska v. Wyoming*, which the parties are in the process of settling based on the Cooperative Agreement, provided another potential forum in which detailed watershed operating rules could have been established by a more neutral, national decisionmaker.¹¹¹

VII. CONCLUSION

This critique of the Platte River collaborative watershed program and my suggestions for alternative approaches perhaps pay too little attention to the political challenges that confronted Secretary Babbitt and his staff when they devised the Platte program. After all, as discussed at the outset, the Platte program was not advanced as an ideal method for making complex

¹⁰⁹ See 16 U.S.C. § 803 (a)(1) (1994) (directing FERC to issue licenses on the condition, among others:

[t]hat the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes").

For a discussion of how the FERC might appropriately deploy its "comprehensive planning" authority, see JOHN D. ECHEVERRIA ET AL., *RIVERS AT RISK: THE CONCERNED CITIZEN'S GUIDE TO HYDROPOWER* (1989).

¹¹⁰ 16 U.S.C. § 661 (2000).

¹¹¹ See *Nebraska v. Wyoming*, 515 U.S. 1 (1995).

resource management decisions. Instead, the goal was simply to defend the ESA from potentially radical legislative surgery. The Platte program apparently helped achieve that objective. Perhaps nothing more is needed to declare the Platte program a success in these terms. The DOI's efforts on the Platte, with all their flaws, have helped preserve the basic legal tools needed to create a truly effective Platte River conservation program in some future, more favorable, time. This article hopefully identifies some of the elements that such a program should include.

Appendix**CHRONOLOGY OF KEY EVENTS RELATING TO AGENCY EFFORTS TO ADDRESS EFFECTS OF PLATTE RIVER WATER PROJECTS ON THREATENED AND ENDANGERED SPECIES**

<i>DATE</i>	<i>DESCRIPTION OF EVENT</i>
1970	Six electric utilities form a consortium to construct a coal-fired power plant and the associated Grayrocks Dam and Reservoir on a tributary of the North Platte River in Wyoming.
March 1977	The National Wildlife Federation (NWF) and other groups intervene in <i>Nebraska v. Rural Electrification Administration</i> , a suit challenging the Rural Electrification Administration's (REA) issuance of loan guarantees for the Grayrocks project, objecting that the REA had not adequately considered the project's impact on downstream habitat. The suit also challenges the U.S. Army Corps of Engineer's (Army Corps) analysis of the project.
March 1978	The Army Corps issues a Section 404 permit for the Grayrocks project, over the objection of the U.S. Fish and Wildlife Service (FWS) that additional studies are required to evaluate impacts on downstream habitat.
May 15, 1978	The FWS designates fifty-one miles of the Platte River in the Big Bend reach as "critical habitat."
October 2, 1978	The federal District Court concludes that the REA and the Army Corps violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), and invalidates both the loan guarantees and the Section 404 permit.
December 8, 1978	The FWS formally requests that the Federal Energy Regulatory Commission (FERC) consult under the ESA on the application of Central Nebraska Public

Power and Irrigation District (Central) to install a new hydroelectric plant at Kingsley Dam.

June 1, 1979

The FWS, in response to FERC's determination that an EIS would not be required on the Kingsley power plant, writes to FERC that "it appears that the critical habitat may be declining at existing flow levels. If this trend of water depletion continues, a significant portion of all of the Platte River will be lost as whooping crane use area. The entire project is a major factor in the depletion of Platte River flows. Therefore, it is essential that FERC study the operation of the entire project and in consultation with the FWS exercise the congressionally mandated duty by requiring project Numbers 1417 and 1835 be operated to conserve the Platte River whooping crane habitat in Nebraska."

December 4, 1979

FERC requests formal consultation with the FWS under the ESA.

1980

The parties to *Nebraska v. Rural Electrification Administration* reach a settlement, leading to the creation of the Platte River Whooping Crane Critical Habitat Maintenance Trust (later renamed the Platte River Whooping Crane Maintenance Trust) (Trust).

November 13, 1980

FERC issues an order approving a settlement between the Districts and intervenor NWF concerning the Kingsley hydropower application. The FERC order recites that (1) the Districts, in consultation with NWF and the resource agencies, will "prepare a protocol of experimentation with respect to the daily release schedule from Kingsley Project number 1417 into the upstream portion of the designated critical habitat in order to acquire additional knowledge of the ecological system;" (2) the Districts will file relicense applications for the projects "within 18 months after publication of the final Platte River study report, but in no event later than three years before the licenses

expire,” and “will request that the Commission give prompt consideration in the relicensing proceeding to the data developed in the Platte River Study;” and (3) if the new licenses are issued prior to expiration of the original licenses, the Districts “will implement, under the original licenses, any changes in operations designed to inure to the benefit of the Whooping Crane.”

January 6, 1981

FERC issues an order amending the licenses in conformity with the approved settlement, and includes a condition in each license stating that “[t]he Licensee shall comply with procedures that have been agreed upon in consultation with the U.S. Department of the Interior (DOI), as described in the Order Approving Settlement, issued November 13, 1980, to ensure that the project operates in a manner that would aid in conserving the Whooping Crane and its critical habitat.”

March 4, 1981

The Director of the Office of Hydropower Licensing, after holding a meeting with the Districts, and without giving any prior notice to NWF or the DOI, amends the licenses to delete the condition that the projects be operated “to ensure that the project operates in a manner that would aid in conserving the Whooping Crane and its critical habitat.”

June 1981

The FWS published “The Platte River Ecology,” a report on the results of a three-year investigation of Platte River habitat in central Nebraska designed to develop guidelines for management of riverine habitat and adjacent lands.

1983

The FWS issues a biological opinion concluding that the Bureau of Reclamation’s (BOR) proposed Narrows Unit on the South Platte River in Colorado would jeopardize threatened and endangered species under the ESA.

- March 25, 1983 In aftermath of the decision on the Narrows project, the FWS and the BOR agree to establish the Platte River Management Joint Study. The study is divided into two phases, with phase I designed to develop conservation alternatives for the management of Platte River habitat that would eliminate the jeopardy determination for the Narrows Unit. The second phase is intended to address the habitat needs of non-listed wildlife. (The Narrows Unit is ultimately abandoned and the Management Joint Study never produces any recommendations for a conservation program).
- June 28, 1984 In accordance with Federal Power Act, Central and the Nebraska Public Power District (NPPD) (the Districts) submit their initial relicense applications to FERC.
- November 1984 Water development interests in Colorado, Nebraska and Wyoming successfully petition the Secretary of the Interior to establish a joint State/Federal Platte River Coordinating Committee to oversee the Management Joint Study.
- December 7, 1984 FERC informs the Districts that their applications are deficient and that they have ninety days to amend them. Deficiencies include inadequate analysis of the long-term impacts of the projects' operations on vegetation and wildlife, a lack of studies regarding the feasibility of operating alternatives, and a lack of proposed mitigation measures that would minimize the environmental impacts of the projects.
- March 6, 1985 The Districts request an extension to correct deficiencies in their applications until 120 days after completion of the Platte River Management Joint Study.
- January 27, 1986 FERC grants the Districts until 120 days after completion of the Platte River Management Joint

Study, which was then scheduled to be completed in Spring 1987, to correct the deficiencies.

- January 20, 1987 The U.S. Supreme Court in *Nebraska v. Wyoming* reopens this long-dormant interstate water case in the Court's original jurisdiction by allowing Nebraska to file a petition to enforce the decree and for injunctive relief.
- April 20, 1987 The U.S. Supreme Court in *Nebraska v. Wyoming* issues an order granting Wyoming leave to file a counterclaim alleging that Nebraska has violated the decree in various respects.
- May 22, 1987 The Trust files a petition with FERC requesting that interim conditions be imposed on any annual licenses issued to Central and NPPD in order to protect the Platte River habitat of the whooping crane and other endangered and threatened bird species.
- May 28, 1987 The FWS requests FERC to formally consult under the ESA prior to issuing annual licenses for the projects.
- July 29 and
June 30, 1987 The original licenses for Central's and NPPD's licenses expire. FERC issues the first of twelve "annual licenses" for the projects, which essentially continue the terms of the original licenses issued in 1937.
- June 30, 1987 FERC denies the Trust's petition for interim conditions to protect wildlife and wildlife habitat.
- July 24, 1987 FERC rejects the FWS's request for consultation on the annual licenses, on the ground that the Commission lacks the legal authority to modify the terms of the original licenses issued in 1937.
- September 30, 1987 Intervenor American Rivers, Inc. and the Sierra Club file a petition for an order establishing expeditious

procedures for relicensing in accordance with the Electric Consumer Protection Act of 1986.

- March 7, 1988 The Supreme Court in *Nebraska v. Wyoming* denies Nebraska's motion to modify the 1945 decree to require Wyoming and Colorado to share the burden of providing instream flows necessary to preserve critical wildlife habitat.
- May 5, 1988 FERC grants the environmental groups' petition for expeditious relicensing proceedings and directs that corrected license applications be filed within two years. The FERC order states, "[i]t is no longer appropriate to tie the correction of the deficiencies in the relicense applications to the [Platte River Management] Joint Study."
- May 19, 1989 The U.S. Court of Appeals, in response to a petition for review filed by the Trust challenging the FERC's denial of the Trust's May 1987 petition, concludes that FERC erred in ruling that it lacked the legal authority to formulate interim terms and conditions and that its failure to do so under the facts of this case was arbitrary and capricious.
- June 6 and
August 21, 1989 The Trust and environmental intervenors file petitions with the FERC, urging the commission to impose interim terms and conditions on the projects to protect wildlife and wildlife habitat.
- September 18, 1989 Districts make a filing with FERC stating that there is no need for interim conditions because irreversible damage has not occurred.
- February 14, 1990 FERC issues an order determining that irreversible environmental damage would occur pending relicensing of the projects unless interim conditions are imposed. FERC orders NPPD to make instream flow releases to benefit the habitat in central Nebraska, to construct tern/plover nesting islands, and

to conduct monitoring studies. Believing that it lacks the authority to unilaterally impose the same conditions on Central, FERC urges Central to cooperate with NPPD in meeting the terms of the order.

- April 17, 1990 FERC, in response to objections raised by NPPD, issues an order lowering the interim instream flow release requirements.
- May 4, 1990 The Districts file a "joint response" to FERC's various deficiency notices, effectively completing the application process (applications were originally required to be filed three to five years prior to the expiration of the original licenses in 1987).
- May 8, 1990 NPPD files with FERC a motion for a stay of the February 1990 order, stating that Central refuses to cooperate in providing water for instream releases.
- May 31, 1990 FERC issues an order staying the instream flow release requirements of the February order, contending that the Commission lacks the authority to direct Central to cooperate.
- June 19, 1990 FERC notifies the Districts that their license applications are accepted for filing.
- August 17, 1990 FERC issues a notice of intention to prepare an Environmental Impact Statement (EIS) pursuant to the NEPA and to conduct public scoping meetings for the relicensing of the Central and NPPD projects.
- November 20, 1990 The Trust and the conservation intervenors file comments with FERC and provide recommendations for terms and conditions to be included in the licenses for the projects.
- January 1991 FERC issues a scoping document for the planned EIS.

- July 16, 1991 FERC, in response to an application filed by Central, issues an order amending Central's annual license to include modest conditions to address wildlife issues pending relicensing.
- January 20, 1992 Central files a "Comprehensive Relicensing Plan" for its project.
- January 22, 1992 FERC releases its Draft Environmental Impact Statement (DEIS) for public comment in the relicensing proceedings.
- April 17, 1992 The U.S. Court of Appeals, in response to a petition for review filed by the Trust, concludes that the Commission has acted lawfully in staying its order imposing interim instream flow requirements. The Court also rejects the Districts' challenge to the interim conditions not stayed by FERC. The Court states it is "a mystery to us" why the parties are "so hotly contesting" the interim conditions given that, "according to the Commission, new long-term licenses could issue in one and one-half years." (FERC did not actually issue new licenses for another six years).
- July 22, 1992 FERC issues a notice of its intention to prepare a revised DEIS, partly in response to the relicensing plan submitted by Central and an offer of settlement filed by NPPD.
- April 20, 1993 The U.S. Supreme Court in *Nebraska v. Wyoming* issues a decision overruling various exceptions to the Special Master's second interim report. The Court rules, among other things, that Nebraska is not entitled to a definitive apportionment of "excess waters" that flow into the North Platte River in Wyoming.
- April 1994 FERC issues a revised DEIS in the Central/NPPD relicensing proceedings.

- June 1994 The FWS issues biological opinions for a series of reservoirs undergoing re-permitting on National Forest Service lands in Colorado. The opinions conclude that unless the impacts of these projects are successfully mitigated their operations will cause “jeopardy” to downstream wildlife interests.
- June 2, 1994 The Secretary of the Interior and the Governors of Colorado, Nebraska, and Wyoming enter into a Memorandum of Agreement (MOA) initiating the development of a basin-wide program for endangered species protection and water management throughout the Platte River Basin. The agreement has a term of one-year.
- December 8, 1994 FERC issues a “supplement” to the revised DEIS.
- May 15, 1995 Environmental intervenors file comments with FERC on the MOA process and urge prompt issuance of long-term licenses without waiting for the completion of speculative MOA negotiations.
- May 30, 1995 The U.S. Supreme Court in *Nebraska v. Wyoming* issues a decision overruling various exceptions to the Special Master’s third interim report. The Court rules, among other things, that Nebraska is entitled to present proof of injury to wildlife and wildlife habitat in order to support its claim for injunctive relief against further development of the North Platte in Wyoming.
- July 1995 The parties to the MOA agree to extend the MOA process for six months until December 1, 1995.
- February 8, 1996 The Trust files with FERC a motion requesting “immediate issuance” of long-term licenses with appropriate environmental conditions.

- February 14, 1996 FERC releases its Biological Assessment on the relicensing applications under the ESA and requests the initiation of formal consultations with the FWS under Section 7 of the ESA.
- March 8, 1996 The FWS files a letter with FERC stating that additional information necessary for consultation is not included in the Biological Assessment and requesting additional economic data from FERC.
- March 13, 1996 The Trust files a letter with FERC outlining problems with the proposed MOA, including the lack of agreement on providing flows for wildlife, and objections to the continuing delays in the relicensing proceedings during MOA negotiations.
- July 25, 1996 The Trust and the National Audubon Society ("Audubon") file a letter with FERC expressing concern about further delays in the relicensing and requesting that the proceedings be concluded without additional delay.
- September 4, 1996 DOI requests an extension to complete its draft Biological Opinion until November 15, 1996.
- September 11, 1996 The Trust and the National Audubon Society send a letter to FERC expressing opposition to Interior's request for a further extension and arguing that FERC would be violating its mandate to expeditiously complete the processing of the District's applications by granting the request.
- September 20, 1996 FERC grants DOI's request for a seventy-day extension to complete its draft Biological Opinion.
- December 4, 1996 DOI issues its draft Biological Opinion on the proposed relicensing of the projects to FERC.
- January 15, 1997 The Trust, Audubon, and other conservation intervenors submit comprehensive comments on the

Draft Biological Opinion arguing that the FWS's proposed reasonable and prudent alternative does not satisfy the requirements of the ESA,

July 1, 1997.

The Secretary of the Interior and the Governors of Colorado, Nebraska, and Wyoming enter into a "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska" (Cooperative Agreement). The primary purpose of the agreement is to develop a basin-wide Platte River program designed to "(1) secure 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 the Department of the Interior," and (2) serve as the reasonable and prudent alternative to offset the effects of existing and new water related activities in the Platte River Basin that, in the absence of such a program, would be found by the FWS to be likely to jeopardize the continued existence of the target species or adversely modify designated critical habitat." The agreement has a term of three years, and may be extended "for six months" if "required to complete NEPA or ESA review."

July 24, 1997

The FWS issues its final Biological Opinion based on the Cooperative Agreement and the proposed Environmental Account in Lake McConaughy.

September 19, 1997

The Trust submits comments on the final Biological Opinion.

January 15, 1998

The Districts and the other major parties to the relicensing proceedings file an agreement on "all issues" with FERC.

May 15, 1998

The parties file their "Offer of Settlement" with FERC.

- June 8, 1998 The Trust files comments generally supporting the Offer of Settlement but requesting several changes, all of which FERC rejects.
- July 24, 1998 FERC issues a final EIS on the relicensing applications based on the terms of the cooperative agreement.
- July 29, 1998 FERC issues an order approving new forty-year licenses for the Central and NPPD projects.
- May 10, 2000 On the eve of trial in *Nebraska v. Wyoming*, the parties arrive at an agreement in principle to settle the entire litigation, without specifically addressing wildlife and wildlife habitat conservation issues.
- December 15, 2000 With the planned NEPA and ESA review wholly incomplete, the Governance Committee established by the MOA agree to extend the cooperative agreement for an additional two and one-half years, until June 30, 2003, with the understanding that the Committee may extend the Cooperative Agreement for an additional six months.

Sources: Platte River Whooping Crane Trust, Chronological Summary of Actions Related to Relicensing of Kingsley Dam and Related Facilities (Mar. 7, 1991) (on file with author); *Nebraska v. Wyoming*, 479 U.S. 1051 (1987); 481 U.S. 1011 (1987); 485 U.S. 931 (1988); 507 U.S. 584 (1993); 515 U.S. 1 (1995); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 295 U.S. App. D.C. 218, 962 F.2d 27 (1989); 277 U.S. App. D.C. 350, 876 F.2d 109 (D.C. Cir. 1989); FERC orders issued as of dates indicated.