

**FINAL
PLATTE RIVER RECOVERY
IMPLEMENTATION PROGRAM**

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Platte River Recovery Implementation Program

October 24, 2006

In the Platte River Recovery Implementation Program Cooperative Agreement (“Program Agreement”), the Department of the Interior (“DOI”) and the States of Colorado, Nebraska and Wyoming (“the states”) agreed to participate in the basin-wide cooperative program described in this Program Document and its attachments relating to four target species (interior least tern, whooping crane, piping plover and pallid sturgeon) listed as threatened or endangered pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. 1531 *et seq.*, and their associated habitats.¹ The Platte River Recovery Implementation Program (“Program”) builds upon the July 1, 1997 Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska (“July 1997 Cooperative Agreement”). The Program includes certain activities and contributions from the states and the federal government to be conducted during incremental time periods as described below. The signatories have agreed that implementation of this Program will be through a Governance Committee consisting of representatives of the signatories and stakeholders as described in the Program Organizational Structure in Attachment 6.

I. PROGRAM PURPOSES

A. The purpose of this Program is to implement certain aspects of the U.S. Fish and Wildlife Service’s (FWS’) recovery plans for the target species that relate to their associated habitats by providing for the following:

1. securing defined benefits for the target species and their associated habitats to assist in their conservation and recovery through a basin-wide cooperative approach agreed to by the three states and DOI;

¹ For purposes of this Program Document and its attachments, the term “associated habitats” means, with respect to the interior least tern, whooping crane, and piping plover, the Platte River valley beginning at the junction of U.S. Highway 283 and Interstate 80 near Lexington, Nebraska, and extending eastward to Chapman, Nebraska, including designated critical habitat for the whooping crane and that portion of any designated critical habitat for piping plover within that Lexington to Chapman reach. With respect to the pallid sturgeon, the term “associated habitat” means the lower Platte River between its confluence with the Elkhorn River and its confluence with the Missouri River. “Associated habitats” may, to the extent approved by the Governance Committee, include any critical habitat in the Lexington to Chapman reach of the Platte River basin which is subsequently designated by the U.S. Fish and Wildlife Service for the target species. The Governance Committee may agree to undertake, fund or give credit for land activities outside the associated habitats to provide biological benefits to the target species.

2. providing ESA compliance² for existing and new water related activities³ in the Platte River basin⁴;
3. helping prevent the need to list more basin associated species pursuant to the ESA;
4. mitigating the adverse impacts of new water related activities on (1) the occurrence of FWS target flows (as described in Section III. E.1.a.) and (2) the effectiveness of the Program in reducing shortages to those flows, such mitigation to occur in the manner and to the extent described in Section III.E.3 and in the approved depletions plans; and
5. establishing and maintaining an organizational structure that will ensure appropriate state and federal government and stakeholder involvement in the implementation of the Program.

B. When doing so will not reduce resources available to target species, the Program will also manage Program lands to benefit non-target listed species and non-listed species of concern and to reduce the likelihood of future listing. When feasible, the Program will provide regulatory certainty with respect to those non-target, listed species.

² “ESA compliance” means: (1) serving as the reasonable and prudent alternative to offset the effects of water-related activities that FWS found were likely to cause jeopardy to one or more of the target species or to adversely modify critical habitat before the Program was in place; (2) providing offsetting measures to avoid the likelihood of jeopardy to one or more of the target species or adverse modification of the critical habitat in the Platte River basin for new or existing water-related activities evaluated under the ESA after the Program was in place; and (3) avoiding any prohibited take of target species in the Platte River basin.

³ For purposes of this Program Document and its attachments, the term “water related activities” means activities and aspects of activities which (1) occur in the Platte River basin upstream of the confluence of the Loup River with the Platte River; and (2) may affect Platte River flow quantity or timing, including, but not limited to, water diversion, storage and use activities, and land use activities. Changes in temperature and sediment transport will be considered impacts of a “water related activity” to the extent that such changes are caused by activities affecting flow quantity or timing. Impacts of “water related activities” do not include those components of land use activities or discharges of pollutants that do not affect flow quantity or timing. “Existing water related activities” include surface water or hydrologically connected groundwater activities implemented on or before July 1, 1997. “New water related activities” include new surface water or hydrologically connected groundwater activities including both new projects and expansion of existing projects, both those subject to and not subject to section 7(a)(2) of the ESA, which may affect the quantity or timing of water reaching the associated habitats and which are implemented after July 1, 1997.

⁴ Platte River basin includes the basins of the South, North, and Platte Rivers.

II. PROGRAM GOALS

The Program's long-term goal is to improve and maintain the associated habitats. This goal includes: (1) improving and maintaining migrational habitat for whooping cranes, and reproductive habitat for least terns and piping plovers; (2) reducing the likelihood of future listings of other species found in this area; and (3) testing the assumption that managing flow in the central Platte River also improves the pallid sturgeon's lower Platte River habitat.⁵

III. PROGRAM ELEMENTS

A. General Description

1. Elements. The Program has three elements: (1) increasing streamflows in the central Platte River during relevant time periods through reregulation and water conservation/supply projects; (2) enhancing, restoring and protecting habitat lands for the target species; and (3) accommodating new water related activities in a manner consistent with long-term Program goals.

2. Increments. The Program will be implemented in increments. The First Increment of the Program begins January 1, 2007, and shall continue for thirteen years from that date or until any later date agreed upon by the Governance Committee in approval of an extension, subject to appropriations as described in Section II.G of the Program Agreement. Subsequent increments, if agreed to by the Secretary of the Interior and Governors of the three states, will be implemented for such periods of time as may be set forth in a replacement or extended cooperative agreement.

3. Objectives.

a. Long term Objectives. The long-term objectives for the Program are:

(1) to provide sufficient water to and through the central Platte River habitat area to meet the general goal set forth in Section II above by reregulation and water conservation/supply projects;

(2) to perpetually protect, restore where appropriate, and maintain approximately 29,000 acres of suitable habitat primarily in habitat complexes in the central Platte River area located between Lexington and Chapman, Nebraska.⁶

⁵ The Integrated Monitoring and Research Plan (Attachment 3, Section V) addresses how the assumption is to be tested, including steps that will be taken to determine habitat needs of the pallid sturgeon.

⁶ Non-complex habitat approved for acquisition by the Governance Committee will count toward the 29,000 acre objective because it will provide demonstrable benefits to target

- b. First Increment Objectives. DOI and the states commit to achieving the following objectives by the end of the First Increment of the Program:

(1) providing water capable of improving the occurrence of Platte River flows in the central Platte River associated habitats relative to the present occurrence of species and annual pulse target flows⁷ (hereinafter referred to as “reducing shortages to target flows”) by an average of 130,000 to 150,000 acre-feet per year at Grand Island, through reregulation and water conservation/supply projects.⁸ DOI and the states agree that FWS’ target flows will be examined through the Adaptive Management Plan and peer review and may be modified by FWS accordingly. DOI and the states have agreed, however, that during the First Increment, species and annual pulse target flows serve as an initial reference point for determining periods of excess and shortage in the operation of Program reregulation and water conservation/supply projects.

(2) protecting, restoring where appropriate, and maintaining at least 10,000 acres of habitat in the central Platte River area between Lexington and Chapman, Nebraska. The Governance Committee may agree to undertake, fund or give credit for land activities outside this area to provide biological benefits to the target species.

- c. Subsequent Increments. DOI and the states agree that the objectives of any subsequent Program increment will be defined as set forth in Section III.F below before the conclusion of an increment.

4. Progress toward Meeting Objectives and ESA Compliance. ESA compliance will be measured through the achievement of the First Increment Milestones (Attachment 2). Any milestones or other measures of ESA compliance to be used during subsequent increments will be developed prior to

species. The definitions of complex and non-complex habitat may be changed by the Governance Committee but are initially set forth in the Land Plan (Attachment 4).

⁷ See “Water Plan Reference Materials” (Attachment 5, Section 11). The states have not agreed that these recommendations are biologically or hydrologically necessary to benefit or recover the target species.

⁸ To the extent that FWS uses Program water for purposes other than reducing shortages to target flows, such use shall not decrease the target flow shortage reduction credited to the Program’s initial three water projects or to any subsequently approved Program water project.

the beginning of such increments. Milestones may be revised by the Governance Committee so long as they are consistent with the Program and First Increment objectives.

Included in Attachment 2 are explanatory materials and estimated time frames for anticipated interim steps that will be taken towards meeting each milestone to assist the Governance Committee in managing, assessing, and, as appropriate, adjusting work carried out during the First Increment. The explanatory information and related interim steps and schedules are included as background information only and are not to be considered as individual milestones for purposes of ESA compliance.

B. Modification of the Program

1. Amendments by the Secretary of the Interior and Governors of Colorado, Nebraska, and Wyoming during the First Increment.

The following changes to the Program will require unanimous consent of the Secretary of the Interior and the Governors of Colorado, Nebraska and Wyoming, and will require a formal amendment of the Program Agreement and this Program Document:

- a. Change of the First Increment objectives of providing water capable of reducing the shortage to target flows by an average of 130,000 to 150,000 acre feet per year and of protecting, restoring where appropriate, and maintaining 10,000 acres of habitat for the target species;
- b. Change to Section IV of the Program Document regarding regulatory certainty afforded under the Program;
- c. Change to underlying principles of the Program that limit it to acquiring interest in land only from willing participants (Section III.D), that provide that the Program will pay taxes or their equivalent (per Section III.D.1.c), and that define July 1, 1997 as the date for new and existing water-related activities;
- d. Increase of signatories' funding responsibilities under the Program; or
- e. Establishment of a subsequent increment of the Program.

2. Modifications by the Governance Committee. Changes to the Program not reserved to the signatories above may be made by the Governance Committee.

C. **Flexibility and Change During the First Increment.**

The Governance Committee will administer the Program during the First Increment using a flexible and incremental approach. To further the First Increment objectives, the Program Document and its attachments describe certain activities and criteria such as Milestones, Adaptive Management Plan, Land Plan, and Water Plan, land and water acquisition and management criteria, management actions, and others. These activities and criteria were based on the information available at the time the Program was established. Changes to Program activities and criteria may be justified by new information. This includes: 1) information learned as the result of implementation of the Land, Water, and Adaptive Management Plans; 2) information from other sources including relevant data from non-Program sources on target species and habitats; and, 3) practical considerations such as land availability, economics, budgetary and time constraints, and the ability or inability, notwithstanding good faith efforts of the participants, to achieve predicted outcomes of Program management hypotheses. Accordingly, except as noted in Section III.B.1 above, the Governance Committee may change the Program's First Increment Milestones and other activities and criteria, provided such changes are consistent with accomplishing the First Increment Objectives. These changes may be made and the Program will continue to provide ESA compliance during the First Increment, so long as the First Increment Milestones, as may be amended, are being met.

1. Adaptive Management Plan. The Adaptive Management Plan, set forth in Attachment 3, describes a systematic process administered by the Governance Committee for continually improving Program management by: 1) designing certain Program management activities to test alternative hypotheses and 2) applying information learned from research and monitoring of Program management. The process also includes the flexibility to use information and experience from all sources.

The Adaptive Management Plan describes experiments that have uncertain outcomes. Changes in adaptive management activities and the Adaptive Management Plan are expected. Achieving particular results through implementation of the Adaptive Management Plan is not the basis for determining ESA compliance during the First Increment.

The Adaptive Management Plan will be implemented within the existing Program defined contributions of money, land, and water unless amended in accordance with Section III.B.1 above. The Governance Committee recognizes the importance of the Adaptive Management Plan.

- a. Habitat and Species Baseline. The Program uses a 1997 starting point, where possible, to assess its effects. This baseline (Baseline Document for Fulfillment of Platte River Cooperative Agreement Milestone R1-1, (Baseline Document)) provides a summary of information available prior to the Program about the target species

and their habitat. Where data are sufficient and methodologies are replicable, this information may be used to assess First Increment activities and criteria. The information available at Program inception did not provide a complete summary of the condition of the species or a comprehensive summary of the habitat available for the target species. Where data were not sufficient or replicable or disagreement exists as to then-current hypotheses regarding the species and their habitats, the Integrated Monitoring and Research Plan (Attachment 3, Section V) includes measures to fill data gaps and assess trends in species and habitat conditions. Historic information, models, and conceptions of the species and their habitat will be rigorously evaluated and modified as data and information become available.

- b. Integrated Monitoring and Research Plan and Protocols. Adaptive management requires systematic observation and evaluation of the target species and the associated habitats to observe their response to the different Program activities. The Governance Committee will use the Integrated Monitoring and Research Plan (Attachment 3, Section V) to monitor and evaluate the impacts of the activities implemented in the First Increment of the Program on Program lands and the associated habitats and the response of the target species to those impacts. The monitoring and research protocols may be modified by the Governance Committee per Section III.B.2 above.

2. Assessments of Activities and Criteria During the First Increment. Program activities and criteria that guide such Program activities shall be periodically evaluated by the Governance Committee. The Governance Committee evaluations will: (1) assess whether the Program activity and criteria being examined is working as originally envisioned; (2) recommend modifications justified by new information; (3) determine whether there are other or better uses for the resources committed to this activity and criteria; (4) assess whether success or failure could be determined by monitoring over the time period evaluated and (5) develop alternative activities and criteria in accordance with the Program Adaptive Management Plan. Evaluations will consider experience, new information, and the results of monitoring and/or research. Opinions of independent peer reviewers, if any, will also be compiled and summarized as part of the evaluation process. Changes to planned activities and their implementation schedule should be peer reviewed as appropriate under the Scientific Peer Review Guidelines (Attachment 3, Appendix A) prior to action by the Governance Committee.
3. Target Flows. During the First Increment, the FWS' species and annual pulse target flows serve as an initial reference point for determining periods of excess and shortage in the operation of Program reregulation

and water conservation/supply projects. The target flows are subject to Program peer review (during the First Increment or later) and review through the Adaptive Management Plan, and may be modified by FWS accordingly. If those target flows are modified, the Governance Committee will determine whether to revise use of those species and annual pulse target flows as a reference point and whether any such revisions also require revisions in the First Increment Milestones. Any changes to the target flows will not impact the ability of the Program to continue to provide ESA compliance during the First Increment as long as the Milestones, as found in Attachment 2, or as revised, are being met.

4. Program Peer Review. The Governance Committee may submit any Program activity or criteria, and the FWS's recommended flows for peer review. Such peer review shall be conducted pursuant to the Peer Review Guidelines (Attachment 3, Appendix A).
5. Day-to-Day Flexibility. Documents implementing the Program provide the flexibility for day-to-day management (e.g., decisions related to weed control or grazing on a particular parcel of land). This type of management will typically not require Governance Committee approval unless they implicate a change in Program policy, increase the budget, or impact the ability of the Program to provide the offsetting measures for ESA compliance purposes.

D. Land

The Governance Committee will meet Program objectives for habitat through land interest acquisition, restoration, management, and maintenance. Annual progress will be dependent upon market conditions and availability of willing participants. Habitat acquisition is to be on a willing seller/willing lessor basis. The land component of the Program is described in greater detail in the Land Plan (Attachment 4). The Organizational Structure Document (Attachment 6) and Land Advisory Committee (LAC) Charter (Attachment 6, Appendix F) describe the responsibilities for carrying out the land component of the Program assigned to the Governance Committee, Land Advisory Committee, a Land Interest Holding Entity, cooperators and contractors.

1. Acquisition of Interests in Land
 - a. Program lands will be selected using the Land Plan (Attachment 4), subject to modification by the Governance Committee as appropriate per Section III.C.1 above. The initial focus will be on obtaining interests in and protecting wet meadow and channel habitat between Lexington and Chapman, Nebraska which are suitable for development into "habitat complexes" as described in the Land Plan, but acquisition of non-complex lands is also expected to occur to the extent permitted in the Land Plan (Attachment 4).

- b. Acquisition may be in the form of purchase, lease, easement or other arrangement, as described in the Land Plan. The Governance Committee, with the advice of the Land Advisory Committee, shall determine the type of interest in land appropriate to particular situations, subject to any applicable limitations on ownership of land acquired with federal/state funds.
- c. Because local support is essential to the success of the Land Plan, the Land Plan has been developed and will be modified as appropriate to assure that local opinions are heard, that land interest acquisition and development are coordinated with local landowners, and that information on acquisitions and on management plans will be available to all interested parties. Where applicable, the expertise of the University of Nebraska and other local organizations and individuals may be used. The Program will develop incentive programs as needed to encourage participation in the Program.
- d. The Program is to avoid shifting tax burdens to adjacent landowners or communities. When land is acquired by the Program and held by the Land Interest Holding Entity or the acquired land is owned by another tax-exempt entity, the Program shall pay or provide for the payment of real property taxes or an equivalent amount. Such taxes or equivalent amount shall be determined each year using the assessments and levies in effect at the time such taxes are due or would be due if the property were owned by a tax paying entity.
- e. A legal entity or entities will, on behalf of the Program, hold title or other interests in land acquired by or contributed to the Program as set forth in the Land Plan (Attachment 4). In the case of lands dedicated to the Program on behalf of a state, the entity dedicating such lands may continue to hold title or other interests in those lands, provided that sufficient access is granted to the Program's representatives to permit Program restoration and management of the lands, or the lands are otherwise protected for Program purposes.

2. Restoration and Protection. Restoration and protection of Program lands will be carried out consistent with the Land Plan (Attachment 4), subject to modification by the Governance Committee. Plans for managing each parcel of Program land will be prepared consistent with the Land Plan. Plans are initially expected to include identifying the habitat baseline for the parcel in question, adapting the appropriate recommendations of the Land Plan for the specific characteristics of the land, and developing site-specific monitoring and

maintenance requirements. Habitat management practices will be evaluated as part of the Program Adaptive Management Plan.

3. Credit Toward Program Objectives

- a. Land protected and managed prior to July 1, 1997 for the benefit of endangered and threatened species by the Platte River Whooping Crane Critical Habitat Maintenance Trust, the National Audubon Society, and the Nature Conservancy within the associated habitats and the Central Nebraska Public Power and Irrigation District (CNPPID) (Jeffrey Island) will be credited to the Program's long-term objectives if such land meets criteria established by the Governance Committee, but not toward the objectives of the first Program increment without the prior approval of the Governance Committee and the managing entity. Lands acquired by these entities after July 1, 1997 may be contributed to the Program and counted toward First Increment objectives with the approval of the Governance Committee and the managing entity.
- b. Land acquired by or on behalf of existing water related activities completing Section 7 consultation of the ESA prior to or during the term of the July 1997 Cooperative Agreement (as described in Section VII of that Agreement), including Nebraska Public Power District's (NPPD) Cottonwood Ranch Property habitat lands, tern and plover islands and sandpits, lands acquired by Wyoming and any lands acquired in the associated habitats using funds contributed prior to the Program as a result of ESA consultation, will be credited to both the Program's long-term objective of 29,000 acres and the First Increment objective of 10,000 acres.

E. Water

During the First Increment, progress toward Program water objectives will be measured against the water related milestones contained in the Milestones Document (Attachment 2). The benefits derived from Program projects implemented in the First Increment of the Program will be monitored and verified. Program objectives for addressing the impacts of existing water related activities by providing water capable of reducing shortages to target flows for the central Platte River will be met through a combination of three initial Program projects and other water conservation/supply projects (Section E.2. below). The impacts of new water related activities will be addressed by the states and the federal government in the manner and to the extent described in the states' depletions plans in the Program Water Plan (Attachment 5, Sections 7, 8, and 9), and the federal government's depletions plan (Attachment 5, Section 10) or a project proponent may proceed with an ESA Section 7(a)(2) consultation on its own.

The Organizational Structure Document (Attachment 6) and the Water Advisory Committee Charter (Attachment 6, Appendix H) describe the responsibilities for carrying

out the Water Plan of the Program and how those responsibilities are assigned to the Signatories, the Governance Committee, the Water Advisory Committee, and Program Project Sponsors.

1. The First Increment Program Water Objective, FWS Instream Flow Recommendations for Central Platte River, and Lower Platte River Flows

FWS has developed instream flow recommendations for the central Platte River, which are described and quantified in the Program Water Plan (Attachment 5, Section 11). These FWS recommendations for the central Platte River include target flows, peak flows and other flows deemed important by the FWS. The FWS recommendations will be examined through the Adaptive Management Plan as described in Section III.C.1 above and may be modified by the FWS accordingly.

- a. Target Flow Recommendations. The term “target flows” refers to FWS’s recommended species and annual pulse flows for the central Platte River. The Program’s First Increment water objective is to provide water capable of reducing shortages to FWS target flows by an average of 130,000-150,000 acre-feet per year. Except as described in paragraphs b. and c. below, Program water will be used to reduce those shortages. The states have not agreed that the target flows are biologically or hydrologically necessary to benefit or recover target species. However, the DOI and the states have agreed that the target flows can be used as a reference to determine progress towards meeting the Program’s first increment water objectives, so long as the FWS’s target flows are examined through the Adaptive Management Plan and peer review and may be modified by FWS accordingly.
- b. Peak and Other Flow Recommendations. The FWS’s instream flow recommendations for the central Platte River also include the periodic occurrence of peak flows at certain times of the year. Those peak flows are in excess of the target flows for the same time periods. During Program formulation, FWS also identified additional flows such as short-term channel management “pulses” that are lower than peak flows but are in excess of target flows and are deemed by the FWS to be important to the creation and/or maintenance of habitat for the target species in the central Platte associated habitats. Methods to evaluate the effectiveness of such flows in providing the benefits desired by FWS are described in the Adaptive Management Plan. The states have not agreed that the peak flows, “pulses” or such other FWS identified flows are biologically or hydrologically necessary to benefit or recover target species. The Program has a First Increment objective of improving the occurrence of Platte River flows in the central Platte associated habitats relative to the present occurrence of species and

annual pulse target flows by an average of 130,000 to 150,000 acre-feet per year at Grand Island, through reregulation and water conservation/supply projects. Creation, protection or improvement of peak flows, pulse flows (other than annual pulse flows) and other FWS identified flows are not part of the first increment water objective. However, the Program will integrate the Program's land and water management activities consistent with the Program's Adaptive Management Plan and system constraints (storage capacity, water rights and the need to avoid property damage). Such integration will enable evaluation of, and FWS believes that such integration may enhance, the Program's ability to utilize flows to (1) avoid loss of existing associated habitats due to channel narrowing, incision, and vegetation encroachment and (2) maintain Program improvements in channel and wet meadow habitats. Consistent with such evaluations, the states agree that FWS may use Program water that is subject to release at its direction to reduce shortages to FWS's recommended peak, pulse, or other flows in the central Platte River as part of an attempt to achieve a more normalized flow regime (one closer to the former structure of the hydrograph) given system constraints. Any such use of Program water is subject to limitations described in the document "An Environmental Account for Storage Reservoirs on the Platte River System in Nebraska" (EA Document) in the Program Water Plan (Attachment 5, Section 5) to prevent such releases from causing or exacerbating floods. To enhance a peak, pulse, or other short duration high flows as described in Attachment 5, Section 1, Subsection 3, the Environmental Account (EA) Manager may request CNPPID and NPPD to reregulate water in their systems downstream of Lake McConaughy with or without also intentionally bypassing Program EA water that the Districts are allowed to divert at their diversion structures. In such an event, the Program will pay CNPPID and NPPD an amount equivalent to lost power production, increased power acquisition costs, and other associated costs in accordance with Attachment 5, Section 1, Subsection 3. To the extent that FWS uses Program water to produce or augment peak, pulse, or other flows, such use shall not decrease the target flow shortage reduction credited to the Program's initial three water projects or to any subsequently approved Program water project. In the case of the pallid sturgeon, peak flows are dealt with in the section on lower Platte River flows (Sec III. E. 1. c.).

- c. Lower Platte River Flows. FWS believes that water related activities at times have reduced the quantity or rate of flow in the lower Platte River during the months of February through July. Consistent with the April 28, 2004 finding of the National Academy of Sciences (NAS), it is now agreed that current habitat

conditions on the lower Platte River do not adversely affect the likelihood of survival and recovery of the pallid sturgeon because that reach of the river appears to retain several habitat characteristics apparently preferred by the species. However, NAS and FWS believe that further alterations of discharge patterns or channel features that modify those characteristics might irreparably alter this habitat for pallid sturgeon use, loss of Platte River habitat would probably result in a catastrophic reduction in the pallid sturgeon population, and any recovery effort for the pallid sturgeon will most likely include the lower Platte River. As stated by the NAS, the Governance Committee agrees that there are many questions about the biology of the pallid sturgeon and the role of the lower Platte River in the species recovery. While the states have not agreed with the NAS and FWS conclusions, the states and the FWS do agree that, during the first Program increment, impacts to the pallid sturgeon that are caused by Program activities or by new water related activities covered by the states or federal depletions plans will be assessed. The assessment will be conducted through the pallid sturgeon research and monitoring activities described in the Program's Integrated Monitoring and Research Plan (Attachment 3, Section V) and complimentary research conducted by others in the Missouri River and its tributaries. The assessment stage change study (Attachment 3, Section V) will be completed by the end of year 3 of the Program's First Increment. If such impacts are deemed to adversely affect the pallid sturgeon, the Governance Committee will develop and implement appropriate conservation measures that either negate or offset the occurrence of adverse impacts on the pallid sturgeon. The appropriate conservation measures will be funded through available Program funds or as otherwise determined by the Governance Committee. The expenditure of any funds proposed to be redirected is subject to approval by the Governance Committee.

- d. Impact of Program Activities on FWS Recommended Flows. During Program formulation, FWS evaluated the three initial Program projects, the projects proposed in the Reconnaissance-Level Water Action Plan (Attachment 5, Section 6), the state and federal depletions plans relative to their projected impacts on the occurrence of target flows, peak flows and other flows in the central and lower Platte River deemed by the FWS to be important to the creation and/or maintenance of habitat for the target species. FWS recognizes that in order to achieve the Program's first increment water objectives, the operation of such projects and the implementation of such depletions plans will, at times, cause an unavoidable adverse impact on one or more of the recommended flows for the central Platte River or on flows in the lower Platte

River. FWS agrees that those adverse impacts are acceptable as long as such operation and implementation is in accordance with the Program Water Plan (Attachment 5), including the depletions plans, any Governance Committee approved operating rules and/or procedures, and other Program activities. This agreement by FWS is subject to NEPA and ESA analyses and review.

2. Program Water Operations to Meet First Increment Water Objectives

- a. Tamarack I, Pathfinder Modification and the Nebraska Environmental Account (Initial Program Projects). A portion of the Program's First Increment water objective will be met with three initial Program projects described in the Program Water Plan. They are: (1) the "Colorado's Initial Water Project (Tamarack I)" (Attachment 5, Section 3); (2) the "Wyoming's Pathfinder Modification Project" (Attachment 5, Section 4); and (3) "An Environmental Account for Storage Reservoirs on the Platte River System in Nebraska", which includes activities by Federal Energy Regulatory Commission ("FERC") Project No. 1417 and FERC Project No. 1835 in Nebraska (Attachment 5, Section 5). If implemented and operated as described, these three projects together will be credited for an average of 80,000 acre-feet per year toward the First Increment water objective of providing water capable of reducing shortages to target flows by an average of 130,000-150,000 acre-feet per year.
- b. Water Conservation/Supply Activities. The remaining portion of the Program's First Increment water objectives will be met through a program of incentive-based water conservation and water supply activities. The "Reconnaissance-Level Water Action Plan" included in the Program Water Plan (Attachment 5, Section 6) describes potential water conservation/supply projects that may be included in the Program with corresponding estimates of the reregulated or conserved water that can be credited toward Program objectives if the respective projects are implemented. The "Reconnaissance-Level Water Action Plan" also sets forth the process for including other water conservation/supply projects in the Program during the First Increment. The "Reconnaissance-Level Water Action Plan" describes the process for moving water projects through the feasibility study and implementation process. Governance Committee approval is required before any water conservation/supply project can be included in the Program. The Program will only include projects that yield a quantifiable net water benefit toward Program First Increment water objectives.

If a proposed water conservation and supply project affects the Program's target flow shortage reduction benefits that are or will

be achieved by an initial Program water project or by another approved Program water project, the proposed Program water project can be implemented if the result is a net increase in Program credit toward the First Increment water objective and if any adverse impacts to then-existing water related activities are addressed as provided later in this section. The sponsor(s) of any adversely affected initial or previously approved Program water project will not be held accountable to the Program or to the FWS for the reduction in Program benefits resulting from the new project.

A new project may be substituted for one or more projects identified in the original Program Water Plan or a project identified in the original Program Water Plan may be substantially modified, if the adverse impacts of that project on FWS recommended flows for the central Platte River are no greater in magnitude or frequency than the original project or projects. Otherwise, if a new or substantially modified project is considered for implementation in the Program Water Plan, FWS, through its membership on the Governance Committee, reserves the right to reject that project on the basis of adverse impacts to one or more of its recommended flows for the central Platte River or on lower Platte River flows.

It is the intent of the Program to implement Program water conservation and supply projects that do not adversely affect existing water related activities in the three states. Should Program water conservation and supply projects adversely impact an existing water related activity, the Governance Committee will evaluate those impacts and if it is not possible to avoid adverse impacts, take steps to offset, mitigate, or compensate the owner of that water related activity for such impacts.

- c. Operation of Program Water Conservation/Supply Projects. The operations of the Program's three initial water projects and of all the other Program water conservation/supply projects will be coordinated as described in the "Program Water Management Process" included in the Program Water Plan (Attachment 5, Section 1). There are recognizable benefits to coordinating upstream Program activities so as to increase storage water as described in the EA Document (Attachment 5, Section 5). However, not all water regulated for Program purposes will be storable in that Environmental Account, and that water need not be stored to contribute toward Program objectives. The rules governing operation of a Program water conservation and supply project must be approved by the Governance Committee.

d. Delivery of Program Water.

- i. The Program has agreed to secure defined benefits for the target avian species and their associated habitats. To do so, the Program seeks to deliver Program water at the appropriate time, place, and in the appropriate quantity. The Integrated Monitoring and Research Plan (Attachment 3, Section V) will study the geomorphological processes of the Platte River, including the feasibility of using Program water or other tools to provide defined benefits for the target avian species and their associated habitat. Undertaking these studies will not increase the habitat maintenance requirement of the Program (which is 10,000 acres for the First Increment), or the water requirement of the Program (which is providing water capable of reducing shortages to target flows by an average of 130,000 to 150,000 acre-feet of water per year for the First Increment). Ultimately the Program is anticipated to select and implement an effective suite of activities including the delivery of Program water that, in conjunction with other Program actions, will create sufficient species benefits to be ESA sufficient.
- ii. The Governance Committee shall complete a study no later than the end of Year 2 of the First Increment to evaluate the feasibility of delivering by the end of Year 5 (1) 5000 cfs of Program water for three days to the upper end of the associated habitat (at Overton gage) for pulse flows when other demands on water are low (normally September 1 – May 31) and (2) quantities of Program water that are likely to yield 800 cfs at the habitat during the irrigation season.

The first phase of the study, to be completed by the end of Year 1 by an independent consultant retained by the Governance Committee, will identify alternative means to provide water in the quantities described above. The alternatives identified shall be limited to those that can be accomplished with water provided by the three initial Program projects and projects identified in Attachment 5, Section 6 of the Program Water Plan, using the National Weather Service flood stage for the North Platte River at North Platte, Nebraska, after taking into account the capital and maintenance measures described below in Section E.2.d.iii below. The monetary costs of each alternative will be estimated. In addition, the impacts of each alternative on the Program's capability to reduce shortages to target flows or to meet other Program objectives will be defined. Following completion of the first phase of the study, the Governance Committee will determine if the deliveries identified above are feasible, and if

not, the Governance Committee will expand the study (second phase) to identify new water supply and conservation projects and/or other means to increase the ability to deliver water. However, any expanded studies must be limited to alternatives that can be accomplished consistent with the First Increment water objective, Section E of this document, and Program budget (Attachment 1).

Based on the results of the study and the adaptive management process, a plan would be developed and implemented. The plan shall include measures expected to deliver, by the end of Year 5 (1) 5,000 cfs of Program water for three days to the upper end of the associated habitat (at Overton gage) for pulse flows when other demands on water are low (normally September 1 – May 31) and (2) quantities of Program water that are likely to yield 800 cfs at the habitat during the irrigation season, unless the feasibility study and the adaptive management process find that these deliveries are infeasible or unnecessary and the Governance Committee concurs. If the evaluation finds these deliveries are infeasible, the Governance Committee commits to develop alternative means of providing similar benefits to the target avian species and their associated habitats.

- iii. In Program Year 1, the Governance Committee will begin implementing the capital investment and maintenance measures that are described in Attachment 5, Section 2 and are designed to increase the channel capacity of the North Platte River upstream of Highway 83 to 3,000 cubic feet per second. The maintenance measures described in that attachment will continue as the Governance Committee deems appropriate until and during implementation of the plan described in Section E.2.d.ii. or until alternative means of providing similar benefits to the target avian species and their associated habitats have been developed.

3. Depletions Plans to Mitigate the Impacts of New Water Related Activities

The three states and the federal government have each prepared a depletions plan, all of which are consistent with the Program purpose described in Section I.A.4. These plans are intended to mitigate the impacts of new water related activities on the occurrence of target flows and on the effectiveness of the Program in reducing shortages to target flows, whether or not the new water related activities are subject to Section 7(a)(2) of the ESA or are intended to mitigate the impacts of other new water related activities. Each plan identifies the existing water related activities covered by the Program, and specifies the means by which new water related activities, both those subject to and those not subject to Section 7(a)(2) of

the ESA, will be addressed under that plan. These plans are set forth in “Depletions Plan, Platte River, Wyoming” (Wyoming’s Depletions Plan) (Attachment 5, Section 7); “Nebraska’s New Depletions Plan” (Nebraska’s Depletions Plan) (Attachment 5, Section 8); “Colorado’s Plan for Future Depletions” (Colorado’s Depletions Plan) (Attachments 5, Section 9); and the “Federal Depletions Plan for the Platte River Recovery Implementation Program” (Federal Depletions Plan) (Attachment 5, Section 10). The states and the federal government are responsible for the implementation of their respective depletions plans. Amendments to depletions plans must be reported to and approved by the Governance Committee. Any proposed amendment is to be approved by the Governance Committee only if the Governance Committee determines that the depletions plan, if so amended, would mitigate the following impacts of any new water related activities: (1) decreases in the occurrence of flows that contribute to target flows; and (2) decreases in target flow shortage reductions achieved or to be achieved by an approved Program water project. Also, if an amendment is proposed to a depletions plan that would result in greater adverse impacts on FWS recommended flows for the central Platte River or on lower Platte River flows than those associated with the original depletions plan, FWS reserves the right to reject the proposed amendment through its membership on the Governance Committee.

Each state and the federal government must also inform the Governance Committee of the specific new depletion mitigation measures it intends to implement consistent with its approved depletions plan. If a state or the federal government proposes use of mitigation measures not included within its approved plan, amendment of the plan shall be required. All mitigation measures for central Platte River impacts shall be implemented in the state where the depletion(s) being mitigated occur. The water yields provided for mitigation of new water related activities will not count toward the Program’s First Increment water objectives, as those yields will be used to mitigate the impacts of new water related activities, not existing ones.

The depletions plans address the impacts of new water related activities, both those subject to and not subject to Section 7(a)(2) of the ESA. The plans explain how, with a Program in place, water related activities subject to Section 7(a)(2) consultation will proceed through the consultation process. The plans describe the process for determining whether a water related activity can rely on the Program for ESA compliance. Also, the plans only address the consultation process for the target species. To the extent a water related activity subject to Section 7(a)(2) consultation may effect other “non-target” listed species in any of the three states, impacts to those species must be addressed separately in that federal project’s biological opinion required by ESA. For any new water related activity that is not covered by an approved depletions plan but is subject to Section 7(a)(2) consultation, the project proponent may proceed with consultation on its own and shall mitigate project impacts in accordance with the results of that consultation and without any reliance on Program activities for such mitigation. In the alternative the state can propose that the activity be covered by the Program by

offering an amendment to the depletions plan that would address the impacts of that activity. If the Governance Committee approves an amendment allowing a new water related activity to be covered by a depletions plan, that activity will be covered by the Program. If the project proponent proceeds with consultation on its own, FWS agrees that it will recommend to the federal action agency that the project's mitigation measures address the following impacts of any new water related activities: (1) decreases in the occurrence of flows that contribute to target flows and (2) decreases in target flow shortage reductions achieved or to be achieved by an approved Program water project and that it also will recommend that water based mitigation measures for central Platte River impacts be implemented in the state where the depletion(s) being mitigated occur.

4. Institutional Protections

The responsibility for accounting, tracking, regulating, and protecting Program water rests with each state's water administration in the manner outlined in the Water Plan (Attachment 5) and approved by the Governance Committee. Any changes in state laws or procedures relating to the accounting, tracking, regulation, or protection of water will be reported to the Governance Committee.

Each state is expected to take whatever steps are necessary, as appropriate, to account for or provide institutional protection within that state for waters intended for environmental purposes, including without limitation: statutory and regulatory reform; granting of any necessary water rights; and water accounting systems. Accounting and tracking of Program water to and through the associated habitats will be implemented beginning Year 1 of the Program.

F. Evaluation of First Increment and Development of Subsequent Increments

1. Evaluation of Effectiveness of the First Increment and Review of Goals, Objectives, Activities and Criteria

At least three years before the end of the First Increment, the Governance Committee will develop a process and timeframe for evaluating the First Increment. The evaluation process will take into account the need for FWS to carry out independent ESA assessments, for NEPA compliance, and other statutory obligations for a second Program increment. These evaluations will include, but are not limited to the following: (1) consideration of information gained through the Integrated Monitoring and Research Plan and experience; (2) the judgment of habitat managers, field biologists, and independent experts; and (3) the results of any peer review. The purpose of these evaluations is to weigh whether Program goals, objectives, activities, and criteria should be modified or should continue unchanged. The Program evaluations performed by the Governance Committee will be coordinated with the FWS reviews undertaken as part of its statutory obligations under the ESA. The Federal Action that is the subject of programmatic ESA and NEPA review for a second Program increment will include continuation of existing water-related activities and new water-

related activities that were consulted on as part of the programmatic biological opinion and project-specific biological opinions issued during the First Program Increment.

2. Definition of Second Increment Components and Term

Before expiration of the First Increment, the Governance Committee will identify goals, objectives, activities and criteria, and milestones or other measures for ESA compliance for a second Program increment. Independent peer review will be used as appropriate pursuant to the Scientific Peer Review Guidelines in the Program Adaptive Management Plan (Attachment 3, Appendix A) to review pertinent scientific data relating to the selection or implementation of specialized recovery tasks or the development of technical milestones. If the Governance Committee decides to recommend that the Department of the Interior and three states enter into an agreement for a second increment, the Governance Committee will develop proposed program documents.

One area of further research and analysis by the National Academy of Sciences, the Forest Service and others during the First Increment is the relationship between forest condition and water yield. The Forest Service has made certain commitments as further described in Attachment A to the Federal Depletions Plan (Attachment 5, Section 10). If the results of the analyses of the impacts of post-1997 changes in forest condition on water yield from forested lands located within the Platte River basin, as described in Attachment A to the Federal Depletions Plan, indicate a reduction in such water yield has occurred and may persist into the second increment, the Governance Committee shall discuss and fully consider such reductions, if any, during its deliberations on the second Program increment's goals, objectives, activities and criteria. The Governance Committee shall take any such reductions into account when it determines the responsibility for funding and implementing the second increment.

3. Decision to Enter Into a Second Increment

Any decision to enter into a second increment will be made by the signatories prior to the expiration of the First Increment.

IV. **REGULATORY CERTAINTY**

DOI and the states intend that this Program provide regulatory certainty for the target species under Sections 7 and 9 of the ESA for existing water related activities and for new water related activities that are covered by a state or federal depletions plan. Implementation of the First Increment milestones provides ESA compliance for the term of the First Increment, and the signatories anticipate that any future Program increments agreed to will provide such compliance during those increments. Additionally, implementation of the milestones is intended to provide ESA compliance for impacts from water related activities to the target species in the entire Platte River basin. Regulatory certainty is provided by the following mechanisms:

A. Existing Water Related Activities. The Program is to provide ESA compliance for the target species during its term for water related activities existing as of July 1, 1997. Certain existing water related activities underwent Section 7 consultation prior to the effective date of this Program (covered by the July 1997 Cooperative Agreement Sections VIII.A.1, 2 and 4). Under the Program, some of these activities may be covered through compliance with the terms of existing federal actions and others will be subject to revised consultations whereby the Program is to provide ESA compliance for the target species.

B. New Water-Related Activities. The Program is to provide ESA compliance for the target species during its term for certain specified new water related activities through the depletions plans of each state and the federal government as described in this Program. Certain new water related activities underwent Section 7 consultation prior to the effective date of this Program (covered by the July 1997 Cooperative Agreement Section VIII.A.3). Under the Program, some of these activities may be covered through the terms of existing federal actions and others will be subject to revised consultations whereby it will be determined if the new water related activities are covered by a depletions plan and this Program.

C. For water related activities covered in Sections IV.A and B above, FWS agrees to encourage other agencies to rely upon the Program when considering agency actions affecting the target species.

D. DOI and the states intend that the Program will provide ESA compliance during the First Increment for so long as the Program is attaining its First Increment Milestones (Attachment 2). Such ESA compliance will continue beyond the first 13-years of the Program provided a subsequent Program increment or First Increment Program extension is adopted pursuant to appropriate ESA and NEPA compliance procedures, and, for a subsequent increment, the effects of water-related activities are to be covered under a programmatic biological opinion for that subsequent increment.

E. If Milestones are not being met, and FWS makes a preliminary determination that the Program is not providing ESA compliance, FWS will notify the Governance Committee in writing and request assistance in resolving the situation. If the Governance Committee is unable to restore the ability of the Program to provide ESA compliance, the Governance Committee shall refer the matter to the Secretary of the Interior and the three Governors (“Oversight Committee”) to resolve the situation. If such attempts at resolution are unsuccessful and the Program is terminated pursuant to the Program Agreement, FWS agrees that if it requests reinitiation of Section 7(a)(2) consultation for any water related activity which relied upon the Program as a component of its ESA compliance and which is subject to reinitiation pursuant to 50 C.F.R. § 402.16, it will request reinitiation for all such water related activities.

FWS further agrees that it will expeditiously pursue all available means to consult on all agency actions for which it requested reinitiation, and if it identifies new or additional measures that it will expeditiously pursue all available means to amend or modify the

agency authorizations. If a state agrees to and continues to carry out the responsibilities it had under the Program, there is a presumption that such actions are sufficient to provide ESA compliance with respect to all water related activities in that state pending completion of any reinitiated consultations. When a state agrees to and continues to carry out the responsibilities it had under the Program, that state and any water related activities covered retain the ability to argue that the responsibilities undertaken are sufficient to constitute the long-term ESA compliance for the reinitiated consultations. FWS agrees to consider these undertakings in any reinitiated Section 7 consultations, including in the development of new reasonable and prudent alternatives or other measures.

F. In developing any new measures to meet the requirements of the ESA, FWS agrees to recognize any contributions made to this Program by the relevant state or the owner or operator of the water related activity under the July 1997 Cooperative Agreement and/or the Program and the degree to which the relevant state or owner or operator met its obligations under the July 1997 Cooperative Agreement or the Program.

G. No person or entity undertaking or proposing to undertake any water related activity will be required to accede to the provisions of this document or to rely on this Program. Reliance on the Program shall be voluntary. In the event such person or entity chooses not to so rely, or chooses to revoke reliance on the Program at any time, FWS will not consider this Program as ESA compliance for such water related activity. FWS believes that revoking reliance on the Program warrants a reopening of any federal action or authorization based thereon, and will reinitiate any ESA Section 7(a)(2) consultation for that water related activity which relied upon this Program.

H. Any time that FWS reinitiates Section 7(a)(2) consultation, it will issue a new biological opinion based on then current conditions. FWS believes that the new biological opinion and any subsequent amendment, restatement, or modification of a federal action based on the new biological opinion, would constitute a new federal action for purposes of administrative or judicial appeals. FWS further believes that no person or entity should be deemed to have waived or relinquished any right to challenge the legal, scientific, or technical validity of any aspect of the new biological opinion or agency action by virtue of its acceptance of or reliance on this Program, or by virtue of its support for this Program in other judicial or administrative proceedings.

V. PROGRAM COST SHARE AND EXIT STRATEGY

A. DOI and the states have determined that each has a responsibility to the success of the Program and that contributions for Program elements addressing existing water related activities should be made to the Program on an equitable basis. For purposes of the First Program Increment, DOI and the states agree that federal contribution and the collective state contributions should be as equal as possible. The Finance Document, Crediting and Exit Principles, and Program Budget (Attachment 1) provides the cash and cash equivalent contributions of the signatories.

- B. The Program exit strategy is found in the Finance Document, Crediting and Exit Principles, and Program Budget (Attachment 1).

VI. CONFORMING FEDERAL FUNDING OR AUTHORIZATIONS

Any person or entity undertaking a water related activity that receives federal funding or a federal authorization and which relies on the Program as a component of its ESA compliance in Section 7 consultation must agree: (1) to the inclusion in its federal funding or authorization documents of reopening authority, including reopening authority to accommodate reinitiation upon the circumstances described in Section IV.E; and (2) to request appropriate amendments from the federal action agency as needed to conform its funding or authorization to any Program adjustments negotiated among the three states and DOI, including specifically new requirements, if any, at the end of the First Increment and any subsequent Program increments. FWS believes that the Program should not provide ESA compliance for any water related activity for which the funding or authorization document does not conform to any Program adjustments.

Notwithstanding Section II.I of the Program Agreement, the states shall not be restrained from taking a position adverse to one another in administrative or judicial proceedings to compel the action agency to include reopening authority in any such federal funding or authorization. Nothing in this paragraph is intended to waive the right of any person or entity undertaking a water related activity to withdraw its reliance on the Program pursuant to Section IV.G.

VII. CONSISTENCY OF DOCUMENTS

The Governance Committee shall have the authority to resolve any inconsistencies between the Program Document and its attachments or referenced materials. The Program Document shall control, unless the Governance Committee decides otherwise.